

(VIA VIDEO-CONFERENCING)

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Reserved on : 28.07.2021
Pronounced on : 05.08.2021

+ BAIL APPLN. 2293/2021 and CRL.M.A. 9959/2021

AMARENDRA DHARI SINGH

.....Petitioner

Through: Mr. Siddharth Luthra, Sr. Advocate
and Mr. Siddharth Aggarwal, Sr.
Advocate with Mr. Madhav
Khurana, Ms. Trisha Mittal, Mr.
Abhinav Sekhri, Ms. Nitika
Khaitan, Ms. Riya Arora, Mr.
Sriram Krishna, Mr. Pankaj Singhal
and Ms. Shubhangni Jain,
Advocates.

Versus

DIRECTORATE OF ENFORCEMENT

..... Respondent

Through: Mr. S V Raju, ASG, Mr. Zoheb
Hossain (Special Counsel for
ED), Mr. Nitish Rana (SPP),
Ms. Naincy Jain, Mr. Vivek
Gurnani and Mr. Puru. Jain,
Advocates.

CORAM:

HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

ORDER

RAJNISH BHATNAGAR, J.

1. The present bail application has been filed by the petitioner under Section 45 of the Prevention of Money Laundering Act, 2002 R/w Section

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439 Cr.P.C. seeking regular bail in ECIR No. DLZO-I/43/2021 dated 20.05.2021.

2. Briefly stated, the facts of the case are that a CBI case was registered vide RC 221/2021/E/0009 on 17.05.2021 U/s 120B, 420 IPC and Sec. 13(1)(d) r/w Sec. 13(2) of the Prevention of Corruption Act, 1988 **(hereinafter referred to as PC Act)** against the present petitioner/accused and other accused persons.

3. The present petitioner/accused was a Senior Vice President of M/s Jyoti Trading Corporation, at the relevant time. The accused persons named in the CBI case entered into a criminal conspiracy during 2007 to 2014 and cheated and defrauded IFFCO and Indian Potash Limited. (IPL), the share holders of those entities and the Government of India by fraudulently importing fertilizers and other materials for fertilizer production at inflated prices and claimed higher subsidy from Government of India causing loss of several crores of rupees. They allegedly siphoned off the commission received from the suppliers through a complex web of fake commercial transactions through multiple companies owned by the accused persons, registered outside India in order to camouflage the fraudulent transactions.

4. It is claimed that IFFCO set up its 100% subsidiary namely M/s Kisan International Trading FZE in Dubai for importing fertilizers and other raw materials from foreign companies. Bills were raised by the suppliers in favour of M/s Kisan International Trading at inflated rates to cover up the bribe money to be paid to the accused persons and similar modus was adopted in respect of other manufacturers/suppliers. Money was paid

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through hawala operators and intermediaries. Group companies of co-accused Rajeev Saxena, who is an accused in Augusta Westland Case also, were used for receipt of commission from supplier of fertilizers and other products to IFFCO and IPL. During the commission of crime, sham consultancy agreements and fake invoices for consultancy services were prepared without providing any such services and thus commission was received by group companies of Rajeev Saxena without any genuine transaction and that money was actually illegal commission generated out of import of fertilizers and raw material.

5. It is claimed that the present petitioner/accused acted as intermediary along with other accused for channelizing the ill gotten money through different firms and companies. It is claimed that in this manner, Rs. 685 Crores approximately were received in the bank accounts of the group companies and individual account of Rajeev Saxena and other accused including the present petitioner/accused Amarendra Dhari Singh. It is claimed that the fertilizers were imported fraudulently at inflated rates and the money was diverted abroad also through complex transactions. It is also the case of ED that in order to provide relief to the farmers, Government of India has been providing subsidies on different types of fertilizers and in calculating subsidy, the cost price of imported fertilizer is important and as such, due to the crime of accused persons, a huge loss also occurred to the public exchequer. It is also claimed that the present petitioner/accused had companies namely Lake Village Assets Corp. and Summerpark Cor., which were used for transferring money to another company owned by co accused.

Money lying in the account of the companies of the accused abroad were used for making real estate investments.

6. It is submitted by the Ld. Sr. counsel for the petitioner that the petitioner was arrested on 02.06.2021 and was remanded to police custody for a period of 13 days. It is further submitted that FIR bearing No. RC221/2021/E0009 was registered by the CBI on the basis of the complaint of one Nishikant Dubey dated 01.04.2013 and as late as on 14.06.2016, the said complaint was forwarded by the Department of Fertilizers, Ministry of Chemical and Fertilizers to the CBI which finally registered the present FIR on 17.05.2021.

7. It is further submitted by the Ld. Sr. counsel for the petitioner that the CBI was bound to conduct a preliminary enquiry under chapter 7 of the CBI Crime Manual, 2020 in terms with the decision of Hon'ble Supreme Court in Lalita Kumari Vs. Government of Uttar Pradesh & Ors. (2014) 2 SCC 1 and in Vinod Dua Vs. State (Govt. of NCT of Delhi), 2020 SCC Online Delhi 644. It is further submitted by the Ld. Sr. counsel for the petitioner that there are no allegations against the petitioner that he has in any manner tampered with the evidence or influenced any witness during the last 8 years since the filing of the complaint by Nishikant Dubey and he was always available for investigation and has even joined the enquiry conducted by FEMA since 2011. It is further submitted by the Ld. Sr. counsel for the petitioner that the petitioner has made 90 foreign trips and has always come back and joined the investigation and not on one occasion he has made

himself unavailable for the investigation so there are no chances of him fleeing away from justice.

