* IN THE HIGH COURT OF DELHI AT NEW DELHI

BAIL APPLN. 2586/2021 & CRL.M.As. 16338/2021, 1069/2022

Reserved on : 18.02.2022
Date of Decision : 11.03.2022

IN THE MATTER OF:

CHRISTIAN MICHEL JAMES .....Petitioner

Through: Mr. Aljo K. Joseph, Advocate alongwith Mr. M.S. Vishnu Sankar, Mr. Sriram Parakkat & Mr. Michael Rao, Advocates.

Versus

CENTRAL BUREAU OF INVESTIGATION ..... Respondent

Through: Mr. D.P. Singh, SPP with Mr. Manu Mishra, Ms. Shreya Dutt & Mr. K.A. Yadav, Advocates.

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

MANOJ KUMAR OHRI, J.

1. The present bail application has been filed under Section 439 Cr.P.C. on behalf of the applicant seeking regular bail in FIR/RC No. 217-2013-A-0003 registered under Section 120B read with Section 420 IPC and Sections 7/8/9/12/13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 (hereinafter, referred to as the *'PC Act'*) by the respondent.

2. The brief facts of the case, as discernible from the material placed on record, are that on the basis of disclosure made by the then Head of External Relations of *M/s Finmeccanica* [holding company of *M/s AgustaWestland International Ltd.* (hereinafter, referred to as *'AWIL'*)], Italian authorities began investigation in the year 2011 regarding payment of bribes through middlemen *Guido Ralph Haschke* and the present applicant, in relation to supply of 12 VVIP helicopters by AWIL to the Government of India. The Office of Public Prosecutors (Naples and Rome) began telephonic/technical surveillance of *Guido Ralph Haschke* and others, including then CEO of *M/s Finmeccanica.* The surveillance revealed that AWIL had paid bribes disguised as payment to various firms for engineering jobs. During search proceedings conducted at the house of mother of *Guido Ralph Haschke,* various incriminating documents including a payment/balance sheet were recovered by the Swiss Police.

Subsequently, Director General (Acq.), Ministry of Defence, Government of India lodged a complaint dated 12.02.2013 with CBI seeking inquiry/investigation into the aforesaid allegations. A preliminary inquiry was conducted, wherefore the present RC came to be registered on 12.03.2013. During investigation in the case, it was revealed that a Request for Proposal (RFP) was issued in March, 2002 on behalf of Indian Air Force (IAF) for procurement of 8 VVIP helicopters. One of the prescribed conditions was a mandatory altitude requirement of 6000 meters. Although 4 firms had responded, only 3 helicopters i.e., MI-172, EC-225 and EH-101 (also known as AW-101) were selected by Technical Evaluation Committee for flight evaluation. Later, only the first two helicopters were flight evaluated as the third helicopter was certified to fly only upto an altitude of

4572 meters against the mandatory Operational Requirement (OR) of 6000 meters. Eventually, during Field Evaluation Trial (FET), only EC-225 conformed to all parameters.

When the FET report was sent to Ministry of Defence, Government of India for approval, the PMO highlighted in a meeting that the condition of mandatory altitude requirement of 6000 meters had resulted in a single vendor situation. The matter came to be deliberated at different levels, wherein the IAF maintained its stance with respect to mandatory altitude requirement of 6000 meters. However, when *Sh. S.P. Tyagi* became the Chief of Air Staff, the IAF's stand softened and the operational requirement of 6000 meters was brought down to 4500 meters, making *M/s AgustaWestland UK* eligible to submit its bid.

Revised ORs, entailing a reduction in service ceiling from 6000 meters to 4500 meters, cabin height of 180 centimeters and addition of the words *'at least'* before twin engine, came into picture. With the finally approved/revised ORs, another RFP was issued by IAF on 27.09.2006, pursuant to which, EC-225 helicopters were eliminated from competition and AW-101 helicopters enabled to enter the fray. On 08.02.2010, AWIL was awarded a contract by the Government of India for supply of 12 AW-101 VVIP helicopters for Euro 556.262 million (Rs.3726.96 crores). When the allegations of bribery in the procurement process of VVIP helicopters came to light, the contract dated 08.02.2010 was terminated by the Government of India on 01.01.2014.

3. After investigation, a charge sheet was filed on 01.09.2017 against 12 accused persons, including *Sh. S.P. Tyagi* and the present applicant, under Section 120B read with Section 420 IPC and Sections 7/8/9/12/13(2) read

with Section 13(1)(d) PC Act and substantive offences thereof, stating the various acts of commission and omission on the part of the accused persons had resulted in a wrongful loss of Euro 392 million to the Government of India. Later, a supplementary charge sheet was also filed against the present applicant and others.

4. It was alleged that the applicant had acted as a middleman on behalf of *M/s AgustaWestland* in the process of procurement of 12 VVIP helicopters through his two companies namely, *M/s Global Trade & Commerce Ltd.,* London and *M/s Global Services FZE,* Dubai, UAE. It was further alleged that he had received Euro 42.27 million for himself and for bribing other middlemen as well as the public servants in India by executing sham agreements as no work was done against the receipt of the amounts. An amount of Euro 37.00 million was alleged to have been received by the applicant through his company *M/s Global Services FZE*, Dubai in the guise of consultancy service charges during February, 2007 to December, 2011 and further investigation was stated to be going on.

