



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

BAIL APPLN. 4185/2021

Reserved on : 11.02.2022

Date of Decision : 02.03.2022

IN THE MATTER OF:

GAUTAM THAPAR

..... Petitioner

Through: Mr. Mukul Rohatgi, Sr. Advocate with
Mr. Sandeep Kapur, Mr. Virinder Pal Singh
Sandhu, Mr. Vivek Suri, Ms. Niharika
Karanjawala, Mr. Abhimanshu Dhyani,
Mr. Sahil Modi and Ms. Kajal, Advocates

Versus

DIRECTORATE OF ENFORCEMENT

..... Respondent

Through: Mr. Amit Mahajan, CGSC with
Mr. Kritagya Kumar Kait, Advocate

CORAM:

**HON'BLE MR. JUSTICE MANOJ KUMAR OHRI
(VIA VIDEO CONFERENCING)**

J U D G M E N T

MANOJ KUMAR OHRI, J.

1. The present application has been filed under Section 439 Cr.P.C. on behalf of the applicant seeking regular bail in Complaint Case No.24/2021 filed under Sections 44/45 of the Prevention of Money Laundering Act, 2002 (hereinafter, referred to as the 'PMLA') and arising out of ECIR No.11/HIU/2021 registered under Sections 3/4 PMLA by the respondent/ED.



Factual Background

2. Pithily put, the case of the prosecution is that subsequent to the removal of *Sh. Rana Kapoor*, the then MD and CEO of *Yes Bank Ltd.* (hereinafter, referred to as the '*Bank*'), certain complaints came to be filed assailing his role in grant of various credit facilities to borrowers, in violation of banking norms and against receipt of illegal gratification, which resulted in huge loss to the Bank. One of these complaints was in relation to *M/s. Oyster Buildwell Pvt. Ltd.* (hereinafter, referred to as '*OBPL*'), a real estate company, which was extended credit facilities to the tune of Rs.514.27 crores, resulting in loss of Rs.466.51 crores to the Bank.

As a result, FIR/RC No.2232021A0005 was registered under Sections 120B/406/420/468/471 by the CBI against OBPL, the applicant and others, including unknown public servants and private persons, for having committed criminal breach of trust, cheating, criminal conspiracy and forgery for diversion/misappropriation of the public money during the period from 2017 to 2019. The investigation in the case is stated to be still pending.

The Prosecution Complaint

3. The present ECIR was recorded by the respondent under Sections 3/4 of the PMLA, followed by filing of the prosecution complaint on 01.10.2021. As per the complaint, Avantha Group is led by the present applicant, being its Founder and Chairman. The companies primarily involved in the transaction in question were OBPL, *M/s. Jhabua Power and Investments Limited* (hereinafter, referred to as '*JPIL*') and *M/s. Jhabua Power Ltd.* (hereinafter, referred to as '*JPL*'), which are a part of



Avantha Group and under the control and beneficial ownership (direct or indirect) of the applicant.

In December, 2017, JPL had signed an operations and management (O&M) agreement for its thermal power project with JPIL, which work was sub-contracted by JPIL to OBPL at higher monthly consideration. In the contract between JPIL and OBPL, a special clause was added, as per which, interest free security deposit to the tune of Rs.514.27 crores was to be provided by OBPL to JPIL. For extending of this security deposit to JPIL, OBPL sought a loan from the Bank, wherefore the Term loan in question came to be disbursed in its favor.

4. After the Term loan of Rs.514.27 crores was disbursed to OBPL, the funds were transferred to JPIL as security deposit. Reportedly, the said funds were utilized for retiring of Avantha Group loans i.e., Non-Convertible Debentures of Rs.285 crores subscribed by *Edelweiss* in *Avantha Holding Ltd.* (hereinafter, referred to as '*AHL*') as well as for repayment of existing debt of the Group companies to the tune of Rs.190 crores of *Aditya Birla Finance Ltd.* (hereinafter, referred to as '*ABFL*').

5. It was alleged that the agreements entered into between OBPL, JPL and JPIL were '*sham*'. Though the Term loan given by the Bank to OBPL was *prima facie* secured, *inter-alia*, by the pledge of 8 crore shares of CG Power, the said shares were already pledged with *Edelweiss* and *ABFL*, against whom the Group companies had pre-existing loan obligations. It was further alleged that OBPL was part of Avantha Group and as such, was controlled by the applicant. It carried no business activity and had no employees working in it. It did not even have any experience in handling of O&M work of a thermal power plant and was shown to have been



contracted by JPIL only to create a paper trail. Notably, the company neither provided any service under the agreement to JPIL nor received any consideration for the same.

6. It was also alleged that the Term loan taken by OBPL was routed from one Group company to another and eventually used to repay the existing loans of *Avantha Power & Infrastructure Limited* (hereinafter, referred to as '*APIL*') and AHL taken from *Edelweiss* and ABFL. The applicant, who is the ultimate beneficial owner of OBPL, JPL and JPIL, was instrumental in generation of proceeds of crime, as he had the knowledge that Term loan was being taken from the Bank on the basis of sham agreements and that the funds were going to be utilized for purposes other than sanctioned. By the time of filing of the complaint, proceeds of crime to the tune of Rs.500.11 crores were detected to have been generated by Avantha Group.

