

Case :- BAIL No. - 5974 of 2020

Applicant :- Anil Kumar Sharma

Opposite Party :- Enforcement Directorate, Lucknow Zone, Lucknow

Counsel for Applicant :- Pranshu Agrawal, Manoj Singh, Mohd. Yasir Abbasi

Counsel for Opposite Party :- Shiv.P.Shukla

Hon'ble Dinesh Kumar Singh, J.

1. This bail application has been filed under Section 439 Code of Criminal Procedure (hereinafter referred to as 'the CrPC') read with Section 45 of the Prevention of Money Laundering Act, 2002 (hereinafter referred to as 'the PMLA') by the accused-applicant, who is Managing Director of Amrapali Group of Companies (fourteen in numbers) after his application for bail got rejected by Special Judge/Sessions Court PMLA, Lucknow vide order dated 15.07.2020 passed in Bail Application No.2458 of 2020 filed in ED Case No.ECIR/06/PMLA/LKZO/2019 under Section 3/4 of the PMLA., Police Station Enforcement Directorate, Lucknow Zone.

2. Learned Special Judge considering the judgment and order dated 23.07.2019 passed by the Supreme Court in Writ Petition (Civil) No.940 of 2017 and, also the nature of accusation, gravity of offence and, punishment provided for the offence and, the fact that the investigation has been going on qua other accused and matter involves huge amount of Rs.6,000/- Crores, has rejected the bail application.

3. This case is one of the classic cases which would reveal the true story that how a real estate company/builder in active connivance and collaboration with the financial institution, government authorities and functionaries can defraud, cheat, dishonestly misappropriate and diverted the funds to the extent of thousand crores collected from home/flat buyers and shatter their cherished dream to have their own house, a dream of every middle class person of this country and leave them completely high and dry.

4. Amrapali Group of Companies entered into real estate business and construction of houses/flats and other real estate projects such as commercial spaces. They offered to construct approximately 4200 flats/houses in various projects. In their brochure, they assured delivery of possession within thirty six months with world class amenities in Noida and Greater Noida. Allotment-cum-Flat Buyers Agreements were entered into between the builder and the flat/home buyers and flat/home buyers, who

had made payment to the extent of 40-100% of total consideration of their flats/houses.

5. Dream of flat/home buyers having their own house got shattered and came crushing down when M/s. Amrapali Silicon City Private Limited and M/s. Amrapali Centurian Park Private Limited were found in serious breaches of their obligation to deliver the flats within stipulated period of 36 months. They defaulted in making payment to the Noida or Greater Noida Authorities and also repayment of loan taken from the financial institution.

6. Several flat/home buyers had approached National Consumer Complaint Redressal Forum by filing consumer complaints against the builder. Bank of Baroda, one of the financial institutions which lended money to the Amrapali Group of Companies, filed Company Petition No. (IB)-121(PB)/2017 before the National Company Law Tribunal under Section 7 of the Insolvency and Bankruptcy Code, 2016 for triggering the Corporate Insolvency Resolution Process in the matter of M/s. Amrapali Silicon City Private Limited. The NCLT appointed the Interim Resolution Professional. Moratorium was declared restricting the institution of any suits, execution of any judgment, decree or order, transferring, encumbering, alienating any of assets of the corporate debtor. Proceedings were also instituted under the Securitisation and Reconstruction of Financial Assets and Enforcement and Security Interest Act, 2002. The order of NCLT has a direct bearing on the home buyers in projects of Amrapali Group of Companies. All these companies are run by the almost same set of Directors including the accused-applicant and Mr. Shiv Priya. The accused-applicant was the Managing Director of the most of the companies and he is the kingpin in defrauding, cheating, misappropriating and diverting and parking funds in bogus and sham companies including in foreign companies. Some of the flat buyers who had seen no other remedy and light in tunnel to protect and secure their interest, had approached the Supreme Court under Article 32 of the Constitution of India, leading petition being in Writ Petition (Civil) No.940 of 2017: Bikram Chatterjee vs Union of India and others. Thousands of intervention applications were also filed before the Supreme Court.