5. Pursuant to his arrest by the CBI on 05.12.2018, the applicant filed applications seeking regular/statutory/interim bail before the Special Court, which came to be dismissed on 22.12.2018, 16.02.2019, 18.04.2019 and 07.09.2019, in view of factors including, the serious nature of allegations, the gravity of the offence and the stage of investigation.

6. Aggrieved, the applicant preferred BAIL APPLNs. 2715/2019 and 2716/2019 before this Court, one in respect of the RC and the other in the corresponding ECIR recorded by the Directorate of Enforcement. When the hearing in the bail applications could not be concluded on account of

restrictions imposed by COVID-19 lockdown, the applicant approached the Supreme Court for grant of bail. The Supreme Court, vide order dated 01.04.2020, directed this Court to decide the applications filed by the applicant seeking interim bail, on their own merits. Pursuant thereto, a Co-ordinate Bench of this Court vide order dated 06.04.2020 declined the prayer made by the applicant in his interim bail applications after giving due consideration to the contentions raised. The Special Leave Petition (Criminal) Diary No(s). 10900/2020 filed against the said order was dismissed by the Supreme Court on 22.04.2020.

7. On 22.04.2021, the applicant sought leave to withdraw BAIL APPLN. 2715/2019 with liberty to seek redressal before the Trial Court, as the supplementary charge sheet had been filed. Accordingly, the bail application was dismissed as withdrawn with grant of the liberty prayed for.

On 18.06.2021, the application filed on behalf of the applicant seeking bail again came to be dismissed by the Special Court, considering *inter-alia* the serious nature of the allegations, the gravity of the offence, the stage of investigation and the conduct of the applicant.

8. I have heard learned counsels for the parties and have also gone through the material placed on record as well as the written submissions filed in support of the contentions.

9. During the course of arguments, Mr. Aljo K. Joseph, learned counsel for the applicant, made a preliminary submission that the Italian Court has already tried and acquitted the applicant and other accused persons after considering all materials and documents. Reference was made by him to the

proceedings dated 19.06.2013 before the Italian Court to submit that the Indian Ministry of Defence was a party to the proceedings, where it was held that no money has flown out of the accounts of the applicant's company to bribe any officials. Thus, the continuation of proceedings before the Courts in India is in violation of Article 15 of the United Nations Convention against Transnational Organized Crime and its protocol. It also amounts to double jeopardy under Article 20(2) of the Constitution of India and is further barred in view of the principles of issue estoppel and *res judicata*.

In response and while opposing the bail application, Mr. D.P. Singh, learned SPP appearing for the respondent/CBI, submitted that neither the applicant nor the CBI/Government of India was party to the criminal proceedings before the Italian Court, and as such, the commencement/continuation of trial before the Courts in India is not precluded either on the principle of issue estoppel or *res judicata*, the latter not even being applicable to criminal proceedings. It was urged that the reliance placed on behalf of the applicant on the United Nations Convention against Transnational Organized Crime is misplaced, as Article 15(6) of the Convention grants the Member States authority with respect to criminal prosecution in their domestic law. It was further stated that the evidence recorded by the Italian Courts with respect to the other co-accused persons has no bearing on the applicant's trial in India. In support of his submissions, learned SPP placed reliance on the decisions in Gramophone Company of India Ltd. *v.* Birendra Bahadur Pandey and Others reported as **(1984) 2 SCC 534**, Jitendra Panchal *v.* Intelligence Officer, Narcotics Control Bureau and Another reported as **(2009) 3 SCC 57,** A.T. Mydeen and Another *v.* Assistant Commissioner, Customs Department reported as **2021**

SCC OnLine SC 1017 and Monica Bedi v. State of Andhra Pradesh reported as **(2011) 1 SCC 284.**

10. Before dealing with the issue, this Court deems it apposite to advert to the decision in Piara Singh *v.* State of Punjab reported as **(1969) 1 SCC 379,** where it has been observed that when a finding of fact has been recorded in favor of the accused in earlier proceedings before a competent Court, the finding would constitute an estoppel against the prosecution to the extent that a Court in subsequent proceedings would be precluded from receiving evidence which disturbs said finding of fact. However, the same will not operate as a bar to the trial or conviction of the accused for a subsequent distinct offence. While taking this view, the Court made reference to the opinion of Dixon, J. in King *v.* Wilkes, (77 CLR at pp 518-519), which was extracted as under:-

> *"**6.** ...Speaking on the principle of estoppel Dixon, J., said in King v. Wilkes:*
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> > *"Whilst there is not a great deal of authority upon the subject, it appears to me that there is nothing wrong in the view that there is an issue-estoppel, if it appears by record of itself as explained by proper evidence, that the same point was determined in favour of a prisoner in a previous criminal trial which is brought in view on a second criminal trial of the same prisoner. That seems to be implied in the language used by Wrigt, J., in R. v. Ollis, which in effect I have adopted in the foregoing statement .... There must be a prior proceeding determined against the Crown necessarily involving an issue which again arises in a subsequent proceeding by the Crown against the same prisoner. The allegation of the Crown in the subsequent proceeding must itself be inconsistent with the acquittal of the prisoner in the previous proceeding. But if such a condition of affairs arises I see no reason why the ordinary rules of issue-estoppel should not apply. Such rules are not to be confused with*

those of res judicata, which in criminal proceedings are expressed in the pleas of autre fois acquit and autre fois convict. They are pleas which are concerned with the judicial determination of an alleged criminal liability and in the case of conviction with the substitution of a new liability. Issue-estoppel is concerned with the judicial establishment of a proposition of law or fact between parties. It depends upon well known doctrines which control the re-litigation of issues which are settled by prior litigation."