Proceedings before the Special Court

7. After registration of the ECIR, the applicant was arrested on 03.08.2021, whereafter he approached the Special Court by way of an application filed under Section 439 Cr.P.C. read with Sections 45/46(1)/65 PMLA seeking regular bail. The said application came to be dismissed by the learned Special Judge vide order dated 30.10.2021. Though the twin conditions provided under Section 45(1) PMLA were adverted to, the bail application was eventually decided by the learned Judge in light of Section 439 Cr.P.C.

**Contentions raised on behalf of the Applicant**

8. Mr. Mukul Rohatgi, learned Senior Counsel appearing for the applicant, submitted that the applicant is about 60 years of age and no case of commission of offence under Sections 3/4 PMLA is made out against him. Assailing the order dismissing bail application of the applicant, learned Senior Counsel made the following submissions on the merits of the case:-

(A) The applicant is in fact a victim of circumstances created by the Bank. The proposal for the loan in question was given by the Bank, which coerced the companies of Avantha Group to take loans from it, ostensibly for the purpose of increasing its liquid collateral against existing loan facilities, under the threat that the facilities extended to other Group companies would be withdrawn, that valuable assets of the company will be auctioned at low prices and that the company would be declared '*Willful Defaulter/Fraud*'.

(B) The Term loan in question was structured by the Bank, while being completely aware of the purpose and utilization of the loan, as evident from the emails dated 23.10.2017 and 03.11.2017 written by one *Sh. Ramesh Sharma* (Corporate Banking, Yes Bank). The entire scheme was orchestrated to grab the shares of CG Power, which were lying pledged with lenders of Avantha Group, viz. *Edelweiss* and ABFL. It was urged that even otherwise, the Term loan of Rs.514.27 sanctioned by the Bank was adequately secured by OBPL through collaterals, including:-

(i) Pledge of over 8 crore shares of CG Power, a company listed on stock exchanges, which were worth Rs.728 crores on the date of the pledge;



- (ii) Pledge of 12.6 crore shares of JPL;
- (iii) Corporate Guarantee of Rs.370 crores given by AHL.

The above collaterals collectively amounted to over Rs.850 crores on the date of the pledge. Further, OBPL had paid Rs.68 crores towards the loan facility and Rs.14.16 crores as fees to the Bank.

(C) On 05.06.2018, i.e. the day on which the pledge was invoked by the Bank, the value of shares of CG Power was around Rs.480 crores. Even though the shares vested with the Bank on said date in view of Section 176 of the Contract Act, 1872, the Bank held on to the shares for more than 02 years and sold the same in July/August, 2020, when the value had gone down to about Rs.105 crores.

In this regard, it was also urged that it was the responsibility of the Bank to check the aggregate value of CG Power shares at the end of each business day in terms of facility letter dated 29.12.2017. The rates of the shares on different dates were stated to be as follows:-

As on date of pledge	Rs.728 crores
As on date of invocation by the Bank	Rs.480 crores
As on date of application	Rs.1200 crores

(D) The Bank has already approached DRT for recovery of Rs.469 crores, which case is pending since 2020. Avantha Group has filed its counter-claims therein against the Bank for over Rs.1500 crores.

(E) The validity of the Master Circular dated 01.07.2016 issued by RBI, on the basis of which OBPL was declared 'fraud' and present



prosecution was launched, is under challenge in writ petitions pending before this Court, including W.P.(C) Nos. 306/2019 and 7209/2021. The latter has been preferred by OBPL, in which interim directions have been passed to maintain status quo with regard to declaration of accounts of OBPL as '*fraud*' and from taking any step pursuant thereto.

(F) The use of Term loan for a purpose other than sanctioned, at the instance and with the knowledge of the Bank, cannot be termed as money laundering. Even as per the ED's case, there has not been any misappropriation. At worst, only a circular issued by RBI has been violated.

(G) The Special Court has given findings in favor of the applicant by holding that there is no chance of his tampering with evidence or influencing witnesses. However, only on the basis of an averment regarding his NRI status in the year 2016-17, and the severity of the allegations, the Court erroneously held that the applicant is a flight risk, even though LOCs have already been issued against him and his presence can be secured by imposing adequate conditions. In this regard, it was submitted that the applicant is also willing to surrender his passport.

(H) The applicant is in custody since 03.08.2021 and the prosecution complaint having been filed, he is no longer required for any investigation. In fact, he had joined the investigation, as directed, on 24.07.2021 and 27.07.2021 and cooperated.

It was further submitted that liberty of an accused may not be curtailed in the name of only '*gravity of the offence*'. Though severity of the offence is a relevant factor when a Court is called to determine whether or not to grant bail, it is now well-settled that the same may be



measured by the maximum punishment provided for the offence, which in the present case is 07 years.

(I) On these facts, even the scheduled offence is not made out against the applicant. As the scheduled offence is not made out, the question of applicant's role in money laundering does not arise. Further, in the scheduled offence, neither charge sheet has been filed nor the applicant has been arrested.

