

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

CRM-M-24870-2020
Date of decision: 30.04.2021

Vijay Shukla

.....Petitioner

Versus

Serious Fraud Investigation Officer

.....Respondent

CORAM: HON'BLE MR. JUSTICE ARUN KUMAR TYAGI

Present : Mr. Vikram Chaudhri, Senior Advocate with
Mr. Gautam Avasthi, Advocate and
Mr. Rahil Mahajan, Advocate
for the petitioner.

Mr. Satya Pal Jain, Addl. Solicitor General of India with
Mr. Alok Jain, Senior Panel Counsel for UOI
for the respondent.

Mr. Rupinder Singh Jhand, Addl. A.G. Haryana.

ARUN KUMAR TYAGI, J.

(Order pronounced through video conferencing.)

1. The petitioner has filed the present (first) petition under Section 438 of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C.') for grant of anticipatory bail in complaint case No.3 of 2019 **CNR No.HRGR01-007022-2019 (CIS No.COMA/5/2019)** dated 18.05.2019 titled as '**Serious Fraud Investigation Office Vs. Adarsh Buildestate Limited and others**' in which the petitioner has been summoned under Sections 58A, 211(7), 227 and 628 of the Companies Act, 1956, Sections 74(3), 147, 447 and 448 of the Companies Act, 2013 and Section 477A of the Indian Penal Code, 1860.

2. Briefly stated, the facts as mentioned in the above-referred complaint relevant for disposal of the present petition are that one Multi

State Credit Co-operative Society was got registered under the Multi State Co-operative Societies Act, 2002 by Mukesh Modi and his family members in the name of Adarsh Credit Co-operative Society Ltd. (hereinafter referred to as ACCSL). ACCSL accepted deposits from its members, who were marginally low to middle income group individuals. ACCSL had more than 800 branches, about 20 lakh members, 3.7 lakh advisors/agents and outstanding deposit liability of Rs. 9253/- crores payable to the investors/members as on 31.05.2018. After collecting money from the public, Mukesh Modi and his family members and associates created a large number of Companies under the aegis of Adarsh Group of Companies Ltd. (hereinafter referred to as AGCL) with their associates and relatives as the Directors. The money deposited with ACCSL was allegedly siphoned off through the Companies created under the aegis of the AGCL. When the matter came to knowledge of the Central Government, the Central Government, through Ministry of Corporate Affairs vide orders dated 20.06.2018 and 25.02.2019 ordered investigation into the affairs of the said companies, through the Serious Fraud Investigation Office (hereinafter referred to as SFIO). During investigation it was found that the group of 126 companies (hereinafter referred to as CUIs) was managed and controlled by Mr. Mukesh Modi, his family members and associates. 70 out of the above said 126 CUIs had fraudulently/illegally obtained loan from ACCSL to the tune of Rs. 1700/- crores. Amount of Rs. 4120/- crores was outstanding against said loans as on 31.03.2018. Section 25 of the Multi-State Cooperative Societies Act, 2002 did not allow a company to be a member of Credit Co-operative Society.

Amendment of the bye-laws of ACCSL for making companies eligible for membership of ACCSL was rejected by the Central Registrar vide order dated 19.04.2012. The petitioner was director of Fracton Technologies Pvt. Ltd., one of the above said 70 CUIs, from 15.06.2011 to 14.08.2018 and was managing affairs thereof during the said period. Fracton Technologies Pvt. Ltd. obtained loan to the tune of Rs.14.75/- crores from ACCSL from financial year 2012-13 to financial year 2016-17 and part of the above said loan secured during enforcement of the Companies Act, 1956 remained unpaid upon commencement of the Companies Act, 2013. On completion of the investigation and after taking necessary permissions from the Central Government, SFIO presented the investigation report in the form of statutory Complaint before the Special Court at Gurugram on 18.5.2019. In the Complaint/ report the petitioner is arrayed as accused at Sr.No.149 and Fracton Technologies Pvt. Ltd. is arrayed as accused at Sr. No.65. On filing of the complaint by the SFIO, learned Sessions Judge, Gurugram vide order dated 03.06.2019 summoned the CUIs and other individuals including the petitioner, under various provisions of the Companies Act, 1956, the Companies Act, 2013 and the Indian Penal Code, 1860 as mentioned therein.

3. The petition has been opposed by the respondent-Serious Fraud Investigation Office in terms of reply dated 17.09.2020 and additional affidavit dated 06.01.2021 of Sh. Parshant Balian, Deputy Director, Serious Fraud Investigation Office.

4. I have heard Mr. Vikarm Chaudhri, learned Senior Counsel assisted by Mr. Rahil Mahajan, Advocate and Mr. Satya Pal

Jain, Addl. Solicitor General of India assisted by Mr. Alok Jain, Senior Panel Counsel for UOI and Sh. Parshant Balian, Deputy Director and Mr. Hari Kishan, Prosecutor, Serious Fraud Investigation Office and Mr. Deepak Sabharwal, learned Additional Advocate General Haryana and have gone through the relevant record.

5. Learned Senior Counsel for the petitioner has submitted that the petitioner is an alumnus of IIT, Delhi and a Telecom Engineer and Research and Development professional who worked for 7 years in reputed telecom organizations in India and the U.S. The petitioner was introduced to Mukesh Modi in the year 2011. As per discussions between them the project of a Technology Company was started by the AGCL in which the petitioner was to build/lead the technology team while other aspects of incorporation, fund infusion, accounting, finances etc. were to be the responsibility of the AGCL/Mukesh Modi. The above said company was incorporated on 15.06.2011 with registered head office at Gurugram, Haryana but the finances, accounting and auditing etc. were the responsibility of the AGCL/Mukesh Modi and were dealt with by Jaipur office of the AGCL. The petitioner was given sweat equity of 25 per cent which was subsequently reduced to 0.1 per cent. The petitioner was told by Abhay Shah, Chartered Accountant of the AGCL that the ACCSL by virtue of amendment of its bye-laws was authorized to give loan to the companies and that loan being taken by Fracton Technologies Pvt. Ltd. from the ACCSL would be subsequently converted into equity in accordance with the relevant statutory provisions. The petitioner having no reasons to doubt him accepted his explanation at face value due to

lack of knowledge and inability to understand the intricacies involved in financial matters/accounting process. Subsequently, registration of charge of the ACCSL in respect of loan given to Fracton Technologies Pvt. Ltd. with the Registrar of Companies also confirmed his belief that the same was in accordance with the statute/rules. The petitioner signed the financial statements brought to him by Abhay Shah, Chartered Accountant of the AGCL believing the same to be correct. The petitioner being a layman understood the ACCSL to be a financial institution. The petitioner has been accused of having signed and filed false/wrong statements by mentioning the funds received from the ACCSL as loan from the financial institution and showing charges as bank charges/bank interest and to have thereby committed offence under Section 448 of the Companies Act, 2013 punishable under Section 447 of the Companies Act, 2013 but the ingredients of offence under Section 448 of the Companies Act, 2013, which are different from those of the offence of fraud under Section 447 of the Companies Act, 2013, are not satisfied as the petitioner did not have any knowledge regarding the said statements being false/wrong or the omissions being material and did not have requisite mens rea as explained above.