7. The Supreme Court looking at the plight and distress of the home/flat buyers entertained the petitions filed under Article 32 of the

Constitution of India as huge public interest was involved in the matter. The real estate business thrives and survives on the money of the flat/home buyers and, the money is to be invested in constructing and delivering possession of the homes/flats to the buyers who has invested the money. The Supreme Court made endeavour to see that the management of these group of companies completed the projects and delivered the possession of the homes/flats to the buyers from whom they had collected the money ranging 40-100% of the total sale consideration. In view thereof, on 22.11.2017 the Supreme Court directed the builder to deposit 10% of the dues to Noida Authorities and also asked the builders regarding date of possession in respect of flats/homes where occupancy certificate and no objection certificate had been granted by the authorities. The Court granted liberty to the flat owners to complete the finishing work. The amount was not deposited nor any promise got extracted from the builders.

8. In order to protect the predominant interest of the home buyers, the Supreme Court directed the Amrapali Group of Companies to complete the projects and the finishing work as assured. The Court vide order dated 15.03.2018 directed the Amrapali Group of Companies and flat buyers to submit joint proposals with respect to providing project wise information of the stages of various building. On 27.03.2018, the Amrapali Group of Companies, which was controlled by the accused-applicant and other directors, stated that they were ready to undertake the completion of the projects of Amrapali Group. In view thereof, I.R.P. of Amrapali Group was directed not to proceed any further in the matter. However, despite promise made, the Amrapali Group did not proceed with any work to complete the projects. The Supreme Court noticed from various documents that the money had been transferred to certain other companies. The promoters/accused-applicant builders accepted before the Supreme Court that they had diverted money of the flats/home buyers money to the extent of Rs.2765 Crores out of six projects in two other projects. The Supreme Court directed the promoters to deposit the said amount in the Court. The Supreme Court also directed to deposit the amount of Rs. Rs.250/- Crores (Rupees Two Hundred Fifty Crores) in the escrow account which was to be opened in the UCO Bank, Supreme Court Branch. This order was also not complied with and the work was not undertaken and the promoters said that they were not able to deposit the amount of Rs.2764 crores nor they would

be able to pay Rs.250 Crores with UCO Bank as ordered. In view thereof, the Supreme Court directed to freeze the individual bank account of the Directors of all forty companies and their properties to be attached.

9. The Supreme Court vide order dated 18.08.2018, directed the Directors of various companies, including the present accused-applicant, to file affidavits regarding movable and immovable properties and their valuation. The Statutory Auditor, co-accused Anil Mittal was directed to conduct the audit. However, looking at the involvement and culpability of the Statutory Auditor of Amrapali Group of Companies, the Supreme Court vide order dated 06.09.2018 appointed individual auditor, Mr. Ravi Bhatia of M/s. Bhatia & Co. and Mr. Pawan Kumar Aggarwal of M/s. Sharp and Tannan Company to conduct the forensic audit of the Amrapali Group of Companies with effect from 2008 till date. Co-accused, Anil Mittal was directed to handover original documents of Amrapali Group of Companies, but he did not hand over the documents required by the Forensic Auditors and the Supreme Court noted non-cooperation of the Directors and Statutory Auditors in this regard. The Supreme Court directed the police to seize the records and hand it over to the Forensic Auditors. The Forensic Auditors in their report noted that there were more than 26 companies to whom money had been diverted and these bogus/sham companies were created by the Amrapali Group of Companies. The Supreme Court in its order dated 13.11.2018, *inter alia*, in paragraphs 17 and 20 observed as under:-

17. It is a case where we find ourselves in a situation that the money of Greater Noida and Noida Authorities has not been paid, buyers have also been duped. Other financial institutions have not been paid. Construction has not been completed. Money paid by buyers has been diverted for the creation of various companies and assets have been created. All these assets are accountable and have to be sold as it is not the independent investment made by these directors. It is a patent and blatant fraud which appears to have been played, the way in which the money has been transacted and creation of companies has taken place in connivance with the CFO, statutory auditors. It was also pointed out that there are various related companies in which money has been transferred. We restrain all monetary transactions out of bank accounts or any kind of alienation of the property held by the related group of companies where the money has been siphoned and has been used for the creation of the assets. Any transfer made in any manner shall be illegal, void and inoperative.