11. Reference may also be made to the decision in <u>Gramophone Company of India Ltd.</u> (Supra), where it was noted thus:-

> *"**5.** ...The doctrine of incorporation also recognises the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. Comity of nations or no, municipal law must prevail in case of conflict. National Courts cannot say yes if Parliament has said no to a principle of international law. National courts will endorse international law but not if it conflicts with national law. National courts being organs of the national State and not organs of international law must perforce apply national law if international law conflicts with it. But the courts are under an obligation within legitimate limits, to so interpret the municipal statute as to avoid confrontation with the comity of nations or the well established principles of international law. But if conflict is inevitable, the latter must yield."*

12. Coming to the case at hand, this Court takes note of the order dated 08.01.2018 passed by the Appellate Court of Milan, Italy. A perusal of the same would show that it was passed with respect to *'criminal proceedings'* against *Giuseppe Orsi* and *Bruno Spagnolini*, alongwith *'civil action'* brought at the instance of AGENZIA DELLE ENTRATE (Revenue Authority) and Indian Ministry of Defence. Although the applicant's name appears in the statement of reasons and the order, he was not a *'party'* before the Italian Court. Only *Giuseppe Orsi* and *Bruno Spagnolini* were charged

and tried, that too for International Bribery and Tax Fraud during the year 2009-10, when the proceedings were dismissed *for lack of evidence*. The trial in Italy was concluded in the year 2014, whereas the charge sheet in the present case was only filed in the year 2017 on the basis of material which was not available with the Italian Courts. Notably, the Ministry of Defence participated in the Italian proceedings only as a civil party.

It may be expedient to also allude to the judgment dated 02.09.2018 passed by the Dubai Supreme Court in extradition proceedings where the applicant took the same defence, i.e. of having already been tried by the Italian Court. Learned SPP for CBI has pointed out that the Dubai Supreme Court disbelieved the applicant's contention and opined that the proceedings before the Italian Court were in respect of other accused persons and not the applicant. In light of the foregoing and on a *prima facie* view, this Court finds no merit in the submission made on behalf of the applicant.

13. The second preliminary submission made by the learned counsel for the applicant was that in view of Section 21 of the Extradition Act, which adopts the *'Doctrine of Specialty'*, the applicant cannot be tried for offences other than for which he was extradited. In this regard, attention of this Court was drawn to the judgment passed by the Dubai Supreme Court and the decision of the Supreme Court of India in Daya Singh Lahoria *v.* Union of India and Others reported as **(2001) 4 SCC 516**.

In response, learned SPP for the CBI submitted that Article 17 of the Extradition Treaty with UAE not only permits trial for offences in respect of which extradition of an accused person is sought, but also for the offences connected therewith. Emphasis was laid on the expression *'is sought'* used in Article 17 of the Treaty to submit that a reading of the extradition request, as noted in the judgment passed by the Dubai Supreme Court, would show that the applicant is being tried for offences in respect of which his extradition was *'sought'*. While distinguishing the decision of the Supreme Court in Daya Singh Lahoria (Supra), it was submitted that the Republic of India has entered into different treaties with different countries and the decision in Daya Singh Lahoria (Supra), interpreting Section 21 of the Extradition Act, 1962, was with respect to the unique facts of the case and the Treaty applicable in the said case. The Treaty involved in the aforesaid case was much different from the Treaty entered into by the Republic of India with UAE, as the latter also permits trial of the person extradited for offences which are *'connected'* with the offences in respect of which extradition is *'sought'*. To buttress his submission, learned SPP placed reliance on the decision in Commissioner of Customs, Bangalore *v.* G.M. Exports and Others reported as **(2016) 1 SCC 91**.

14. In relation to the above issue, it is deemed expedient to make reference to the judgment passed by the Dubai Supreme Court, an English translated copy of which has been placed on record, supported by an affidavit to the effect that the same was examined by *Prof. Rizwanur Rahman*, Chairperson, Centre of Arabic and African Studies, School of Language, Literature and Culture Studies, Jawaharlal Nehru University, New Delhi. Learned counsel for the applicant has raised no dispute regarding the translated copy or its contents. Relevant extract of the proceedings before the Dubai Supreme Court is reproduced hereunder:-

> *"Whereas the case is related to the extradition of Christian James Michael, British citizen, to the Indian authorities on charge of "misuse of occupation or position, money laundering, collusion, fraud, misappropriation and offering illegal*

<u>gratification".</u> Whereas the merits of the extradition request are briefed in that the Indian authorities requested the UAE to extradite Christian James Michael, British citizen, <u>on charge of misuse of position or job, money laundering, collusion, fraud, misappropriation and offering illegal gratification within the territory of the requesting country.</u> An arrest warrant was issued by the court in the requesting state."

