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

BAIL APPLN. 2566/2021 & CRL. M.As. 16335/2021, 1126/2022

Reserved on : 18.02.2022
Date of Decision : 11.03.2022

IN THE MATTER OF:

CHRISTIAN MICHEL JAMES ..... Petitioner

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

Versus

DIRECTORATE OF ENFORCEMENT ..... Respondent

Through: Mr. S.V. Raju, ASG with Mr. Zoheb Hossain, Special Counsel for ED alongwith Mr. Ankit Bhatia, Ms. Pallavi Yadav, Mr. Anshuman Singh and Mr. Vivek Gurnani, Advocates.

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

MANOJ KUMAR OHRI, J.

1. The present bail application has been filed under Section 439 Cr.P.C. read with Section 45 of the Prevention of Money Laundering Act, 2002 (hereinafter, referred to as the *'PMLA'*) on behalf of the applicant seeking regular bail in ECIR No. DLZO/15/2014/AD(VM) registered under Sections 3/4 of the PMLA by the respondent.

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

Subsequently, Director General (Acq.), Ministry of Defence, Government of India lodged a complaint dated 12.02.2013 with CBI seeking inquiry/investigation into the aforesaid allegations. A preliminary inquiry was conducted, wherefore an FIR/RC bearing No.217-2013-A-0003 came to be registered on 12.03.2013. During investigation in the case, it was revealed that a Request for Proposal (RFP) was issued in March, 2002 on behalf of Indian Air Force (IAF) for procurement of 8 VVIP helicopters. One of the prescribed conditions was a mandatory altitude requirement of 6000 meters. Although 4 firms had responded, only 3 helicopters i.e., MI-172, EC-225 and EH-101 (also known as AW-101) were selected by Technical Evaluation Committee for flight evaluation. Later, only the first two helicopters were flight evaluated as the third helicopter was certified to fly only upto an altitude of 4572 meters against the mandatory Operational

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

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

Revised ORs, entailing a reduction in service ceiling from 6000 meters to 4500 meters, cabin height of 180 centimeters and addition of the words *'at least'* before twin engine, came into picture. With the finally approved/revised ORs, another RFP was issued by IAF on 27.09.2006, pursuant to which, EC-225 helicopters were eliminated from competition and AW-101 helicopters enabled to enter the fray. On 08.02.2010, AWIL was awarded a contract by the Government of India for supply of 12 AW-101 VVIP helicopters for Euro 556.262 million (Rs.3726.96 crores). When the allegations of bribery in the procurement process of VVIP helicopters came to light, the contract dated 08.02.2010 was terminated by the Government of India on 01.01.2014. Based on the case made out in the RC, the present ECIR was recorded against the applicant and others on 03.07.2014.

3. After investigation by the Directorate of Enforcement (hereinafter, referred to as the *'ED'*), a prosecution complaint was filed against *Guido Haschke* and other accused persons on 20.11.2014. The applicant was arrayed as an accused in the first supplementary complaint dated 10.06.2016.

4. It was alleged that the applicant, who was a consultant of *M/s AgustaWestland*, had acted as a middleman/agent on behalf of the company in securing confidential information regarding the procurement of 12 VVIP helicopters by the Government of India. It was further alleged that he was roped in post-2006 for liaison work, in furtherance of which he and *Guido Haschke* combined received more than Euro 70 million in the companies beneficially owned and controlled by them, of which Euro 30 million were transferred to the applicant's companies, namely *M/s Global Services FZE*, UAE and *M/s Global Trade & Commerce Ltd.* Reportedly, to bye-pass the integrity pact signed between the Government of India and AWIL and to facilitate payment of kickbacks, several service contracts were executed between the applicant's companies and AWIL, even though no service was rendered by said companies in exchange or if rendered, the payments were not commensurate with the work done. In this way, a smoke screen was created between the bogus agreements/contracts and the main contract of AWIL with the Government of India, while *prima facie* legitimizing the payment of kickbacks by showcasing them as service charges.

5. It was further alleged that the applicant carried out liaison activities with various political leaders, bureaucrats and ministers, and engaged one *J.B. Subramanian* for typing and sending dispatches/reports in relation to developments in the procurement process to co-accused persons, which

ultimately helped AWIL influence and bag the VVIP helicopter deal. The applicant was also alleged to have created various structures in India, Singapore, Dubai, etc., wherein several people were engaged, to route the kickbacks. While major portion of the kickbacks was stated to have been withdrawn in cash and through Hawala for payment to Indian Air Force officials, bureaucrats, etc., a certain portion was also reported to have been used by the applicant to purchase properties and to make payments to friends and family. Till date, 9 supplementary complaints have been filed and further investigation is stated to be going on.

6. After the applicant was extradited and brought to India, on 22.12.2018, an application filed by ED seeking arrest of the applicant was taken up by the Special Court and after hearing both sides, 7 days' PC remand of the applicant was granted to ED. Subsequently, the applicant filed applications seeking statutory/interim/regular bail, which came to be dismissed by the Special Court on 16.02.2019, 18.04.2019 and 07.09.2019, in view of factors including, the serious nature of allegations and the stage of investigation.