(J) While referring to Section 45 PMLA, it was submitted that the twin conditions set out in sub-clause (1) thereof, having been struck down in Nikesh Tarachand Shah v. Union of India reported as **(2018) 11 SCC 1**, are not applicable to the present case. Notably, the Special Court also did not apply Section 45 PMLA against the applicant.

It was also averred that by virtue of the Finance Act, 2018, the only amendment made in Section 45(1) PMLA is that the term "*punishable for a term of imprisonment of more than three years under Part A of the Schedule*" has been substituted with the term "*under this Act*". The same does not result in revival of the twin conditions, which were categorically struck down by the Supreme Court in Nikesh Tarachand Shah (Supra). If the legislature had intended to revive the twin conditions under Section 45 PMLA, it would and should have brought back the entire section. In this regard, reliance was placed on the objects and reasons of PMLA and the decision in Devi Dass Gopal Krishnan Etc. v. State of Punjab and Others (In all the appeals) reported as **(1967) 3 SCR 557**.

(K) Section 44 PMLA provides the procedure for trying of both the PMLA offence as well as the predicate offence by the Special Court. As



the investigation is still pending in the predicate offence, the trial is likely to take a long time.

9. In support of his submissions, reliance was placed by the learned Senior Counsel on the decisions in Sanjay Chandra v. Central Bureau of Investigation reported as (2012) 1 SCC 40, P. Chidambaram v. Directorate of Enforcement reported as (2020) 13 SCC 791, Ashok Dhingra v. N.C.T. of Delhi reported as (2000) 9 SCC 533, Krishna Janardhan Bhat v. Dattatraya G. Hegde reported as (2008) 4 SCC 54, Nikesh Tarachand Shah (Supra), Babu Singh and Others v. State of U.P. reported as (1978) 1 SCC 579, Gudikanti Narasimhulu and Others v. Public Prosecutor, High Court of Andhra Pradesh reported as (1978) 1 SCC 240, Joginder Kumar v. State of U.P. and Others reported as (1994) 4 SCC 260, Siddharam Satlingappa Mhetre v. State of Maharashtra and Others reported as (2011) 1 SCC 694, Dataram Singh v. State of Uttar Pradesh and Another reported as (2018) 3 SCC 22, Firoz Khan v. State (NCT of Delhi) reported as 2020 SCC OnLine Del 1694, Sai Chandrashekhar v. Directorate of Enforcement reported as 2021 SCC OnLine Del 1081, H.B. Chaturvedi v. C.B.I. reported as 2010 SCC OnLine Del 2155, State of Kerala v. Raneef reported as (2011) 1 SCC 784, Santosh s/o Dwarkadas Fafat v. State of Maharashtra reported as 2016 SCC OnLine Bom 15888, D.K. Shivakumar v. Directorate of Enforcement reported as 2019 SCC OnLine Del 10691, Upendra Rai v. Directorate of Enforcement reported as (2017) 9 SCC 714, R. Vasudevan v. CBI, New Delhi reported as 2010 SCC OnLine Del 130, Anil Mahajan v. Commissioner of Customs & Anr. reported as 2000 SCC OnLine Del 119, Sameer Magan Bhujbal v. Assistant Director, Directorate of Enforcement and Others reported as 2019 SCC OnLine Bom 7574, The



Asst. Director Enforcement Directorate v. Dr. V.C. Mohan, Criminal Appeal No. 21/2022, Satender Kumar Antil v. Central Bureau of Investigation and Another reported as **2021 SCC OnLine 922**, Jagdish Chandra Sharma v. Directorate of Enforcement, CRM-M-16596-2021(O&M), Rajeev Sharma v. Directorate of Enforcement reported as **2022 SCC OnLine Del 47**.

Contentions raised on behalf of the respondent/ED

10. Per contra, Mr. Amit Mahajan, learned CGSC appearing for the respondent, vehemently opposed the bail application and made the following submissions:-

(A) OBPL is a paper company with no business activity, which lacked the financial strength to service the proposed loan. Accordingly, the officers of Avantha Group connived with the officers of the Bank and created a paper trail to facilitate sanctioning of the loan in favor of OBPL on the basis of sham agreements. In this regard, attention was drawn to the fact that the Memorandum of Association of OBPL was amended one day prior to its entering into agreement with JPIL, i.e., on 14.12.2017, to include O&M services.

(B) After the Term loan was disbursed by the Bank, the funds were used to service pre-existing loan obligations of Avantha Group. The Group engaged in layering tactics to project the funds as untainted money and routed them between Group companies, to ultimately settle liability towards *Edelweiss* and ABFL. The same amounts to money laundering and further investigation/backtracking in this regard is underway.



(C) The Term loan was not only taken by OBPL in violation of RBI Circular dated 01.07.2015, but was also disbursed by the Bank knowing fully well that the funds would be utilized to pay existing lenders, viz. *Edelweiss* and ABFL. While the actual purpose behind OBPL seeking Term loan from the Bank was repayment of loans taken earlier by Avantha Group from *Edelweiss* and ABFL, the incentive to the Bank was the acquisition of shares of CG Power, which upon repayment of loans of *Edelweiss* and ABFL became free and came to be exclusively pledged with the Bank.