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As such, and as there is extradition treaty between the UAE and the Republic of India in respect of the reciprocal legal assistance in criminal matters and extradition of criminals, the said treaty shall apply. Whereas Article 2 of the said treaty states the following: (The following persons shall be extradited):

a. Persons accused of an offence punishable under the laws of both the signatory States by imprisonment for a period of at least one year or more.

b. Persons sentenced by the Courts of the requesting State with imprisonment for at least six months in respect of an offence mentioned in the Extradition Treaty.

Whereas the offences for which the above concerned person is wanted are of deceit and criminal conspiracy punishable by the laws of both the States. In India, the said offences are punishable by imprisonment or fine, or with both, by the provisions of articles 120B, 415 and 420 of the Indian Penal Code. Article 120B {Punishment for Criminal Conspiracy} provides for the following:

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There are similar provisions in the UAE for offences of bribery, fraud and deceit in commercial transactions, and such offences are punishable under the provisions of articles 237, 399 and 423 of the Federal Penal Law No. 2 of 1987 and its amendment of 2016 with imprisonment or fine, or with both…

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> *...It has been proved that the person requested to be extradited is wanted for standing trial for charge of misuse of position or job, money laundering, collusion, fraud, misappropriation and offering illegal gratification which constitute criminal offences. Therefore, such defense is baseless thus rejected."*
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> (*emphasis added*)

15. Reference is also had of the Extradition Treaty signed between the Government of the Republic of India and the UAE at New Delhi on 25.10.1999, which was ratified on 29.05.2000. Article 17(1) of the Treaty reads as under:-

> *"1. The person to be extradited shall not be tried or punished in the requesting State except for the offence for which his extradition is sought or for offences connected therewith, or offences committed after his extradition. If the characterization of the offence is modified during the proceedings taken against the person extradited, he shall not be charged or tried, unless the ingredients of the offence in its new characterization, permit extradition in conformity with the provisions of this Agreement."*
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> (*emphasis added*)

16. Notably, the charge sheet against the applicant has been filed for offences under Section 120B read with Section 420 IPC and Sections 7/8/9/12/13(2) read with Section 13(1)(d) of the PC Act. On a plain reading of the judgment passed by the Dubai Supreme Court; the Extradition Treaty signed between UAE and the Republic of India; and the authorities cited on the issue by the parties, this Court, *prima facie*, finds no merit in the submission made on behalf of the applicant. Even otherwise, the said submission would be open to test at the time of framing of Charge/trial.

17. A third preliminary submission made by the learned counsel for the applicant was that the applicant was subject of rendition and kept in illegal

custody by the CBI. In this regard, reliance was placed on a finding recorded in favor of the applicant by the United Nations Human Rights Council Working Group on Arbitrary Detention (hereinafter, referred to as the *'UNHRC WGAD'*) in its 89th meeting.

On the other hand, learned SPP for CBI submitted that though the Government of India had sent its reply to the UNHRC WGAD, the finding of the Group is not binding on the Courts in India as the Group is not a judicial body. It was also submitted that the findings have been negated by the Ministry of External Affairs, Government of India in an official statement on 26.02.2021.

18. In connection with the issue, this Court notes that even though the UNHRC WGAD opinion relates to the present applicant, it was predominantly based on allegations and limited information received from an unidentified source. A response dated 26.06.2020 was sent by the Government of India pursuant to the Group's call for comments, wherein the circumstances surrounding the applicant's extradition were laid out and it was categorically stated that no procedural deficiencies had taken place in his extradition. It was also stated that the applicant's arrest and subsequent custody were in accordance with the judicial process established by law, and the issue of his custody and a request for interim bail had been considered by various Courts, including the Supreme Court of India.

Besides, the Special Court, which was seized of all developments, has dealt with the issue in the order dated 18.06.2021 and observed that the Group did not have complete material before it while forming opinion; it was also held that the opinion had neither binding nor persuasive value over the Special Court, which had jurisdiction over the case and was in possession of the charge sheet, the supplementary charge sheet, including the statements of witnesses, and the documents relied upon by the investigating agency. Suffice it to note, the Special Court has taken cognizance of the offence and the applicant is being tried by Court of competent jurisdiction in India. Accordingly, the submission made on behalf of the applicant does not weigh with this Court.

19. In addition to the foregoing, learned counsel for the applicant made the following further submissions:-

(A) That the applicant has been falsely implicated in the present case and from the material placed on record, no *prima facie* case is made out against him. It was urged that neither any role has been attributed to the applicant regarding lowering of operational height of the VVIP helicopters from 6000 meters to 4500 meters, nor any material has been placed on record to indicate that any payment was made by the applicant to any person, including any government official, for doing any corrupt act.

(B) That the applicant deserves bail also on the ground of parity, as all the other accused persons, including the foreign national(s), have already been released on bail. In this regard, it was urged that the applicant has deep roots in India and it is not the respondent’s case that he has tried to influence witnesses/tamper with the evidence. It was submitted that the entire material seized during the investigation, being documentary in nature, has already been placed on record alongwith the charge sheet/supplementary charge sheet and nothing more is to be recovered at the instance of the applicant. It was also submitted that the passport of the applicant is already with the CBI and he has cooperated in other jurisdictions i.e., in Italy, Dubai and Switzerland.

(C) That the applicant's pre-trial incarceration is violative of the right to life and personal liberty guaranteed under Article 21 of the Constitution of India, which is available to non-citizens also, and that it would hamper his chances to defend himself in the trial, as the documents concerning the case are available in different countries.