8. It is further submitted by the Ld. Sr. counsel for the petitioner that the main accused of this case namely P.S. Gahlaut and Dr. US Awasthi have filed W.P. (CRL) 1051/2021 and W.P. (CRL) 1052/2021 and in these petitions, those petitioners have raised the issue that they are not public servants under the Prevention of Corruption Act 1988 and the present petitioner has not been arrested in the said FIR. It is further submitted by the Ld. Sr. counsel that if the said petitions are allowed, the present ECIR would cease to exist in the absence of predicate offence and he referred to the order dated 31.05.2021 passed by this Court. It is further submitted by the Ld. Sr. counsel for the petitioner that the arrest of the petitioner is in violation of Section 50 Cr.P.C. and Section 19 PMLA. It is further submitted that the respondent has failed to furnish the ground of arrest to the petitioner till date and they are not even incorporated in the arrest memo handed over to the petitioner at the time of his arrest. It is further submitted that the respondent is under an obligation to inform the arrested person about the grounds of his arrest and in this regard reliance has been placed by the Ld. Sr. counsel on DK Basu Vs. State of West Bengal (1997) 1 SCC 416 and Rajbhushan Omprakash Dixit Vs. Union of India 2018 SCC OnLine Delhi 7281. It is further submitted by the Ld. Sr. counsel that the offence U/s 3 r/w Section 4 PMLA is punishable with imprisonment for a term of 7 years and prior to the arrest of the petitioner the respondent had failed to comply with the directions passed by the Hon'ble Supreme Court in Arnesh Kumar Vs. State of Bihar & Anr. (2014) 8 SCC 273.

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9. It is further submitted by the Ld. Sr. counsel for the petitioner that not even a single summon U/s 41 A Cr.P.C. was issued to the petitioner directing him to join the investigation and he was arrested by flouting each and every procedure prescribed for arrest of a person. It is further submitted by the Ld. Sr. counsel that on 02.06.2021 less than 24 hours of the passing of the order dated 01.06.2021 by this Court in WP(Crl.) 1035/2021 a search was conducted by the respondent at the residence of the petitioner from 10:05 a.m. to 08:20 p.m. in which the petitioner fully co-operated but despite extending full co-operation for about ten hours, petitioner was arrested without any basis by the respondent. It is further submitted by the Ld. Sr. counsel that vide order dated 17.07.2021 on an application filed by the petitioner Ld. Special Judge directed the respondent to supply the copy of the ECIR to the petitioner within a week which expired on 21.07.2021 but the respondent failed to supply the copy of the ECIR and challenged the said order of the Special Judge before this Court in Crl. MC 1598/2021.

10. It is further submitted by the Ld. Sr. counsel for the petitioner that this Court vide order dated 22.07.2021 directed the respondent to file an affidavit indicating the manner in which the grounds of arrest are informed to the arrested person in terms of the guidelines issued in DK Basu Vs. State of West Bengal (1997) 1 SCC 416. It is further submitted by the Ld. Sr. counsel that the petitioner has challenged his illegal arrest and the first remand order by way of Crl. MC No. 1424/2021 which was listed before the vacation Bench of this Court and since the petitioner had filed his regular bail application before the Special Judge, the said petition was withdrawn and the petitioner was permitted to agitate all the issues contained in the said BAIL APPLN. 2293/2021

petition at the time of the arguments on his regular bail application. It is further submitted by the Ld. Sr. counsel that since 2010 the respondent has been conducting enquiry against the petitioner under the provisions of FEMA and the petitioner has duly co-operated in the enquiry and submitted all the documents as required by the respondent.

11. It is further submitted by the Ld. Sr. counsel that the allegations in the said FEMA case which were being investigated are identical to those in the present ECIR and even the investigating officer under the FEMA enquiry is the same as that in the present ECIR. It is further submitted by the Ld. Sr. counsel that since 2019 the petitioner has been duly co-operating in the enquiry conducted by the Income Tax Department where also the nature of allegations are identical with that of the present ECIR. It is further submitted by the Ld. Sr. counsel that the respondent in reply to the bail application has relied upon the statements of the petitioner made U/s 50 of the PMLA. It is further submitted by the Ld. Sr. counsel that the exculpatory and inculpatory nature of the statements made by the petitioner are matter of trial and cannot be gone into at the stage of investigation and the said statements are hit under Article 20 (3) and he has relied upon Selvi and Ors. Vs. State of Karnataka (2012) 7 SCC 263.

