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

Date of decision: 03 May, 2023

\+ BAIL APPLN. 251/2023 & CRL.M.(BAIL) 115/2023, CRL.M.A. 2074/2023, CRL.M.A. 2470/2023

ASHISH MITTAL ..... Petitioner

Through: Mr. N. Hariharan, Senior Advocate with Mr. Tanveer Ahmed Mir, Mr. Shikhar Sharma, Mr. Kartik Venu, Mr. Punya Rekha Angara, Mr. Prateek Bhalla and Mr. Mohammed Qasim, Advocates.

versus

SERIOUS FRAUD INVESTIGATION OFFICE ..... Respondent

Through: Mr. Ajay Digpaul, CGSC for SFIO with Mr Arib Ansari, prosecuter for SFIO, Mr. Harvinder IO for SFIO alongwith Ms. Shivani Sharma, Ms. Ikshita Singh, Mr. Kamal Digpaul and Ms. Swati Kwatra, Advocates.

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI J.

By way of the present petition filed under section 439 of the Code of Criminal Procedure, 1973 ('Cr.P.C.' for short) read with section 212(6) of the Companies Act, 2013, the petitioner seeks regular bail in criminal complaint case bearing Ct. Case No. 990/2022 filed by the respondent/Serious Fraud Investigation Office ('SFIO' for short). The criminal complaint alleges offences under sections

420/120B of the Indian Penal Code 1860 ('IPC' for short), sections 211/628/227/233 of the Companies Act, 1956 ('1956 Act' for short) and sections 129/447/448 of the Companies Act, 2013 ('2013 Act' for short).

2. Notice on this petition was issued on 25.01.2023; whereupon reply has been filed by the SFIO by way of counter affidavit dated 03.02.2023. Both parties have also filed their respective written submissions in the matter.

3. The court has heard Mr. N. Hariharan, learned senior counsel and Mr. Tanveer Ahmed Mir, learned counsel on behalf of the petitioner. The court has also heard Mr. Ajay Digpaul, learned Central Government Standing Counsel on behalf of the SFIO.

BRIEF OVERVIEW

4. M/s. Educomp Solutions Ltd. ('ESL' for short) was incorporated in the year 1994. One Shantanu Prakash was its managing director and his father Jagdish Prakash was a whole-time director. In 2013 ESL faced a severe liquidity crunch for various reasons and had to therefore opt for Corporate Debt Restructuring ('CDR' for short) *vide* Master Restructuring Agreement dated 25.03.2014 ('MRA' for short) signed with the consortium of lenders (banks) led by the State Bank of Patiala (which bank has later merged with State Bank of India).

5. *Vide* order dated 17.08.2018 bearing No. 1/52/2017 the Ministry of Corporate Affairs assigned the investigation into the affairs of ESL to the SFIO. After commencement of investigation against ESL, approval was also obtained for investigation into the affairs of two other companies M/s. Educomp Infrastructure and School

Management Ltd ('EISML' for short) and M/s. Edu Smart Services Pvt. Ltd. ('ESSPL' for short), both of which are subsidiaries of ESL.

6. After a detailed investigation in the matter, the SFIO has filed a prosecution complaint under section 439(2)/436/212 of the 2013 Act, which is the equivalent of a chargesheet, arraigning 70 persons as accused. Of the accused, 15 are corporate entities and 55 are various persons alleged to have been associated with ESL and other subsidiary companies in various ways.

RELEVANT FACTUAL MATRIX

7. The factual matrix that is relevant for purposes of the present petition is that as part of the CDR proposal for ESL, its managing director Shantanu Prakash (A-16 in the prosecution complaint) was required to contribute Rs.240.76 crores *out of his own funds* towards 'promoter contribution'. The allegation goes that instead of investing his own funds towards promoter contribution, Shantanu Prakash siphoned-off Rs. 240.76 crores from ESL and received that money back into his personal bank accounts from some 65 companies/entities through dubious transactions, which money he then showed as promoter contribution towards the CDR process. The allegation accordingly is, that the investment made by Shantanu Prakash as promoter were not his funds; but were funds that Shantanu Prakash had siphoned-off through various companies into his personal accounts, with the intent to deceive investors and CDR lenders; and that Shantanu Prakash had then invested the same as part of the CDR process to fraudulently show that he had fulfilled the conditions.

8. The crux of the offence alleged against the accused persons is therefore, that by round-tripping funds, ESL and some of the other 69 accused (including companies and individuals), have committed 'fraud' as contemplated under section 447 of the 2013 Act, apart from other offences under the 1956 Act and the IPC.

9. The petitioner is arraigned as A-18 in the criminal complaint.

10. In investigation report dated 30.11.2022[1] the SFIO has levelled 11 charges against the petitioner. These have then found their way into the criminal complaint by way of 'findings' of the SFIO. The charges and findings may be collated and summarised in the following extracts from the criminal complaint :

10.1. Commission of fraud in the affairs of the Companies Under Investigation ('CUIs') by using the paper companies (divided in 5 groups); and by siphoning-off funds of CUIs in the accounts of the close associates of Shantanu Prakash, punishable under section 447 of the 2013 Act. The relevant allegations read as under :

> "***Ashish Mittal, Ex-CFO Educomp Group***
>
> *120. Ashish Mittal joined as Vice President (Finance) in ESL on 01.11.2013 and was promoted to CFO of Educomp Group on 26.05.2014. He resigned on 24.02.2018. He had also given professional services to ESL before joining as CFO of Educomp group through his company namely Lotus Risk Management Pvt Ltd during period FY 2009-10 to FY 2012-13. Further, he had also given services to ESSPL through his company Lotus Risk Management Pvt Ltd during period FY 2013-14 to FY 2014-15.*

[1] section 212(15) of the 2013 Act

> *121. Further, Ashish Mittal had received funds of* ***Rs. 5.50 crores*** *in his personal accounts from the Group-I Companies. He failed to prove the genuineness of the funds received.*
>
> *122. Ashish Mittal had signed the financial statements of ESL for F.Y. 2014-15 to 2016-17, knowing the fact that the financials are not reflecting a true and fair view of the affairs the company. He had attended the Joint Lenders Meetings alongwith Shantanu Prakash on behalf of the company.*
>
> *123. During his tenure he had attended the board meetings of ESL as VP (Finance) and CFO of the ESL and EISML in which financials of the company were approved. He was responsible for implementation of the CDR of ESL, EISML and ESSPL.*"

10.2. Commission of fraud by divesting the Asset of ESL (share in Educomp Child Care Private Ltd. now known as Little Millennium Education Private Limited) in favour of Millennium Education and Management Pvt Ltd.; and by using the funds of CUIs to acquire "The Millennium School" through Millennium Education Foundation, punishable under section 447 of the 2013 Act. The relevant allegations read as under :

> "***Ashish Mittal, Ex-Director of LMEPL and Ex-CFO of Educomp Group***
>
> *157. Ashish Mittal joined as Vice President (Finance) in ESL on 01.11.2013 and was promoted to CFO of Educomp Group on 26,05.2014 (resigned on 24.02.2018). He was also director of LMEPL during the period 20.12.2013 to 24.02.2018.*
>
> *158. Ashish Mittal had signed the balance sheets of LMEPL for the F.Y. 2013-14 to 2016-17 and ESL for the period for F.Y. 2014-15 to 2016-17, knowing the fact that the financials are not reflecting a true and fair view of the affairs the*

company. He had attended the Joint Lender Meetings of CDR.

159. As per CDR proposal of ESL, ECCPLL/LMEPL was identified one of the assets to be monetized. He was well aware of the fact that Shantanu Prakash was holding indirectly control of LMEPL through MEMPL and the Millennium School at sector 119 Noida through MEF.

160. Ashish Mittal's wife Poonam Mittal, was the Ex-Director of MEF. He had transferred Rs 1.50 Crore in MEF through his wife Poonam Mittal for construction of school in the name and style of 'The Millennium School'. Out these funds Rs 0.50 Crore was received from Group I companies.

161. He was well aware of the fact that the funds used for acquiring the majority shareholding of LMEPL by MEMPL were siphoned off from ESL, EISML and ESSPL and routed through the entities of Group I & II."

10.3. Commission of fraud by divesting the share in Vidya Mandir Classes Ltd. (VMC), punishable under section 447 of the 2013 Act. The relevant allegations read as under :

"***Ashish Mittal, Ex-CFO of ESL***

209. He joined as Vice President (Finance) in ESL on 01.11.2013 and was promoted to CFO of Educomp Group on 26.05.2014 and resigned on24.02.2018. Ashish Mittal had attended the Joint Lender Meetings of CDR. As per CDR proposal of ESL, VMC was identified one of the assets to be monetized. He was well aware of the fact that Shantanu Prakash was holding indirectly control of VMC by KBESPL..

210. The first tranche of sale of VMC was executed when he was CFO of Educomp group and he was well aware that the funds of Rs. 16.33 Crore were arranged from SDPL, SESPL, Progressive Finlease and Group I companies. Further, he was also aware of Rs. 3 Crore arranged from ESSPL and the same were utilized by ELHPL for payment to ICICI bank. Ashish Mittal, Auditor of KBESPL and Ajit Singh, Account of

KBESPL used to report him. Further, finalization of the books of accounts of KBESPL was done at the premises of ESL at Gurgaon under his supervision."