(D) That the applicant, who is aged about 60 years, suffers from various medical ailments and has been in custody for more than 03 years and 02 months. It was also averred that the prosecution has cited 288 witnesses and 1059 documents running into 85,000 pages, and the trial is pending at the stage of Section 207 Cr.P.C. The investigation has taken 9 years and is still stated to be continuing. In these facts, the commencement/conclusion of the trial is likely to take a long time. Besides, the CBI had filed charge sheet in the case against the applicant on 01.09.2017, of which cognizance was taken on 11.10.2017. A supplementary challan has also been filed, wherein further investigation is still stated to be pending.

20. In support of his submissions seeking bail, learned counsel cumulatively placed reliance on the decisions in Babba alias Shankar Raghuman Rohida *v.* State of Maharashtra reported as **(2005) 11 SCC 569**, Rakesh Kumar Paul *v.* State of Assam reported as **(2017) 15 SCC 67,** Sanjay Chandra *v.* Central Bureau of Investigation reported as **(2012) 1 SCC 40,** State of Kerala *v.* Raneef reported as **(2011) 1 SCC 784** and Lambert Kroger *v.* Enforcement Directorate reported as **2000 SCC OnLine Del 208.**

21. Per contra, learned SPP for CBI made the following submissions:-

(A) That the conspiracy in the present case did not stop in 2005 and the commission of offences continued even after the award of contract to AWIL.

(B) That the applicant had landed at New Delhi, India on 12.02.2013, when proceedings were pending before the Courts in Italy. The moment he got to know that the officials of AWIL were arrested in Italy, he left India on the same day for Dubai. He has no roots in India and he never joined the investigation in India or Italy on his own. As such, he cannot claim parity with the other accused persons. Besides, the ground of parity has been rejected in the previous bail application as well.

(C) Learned SPP raised an objection to the filing of the present bail application by the applicant. He submitted that an earlier regular bail application filed on behalf of the applicant was dismissed as withdrawn by this Court on 22.04.2021 and without material change in circumstance, successive bail application is not maintainable. It was further submitted that the applicant's applications seeking interim bail were dismissed by this Court on 18.04.2019, wherein his conduct was also noted, and as such, heavy burden lies on the applicant to show as to what material change has taken place in the fact situation of the case. It was also averred that further time spent in jail is not a material change in circumstance and insofar as the applicant's contention that since the earlier dismissal orders, an opinion by the UNHRC WGAD has been filed, is concerned, the same being a report by a third party cannot be considered as a material change in circumstance either. In support of his submissions, reliance was placed by the learned SPP on the decisions in Kalyan Chandra Sarkar *v.* Rajesh Ranjan alias Pappu

Yadav and Another reported as **(2005) 2 SCC 42**, Virupakshappa Gouda and Another *v.* State of Karnataka and Another reported as **(2017) 5 SCC 406** and Rakesh Makhabhai Bamaniya *v.* State of Gujarat reported as **2020 SCC OnLine Guj 1801**.

(D) While referring to the parameters for consideration of bail application, learned SPP submitted that the applicant is a British national, having no roots in India and is accused of a grave economic offence. He urged that since the applicant was not available during investigation, he had to be extradited. However, he has not cooperated with CBI. It was further submitted that despite being a British national, the applicant has not been residing in UK for the last 7-8 years, and he had also evaded investigation/trial in Italy. Thus, he is a flight risk, as also observed by a Co-ordinate Bench of this Court in the order dated 06.04.2020 passed in BAIL APPLN. 2715/2019.

(E) Learned SPP further contended that in view of his powerful connections, the applicant, if enlarged on bail, may influence the witnesses and there is also a likelihood of his tampering with the LRs which are pending in UK.

22. On the issue of the present application being a successive bail application to an order of dismissal, it is apparent from the decisions in Kalyan Chandra Sarkar (Supra) and Virupakshappa Gouda (Supra) that a fresh bail application of an accused may be allowed, only in case a *'material change in circumstance'* has occurred since an earlier dismissal order. In order to determine if such change has occurred, a Court shall look into the fresh grounds raised and/or material placed on record, and thereafter provide

a reasoned finding as to what inclined it to take view different from its predecessor Bench, if so.

However, in the present case, the earlier dismissal order referred to by the learned SPP for CBI came to be passed in an interim bail application. Though the applicant had filed an earlier application for regular bail before this Court, the same was withdrawn with liberty to seek redressal before the Trial Court. On 13.04.2021, this Court had permitted the application to be withdrawn, with liberty aforementioned, and was not considered on merits. In this backdrop, the submission made on behalf of the CBI is discounted and this Court proceeds to consider the bail application on its own merits.

23. Before proceeding to analyse the facts of the present case, this Court deems it expedient to recapitulate the position of law on grant of bail.