6. Learned Senior Counsel for the petitioner has further argued that In ***Nikesh Tarachand Shah Vs. Union of India : 2018(2) R.C.R.(Criminal) 232***, Hon'ble Supreme Court declared Section 45 of the Prevention of Money Laundering Act, 2002, which was pari materia to Section 212(6) of the Companies Act, 2013, to be unconstitutional due to being violative of Articles 14 and 21 of the Constitution. Petition

challenging constitutional validity of Section 212 (6) of the Companies Act, 2013 is pending before Hon'ble Supreme Court. Twin conditions imposed by Section 212 (6) of the Companies Act, 2013 for release on bail being arbitrary, unreasonable and violative of Articles 14 and 21 of the Constitution of India are ultra vires thereto and being liable to be ignored can not be invoked to deny bail to the petitioner.

7. In support of these arguments learned Senior Counsel for the petitioner has also relied on the following observations in ***Jainam Rathod Vs. State of Haryana (P&HHC) : 2020 (1) RCR (Criminal)***

241:-

“26. At the same time this court does not find any substance in the argument of the learned Counsel for the SFIO has that the twin conditions prescribed under section 212 (6) of the New Companies Act, 2013 start with negation of bail to the accused and the court could grant bail to such an accused only if the court records a satisfaction qua the accused being 'not guilty' of the alleged offence and also a satisfaction that if released on bail the accused is not likely to commit any similar offence again. Also this court does not find substance in the insistence of the learned counsel for the SFIO that the application of the twin conditions, as prescribed under Section 212 (6), are mandatory and have to be applied to all the considerations of grant of bail to the accused facing charge covered by section 447 of the New Companies Act. No doubt the statutory language of section 212 (6) has prescribed the twin conditions to be considered by the court, in case the prosecutor raises his objection to the grant of bail, however a similar language existing in the Prevention of Money Laundering Act, which was para materia to the language of the twin conditions contained in section 212(6) of the new Companies Act, had earlier comeup for consideration of the Supreme Courts in case of Nimesh Tarachand Shah (supra) case and such language has already been declared to be ultra vires by the Supreme Court in that case. Not only this, even this court had an occasion of considering the nature and scope and the operational functionality of the language of these twin conditions, as contained in the Narcotic Drugs and Psychotropic Substances Act, in case of Ankush Kumar (supra). After threadbare analyzing the operational

*functionality of the language of the twin conditions, as used in the statute, this court had come to conclusion that the language of the twin conditions requires impossibility from the court, besides defying the human logic in its operational functionality. This language, if made operational in a case, even by adopting the semi-cooked concept of 'reading down' the language - and thereby ignoring the celebrated 'Doctrine of Severability' and the touchstone of Articles 14 & 21; both, qua test of constitutional validity, then also it turns on their head some well established principles of criminal jurisprudence as well as, goes in negation of the provisions of Cr.P.C. dealing with the further progress of the trial in a criminal case, besides requiring prophesy from the court, which by no means, is a job of a criminal court. Hence this court had held in case of Ankush Kumar(supra), that since the operational functionality of the language of twin conditions is based upon totally indeterminate criteria which are required for exercise of this power by the court; and also expects the impossible from the court, therefore, the language of these twin conditions is in direct conflict with the rights of an individual guaranteed by Article 14, which protects him from irrationality and arbitrariness in application of law against him, as well, his right to life and liberty protected by Article 21 of the Constitution of India. In case of conflict between the rights guaranteed by the Articles 14 & 21 of the Constitution on one hand and the language in a statute on the other hand, the latter has to give in to the former. This has also been so held by the Supreme Court in another case where the Supreme Court has held that despite prohibition of suspension of sentence under NDPS Act, the Courts can suspend the sentence. Hence it was held by this court that, despite the fact that the constitutional vires of the language of the twin conditions might be considered by some other court in some other appropriate proceedings, the state could not be permitted to take the twin conditions as an objection to the grant of the bail to the accused. This court does not find any reason to take a different view now. This judgment of this court was even challenged before the Hon'ble Supreme Court in case of **SLP (Criminal) Diary No. 42609 of 2018, State of Punjab v. Ankush Kumar @ Sonu**. However, the Hon'ble Supreme Court had not found any reason to interfere with that judgment of this court; and SLP was, accordingly, dismissed by the Supreme Court. It would not be appropriate to reproduce only some part of that judgment of this court in a mutilated form, lest the essence of the matter should be lost in the process. Rather to truly appreciate the matter of the operational functionality of the twin conditions; the said judgment has to be read as an organic whole. Since the said judgment is*

reported one, thus, the reasoning given in that judgment can be taken as a supplement to the decision of the present case as well.

*27. Although the learned Counsel for the SFIO has, additionally, referred to the language used in section 437 of Cr.P.C., 1973 to argue that a similar language is already used in the said provision of bail; and has also relied upon the judgment of the Supreme Court rendered in **Kartar Singh v. State of Punjab, 1994 (3) SCC 569**, wherein referring to the language of section 437 Cr.P.C., 1973 the para materia language of twin conditions used in Terrorist and Disruptive Activities Act was upheld. However, although this court has no competence to comment upon this judgment of the Supreme Court, yet it has to be noted that the same judgment was cited even before the Supreme Court in Nikesh Tarachand Shah (supra) case and the Hon'ble Supreme Court had not found it worth reliance to the extent of being sufficient for upholding the para-materia language of twin conditions used in the Prevention of Money Laundering Act. Beyond that; this court can only observe that any further relevance of this judgment can be assessed only by the Hon'ble Supreme Court in the case which is now stated to be pending before the Supreme Court itself and in which the constitutional validity of twin conditions as prescribed under section 212(6) is directly under challenge. However, so far as the language of section 437 Cr.P.C., 1973 is concerned, although in itself that cannot be a ground for pleading constitutional validity of the section 212(6) of the Companies Act, yet otherwise also; that language is drastically different than the language used in section 212(6) of Companies Act. A bare perusal of this section shows that the section 437 Cr.P.C., 1973 uses two different phrases, qua satisfaction of the court for releasing an accused on bail, at two drastically different stages of the trial. Section 437(1)(i) is dealing with a stage when an accused appears or brought before the trial court for the first time to start proceedings against him. This provision, for declining bail to such a person; requires the satisfaction and belief of the court that the said person 'has been guilty' of the offence mentioned in that provision. On the other hand Section 437(7) deals with a situation where the trial stands concluded but the decision is not yet pronounced. In this Situation; this provision provides that the accused need not be unnecessarily incarcerated and he can be released on bail if the court has a satisfaction and belief; on the basis of the evidence of the prosecution; that the accused 'is not guilty' of the offence. Both these provisions are perfectly in tandem with the other provisions of Cr.P.C. relating to the stages and progress of trial, like framing of charge, discharge and acquittal of*

an accused as per the progress of trial and availability of evidence on record. On the other hand, section 212(6) of the Companies Act requires from the court; at the start of the trial itself; what section 437(7) requires from the court at the end of the trial. Even if, by hook or crook, the court manages to record, while granting bail to an accused, as is required under section 212(6), that the accused 'is not guilty', then it negates the entire process of further trial of that accused. It goes against framing of the charge by the same court and it may require even discharge of such an accused; because by recording a satisfaction that a person 'is not guilty' the court surpasses the level of satisfaction required for framing charge itself; and goes near to recording the satisfaction required for his discharge.