(D) The applicant, who is the ultimate beneficial owner of the Avantha Group and major beneficiary of the entire money laundering scheme, was aware of the real purpose of the O&M agreements and also that the Term loan granted by the Bank was not going to be utilized for the sanctioned purpose. Thus, he was instrumental in the generation of proceeds of crime. In this regard, it was also submitted that the emails exchanged between the applicant and *Sh. Rana Kapoor*, as well as between *Sh. Ramesh Sharma* and *Sh. Rana Kapoor*, would *prima facie* show that the applicant connived with *Sh. Rana Kapoor* to tide over the financial crisis of Avantha Group.

(E) Backtracking of loans taken by AHL, which was the 'Pledgor' in the loan transaction between OBPL and the Bank, as well as recipient of funds out of the Term loan sanctioned by the Bank to OBPL, has revealed that the company transferred funds to the tune of Rs.131.32 crores overseas to Mauritius-based companies, namely *NQC Global (Mauritius) Ltd.*, *NQC International (Mauritius) Ltd.* and *MTP New Ocean*



(Mauritius) Ltd., in which the applicant and Mrs. Stephanie Thapar are beneficial owners.

(F) The applicant is an NRI and his immediate family is based in London, England. During investigation, it has also come on record that the applicant and his family members control properties, companies, trust, and bank accounts abroad. Thus, the possibility of his fleeing from justice cannot be ruled out.

(G) The seriousness of the alleged offence is an important factor in economic offences as financial health of the country is likely to be affected. Thus, economic offences form a class apart and different approach needs to be adopted while adjudicating the present case, wherein the allegations relating to diversion and siphoning off of public money are grave.

(H) On Section 45 PMLA, it was submitted that the provision was amended by way of Finance Act, 2018 to cure the defects pointed out by the Supreme Court in Nikesh Tarachand Shah (Supra). Till date, the amendment has not been struck down or declared *ultra vires*. As such, the twin conditions under Section 45(1) PMLA stand revived.

Reference was made to the judgment dated 28.01.2022 passed in Ajay Kumar v. Directorate of Enforcement, **Criminal Application (BA) No. 1149/2021**, where a Division Bench of the Bombay High Court, while answering a reference in respect of Section 45 PMLA post the decision in Nikesh Tarachand Shah (Supra) and the amendment made in the provision by virtue of Finance Act, 2018, has held that the twin conditions in Section 45(1) PMLA stand revived.



(I) The authorized officer, on the basis of the material in his possession and after having reason to believe that the applicant was guilty of an offence punishable under PMLA, arrested him in terms of Section 19 of the Act. The charged offence being under PMLA, the onus to prove his innocence is on the applicant, which has not been discharged. Further, the likelihood of his indulging in subsequent money laundering activities and repeating the offence cannot be ruled out.

11. In support of his submissions, learned CGSC placed reliance on the decisions in Bimal Kumar Jain and Another v. Directorate of Enforcement reported as **2021 SCC OnLine Del 3847**, P. Chidambaram v. Directorate of Enforcement reported as **(2019) 9 SCC 24**, Mohammad Arif v. Directorate of Enforcement, Govt. of India reported as **2020 SCC OnLine Ori 544**, Y.S. Jagan Mohan Reddy v. Central Bureau of Investigation reported as **(2013) 7 SCC 439**, Deepak Talwar v. Enforcement Directorate reported as **2019 SCC OnLine Del 10135**, Central Bureau of Investigation v. Ramendu Chattopadhyay reported as **(2020) 14 SCC 396**, State of Bihar and Another v. Amit Kumar alias Bachcha Rai reported as **(2017) 13 SCC 751**, State of Gujarat v. Mohanlal Jitmalji Porwal and Another reported as **(1987) 2 SCC 364**, Dr. V.C. Mohan (Supra), Suresh N. Patel v. State, **CRL. OP(MD) Nos.6883/2021 & 7966/2021**, Vijay Madanlal Choudhary & Ors. v. Union of India & Ors., **Special Leave to Appeal (Crl.) No. 4634/2014**, Religare Finvest Ltd. v. State of NCT of Delhi & Anr., **CRL.M.C. 796/2021**.

12. I have heard learned counsels for the parties and have also gone through the material placed on record, including the written submissions.



Analysis

13. Article 21 of the Constitution of India guarantees a right to personal liberty to every person, and thus, there is no gainsaying that bail is the rule and jail an exception. Before proceeding to analyze the facts of the present case and bearing this principle in mind, I deem it expedient to first recapitulate the position of law on the issue of grant of bail, in cases involving economic offences and otherwise.

14. In Moti Ram v. State of Madhya Pradesh reported as **1978 (4) SCC 47**, while issuing a note of caution in respect of adverse consequences pre-trial incarceration, the Supreme Court had observed thus:-

“14. The consequences of pre-trial detention are grave. Defendants presumed innocent are subjected to the psychological and physical deprivations of jail life, usually under more onerous conditions than are imposed on convicted defendants. The jailed defendant loses his job if he has one and is prevented from contributing to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family.”