10.4. Commission of fraud in the sale of Mussoorie International School, punishable under section 447 of the 2013 Act. The relevant allegations read as under :

"***Ashish Mittal, Ex-CFO of ESL***

250. Ashish Mittal joined as Vice President (Finance) in ESL on 01.11.2013 and promoted to CFO of Educomp Group on 26.05.2014 and resigned on 24.02.2018. He was Director (Finance) during period01.04.2017 to 30.06.2017.-

251. Ashish Mittal had attended the Joint Lender Meetings of CDR of EISML. As per CDR proposal of EISML, MIS was identified one of the assets to be monetized. He was well aware of the fact that Shantanu Prakash was holding indirectly control of MIS through SDPL.

252. Ashish Mittal had also attended the board meetings of EISML being CFO of Educomp Group. He was well aware of the fact that the funds arranged to purchase MIS by SDPL were arranged by Shantanu Prakash through ESL, EISML and ESSPL and entities managed and controlled by Shantanu Prakash. He also admitted that Parmjit Gandhi, Director of SDPL is close associate of him and also given services to his (Parmjit Gandhi) entities."

10.5. Criminal conspiracy and cheating by diverting funds of ESL, EISML and EPEL in the form of bogus capital advances with the help of Jubilant Developers & Management Services Private Limited (JDMS), Wens Agro Foods Limited (Wens Agro) SSSK Developers, SSK Developers, OSN Infrastructure & Management Pvt Ltd (OSNIPPL) and OSN Buildwell Pvt Ltd (OSNBPL), punishable under section 420 read with section 120B IPC. The relevant allegations read as under :

"***Ashish Mittal, Ex-CFO Educomp Group***

288. Ashish Mittal joined as Vice President (Finance) in ESL on 01.11.2013 and promoted to CFO of Educomp Group on 26.05.2014 and resigned on 24.02.2018. He was Director (Finance) during period 01.04.2017 to 30.06.2017. He had also given He had also given professional services to ESL before joining as CFO of Educomp group through his company namely Lotus Risk Management Pvt Ltd during period FY 2009-10 to FY 2012-13. Further, he had also given services to ESSPL through his company Lotus Risk Management Pvt Ltd during period FY 2013-14 to FY 2014-15.

289. He was the virtual CFO of OSN Group till 2011-12. He had given services to OSN Group through his firms and he was the connecting link between Educomp Group and OSN Group. Sanjay Saini admitted that OSNIPPL and OSNBPL were formed on the instructions of Ashish Mittal.

290. Further, he used to instruct and direct Sanjay Saini, promoter and director of OSN group regarding the transactions towards to be made. He admitted that during F.Y. 2009-10 to 2011-12 huge amount of capital advances to OSN group to reduce the fictitious debtors in the books of account of ESSPL. He also admitted that fictitious collection agencies were created to route the monies through entry-operators based at Sirsa which was managed by Mahesh Sharda, Ex-Director of ElSML and he also admitted that OSN group was indirectly controlled by Shantanu Prakash through Sanjay Saini.

291. He admitted that EISML and EPEL had given capital advances to JDMS, Wens Agro which were controlled by CA Deepak Jain.

292. He also admitted that he had routed the funds received through his controlled companies into the. bank accounts of ESSPL. This whole process was opted just to clear the bogus debtors of ESL which were transferred to ESSPL."

10.6. Criminal conspiracy and cheating by siphoning-off funds from EISML through acquisition of land located at Hanumangarh, Rajasthan at an inflated price, punishable under section 420 read with section 120B IPC. The relevant allegations read as under :

> "***Ashish Mittal, Ex-CFO of Educomp Group and Virtual CFO of OSN Group***
>
> *324. Ashish Mittal was the virtual CFO of OSN Group before joining the Educomp Group. He alongwith Shantanu Prakash was the controller of OSN Group and his entities namely Ashish Mittal & Co and Lotus Risk Management Pvt Ltd had given services to OSN Group during the period FY 2010-11 to FY 2011-12. He had also given professional services to ESL before joining the Educomp Group through his company namely Lotus Risk Management Pvt Ltd during the period FY 2009-10 to FY 2012-13. Later on, he joined as Vice President (Finance) in ESL on 01.11.2013 and promoted to CFO of Educomp Group on 26.05.2014 and resigned on 24.02.2018. He was Director (Finance) during period 01.04.2017 to 30.06.2017. He had also given professional services to ESL before joining as CFO of Educomp group through his company namely Lotus Risk Management Pvt Ltd during period FY 2009-10 to FY 2012-13. Further, he had also given services to ESSPL through his company Lotus Risk Management Pvt Ltd during period FY 2013-14 to FY 2014-15.*
>
> *325. He was the virtual CFO of OSN Group till 2011-12. He had given services to OSN Group through his firms and was the connecting link between Educomp Group and OSN Group.*
>
> *326. He was well aware of the fact that transactions related to the land development of Hanumangarh Land parcel was done at inflated rate.*
>
> *327. In his statement on oath he confirmed that negotiated prices of land parcels were higher than the normal*

prevailing prices at that time and that it was instructed by Sangeet Gulati, the then CFO of ESL to purchase land at a price significantly higher than the actual price."

10.7. Criminal conspiracy and cheating by siphoning-off funds from EISML through acquisition of land located at Alwar, Rajasthan at an inflated price, punishable under section 420 read with section 120B IPC. The relevant allegations read as under :

"***Ashish Mittal, Ex-CFO of Educomp Group and Virtual CFO of OSN Group-***

341. Ashish Mittal was the virtual CFO of OSN Group before joining the Educomp Group. He alongwith Shantanu Prakash was the controller of OSN Group and his entities namely Ashish Mittal & Co and Lotus Risk Management Pvt Ltd had given services to OSN Group during the period FY 2010-11 to FY 2011-12. He had also given professional services to ESL before joining the Educomp Group through his company namely Lotus Risk Management Pvt Ltd during the period FY 2009-10 to FY 2012-13. Later on, he joined as Vice President (Finance) in ESL on 01.11.2013 and promoted to CFO of Educomp Group on 26.05.2014 and resigned on 24.02.2018. He was Director (Finance) during period 01.04.2017 to 30.06.2017. He had also given professional services to ESL before joining as CFO of Educomp group through his company namely Lotus Risk Management Pvt Ltd during period FY 2009-10 to FY 2012-13. Further, he had also given services to ESSPL through his company Lotus Risk Management Pvt Ltd during period FY 2013-14 to FY 2014-15

342. He was the virtual CFO of OSN Group till 2011-12. He had given services to OSN Group through his firms and was the connecting link between Educomp Group and OSN Group.

343. During statement on oath Sanjay Saini confirmed that OSNIPPL and OSNBPL were formed on the instructions of Ashish Mittal. He confirmed that OSN group was indirectly controlled by Shantanu Prakash through Sanjay Saini and that negotiated prices of land parcels were higher than the normal prevailing prices at

that time. He further confirmed that it was instructed by Sangeet Gulati, the then CFO of ESL to purchase land at a price significantly higher than the actual price."

10.8. Criminal conspiracy and cheating by siphoning-off funds from Educomp Professional Education Limited (EPEL)/ ESL through acquisition of land located at Hyderabad at an inflated price, punishable under section 420 read with section 120B IPC. The relevant allegations read as under :

"***Ashish Mittal, Ex-CFO of Educomp Group and Virtual CFO of OSN Group***

362. Ashish Mittal was the virtual CFO of OSN Group before joining the Educomp Group. He alongwith Shantanu Prakash was the controller of OSN Group and his entities namely Ashish Mittal & Co and Lotus Risk Management Pvt Ltd had given services to OSN Group during the period FY 2010-11 to FY 2011-12. He had also given professional services to ESL before joining the Educomp Group through his company namely Lotus Risk Management Pvt Ltd during the period FY 2009-10 to FY 2012-13. Later on, he joined as Vice President (Finance) in ESL on 01.11.2013 and promoted to CFO of Educomp Group on 26.05.2014 and resigned on 24.02.2018. He was Director (Finance) during period 01.04.2017 to 30.06.2017. He had also given professional services to ESL before joining as CFO of Educomp group through his company namely Lotus Risk Management Pvt Ltd during period FY 2009-10 to FY 2012-13. Further, he had also given services to ESSPL through his company Lotus Risk Management Pvt Ltd during period FY 2013-14 to FY 2014-15. He was the connecting link between Educomp Group and OSN Group. Sanjay Saini in his statement on oath confirmed that OSNIPPL and OSNBPL were formed on the instructions of Ashish Mittal

363. Further, Ashish Mittal in his statement on oath during the investigation has confirmed that OSN group was indirectly controlled by Shantanu Prakash through Sanjay

> *Saini and that he negotiated prices of land parcels were higher than the normal prevailing prices at that time and that it was instructed by Sangeet Gulati, the then CFO of ESL to purchase land at a price significantly higher than the actual price.*"

10.9. Falsification of Books of Accounts for not providing true and fair view of financials of ESL for FY 2015-16 and FY 2016-17 punishable under section 129/448 read with section 447 of the 2013 Act. The relevant narration in this regard has only general allegations against all accused persons, with nothing specific cited against the petitioner.