7. Aggrieved, the applicant preferred BAIL APPLNs. 2715/2019 and 2716/2019 before this Court, one in respect of the RC and the other in the present ECIR recorded by the ED. When the hearing in the bail applications could not be concluded on account of restrictions imposed by COVID-19 lockdown, the applicant approached the Supreme Court for grant of bail. The Supreme Court, vide order dated 01.04.2020, directed this Court to decide the applications filed by the applicant seeking interim bail, on their own merits. Pursuant thereto, a Co-ordinate Bench of this Court vide order dated 06.04.2020 declined the prayer made by the applicant in his interim bail

applications after giving due consideration to the contentions raised. The Special Leave Petition (Criminal) Diary No(s). 10900/2020 filed against the said order was dismissed by the Supreme Court on 22.04.2020.

8. On 22.04.2021, the applicant sought leave to withdraw BAIL APPLN. 2716/2019 with liberty to seek redressal before the Trial Court, as the supplementary charge sheet had been filed. Accordingly, the bail application was dismissed as withdrawn with grant of the liberty prayed for.

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

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

10. During the course of arguments, Mr. Aljo K. Joseph, learned counsel for the applicant, made a preliminary submission that the Italian Court has already tried and acquitted the applicant and other accused persons after considering all materials and documents. Reference was made by him to the proceedings dated 19.06.2013 before the Italian Court to submit that the Indian Ministry of Defence was a party to the proceedings, where it was held that no money has flown out of the accounts of the applicant's company to bribe any officials. Thus, the continuation of proceedings before the Courts in India is in violation of Article 15 of the United Nations Convention against Transnational Organized Crime and its protocol. It also

amounts to double jeopardy under Article 20(2) of the Constitution of India and is further barred in view of the principles of issue estoppel and *res judicata*.

In response and while opposing the bail application, Mr. S.V. Raju, learned ASG appearing for the respondent/ED, submitted that neither the applicant nor the ED/Government of India was party to the criminal proceedings before the Italian Court, and as such, the commencement/continuation of trial before the Courts in India is not precluded either on the principle of issue estoppel or *res judicata*, the latter not even being applicable to criminal proceedings. It was urged that the reliance placed on behalf of the applicant on the United Nations Convention against Transnational Organized Crime is misplaced, as Article 15(6) of the Convention grants the Member States authority with respect to criminal prosecution in their domestic law. It was further stated that the evidence recorded by the Italian Courts with respect to the other co-accused persons has no bearing on the applicant's trial in India. In support of his submissions, learned ASG placed reliance on the decisions in Gramophone Company of India Ltd. *v.* Birendra Bahadur Pandey and Others reported as **(1984) 2 SCC 534**, Jitendra Panchal *v.* Intelligence Officer, Narcotics Control Bureau and Another reported as **(2009) 3 SCC 57,** Monica Bedi *v.* State of Andhra Pradesh reported as **(2011) 1 SCC 284** and A.T. Mydeen and Another *v.* Assistant Commissioner, Customs Department reported as **2021 SCC OnLine SC 1017**.

11. Before dealing with the issue, this Court deems it apposite to advert to the decision in Piara Singh *v.* State of Punjab reported as **(1969) 1 SCC 379,** where it has been observed that when a finding of fact has been recorded in

favor of the accused in earlier proceedings before a competent Court, the finding would constitute an estoppel against the prosecution to the extent that a Court in subsequent proceedings would be precluded from receiving evidence which disturbs said finding of fact. However, the same will not operate as a bar to the trial or conviction of the accused for a subsequent distinct offence. While taking this view, the Court made reference to the opinion of Dixon, J. in King *v.* Wilkes, (77 CLR at pp 518-519), which was extracted as under:-

> *"**6.** ...Speaking on the principle of estoppel Dixon, J., said in King v. Wilkes:*
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> > *"Whilst there is not a great deal of authority upon the subject, it appears to me that there is nothing wrong in the view that there is an issue-estoppel, if it appears by record of itself as explained by proper evidence, that the same point was determined in favour of a prisoner in a previous criminal trial which is brought in view on a second criminal trial of the same prisoner. That seems to be implied in the language used by Wrigt, J., in R. v. Ollis, which in effect I have adopted in the foregoing statement .... There must be a prior proceeding determined against the Crown necessarily involving an issue which again arises in a subsequent proceeding by the Crown against the same prisoner. The allegation of the Crown in the subsequent proceeding must itself be inconsistent with the acquittal of the prisoner in the previous proceeding. But if such a condition of affairs arises I see no reason why the ordinary rules of issue-estoppel should not apply. Such rules are not to be confused with those of res judicata, which in criminal proceedings are expressed in the pleas of autre fois acquit and autre fois convict. They are pleas which are concerned with the judicial determination of an alleged criminal liability and in the case of conviction with the substitution of a new liability. Issue-estoppel is concerned with the judicial establishment of a proposition of law or fact between parties. It depends upon well known doctrines which control the re-litigation of issues which are settled by prior litigation."*