15. Subsequently, in Ram Govind Upadhyay v. Sudarshan Singh and Others reported as **(2002) 3 SCC 598**, certain considerations that may be borne in mind by Courts while determining the question of bail were illustrated by the Supreme Court in the following terms:-

“4. Apart from the above, certain other which may be attributed to be relevant considerations may also be noticed at this juncture, though however, the same are only illustrative and not exhaustive, neither there can be any. The considerations being:

(a) While granting bail the court has to keep in mind not only the nature of the accusations, but the severity of the



punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.

(b) Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the court in the matter of grant of bail.

(c) While it is not expected to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prima facie satisfaction of the court in support of the charge.

(d) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail, and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.”

16. In Masroor v. State of Uttar Pradesh and Another reported as (2009) 14 SCC 286, it was noted that while deciding the question of bail, Courts must strike a balance between the interest of the society in general and the right of an accused to personal liberty. While stressing on the importance of achieving said balance, the Supreme Court held:-

“15. There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned. In this context, the following observations of this Court in Shahzad Hasan Khan v. Ishtiaq Hasan Khan are quite apposite : (SCC p. 691, para 6)



“6. ... Liberty is to be secured through process of law, which is administered keeping in mind the interests of the accused, the near and dear of the victim who lost his life and who feel helpless and believe that there is no justice in the world as also the collective interest of the community so that parties do not lose faith in the institution and indulge in private retribution.”

17. In Prasanta Kumar Sarkar v. Ashis Chatterjee and Another reported as (2010) 14 SCC 496, while relying on State of U.P. through CBI v. Amarmani Tripathi reported as (2005) 8 SCC 21, Prahlad Singh Bhati v. NCT, Delhi and Another reported as (2001) 4 SCC 280 and Ram Govind Upadhyay (Supra), factors to be considered when deciding a bail application were again enunciated by the Supreme Court, as follows:-

“9. ...It is well settled that, among other circumstances, the factors to be borne in mind while considering an application for bail are:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.”



18. 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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37. The principles, which the Court must consider while granting or declining bail, have been culled out by this Court in *Prahlad Singh Bhati v. NCT, Delhi* thus : (SCC pp. 284-85, para 8)

"8. The jurisdiction to grant bail has to be exercised on the basis of well-settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the court has to keep in mind the nature of accusations, the nature of [the] evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the legislature has used the words 'reasonable grounds for believing' instead of 'the evidence' which means the court dealing with the grant of bail can only satisfy it (sic itself) as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is



not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."

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45. In Bihar Fodder Scam (Laloo Prasad case) this Court, taking into consideration the seriousness of the charges alleged and the maximum sentence of imprisonment that could be imposed including the fact that the appellants were in jail for a period of more than six months as on the date of passing of the order, was of the view that the further detention of the appellants as pretrial prisoners would not serve any purpose.

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."

19. The considerations and parameters relevant to grant of bail have been restated by the Supreme Court in Y.S. Jagan Mohan Reddy (Supra), while taking special note of cases involving economic offences, in the following manner:-

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

35. While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension



of the witnesses being tampered with, the larger interests of the public/State and other similar considerations.”

20. In P. Chidambaram (Supra), it was held by the Supreme Court that even though gravity of the offence is an important factor for determining whether or not to grant bail, and economic offences of the nature involved in the case were *prima facie* grave, it is not a rule that bail shall inevitably be denied. No case may be seen as setting a precedent with respect to grant/rejection of bail, except on principle, and it will be for the Court concerned to determine the gravity of the charged offence in each case based on the facts and circumstances. Further, the gravity of the offence is a factor which is in addition to the triple test/tripod test. Relevant excerpt from the decision is extracted below:-

“22. The learned Senior Counsel for the appellant has also placed reliance on the decision on the decision in Sanjay Chandra v. CBI...

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The said case was a case of financial irregularities and in the said circumstance this Court in addition to taking note of the deep-rooted planning in causing huge financial loss, the scope of consideration relating to bail has been taken into consideration in the background of the term of sentence being seven years if convicted and in that regard it has been held that in determining the grant or otherwise of bail, the seriousness of the charge and severity of the punishment should be taken into consideration.

23. ...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 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.”

21. From a reading of the judicial dicta cited hereinabove, it is discernible that in matters of regular bail under Section 439 Cr.P.C., a Court must consider aspects, including but not limited to, the larger interest of the State or public, whether the accused is a flight risk, whether there is likelihood of his tampering with evidence, whether there is likelihood of his influencing witnesses, etc. Apart from these, another factor relevant to the question of bail would be the gravity of the alleged offence and/or nature of the allegations levelled, which may serve as an additional test and can be applied while keeping in view the severity of the punishment that the offence entails.



22. It is equally well-settled that economic offences constitute a class apart and need to be visited with a different approach, given their severity and magnitude. Albeit these offences are likely to adversely impact the economic fabric of the country, bail shall not be denied to a person accused of an economic offence in a routine manner. Each case must be adjudged on the basis of the peculiar facts and circumstances, while striking a balance between the right to personal liberty of the accused and the interest of the society in general.