28. Similarly, holding the twin conditions to be mandatorily followed in all situations for release of an accused on bail; can lead the court to hit against the wall in a given situation. This can be clear from another inconvenient question, which has not been shown by the learned Counsel for the SFIO to have been answered by any court so far, including the Hon'ble Supreme Court. The question is - for how long an accused can be kept in custody on the basis of non-fulfillment of the requirement prescribed under section 212(6)? This question was specifically referred to Delhi High Court by way of reference by a judicial officer, in case of Court on its Own Motion (Supra) case. However, even there the question does not find any answer. Unless this question is categorically answered to say that till the conclusion of the trial such a person cannot be released on bail without satisfying the conditions mentioned in section 212(6), the twin condition cannot be held to be mandatory. This is so because if a person can be released on bail without satisfying the twin conditions of the section 212(6), say, after 3 years, then there is no reason why he cannot be released without complying the said twin condition today itself. But this court has come across the unfortunate situations where a court may not even find the moral courage or the legal sanctity to tell to the accused that he shall have to wait in custody till conclusion of the trial, despite and in face of the legislative policy contained in provisions of section 436A of the Cr.P.C., 1973. If an accused is in custody for years together without his fault and without any effective proceedings being conducted against him, this may turn into a totally unfair procedure, which cannot be used to curtail the liberty of an accused in violation of Article 21 of the Constitution of India. And in our system of criminal adjudication these situations are not uncommon. In fact, this court has come across the cases where this court had to order taking the police officers into custody and keeping them in custody till their

examination and cross examination before the trial court, as prosecution witnesses, was completed, because in those cases only the police persons were the witnesses and they were not appearing before the trial court, for 19 dates in one case and for 41 dates in another case; despite the fact that the accused was in continuous custody or was regularly appearing before the trial court. Such kind of cases does galore. In such a situation the court would do substantial justice; or would stick to the conditions; like the ones prescribed under section 212(6); to deny even the bail to such an accused? Even if the courts are to stick to such condition; then how much injustice to the accused would be sufficient to off-set or to balance with the rigor of the twin condition? This court finds the answer to these inconvenient questions to be in negative and, therefore, constrained to observe that in humble view of this court; the twin conditions mentioned in section 212(6) are not mandatory in their compliance.

*29. Although learned Counsel for the SFIO has submitted that in the case of Nitin Johari (Supra) the Hon'ble court has remanded the matter to the Delhi High Court for reconsideration on bail by considering the scope and effect of the twin conditions, as laid down in the section 212(6) of the Companies Act, however, this court finds that; in that case, the Hon'ble Supreme Court has also observed that even if conditions prescribed under section 212(6) are not to be followed, still the criteria meant for bail in cases of economic offences was required to be considered by the High Court of Delhi. Hence, the primary reason for remand in that case was that the High Court of Delhi had not considered the material on record of the case and had granted bail even without advertting to the factors considered relevant by the Supreme Court for economic offences. Additionally, the Supreme Court had also directed the Delhi High Court to consider the 'scope and effect' of the twin conditions prescribed under section 212(6) of the Companies Act. However, in the present case, as mentioned above, this court has already considered the 'scope and effect' of the operational functionality of the language para materia to the one contained in the twin conditions, as prescribed under section 212(6) of the Companies Act and has found in the case of Ankush Kumar (Supra) that the languages is in conflict with the right of the accused guaranteed under Article 14 and Article 21 of the Constitution and thus has to give way to the fundamental rights of the accused; qua his consideration for grant of bail. That judgment of this court was even challenged before the Hon'ble Supreme Court in case of **SLP(Criminal) Diary No. 42609 of 2018, State of Punjab v. Ankush Kumar @ Sonu**. However, the Hon'ble Supreme Court had not found any reason to*

interfere with that judgment of this court; and SLP was, accordingly, dismissed by the Supreme Court. Hence this court is of the view that bail to the petitioners cannot be denied only on the strength of insistence by the public prosecutor upon twin conditions, as prescribed under section 212(6) of the Companies Act.”

8. Learned Senior Counsel for the petitioner has alternatively argued that rigors of Section 212 (6) of the Companies Act, 2013 apply only to the case of the accused who is arrested during investigation. Since in the present case the petitioner was not arrested during investigation, rigors of Section 212(6) of the Companies Act, 2013 are not attracted to his case. In support of this argument learned Senior Counsel for the petitioner has placed reliance on the following observations of Hon'ble Supreme Court in ***Nikesh Tarachand Shah v.***

Union of India : 2018(2) R.C.R.(Criminal) 232:-

*“35. Another conundrum that arises is that, unlike the Terrorist and Disruptive Activities (Prevention) Act, 1987, there is no provision in the 2002 Act which excludes grant of anticipatory bail. Anticipatory bail can be granted in circumstances set out in ***Siddharam Satlingappa Mhetre v. State of Maharashtra, 2011(1) R.C.R.(Criminal) 126 : (2011) 1 SCC 694*** (See paragraphs 109, 112 and 117). Thus, anticipatory bail may be granted to a person who is prosecuted for the offence of money laundering together with an offence under Part A of the Schedule, which may last throughout the trial. Obviously for grant of such bail, Section 45 does not need to be satisfied, as only a person arrested under Section 19 of the Act can only be released on bail after satisfying the conditions of Section 45. But insofar as pre-arrest bail is concerned, Section 45 does not apply on its own terms.....”*

9. Learned Senior Counsel for the petitioner has also placed reliance on judgments of Division Bench of this Court ***CRM-M 28490 of 2015 titled as Dalip Singh Mann and another Vs. Niranjana Singh, Assistant Director, Director of Enforcement, Govt. of India decided on 01.10.2015*** and ***CRM-M 28452 of 2015 titled as Gurpreet Kaur @***

Gurmeet Kaur Vs. Niranjana Singh, Assistant Director, Director of Enforcement, Govt. of India decided on 01.10.2015 in which rigors of Section 45(1)(ii) of the Prevention of Money Laundering Act, 2002 were held to be attracted only while considering the bail plea of an accused who has been arrested by the Enforcement Directorate under Section 19 of the the Prevention of Money Laundering Act, 2002.

10. Learned Senior Counsel for the petitioner has further argued that in the eventuality of the twin conditions laid down in Section 212 (6) of the Companies Act, 2013 being held applicable to the case of the petitioner, the same have to be toned down to see only the probability of conviction of the petitioner. In support of his arguments learned Counsel for the petitioner has relied on the following observations in ***Ranjitsing Brahmajeetsingh Sharma Vs. State of Maharashtra and Another : 2005 (5) SCC 294 :-***

“45. We are furthermore of the opinion that the restrictions on the power of the Court to grant bail should not be pushed too far. If the Court, having regard to the materials brought on record, is satisfied that in all probability he may not be ultimately convicted, an order granting bail may be passed. The satisfaction of the Court as regards his likelihood of not committing an offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever be it a minor or major offence. If such an expansive meaning is given, even likelihood of commission of an offence under Section 279 of the Indian Penal Code may debar the Court from releasing the accused on bail.....

51. The wording of Section 21(4), in our opinion, does not lead to the conclusion that the Court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act. If such a construction is placed, the court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an event, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the Legislature. Section 21(4) of MCOCA, therefore, must be construed

reasonably. It must be so construed that the Court is able to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. Similarly, the Court will be required to record a finding as to the possibility of his committing a crime after grant of bail. However, such an offence in futuro must be an offence under the Act and not any other offence. Since it is difficult to predict the future conduct of an accused, the court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence.

52. It is, furthermore, trite that for the purpose of considering an application for grant of bail, although detailed reasons are not necessary to be assigned, the order granting bail must demonstrate application of mind at least in serious cases as to why the applicant has been granted or denied the privilege of bail.