PETITIONER'S SUBMISSIONS

11. Mr. Hariharan, learned senior counsel and Mr. Mir, learned counsel for the petitioner have made detailed submissions in the matter. From the oral submissions made and the written submissions filed on behalf of the petitioner, the following may be summarised as the key points raised on the petitioner's behalf :

11.1. *The main promoters/alleged beneficiaries in the matter are enjoying interim protection and have been chargesheeted without arrest*:

11.1.1. The main promoters of the ESL including the MD/CEO Shantanu Prakash, Whole-Time Director/Chairman Jagdish Prakash and Whole-Time Director Vinod Kumar Dandona were all granted interim protection by a Co-ordinate Bench of this court *vide* order dated 26.05.2022 in W.P. (Crl) 1242/2022. The interim protection is operative till

date. No proceedings have been filed by the SFIO to challenge the interim protection so granted.

11.1.2. The above-named main promoters/key managerial personnel, who are the main beneficiaries of the alleged fraud as per SFIO's own case, along with 53 other individuals who have been assigned a greater role than the petitioner by the SFIO, were all chargesheeted without arrest. Several other persons who held key managerial positions in the Educomp Group and are *prima-facie* complicit in the alleged fraud, were not even made accused in the investigation. However, the SFIO chose to arrest only the petitioner and one co-accused Dr. Bindu Rana, who (latter) was subsequently admitted to bail by a Co-ordinate Bench of this court *vide* order dated 20.01.2023.

11.2. *The petitioner joined ESL when the company was already undergoing CDR implementation as approved by the consortium of lenders* :

11.2.1. The petitioner was appointed as Senior Vice-President Finance on 01.11.2013 in ESL and was re-designated as Chief Financial Officer of ESL on 26.05.2014. The petitioner resigned from the company on 24.02.2018. It is imperative to note that the petitioner was never a member of the Board of Directors, nor a shareholder, nor even a member of any of the statutory committees

of ESL, including the Audit, Finance and Fund-Raising Committee.

11.2.2. It is the SFIO's own case that all loans were applied, sanctioned and disbursed for ESL *before* the petitioner was employed at ESL. The petitioner has never signed any financial statements, reports or documents related to the applications for loans by the Educomp Group, either before his tenure as Sr. VP/CFO or thereafter. Furthermore, the availed loans came under stress and the company opted for CDR as per the Letter of Acceptance dated 08.07.2013 issued by the State Bank of Patiala, *before* the petitioner joined ESL. Moreover, the petitioner only accepted the post of a CFO considering the certificate dated 13.01.2014 issued by the State Bank of Patiala as the Monitoring Institution, certifying that "*no diversion of funds outside the business has taken place and there is no misuse of funds by the Promoter/Company*";

11.2.3. It is also SFIO's admitted case that the petitioner is not a signatory to the CDR proposal or to the Master Restructuring Agreement (MRA). In fact, *during the petitioner's tenure no fresh loans were applied-for by ESL*.

11.2.4. The petitioner joined ESL at a time when CDR implementation was in progress and the company's financial transactions were being closely supervised and scrutinized by the Monitoring Institution *viz.* the

State Bank of Patiala, and the Monitoring Committee comprising Axis Bank, ICICI Bank, State Bank of India, IDBI Bank and the State Bank of Patiala. Subsequently, once ESL was admitted for undergoing corporate insolvency resolution process under the Insolvency & Bankruptcy Coder 2016 ('IBC' for short), the management control vested with the Resolution Professional appointed *w.e.f.* 30.05.2017. Though these were the prevailing circumstances, none of the bankers, banks or members of the lending consortium are accused in the present case, which also belies the allegations against the petitioner.

11.3. *The petitioner was not involved in the day-to-day decision making or control of any of the subsidiaries of the ESL*:

11.3.1. The petitioner was internally referred to as the Group CFO only to facilitate him to coordinate CDR implementation but there is no Board Resolution of ESL or its subsidiaries (as required under section 203(2) of the 2013 Act), or any filing with RoC appointing him as Group CFO. The petitioner was not in control of the day-to-day functioning or any decision making of the subsidiaries of ESL. This has been stated on oath by the main Promoter/Managing Director, who employed the petitioner, in his statement tendered under section 217 of the 2013 Act. There were separate CFOs/Managing Directors/key managerial personnel for each subsidiary company.

11.3.2. The SFIO alleges in the para 21 of its status report that the petitioner held a strategic position in the Educomp Group as he was the Director of 08 of its subsidiary companies. *This is incorrect*, since the petitioner was merely a Non-Executive Director in the said subsidiaries and not a key managerial personnel and took no executive or day-to-day decisions.

11.3.3. The SFIO seeks to attach criminality upon the petitioner merely on the basis that he attended board meetings of the company. But it is evident from the minutes of the board meetings that the petitioner took no executive decisions and merely attended the said meetings as a 'special invitee', and was not permitted to make any decisions as per The Secretarial Standard on Meetings of the Board of Directors (SS-1) issued by the Institute of Company Secretaries of India (ICSI) under section 118(10) of the 2013 Act.

11.4. *The charge that the promoter fulfilled the lenders' requirement of promoter's contribution of Rs.240.76 crore by siphoning-off funds through bogus purchases, is not tenable as against the petitioner:*

11.4.1. This is so for the following reasons : (i) It was neither the responsibility of the petitioner as CFO, nor was it even possible for the petitioner or any auditor to scrutinize or know about the source of funds infused by the promoter into the company from accounting ledger entries. The petitioner was never the Statutory

or Internal Auditor of ESL at any time, prior to joining as Senior Vice President of ESL on 01.11.2013; (ii) The alleged siphoning-off could only have taken place through bogus purchases made by the Procurement Department of the company, which was reporting directly to the promoter and was not under the petitioner‘s charge. The said fact is confirmed by the Organizational Chart in the Grant Thornton Forensic Audit Report of the company, which was commissioned by the Monitoring Institution *viz.* State Bank of Patiala. The procurement department was headed by the Chief Procurement Officer Mansoor Raza, who has not even been made an accused in the case. It was the Procurement Department that prepared purchase orders, made material receipt notes against invoices received by them, and effected payments through cheques signed by the promoters. No purchases or payments were authorized by the petitioner and he was never part of the purchase process. The petitioner was not signatory to the vouchers/cheques issued by ESL. Such papers were signed by Shantanu Prakash, Jagdish Prakash and Pramod Thatoi as per the SFIO‘s own investigation.

11.5. *As per documents relied upon by the prosecution, during the petitioner‘s tenure only about Rs. 5.76 crore was allegedly*

transferred out from the accounts of ESL into the accounts of the 65 companies, alleged to be paper companies :

11.5.1. As explained above, such siphoning-off could, if at all, only have been done by the Procurement Department headed by the Procurement Head, which was directly reporting to the main promoter, Shantanu Prakash. Since no vouchers, cheques, invoices were ever signed by the petitioner, he could not have had any knowledge about the transactions related to such alleged bogus purchases/sales. *As per the MCA report the network of operators for the alleged siphoning-off funds was already in place prior to the petitioner joining the company; and almost the entire alleged siphoning of Rs. 240.76 crore had already taken place before he joined ESL.* None of the operators of the alleged paper companies have stated that the petitioner was involved in the alleged siphoning operations.

11.5.2. During the petitioner's tenure, no investment was made in any subsidiary company, no capital advances were made, nor were any related party transactions conducted, and no loans were raised by ESL. The allegations made in Charge 8 pertains to a period prior to the petitioner's tenure. Furthermore, since no fresh loans were ever raised by ESL during the petitioner's tenure, there was no occasion for the company to falsify or to make any misrepresentation

in its balance sheets. The petitioner cannot be attached with the liability for any alleged falsification/misrepresentation in the balance sheets prior to his appointment as CFO.

11.5.3. The petitioner has only signed balance sheets of ESL for FY 2014-2015, FY 2015-2016, both years during which the company was under the supervision of the Monitoring Institution under the CDR process. For FY 2014-2015 and FY 2015-2016, the Monitoring Institution led by State Bank of Patiala conducted a Forensic Audit of ESL through *M/s. Grant Thornton, whose report does not incriminate the petitioner*. In any case, the Monitoring Institution and Monitoring Committee which had the authority to have the financial reports corrected, did not see the need to do so. None of the Lenders' Monitoring Committee are an accused in the case.

11.5.4. The Financial Reports for FY 2016-2017 were the responsibility of the Resolution Professional ('RP' for short) appointed under the IBC who had assumed management control after the Board of Directors was suspended on 30.05.2017. The RP also conducted a Transaction Audit through BDO as required by the IBC; and the observations by BDO in their report were satisfactorily explained by the RP, with many of the transactions having the approval of the State Bank of Patiala.

