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

Judgment reserved on : 27.09.2022
Judgment pronounced on: 08.12.2022

\+ **BAIL APPLN. 2409/2022 & CRL.M.(BAIL) 957/2022**

SANJAY PANDEY ..... Petitioner

Through: Mr. Akhil Sibal, Sr. Advocate with Mr. Aditya Wadhwa, Mr. Siddharth Sunil, Mr. Shivansh Agarwal, Mr. Pranay Mohan, Ms. Sanya Kumar and Mr. Ranbir Singh, Advocates

versus

DIRECTORATE OF ENFORCEMENT ..... Respondent

Through: Mr. S.V. Raju, Ld. ASG with Mr. Zoheb Hossain, Mr. Vivek Gurnani, Mr. Ankit Bhatia, Advocates with Mr. Sushant, EO, ED

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

JASMEET SINGH, J.

1. This is BAIL APPLN. 2409/2022 to enlarge the applicant on regular bail in ECIR/DLZO-I/28/2022 registered on the basis of FIR bearing RC No. 2212022E0030 registered by CBI/EO-III/Delhi.

2. It has been stated that the Ministry of Home Affairs on 19.05.2022

and 20.05.2022 sent two communications to Central Bureau of Investigation

(hereinafter referred to as 'CBI') against M/s. ISEC SERVICES PVT. LTD. and Sh. Sanjay Pandey, the applicant herein and :-

(i) Smt. Santosh Pandey;

(ii) Sh. Anand Narayan;

(iii) Sh. Armaan Pandey;

(iv) Sh. Manish Mittal;

(v) Sh. Naman Chaturvedi;

(vi) Sh. Ravi Varanasi;

(vii) Sh. Mahesh Haldipur;

(viii) Sh. Ravi Narain;

(ix) Ms. Chitra Ramkrishna;

(x) Sh. Arun Kumar Singh; and

(xi) Other unknown persons.

3. It is stated that ISEC SERVICES PVT. LTD. in conspiracy with other accused illegally intercepted MTNL lines at National Stock Exchange (hereinafter referred to as 'NSE') between 2009 to 2017 and recorded calls by various NSE officials. The transcript of these calls was thereafter made available by ISEC to NSE officials. No other phone lines outside NSE are alleged to have been recorded or monitored. It is further stated that the telephone monitoring was carried out by ISEC without taking permission of the competent authority as required under Section 5 of the Indian Telegraph Act, 1885 and also it was without the knowledge and consent of NSE employees. It has further been stated that for the work carried out between 2009 to

2017, ISEC was paid a sum of Rs. 4.54 crores by NSE. The FIR No. RC2212022E0030 dated 07.07.2022 was registered on the allegations levelled by CBI under Sections 120-B read with 409 and 420 of the Indian Penal Code, 1860 ("IPC") and Sections 69B, 72, 72A of the Information Technology Act, 2000 ("IT Act") and Sections 20, 21, 24 & 26 of the Indian Telegraph Act, 1885 ("Telegraph Act") and Sections 3 & 6 of the Indian Wireless Telegraphy Act, 1933 and Section 13(2) r/w Section 13(1)(d) of the Prevention of Corruption Act, 1988 ("PC Act") at PS – EO-III, CBI, Delhi.

4. Thereupon, the Directorate of Enforcement has registered the ECIR bearing no. ECIR/DLZO-I/28/2022 on 11.07.2022 allegations of scheduled offences. Pursuant to the FIR, the CBI carried out search in the office premises of ISEC and seized various articles and properties. The CBI also carried out a search of the applicant and seized his mobile phone. The ED arrested applicant on 19.07.2022 and the CBI arrested the applicant on 24.09.2022.

5. The applicant states that in or around 2009, NSE approached ISEC with a request to engage its services for analysis of calls that NSE was recording of its employees. As per ISEC, NSE had been monitoring calls from the landlines installed in its premises since 1997. As per the proposal, NSE was to be provided a hard drive containing pre-recorded call data of its employees and ISEC was required to listen to the data provided by NSE on a weekly basis and submit a report to NSE officials upon analysis thereof. The work required ISEC to flag pre-recorded calls as "suspicious" based on their content and to determine whether there were any system or process vulnerabilities. It

is stated that the information available with the NSE and its employees is very critical, sensitive and has a great potential for misuse. Any leakage of sensitive information could potentially lead to insider or unfair trading allowing persons to make illegal profits and prejudicing the general public and investors.

6. Mr. Akhil Sibal, learned senior counsel, has stated that there is an inherent fallacy in the registration of FIR. The FIR is premised on the fact that the action of ISEC as well as the applicant in recording of calls is illegal. He states that there is no prohibition in law restraining the NSE from recording conversations made on the land lines owned by them and in their premises. He states that there is no dishonest intention by ISEC as call recording was being done by NSE prior to 2009. He states that in 2009, services of ISEC were utilized for pre-existing arrangement of monitoring and analysis of the calls. The applicant entered into a duly signed contract wherein Rs. 4.5 crores were paid for the services rendered by ISEC on which the applicant has duly paid tax. He states that it is not a prohibited activity and the NSE was doing it since 1997. Mr Sibal has taken me through the statements of Mr Mahesh Haldipur and Ms. Suguna Pappaiah in this regard. He states that none of the ingredients of the sections leveled against the applicant make it a cognizable offence. The submission of Mr. Sibal as regards the various charge sections are concerned, is as follows:

Telegraph Act Section 5 reads as under:

*"**5. Power for Government to take possession of licensed***

telegraphs and to order interception of messages. *– (1) On the occurrence of any public emergency, or in the interest of the public safety, the Central Government or a State Government or any officer specially authorized in this behalf by the Central Government or a State Government may, if satisfied that it is necessary or expedient so to do, take temporary possession (for so long as the public emergency exists or the interest of the public safety requires the taking of such action) of any telegraph established, maintained or worked by any person licensed under this Act.*

(2) On the occurrence of any public emergency, or in the interest of the public safety, the Central Government or a State Government or any officer specially authorized in this behalf by the Central Government or a State Government may, if satisfied that it is necessary or expedient so to do in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of an offence, for reasons to be recorded in writing, by order, direct that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order:

Provided that press messages intended to be published in India of correspondents accredited to the Central Government or a State Government shall not be intercepted or detained, unless their transmission has been prohibited under this sub-section."

7. Mr Sibal states that Section 5 applies only to Government and does not apply to a consumer recording its phone calls. He states in the present case, the lines which were recorded belong to NSE and there is no prohibition under Section 5 against the consumer.