53. The duty of the court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. The findings recorded by the Court while granting or refusing bail undoubtedly would be tentative in nature, which may not have any bearing on the merit of the case and the trial court would, thus, be free to decide the case on the basis of evidence adduced at the trial, without in any manner being prejudiced thereby.”

11. Learned Senior Counsel for the petitioner has further submitted that the petitioner and his team officially built comprehensive education solution and on dis-continuance thereof developed world class network optimization solution but subsequently, all assistance including financial investment was stopped by the AGCL without any information. In June, 2018 serious allegations against the ACCSL surfaced in national media on which the petitioner tendered resignation on August 14, 2018 and after waiting for acceptance thereof, filled form-11 at MCA portal on March 28, 2019 after paying the penalties. Fracton Technologies Pvt. Ltd. was not a shell company and was doing legitimate business. The petitioner only received his monthly

remunerations from the company and had no role, what so ever, in the alleged fraud/illegalities. The petitioner does not belong to the group of Mukesh Modi and is not his family member or associate. Role and focus of the petitioner was only on technology related aspects. No doubt the case involves serious economic offences which constitute a class apart but in the present case there is no attribution of any specific/active fraudulent act/omission to the petitioner in the investigation report or the complaint. In para 8 (12) of reply dated 17.09.2020 filed to the present petition, the respondent has admitted that unlike other co-accused, the offence under Section 447 of the Companies Act, 2013 (fraud) has not been invoked against the petitioner as the investigation did not reveal any role of the petitioner in actual fraudulent loan taking by Fracton Technologies Pvt. Ltd. The petitioner was himself victim of the deceptive business of his co-accused Mukesh Modi who adorned dominant position in the business establishments and used him as a tool to further his ulterior motives in the garb of his employment/business endeavours. The petitioner did not commit any fraud as defined by explanation to Section 447 of the Companies Act, 2013 and was not beneficiary of any such fraud committed by others. The petitioner has clean antecedents and was not involved in any un-lawful activity. The petitioner has not committed any offence covered by Section 447 of the Companies Act, 2013 and is not likely to commit any offence under the Companies Act, 2013. Both the conditions laid down in Section 212 (6) of the Companies Act, 2013 for grant of bail are satisfied. There is no cogent evidence of any fraudulent act/omission and mens rea on the part of the petitioner and

on broad probabilities of the case the petitioner may not be ultimately convicted in the case and the petitioner deserves grant of anticipatory bail on this ground.

12. Learned Senior Counsel for the petitioner has further argued that during the course of investigation the petitioner was not summoned for giving any statement nor any query was made from him. Investigation has already been completed and on completion of investigation complaint has also been filed. Without joining him in investigation and ascertaining the facts and circumstances regarding his alleged involvement, the petitioner has been arbitrarily implicated as an accused in the complaint. The petitioner was not arrested during investigation. If the petitioner is now taken in custody it would amount to punishment before trial, which is contrary to the cardinal principles of criminal jurisprudence. Further his detention during trial will also not serve any useful purpose.

13. In support of his submissions learned Senior Counsel for the petitioner has relied on judgment of Hon'ble Supreme Court in ***Dataram Singh Vs. State of Uttar Pradesh and Another : (2018) 3 SCC 22*** where appellant who cheated complainant of Rs.37 lakhs and issued cheque for Rs.18 lakhs but stopped payment thereof was granted bail by Hon'ble Supreme Court in view of the fact that the appellant was not arrested for considerable period of time which indicated that there was no apprehension that the the appellant would abscond or would hamper the trial in any manner.

14. Learned Senior Counsel for the petitioner has also placed reliance on the following observations made by Hon'ble Supreme Court

in that case :-

“2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft

approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

7.....The grant or refusal of bail is entirely within the discretion of the judge hearing the matter and though that discretion is unfettered, it must be exercised judiciously and in a humane manner and compassionately..... ”

15. In support of these arguments learned Senior Counsel for the petitioner has also relied on the judgments of Delhi High Court in ***Court on its own motion Vs. CBI : 2006(4) R.C.R.(Criminal) 206*** wherein directions were issued to Criminal Courts that on appearance before it, person accused of non-bailable offence, who has neither been arrested by the police/Investigating Agency during investigation nor produced in custody as envisaged in Section 170 of the Cr.P.C., be released on bail while holding that the circumstance of his having not been arrested during investigation or not being produced in custody is itself sufficient to entitle him to be released on bail for the simple reason that if a person has been at large and free for several years and has not been even arrested during investigation, to send him to jail by refusing bail suddenly, merely because charge-sheet has been filed is against the basic principles governing grant or refusal of bail and ***Sanjay Chaturvedi Vs. State : 2007(1) R.C.R.(Criminal) 822 (Delhi High Court)*** wherein the said directions were approvingly quoted.

16. While referring to judgments of Hon'ble Supreme Court in ***Bharat Chaudhary Vs. State of Bihar : 2003(4) R.C.R. (Criminal) 716 (Supreme Court)*** and ***Sushila Aggarwal Vs. State (NCT of Delhi) SC : 2020 (1) RCR (Criminal) 337*** learned Senior Counsel for the petitioner has argued that there is no restriction or bar to grant of anticipatory bail after filing of charge-sheet or taking of cognizance by the Court and

that anticipatory bail is not mandatorily required to be granted till filing of charge-sheet or taking of cognizance and would enure till conclusion of trial.

17. Learned Senior Counsel for the petitioner has further argued that the case of the petitioner stands on the same or better footing as those of Bharat Mardia, Leena Harivyasi and Vimal S Sharma as shown by the factors mentioned in the following table :-

Facts/alleged offences	Bharat Mardia	Leena Hariyvyasi	Vimal S Sharma	Petitioner herein
Number of CUIs associated with as a Director	1	7	4	1
Loan from ACCSL in associated CUIs	Yes	Yes	Yes	Yes
Loan Amount (in crores)	62	103	72	14
Non-repayment of loans till March 2017	Yes	Yes	Yes	Yes
Signatory on balance sheets of the accociated CUIs	Yes	Yes	Yes	Yes
Whether any active role or involvement in conspiracy alleged	No	No	No	No
Whether alleged to be beneficiary of fraud	No	No	No	No
Identified by SFIO as alleged associate of Mr. Mukesh Modi	Yes	Yes	Yes	No
Summoned to join investigation by SFIO	Yes	No	No	No
Anticipatory bail status	Granted	Granted	Granted	Denied

The petitioner is entitled to grant of anticipatory bail on parity with the above-said similarly placed persons who have been granted anticipatory bail by this Court.

18. Learned Senior Counsel for the petitioner has also asserted that the petitioner is sole bread earner of his family comprising his old mother, wife and minor children and is not likely to abscond. The case is based largely on documentary evidence which is already seized by and in possession of the complainant and the question of tampering with the evidence or hampering of the trial by the petitioner does not arise at all. The petitioner undertakes to abide by the conditions to be imposed by the Court and will not threaten, intimidate or influence the witnesses of the complainant in any manner whatsoever.

19. Learned Senior Counsel for the petitioner has accordingly vehemently urged that in view of the above referred facts and circumstances of the case and the judicial precedents relied upon by him the petitioner may be granted anticipatory bail.