20. It is also necessary in order to find out the actual amount invested in building activities, out of the funds collected. It also appears that certain companies were created only for the purpose of purchasing raw materials. Whether actual transactions of purchase have taken place is required to be ascertained. Let all the vouchers of the purchase, Bills, orders, etc., which are in possession of Amrapali Group of Companies and the estimates of various raw materials for each and every building without which construction of a building is not possible to be undertaken to be positively handed over to the forensic auditors within a week. We also request the forensic auditors to propose how the actual valuation of the buildings constructed so far by the Amrapali Group of Companies on the spot can be made so as to ascertain the actual investments made and extent of diversion. Let the estimate and quantities of the bills be also furnished by Amrapali Group to the forensic auditors along with the names of all the suppliers and mode of payment. They may also collect information/documents from suppliers."

10. The Forensic Auditors in their report found that Rs.140 Crores had been parked with M/s J.P. Morgan. The shares of the Amrapali Zodiac were purchased for Rs.140 Crores by two sham companies i.e. M/s. Neelkanth and M/s. Rudraksha, whose Directors, were, Chandan Kumar, a peon in the office of co-accused Mr. Anil Mittal and his nephew Vivek Mittal, who was doing petty job for monthly income of Rs.15,000 only. In respect of this fraud, the Supreme Court had observed as under:

"As inability was expressed on behalf of M/s. J.P. Morgan as well as other counsel to explain the report dated 23.10.2013 submitted by Mr. Sudit K. Parikh & Co., Chartered Accountants. In the circumstances, so as to find out the basis of the valuation, it is necessary to call Mr. Sudit K. Parikh [Address : Ballard House, 2nd Floor, Adi Marzban Path, Ballard Pier, Fort, Mumbai – 400 001] to explain the valuation report on the basis of which Rs. 140 crores had been withdrawn by M/s. J.P. Morgan. Let the Registry send a communication to Mr. Sudit K. Parikh to appear before this Court on the next date of hearing.

It was pointed out that shares of Amrapali Zodiac were ultimately purchased for Rs.140 crores by M/s Neelkanth and M/s Rudraksha. It is pointed out by forensic auditors that there are two persons, namely, Chandan Kumar, who is a peon of Mr. Anil Mittal, Statutory Auditor, and working in his office and another one is Vivek Mittal, who is the nephew of Mr. Anil Mittal, and is doing petty jobs of sub- contractors and having a monthly income of Rs.15,000/-. It is stated by the learned counsel appearing on behalf of M/s J.P. Morgan that in one company, Chandan Kumar and Atul Mittal were Directors. M/s

Neelkanth and M/s Rudraksha are the private limited companies in which the abovementioned persons are named as Directors. They are not having the capacity to give an amount of Rs,140 Crores to be paid to M/s J.P. Morgan.

This is a serious kind of fraud apparent from the aforesaid facts. On being asked, Mr. Anil Kumar Sharma has shown reluctance to disclose about Atul Mittal, who was the Director of M/s Rudraksha along with Chandan Kumar. It is apparent that it was not a fair transaction of sale. That fact is required to be gone into. Let Mr. Anil Mittal and Directors of Amrapali Zodiac and Mr. Anil Sharma explain the situation by filing their personal affidavits from where the money came to be paid to M/s J.P. Morgan, who managed the money and how the companies were framed and for what purpose."

11. The summary of report of Forensic Auditors had been noted by the Supreme Court in paragraph-61 of the order dated 23rd July, 2019 passed in Writ Petition (C) No.940 of 2017 and other connected petitions. The summary would demonstrate the *modus operandi* of the accused and other co-accused in commission of the offence of this magnitude and extent. It was noted that the funds of the home buyers were diverted to the tune of Rs.5619.47 Crores to other bogus and sham companies, adopting the methods such as payment of professional fees to the Directors, bogus billing, under-valuing flats and brokerage paid against the flats which were not sold and inter corporate deposits given to the related companies. The Supreme Court also noted the blatant violation of several statutory prescriptions such as provisions of RERA, FEMA, Uttar Pradesh Apartments (Promotion of Construction, Ownership and Maintenance) Act, 2010, besides their criminal liability under the IPC and PMLA etc. The Supreme Court ultimately to secure the interest of the flat/home buyers appointed NBCC to complete the projects. The present accused-applicant had given details of companies from which funds were transferred to the extent of Rs.2996 Crores to the different group of companies. The Supreme Court directed the Enforcement Directorate to make investigation in accordance with law and submit reports quarterly to the Supreme Court about the money laundering aspect. In paragraph-154 of the aforesaid judgment, sleeve of directions had been issued, including to the NBCC, Noida and Greater Noida Authorities and Banks etc., which are as follows:-