8. He states that recording of phone calls of employees of NSE by NSE, at the workplace, on phone lines provided to NSE, by itself, is not an offence as per the Telegraph Act, as:

   (i) The recording device does not constitute a 'telegraph' as defined under Section 3 (1) (AA) of the Indian Telegraph Act; as, of and by itself the said device does not have any capacity for transmission/reception.

   (ii) If every call recording device is a "telegraph" since it is capable of recording sound, it would lead to absurd consequences whereby every recording device capable of recording sound or images, such as a pen-drive, a camera, a recordable compact disk, a personal computer etc. would all fall within the definition of a telegraph, requiring a licence under section 4 of the Act.

   (iii) The ED in its prosecution complaint seeks to assert that such recording was illegal in the absence of permission under Section 5 of the Telegraph Act. This submission is wholly

misplaced as is evident from a bare perusal of Section 5 read with Rule 419A of the Telegraph Act, which prescribes a method through which the Central Government or a State Government can intercept third party communications only on a 'public emergency' or 'in the interest of public safety'. The said provision is specific to interception of third party communications by the State. The licensing scheme does not envisage a private entity obtaining a licence to install a recording device to monitor internal phones on internal lines. The falsity of the submission of the ED is evident from its failure to produce any cogent material in the form of particular guidelines or rules to show that the licensing regime envisages and mandates obtaining such a licence.

(iv) It is submitted that Section 20 of the Telegraph Act which punishes the act of establishing, maintaining or working a Telegraph in violation of the provisions contained in Section 4 of the Telegraph Act cannot be invoked in the facts of the instant case as the device of the applicant is not a telegraph.

(v) He further states that the offence under Section 21 of the Telegraph Act is not attracted as no 'telegraph' has been used to transmit or receive any message contrary to the provisions of the Act. Significantly, if this section applies, then Comtel and Nexsus, who installed the recording equipment at the NSE, and all similar vendors of the call recording equipment and service would also be guilty of the said offence.

(vi) Section 24 of the Telegraph Act punishes breach of Section 23

with intention of learning the contents of any message. Section 23 in turn prohibits intrusion into a signal room or a telegraph office (defined under Rule 2 (tt) of the Indian Telegraph Rules, 1951). Admittedly, no such telegraph office has been intruded upon, and as such this provision is wholly inapplicable.

(vii) Section 26 seeks to regulate, by prescribing penal consequences, the acts of a Telegraph Officer or a person having 'official duties.' No such person is involved in this case, and as such this section is also inapplicable.

(viii) The said FIR of the CBI does not invoke the offence under Section 25 of the Telegraph Act and is not a scheduled offence. The falsity of this position is apparent from Para 20 of the judgment of the Hon'ble Supreme Court in ***R. M. Malkani v. State of Maharashtra, (1973) 1 SCC 471*** wherein it was *inter alia* observed and held that where the owner of the device [a telephone therein] consents to it being recorded, provisions of Section 25 of the Telegraph Act shall not apply; as the same does not constitute 'interception' as required in the Section.

9. Learned senior counsel states that the device of ISEC is not a telegraph. The same is bought and sold in the open market by various vendors. There is no prohibition from the vendors selling the equipment.

10. Mr. Sibal states the provisions of the IT Act are wholly inapplicable for the following reasons:

(i) Section 72 of the IT Act (PMLA Scheduled Offence) only

penalizes wrongdoing by any person acting in pursuance of 'any of the powers conferred under' the IT Act or the rules/regulations made thereunder. Nowhere in the said FIR is it alleged that either ISEC or NSE or the Applicant were acting in pursuance of powers conferred under the IT Act or the rules/regulations made thereunder. Thus, Section 72 of the IT Act has no application.

(ii) Section 72 A of the Information Technology Act is inapplicable since the information collected was not 'personal information', and instead pertained to the internal workings of the NSE. Admittedly, only the work telephones at the NSE were being monitored, and thus there is no occasion for any information relating to personal or of a personal/sensitive nature being misused. In any event there is no allegation made that such information was used to cause 'wrongful loss' or 'wrongful gain'. Section 72-A is bailable and non-cognizable offence and anyways, the applicant had the consent of the owner of the line i.e. NSE.

11. As regards PC Act is concerned, Mr. Sibal submits that the contract is with the NSE. He states that at best even assuming that the contract between the NSE and the applicant is unlawful, there is no dishonest purpose or intention.

12. He states that Section 13(1)(d) read with Section 13(2) of the PC Act (PMLA Scheduled Offences) cannot be invoked as there is no allegation of giving or receiving a bribe or giving of illegal gratification. Nor is this a case of 'criminal misconduct'. This is a

case where the NSE, which is a private company, engaged ISEC to perform a service. Payments were made in lieu of receipt of such services. It is not the case of the prosecution that the contract was entered into to provide a 'pecuniary advantage' to ISEC. Nor is it the case of the prosecution that inflated sums were paid for receipt of such services. Contractual compensation for services rendered cannot, without more amount, amount to a "pecuniary advantage" in terms of the PC Act.

13. He states that provisions of IPC are inapplicable for the following reasons:

(i) Section 420 of the IPC (PMLA Scheduled Offence) is inapplicable in the facts and circumstances of the instant case as the offence necessitates the existence of dishonest inducement [or deception] to deliver any property. The definition of Cheating under Section 415 uses the phrase 'dishonestly or fraudulently' as defined under Section 24 and Section 25 of the IPC, which also necessarily require a dishonest intent to cause a wrongful loss or wrongful gain or an intention to defraud. However, in the present case, the entire work was executed strictly as per the terms of the proposal duly accepted by NSE & awarded to ISEC. The necessary ingredients for an offence of 'Cheating' have not been made out as ISEC was merely executing a commercial contract entered into with NSE. Furthermore, there is no wrongful loss caused to anyone, let alone any wrongful gain.

(ii) The ED has failed to show the nature of such information which

was shared or misused, or intended to be misused, to cause any wrongful loss or wrongful gain. Moreover, such 'customers' have not filed any complaint nor have they been made witnesses in the Complaint.

(iii) He states that Section 409 IPC cannot be invoked because none of these ingredients of sec.409 have been satisfied in the subject FIR. The allegations in the said FIR nowhere make out a case that the dominion or control over the property was acquired by the Applicant herein in the capacity of being a Public Servant.

(iv) He further states that even assuming that call recordings are 'property' within the meaning of Section 409 of IPC, there is no basis to contend that such property was 'misappropriated'. It is a matter of fact that M/s ISEC was merely provided such call data by the NSE, analyzed it, and duly returned them to the NSE. Thus, under no circumstances can it be alleged that these call recordings, even if assumed to be 'property' under section 409 IPC, were misappropriated by M/s ISEC.

(v) He states that under section 120-B of the IPC, there is no illegal act and assuming that there was an illegal act, there is no conspiracy as there is no meeting of minds between the various accused.