12. It is further submitted by the Ld. Sr. counsel for the petitioner that the foundation of the FIR registered by the CBI is the disclosure statement of one Rajiv Saxena and documents submitted by him. It is further submitted by the Ld. Sr. counsel that the said Rajiv Saxena is himself an accused in the FIR and several cases have been filed by the CBI and the respondent

including RC No. 217-2013-A-003. It is further submitted by the Ld. Sr. counsel that initially the said Rajiv Saxena was made an approver vide order dated 25.03.2019 in ECIR No. 15/DLZO/2014 but in less than 7 months vide application dated 18.10.2019 the respondent sought revocation of the tender of pardon of Rajiv Saxena inter alia on grounds of submission of forged bank statements and other documents by him during investigation and the respondent even went ahead and filed an application seeking cancellation of his bail and till date neither the CBI nor ED has arrested him in the present case despite serious allegations against him.

13. It is further submitted by the Ld. Sr. counsel that the petitioner is aged around 61 years and suffers from numerous ailments including Hodgkin's disease i.e. lymphatic cancer since 2002, which relapsed in 2004, 2013 and 2015; Graves' disease i.e. hyperthyroidism of the eye glands with Grave's orbitopathy i.e. exophthalmos since 2011; Type II Diabetes mellitus; Cardiac/cardiovascular complications; Hyperlipidaemia or cholesterol; Obstructive sleep apnea; Hypertension coupled with blood pressure. It is further submitted by the Ld. Sr. counsel for the petitioner that all his medical conditions are preexisting which have been confirmed by the medical report received from RML Hospital in Crl. M.C. No. 1435/2021. It is further submitted by the Ld. Sr. counsel for the petitioner that the medical condition of the petitioner deteriorated significantly. He further submitted that on 04.06.2021, the petitioner was taken to GB Pant Hospital where on account of preexisting risk of Corona Virus he was taken to AIIMS Hospital. It is further submitted by the Ld. Sr. counsel that the petitioner was granted special permission to travel America by the
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American Embassy New Delhi aided by the Ministry of External Affairs and his sister was also allowed to accompany him for his medical treatment between 25.05.2021 to 24.06.2021 and the said special permission was commenced by the petitioner even prior to the registration of the present FIR i.e. since 10.05.201.

14. It is further submitted by the Ld. Sr. counsel for the petitioner that looking into the medical condition of the petitioner which was also considered by the American Embassy, on 01.06.2021 this Court in WP (Crl.) 1035/2021 permitted the petitioner to travel to USA for his medical treatment subject to conditions, despite the registration of the FIR by CBI. It is further submitted by the Ld. Sr. counsel that the petitioner was also permitted to travel abroad for medical treatment by this Court vide order dated 20.01.2020. It is further submitted by him that the petitioner has fully co-operated with the investigation.

15. It is further submitted by the Ld. Sr. counsel for the petitioner that the petitioner is a member of Rajya Sabha from Bihar whose turn expires in the year 2026. It is further submitted by the Ld. Sr. counsel that the petitioner is in the business of fertilizer trading and consultancy and is a tax payee. He further submitted that there is not even an iota of allegation by the ED that the petitioner misused his position as a member of the Standing Committee of Fertilizers. It is further submitted by the Ld. Sr. counsel that the petitioner has travelled overseas approximately 90 times since the receipt of first notice in FEMA enquiry on 03.03.2011 and has duly returned to the

country despite pendency of various enquiries and investigation so by no stretch of imagination it can be said that the petitioner is a flight risk.

16. It is further submitted by the Ld. Sr. counsel that this Court on two occasions has permitted the petitioner to travel abroad for medical treatment despite opening of LOC against him and the registration of the FIR. It is further submitted by the Ld. Sr. counsel that there are no chances of petitioner tampering with the evidence or influencing the witnesses as all the evidence in the present case is documentary in nature and in possession of the investigating agency. It is further submitted that raids have been conducted at the residence and office of the petitioner and all the documents and the digital devices like computers, lap tops, hard disk were either seized or duplicated. It is further submitted that search and seizure was conducted by the IT department between 30.06.2019 to 05.07.2019. The search was also conducted by the respondent in relation to FEMA enquiry on 15.10.2020 and on 19.05.2021 by the CBI in relation to the present FIR. It is further submitted that on 02.06.2021, the respondent conducted raid at the petitioner's residence in the present ECIR. Ld. Sr. counsel contended that all the documents are in possession and custody of the investigating agency and he placed reliance on State of Maharashtra Vs. Nainmal Punjaji Shah (1969) 3 SCC 904 and Manoranjana Sinh Vs. CBI (2017 5 SCC 218).

17. It is further submitted by the Ld. Sr. counsel for the petitioner that simply because the petitioner is a Member of Parliament or a Member of Standing Committee of Fertilizers, it does not disentitle him to any relief from this Court as no misconduct has been attributed to him. It is further

argued that the position of the petitioner in the society shows that he has deep roots and there are no chances of his running away. It is further submitted by the Ld. Sr. counsel that it has been alleged that the petitioner helped one Sushil Kumar Pachisia to flee from the country which is totally false and baseless. It is submitted by the Ld. Sr. counsel that these allegations have been made on the basis of Whatsapp messages recovered from the petitioner's phone seized during the search conducted in October 2019 in the FEMA enquiry but it is pertinent to note here that the petitioner became a Member of Parliament in March, 2020.