(i) The registration of Amrapali Group of Companies under RERA shall stand cancelled;

(ii) *The various lease deeds granted in favour of Amrapali Group of Companies by Noida and Greater Noida Authorities for projects in question stand cancelled and rights henceforth, to vest in Court Receiver;*

(iii) *We hold that Noida and Greater Noida Authorities shall have no right to sell the flats of the home buyers or the land leased out for the realization of their dues. Their dues shall have to be recovered from the sale of other properties which have been attached. The direction holds good for the recovery of the dues of the various Banks also.*

(iv) *We have appointed the NBCC to complete the various projects and hand over the possession to the buyers. The percentage of commission of NBCC is fixed at 8 percent.*

(v) *The home buyers are directed to deposit the outstanding amount under the Agreement entered with the promoters within 3 months from today in the Bank account opened in UCO Bank in the Branch of this Court. The amount deposited by them shall be invested in the fixed deposit to be disbursed under the order of this Court on phase-wise completion of the projects/work by the NBCC.*

(vi) *In view of the finding recorded by the Forensic Auditors and fraud unearthed, indicating prima facie violation of the FEMA and other fraudulent activities, money laundering, we direct Enforcement Directorate and concerned authorities to investigate and fix liability on persons responsible for such violation and submit the progress report in the Court and let the police also submit the report of the investigation made by them so far.*

(vii) *We direct the Institute of Chartered Accountants of India to initiate the appropriate disciplinary action against Mr. Anil Mittal, CA for his conduct as reflected in various transactions and the findings recorded in the order and his overall conduct as found on Forensic Audit. Let appropriate proceedings be initiated and concluded as early as possible within 6 months and a report of action taken to be submitted to this Court.*

(viii) *We direct various Companies/ Directors and other incumbents in whose hands money of the home buyers is available as per the report of Forensic Auditors, to deposit the same in the Court within one month from today and to do the needful in the manner as observed. The last opportunity of one month is granted to deposit the amount and to do the needful failing which appropriate action shall be taken against them.*

(ix) *Concerned Ministry of Central Government, as well as the State Government and the Secretary of Housing and*

Urban Development, are directed to ensure that appropriate action is taken as against leaseholders concerning such similar projects at Noida and Greater Noida and other places in various States, where projects have not been completed. They are further directed to ensure that projects are completed in a time-bound manner as contemplated in RERA and home buyers are not defrauded.

(x) We appoint Shri R. Venkataramani, learned Senior Advocate, as the Court Receiver. The right of the lessee shall vest in the Court Receiver and he shall execute through authorized person on his behalf, the tripartite agreement and do all other acts as may be necessary and also to ensure that title is passed on to home buyers and possession is handed over to them.

(xi) We also direct Noida and Greater Noida Authorities to execute the tripartite agreement within one month concerning the projects where homebuyers are residing and issue completion certificate notwithstanding that the dues are to be recovered under this order by the sale of the other attached properties. Registered conveyance deed shall also be executed in favour of homebuyers, they are to be placed in the possession and they shall continue to do so in future on completion of projects or in part as the case may be. We direct the Noida and Greater Noida Authorities to take appropriate action to do the needful in the matter. The Water Works Department of the concerned area and the Electricity Supplier are directed to provide the connections for water and electricity to home buyers forthwith.

12. In view of the finding recorded by the Forensic Auditors and fraud unearth, looking at the *prima facie* violation of the FEMA and other fraudulent activities of money laundering, the Supreme Court directed the Enforcement Directorate and concerned authorities to investigate and fix liability on persons responsible for such violation and submit progress report to the Court. The police was also directed to submit a report of investigation made by them.

13. Thus, it is evident that but for the Supreme Court intervention, at expenses and cost of its valuable time, efforts and labour, the thousands of flat buyers would have been left high and dry by the promoters of the Amrapali Group of Companies in which the present accused-applicant has been the Managing Director throughout and, is the king-pin of the fraud, cheating, diversion of funds, money-laundering, violation of FEMA etc. The Supreme Court with great efforts has been able to protect the interest of the flat buyers and directed the different investigating agencies and

Statutory Authorities to initiate and take necessary actions, in accordance with law, against the present accused-applicant and other accused.