14. Learned senior counsel also states that provisions of PMLA are inapplicable as none of the offences alleged in the said FIR (much less scheduled offences as per PMLA) are made out. In such circumstances, there is no occasion to assert the existence of any 'proceeds of crime'; accordingly, no offence of money laundering

within the meaning of Section 3 has been committed.

15. He has further drawn my attention to SEBI circulars which itself mentions for keeping phone recording between a broker and customer. The operative portion of the circular reads as under:

*"**Securities and Exchange Board of India***

CIRCULAR

CIR/HO/MIRSD/MIRSD2/CIR/P/2017/108

September 26, 2017

To

All recognized Stock Exchanges,

Dear Sir / Madam,

Sub: Prevention of Unauthorised Trading by Stock Brokers

I. SEBI in the past has taken several steps to tackle the menace of "Unauthorized Trades" viz Periodic Running Account Settlement, Post transactions SMS/email by exchanges/Depositories, Ticker on broker/DP websites etc. It was observed that in spite of measures taken, a considerable proportion of investor complaints is of the nature of "Unauthorized Trades".

II. The current regulatory requirements in commodity derivative markets require that "The members shall execute the trade of clients only after keeping evidence of the client

placing such order; it could be, interalia, in the form of sound recording." There are no such requirements in Equity, Equity Derivative and Currency Derivative Market side.

III. *To further strengthen regulatory provisions against un-authorized trades and also to harmonise the requirements across markets, it has now been decided that all brokers shall execute trades of clients only after keeping evidence of the client placing such order, it could be, inter alia, in the form of:*

a. Physical record written & signed by client,

b. Telephone recording,

c. Email from authorized email id,

d. Log for internet transactions,

e. Record of SMS messages,

f. Any other legally verifiable record.

When dispute arises, the burden of proof will be on the broker to produce the above records for the disputed trades.

IV. *Further, wherever the order instructions are received from clients through the telephone, the stock broker shall mandatorily use telephone recording system to record the instructions and maintain telephone recordings as part of its records.*

V. *This circular shall be effective with effect from 1st January 2018.*

VI. *The Stock Exchanges are directed to:*

a. bring the provisions of this circular to the notice of the Stock Brokers and also disseminate the same on their websites.

b. make necessary amendments to the relevant bye-laws, rules and regulations for the implementation of the above directions in co-ordination with one another to achieve uniformity in approach.

c. communicate to SEBI, the status of the implementation of the provisions of this circular in their Monthly Development Reports.

VII. *This circular is issued in exercise of powers conferred under Section 11(1) of the Securities and Exchange Board of India Act, 1992 to protect the interest of investors in securities and to promote the development of and to regulate the securities market.*

Yours faithfully,

Debashis Bandyopadhyay

General Manager"

*"**Securities and Exchange Board of India***

CIRCULAR

CIR/HO/MIRSD/MIRSD2/CIR/P/2017/124

November 30, 2017

To
All Recognized Stock Exchanges

Dear Sir / Madam,

Sub: Clarification to Circular on Prevention of Unauthorised Trading by Stock Brokers

1. *SEBI vide circular no. CIR/HO/MIRSD/MIRSD2/CIR/P/2017/108 dated September 26, 2017 has inter-alia specified that brokers shall execute trades of clients only after keeping evidence of the client placing such order. Further, SEBI has made it mandatory to use telephone recording system to record client instructions and maintain telephone recordings wherever the order instructions are received from clients through the telephone.*

2. *Subsequently, SEBI has received representations from stock brokers and their associations expressing operational difficulties caused to stock brokers. Accordingly, in view of operational difficulties faced by stock brokers, it has been decided as under.*

i. *Brokers are required to maintain the records specified at para III of aforementioned circular for a minimum period for which the arbitration accepts investor complaints as notified from time to time, currently three years. However in cases where dispute has been raised, such records shall be kept till final resolution of the dispute.*

ii. *If SEBI desires that specific records be preserved then such records shall be kept till further intimation by SEBI.*

iii. *The above mentioned SEBI circular also prescribes that 'when dispute arises, the burden of proof will be on the broker to produce the above records for the disputed trades'. However for exceptional cases such as technical failure etc. where broker fails to produce order placing evidences, the broker shall justify with reasons for the same and depending upon merit of the same, other appropriate evidences like post trade confirmation by client, receipt/payment of funds/securities by client in respect of disputed trade, etc. shall also be considered.*

3. *The Stock Exchanges are directed to:*

a. Bring the provisions of this circular to the notice of the Stock Brokers and also disseminate the same on their websites.

b. Make necessary amendments to the relevant bye-laws, rules and regulations for the implementation of the above directions.

c. Communicate to SEBI, the status of the implementation of the provisions of this circular in their Monthly Development Reports.

4. *This circular is being issued in exercise of powers conferred under Section 11 (1) of the Securities and Exchange Board of India Act, 1992 to protect the interests of investors in securities and to promote the development of, and to regulate the securities market.*

Yours faithfully,

Debashis Bandyopadhyay
General Manager"

16. Mr Sibal also places reliance on ***G.N. Verma v. State of Jharkhand and Anr., (2014) 4 SCC 282*** to emphasise that rule of construction of penal statutes states that if two possible and reasonable constructions can be put upon a penal provision, the court must lean towards that construction which exempts the subject from penalty rather than the one which imposes penalty. The relevant portion of ***G.N. Verma (supra)*** reads as under:

"24. The law is well settled by a series of decisions beginning with the Constitution Bench decision in W.H. King v. Republic of India that when a statue creates an offence and imposed a penalty of fine and imprisonment, the words of the section must be strictly construed in favour of the subject. This view has been consistently adopted by this Court over the last, more than sixty years."

17. Per contra, Mr. Raju, learned ASG, states that a bare perusal of the FIR and Prosecution Complaint will disclose that under the garb of study of cyber vulnerabilities at NSE, a criminal conspiracy was entered into for telephone tapping without any authorization as required under the Indian Telegraph Act, 1885. The phone calls of employees of NSE were illegally intercepted without their consent or knowledge. The comparison by petitioner of call centres is misleading since there is a due disclosure in call centres and consent is taken prior to monitoring and recording of calls which is absent in this case.

18. He states that Section 3(1AA) of the Indian Telegraph Act, provides for the definition of Telegraph, which will show that telegraph means any apparatus capable of use for reception of signals. The device installed by ISEC recorded all incoming and outgoing calls of all Primary Rate Interface (PRI) lines which are connected to the voice logging system. Investigation has revealed that the PRI lines coming from the service provider were split into two with the help of a splitter. Out of these two lines, one went to the EPBAX and the other went to the Voice Logging System. Therefore, the tapping was done

prior to the line entering the EPBAX at the stage of PRI line coming from MTNL itself which is a clear breach of the Telegraph Act in terms of Section 20 read with section 4 of the Telegraph Act apart from Section 25(b).