23. During the course of arguments, an issue regarding applicability of Section 45(1) PMLA was raised on behalf of the parties. In connection therewith, I shall advert at the very outset to the provision, as it stood prior to the amendment in 2018:-

“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 an opportunity to oppose the application for such release; and

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

Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs :

Provided further that the Special Court shall not take cognizance of any offence 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.

24. A plain reading of the provision would show that the embargo imposed by Section 45(1) PMLA on grant of bail took form of twin conditions – (i) that the Public Prosecutor shall be given an opportunity to oppose the application for release, and (ii) where the Public Prosecutor opposes such application, the Court should be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offence and that he is not likely to commit any offence while on bail. The limitations so imposed were in addition to those imposed under Cr.P.C. and had an overriding effect over the provisions of the Code, in case there occurred any inconsistency between the provisions of the two. Though stringent, they were held by the Supreme Court to be mandatory.

25. In Gautam Kundu v. Directorate of Enforcement (Prevention of Money-Laundering Act), Government of India through Manoj Kumar, Assistant Director, Eastern Region reported as **(2015) 16 SCC 1**, while dismissing an appeal filed against the order of the High Court rejecting bail application of the appellant, the Supreme Court analyzed the sweep of Section 45 PMLA and held:-

“30. The conditions specified under Section 45 of PMLA are mandatory and needs to be complied with, which is further strengthened by the provisions of Section 65 and also Section 71 of PMLA. ...PMLA has an overriding effect and the provisions of CrPC would apply only if they are not inconsistent with the provisions of this Act. Therefore, the conditions enumerated in Section 45 of PMLA will have to be complied with even in respect of an application for bail made



under Section 439 of CrPC. That coupled with the provisions of Section 24 provides that unless the contrary is proved, the authority or the Court shall presume that proceeds of crime are involved in money-laundering and the burden to prove that the proceeds of crime are not involved, lies on the appellant.

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34. ...We have noted that Section 45 of PMLA will have overriding effect on the general provisions of the Code of Criminal Procedure in case of conflict between them. As mentioned earlier, Section 45 of PMLA imposes two conditions for grant of bail, specified under the said Act. ...Therefore, there is no doubt that the conditions laid down under Section 45-A of PMLA, would bind the High Court as the provisions of special law having overriding effect on the provisions of Section 439 of the Code of Criminal Procedure for grant of bail to any person accused of committing offence punishable under Section 4 of PMLA, even when the application for bail is considered under Section 439 of the Code of Criminal Procedure.”

26. Later, while relying on the decision in Gautam Kundu (Supra), the Supreme Court, in Rohit Tandon v. Directorate of Enforcement reported as (2018) 11 SCC 46, observed thus:-

“18. ...The other observations in the said order will have no bearing on the merits of the controversy and required to be reckoned whilst considering the prayer for grant of regular bail. For that, the appellant must succeed in overcoming the threshold of the rigors of Section 45 of the 2002 Act... Suffice it to observe that indulgence shown to the appellant in terms of order dated 10-8-2017 will be of no avail. In that, the facts such as the appellant never tried to evade the investigation or that he has suffered incarceration for over 7½ months or that the chargesheet has been filed in the predicate offence registered under FIR No. 205/2016 or the factum of illness of the mother of the appellant or the observation that no definite reason has been assigned by the respondents for substantiating the allegation that the appellant would tamper with the evidence, may become relevant only if the threshold



stipulation envisaged under Section 45 of the 2002 Act was to be fulfilled...

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21. The consistent view taken by this Court is that economic offences having deeprooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country. Further, when attempt is made to project the proceeds of crime as untainted money and also that the allegations may not ultimately be established, but having been made, the burden of proof that the monies were not the proceeds of crime and were not, therefore, tainted shifts on the accused persons under Section 24 of the 2002 Act.”

27. Be that as it may, in 2017, the constitutional validity of Section 45 PMLA came to be challenged before the Supreme Court in Nikesh Tarachand Shah (Supra), wherefore, by a judgment rendered in 2018, explicating the defects inherent in the provision and the challenges posed thereby, the Supreme Court held that the twin conditions imposed by Section 45(1) PMLA were manifestly arbitrary, discriminatory and violative of Articles 14 and 21 of the Constitution of India.

28. Post the decision in Nikesh Tarachand Shah (Supra), an amendment was made to Section 45 PMLA vide the Finance Act, 2018 and brought into effect from 19.04.2018. The new Section 45(1) PMLA reads as follows:-

“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 [under this Act] shall be released on bail or on his own bond unless—]



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

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

Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm [or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees], 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.”

29. Mr. Rohatgi, learned Senior Counsel appearing for the applicant, while placing reliance on the decisions of different High Courts, had submitted that the amendment made to Section 45 PMLA in 2018 does not revive the twin conditions set out in sub-clause (1). Learned CGSC appearing for the respondent, on the other hand, had placed reliance on the views expressed in certain other decisions of High Courts, where discordant notes were sounded.