14. In view of the directions issued by the Supreme Court, the Directorate of Enforcement had undertaken the investigation for offences regarding money-laundering by the accused-applicant and other accused. In view of the directions issued by the Supreme Court, a complaint under Section 3/4 of the PMLA was filed before the Special Judge, PMLA/Sessions Judge, Lucknow. The further investigation to unearth the money trail by the accused-applicant and the other accused, is still on. Some details, as unearthed regarding money-laundering and the acquisition of properties from the proceeds of crime, have been given in the complaint.

15. Heard Sri Manoj Singh, Mr. Pranshu Agarwal and Mohd. Yasir Abbasi, learned counsels appearing for the accused-applicant and Sri Shiv P. Shukla, learned counsel appearing for the Enforcement Directorate.

16. It would be evident from the facts, as noted above, that but for the Supreme Court's intervention and undertaking painful and strenuous exercise to secure and protect the interest of innocent home/flat buyers, the fraud played by the accused-applicant and other accused in cheating and defrauding thousands innocent home/flat buyers of their hard earned money, could not have been unearthed. The Supreme Court is monitoring the investigation. The Supreme Court had been in pain to note the conduct of the accused-applicant and other accused. They had even violated the Supreme Court orders and did not comply the directions issued on several occasions. The forensic auditors appointed by the Supreme Court had meticulously flagged the fraud and cheating by the accused-applicant and other co-accused in creating bogus and sham companies and diversion of funds of the flat buyers money and creating assets etc.

17. PMLA is a special statute enacted by Parliament for dealing with money laundering. Section 5 of the Cr.P.C. clearly lays down that the provisions of Cr.P.C. will not affect any special statute or any local law. In other words, the provisions of the special statute will prevail over the general provisions of the Cr.P.C. in case of any conflict.

18. The economic crime of such scale and magnitude are carefully and meticulously planned and executed. It is well settled that economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. While granting bail, the court has to keep in mind the

nature of accusations, magnitude and gravity of offence and nature of evidence in support of the accusations.

19. The Supreme Court in the case of ***Y.S. Jagan Mohan Reddy vs CBI: (2013) 7 SCC 439*** in paras 34 and 35 in respect of granting bail in economic offences having deep rooted conspiracy and large public money involved has held as under:-

"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. 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."

20. The Supreme Court in the case of ***Nimmagadda Prasad vs CBI: (2013) 7 SCC 466*** has observed that the alarming rise in white collar crimes has affected the fiber of country's economic structure. Economic offences have serious repercussions on the development of the country as a whole. Economic offences constitute a class apart and a different approach has to be adopted in the matter of bail. Para 23 to 25 of the aforesaid judgment are extracted hereinbelow:-

"23. Unfortunately, in the last few years, the country has been seeing an alarming rise in white-collar crimes, which has affected the fibre of the country's economic structure. Incontrovertibly, economic offences have serious repercussions on the development of the country as a whole. In State of Gujarat v. Mohanlal Jitmalji Porwal [(1987) 2 SCC 364 : 1987 SCC (Cri) 364] this Court, while considering a request of the prosecution for adducing additional evidence, inter alia, observed as under: (SCC p. 371, para 5) "5. ... The entire community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the community. A disregard for the interest of the community can be manifested only at the cost of forfeiting the trust and faith of the community in the system to administer justice in an even-handed manner without fear of criticism from the

quarters which view white-collar crimes with a permissive eye unmindful of the damage done to the national economy and national interest."

24. 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. It has also to be kept in mind that for the purpose of granting 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 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.

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

21. In judgment rendered in the case of ***State of Bihar Vs. Amit Kumar (2017) 13 SCC 751***, it has been held that while considering the bail involving socio-economic offences stringent parameters should be applied.

Paras 8-9 of the said judgment are extracted hereunder:-

"8. A bare reading of the order impugned discloses that the High Court has not given any reasoning while granting bail. In a mechanical way, the High Court granted bail more on the fact that the accused is already in custody for a long time. When the seriousness of the offence is such the mere fact that he was in jail for however long time should not be the concern of the courts. We are not able to appreciate such a casual approach while granting bail in a case which has the effect of undermining the trust of people in the integrity of the education system in the State of Bihar.