20. On the other hand, learned Additional Solicitor General of India and learned Senior Panel Counsel for the respondent have submitted that petitioner was the Director of Fracton Technologies Pvt. Ltd., one of CUIs of AGCL, during the period from 15.06.2011 to 14.08.2018. Fracton Technologies Pvt. Ltd. could not become member of ACCSL, a multi-state credit cooperative society. Fracton Technologies Pvt. Ltd. fraudulently/illegally obtained loan of Rs. 14.75 crores from ACCSL during the period from financial year 2012-2013 to financial year 2016-17. Amendment in bye-laws of ACCSL permitting companies to be member thereof was rejected by the Central Registrar Vide order dated 19.04.2012. The petitioner was having knowledge that a company could not be a member of ACCSL and was ineligible to take loan from ACCSL. Part of the loan secured during enforcement of

the Companies Act, 1956 remained unpaid on commencement of the Companies Act, 2013. The loan obtained by Fracton Technologies Pvt. Ltd. from ACCSL fell under the definition of deposit but was wrongly shown as secured loan from financial institution in the financial statements signed and filed by the petitioner. The petitioner has shifted the blame to Mr. Abhay Shah, Chartered Accountant of the AGCL pleading that he was not aware of the intricacies involved but in view of Section 166(3) of the Companies Act, 2013, the petitioner was under obligation to exercise his duties with due and reasonable care, diligence and independent judgement. The petitioner being the Director of Fracton Technologies Pvt. Ltd. has knowingly signed false financial statements of the company which amounted to an offence under Section 448 of the Companies Act, 2013 punishable under Section 447 of the Companies Act, 2013.

21. Learned Additional Solicitor General of India and learned Senior Panel Counsel for the respondent have further argued that Section 212 (6)(ii) of the Companies Act, 2013 bars grant of bail to person accused of having committed offence covered under Section 447 of the Companies Act, 2013 unless the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail. The twin conditions thereby laid down are mandatory and being conditions precedent, bar release of such person on bail unless the same are satisfied. In ***Nikesh Tarachand Shah Vs. Union of India : 2018(2) R.C.R.(Criminal) 232***, Hon'ble Supreme Court declared Section 45 of the Prevention of Money Laundering Act, 2002 to be unconstitutional

but the Parliament has subsequently amended Section 45 of the Prevention of Money Laundering Act, 2002 and the amended provision was considered by Hon'ble Supreme Court in ***P. Chidambaram Vs. Directorate of Enforcement : (2019) SCC Online SC 1143 (Supreme Court)***. Section 37(1)(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985, Section 20(8) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 and Section 21(4) of the Maharashtra Control of Organised Crime Act, 1999 which are pari materia to section 212 (6) of the Companies Act, 2013 have been upheld and given due effect by Hon'ble Supreme Court. In ***Ankush Kumar @ Sonu Vs. State of Punjab; (2018) SCC Online P&H 1259 (Punjab and Haryana High Court)*** the Coordinate Bench of this Court after discussing the matter of functional impracticability and constitutional validity of twin conditions imposed by Section 37 (1) (b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 observed in its judgment that pronouncement on the constitutional validity thereof was not the domain of the petition and the constitutional validity thereof could be considered only by the appropriate Court in the appropriate proceedings. Petition challenging the constitutional validity of Section 212 (6)(ii) of the Companies Act, 2013 is pending before Hon'ble Supreme Court but mere pendency of the same does not make the said provision inoperative or inapplicable. In support of their arguments, learned Additional Solicitor General and learned Senior Panel Counsel for the respondent have placed reliance on the observations in ***Serious Fraud Investigation Office Vs. Neeraj Singal : (2018) SCC Online SC 1573 (Supreme Court); Serious Fraud Investigation Office Vs. Nitin***

Johari and Another : (2019) SCC Online SC 1178 (Supreme Court); Serious Fraud Investigation Office Vs. Rahul Modi and Another : (2019) 5 SCC 266 (Supreme Court); Nikesh Tarachand Shah Vs. Union of India (Supreme Court) : 2018(2) R.C.R.(Criminal) 232; P. Chidambaram Vs. Directorate of Enforcement : (2019) SCC Online SC 1143 (Supreme Court); Writ Petition(s)(Criminal) No(s). 263/2019 dated 23.09.2019 titled as Deepak Shrimali Vs. Union of India and others (Supreme Court) and Writ Petition(s)(Criminal) No(s).107 & 108/2019 dated 10.04.2019 titled as Hari Sankaran Vs. Union of India and Ors. and Writ Petition (Criminal) No.107 of 2019 titled as Ramesh C. Bawa Vs. Union of India & Ors. (Supreme Court) decided on 10.04.2019.

22. Learned Additional Solicitor General of India and learned Senior Panel Counsel for the respondent have further argued that the mere fact that the petitioner was not summoned or arrested during investigation does not by itself entitle the petitioner for grant of bail which is a matter of judicial discretion and not any right of the accused. Rigors of Section 212 (6) of the Companies Act, 2013 also apply to persons accused of the offences mentioned therein seeking grant of anticipatory bail. Anticipatory bail can be granted for limited duration till filing of charge-sheet or taking of cognizance. Since the complaint has already been filed, the petitioner has to surrender and then apply for regular bail. In support of these arguments, learned Additional Solicitor General and learned Senior Panel Counsel for the respondent have placed reliance on the observations in ***Arun Sharma Vs. Union of India and others : (2016) 3 RCR (Criminal) 883 (DB) (Punjab &***

Haryana High Court); Pankaj Jain Vs. Union of India : (2018) 5 SCC 743 (Supreme Court); Ankush Kumar @ Sonu Vs. State of Punjab; (2018) SCC Online P & H 1259 (Punjab and Haryana High Court); Satpal Singh Vs. State of Punjab : (2018) 13 SCC 813 (Supreme Court); HDFC Bank Ltd. Vs. J.J. Mannan @ J.M. John Paul and Another : (2010) 1 SCC 679 (Supreme Court) and Sushila Aggarwal Vs. State (NCT of Delhi) : 2020 (1) RCR (Criminal) 337 (Supreme Court).

23. Learned Additional Solicitor General of India and learned Senior Panel Counsel for the respondent have further argued that the petitioner has not placed any material on record to show and there is no reasonable ground to believe that the petitioner has not committed the offence under Section 448 punishable under Section 447 of the Companies Act, 2013 and that the petitioner will not commit any offence after his release on bail and the twin conditions laid down in Section 212(6) of the Companies Act, 2013 are not satisfied. Therefore, the petitioner does not deserve grant of anticipatory bail.

24. Learned Additional Solicitor General of India and learned Senior Panel Counsel for the respondent have also relied on the judgment of Hon'ble Supreme Court in *Serious Fraud Investigation Office Vs. Nitin Johari and Another : (2019) SCC Online SC 1178 (Supreme Court)* where order granting bail to Nitin Johri, accused of having inter alia committed offence punishable under Section 447 of the Companies Act, 2013, was set aside and the matter was remanded to the Delhi High Court to reconsider the bail application in light of the principles governing the grant of bail under Section 439 of the Cr.P.C.

while also keeping in mind the scope and effect of the twin mandatory conditions for grant of bail laid down in Section 212 (6) (ii) of the Companies Act, 2013. Learned Additional Solicitor General of India and learned Senior Panel Counsel for the respondent have also referred to judgment of Delhi High Court in ***Nitin Johari Vs. Serious Fraud Investigation Office 2020 SCC Online Del 394 (Delhi High Court)*** whereby on reconsideration regular bail was denied to Nitin Johari and order of Hon'ble Supreme Court in ***Special Leave to Appeal (Criminal) No. 2539/2020 dated 16.07.2020 titled as Serious Fraud Investigation Office Vs. Nitin Johari (Supreme Court)*** whereby Special leave petition filed against the same was dismissed.