11.5.5. The RP also conducted an investigation into the accounts of the Corporate Debtor *i.e.,* ESL. *Vide* affidavit dated 08.10.2018 filed before the NCLT, Delhi the RP ascertained that there was no transaction which fell within the ambit of section 43, 45, 50 or 66 of the IBC *viz.* that there were no preferential transactions (section 43 of the IBC), undervalued transactions (section 45 of the IBC), extortionate credit transactions (section 50 of the IBC) and fraudulent trading or wrongful trading (section 66 of the IBC) in the accounts of ESL.

11.5.6. The SFIO was also supplied the Axis Bank Fraud Monitoring Report dated 24.07.2020 which names as many as 12 people, but importantly does *not name or implicate* the petitioner. On the other hand, the said report directly names Shantanu Prakash, VK Dandona, Jagdish Prakash, Rajat Khare, VK Chaudhary, Krishna Pratap Singh, Raman Bajaj, DK Gupta, Pramod That oi, Sunil Malhotra, Mahesh Gandhi, and Abhinav Dhar. However all these accused have been chargesheeted without arrest by the SFIO.

11.6. *The amount of Rs. 5.5 crore received by the petitioner from Group 1 Companies, alleged to be paper companies, was only a loan* :

11.6.1. In response to this charge, it is the petitioner's contention that the amount of Rs.5.5 crore received by

the petitioner was only a loan advanced and arranged by the promoter through his business associates between November, 2014 and March, 2015. This money was *not routed back* to the promoter, or for any of his proxy investments like in the case of others accused persons. The transaction happened through legitimate banking channels and on proper documentation in the nature of loan agreements, regularized through purchase of stamp paper, which was done shortly after the transaction. The petitioner could not have known the actual source from which the money was arranged by the promoter Shantanu Prakash through his business associates/concerns for advancing the loan to the petitioner. No offence is made-out against the petitioner with respect to the said allegation, since the transaction would not constitute any offence under the 2013 Act or under any other penal statute.

11.7. *The charge that the petitioner facilitated the attempt of the main promoter Shantanu Prakash to gain control of the assets, which were meant to be divested/sold as per the MRA viz. (i) Little Millennium Education Private Limited (LMEPL), (ii) Vidya Mandir Classes (VMC) and (iii) Mussoorie International School (MIS), through proxy buyers, is not tenable against the petitioner*:

11.7.1. It is alleged that the aforesaid assets were indirectly bought-back by the main promoter, Shantanu Prakash

through buyers who were partly funded by Shantanu Prakash, his family, and his family trusts. However, the said charges are not tenable *qua* the petitioner for following reasons: (i) The selection of buyer, valuation of assets, and approval of the sale price of the assets was decided by the Lenders' Asset Sale Monitoring Committee (ASMC) comprising the State Bank of Patiala, State Bank of India, ICICI Bank, and IDBI Bank; (ii) The allegation is that the buyers of the aforesaid assets received funds either from the bank account of Shantanu Prakash, his daughter or through his family trusts. However, the petitioner could not have known about the source of funds of the buyers, since the buyers were neither related to ESL, nor did they receive any funds from ESL. The petitioner's role was only to ensure that payment was made to the lenders by co-ordinating the CDR process. He attended the meetings with the lenders for this purpose and had absolutely no role in making decisions related to the sale of assets. The petitioner was not part of the day-to-day decision making of any of the subsidiaries of the ESL and this has been stated under oath by the main Promoter/Managing Director in his statement tendered under section 217 of the 2013 Act. In fact, in his statement Shantanu Prakash even gives the names of the persons who were in

charge of the day-to-day functioning of some of the subsidiaries.

11.8. *The charge that the petitioner had transferred Rs. 1.50 crore in Millennium Education Fund, through his wife Poonam Mittal who was an ex-Director, for construction of a school in the name and style of 'The Millennium School' and out of these funds Rs. 0.50 crore was received from Group-1 companies is baseless* :

11.8.1. Millennium Education Foundation is a Not-for-Profit company under section 8 of the 2013 Act and is not part of, or related to, the Educomp Group in any manner whatsoever. The petitioner's wife is a lifetime Educator and currently runs a school in a village in NOIDA for underprivileged children. In these circumstances, it was only natural for her to provide her expertise to MEF where she was a Director with insignificant shareholding of less than 1%. She was requested for a Director loan of Rs.1.50 crore to MEF for working capital requirements, and she obliged by borrowing that sum from her husband, the petitioner. The petitioner had redeemed his investments in certain fixed deposits and mutual funds, from which that sum was advanced as loan to the Petitioner's wife between December 2015 and March 2016. This had no connection with the Rs. 5.5 crore loan received by the petitioner from the company *almost a year back* which was used to meet other liabilities. The

transaction happened through legitimate banking channels and does not fall under section 447 of the 2013 Act.

11.8.2. The SFIO further alleges that the petitioner‘s wife received Rs 1 crore from Priya Prakash, daughter of the promoter Shantanu Prakash. This was a personal loan arranged by the promoter and was received between 13th October and 28th November 2014 and was fully repaid between 22nd March 2018 and 10th February 2022. Bank statements are available in evidence.

11.9. *The charge of bogus capital advances having been made and siphoning-off funds through inflated land deals through OSN is baseless* :

11.9.1. These charges are not tenable *qua* the petitioner for following reasons: (i) The petitioner was neither the CFO of ESL prior to 26.05.2014, nor of the OSN Group of companies, or of the other entities; and was also not a shareholder, director, or employee of any of these companies. All capital advances were made and were being co-ordinated directly between the CFO Sangeeta Gulati, the promoter of ESL and Sanjay Saini. The petitioner had nothing to do whatsoever with the business transactions between OSN and ESL at any time. The OSN Group and ESL have continued to work with each other, even after the petitioner stopped providing consulting services to OSN, which

he did only for a brief period of 10 months; (ii) The petitioner is a Chartered Accountant and was providing outsourced consulting services to the OSN Group and to ESL for a brief 10-month period from October 2010 until August 2011 through his firm M/s Lotus Risk Management Ltd. for specific projects like cost reduction, ERP Software, Module Design etc. and conducted the internal audit of some schools that were third-party franchisee of EISML. As a third-party consultant, the petitioner was not involved in any kind of fundraising by ESL or its subsidiaries; (iii) The petitioner had no role in the land deals arranged by OSN for ESL; he was not involved in price negotiation for these land deals and is not a signatory or witness to any documents related to these deals. The petitioner has received no money pertaining to these transactions. All the MoUs relating to the land deals were signed before the petitioner started giving consulting services to OSN from 1st October 2010 for 10 months. The Hanumangarh land deal was signed on 02.04.2009, the MoU for the Alwar land deal was signed on 25.08.2010 and the MOU for the Hyderabad land deal was signed on 09.09.2010. The sellers of the lands have not incriminated the petitioner in any manner whatsoever regarding the land deals or the fixation of prices. The petitioner never signed any document, cheque or

agreement on behalf of OSN. All land deals were signed by Sanjay Saini, Promoter/Director of OSN; (iii) The petitioner quit his consultancy contract with OSN after 10 months, immediately after an Income Tax raid was conducted on OSN in August 2011. It is pertinent to note that the petitioner‘s Income Tax Assessment Orders for the relevant period (2008-2013) do not impute any undisclosed income; (iv) The only evidence which the SFIO claim to have against the petitioner in relation to this charge is the statement of the co-accused and the statement of the petitioner, which were recorded by use of coercion and were retracted on 28.11.2022 and 23.12.2022. In any case, the present charge pertains to section 420 of the IPC and not to any provision of the 2013 Act and therefore is not subject to the additional twin-conditions imposed for bail under the Companies Act and the SFIO do not have the power to arrest the petitioner on this charge.

11.9.2. The SFIO relies upon the statements of Sanjay Saini (main promoter/director of OSN group companies from 2010 till date), Pramod Thatoi (Whole-time Director and employee of ESL since 1996), Manoj Garg (Employee of ESL since 2010, ex-CFO of EISML and Present CFO of ESL), and Vinod Kumar Dandona (SVP Corporate Affairs of ESL since 2010, Whole-time director of ESL and EISML, President of

ESL). On a bare perusal of the statements of above named co-accused, it is evident that they have made the statements only in order to shrug their own criminal liability and in an attempt to implicate the petitioner. No link evidence or any material documents has been provided by the said co-accused; and in any case, such statements cannot be read against the petitioner at the stage of deciding bail.

11.9.3. The prosecution has assumed that all cases of financial fraud invariably involve the CFO and have cited the example of Nittin Johari of M/s. Bhushan Steel Ltd. However, it is relevant to note that Nitin Johri was a Whole-Time Director (Finance) of that company for 20 years, was a member of Management Committees, and had raised more than Rs 45,000/- crore as loans and credit limits through falsified financial projections and had organized the siphoning-off funds. The petitioner has never raised any loans and had nothing to do with the alleged siphoning-off funds, which happened prior to his tenure.