9. We are conscious of the fact that the accused is charged with economic offences of huge magnitude and is alleged to be the kingpin/ringleader. Further, it is alleged that the respondent-accused is involved in tampering with the answer sheets by illegal means and interfering with the examination system of Bihar Intermediate Examination, 2016 and thereby securing top ranks, for his daughter and other students of Vishnu Rai College, in the said examination. During the investigation when a search team raided his place, various

documents relating to property and land to the tune of Rs 2.57 crores were recovered besides Rs 20 lakhs in cash. In addition to this, allegedly a large number of written answer sheets of various students, letterheads and rubber stamps of several authorities, admit cards, illegal firearm, etc. were found which establishes a prima facie case against the respondent. The allegations against the respondent are very serious in nature, which are reflected from the excerpts of the case diary. We are also conscious of the fact that the offences alleged, if proved, may jeopardise the credibility of the education system of the State of Bihar."

22. Further, the aforesaid view has been reiterated in the case of **Rohit Tandon vs Directorate of enforcement (2018) 11 SSC 46**. Paras 21 and 22 of the aforesaid judgement read as under:-

"21. The consistent view taken by this Court is that 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. 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.

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 [Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra, (2005) 5 SCC 294 : (2005) SCC (Cri) 1057] and State of Maharashtra v. Vishwanath Maranna Shetty [State of Maharashtra v. Vishwanath Maranna Shetty, (2012) 10 SCC 561 : (2013) 1 SCC (Cri) 105] 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.

23. The Supreme Court in its judgment in ***Serious Fraud Investigation Office Vs. Nitin Johri and another, (2019) 9 SCC 165***, while considering the factors to be taken into account while considering the bail involving serious economic offences in para 24-27 has held as under:-

"24. At this juncture, it must be noted that even as per Section 212(7) of the Companies Act, the limitation under Section 212(6) with respect to grant of bail is in addition to those already provided in CrPC. Thus, it is necessary to advert to the principles governing the grant of bail under Section 439 of CrPC. Specifically, heed must be paid to the stringent view taken by this Court towards grant of bail with respect of economic offences. In this regard, it is pertinent to refer to the following observations of this Court in Y.S. Jagan Mohan Reddy [Y.S. Jagan Mohan Reddy v. CBI, (2013) 7 SCC 439 : (2013) 3 SCC (Cri) 552] : (SCC p. 449, paras 34-35)

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

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

*This Court has adopted this position in several decisions, including **Gautam Kundu v. Directorate of Enforcement [Gautam Kundu v. Directorate of Enforcement, (2015) 16 SCC 1 : (2016) 3 SCC (Cri) 603]** and **State of Bihar v. Amit Kumar [State of Bihar v. Amit Kumar, (2017) 13 SCC 751 : (2017) 4 SCC (Cri) 771]**. Thus, it is evident that the above factors must be taken into account while determining whether bail should be granted in cases involving grave economic offences.*

25. As already discussed supra, it is apparent that the Special Court, while considering the bail applications filed by Respondent 1 both prior and subsequent to the filing of the investigation report and complaint, has attempted to account not only for the conditions laid down in Section 212(6) of the Companies Act, but also of the general principles governing the grant of bail.

26. In our considered opinion, the High Court in the impugned order has failed to apply even these general principles. The High Court, after referring to certain portions of the complaint to ascertain the alleged role of Respondent 1, came to the conclusion that the role attributed to him was merely that of colluding with the co-accused promoters in the

commission of the offence in question. The Court referred to the principles governing the grant of bail as laid down by this Court in Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra [Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra, (2005) 5 SCC 294 : 2005 SCC (Cri) 1057] , which discusses the effect of the twin mandatory conditions pertaining to the grant of bail for offences under the Maharashtra Control of Organised Crime Act, 1999 as laid down in Section 21(4) thereof, similar to the conditions embodied in Section 212(6)(ii) of the Companies Act. However, the High Court went on to grant bail to Respondent 1 by observing that bail was justified on the "broad probabilities" of the case.