19. As per the Prosecution Complaint, the allegation against the applicant is as under: -

"

Name of the accused	**2. <u>SANJAY PANDEY</u>**
Role in the case	*Based upon the investigation conducted, as detailed above, it is clearly established that Sanjay Pandey was playing an active role in iSec Services Private Limited (the company) through out the period 2009 to 2017. Though he has tried to project that he was merely having an advisory and guidance role in the company, however, the factual position as evidenced by the documents available on record and statements of various persons tendered under Section 50 of PMLA, 2002 belie his claims. It is a proven fact that he was deeply and fully involved in all the affairs of the company including monitoring/interception/recording of telephone calls of NSE employees and its nomenclature as 'Periodic Study of Cyber Vulnerabilities'. All the employees were regularly briefing him about the affairs of the company and he was seeking updates from them and also issuing directions for different types of work of the company including the so called Cyber Vulnerabilities Study. It was he who had participated in the discussions with Mr. Ravi Narain and Ms. Chitra Ramkrishna on behalf of the company regarding monitoring/ interception/recording of telephone calls of NSE employees and also the*

	decision to term it as Cyber Vulnerability Studies. The work order dated 03.06.2009 was marked to him. Though initially he tried to mislead the investigation by stating that the call recordings were provided to the company by NSE, however, on sustained interrogation, he admitted that the said call recordings were retrieved by employees of the company, copied in storage media, taken to the office of the company, listened to by a team of employees and were segregated as suspicious calls. The transcripts of such call recordings deemed suspicious by the company employees were prepared and a report was submitted to NSE on a periodic basis along with suspicious call recordings in a storage media. The e-mail communications also prove that the system used for recording the calls between 2009 to 2012 was maintained by the company employees, numbers were hooked by them, ports were monitored by them and regular back up i.e. call recordings were taken out by the employees of the company only. Sanjay Pandey was regularly monitoring the said work and even had prepared and forwarded the call monitoring reports to NSE. He had even issued instructions not to send email regarding it and instead call on his phone. It is also a proven fact that in 2012, iSec Services Private Limited had procured a new and better system for the said illegal activity. Sanjay Pandey was also involved in finalizing the said product and the cost of hardware/software from Nexsus Techno Solutions Private Limited. The said system was got installed by the company at NSE premises. The same was run by its employees. The contents of e-mail dated 1.09.212 from akhtar.inamdar@nexsussolutions.comto naman@ichek.info clearly show that it was decided between iSec Services Private Limited and Nexsus

	Techno Solutions Private Limited for customization of the product which would enable the employee of the company deployed at NSE to choose which lines would be recorded and which won't and also to show the NSE higher-ups which lines are being recorded and which were completely secure. During the brief period in 2012-2013, when the call monitoring work was suspended for a brief period, he was regularly exhorting his employees for resumption of the said work. He held regular meetings with NSE employees including the persons at the helm of affairs for the company's business with NSE including monitoring/interception/recording of telephone calls of NSE employees. It is also an admitted fact that none of the directors of the company were involved in day to day affairs of the company. It has also been admitted by him that he was running the company through his proxies including Mr. Jagdish Dalvi, who though not on the rolls of the company had admitted to having signed documents/proposals on behalf of the company at the behest of Sanjay Pandey. Thus, Sh. Sanjay Pandey is guilty of offence of money laundering as defined in Section 3 of the PMLA, 2002 read with Section 70 ibid as he was directly or indirectly indulging in or knowingly assisting in and was actually involved in all or any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property.

”

20. He states that ISEC and the petitioner herein have caused themselves wrongful gain through a criminal conspiracy with some officials of

NSE to deceive to deliver Rs 4.54 crores for such illegal activity of interception of telephone lines. It is sufficient to show that wrongful gain is caused to the person on account of fraudulent and dishonest representation to NSE. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in ***Tulsi Ram etc. vs. State of Uttar Pradesh, AIR 1963 SC 666 at Para17***, wherein it was held as under:

> *"**17.** But, in an offence under Section 420 IPC a pecuniary question necessarily arises. The first part of Section 464 IPC provides that a person is said to make a false document who dishonestly or fraudulently makes, signs etc. a document with a particular intention and covers cases both of acts which are dishonest and acts which are fraudulent. Where no pecuniary question arises the element of dishonesty need not be established and it would be sufficient to establish that the act was fraudulent and, therefore, it may be, as the learned Judge has held, that where an act is fraudulent the intention to cause injury to the person defrauded must be established. But where the allegation is that a person has dishonestly induced another to part with property something different has to be considered and that is whether he has thereby caused a wrongful loss to the person who parted with property or has made a wrongful gain to himself. These are the two facets of the definition of dishonesty and it is enough to establish the existence of one of them. The law does not require that both should be established. The decision relied upon by learned counsel is, therefore, distinguishable. Learned counsel then referred to the dissenting judgment of Subrahmania Ayyar, J., in Katamraju Venkatarayudu v. Emperor to the effect that in regard to offences falling under Sections 465 and 461 it must be established that the deception involved some loss or risk of loss to the individual and to the public and that it was not enough to show that the deception was intended to secure advantage to the deceived. This decision as well as some other decisions*

referred to by learned counsel are therefore distinguishable for the same reason which distinguishes Sanjiv Ratanappa Ronad's case from the one before us. We are, therefore, of the view, that the offence of cheating has been established."

21. He states that the Information Technology Act is also breached as there is a violation of Sec. 69B(2) read with sub-section 4 since ISEC is not an authorized agency which has been authorized to transmit or receive traffic data or information. He further states that section 72 is also violated since officials of NSE in conspiracy with ISEC have tried to secure access to information without consent of the person concerned and disclosed such information to higher officials of NSE.

22. He states that in the rejoinder of the applicant, an attempt has been made to project that during the period 2012-2017, the telephone trunk lines were not tampered with and that the call recording was being done from a LAN cable using splitter. However, the evidence available with ED shows the falsity of the said claim made by the applicant. In his statement dated 26.08.2022, Sh. Subramaniam Iyer reiterated the contents of his earlier statement dated 26.05.2022 wherein he had stated as follow: -

"*Q6. What is the function of this equipment supplied by you to ISEC Services Private Limited and installed at NSE Office at Bandra Kurla Complex, Mumbai?*

Ans6. It records all incoming and outgoing calls of all Primary Rate Interface (PRI) lines which are connected to the Voice logging System.

Q7. In what manner were these PRI lines connected to the Voice Logging System?