11.9.4. The petitioner has deep roots in society; he has two children whose career and personal life has been impacted deeply due to the unjust arrest of their father. The petitioner has appeared over seven times at the SFIO during the course of the investigation, has fully cooperated, and submitted the required documentation. Further, the petitioner has never been

questioned while he has been judicial custody. He is not a flight risk, as he has travelled aboard on 05 occasions during the course of the investigation and returned in compliance with the orders of the court.

12. The petitioner has relied on the following judgements in support of his contentions :

12.1. ***Vijay Madanlal Choudhary & Ors vs. Union of India & Ors***[2]: on the proposition that the court must consider whether the accused possessed the requisite *mens rea*, and that the court is not required to record a positive finding that the accused has not committed an offence, and is only required to arrive at a finding on the basis of broad probabilities; and that the twin-conditions are not an absolute restraint on the grant of bail.

12.2. ***Raman Bhuraria vs. Directorate of Enforcement***[3]and ***Paras Mal Lodha vs. Assistant Director, Directorate of Enforcement***[4]: on the proposition that at the stage of bail, notwithstanding the admissibility of the retracted statements, the court is to assess whether the same are reliable; and that bail cannot be denied solely on the basis of retracted statements.

12.3. ***Ranjitsing Brahmajeetsingh Sharma vs. State of Maharashtra***[5]and ***Union of India vs. Shiv Shanker Kesari***[6]: on the proposition that the embargo in the twin-conditions does

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2 (2022) SCC OnLine SC 929 at paras 388, 400-401
3 2023 SCC OnLine Del 657 at paras 57-60
4 2017 SCC OnLine Del 8676 at para 8
5 (2005) 5 SCC 294 at paras 36-38, 43-48
6 (2007) 7 SCC 798 at paras 6-8, 10,11

not require the accused to positively establish his innocence beyond a reasonable doubt.

12.4. ***Jainam Rathod vs. State of Haryana & Anr***[7] and ***Sujay U Desai vs. SFIO***[8]: on the proposition that notwithstanding the twin-conditions, the accused's right to a speedy trial must be taken into consideration in deciding the application for grant of bail.

12.5. ***Sunil Bhatia vs. Serious Fraud Investigation Office***[9] and ***Vijay Kumar Jain vs. Serious Fraud Investigation Office***[10]: on the proposition that the main stakeholders being enlarged on bail is a relevant consideration.

12.6. ***Anil Saxena vs. State***[11], ***Maninder Singh vs. State***[12] and ***Krishnan Subramanian vs. State***[13]: on the proposition that bail cannot be denied simply because there are allegations of substantial financial fraud.

12.7. ***R Vasudevan vs. CBI***[14]: on the proposition that selective prosecution is a relevant consideration for grant of bail.

12.8. ***Bai Hira Devi & Ors vs. Official Assignee of Bombay***[15]: on the proposition that oral evidence has to be excluded when the same has been reduced to form a document.

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7 2022 SCC OnLine SC 1506 at paras 8, 9
8 2022 SCC OnLine SC 1507 at para 7
9 2022 SCC OnLine Del 1917 at paras 37, 38
10 2022 SCC OnLine Del 2095 at para 9
11 Bail Appln No 1074/2020, judgment dated 17.06.2020 (Delhi High Court) at paras 20, 21
12 Bail Appln No 3952/2020, judgment dated 05.05.2021 (Delhi High Court) at paras 18, 19
13 Bail Appln No 672/2022, judgment dated 10.05.2022 (Delhi High Court) at para 9
14 2010 SCC OnLine Del 130 at paras 15, 17
15 AIR 1958 SC 448 at paras 4, 5

12.9. ***Rajendra Shah vs. State of Maharashtra***[16]: on the proposition that the mere fact of a director signing on a balance sheet is insufficient to infer that the director had knowledge of fraudulent activity.

12.10. ***Sanjay Chandra vs. CBI***[17]: on the proposition that the object of bail is to secure the appearance of the accused at his trial.

12.11. ***Prabhakar Tewari vs. State of UP***[18]: on the proposition that the gravity and seriousness of the offences alleged cannot, by themselves, be the basis for refusal of bail.

12.12. ***P Chidambaram vs. CBI***[19]: on the proposition that mere allegations of the possibility of the accused influencing witnesses or tampering with evidence cannot be grounds to deny bail.

12.13. ***Mehboob Dawood Shaikh vs. State of Maharashtra***[20]: on the proposition that a judgment has to be understood in light of the facts of the case.

12.14. ***Dr Bindu Rana vs. Serious Fraud Investigation Office***[21]: to assert that the only co-accused who was also in custody, has already been admitted to regular bail.

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16 2019 SCC OnLine Bom 13099 at para 15
17 (2012) 1 SCC 14 at paras 21-23
18 (2020) 11 SCC 648 at para 7
19 (2020) 13 SCC 337 at para 32
20 (2004) 2 SCC 362 at para 12
21 2023 SCC OnLine Del 276 at paras 45-47, 55, 59, 62

SFIO'S SUBMISSIONS

13. Arguing on behalf of SFIO, Mr Ajay Digpaul, learned CGSC has opposed the grant of bail. Based on the charges placed in the SFIO complaint filed before the learned Special Judge, on the oral submissions made by learned CGSC and the written submissions filed in the matter, the following may be summarised as the key points raised on behalf of the SFIO :

13.1. It is the SFIO's submission that Shantanu Prakash had invested directly as well as through A.P Eduvision, money as promoter's contribution in succeeding years starting FY 2013-14 to FY 2016-17, and during this period the petitioner was the CFO of ESL. Furthermore, the statement of Pramod Thatoi suggests that the petitioner was looking after the finances of ESSPL which was not a subsidiary of ESL.

13.2. As regards the charge of siphoning-off funds of ESL, EISML, and ESSPL into the accounts of the close associates of Shantanu Prakash, the SFIO submits that though the petitioner says that the amount of Rs 5.50 crore received by him was a loan, in fact this amount was siphoned-off from ESL and was received by the petitioner from Group-I Companies. Furthermore, it has been admitted by the Entry Operator, Ankur Mittal (Controller of Group-I Companies) that he had transferred funds from those companies to the accounts of people, including the petitioner, as he was instructed. The stamp papers used for executing the purported agreement extending unsecured loans are either backdated or dated two

months after the date of the agreement, showing the inconsistencies in the version of the petitioner.

13.3. As for the charge of commission of fraud by divesting the asset of ESL in favour of Millennium Education and Management Pvt. Ltd. ('MEMPL'), it is the allegation that Little Millennium Education Pvt. Ltd. ('LMEPL') was an asset to be monetized under the CDR process, but since Shantanu Prakash did not want to lose control of this asset, in connivance with the petitioner (who was the CFO of ESL) Shantanu Prakash siphoned-off funds from ESL into the accounts of Bindu Rana and MEMPL, using Group-I and Group-II companies, which funds were ultimately used to acquire a major shareholding in LMEPL. The contention is that the Directors in MEMPL were Bindu Rana (co-accused, ex-employee of ESL) and Poonam Mittal (petitioner's wife) and that therefore Shantanu Prakash ultimately acquired a controlling stake in LMEPL through the petitioner's wife.

13.4. With regard to commission of fraud by using the funds of ESL, EISML, and ESSPL to acquire "The Millennium School" through Millennium Education Foundation, the SFIO says that though the petitioner's stand is that the amount of Rs 1.5 crore was transferred by him to his wife, Poonam Mittal, from his mutual funds, the petitioner's bank statements establish that only Rs 1.0 crore was received by the petitioner from liquidating his mutual funds and the rest was received from Group-I Companies.

13.5. As for the allegation of commission of fraud by divesting the shares in Vidya Mandir Classes Ltd. ('VMC'), the SFIO says that it was the petitioner's duty to ensure that the implementation of CDR is done in a manner which served the best interests of ESL; and also that the petitioner being CFO was responsible for managing the finances of ESL and had also attended the Joint Lenders Meeting for CDR. Despite the availability of a higher offer from Resonance (another company that was interested in acquiring VMC), that offer was rejected by the management of ESL and instead, a paper company *i.e.*, KBESPL was used to acquire the shares of VMC, so that the control of VMC remained with Shantanu Prakash indirectly.

13.6. Similar is the allegation of commission of fraud in relation to the sale of Mussoorie International School ('MIS'), the allegation being that the petitioner was responsible for managing the finances of ESL, and had also attended the Joint Lenders Meeting for CDR, and was therefore well aware that money was siphoned-off to acquire MIS so that the control of MIS remained indirectly with Shantanu Prakash.

13.7. In response to the reliance placed by the petitioner on the bail granted to co-accused Bindu Rana by a Co-ordinate Bench of this court *vide* order dated 20.01.2023, the SFIO submits that the role of every accused has to be considered on its own merits; and no parity can be drawn between two co-accused. Is the SFIO's allegation that the petitioner has been involved in the fraud since the beginning, when money had started being siphoned-off to clear fictitious debts of ESSPL through the

OSN Group. On the other hand, Bindu Rana was associated with ESL in the capacity of a Research Head and has been implicated only in 3 charges; whereas the petitioner was the financial expert being CFO and was the 'directing mind' along with Shantanu Prakash. The petitioner was also a direct beneficiary of Rs. 5.50 crore. Moreover, it is the SFIO's contention that Bindu Rana, being a woman, was entitled to the benefit of the proviso to section 212(6) of the 2013 Act, which she did get in the bail order passed in her favour.