25. Learned Additional Solicitor General of India and learned Senior Panel Counsel for the respondent have further argued that the petitioner has committed serious economic offences which constitute a class apart and the petitioner does not deserve grant of anticipatory bail. In support of their arguments, learned Additional Solicitor General and learned Senior Panel Counsel for the respondent have placed reliance on the observations in ***Y.S. Jagan Mohan Reddy Vs. Central Bureau of Investigation : (2013) 7 SCC 439 (Supreme Court)***; ***Rohit Tandon Vs. Directorate of Enforcement : (2018) 11 SCC 46 (Supreme Court)*** and ***State of Gujarat Vs. Mohanlal Jitamalji Porwal : (1987) 2 SCC 364 (Supreme Court)***.

26. In support of their arguments, learned Additional Solicitor General and learned Senior Panel Counsel for the respondent have also placed reliance on observations in ***Jainam Rathod Vs. State of Haryana (Punjab and Haryana High Court) : 2020 (1) RCR***

(Criminal) 241 and Raj Kumar Modi Vs. Serious Fraud Investigation Office : (2019) SCC Online P & H 4987 (Punjab and Haryana High Court) where regular bail was denied by the Co-ordinate Bench of this Court in similar matters of co-accused Jainam Rathod and Raj Kumar Modi.

27. Learned Additional Solicitor General of India and learned Senior Panel Counsel for the respondent have further argued that Bhart Kumar Mardia and Leena Harivyasi were granted bail as there were no allegations of commission of offence punishable under Section 447 of the Companies Act, 2013 against them and Section 212(6) of the Companies Act, 2013 was not applicable to them. Vimal S Sharma was granted bail under the proviso to Section 212(6) of the Companies Act, 2013 which permitted grant of bail to a person on the ground of being a sick or infirm or a woman. The case of the petitioner stands on different footing and the petitioner is not entitled to grant of anticipatory bail on parity with them. In view of the quantum of sentence which the conviction may entail, the petitioner is likely to abscond, tamper with evidence and intimidate the witnesses. In view of the nature of accusation and gravity of the offences, the petitioner does not deserve grant of anticipatory bail. Therefore, the petition may be dismissed.

28. In the present case the petitioner has been summoned vide order dated 03.06.2019 passed by learned Sessions Judge, Gurugram to face trial under Sections 58-A, 211(7), 227 and 628 of the Companies Act, 1956, Sections 74(3), 147, 447 and 448 of the Companies Act, 2013 and Section 477-A of the Indian Penal Code, 1860.

29. The petitioner filed Writ Petition (Criminal) No.239 of

2019 titled 'Vijay Shukla Vs. Union of India and another' before Hon'ble Supreme Court. Vide order dated 03.09.2019 the petitioner was granted interim relief that no coercive action be taken against him which was extended vide order dated 05.09.2019 and 12.09.2019 but vide order dated 19.09.2019 the prayer for interim relief was declined and the petitioner was granted liberty to pursue appropriate remedy before the concerned Court by way of application for anticipatory bail/bail or quashing as the case may be which was ordered to be considered on its own merits in accordance with law. Interim direction issued was extended for a period of 10 days to enable the petitioner to approach the appropriate Court. It was clarified that the concerned Court shall proceed in the matter before it uninfluenced by the fact that limited protection has been given to the petitioner by Hon'ble Supreme Court. It was also observed that the fact that challenge to Section 212 of the Companies Act, 2013 is pending before the Supreme Court will be no impediment for the petitioner to pursue appropriate remedy before the concerned Court. Thereupon, the petitioner filed application for grant of anticipatory bail which was dismissed by learned Additional Sessions Judge, Gurugram vide order dated 02.07.2020.

30. By virtue of power conferred by Section 212(8) of the Companies Act, 2013 the Director, Additional Director or Assistant Director of Serious Fraud Investigation Office authorized in this behalf by the Central Government by general or special order can arrest any person whom he believes on the basis of material in his possession and for reasons to be recorded in writing to be guilty of any offence punishable under sections referred to in Section 212(6) of the

Companies Act, 2013 but use of word 'may' in Section 212(8) of the Companies Act, 2013 by the Parliament makes it discretionary for him to arrest or not to arrest such person and it is not mandatory for him to arrest such person. Therefore, the mere fact that the petitioner was not summoned or arrested by the Investigating Officer during investigation does not entitle the petitioner to grant of bail. Reference for judicial precedents in this regard may be made to ***Jainam Rathod Vs. State of Haryana (P&HHC) : 2020 (1) RCR (Criminal) 241*** and ***Raj Kumar Modi Vs. Serious Fraud Investigation Office : (2019) SCC Online P & H 4987 (Punjab and Haryana High Court)***.

31. The question of bail is primarily a matter of judicial discretion and not any right of the accused. The question of grant of bail to the accused has to be decided by the Court on the facts and circumstances of the case in accordance with the provisions regarding grant of bail contained in Chapter XXXIII of the Cr.P.C. and the relevant statute creating the offence and well settled principles guiding exercise of judicial discretion.

32. Section 212(6) of the Companies Act, 2013, which imposes limitations on power of the Court to grant bail, reads as under:-

“(6) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), 1 [offence covered under section 447] of this Act shall be cognizable and no person accused of any offence under those sections shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:

Provided that a person, who, is under the age of sixteen years or is a woman or is sick or infirm, may be released

on bail, if the Special Court so directs:

Provided further that the Special Court shall not take cognizance of any offence referred to this subsection except upon a complaint in writing made by—

(i) the Director, Serious Fraud Investigation Office; or

(ii) any officer of the Central Government authorised, by a general or special order in writing in this behalf by that Government.”

33. Section 212(7) of the Companies Act, 2013 provides that:-

“The limitation on granting of bail specified in sub-section (6) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.”

34. The provisions of Section 212(6) of the Companies Act, 2013 are pari materia to Section 45 of the Prevention of Money Laundering Act, 2002, Section 37(1)(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985, Section 20(8) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 and Section 21(4) of the Maharashtra Control of Organised Crime Act, 1999.

35. Constitutional validity of Section 20(8) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 was upheld by Hon'ble Supreme Court in ***Kartar Singh Vs. State of Punjab : 1994 (3) SCC 569.***

36. In ***Ranjitsing Brahmajeetsingh Sharma Vs. State of Maharashtra and Another : 2005 (5) SCC 294 (Supreme Court)*** constitutionality of Section 21(4) of the Maharashtra Control of Organised Crime Act, 1999 was not doubted although the same was toned down as observed in paras No.45 and 51 to 53 of the judgment extracted hereinabove.

37. In ***Nikesh Tarachand Shah Vs. Union of India : 2018(2) R.C.R.(Criminal) 232***, Hon'ble Supreme Court declared Section 45 of

the Prevention of Money Laundering Act, 2002 to be unconstitutional but the Parliament has subsequently amended Section 45 of the Prevention of Money Laundering Act, 2002. The amended provisions were considered by Hon'ble Supreme Court in ***P. Chidambaram Vs. Directorate of Enforcement : (2019) SCC Online SC 1143 (Supreme Court)***.