Ans7. The PRI lines coming from the service provider were split into two lines with the help of a splitter. Out of these two lines, one went to the EPABX system of NSE and the other line went to the Voice Logging system."

23. He also states that the above statement clearly shows that the PRI lines itself were split into two lines with the help of a splitter. Additionally, Sh. Subramaniam Iyer had also provided copies of communications exchanged between his company and ISEC Services Private Limited which corroborate the factual position as stated above.

24. He further states that based on the evidence collected so far, it is seen that the applicant by way of criminal activity related to a scheduled offence has indulged in or actually involved in or knowingly assisted in process or activity connected with the proceeds of crime including its acquisition, use and projection thereof as untainted property, thereby, has committed an offence of money-laundering as defined under Section 3 of PMLA, 2002.

25. He further states that investigation in the instant case has revealed the role of the applicant in the commission of the offence of money laundering. Based on the evidence and material in possession against the said applicant, it can be safely concluded that he is involved in the offence of money laundering. Further investigation is being conducted to trace the Proceeds of Crime and crack the modus operandi of the

Accused person(s). Hence, he states that there is sufficient material on record to show that no satisfaction under 45 of the PMLA can be reached.

26. He states that the argument that the scheduled offences in the present case are bailable and non-cognizable is without merit since the offence of money laundering is non-bailable and cognizable and the Hon'ble Supreme Court in ***Vijay Madanlal Chaudhary &Ors. vs. Union of India &Ors. 2022 SCC OnLine SC 929 at Para 406*** has held as under:

> *"406. It was urged that the scheduled offence in a given case may be a non cognizable offence and yet rigors of Section 45 of the 2002 Act would result in denial of bail even to such accused. This argument is founded on clear misunderstanding of the scheme of the 2002 Act. As we have repeatedly mentioned in the earlier part of this judgment that the offence of money-laundering is one wherein a person, directly or indirectly, attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime. The fact that the proceeds of crime have been generated as a result of criminal activity relating to a scheduled offence, which incidentally happens to be a noncognizable offence, would make no difference. The person is not prosecuted for the scheduled offence by invoking provisions of the 2002 Act, but only when he has derived or obtained property as a result of criminal activity relating to or in relation to a scheduled offence and then indulges in process or activity connected with such proceeds of crime. Suffice it to observe that the argument under consideration is completely misplaced and needs to be rejected."*

ANALYSIS:-

27. I have heard learned counsel for the parties.

28. The FIR as well as the Prosecution Complaint in the present case, is premised on the allegation that ISEC illegally intercepted the MTNL lines at the NSE between 2009 & 2017 and recorded calls of various NSE officials. CBI alleges that ISEC was monitoring and analysing such calls and sending periodic reports to the NSE. It is alleged that these acts constitute the underlying scheduled offences. The Enforcement Directorate alleges that the revenue of Rs. 4.54 crores generated by ISEC for providing such services constitutes the 'proceeds of crime' and therefore alleges commission of the offence of money laundering punishable under Section 4 of the PMLA.

29. ISEC is primarily involved in the business of cyber security consulting, which includes conducting audits, preparing policy design and evaluation of cyber security systems and processes.

30. In the year 2009, the NSE entered into a contract with ISEC. ISEC's mandate under this contract was to analyze data and check for cyber vulnerabilities within the NSE. As per the agreed arrangement between NSE and ISEC, NSE would provide ISEC with a hard drive (on a weekly basis) which contained the pre-recorded call data that ISEC was to analyse. ISEC would conclude its analysis and submit its weekly report to the NSE. ISEC would identify and isolate suspicious calls bearing on the issue of data and information security and cyber and process vulnerability. Until 2012, such call-recording took place via a system installed by one M/s Comtel. Subsequently, from the

year 2012, such call-recording was done using a set-up installed by one NEXSUS Techno Solutions Pvt. Ltd. ("NEXSUS").

31. I am *prima facie* of the view that tapping phone lines or recording calls without consent is a breach of privacy. The right to privacy enshrined under Article 21 of the Constitution demands that phone calls not be recorded. Only with consent of the individuals concerned, can such activity be carried out otherwise it will amount to breach of the fundamental right to privacy.

32. The Apex Court in ***K.S. Puttaswamy v. Union Of India (2017) 10 SCC 1*** holds right to privacy inheres in every individual as a natural right. It is inalienable and attached to every individual as a pre-condition for being able to exercise their freedom. The Apex Court held that "*Privacy is a concomitant of the right of the individual to exercise control over his or her personality. It finds an origin in the notion that there are certain rights which are natural to or inherent in a human being. Natural rights are inalienable because they are inseparable from the human personality. The human element in life is impossible to conceive without the existence of natural rights…*"The Supreme Court also discussed the right to privacy with respect to protection of informational privacy and the right to preserve personal reputation. The court held that the law must provide for data protection and regulate national security exceptions that allow for interception of data by the State.

33. The nine-judge bench of the Supreme Court in ***Puttaswamy (supra)*** whilst unanimously recognizing right to privacy as an intrinsic part of the right to life and personal liberty under Article 21 of the

Constitution also enunciated that the right was not absolute but allowed for restriction where the restriction is was provided by law, corresponds to a legitimate aim of the State and is proportionate and necessary to the objective it sought to achieve.

34. I have gone through the Status Report dated 14.09.2022 filed by CBI in the quashing petitions viz., CRL. M.C 3763/2022 and CRL. M.C 3766/2022 wherein under para 8.1 it is stated that M/s ISEC illegally intercepted the phone calls of employees of NSE by installing illegal machines which act is in contravention of provisions of the Telegraph Act. I am *prima facie* in agreement with the acts being violative of the Telegraph Act, however, the offences under the Telegraph Act are not scheduled offences under PMLA.

35. In the present case, recording or tapping of phone lines by ISEC was not an action of the State. The facets of privacy include right of non-interference with the individual body, protection of personal information and autonomy over personal choices. Consent is essential when it comes to recording phone lines which aspect was disregarded by both NSE and ISEC. However, this aspect need not detain me any further as in the present application, I am only dealing with the bail application of the applicant and not the quashing petition.

36. In the given case, NSE mandates to record conversations since SEBI has mandated brokers to execute trades only after maintaining inter alia telephonic recordings. The same is duly found in the SEBI circulars dated 26.09.2017 and 30.11.2017 which are detailed above. Hence, on one hand, the circulars mandate calls be recorded for the purposes of adjudication of disputes while on the other hand, it

prosecutes for complying with the circulars.