13.8. Responding to the petitioner's contention that he was not the Group CFO, the SFIO draws attention to the Minutes of Meeting of the Board of Directors of EISML, a subsidiary of ESL, at which meeting he was designated as the Group CFO. It is pointed-out that the petitioner attended the said Board meeting. Furthermore, Manoj Kumar Garg, CFO of EISML, who was formerly an employee of ESL, has in various statements recorded on oath, said that he worked under the instructions of Group CFO *i.e.*, Ashish Mittal.

13.9. In relation to the petitioner's contention that he only joined ESL in 2013 and was not associated with any previous transactions, the SFIO submits that before joining the company as V.P. (Finance), the petitioner was the Internal Auditor of ESL and had also attended the Board Meetings of ESL; and was the 'virtual CFO' of the OSN Group, which group was used by Shantanu Prakash for siphoning-off funds.

13.10. To the petitioner's submission that no fraud could have taken place after 2014 since the Monitoring Institution under the

CDR process was monitoring all transactions and in the forensic audit conducted by M/s. Grant Thornton, they did not mention any fraud having been committed at the company, the SFIO says that though there was a Monitoring Committee during the CDR process, but the management was still with the original promoters/CFO of the company, and the siphoning-off funds to acquire various assets has taken place even after 2014.

13.11. Furthermore, the SFIO contends that the petitioner being the CFO, which comes under the ambit of 'key managerial person' as defined under section 2(51) of the 2013 Act, and also thereby under the definition of 'officer in default' under section 2(60) of the 2013 Act, it was his responsibility to implement the CDR process in the best interests of the ESL as well as its lenders.

13.12. It is also submitted that the petitioner has not presented the true facts before this court with regard to the Grant Thornton Report, since, as narrated in the 'Scope of Work' of that report, it is clear that the forensic auditor only examined transactions of more than Rs 1.0 crore (and many such transactions have taken place) and only related-party transactions (which does not include transactions with paper companies); and besides, the forensic audit was done on the basis of Audited Financial Statements of the company (which financial statements were false).Furthermore, it is also pointed-out that the conclusions in the Grant Thornton Report mention that they had undertaken no physical verification, which shows that the forensic audit of the Financial Statements was not verified by the Forensic Auditors

themselves. Attention is also drawn to the 'Disclaimer' contained in the forensic auditor's report, which mentions that the analyses were made only on the information available for the period from 07.03.2016 to 01.09.2016.

13.13. The SFIO says that several banks are themselves affected by the fraud perpetrated in the affairs of ESL, and Fraud Monitoring Reports (FMRs) have been received by various banks pertaining to the loans taken by ESL and its subsidiary EISML, by way of siphoning-off funds.

13.14. As for the petitioner's submission, that siphoning-off fund could only have happened through the Procurement Head, who at the relevant time, was one Mansoor Raza, as also mentioned in the Grant Thornton Report, the SFIO says that the petitioner was heading the Finance Department, and so he was responsible for advances made towards any services, and that final approvals were given by Shantanu Prakash (MD) or Ashish Mittal (CFO), which shows that funds were ultimately managed by the petitioner.

14. The SFIO has relied upon the following judgments in support of its contentions :

14.1. *Vijay Madanlal Choudhary* [22] (supra) and ***Serious Fraud Investigation Office vs. Nittin Johari & Anr*** [23] : on the proposition that a stringent view must be taken towards grant of

22 at paras 402-404

23 (2019) 9 SCC 165 at paras 24-31

bail in relation to economic offences, and that the twin-conditions are in addition to the limitations under the Cr.P.C.

14.2. ***Narcotics Control Bureau vs. Mohit Aggarwal***[24] and ***Union of India (NCB) etc vs. Khalil Uddin, etc.***[25]: on the proposition that when the narrow parameters of the twin conditions are not satisfied, and the court cannot conclude that the accused has demonstrated that there are reasonable grounds to believe that he is not guilty of the offence alleged, bail cannot be granted; and that length of the period of custody, the fact that complaint has been filed and trial has commenced are not persuasive grounds by themselves for granting relief under the twin-conditions.

14.3. ***Union of India vs. Rattan Mallik @ Habul***[26], ***Narcotics Control Buraeu vs. Kishan Lal***[27], ***Collector of Customs, New Delhi vs. Ahmadalieva Nodira***[28], ***Satpal Singh vs. State of Punjab***[29] and *Shiv Shanker Kesari*[30] (supra): on the proposition that the phrase "reasonable grounds" in the twin-conditions connote substantial probable cause for believing that the accused is not guilty of the offence he is charged with.

24 (2022) SCC OnLine SC 891 at para 18
25 Criminal Appeal Nos. 1841-1842/2022, Order dated 21.10.2022 (Supreme Court)
26 (2009) 2 SCC 624 at para 13
27 (1991) 1 SCC 705 at para 7
28 (2004) 3 SCC 549 at para 7
29 (2018) 13 SCC 813 at para 3
30 (supra) at paras 7, 8, 12

DISCUSSION ON LAW

15. Now, of the offences alleged against the petitioner, the one that requires closer consideration is the offence under section 447 of the 2013 Act. It is that offence for which the SFIO is entitled to arrest; and in relation to which the additional twin-conditions in section 212(6) of the 2013 Act are required to be satisfied, while considering grant of bail.

16. A brief discussion of the law on the point is therefore necessary.

17. The twin-conditions contained in section 212(6) of the 2013 Act *do not imply* that as soon as section 212(6) is triggered, *bail must reflexively, immediately or automatically be rejected.* Section 212(6) however raises the threshold of satisfaction required of the court while considering the grant or denial of bail. In addition to the usual and ordinary conditions under section 439 Cr.P.C., the court is also required to be satisfied that there are reasonable grounds for believing that the accused is *not guilty*, and that the accused is *not likely* to commit any offence while on bail.

18. At the threshold therefore, it must be seen if there are any allegations *against the accused* under the relevant section *viz.* section 447 of the 2013 Act, since otherwise section 212(6) will not come into play at all.

19. Section 212(6) contemplates that before a court decides to grant bail to an accused, the public prosecutor must be given an *opportunity* to oppose the bail application.

20. Giving to the public prosecutor the opportunity to oppose bail however, does not mean rejection of bail on *opposition simpliciter*.

The public prosecutor cannot simply say that bail must not be granted, without giving any reasons for the opposition.

21. The requirement of *opportunity to oppose* indicates and contemplates:

21.1. *Firstly*, based on an assessment of the need for custody, the public prosecutor may choose to *not oppose* the grant of bail, in which case the additional twin-conditions under section 212(6) will not apply[31] and the court will consider bail on the usual in ordinary conditions under section 439 Cr.P.C.[32]. To illustrate this point, the public prosecutor may choose not to oppose grant of *interim* bail, say on the ground of demise of a close family member, medical emergency in the family, social obligations such as marriage of children, etc.; and

21.2. *Secondly*, if the public prosecutor opposes grant of bail, the opposition must be *reasoned* opposition, for which the prosecutor must first make-out a case for denial of bail by establishing *foundational facts* as against the accused and giving *valid reasons*.

22. A *reasoned* opposition by the public prosecutor - not by the investigating agency - is a *sine-qua-non* for the *court being satisfied* in relation to the additional twin conditions stipulated under section

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31 section 212(6) of the 2013 Act

"(*6) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), offence covered under section 447 of this Act shall be cognizable and no person accused of any offence under those sections 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 ……"*

32 section 212(7) of the 2013 Act

"*(7) The limitation on granting of bail specified in sub-section (6) is* ***in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974)*** *or any other law for the time being in force on granting of bail.*"

212(6) of the 2013 Act. Needless to add that the public prosecutor is expected to be fair and reasonable, being first and foremost an officer of the court, who is not expected to act as a mouthpiece of the investigating agency. The necessity for a *reasoned opposition* is also inherent in the constitutional guarantee in Article 21 of the Constitution, when it prescribes that every act depriving the liberty of an individual must be *in accordance with procedure established by law*, which procedure must not be *arbitrary, unfair or unreasonable*.[33] The sanctity of personal liberty cannot be waylaid on mere unreasoned *ipse-dixit* of the public prosecutor.