24. Article 21 of the Constitution of India guarantees a right to personal liberty to every person, and thus, time and again, it has been opined by Courts across the country that bail is the rule and jail an exception. Besides reiterating this view, the Supreme Court in Sanjay Chandra (Supra) has further laid down that both factors, i.e., severity of the punishment and gravity of the offence, have to be simultaneously weighed while determining whether or not to grant bail to an accused. Relevant excerpt from the decision is extracted hereunder:-

> *"**21.** In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of*

liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

22. *From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.*

23. *Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson.*

24. *In the instant case, we have already noticed that the "pointing finger of accusation" against the appellants is "the seriousness of the charge". The offences alleged are economic offences which have resulted in loss to the State exchequer. Though, they contend that there is a possibility of the appellants tampering with the witnesses, they have not placed any material in support of the allegation. In our view, seriousness of the charge is, no doubt, one of the relevant considerations while considering bail applications but that is not the only test or the factor: the other factor that also requires to be taken note of is the punishment that could be imposed after trial and conviction, both under the Penal Code and the Prevention of Corruption Act. Otherwise, if the former is the only test, we would not be balancing the constitutional rights but rather "recalibrating* *the scales of justice".*

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***46.** We are conscious of the fact that the accused are charged with economic offences of huge magnitude. We are also conscious of the fact that the offences alleged, if proved, may jeopardise the economy of the country. At the same time, we cannot lose sight of the fact that the investigating agency has already completed investigation and the charge-sheet is already filed before the Special Judge, CBI, New Delhi."*

25. While taking special note of cases involving economic offences, it has been propounded by the Supreme Court that such offences constitute a class apart and should be visited with a different approach in matters of bail [Refer: Y.S. Jagan Mohan Reddy *v.* Central Bureau of Investigation reported as **(2013) 7 SCC 439**, Anil Kumar Yadav *v.* State (NCT of Delhi) and Another reported as **(2018) 12 SCC 129** and Rohit Tandon *v.* Directorate of Enforcement reported as **(2018) 11 SCC 46**].

26. In respect of the considerations relevant to the grant of bail, this Court deems it profitable to also advert to the decision in Anil Kumar Yadav (Supra), where it has been observed as follows:-

*"**17.** While granting bail, the relevant considerations are : (i) nature of seriousness of the offence; (ii) character of the evidence and circumstances which are peculiar to the accused; and (iii) likelihood of the accused fleeing from justice; (iv) the impact that his release may make on the prosecution witnesses, its impact on the society; and (v) likelihood of his tampering. No doubt, this list is not exhaustive. There are no hard-and-fast rules regarding grant or refusal of bail, each case has to be considered on its own merits. The matter always calls for judicious exercise of discretion by the Court."*

27. Recently, the principles governing grant of bail were considered by the Supreme Court in <u>P. Chidambaram *v.* Central of Investigation</u> reported as **(2020) 13 SCC 337.** Relevant extract from the decision is reproduced hereunder:-

> *"**21.** The jurisdiction to grant bail has to be exercised on the basis of the well-settled principles having regard to the facts and circumstances of each case. The following factors are to be taken into consideration while considering an application for bail:*
>
> > *(i) the nature of accusation and the severity of the punishment in the case of conviction and the nature of the materials relied upon by the prosecution;*
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> > *(ii) reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant or the witnesses;*
> >
> > *(iii) reasonable possibility of securing the presence of the accused at the time of trial or the likelihood of his abscondence;*
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> > *(iv) character, behaviour and standing of the accused and the circumstances which are peculiar to the accused;*
> >
> > *(v) larger interest of the public or the State and similar other considerations.*
>
> *[Vide Prahlad Singh Bhati v. State (NCT of Delhi).]*
>
> ***22.** There is no hard-and-fast rule regarding grant or refusal to grant bail. Each case has to be considered on the facts and circumstances of each case and on its own merits. The discretion of the court has to be exercised judiciously and not in an arbitrary manner. At this stage itself, it is necessary for us to indicate that we are unable to accept the contention of the*

learned Solicitor General that "flight risk" of economic offenders should be looked at as a national phenomenon and be dealt with in that manner merely because certain other offenders have flown out of the country. The same cannot, in our view, be put in a straitjacket formula so as to deny bail to the one who is before the court, due to the conduct of other offenders, if the person under consideration is otherwise entitled to bail on the merits of his own case. Hence, in our view, such consideration including as to "flight risk" is to be made on individual basis being uninfluenced by the unconnected cases, more so, when the personal liberty is involved."

28. Subsequently, in P. Chidambaram *v.* Directorate of Enforcement reported as **(2020) 13 SCC 791,** the Supreme Court, after going through the entire conspectus of law on the aspect of determining factors to be taken into account at the time of consideration of bail, has observed that one of the circumstances to consider the gravity of offence is the term of sentence, which has to be kept in mind besides the triple test.

29. Coming to the facts of the case, it is noted that the applicant is stated to be the key accused. He is accused of having played a pivotal role in the entire case, being a middleman engaged by *M/s AgustaWestland* for obtaining confidential information regarding the procurement process of VVIP helicopters by the Government of India. As per the allegations, one *J.B. Subramanian* was engaged by the applicant for typing and sending dispatches/reports in relation to developments in the procurement process to co-accused persons. One of such reports dated 10.04.2008, which was sent to *Giuseppe Orsi, Giacomino Saponaro* and others, contained material particulars of the process.

Reportedly, the applicant had also sent three confidential documents, namely revised ORs of January, 2006 for VVIP helicopters, FER of S-92 helicopter and contents of Technical Evaluation Committee report dated February, 2007 of Indian Air Force, to the aforesaid persons. He is further accused of having facilitated payment of kickbacks/bribes to IAF personnel, bureaucrats and politicians in India in order to influence the outcome of the procurement process with the end goal to benefit AWIL, for which work Euro 42 million were allegedly paid to him.