38. In ***Ankush Kumar @ Sonu Vs. State of Punjab : (2018) SCC Online P & H 1259 (Punjab and Haryana High Court)***, the Coordinate Bench of this Court while considering the provisions of Section 37(1)(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 observed that the operational functionality of the language of twin conditions is based upon totally indeterminate criteria which are required for exercise of this power by the court and also expects the impossible from the Court and that the language of these twin conditions is in direct conflict with the rights of an individual guaranteed by Article 14, which protects him from irrationality and arbitrariness in application of law against him, as well, his right to life and liberty protected by Article 21 of the Constitution of India. In case of conflict between the rights guaranteed by Articles 14 and 21 of the Constitution on one hand and the language in a statute on the other hand, the latter has to give in to the former. However, the Coordinate Bench observed in its judgment that pronouncement on the constitutional validity of the provision was not the domain of the petition and the constitutional validity of the provision could be considered only by the appropriate Court in the appropriate proceedings. Therefore, the observations therein are not of any help to

the petitioner.

39. It may also be observed here that Hon'ble Supreme Court has upheld and given effect to the twin conditions imposed by Section 37(1) (b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 on power of the Court for release on bail in numerous cases. Reference in this regard may be made to ***Union of India Vs. Niyazuddin Sk., (SC) : 2017(4) R.C.R.(Criminal) 644; Satpal Singh Vs. State of Punjab (SC) : 2018(5) R.C.R.(Criminal) 152 and State of Kerala Vs. Rajesh (SC) : 2020 (1) R.C.R.(Criminal) 818.***

40. Admittedly, petition challenging constitutional validity of Section 212(6) of the Companies Act, 2013 is pending before Hon'ble Supreme Court but mere pendency of the petition challenging constitutional validity of the same does not make the said statutory provision inoperative and does not exclude applicability thereof to the case of the petitioner.

41. In ***Serious Fraud Investigation Office Vs. Nitin Johari and Another : (2019) SCC Online SC 1178 (Supreme Court)*** Hon'ble Supreme Court, while setting aside order granting bail to Nitin Johri, accused of having inter alia committed offence punishable under Section 447 of the Companies Act, 2013, observed as under :-

“.....Although arguments have been advanced touching upon the scope and validity of the above provision, particularly in the aftermath of the decision of this Court in Nikesh Tarachand Shah (supra) pertaining to a similar provision in the Prevention of Money Laundering Act, we do not find it appropriate to make any observations in this regard in light of the pendency of the challenge to the constitutionality of the said provision of the Companies Act before this Court.

11. At this juncture, it must be noted that even as per Section 212(7) of the Companies Act, the limitation under

Section 212(6) with respect to grant of bail is in addition to those already provided in the Cr.P.C. Thus, it is necessary to advert to the principles governing the grant of bail under section 439 of the Cr.P.C., 1973 Specifically, heed must be paid to the stringent view taken by this Court towards grant of bail with respect of economic offences. In this regard, it is pertinent to refer to the following observations of this Court in Y.S. Jagan Mohan Reddy (supra):

“34. Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.

35. While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations.”

This Court has adopted this position in several decisions, including Gautam Kundu v. Directorate of Enforcement (Prevention of Money Laundering Act), Government of India, (2015) 16 SCC 1, and State of Bihar v. Amit Kumar, (2017) 13 SCC 751. Thus, it is evident that the above factors must be taken into account while determining whether bail should be granted in cases involving grave economic offences.”

In that case Hon'ble Supreme Court remanded the matter to the Delhi High Court to reconsider the bail application in light of the principles governing the grant of bail under Section 439 of the Cr.P.C. while also keeping in mind the scope and effect of the twin mandatory conditions for grant of bail laid down in Section 212 (6) (ii) of the Companies Act, 2013.

42. In view of the fact that Section 212(6) of the Companies Act, 2013 is pari materia to Section 37(1)(b) of the Narcotic Drugs and

Psychotropic Substances Act, 1985, the judicial precedents considering the scope and effect thereof are relevant in considering the scope and effect of Section 212(6) of the Companies Act, 2013.

43. In ***Union of India Vs. Rattan Mallik @ Habul : (SC) : 2009(1) R.C.R.(Criminal) 938*** Hon'ble Supreme Court observed as under:-

*“13. It is plain from a bare reading of the non- obstante clause in the Section and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the Narcotic Drugs And Psychotropic Substances Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by sub-clause (b) of sub-section (1) of Section 37 of the Narcotic Drugs and Psychotropic Substances Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz; (i) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds". The expression 'reasonable grounds' has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. [Vide ***Union of India v. Shiv Shanker Kesari, 2007(4) RCR (Criminal) 186 : 2007(5) RAJ 134 : (2007)7 SCC 798***]. Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the Narcotic Drugs And Psychotropic Substances Act.”*

44. Rigors of Section 37(1)(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 are not restricted in application only to person, accused of having committed offence punishable under

Section 19, Section 24 or Section 27A thereof or offence involving commercial quantity, arrested during investigation and are equally applicable to person, accused of above-said offences, who seeks grant of anticipatory bail or appears/surrenders before the Court and applies for grant of regular bail. Reference for judicial precedent in this regard may be made to judgment in ***Satpal Singh Vs. State of Punjab : 2018(5) RCR (Criminal) 152*** where Three Judges Bench of Hon'ble Supreme Court held Section 37(1)(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 to be applicable at the stage of grant of anticipatory bail as well and set aside order dated 21.09.2017 granting anticipatory bail passed by this Court without recording findings as to the twin conditions laid down by Section 37(1)(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 and order dated 31.10.2017 granting regular bail passed by learned Sessions Judge on the basis thereof.

45. It is now well settled by a catena of judgments that no person can be enlarged on bail for offences punishable under Section 19 or Section 24 or Section 27A of the Narcotic Drugs and Psychotropic Substances Act, 1985 and also for offences involving commercial quantity unless twin conditions embodied therein are satisfied and the findings with respect to satisfaction thereof are sine qua non for granting bail to the accused under the Narcotic Drugs and Psychotropic Substances Act, 1985. (See ***Union of India Vs. Niyazuddin Sk., (SC) : 2017(4) R.C.R.(Criminal) 644; Satpal Singh Vs. State of Punjab (SC) : 2018(5) R.C.R.(Criminal) 152 and State of Kerala Vs. Rajesh (SC) : 2020 (1) R.C.R.(Criminal) 818***. In ***State of***

Kerala Vs. Rajesh (SC) : 2020 (1) R.C.R.(Criminal) 818 Hon'ble Supreme Court has also held that in the matter of grant of bail in cases under the Narcotic Drugs and Psychotropic Substances Act, 1985 liberal approach is uncalled for.

46. Accordingly, the question of grant of anticipatory bail to the petitioner has to be considered in conformity with twin conditions laid down in Section 212(6) of the Companies Act, 2013. Even otherwise the question of grant of bail to the petitioner has to be decided by adverting to the principles governing grant of bail under Section 438 of the Cr.P.C. and taking into consideration the fact that offences alleged to have been committed by the petitioner fall in the category of serious economic offences.