18. It is further submitted by the Ld. Sr. counsel that the petitioner never helped anybody connected with the case flee the country and the allegations against the petitioner of helping Sushil Kumar Pachisia are false and baseless. It is further submitted that Sushil Kumar Pachisia has been ordinarily residing abroad since 2005-2006 and he was available to the IT department and ED during 2019-2020 and even an LOC was opened by the IT against him and only after the said LOC lapsed only then the said Susheel Kumar went abroad. It is further submitted by the Ld. Sr. counsel that if ED required the presence of Sushil Kumar, it could have opened LOC against him as has been done against the petitioner. It is further submitted that the petitioner has not in any way assisted the said Susheel Kumar in fleeing the country in violation of any rule of law and has only made a recommendation for extension of airport facilities to him and the same cannot be said to be influencing a witness.

19. It is further submitted by the Ld. Sr. counsel for the petitioner that mere gravity of the offence or status of an accused is no ground to deny bail. Reliance has been placed upon HB Chaturvedi Vs. CBI 2010 SCC Online Del 2155 and R. Vasudevan V. CBI 2012 SCC OnLine Del 130. It is further submitted by the Ld. Sr. counsel that the twin conditions U/s 45 PMLA are not applicable and the present application has to be decided on the basis of Section 439 Cr.P.C. It is further submitted by the Ld. Sr. counsel that in Nikesh Tarachand Shah Vs. Union of India (2018) 11 SCC 1 it has been held that the twin conditions U/s 45 PMLA to be unconstitutional and violative of Articles 14 & 21 of the Constitution on various fronts. Neither the Finance Act, 2018 nor 2019 revived the twin conditions as were struck down by the Hon'ble Supreme Court. Reliance has been placed on Sai Chandrasekhar Vs. Directorate of Enforcement (2021) SCC OnLine Delhi 9086 (it has not been stayed by the Supreme Court), Prakash Gurbaxani Vs. Directorate of Enforcement MANU/PH/0484/2021 (it has not been stayed by the Supreme Court.), Upender Rai Vs. Directorate of Enforcement (2019) SCC OnLine Del 9086 (Supreme Court stay only on release of the accused.)

20. It is further submitted by the Ld. Sr. counsel that the stay of the Hon'ble Supreme Court in Upender Rai [SLP (Crl.) Diary No. 5150/2020 order dated 03.06.2020] is only of the operation of the order in terms with release of the accused there in on bail. It is further submitted by him that the said order is distinguished from the order passed by the Hon'ble Supreme Court in ED Vs. Shivinder Mohan Singh [SLP Crl. No. 3474/2020 order dated 31.07.2020.] It is further submitted by him that the stay passed

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by the Hon'ble Supreme Court only operates inter se the parties and does not create a vacuum in the legal position. He placed reliance on Principal Commissioner of C. Ex., Delhi-I V. Space Telelink Ltd. 2017 (355) ELT 189 (Del), Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras (1992) 3 SCC 1.

21. It is further submitted by the Ld. Sr. counsel for the petitioner that the proviso of Section 45 of the PMLA provides that in case of sick person, bail should be granted to the person arrested.

22. On the other hand, it is submitted by the Ld. ASG that the accusation against the petitioner are serious in nature and he is involved in money laundering which is a serious economic offence and in view of the Supreme Court of India, the economic offenders constitute a class apart and be visited with a different approach in the matter of bail. It is further submitted by the Ld. ASG that the petitioner is a sitting Rajya Sabha MP and is a Member of Parliamentary Standing Committee of Fertilizers and the present offence pertains to generation of proceeds of crime while committing the offence in the import of fertilizers. It is further argued by the Ld. ASG that the accused is a powerful and influential person and there is all likelihood of the petitioner tampering with the evidence and the evidence of the witnesses to whom the cash was paid on behalf of the accused is yet to be recorded. It is further submitted that the allegations of malafide are wholly irrelevant to the proceedings of PMLA which is concerned with the stand alone offence of money laundering. It is further submitted by the Ld. ASG that in a case when the information received discloses a cognizable offence in that case no

preliminary enquiry is necessary and there is no violation of the condition as laid down by the Hon'ble Supreme Court in "Lalita Kumari" case. It has also been argued by the Ld. ASG that even anonymous complaint can be the basis of registering of FIR and even complete stranger can initiate criminal proceedings. It is further submitted by the Ld. ASG that the petitioner in the CBI RC has been clearly mentioned as an intermediary to channelize the ill-gotten money. It is further submitted by the Ld. ASG that attacking of Rajiv Saxena's credibility cannot take away the existence of documentary and digital evidences available against the petitioner and various statements of said Rajiv Saxena have been recorded U/s 50 of PMLA, wherein he has stated that the invoices of different companies were raised on the instructions of either Pankaj Jain, Sanjay Jain or the present petitioner. It is further submitted that the said Rajiv Saxena is only confirming the facts which are available in documentary and digital evidence with the ED pursuant to the investigation. During the course of argument, the Ld. ASG submitted that prosecution complaint is ready and would be filed by Saturday i.e. 30.07.2021.