23. Failure of the public prosecutor to establish *foundational facts* would necessarily lead the court to be satisfied that there are reasonable grounds for believing that the accused is not guilty. Only when the prosecution is able to cross that threshold – of establishing foundational facts – would the onus shift to the accused to explain his position and to satisfy the court as to reasonable grounds for absence of guilt. The requirement for the public prosecutor to establish foundational facts in the first instance, also flows from the fundamental principle of the law of evidence that the onus lies on the propounder of a fact [34] and the cardinal presumption [35] that all individuals are *innocent until proven guilty*.[36]

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33 ***Maneka Gandhi vs. Union of India & Anr***, (1978) 1 SCC 248 at para 5

34 *Vijay Madanlal Chaudhary* (supra) at para 338

35 ***Satender Kumar Antil vs. Central Bureau of Investigation & Anr,*** (2022) 10 SCC 51 at para 15 ; ***Sahara India Real Estate Corp Ltd & Ors vs. SEBI & Anr***, (2012) 10 SCC 603 at para 42

36 Article 11(1) of the Universal Declaration of Human Rights (1948); Article 14.2 of the International Covenant on Civil and Political Rights (1966)

24. An insight into how the additional twin-conditions under section 212(6) of the 2013 Act are to be applied, is found in other decisions of the Supreme Court on similar conditions that appear in similar statutes. Some of them are discussed below.

25. In the context of sections 35 and 54 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' for short), the Supreme Court has specifically held that the *initial burden to show the existence of foundational facts remains on the prosecution and only when those facts are satisfactorily shown, does the legal burden shift to the accused*; observing that a failure to prove the foundational facts would necessarily prevent the presumptions contained therein being applied.[37] It has also recently been held by the Supreme Court that that the twin-conditions contained in section 37 of the NDPS Act have to be read *reasonably* and *not literally*[38]. Considering the drastic powers in the statute which can deprive a citizen of liberty, the necessity of scrupulous compliance with the statutory provisions has also been noticed in the context of the NDPS Act.[39]

26. In interpreting section 45 of the Prevention of Money-Laundering Act, 2002 which also contains the additional twin-conditions, while relying on precedent, the Supreme Court has further observed that *the court has to see only if there is a genuine case against the accused and the prosecution is not required to prove the charge beyond reasonable doubt.*[40]

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[37] ***Noor Aga vs. State of Punjab & Anr***, (2008) 16 SCC 417 at paras 58, 59

[38] ***Mohd. Muslim alias Hussain vs. State (NCT of Delhi)***, 2023 SCC OnLine SC 352 at paras 19-21

[39] ***Union of India vs. Bal Mukund***, (2009) 12 SCC 161 at para 28

[40] *Vijay Madanlal Chaudhary* (supra) at para 401

27. Also, in the Supreme Court decision *inter-alia* on section 21 of the Maharashtra Control of Organised Crime Act, 1999, the Supreme Court has held that the opportunity to oppose the grant of bail *must be given a proper meaning*[41] and be construed reasonably.[42] In fact, in that case, the Supreme Court has expressly noticed *that allegations by themselves can be no reason to keep an accused behind bars* and that in case of circumstantial evidence, the court must consider *whether the circumstantial evidence is such whereby all the links in the chain are complete;*[43] and that the court is also to consider the application for grant of bail from the angle of whether the applicant possessed the requisite *mens rea*.[44]

28. The above enunciation of the law clearly mandates that where additional conditions are stipulated in a statute for grant of bail relating to specified offences, it cannot be that the prosecution need only *recite* from its complaint, or simply say that it has material against the accused in respect of such offences. The *prosecution must show **how** the material collected during investigation supports the allegations in the complaint, and most importantly, how the allegations **apply** against the accused*. To reiterate, the opposition by the public prosecutor must be *reasoned opposition*, supported by *valid and relevant reasons*. When the public prosecutor opposes a bail plea, he would have to establish foundational facts sufficiently to dislodge the presumption of innocence, and it is only then that the onus of

[41] *Ranjitsing Brahmajeetsing Sharma* (supra) at para 35
[42] *Ranjitsing Brahmajeetsing Sharma* (supra) at paras 42, 44
[43] *Ranjitsing Brahmajeetsing Sharma* (supra) at para 43
[44] *Ranjitsing Brahmajeetsing Sharma* (supra) at para 38

satisfying the stringent twin-conditions would shift onto the accused. To be clear, *there is no statutory mandate for the court to depart from the presumption of innocence*.

29. Coming back to the present case, section 212(6) of the 2013 Act is actuated when the individual is accused of committing an offence as mentioned in the said section, *viz.* section 447 of the 2013 Act. However, what is stated in a complaint or the FIR are only allegations, which may or may not be founded on evidence or material. To borrow the words of the Supreme Court in *Noor Aga* (supra), *superficially a case may have an ugly look and thereby, prima facie, shaking the conscience of any court but it is well settled that suspicion, however high it may be, can under no circumstances, be held to be a substitute for legal evidence.*[45] Unlike cases of preventive detention, this is not a jurisdiction of suspicion. Indeed, the more severe the punishment, the greater must be the care taken to see that all safeguards in a statute are scrupulously followed.[46]

30. Therefore, to assess whether the State has been able to *prima-facie* make-out a case against an accused and for the additional twin-conditions to apply, there must be (i) a specific allegation against the accused; (ii) which allegation must find place in the complaint/FIR; (iii) there must be material in support of such allegation; and (iv) the combined reading of the material in support of the allegation must point towards the guilt of the accused as regards the relevant offence. It would be necessary to note that the bulky nature of material

[45] *Noor Aga* (supra) at para 57
[46] ***State of Punjab vs. Baldev Singh***, (1999) 6 SCC 172 at para 28

annexed to the complaint is not a sufficient criteria, *there must be something, as regards each specific allegation against the accused in the complaint, which point towards the guilt of the accused of the offence which attracts the additional twin-conditions.*

31. After all, bail, not jail is the rule.[47]

32. While still on this point, it may be noticed that the 2013 Act specifically circumscribes *even* the power of an SFIO officer to arrest an accused. Section 212(8) expressly stipulates that an arrest may only be made by an officer of the rank of Assistant Director or above; and further stipulates pre-conditions to making an arrest, *viz.* that the officer *must be in possession of material*, based on which he has formed the reason to believe that the accused has committed an offence under the 2013 Act, with a further requirement that the reason for the belief are to be recorded in writing[48]. This adds further weight to the interpretation that the opposition offered by the prosecutor must also be based on material in the possession of the SFIO, from which the reason to believe for arrest has arisen, which reason must also have been recorded in writing.

33. It is also important to articulate here, that though the general principle is that parity with co-accused *alone* is not a ground to claim bail as a matter of right; however, that principle is nuanced. The nature of an offence may be such, that the fact that other accused have been

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[47] ***Arnab Manoranjan Goswami vs. State of Maharashtra***, (2021) 2 SCC 427 at para 70

[48] 212(8) of the 2013 Act

"*(8) If any officer not below the rank of Assistant Director of Serious Fraud Investigation Office authorised in this behalf by the Central Government by general or special order, has* ***on the basis of material in his possession reason to believe*** *(the reason for such belief to be recorded in writing)* ***that any person has been guilty of any offence punishable under sections referred to in sub-section (6)****,* ***he may arrest such person*** *and shall, as soon as may be, inform him of the grounds for such arrest."*

granted bail, may persuade the court to exercise its discretion in favour of another co-accused in granting bail.[49]

DISCUSSION ON FACTS

34. Based on the above discussion, this court can discern the following facts on *broad probabilities*:

34.1. ESL went under CDR *vide* order Master Restructuring Agreement dated 25.03.2014, which was signed between ESL, State Bank of Patiala (as the Monitoring Institution) and the consortium of banks (as CDR lenders); after which all financial affairs of ESL were conducted under the oversight of the consortium of banks.

34.2. The principal allegation is of siphoning-off about Rs.240 crores from ESL, out of which, the SFIO's own case is that about Rs.235 crores was siphoned-off between FY 2012-13 and FY 2014-15. The petitioner joined as Chief Financial Officer of the company with effect from 26.05.2014, that is to say *after* about Rs.235 crores had already been allegedly siphoned-off. The petitioner resigned as CFO on 24.02.2018. It is not in dispute that before that the petitioner had been advising ESL as its chartered accountant/financial consultant for many years; and had joined the company as Senior Vice President (Finance) with effect from 01.11.2013 and held that position for about 07 months before he became the CFO.

[49] ***Totaram vs. State of Madhya Pradesh & Anr***, Criminal Appeal No. 1010/2023, Order dated 06.04.2023 (Supreme Court)

34.3. During the period before 26.05.2014, the petitioner was not in charge of or in control of the management of financial affairs of ESL. The petitioner did not sign the financial statements and accounts of ESL before he became CFO.

34.4. Even when he joined as CFO, the petitioner was not on the Board of Directors of ESL; he was not even a member of any of the committees; and was therefore not a '*key managerial personnel*.'

34.5. The petitioner was appointed CFO with the task of co-ordinating implementation of the CDR process of ESL. During the CDR process the financial affairs of the ESL were monitored by a Monitoring Institution headed by the State Bank of Patiala, which was the consortium leader. The State Bank of Patiala has issued a certificate dated 13.01.2014 stating that *there was no fraud in the transactions*. This is one of the documents relied upon by the SFIO. Another member of the Consortium of Banks *viz.* Axis Bank Limited has rendered a Fraud Monitoring Report dated 08.09.2022, in which also, they did not find any inculpatory material against the petitioner.