30. During the course of submissions, learned counsels for the parties had also informed that the issue relating to constitutional validity of the amendment made in Section 45 PMLA vide the Finance Act, 2018 as well as revival of the twin conditions thereby, alongwith other issues relating



to PMLA, has already been taken up for hearing by the Supreme Court and is under active consideration.

31. At this stage, this Court deems it apposite to advert to the two recent decisions by the Supreme Court in The Directorate of Enforcement v. Parkash Gurbaxani etc., **SLP(Crl.) 7666-7667/2021** and Dr. V.C. Mohan (Supra), which are briefly discussed hereunder.

32. By way of the impugned order in Parkash Gurbaxani (Supra), passed in the context of grant of regular bail, the Punjab and Haryana High Court had held that the twin conditions under Section 45(1) PMLA do not stand revived by virtue of the amendment made by the Finance Act, 2018. Vide order dated 20.10.2021, the Supreme Court observed as under :-

"...We are in agreement with his grievance that the High Court has not dealt with the mandatory twin requirements but has granted indulgence to the respondent(s) on extraneous consideration."

Although the Supreme Court declined to interfere with the impugned order in the circumstances of the case, including the fact that the respondent(s) were reportedly senior citizens and had cooperated in the investigation, it was directed that the same shall not be treated as precedent in other cases. The question of law, however, was left open.

33. In Dr. V.C. Mohan (Supra), on a challenge made by the Directorate of Enforcement to the grant of anticipatory bail to the respondent, the Supreme Court set aside the impugned order and remanded the matter back for re-consideration. It was held as under:-



“This appeal takes exception to the judgment and order dated 25.06.2021 passed by the High Court of Telangana at Hyderabad in Criminal Petition No. 4134 of 2021, whereby the High Court granted anticipatory bail to the respondent in connection with offence concerning the Prevention of Money Laundering Act (for short 'PMLA Act') being F.No. ECIR/HYZO/20/2019/2246 bearing summons dated 11.05.2021.

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Indeed, the offence under the PMLA Act is dependent on the predicate offence which would be under ordinary law, including provisions of Indian Penal Code. That does not mean that while considering the prayer for grant of anticipatory bail in connection with PMLA offence, the mandate of Section 45 of the PMLA Act would not come into play.

Mr. Dama Seshadri Naidu, learned senior counsel appearing for the respondent invited our attention to the dictum in paragraph 42 of the judgment in Nikesh Tarachand Shah vs. Union of India & Anr. reported in (2018) 11 SCC 1. The observations made therein have been misunderstood by the respondent. It is one thing to say that Section 45 of the PMLA Act to offences under the ordinary law would not get attracted but once the prayer for anticipatory bail is made in connection with offence under the PMLA Act, the underlying principles and rigors of Section 45 of the PMLA Act must get triggered — although the application is under Section 438 of Code of Criminal Procedure. As aforesaid, the High Court has not touched upon this aspect at all.

It is urged before us by the respondent that this objection was never taken before the High Court as it is not reflected from the impugned judgment. It is not a question of taking objection but the duty of court to examine the jurisdictional facts including the mandate of Section 45 of the PMLA Act, which must be kept in mind.

Accordingly, we deem it appropriate to set aside the impugned judgment and order and relegate the parties before the High Court for reconsideration of Criminal Petition No. 4134 of



2021 afresh for grant of anticipatory bail filed under Section 438 of the Code of Criminal Procedure in connection with stated PMLA offence.”

Notably, the above observations came to be made by the Supreme Court after granting leave in an SLP and conversion of the case into a Criminal Appeal.

34. Coming to the present case, it is noted that while rejecting the applicant's bail application on 30.10.2021, the learned Special Judge held that the complaint having been filed and the documentary evidence having been collected, there was no possibility of the applicant tampering with the evidence. It was further held that the evidence having been collected and the witnesses having been examined, chances of the applicant influencing witnesses were remote. However, the application came to be dismissed on the ground that the possibility of the applicant fleeing the country could not be ruled out and also that the alleged offence was grave.

For the reasons stated in the order, this Court concurs that the apprehensions of the applicant tampering with evidence and influencing witnesses are unfounded. Insofar as the apprehension of the applicant being a flight risk is concerned, it is noted that the respondent has already issued LOCs against the applicant, who is also willing to surrender his passport. In this backdrop, this Court is of the opinion that the applicant's presence during the trial can be secured by taking adequate measures, including surrender of his passport, and imposing necessary conditions in terms of the decision in P. Chidambaram (Supra). Considering the foregoing, the applicant satisfies the triple test for grant of bail.

35. Though it has been urged on behalf of the respondent that further investigation in the case, besides backtracking of funds siphoned off by



AHL and sent abroad to entities in which the applicant and his wife are beneficial owners, is pending, it is observed that an accused cannot be kept languishing in jail for long, undetermined periods, only on the ground that investigation is stated to be pending [Refer: P. Chidambaram v. Central Bureau of Investigation reported as **(2020) 13 SCC 337**].