47. In the present case as per the version of the respondent-complainant the investigation revealed that ACCSL accepted deposits from its members, mostly low to middle income group individuals and had outstanding deposit liability of Rs. 9253/- crores as on 31.05.2018. AGCL, a group of 126 companies, was being managed/controlled by Mukesh Modi, his family members and associates. 70 out of the aforesaid 126 CUIs had, despite being ineligible, fraudulently/illegally obtained loans from ACCSL to the tune of Rs.1700/- crores and amount of Rs.4120/- crores was the outstanding balance against the above-said loans as on 31.03.2018. Section 25 of the Multi-State Cooperative Societies Act, 2002 did not allow a company to be a member of Credit Co-operative Society. Amendment of the bye-laws of ACCSL for making companies eligible for membership of ACCSL was rejected by the Central Registrar vide order dated 19.04.2012. Investigation

revealed that the petitioner was a Director in Fracton Technologies Pvt. Ltd., one of the aforesaid 70 CUIs of AGCL, from 15.06.2011 to 14.08.2018 and was managing the affairs of the company during the said period. Fracton Technologies Pvt. Ltd., using the above modus operandi, obtained loan to the tune of Rs.14.75 crores from ACCSL as principal amount from financial year 2012-13 to financial year 2016-17 during the period when the petitioner was one of the Directors and managing affairs thereof. Fracton Technologies Pvt. Ltd. accepted deposits in contravention of the applicable provisions/rules under the Companies Act, 1956. The deposits taken before the commencement of Companies Act, 2013, remained unpaid upon such commencement on 12.09.2013. The company and its Directors including the petitioner and officers in default committed offences punishable under Section 58-A of the Companies Act, 1956 and Section 74(3) of the Companies Act, 2013. The said offences are punishable with imprisonment upto five and seven years respectively and are non-bailable offences but the restrictive conditions of bail as provided under Section 212(6) of the Companies Act, 2013 are not applicable qua the said offences. However, as per version of the respondent-complainant, investigation revealed that the petitioner, being the Director of Fracton Technologies Pvt. Ltd. knowingly signed and filed financial statements of the said company during the financial years 2011-12 to 2015-16, which were false in material particulars as the loans obtained from ACCSL by Fracton Technologies Pvt. Ltd. which actually fell under the definition of 'deposit' were shown as 'secured loans' taken from financial institution and from which material facts were also omitted. In balance

sheets for the financial year 2011-12 ending on 31.03.2012 and financial year 2012-13 ending on 31.03.2013 Fracton Technologies Pvt. Ltd. was mentioned to have taken secured loan from ACCSL which was mentioned to be financial institution but in balance sheets for financial years 2013-14, 2014-15 and 2015-16 ending on 31.03.2014, 31.03.2015 and 31.03.2016 respectively Fracton Technologies Pvt. Ltd. was merely mentioned to have taken secured term loan from financial institution and even the name of ACCSL was omitted from the same. Clause (39) of Section 2 of the Companies Act, 2013 defines “financial institution” as including a scheduled bank and any other financial institution defined or notified under the Reserve Bank of India Act, 1934. Prima facie, ACCSL does not fall within the definition of financial institution. Therefore, statement regarding taking of loan from financial institution in all the above-said balance sheets was false in material particulars. Since in balance sheets for the financial years 2013-14, 2014-15 and 2015-16 ending on 31.03.2014, 31.03.2015 and 31.03.2016 name of ACCSL, from which the term loan was taken, was not mentioned, the facts which were material were omitted. The petitioner has claimed that the petitioner was told by Abhay Shah, Chartered Accountant of the AGCL that the ACCSL by virtue of amendment of its bye-laws was authorized to give loan to the companies and that loan being taken by Fracton Technologies Pvt. Ltd. from the ACCSL would be subsequently converted into equity in accordance with the relevant statutory provisions and that the petitioner having no reasons to doubt him accepted his explanation at face value due to lack of knowledge and inability to understand the intricacies

involved in financial matters/accounting process but in view of Section 166(3) of the Companies Act, 2013, the petitioner was under obligation to exercise his duties with due and reasonable care, diligence and independent judgement.

48. Sections 447 and 448 of the Companies Act, 2013 read as under:-

“447. Punishment for fraud.— Without prejudice to any liability including repayment of any debt under this Act or any other law for the time being in force, any person who is found to be guilty of fraud, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud: Provided that where the fraud in question involves public interest, the term of imprisonment shall not be less than three years.

Explanation- For the purposes of this section (i) fraud in relation to affairs of a company or any body corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss; (ii) wrongful gain means the gain by unlawful means of property to which the person gaining is not legally entitled; (iii) wrongful loss means the loss by unlawful means of property to which the person losing is legally entitled.

448. Punishment for false statement.- Save as otherwise provided in this Act, if in any return, report, certificate, financial statement, prospectus, statement or other document required by, or for, the purposes of any of the provisions of this Act or the rules made thereunder, any person makes a statement, (a) which is false in any material particulars, knowing it to be false; or (b) which omits any material fact, knowing it to be material, he shall be liable under section 447.”

49. No doubt, the petitioner is not accused of having committed the offence of fraud punishable under Section 447 of the

Companies Act, 2013 as the investigation did not reveal any role of the petitioner in actual fraudulent loan taking process by Fracton Technologies Pvt. Ltd., but the petitioner has prima facie signed and filed financial statements containing false information *knowing it to be false* and omitting material information as to material facts *knowing it to be material* and to have thereby committed offence under Section 448 punishable under Section 447 of the Companies Act, 2013 to which the rigors of twin conditions laid down in Section 212 (6) (ii) of the Companies Act, 2013 are applicable. The Court can not presume absence of guilty mind/mens rea at this stage. There are no reasonable grounds for believing that the petitioner has not committed offence under Section 448 punishable under Section 447 of the Companies Act, 2013. Since the first condition laid down in Section 212 (6) (ii) of the Companies Act, 2012 for release on bail is not satisfied the petitioner is not entitled to grant of anticipatory bail even if in view of the fact that the petitioner does not have any criminal antecedents, the second condition be considered to be satisfied that the petitioner is not likely to commit any offence under the Companies Act, 2013 after his release on bail. Even otherwise, the case involves serious economic offences affecting large number of individuals from low and middle income groups and also adversely affecting the national economy. The offences under the Companies Act, 2013 are required by the said Act itself to be treated as serious economic offences and constitute a class apart. For judicial precedents in this regard reference may be made to judgment of Delhi High Court in ***Nitin Johari Vs. Serious Fraud***

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whereby on reconsideration regular bail was denied to Nitin Johari and order of Hon'ble Supreme Court in ***Special Leave to Appeal (Criminal) No. 2539/2020 dated 16.07.2020 titled as Serious Fraud Investigation Office Vs. Nitin Johari (Supreme Court)*** whereby Special leave petition filed against the same was dismissed and judgments of Coordinate Bench of this Court in ***Jainam Rathod Vs. State of Haryana (P&HHC) : 2020 (1) RCR (Criminal) 241*** and ***Raj Kumar Modi Vs. Serious Fraud Investigation Office : (2019) SCC Online P & H 4987 (Punjab and Haryana High Court)*** whereby regular bail was denied to co-accused on the ground of offences involved being serious economic offences. In the present case in view of nature of serious economic offences involved the petitioner does not deserve grant of anticipatory bail.

50. In these above discussed facts and circumstances of the case which are evidently different observations in judicial precedents relied upon by learned Senior Counsel for the petitioner referred to above are not applicable and are not of any help to the petitioner.

51. In view of the above-referred facts and circumstances of the case, serious nature of the economic offences involved, nature of accusation against and role attributed to the petitioner who is alleged to have signed and filed financial statements which were false in material particulars and also omitted material facts, there being no reasonable ground to believe that the petitioner has not committed offence under Section 448 punishable under Section 447 of the Companies Act, 2013, I am of the considered view that the petitioner does not deserve grant of anticipatory bail.

52. In view of the above discussion, the present petition for grant of anticipatory bail to the petitioner is hereby dismissed.

30.04.2021

kavneet/kothiyal

(ARUN KUMAR TYAGI)
JUDGE

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No