34.6. ESL went into bankruptcy and an RP was appointed for the company with effect from 30.05.2017; and the petitioner resigned on 24.02.2018. Once the RP was appointed with effect from 30.05.2017, the RP was in control of the management and affairs of ESL.

34.7. Significantly, all the loans raised by ESL, which went bad, were taken *prior* to the petitioner joining the company.

34.8. Suspicion is sought to be raised by the SFIO that the petitioner obtained a loan for Rs.5.5 crores from ESL, which was not really a loan but was part of the siphoned-off money. The loan, however, was taken by way of formal loan agreements. The SFIO argues that the stamp-papers for the loan agreements were not purchased contemporaneously; they were either dated before or after the dates of execution of the loan agreements; which the SFIO submits, make the loan agreements 'suspect documents'.

34.9. The summary of charges in the investigation report/prosecution complaint allege the petitioner's liability for 11 charges, of which 07 charges falls within the ambit of section 447 of the 2013 Act, since that provision came into effect from 12.09.2013. The other charges relate *inter-alia* to sections 420/120B of the IPC or offences under the 1956 Act and would therefore not attract the twin-conditions contained in section 212(6) of the 2013 Act.

34.10. Though the common thread running through all the allegations is of 'round-tripping of money', none of the so-called paper companies or shell companies have been investigated.

34.11. Part of the scope of review by M/s. Grant Thornton was *"review of induction of money by Promoters"* and the report covers the entire period from 01.04.2012 to 31.03.2016. However, there is no clear inference in that report on this aspect, whereby it would appear that the forensic auditor did not find anything remiss in relation to the induction of promoter's contribution. This does beg the question, that if a

forensic auditor did not find anything amiss, then how could the petitioner have found something, in the usual and ordinary course of work.

34.12. The organisational chart shows that ESL was structured in two separate verticals, *viz.*, 'Group CFO' and 'Procurement Head'; and the petitioner was in-charge of the Group CFO vertical, with neither the knowledge nor any control over the functioning of the Procurement Head vertical, which was headed by a different individual *viz.* Mansoor Raza. The latter is neither an accused nor a witness in the case.

34.13. The assessment orders issued by the Income Tax Department to M/s OSN Infrastructure & Projects Pvt. Ltd. for AY 2011-2012, as also to the petitioner for AY 2006-07 to 2012-13 accept the taxes filed by them for the said years without anything remiss.

34.14. The SFIO's case against the petitioner is based essentially on the statements of Sanjay Saini and of the petitioner Ashish Mittal recorded under section 217 of the 2013 Act, which are admissible in evidence since these statements are recorded under oath. In addition, the SFIO also relies upon the statements of Sitaram Saini, Poonam Mittal (the petitioner's wife), Manoj Garg and V.K. Dandona. However, the petitioner has retracted his statements on 28.11.2022 and 23.12.2022; and the within-named Sanjay Saini has also done so, which the law permits them to do.

34.15. Only 02 out of 55 accused persons in the complaint were arrested. The principal promoters and directors of ESL obtained

interim protective orders from Co-ordinate Bench of this court; and have never suffered any custody.

34.16. Dr. Bindu Rana, Chief Technical Officer was arrested on 12.12.2022; and was admitted to regular bail by a Co-ordinate Bench of this court on 20.01.2023. She got bail *not* under the special dispensation for women as contained in the proviso to section 212(6) of the 2013 Act, but on the merits of her case.

34.17. The petitioner remained in SFIO's custody for only 05 days that is from 14.10.2022 to 20.10.2022, during which nothing incriminating was recovered from the petitioner. The petitioner was remanded to judicial custody from 25.10.2022 and has never been interrogated thereafter.

CONCLUSIONS

35. Since in the course of deciding a bail petition, this court is not required to render any 'finding' in relation to the allegations in the complaint and is required to decide the matter on 'broad probabilities', this court refrains from deliberating further upon the facts as propounded in the complaint.

36. This court is further guided by the principles of law as to grant of bail as laid down by the Supreme Court, which have been summarized above.

37. Upon a conspectus of the foregoing, after distilling the detailed and extensive submissions made by counsel on both sides over multiple hearings, what prevails with the court is the following:

37.1. The petitioner began working as an officer of ESL from 01.11.2013 as Senior Vice President (Finance) and thereafter,

became the CFO from 26.05.2014 to 24.02.2018. Though it is alleged that he was advising ESL in his professional capacity as a Chartered Accountant/financial consultant even before that, at that time the petitioner was clearly not an officer of the company and could not, therefore, have been a 'key managerial personnel' or an 'officer in default'.

37.2. Even as Senior Vice President (Finance), the petitioner could not have been the final deciding authority in relation to the financial affairs of ESL. Out of the Rs.240 crores alleged to have been siphoned-off from ESL, Rs.235 crores were siphoned-off before 31.03.2015, between FY 2012-13 and FY 2014-15; but the petitioner became CFO only *w.e.f.* 26.05.2014.

37.3. ESL has undergone a CDR process which commenced with the signing of the Master Re-structuring Agreement dated 25.03.2014, under which the financial affairs of ESL were under the oversight of the consortium of banks, headed by the State Bank of Patiala as the Monitoring Institution. Thereafter, ESL went into bankruptcy and the management and affairs of ESL came under the control of Resolution Professional appointed *w.e.f.* 30.05.2017. The investigation report dated 07.11.2016 rendered by M/s Grant Thornton, which conducted a forensic audit of the financial affairs of ESL for the period from 01.04.2012 to 31.03.2016, also did not find anything amiss, in particular, relating to siphoning-off funds and round-tripping them as 'promoter contribution'.

37.4. The principal promoters and Whole-time Directors of ESL have never suffered any custody, since they were granted interim

protective orders by a Co-ordinate Bench of this court. Other senior officers, such as the Procurement Head and others, have not even been named as accused. Only 02 out of the 55 accused persons were ever arrested – one, the petitioner; and the other, the CTO/Dr. Bindu Rana. Dr. Bindu Rana has been admitted to regular bail by a Co-ordinate Bench of this court on 20.01.2023. The bail has been granted not under the special dispensation for women contained in the proviso to section 212 (6) of the 2013 Act but on the merits of her case.

37.5. In the circumstances, for the limited purpose of the bail plea, this court is satisfied that there are reasonable grounds for believing that the petitioner is not guilty of the offence charged under the 2013 Act. Furthermore, considering that the investigation is complete and the prosecution complaint has been filed before the learned Special Judge, this court is also satisfied that the petitioner is not likely to commit any offence while on bail.

37.6. To be sure, *Nittin Johri* (supra) lays-down that the twin-conditions contained in section 212(6) of the 2013 Act are *in addition to* the usual and ordinary criteria for deciding a bail petition as contained in section 439 Cr.P.C.[50] Insofar as the ordinary criteria for grant of bail under section 439 Cr.P.C. are concerned, no specific flight risk nor any particular threat to witnesses has been cited by the SFIO, and the thrust of their

[50] *Nittin Johri* (supra) at para 24

arguments has been the additional twin-conditions under section 212(6) of the 2013 Act.

38. As a sequitur to the aforesaid discussion, the petitioner is admitted to regular bail, subject to the following conditions:

38.1. The petitioner shall furnish a personal bond in the sum of Rs. 50,00,000/- (Rs. Fifty Lacs Only) with 02 sureties of the like amount from family members, to the satisfaction of the learned Special Judge;

38.2. The petitioner shall furnish to the Investigating Officer a cell - phone number on which he may be contacted at any time and shall ensure that the number is kept active and switched-on at all times;

38.3. The petitioner shall *ordinarily* reside at his place of residence as per records; and shall inform the Investigating Officer in writing at least 07 days in advance if he proposes to change his place of ordinary residence;

38.4. The petitioner shall surrender his passport to the learned Special Judge; and shall not travel out of the country without prior permission of the learned Special Judge;

38.5. The petitioner shall co-operate in any further investigation or proceedings by the Investigating Officer, as and when required;

38.6. The petitioner shall not, whether directly or indirectly, contact nor visit nor offer any inducement, threat or promise to any of the prosecution witnesses or other persons acquainted with the facts of the case. The petitioner shall not tamper with evidence nor otherwise indulge in any act or omission that is unlawful or that would prejudice the proceedings in the matter; and

38.7. In addition to the above condition, it is specifically directed that the petitioner shall also not, whether directly or indirectly, contact or visit or have any transaction with any of the officials/employees of the banks, financial institutions, companies, entities etc., who are concerned with the complaint in this case, whether in India or abroad.

38.8. The Investigating Officer is further directed to issue a request to the Bureau of Immigration, Ministry of Home Affairs of the Government of India or other appropriate authority to *forthwith* open a 'Look-out-Circular' in the petitioner's name, to prevent the petitioner from leaving the country, without the permission of the learned Special Judge.

39. Nothing in this judgment shall be construed as an expression of opinion on the merits of the pending matter.

40. A copy of this judgment be sent to the concerned Jail Superintendent *forthwith*.

41. Petition stands disposed of in the above terms.

42. Pending application, if any, also stand disposed of.

ANUP JAIRAM BHAMBHANI J

MAY 03 2023/ak/ds/*uj*