36. At the same time however, based on the categorical observations made by the Supreme Court in Dr. V.C. Mohan (Supra) and Parkash Gurbaxani (Supra), this Court reckons that the present bail application needs to be tested on the touchstone of the twin conditions set out in Section 45(1) PMLA as well.

37. At this stage, it is deemed apposite to refer to the observations made in Rohit Tandon (Supra), where while relying on its earlier decisions in Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra and Another reported as **(2005) 5 SCC 294** and State of Maharashtra v. Vishwanath Maranna Shetty reported as **(2012) 10 SCC 561**, the Supreme Court outlined the parameters for adjudication of bail application in terms of Section 45(1)(ii) PMLA and held as under:

“22. It is not necessary to multiply the authorities on the sweep of Section 45 of the 2002 Act which, as aforementioned, is no more res integra. The decision in Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra and State of Maharashtra v. Vishwanath Maranna Shetty dealt with an analogous provision in the Maharashtra Control of Organised Crime Act, 1999. It has been expounded that the Court at the stage of considering the application for grant of bail, shall consider the question from the angle as to whether the accused was possessed of the requisite mens rea. The Court is not required to record a positive finding that the accused had not committed an offence under the Act. The Court ought to maintain a delicate balance between a judgment of acquittal and conviction and an order



granting bail much before commencement of trial. The duty of the Court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. Further, the Court is required to record a finding as to the possibility of the accused committing a crime which is an offence under the Act after grant of bail.”

38. The applicant is stated to be the ultimate beneficiary, being the Founder and Chairman, of the Avantha Group and in total, an amount of Rs.500.11 crores is stated to be the ‘*proceeds of crime*’ in the case.

39. It has come in the investigation that OBPL, JPL and JPIL, all Avantha Group companies, entered into O&M agreements to avail Term loan from the Bank. Firstly, JPL entered into an O&M agreement for its thermal power project with JPIL @ Rs.7.5 crores monthly consideration. Subsequently, JPIL sub-contracted the same work to OBPL @ Rs.15 crores monthly consideration. In the agreement between JPIL and OBPL, a condition for furnishing of an interest free security deposit by OBPL to JPIL, to the tune of Rs.514.27 crores, was put. Both the agreements were signed on the same day i.e., on 15.12.2017, and were thus alleged to be in fact ‘*sham*’ agreements, as OBPL is stated to be a paper company having no employees and/or any prior experience in handling of O&M work. It has also been alleged that neither any service was provided by OBPL nor any consideration was paid by JPIL to OBPL.

40. As per the prosecution complaint, certain Bank officials colluded with the applicant for the grant of Term loan, which was ostensibly obtained by OBPL to furnish security deposit in favor of JPIL, however in reality, the same was sought with *malafide* intentions to be siphoned off and diverted towards repayment of facilities availed of by Avantha Group companies and for meeting other expenses. The Bank was fully aware of



the real purpose for which the loan was obtained. Reportedly, public money under the garb of Term loan was siphoned off in this way, resulting in generation of '*proceeds of crime*' as well as its layering and ultimate projection as untainted money.

41. A submission was made on behalf of the applicant that the market value of CG Power shares pledged with the Bank, as on the date of invocation of pledge, was Rs.480 crores and thus sufficient, alongwith other collaterals, to meet the loan obligation. But, the Bank by delaying the sale of pledged shares to July/August 2020 could realize only Rs.105 crores, as by that time the value of the shares had eroded. It was submitted that under-realization of the value of the shares due to lack of timely action by the Bank has caused loss not only to the Bank, but also to the applicant. The submission is specious for the purpose of the present proceedings. The Bank may have been under a contractual obligation to mitigate losses in realization of the appropriate market value of the security held by it, however, its failure to do so does not negate the criminal liability of the accused.

42. From the additional written submissions filed on behalf of the applicant before the Special Court (copy of which has been placed on record in the present case), it is apparent that the applicant is also arraigned as an accused in CBI Spl. Case No. 1233/2021 in relation to loan taken by AHL, wherein the designated Special Court, CBI, Mumbai has taken cognizance on 12.10.2021. On *prima facie* reading of the material placed on record as discussed hereinabove, and considering the parameters of Section 45(1) PMLA as well as the gravity of the alleged



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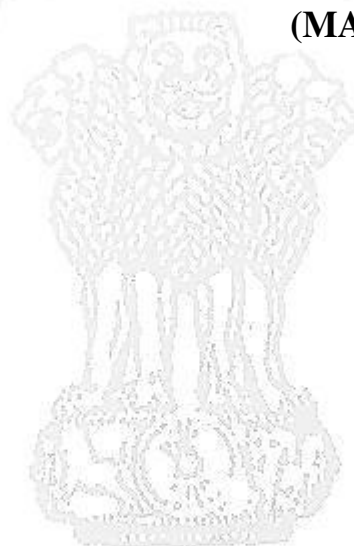
offences, it cannot be held that the applicant is not guilty of the alleged offences or that he is not likely to commit any such offence while on bail.

43. Consequently, this Court is not inclined to admit the present applicant on bail. The bail application is accordingly dismissed.

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

(MANOJ KUMAR OHRI)
JUDGE

MARCH 02, 2022
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