23. It is further submitted by the Ld. ASG that during the analysis of the data recovered from one of the phones of the petitioner which was seized during the course of search in October 2019 in proceedings under FEMA, certain Whatsapp messages showed that he had helped one Sushil Kumar Pachisia to flee from India by getting favour as a Member of Parliament by misrepresenting him as his manager and got him VIP treatment at the airport. It is further submitted that record/evidences received from Income-Tax which were collected by the Income Tax during the course of its

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searches, and statement of various persons recorded U/s 50 of PMLA, wherein these persons when confronted with the said records/evidence have confirmed the veracity of the said record evidencing transfer of proceeds of crime in India in cash to the petitioner and his associates.

24. It is further submitted by the Ld. ASG that the petitioner has not co-operated in the investigation and has given evasive reply. It is further submitted by the Ld. ASG that the petitioner's health condition is stable and does not warrant bail on medical ground. It is further submitted by the Ld. ASG that the medical condition of the petitioner is manageable which is evident from his own pleading as he has traveled abroad for business, leisure and medical treatment over 90 times. It is further submitted by the Ld. ASG that the petitioner has been medically examined by a competent doctor every 48 hours and necessary medical help was provided and he was even taken to RML Hospital on 09.06.2021 for his thorough medical examination and the medical condition of the petitioner was confirmed to be stable by the competent doctors of RML Hospital.

25. Ld. ASG further submitted that in terms of the twin conditions prescribed in Section 45 of the PMLA, this Court could only grant bail to the petitioner after recording a satisfaction to the effect that there are reasonable grounds for believing that the petitioner is not guilty of the alleged offences and that while on bail he is not likely to commit any offence.

26. The Ld. ASG further submitted that though in Nikesh Tarachand Shah vs. Union of India and another (2018) 11 SCC 1 Section 45(1) of the PMLA, as it then stood, had been declared unconstitutional by the Supreme Court, BAIL APPLN. 2293/2021

Court but the defect pointed out by the Supreme Court which formed the basis to declare Section 45(1) to be unconstitutional had since been cured by the Legislature through its Act No.13 of 2018 which came into force from 19.04.2018; as per Act No.13 of 2018 the offending expression “punishable for a term of an imprisonment of more than three years under Part A of the Schedule” has been substituted with “under this Act”; in view of the afore amendment the twin conditions prescribed under Section 45(1) of the PMLA stood revived; the amended Section 45(1) of the PMLA has not been challenged by the petitioner and therefore, this Court is bound by the aforesaid twin conditions prescribed therein; in terms of the law laid down by the Supreme Court in Nagaland Senior Government Employees Welfare Association and others vs. State of Nagaland and others, (2010) 7 SCC 643 a statute is deemed to be constitutionally valid till struck down by a competent Court; in Molar Mal (dead) through L.Rs. v. M/s. Kay Iron Works (Pvt.) Ltd., (2000) 4 SCC 285 the Supreme Court had held that where the constitutional validity of a provision was not under challenge such provision would bind the Court; in Ashutosh Gupta vs. State of Rajasthan (2002) 4 SCC 34 the Supreme Court has opined that where the challenge is made to a statutory provision allegations in the petition should be specific, clear and unambiguous and that there is a presumption in favour of the constitutionality of an enactment with the burden upon the person who attacks the provision to show that the same is unconstitutional; the Delhi High Court in Upendra Rai vs. Enforcement Directorate (2019) SCC Online Delhi 9086 and Dr. Shivinder Mohan Singh vs. Directorate of Enforcement 2020 SCC Online Del 766 held that Act 13 of 2018 would not revive or

resurrect the twin conditions for grant of bail contained in Section 45(1) of the PMLA and on challenge before the Supreme Court such orders passed by the Delhi High Court have been stayed.

27. The PMLA, as enacted by the Parliament in the year 2002, contained Section 45(1) which read as under:-

“Section 45. Offences to be cognizable and non- bailable.—

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given a 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 punishable under Section 4 except upon a complaint in writing made by—

(i) the Director; or

(ii) any officer of the Central Government or a State Government authorised in writing in this behalf by the

Central Government by a general or special order made in this behalf by that Government.”

28. The quoted provision imposed two conditions before bail could be granted to a person accused of an offence punishable for a term of imprisonment for more than three years under Part A of the Schedule attached to the PMLA. These conditions were that before grant of bail the Public Prosecutor was required to be given an opportunity to oppose the plea for bail and that where the Public Prosecutor opposed such plea the Court could order release of the accused on bail only after recording a satisfaction that there were reasonable grounds for believing that the person to be released was not guilty of the offence he was accused of and that while on bail he was not likely to commit any offence.

29. The constitutional validity of the afore quoted provision imposing the twin conditions for grant of bail was questioned before the Supreme Court in Nikesh Tarachand Shah's case (supra) and the Supreme Court, after holding that the prescribed twin conditions for release on bail were violative of Articles 14 and 21 of the Constitution of India declared Section 45(1) of the PMLA, to that extent, to be unconstitutional. The operative part of judgment of the Supreme Court is as follows:-

“54. Regard being had to the above, we declare Section 45(1) of the Prevention of Money Laundering Act, 2002, insofar as it imposes two further conditions for release on bail, to be unconstitutional as it violates Articles 14 and 21 of the Constitution of India. All the matters before us in

which bail has been denied, because of the presence of the twin conditions contained in Section 45, will now go back to the respective Courts which denied bail. All such orders are set aside, and the cases remanded to the respective Courts to be heard on merits, without application of the twin conditions contained in Section 45 of the 2002 Act. Considering that persons are languishing in jail and that personal liberty is involved, all these matters are to be taken up at the earliest by the respective Courts for fresh decision. The writ petitions and the appeals are disposed of accordingly.”