30. As per the charge sheet/supplementary charge sheet, it has been found that a paper trail was created by the accused to route the kickbacks/bribe amounts. In furtherance of the same, the applicant entered into 5 different service contracts through his two firms, namely *M/s Global Trade & Commerce Ltd.,* London and *M/s Global Services FZE,* Dubai, UAE with *M/s Finmeccanica, M/s AgustaWestland, M/s Westland Helicopters,* UK etc., wherefore his companies were paid an amount of Euro 30 million, even though no work was carried out. It has been alleged that the aforesaid agreements were sham agreements, intended to camouflage the payments received by the applicant for paying kickbacks/bribes in India. Details of the

aforesaid 5 agreements/contracts are reproduced in the table given below:-

AgustaWestland: Payment to Christian Michel Games

Two companies namely M/s Global Services FZE, Dubai and M/s Global Trade & Commerce Ltd., London (both owned by Mr. Christian Michel James were paid total amount of €42.27M by M/s AgustaWestland (AW)/M/s Westland Helicopters Ltd. (WHL) against five Post Contract Service Agreement as per details given below:-

Payment of €7.02m (£6.16×1.14 = €7.02m approx.) paid to M/s Global Services FZE by M/s WHL from June, 2005 to July, 2012 towards agreement dt. 01.02.03 (subsequently replaced by 01.02.05), further revised on various occasions upto 31.12.11 (Indian Navy+HAL)	Payment of €8.97m (£7.87×1.14=€8.97 m approx.) paid to M/s Global Services FZE by M/s AgustaWestland Holdings Ltd. from Nov, 2006 - Jan, 2011 towards contract dt. 01.11.06, further revised on 01.09.08. (Sea King Helicopter recovery Plan).	Payment of €6.05M from April, 2010 to Dec, 2011 against agreement dt. 01.03.10 to M/s Global Services FZE, Dubai by M/s AgustaWestland Holdings Ltd. (For implementing AW-101 contract)	Payment of €18.20m from May, 2010 to Jan, 2012 against agreement dt. 26.05.10 This amount was paid to M/s Global Trade & Commerce Ltd. by M/s WHL. (M/s Pawan Hans Ltd. - buy back)	Payment of €2.03m (£1.78×1.14=€ 2.03m approx.) paid to M/s Global Services FZE by M/s WHL from Dec, 2010 to July, 2012 against contract dt. 23.12.10. (HAL contract dt. 23.12.10)

31. A perusal of the 3rd agreement mentioned in the table would show that it was executed between *M/s AgustaWestland Holdings Ltd.* and *M/s Global Services FZE*, Dubai, UAE on 01.03.2010 for rendering assistance in commissioning of subject contract dated 08.02.2010 executed by the Government of India with AWIL. In pursuance of the same, an amount of Euro 6.05 million was paid from April, 2010 to December, 2011 to *M/s Global Services FZE*, Dubai.

Similarly, a perusal of the 4th agreement mentioned in the table would show that it was executed between *M/s Westland Helicopters Ltd.* and *M/s Global Trade & Commerce Ltd.*, London on 26.05.2010 for re-purchase of 14 WG-30 helicopters from *M/s. Pawan Hans Ltd* for an amount of Euro 18.2 million. However, neither *M/s Westland Helicopters Ltd.,* UK nor any of the companies belonging to the applicant made any communication with *Pawan Hans Ltd.* or met its official for the re-purchase of WG-30 Westland Helicopters.

It has also been stated that AWIL appointed the applicant's company as a consultant/agent in contravention of the terms of the Pre-Contract Integrity Pact dated 03.10.2008 signed between AWIL and the Government of India.

32. Likewise, the applicant is stated to have transferred Euro 0.94 million from the kickbacks received to *Pacific International FZE, Midal Metals International LLC, Metolix Ltd.* and *Eurotrade*, which belong to co-accused/*Rajiv Saxena,* as payments for consultancy services. However, no such service was provided by the companies and the transaction was intended to veil the transfer of kickbacks.

33. During investigation conducted abroad, an agreement dated 08.05.2011 is stated to have been recovered from the house of co-accused *Guido Haschke's* mother at Lugano (Switzerland), as per which the applicant had agreed to reduce the commission of the *'team'* (the applicant and his associates) from Euro 42 million to Euro 30 million to ensure honoring in full the commission of the *'family'*.

From the aforesaid house, a payment sheet prepared by the applicant in early 2008 is also stated to have been recovered by Swiss Police, showing that an amount of Euro 30 million was paid/proposed to be paid to Officers of Ministry of Defence, Government of India, Bureaucrats, Politicians, etc. for influencing the VVIP helicopters deal.

34. The applicant is also alleged to have acted in connivance with one *K.V. Kunhikrishnan*, ex-General Manager, *M/s Westland Support Services Ltd., New Delhi,* through whom he obtained confidential/secret documents. In 2011, *K.V. Kunhikrishnan* left the aforesaid company and formed a firm, namely *M/s Varier Inc*, with whom the applicant's firm *M/s Global Services FZE*, Dubai, UAE entered into an agreement dated 01.12.2011 (renewed on 01.12.2012) for providing offset support. It has been stated that the applicant paid Rs.97 lacs through foreign remittances to *Sh. K.V. Kunhikrishnan* though no such service was provided by him to the applicant. In this way, the money received in the account of *M/s Varier Inc* was used to pay kickbacks/bribe amounts.