27. In our considered opinion, this vague observation demonstrates non-application of mind on the part of the Court even under Section 439 CrPC, even if we keep aside the question of satisfaction of the mandatory requirements under Section 212(6)(ii) of the Companies Act."

24. Section 45 of PMLA starts with a non obstante clause which indicates that the provisions laid down in Section 45 of PMLA will have overriding effect on the general provisions of the Code of Criminal Procedure in case of conflict between them. Section 45 PMLA imposes the following two conditions for grant of bail to any persons accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule to PMLA:

(i) That the prosecutor must be given an opportunity to oppose the application for bail; and

(ii) That the court must be satisfied that there are reasonable grounds for believing that the accused persons is not guilty of such offence and that he is not likely to commit any offence while on bail.

25. The Supreme Court in the case of **Gautam Kundu Vs. Directorate of Enforcement (Prevention of Money Laundering Act), Government of India**, (2015) 16 SCC 1 in paragraphs 28, 29 and 30 while dealing with the provisions of bail under Section 45 of the PMLA held as under :-

"28. Before dealing with the application for bail on merit, it is to be considered whether the provisions of Section 45 of PMLA are binding on the High Court while considering the application for bail under Section 439 of the Code of Criminal Procedure. There is no doubt that PMLA deals with the offence of money-laundering and Parliament has enacted this law as per commitment of the country to the United Nations General Assembly. PMLA is a special statute enacted by Parliament for dealing with money-laundering. Section 5 of the Code of Criminal Procedure, 1973 clearly lays down that the provisions of the Code of Criminal Procedure will not

affect any special statute or any local law. In other words, the provisions of any special statute will prevail over the general provisions of the Code of Criminal Procedure in case of any conflict.

29. Section 45 of PMLA starts with a non obstante clause which indicates that the provisions laid down in Section 45 of PMLA will have overriding effect on the general provisions of the Code of Criminal Procedure in case of conflict between them. Section 45 of PMLA imposes the following two conditions for grant of bail to any person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule to PMLA:

(i) That the prosecutor must be given an opportunity to oppose the application for bail; and

(ii) That the court must be satisfied that there are reasonable grounds for believing that the accused person is not guilty of such offence and that he is not likely to commit any offence while on bail.

30. The conditions specified under Section 45 of PMLA are mandatory and need to be complied with, which is further strengthened by the provisions of Section 65 and also Section 71 of PMLA. Section 65 requires that the provisions of CrPC shall apply insofar as they are not inconsistent with the provisions of this Act and Section 71 provides that the provisions of PMLA shall have overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. 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 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."

26. The Supreme Court in the case of ***Nikesh Tarachand Shav Vs. Union of India***, (2018) 11 SCC 1 has struck down two conditions under Section 45 of the PMLA as unconstitutional. Subsequently, Section 45 has been amended by Amendment Act 13 of 2018. The words “*imprisonment for a term of imprisonment of more than three years under Part A of the Schedule*” has been substituted with “*accused of an offence under this Act...*”. Section 45 prior to Nikesh Tarachand (supra) and post Nikesh Tarachand (supra) reads as under:

Section 45 — Prior to Nikeshtarachand Shah Section 45 — Post Nikeshtarachand Shah

“45. Offences to be cognizable and non-bailable.—(1) Notwithstanding 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:”

“45. Offences to be cognizable and non-bailable.—(2) 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:”

(emphasis supplied)

27. The object of PMLA is to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering. Section 44 of the PMLA confers jurisdiction on special court to deal with the offences under PMLA. Section 45 of the PMLA makes the

offence of money laundering cognizable and non-bailable notwithstanding anything contained in Code of criminal Procedure, 1973. Money laundering is a serious economic offence and serious threat to the national economy and national interest and, these offences are committed with cool calculation with the motive of personal gain regardless of the consequences on the society.

28. Considering the order dated 23.7.2019 passed by the Supreme Court in Writ Petition (C) No.940 of 2017, in which involvement of the accused in offence has been meticulously flagged, his conduct before the Supreme Court and, the fact that the investigation is still on and money trail has to be completely unearthed, it would not be appropriate to enlarge the accused on bail. Therefore, the plea for bail is refused and the bail application is *rejected*.

(Dinesh Kumar Singh, J.)

Order Date: 09.12.2020

MRP/-