30. By Act 13 of 2018 Section 45(1) of the PMLA was sought to be amended w.e.f. 19.04.2018. Through such amendment the words “punishable for a term of imprisonment of more than three years under Part A of the Schedule” as occurring in Section 45(1) before the judgment of the Supreme Court in Nikesh Tarachand Shah's case (supra) were substituted with the words “under this Act”. As per learned ASG, after such amendment, the defect on the basis of which the Supreme Court had declared Section 45(1) of the PMLA to be unconstitutional was cured and consequently the twin conditions prescribed in Section 45(1) stood revived.

31. The declaration by the Supreme Court in Nikesh Tarachand Shah's case (supra) would render the twin conditions prescribed in Section 45(1) of the PMLA for release of an accused on bail to be void in toto; such conditions have to be disregarded of any legal force from its inception; they

cease to be law; the same are rendered inoperative and that they are to be regarded as if they had never been enacted. That being so, the twin conditions for grant of bail under Section 45(1) of the PMLA as are now sought to be pressed into service by the ED cannot be considered to have revived or resurrected only on the prospective substitution of the words “punishable for a term of imprisonment of more than three years under Part A of the Schedule” with the words “under this Act” especially without there being any amendment with regard to the twin conditions for grant of bail which had specifically been declared to be unconstitutional as also in the absence of any validating law in this regard with retrospective effect.

32. The Bombay High Court vide order dated 06.06.2018 in Bail Application No. 286 of 2018 – Sameer M. Bhujbal vs. Assistant Director Directorate of Enforcement and another, a similar objection raised on behalf of the ED was considered and repelled through the following observations:-

“9. It is to be noted here that, after effecting amendment to Section 45(1) of the PMLA Act the words “under this Act” are added to Sub Section(1) of Section 45 of the PMLA Act. However, the original Section 45(1)(ii) has not been revived or resurrected by the said Amending Act. The learned counsel appearing for the applicant and the learned Additional Solicitor General of India are not disputing about the said fact situation and in fact have conceded to the same. It is further to be noted here that, even Notification dated 29.3.2018 thereby amending Section 45(1) of the PMLA Act which came into effect from 19.4.2018, is silent about its retrospective applicability.

In view thereof, the contention advanced by the learned A.S.G. cannot be accepted. It is to be further noted here that,

the original Sub-section 45(1)(ii) has therefore neither revived nor resurrected by the Amending Act and therefore, as of today there is no rigor of said two further conditions under original Section 45(1)(ii) of PMLA Act for releasing the accused on bail under the said Act.

10. In view of the above, when there is no bar of twin conditions contained in original Section 45(1)(ii) of the PMLA Act, the present application has to be considered and decided under Section 439 of the Code of Criminal Procedure with or without conditions.”

33. Observations made in Sameer M. Bhujbal vs. Assistant Director Directorate of Enforcement and another was considered and followed by the Bombay High Court in its judgment dated 25.03.2020 rendered in Bail Application No.1322 of 2020 – Deepak Virendra Kochhar vs. Directorate of Enforcement and another. Observations in this regard are as follows:-

“38. The question is the provision which was held constitutional by Apex Court in the case of Nikesh Shah (supra) stands revived in view of Amendment as stated above to Section 45 of the Act. This Court in the case of Sameer Bhujbal (supra) has turned down the submission of respondents therein that Government has brought an amendment to Finance Act, 2018 which has come into effect from 19.04.2018 to Section 45(1) of PMLA thereby inserting words "under this Act" in Section 45 (1) of the Act. In view of amendment, the original sub- Section (ii) of Section 45(1) which imposes the said twin conditions automatically stands revived and the said condition therefore remain on statute book. The original Section 45(1) (ii) has to be inferred and treated as it still exists on the statute book and holds the field even as of today for deciding application for bail by an accused under PMLA. It was further argued that by inserting words "under this Act", the Judgment delivered by Supreme Court in Nikesh Shah (supra) has become in effective.

The Court held that the Apex Court in Nikesh Shah (supra) has declared Section 45(1) of PMLA in so far as it imposes two further conditions for release on bail to be unconstitutional as it violates Articles 14 and 21 of Constitution of India. After effecting amendment to Section 45 (1) of PMLA. The words "under this Act" are added to sub- Section (1) of Section 45 of PMLA. However, the original Section 45(1) (ii) has not been revived or resurrected by Amending Act. Even notification dated 29.03.2018 amending Section 45(1) of PMLA which came into effect from 19.04.2018 is silent about its retrospective applicability. Hence, contention of respondent cannot be accepted. The Original sub-Section 45 (1) (ii) has neither revived nor resurrected by amending Act and therefore there is no rigour of twin conditions. This decision is still in the field. Although it is contended that, the decision has been challenged before Apex Court, it has not been set aside nor there is stay on the decision."