37. The scheduled offences against the applicant are the following:

ACT	SECTION	PUNISHMENT	COGNIZABLE	BAILABLE
IT Act	Section 72	2 years and/or fine	Non-Cognizable	Bailable
IPC	Section 420	1 year (min.) to 7 years (max.) and fine	Cognizable	Non-Bailable
IPC	Section 120-B	6 months and/or fine	Cognizable	Non-Bailable
PC Act	Section 13(2) r/w 13(1)(d)	1 year (min.) to 7 years (max.) and fine	Cognizable	Non-Bailable

38. For the purposes of deciding the present Bail Application, I am only to see the scheduled offences in the FIR. The other offences are not relevant for this bail application and would be subject matter of quashing petitions which are yet to be argued.

39. Section 72 of the IT Act reads as under:

> "***72. Penalty for breach of confidentiality and privacy***
> *Save as otherwise provided in this Act or any other law for the time being in force, if any person who, in pursuance of any of the powers conferred under this Act, rules or regulations made*

thereunder, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information, document or other material to any other person shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both."

40. There are 3 requirements of the mandate of section 72:- 1. Powers must be conferred under the Act; 2. In pursuance of those powers, person must have access to electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned and 3. There has to be disclosure of such electronic record, book, register, correspondence, information, document or other material to any other person by that person.

41. Sec.72 of the IT Act prescribes the penalty for breach of confidentiality and privacy. The language of sec. 72 IT Act categorically states that it penalises only persons acting "*in pursuance of any of the powers conferred under*" the IT Act or the rules or regulations made thereunder. In the present case, the prosecution under PMLA seems to be predicated on the fact that by tapping the telephone lines of the employees of NSE, the applicant has secured access to electronic record without the consent of that person and is punishable. However, the key words in section 72 IT Act state that the person who secures access to electronic record, book, register,

correspondence, information, document or other material has to be in pursuance of powers conferred under the Act or rules and regulations made thereunder.

42. The applicant is not a person who has any powers conferred under the act (or was acting in pursuance thereof) or any rules or regulations made thereunder. ISEC was recording conversations pursuant to the contractual obligations with NSE. Thus, Section 72 of the IT Act cannot be invoked in the present matter.

43. No offence under section 72 of the IT Act is made out because firstly, the Applicant or ISEC had never been conferred with any powers in terms of the IT Act or rules and regulations made therein and secondly, there is no allegation in the FIR or the Prosecution Complaint that the Applicant or ISEC was acting in pursuance of powers conferred under the IT Act or rules and regulations made therein.

44. The act of tapping and recording phone calls without consent of the concerned person can be penalised under various sections of the Indian Telegraph Act and Indian Wireless Telegraphy Act but the offences under the said statutes are not scheduled offences. On the other hand, invocation of sec. 72 of the IT Act is only limited to breach of confidentiality and privacy, which offence has not been made out.

45. As regards offences under the IPC are concerned, I am of the opinion that *prima facie* the ingredients of the alleged offences are not made out in the present case.

46. The scheduled offences under section 120B read with 409 and 420 IPC are not made out. NSE and ISEC, both knew the purport of the agreement and obligations of the contracting parties was clear from the beginning. ISEC did not induce or deceive NSE to part with money. Section 409 IPC reads as under:

> "***409. Criminal breach of trust by public servant, or by banker, merchant or agent.—****Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with* [1]*[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*"

47. For an offence of criminal breach of trust under section 409 IPC to have been committed, the following ingredients need to be satisfied:

a. Entrustment of property;
b. Dishonest misappropriation or conversion to own use or dishonest use or disposal of that property;
c. Such entrustment/misappropriation should be carried out by an individual in her/his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent.

48. The allegations in the prosecution case nowhere make out a case that the dominion or control over the property was acquired by the Applicant herein in the capacity of being a Public Servant.

49. Section 409 of the IPC cannot be invoked in the facts of the instant case as a necessary ingredient of the offence of criminal breach of trust (as defined in Section 405/403 of the IPC) is 'dishonest misappropriation/conversion' to one's own use. There is no allegation that a) the data from the pre-recorded calls was used for any purpose other than the preparation of the Call Monitoring Reports; and b) all sums paid to ISEC by NSE were for services duly rendered under a contract, and as such the payment of such sums have not been 'embezzled' or 'siphoned off' and cannot be said to have been 'misappropriated'.

50. The prosecution case fails to satisfy the ingredients of criminal breach of trust as defined in S. 405 of the IPC, since there is not even a whisper therein of any 'misappropriation' of property. Further, the prosecution case is also completely silent on there being any wilful loss caused to any person either by ISEC or the Applicant.

51. Section 420 IPC is reproduced below:

> "***420. Cheating and dishonestly inducing delivery of property.—****Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is*

capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

52. The essential ingredients of Section 420 IPC as enunciated by the Hon'ble Supreme Court in ***Prof. R.K. Vijayasarathy v. Sudha Seetharam (2019) 16 SCC 739*** are as under :

"19. The ingredients to constitute an offence under Section 420 are as follows:

19.1. i) A person must commit the offence of cheating under Section 415; and

19.2. ii) The person cheated must be dishonestly induced to

(a) deliver property to any person; or

(b) make, alter or destroy valuable security or anything signed or sealed and capable of being converted into valuable security.

20. Cheating is an essential ingredient for an act to constitute an offence under Section 420."

53. The Apex court in ***V.Y. Jose & Anr. v. State of Gujarat, (2009) 3 SCC 78*** observed the pre-requisites for determining offence under Section 420 IPC and more particularly, paragraph 14 which reads as under:

"*14. An offence of cheating cannot be said to be made out*

unless the following ingredients are satisfied:

(i) deception of a person either by making a false or misleading representation or by other action or omission;

(ii) fraudulently or dishonestly inducing any person to deliver any property; or to consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which would not do or omit.

For the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise of representation. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in the absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Penal Code can be said to have been made out."

54. The primary ingredient for sec. 420 IPC (which is a PMLA Scheduled Offence) is the dishonest inducement or deception to deliver any property. Cheating under sec. 415 IPC lays emphasis on the phrase 'dishonestly or fraudulently' thereby meaning that for an offence of cheating to establish, there must be a dishonest intent to cause a wrongful loss or wrongful gain or an intention to defraud. In the present case, there was a business arrangement between ISEC and

NSE by virtue of a contract under which the entire work was being executed.

55. The entire prosecution is silent on the identity of the victim who has suffered a wrongful loss. There is nobody named in the prosecution complaint who has been deceived or cheated. Nobody has been named to whom a wrongful loss has been caused and as to what is the wrongful loss. Except for a bald averment that various customers have been cheated, the complaint is totally silent on the name of the customers, the way and manner that they have been cheated.