It is also reported that the applicant signed an *'extension of the agreement'* dated 01.12.2012 with *M/s Varier Inc*. The signatures of the applicant thereon are stated to be proved by the handwriting expert report dated 08.04.2019. The said report is stated to also prove that certain words/figures on the dispatch report dated 14.05.2008 were written by the applicant in his own handwriting.

35. Further, an excel sheet prepared by *Mr. Giorgio Casana* (Casana Sheet), an internal auditor of *M/s Finmeccanica*, is also stated to have been recovered during investigation, which mentions payments of Euro

34,135,766 made by *M/s Global Services FZE, Dubai* to various entities/persons from October, 2009 to March, 2012.

36. Learned counsel for the applicant, while pressing for bail, has placed reliance on Section 436A Cr.P.C. In this regard, suffice it to note that the applicant has been charge-sheeted in the present case for the offence under Section 467 IPC, which entails life imprisonment. Besides, it has been submitted by learned SPP that during investigation, overwhelming incriminating material has been collected against the applicant connecting him with the present case/offence.

37. During the course of submissions, learned SPP for CBI raised an apprehension that the applicant may influence witnesses and/or tamper with evidence. However, in the opinion of this Court, the respondent has failed to bring out any credible circumstance to show that the applicant has directly or indirectly influenced any witness till date. Further, all the material relevant to the case being documentary in nature, is stated to have already been seized and filed alongwith the charge sheet. In this backdrop, the apprehensions of the applicant influencing witnesses/tampering with evidence are not supported by any material placed on record, and on this aspect, mere pendency of LRs or further investigation is of no consequence. In this regard, the Supreme Court in P. Chidambaram *v.* Central Bureau of Investigation (Supra) and Sanjay Chandra (Supra) has also observed that mere apprehension of the accused influencing witnesses/tampering with evidence, without any material supporting the allegations, cannot be a basis to keep him in jail.

38. Insofar as the third prong of triple test, i.e., of the applicant being a

flight risk, is concerned, learned counsel for the applicant has submitted that the applicant's passport lies seized with CBI, whereas learned SPP for CBI has stressed that the applicant is a British national and continues to be a flight risk. It has also been submitted on behalf of CBI that prior to his role becoming public, the applicant was a frequent visitor to India, however, when co-accused *Giuseppe Orsi* was arrested by the Italian authorities on 12.02.2013, the applicant left India on the same day, and thereafter, never returned, until he was extradited.

39. From a perusal of the material placed on record, it is further discernible that the applicant never joined proceedings before the Court in Italy, and for that reason European Non-Bailable Warrants were issued against him. In India, open ended non-bailable warrants were issued by the learned Special Judge on 24.09.2015. On the basis of the warrant and at the request of CBI, a Red Corner Notice was issued in respect of the applicant by INTERPOL on 25.11.2015. As a result of the same, the applicant came to be arrested in Dubai. A request letter dated 19.03.2017 for extradition of the applicant was sent to the competent authority in UAE, and finally, on 05.12.2018, he came to be arrested by the CBI.

Although, merely because an accused is a foreign national, bail cannot be denied as a matter of course, but at the same time this Court cannot lose sight of the aforementioned facts which indicate as to how the applicant has evaded investigation in the present case. It is also worthwhile to take into account that the applicant could be brought to India only after going through the process of extradition, which in fact was vehemently opposed by him, as apparent from the judgment of the Dubai Supreme Court. For the said reasons, the ground of parity is not available to the applicant in the opinion of this Court.

40. Besides, while dismissing the earlier interim bail application of the applicant, a Co-ordinate Bench of this Court made a categorical observation that he was a flight risk, having no roots in the society. At the time, it was also observed by the learned Judge that in the aforesaid facts, the applicant could not seek parity with co-accused persons. The said order was challenged before the Supreme Court, but the same also came to be dismissed.

41. Considering the peculiar facts and circumstances of the case, including the factum of the applicant evading process/investigation in India/Italy and eventually having been extradited to India, this Court is of the opinion that the applicant, having no roots in the Indian society, is a flight risk. Accordingly, the present bail application is dismissed.

42. In closing, it may also be mentioned that after the arguments were concluded and while the order was being reserved in the present case, an unverified letter dated 07.02.2022 from one *Mr. Edward Bossley*, HM Consul to India, was shown on behalf of the applicant, in respect of the apprehension that if enlarged on bail, he may be issued travel documents which may ultimately lead to his fleeing from justice. Learned SPP for CBI raised a strong objection regarding the same. It was pointed out that a similar letter from *Mr. Bossley* was sent to the Special Court through e-mail at the time of adjudication of the applicant's bail application on which, the Special Court had observed that the letter having come from a third party was not permissible material. Under these circumstances, this Court finds the letter dated 07.02.2022 to be of no persuasive value and the reliance

placed thereon unmerited.

43. Needless to state, nothing stated hereinabove shall amount to an expression on the merits of the case and shall not have a bearing in the trial of the case.

MANOJ KUMAR OHRI, J

MARCH 11, 2022
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