34. While considering the applicability of twin conditions this Court made the following observations in Sai Chandrasekhar vs. Directorate of Enforcement 2021 SCC Online Delhi 1081:

"17. Twin conditions mentioned in Section 45 of the PML Act continue to be struck down as being unconstitutional in view of the judgment of the Apex Court in the case of Nikesh Tarachand Shah vs. Union of India (2018) 11 SCC 1. The amendment in Section 45 by the Finance Act 2018 is only with respect to substituting the term 'offence punishable for 3 years' with 'offence under this Act'. The said amendment does not revive the twin conditions already struck down by the aforesaid judgment.

18. Since the twin conditions for bail in section 45 of the PML Act have been struck down by the Hon'ble Supreme Court and the same are neither revived nor resurrected by the Amending Act therefore, as of today there is no rigor of said two conditions under original Section 45(1)(ii) of the PML Act for releasing the Petitioner on bail. The provisions of Section 439 of Cr.P.C and

the conditions therein will only apply in the case of the Petitioner for grant of bail.”

35. This issue has also been dealt in a similar manner by the Madhya Pradesh High Court in *M.Cr.C. No.34201/2018 - Dr.Vinod Bhandari Vs. Assistant Director, Directorate of Enforcement*, decided on 29.08.2018 and the High Court of Patna in Criminal Miscellaneous No.41413 of 2019 – *Ahilya Devi vs. The State of Bihar and others*, decided on 28.05.2020 and in *Parkash Gurbaxani Vs. The Directorate of Enforcement through Assistant Director* in CRM-M-12901-2021(O&M) decided on 02.06.2021.

36. Reliance by the respondent has been placed on *Bimal Kumar Jain and Naresh Jain Vs. Directorate of Enforcement BAIL APPLN.112/2021 and CRL. M. (BAIL) 81/2021; BAIL APPLN. 122/2021*. The said bail application has been decided only on the basis of parameters as laid down U/s 439 of the Cr.PC. Therefore, in view of the above, the provisions of Section 439 of Cr.P.C and the conditions therein will apply in the case of petitioner for grant of bail.

37. While dealing with the bail application it is not in dispute that three factors have to be seen namely i) flight risk, ii) tampering evidence, iii) influencing witnesses.

38. The Hon’ble Supreme Court in *Niranjan Singh & Anr. Vs. Prabhakar Rajaram Kharote and Others* (1980) 2 SCC 559 has held that at the stage of granting bail detailed examination of evidence and elaborate documentation of the merits of the case should be avoided, so that no party should have the

impression that his case has been prejudiced. In the instant case, the petitioner has been investigated under FEMA and Income Tax prosecution has also been lodged against him in regard to the same allegations. It is not the case of the department that the petitioner has not joined the investigation but what has been averred is that he has given some evasive answers, no details provided. During the course of the arguments, it was submitted by the Ld. Sr. counsel for the petitioner that the prince of the department's case is one Rajiv Saxena who has made statements against the petitioner. The Ld. Sr. counsel for the petitioner has also argued that said Rajiv Saxena was once made an approver by the department but subsequently department moved for cancellation of the same. This is not the stage, to comment as to what would be the fate of the statements given by said Rajiv Saxena and the other statements recorded during the investigation. Their veracity would be tested during the course of the trial. As per the department, the raid was conducted at the office and premises of the petitioner. All the digital devices i.e. laptops, mobile phone etc. have already been seized and the other evidence seized is documentary in nature and are in the custody of the prosecuting agency. In the case of Sukhram Vs. State (CBI) CrI.M. Appeal No. 2407/1996 decided on 14.10.1996, similar apprehension expressed by the counsel for CBI that the accused could tamper with evidence was negated by the Hon'ble High Court of Delhi. Moreover, if the applicant/accused is at any stage required for investigation, he can be called to join investigation. The correctness or otherwise of the allegations as to whether the applicant/accused had received and laundered proceeds of crimes can only be looked into during the course

of trial which is likely to take time. It is also not the case of the department that the petitioner at any point of time tried to tamper with the evidence or threaten any witness except one contention that the petitioner helped one Sushil Kumar Pachisia in fleeing from India by getting favours as a Member of Parliament. In this regard it has been submitted by the Ld. Sr. counsel for the petitioner that during the relevant time the petitioner was not the Member of Parliament and he became member of Parliament in the year 2020. In reply the department has submitted that the said Sushil Kumar Paschisia was summoned U/s 50 but he has expressed his inability to travel to India under the prevailing circumstances but it has not been spelled out as to what action has been taken to bring him back to India or he is totally avoiding to come back or whether any LOC has been opened in his name. There are no specific allegations that the petitioner in any manner over the last many years since the filing of the complaint way back in the year 2013 had in any manner tried to tamper with the evidence or threaten the witnesses.