56. It is alleged that the 'customers' were cheated as they shared 'information' only under an assumption that the same would not be recorded. However, the ED has failed to show the nature of such information which was shared or misused, or intended to be misused, to cause any wrongful loss or wrongful gain. Moreover, no 'customers' have filed any complaint or been made witnesses in the Complaint.

57. Section 120B of IPC reads as under:

> "***120B. Punishment of criminal conspiracy. —***
>
> *(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, [2][imprisonment for life] or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.*

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both."

58. The offence under section 120-B IPC (which is also a PMLA scheduled offence) is also not made out in so far as the criminal intent i.e., agreement to do an illegal act as defined under sec.120-A IPC is not established. NSE has been involved in call-recording since 1997 through other vendors such as M/s Comtel, prior to ISEC being brought into the picture to analyse recorded calls. Since call recording was being done prior to the arrival of ISEC, there is no criminal conspiracy entered into between ISEC and NSE with the intention of committing an illegal act, namely, call recording. Thus, the element of criminal intent is not made out in the present case and no offence under section 120 B read with 409 and 420 IPC is established.

59. In addition, even though 120B IPC is a standalone scheduled offence under PMLA, in the present case, the offences under section 120B is alleged along with section 409 and 420 IPC. It has been stated in para 3 of the Prosecution Complaint that 120B is read with 420 IPC:

***"3. Brief facts of the offence/ allegation/ charge/ amount involved under PMLA**:*

a. That an investigation under PMLA was initiated vide F. No. ECIR/DLZO-I/28/2022 in Enforcement Directorate, Delhi Zone-I and is under investigation in Delhi Zone-I.

The LEA case of predicate offence vide RC2212022E0030 dated 07.07.2022 ***under Sections 120B r/w 409 & 420 of IPC, 1860,*** *Section 20,21,24 & 26 of Indian Telegraph Act, 1885, Section 3 & 6 of Indian Wireless Telegraphy Act, 1933, Section 13(2) r/w 13(1) (d) of Prevention of Corruption Act, 1988 and Section 69B, 72 & 72A of Information Technology Act, 2000, is pending investigation with EO-III, Central Bureau of Investigation, New Delhi against M/s iSec Services Private Limited, B-1/1810, Vasant Kunj, New Delhi, Ms. Santosh Pandey, Director, iSec Services Private Limited, Mr. Anand Narayan, Director, iSec Services Private Limited, Mr. Armaan Pandey, Ex-Director, iSec Services Private Limited, Mr. Manish Mittal, Ex-Director, iSec Services Private Limited, Mr. Sanjay Pandey, Ex-Director, iSec Services Private Limited, Mr. Naman Chaturvedi, Sr. Information Security Analyst, iSec Services Private Limited, Mr. Ravi Varanasi, the then Executive Vice President, NSE, Mumbai, Mr. Mahesh Haldipur, the then Head (Premises), NSE, Mumbai, Mr. Ravi Narain, the then MD, NSE, Mumbai, Ms. Chitra Ramkrishna, the then DMD, NSE, Mumbai, Mr. Arun Kumar Singh of iSec Services Private Limited and unknown Persons."*

60. In the Reply dated 07.09.2022 filed by the Respondent, it has been stated as under:

"*IV. The Central Bureau of Investigation registered FIR/RC bearing no. RC2212022E0030 dated 07.07.2022 inter-alia for the commission of offences punishable u/s* ***section 120B r/w 409 & 420 of IPC, 1860,*** *Section 20, 21, 24 & 26 of Indian Telegraph Act, 1885, Section 3 & 6 of Indian Wireless Telegraphy Act, 1933, Section 13(2) r/w 13(1)(d) of Prevention of Corruption Act,1988 and Section 69B, 72 & 72A of Information Technology Act, 2000 at EO-III, CBI, New Delhi against M/s iSec Private Limited and other accused including Sh. Sanjay Pandey, regarding illegal interception/monitoring of telephone calls of NSE employees."*

61. The remand application filed by the ED dated 20.07.2022 also reads section 120B to be read with 420 IPC. The relevant portion reads as under:

"*2. The Central Bureau of Investigation registered FIR/RC bearing no. RC2212022E0030 dated 07.07.2022 inter-alia for the commission of offences punishable u/s* ***section 120B r/w 409 & 420 of IPC, 1860,*** *Section 20, 21, 24 & 26 of Indian Telegraph Act, 1885, Section 3 & 6 of Indian Wireless Telegraphy Act, 1933, Section 13(2) r/w 13(1)(d) of Prevention of Corruption Act,1988 and Section 69B, 72 & 72A of Information Technology Act, 2000 at EO-III, CBI, New Delhi against M/s iSec Private Limited and other accused including*

Mr. Sanjay Pandey, regarding illegal interception/ monitoring of telephone calls of NSE employees."

62. In fact, the ED whilst seeking further remand custody of the applicant has stated under para 4 that 120 B is read with 420 IPC:

"4. *The Central Bureau of Investigation registered FIR/RC bearing no. RC2212022E0030 dated 07.07.2022 inter-alia for the commission of offences punishable u/s* ***section 120B r/w 409 & 420 of IPC, 1860,*** *Section 20, 21, 24 & 26 of Indian Telegraph Act, 1885, Section 3 & 6 of Indian Wireless Telegraphy Act, 1933, Section 13(2) r/w 13(1)(d) of Prevention of Corruption Act,1988 and Section 69B, 72 & 72A of Information Technology Act, 2000 at EO-III, CBI, New Delhi against M/s iSec Private Limited and other accused including Mr. Sanjay Pandey, regarding illegal interception/ monitoring of telephone calls of NSE employees."*

63. Hence, *prima facie*, for the reasons stated above, ingredients of section 120B read with section 409 and 420 IPC have not been made out in the present case.

64. The prerequisite for the offence under Section 13 (1)(d) of the PC Act is demand or request of a valuable thing or pecuniary advantage from the public servant. Section 13(1)(d) and 13(2) of PC Act (pre-amended) is reproduced below:

"***13. Criminal misconduct by a public servant.—***

(1) A public servant is said to commit the offence of criminal misconduct,—

…

(d) if he,—

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest; or

…

(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than one year but which may extend to seven years and shall also be liable to fine."

65. In ***A. Subair v. State of Kerala, (2009) 6 SCC 587*** and ***C.K. Jaffer Sharief v. State (2013) 1 SCC 205***. The Apex court in ***A. Subair (supra)*** culled out the essential ingredients for determining offence under Section 13 (1)(d) of PC Act while observing the following:

"*14. Insofar as Section 13(1)(d) of the Act is concerned, its essential ingredients are:*

- *that he should have been a public servant;*

- *that he should have used corrupt or illegal means or otherwise abused his position as such public servant, and*
- *that he should have obtained a valuable or pecuniary advantage for himself or for any other person*."

66. As regards the offences under sec. 13(2) read with 13(1)(d) PC Act are concerned, which are PMLA Scheduled Offences, the same cannot be invoked since there is no allegation in the prosecution case of giving or receiving a bribe or illegal gratification.NSE is a private entity, thus no offences under section 13 of the PC Act, can be said to have been committed over the course of ISEC's contractual dealings with it.

67. This is a case where the NSE, which is a private company, engaged ISEC to perform a service. Payments were made in lieu of receipt of such services. ISEC duly showed amounts in tax returns and paid income tax on said income. Therefore, I find merit in the petitioner's submission that contractual compensation of Rs. 4.54 crores for services rendered cannot amount to a "pecuniary advantage" in terms of the PC Act.

68. No call recordings were ever entrusted to the Applicant on account of his capacity as a 'public servant'. The Applicant was a director of ISEC only from 2003 till 17.05.2006. After resigning, his role was peripheral and supervisory in nature.

69. At the time the NSE entered into a contractual relationship with M/s ISEC in 2009, the Applicant was not holding public office. Thus, under no circumstances can an offence under section 13(1)(d) of the

PC Act be alleged to have been made out. It was subsequently on account of ISEC's successful and satisfactory performance, that NSE was pleased to periodically renew ISEC's contractual mandate**.**

70. After December 2011 (viz. when the Applicant was finally reinstated as a public servant), he has received rental income from ISEC. Post 2011, the Applicant has not received any emoluments from ISEC. Payments received have largely been on account of rent paid to the Applicant. Thus, the applicant has not received any pecuniary advantage.

71. Nothing has been produced before me to demonstrate that the Applicant employed any corrupt or illegal means to obtain a valuable thing or pecuniary advantage for himself. No offence under section 13(1)(d) PC Act can be alleged to have been committed as no presumption treating the receipt of monies as illegal gratification can be drawn.

72. Since ISEC's performance of its obligations was done as per its contract with the NSE and the Applicant did not hold any public office between 2009 and 2011, therefore, there is no question of him abusing 'his position as a public servant'.

73. As per Section 45 PMLA, the two conditions for grant of bail are: (i) public prosecutor has been given the opportunity to oppose the bail and (ii) there are reasonable grounds for believing that the accused is not guilty of the offence and the accused is not likely to commit any offence while on bail.

74. To address the second condition, the ingredients of offence under section 3 PMLA are as under:

- A person who directly or indirectly attempts to indulge or knowingly assists, or knowingly is a party, or is actually involved;
- In any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property.

75. The Hon'ble Supreme Court in ***Vijay Madanlal Choudhary (supra)*** while discussing grant of bail under section 45 PMLA has observed that provisions of PMLA would apply when a person has derived or obtained property as a result of a scheduled offence, and then indulged in any process or activity connected with such property.

76. Since I have *prima facie* given a finding that none of the ingredients of the scheduled offence are made out, the provisions of PMLA are not attracted.

77. I am of the view that in the present case, no scheduled offence is *prima facie* made out, concomitantly there cannot be proceeds of crime having been generated as there is no criminal activity relating to a scheduled offence. This position is in consonance with the dicta of ***Vijay Madanlal Choudhary (supra)*** where the Hon'ble Supreme Court held as under:

> *"**406**.... The fact that the proceeds of crime have been generated as a result of criminal activity relating to a scheduled offence, which incidentally happens to be a*

noncognizable offence, would make no difference. The person is not prosecuted for the scheduled offence by invoking provisions of the 2002 Act, but only when he has derived or obtained property as a result of criminal activity relating to or in relation to a scheduled offence and then indulges in process or activity connected with such proceeds of crime. Suffice it to observe that the argument under consideration is completely misplaced and needs to be rejected."

78. Since none of the ingredients of the scheduled offences viz., Section 72 IT Act, Section 120B r/w 409 and 420 IPC, Section 13(2) read with 13(1)(d) PC Act are made out, there is no occasion to allege acquisition or retention of 'proceeds of crime', which under Section 2(u) of PMLA is defined to mean proceeds arising out of 'scheduled offences.'

79. In view of the above discussion, the Applicant cannot be held to have derived or obtained property as a result of criminal activity relating to or in relation to a scheduled offence.

80. Reliance is placed on ***Vijay Madanlal Choudhary (supra)***wherein the Hon'ble Supreme Court has held that:

*"**388.** ...The successive decisions of this Court dealing with analogous provision have stated that the Court at the stage of considering the application for grant of bail, is expected to 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."(emphasis supplied)*

81. The afore-mentioned judgment clearly provides that at the stage of bail, I am not to determine the guilt of the accused but to only assess the matter on broad probabilities.

82. Hence, there is no likelihood of the Applicant committing an offence under the PMLA if released on bail.

83. On the basis of the material collected and referenced by the ED, the ED has not substantiated that the Applicant has derived or obtained any property as a result of a scheduled offence or indulged in any activity or process relating to that property.

84. I am of the view that according to sec.45 PMLA, *prima facie*, there are reasonable grounds to believe that the Applicant is not guilty of the offence and he is not likely to commit any offence while on bail. I have given an opportunity to the ED to oppose the bail application thereby satisfying the conditions enumerated under 45 PMLA.

85. After hearing of arguments, this Court has been informed of grant of bail by Learned ASJ on 07.11.2022 in *CBI vs. Ravi Narain, Bail*

Matter No. 02/2022 and Bail Matter No. 232/2022 on the humanitarian grounds. The said case is not applicable herein since in my view, the case for bail on humanitarian grounds is not available to the Applicant.

86. For aforesaid reasons, the application is allowed and the applicant is granted bail on the following terms and conditions:

i. The applicant shall furnish a personal bond in the sum of Rs. 1,00,000/- with two sureties in the like amount to the satisfaction of the Trial Court;

ii. The applicant shall appear before the Court as and when the matter is taken up for hearing;

iii. The applicant shall provide his mobile number to the Investigating Officer (IO) concerned, which shall be kept in working condition at all times. The applicant shall not switch off, or change the same without prior intimation to the IO concerned, during the period of bail;

iv. The applicant shall join investigation as and when called by the I.O concerned;

v. In case the applicant changes his address, he will inform the IO concerned and this Court also;

vi. The applicant shall not leave the country during the bail period and surrender his passport, if any, at the time of release before the I.O. concerned;

vii. The applicant shall not indulge in any criminal activity during the bail period;

viii. The applicant shall not communicate with, or come into contact with any of the prosecution witnesses or tamper with the evidence of the case.

87. In view of the above, the bail application is disposed of.

JASMEET SINGH, J

DECEMBER 8th, 2022 / (MS)

HIGH COURT OF DELHI
सत्यमेव जयते