39. It has been argued by the Ld. ASG that economic offences constituted a class apart and needed to be visited with a different approach and reliance was placed on the judgments of Hon'ble Supreme Court in State of Gujarat v. Mohanlal Jitmalji Porwal, (1987) 2 SCC 364; Y.S. Jagan Mohan Reddy v. CBI, (2013) 7 SCC 439; Anil Kumar Yadav v. State (NCT of Delhi) (2018) 12 SCC 129; Sunil Dahiya v. State (Govt. of NCT of Delhi) 2016 SCC OnLine Del 5566; Bhupinder Singh v. Unitech Ltd. Civil Appeal No. 10856/2016 order dated 18.03.2021 and also in Rohit Tandon v. Directorate of Enforcement (2018) 11 SCC 46. However, in this regard, BAIL APPLN. 2293/2021

reference may be made to the judgment of the Hon'ble Supreme Court in P. Chidambaram v. Directorate of Enforcement (2020) 13 SCC 791 wherein it was observed as under:

“23. Thus, from cumulative perusal of the judgments cited on either side including the one rendered by the Constitution Bench of this Court, it could be deduced that the basic jurisprudence relating to bail remains the same inasmuch as the grant of bail is the rule and refusal is the exception so as to ensure that the accused has the opportunity of securing fair trial. However, while considering the same the gravity of the offence is an aspect which is required to be kept in view by the Court. The gravity for the said purpose will have to be gathered from the facts and circumstances arising in each case. Keeping in view the consequences that would befall on the society in cases of financial irregularities, it has been held that even economic offences would fall under the category of “grave offence” and in such circumstance while considering the application for bail in such matters, the Court will have to deal with the same, being sensitive to the nature of the allegation made against the accused. One of the circumstances to consider the gravity of the offence is also the term of sentence that is prescribed for the offence the accused is alleged to have committed. Such consideration with regard to the gravity of offence is a factor which is in addition to the triple test or the tripod test

that would be normally applied. In that regard what is also to be kept in perspective is that even if the allegation is one of grave economic offence, it is not a rule that bail should be denied in every case since there is no such bar created in the relevant enactment passed by the legislature nor does the bail jurisprudence provide so. Therefore, the underlining conclusion is that irrespective of the nature and gravity of charge, the precedent of another case alone will not be the basis for either grant or refusal of bail though it may have a bearing on principle. But ultimately the consideration will have to be on case-to-case basis on the facts involved therein and securing the presence of the accused to stand trial.”(emphasis supplied)

40. Thus it was held that even if the allegation was one of grave economic offence, it was not a rule that bail should be denied in every case.

41. Regarding the flight risk, it is the admitted case of the department that over the period of last 10 years the petitioner has gone abroad atleast 90 times for various purposes. In this regard, it has been submitted by the Ld. Sr. counsel for the petitioner that the petitioner is a sitting member of Rajya Sabha and owns substantial movable and immovable property in India. It is further submitted that despite the pendency of various enquiries and investigation, the petitioner has returned to the country. The petitioner was even allowed to travel abroad by this Court twice subject to conditions despite the opening of LOC against him and the registration of the FIR by

the CBI. Therefore, when such is the conduct of the petitioner, he cannot be said to be a flight risk. Moreover, nothing has been placed on record that the petitioner/accused is a flight risk nor much emphasis was laid on this during the argument.

42. Now as far as the medical condition of the petitioner is concerned, he is suffering from cancer since 2002 which is not denied by the department. The petitioner is under the treatment of one doctor namely Morton Coleman of U.S. and he visits the doctor for his follow up from time to time. It is on record that the petitioner was granted special permission to travel to America by the American Embassy aided by the Ministry of External Affairs and his sister was also allowed to travel with him due to his medical condition. Looking into the medical condition of the petitioner, this Court permitted the petitioner to travel to USA for his medical treatment subject to conditions, despite the registration of the FIR. The medical report in regard to the petitioner's health was also called from RML hospital and vide its report dated 19.07.2021, it has been stated that his medical records were reviewed by the medical board and he was found to be a known case of Hodgkin's Lymphoma since 2002, Right bundle branch block, mild stress induced ischaemia (infero-apical region on stress-MPI), hyper tension, diabetes mellitus, obstructive sleep apnea, treated Graves disease, benign prostate enlargement. No doubt, as argued by the Ld. ASG, the condition of the petitioner is not serious and does not require immediate attention and his present condition is manageable, but one also cannot lose sight of the fact that the petitioner is a known case of cancer and is suffering from various

aforementioned diseases for which he is taking medicines as submitted by Ld. Sr. counsel for the petitioner.

43. The petitioner is in J.C. since 02.06.2021. Therefore, in view of the entire facts and circumstances, I am of the considered opinion, that the petitioner is entitled to be released on bail on merits as well as on medical grounds. Accordingly, the petitioner shall be released on bail on the following terms and conditions:-

- (i) On furnishing personal bond in the sum of Rs. 10,00,000/- with one surety of the like amount to the satisfaction of the Trial Court.
- (ii) He shall not leave the country without permission of the Special Court, the passport if already not deposited, shall be deposited with the Special Court.
- (iii) He shall make himself available for investigation, if required by the prosecuting agency.
- (iv) He shall not influence the prosecution witnesses directly or remotely.

44. The bail application is disposed of accordingly.

45. Nothing stated hereinabove shall tantamount to the expression of any opinion on the merits of this case.

CRL.M.A. 9959/2021

46. In view of the order passed in the above Bail Appln. 2293/2021, the CRL.M.A. 9959/2021 has become infructuous and is accordingly disposed of.

RAJNISH BHATNAGAR, J

AUGUST 05, 2021

Sumant