12. Reference may also be made to the decision in Gramophone Company of India Ltd. (Supra), wherein it was noted thus:-

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

13. Coming to the case at hand, this Court takes note of the order dated 08.01.2018 passed by the Appellate Court of Milan, Italy. A perusal of the same would show that it was passed with respect to *'criminal proceedings'* against *Giuseppe Orsi* and *Bruno Spagnolini*, alongwith *'civil action'* brought at the instance of AGENZIA DELLE ENTRATE (Revenue Authority) and Indian Ministry of Defence. Although the applicant's name appears in the statement of reasons and the order, he was not a *'party'* before the Italian Court. Only *Giuseppe Orsi* and *Bruno Spagnolini* were charged and tried, that too for International Bribery and Tax Fraud during the years 2009-10, when the proceedings were dismissed *for lack of evidence*. The trial in Italy was concluded in the year 2014, whereas the charge sheet in the predicate offence was only filed in the year 2017 on the basis of material which was not available with the Italian Courts. Notably, the Ministry of

Defence participated in the Italian proceedings only as a civil party.

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

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

In response, learned ASG submitted that Article 17 of the Extradition Treaty with UAE not only permits trial for offences in respect of which extradition of an accused person is sought, but also for the offences connected therewith. Emphasis was laid on the expression *'is sought'* used in Article 17 of the Treaty to submit that a reading of the extradition request, as noted in the judgment passed by the Dubai Supreme Court, would show that besides other offences, the applicant's extradition was also *'sought'* in respect of the offence of *'money laundering'*. While distinguishing the decision of the Supreme Court in Daya Singh Lahoria (Supra), it was

submitted that the Republic of India has entered into different treaties with different countries and the decision in Daya Singh Lahoria (Supra), interpreting Section 21 of the Extradition Act, 1962, was with respect to the unique facts of the case and the Treaty applicable in the said case. The Treaty involved in the aforesaid case was much different from the Treaty entered into by the Republic of India with UAE, as the latter also permits trial of the person extradited for offences which are *'connected'* with the offences in respect of which extradition is *'sought'.* To buttress his submission, learned ASG placed reliance on the decision in Commissioner of Customs, Bangalore *v.* G.M. Exports and Others reported as **(2016) 1 SCC 91**.

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

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

by the court in the requesting state."

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

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

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

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

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

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

(*emphasis added*)

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

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

17. Notably, the supplementary complaint against the applicant has been filed for offences under Sections 3/4 PMLA. On a plain reading of the judgment passed by the Dubai Supreme Court; the Extradition Treaty signed between UAE and the Republic of India; and the authorities cited on the issue by the parties, this Court, *prima facie*, finds no merit in the submission made on behalf of the applicant. Even otherwise, the said submission would be open to test at the time of framing of Charge/trial.

18. A third preliminary submission made by the learned counsel for the applicant was that the applicant was subject of rendition and kept in illegal custody by the ED. In this regard, reliance was placed on a finding recorded in favor of the applicant by the United Nations Human Rights Council Working Group on Arbitrary Detention (hereinafter, referred to as the *'UNHRC WGAD'*) in its 89th meeting.

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

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

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

competent jurisdiction in India. Accordingly, the submission made on behalf of the applicant does not weigh with this Court.

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

(A) That the applicant has been falsely implicated in the present case and from the material placed on record, no *prima facie* case is made out against him. It was urged that neither any role has been attributed to the applicant regarding lowering of operational height of the VVIP helicopters from 6000 meters to 4500 meters, nor any material has been placed on record to indicate that any payment was made by the applicant to any person, including any government official, for doing any corrupt act. Accordingly, the predicate offence is not made out against the applicant and as a necessary corollary, the offence under Sections 3/4 PMLA is also not made out.

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

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

(D) That the applicant, who is aged about 60 years, suffers from various medical ailments and has been in custody for more than 03 years and 02 months. It was also averred that the prosecution has cited a number of witnesses and the records are voluminous. The investigation has taken 9 years and is still stated to be continuing. In these facts, the commencement/conclusion of the trial is likely to take a long time. Besides, the ED had filed the first supplementary complaint in the case against the applicant on 10.06.2016.

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

22. Per contra, learned ASG made the following submissions:-

(A) That money has been laundered in the present case through two channels, one of which was constituted by the applicant and his associates, and the conspiracy continued even after the award of contract to AWIL.

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

(C) Learned ASG raised an objection to the filing of the present bail application by the applicant. He submitted that an earlier regular bail application filed on behalf of the applicant was dismissed as withdrawn by this Court on 22.04.2021 and without material change in circumstance, successive bail application is not maintainable. It was further submitted that the applicant's applications seeking interim bail were dismissed by this Court on 18.04.2019, wherein his conduct was also noted, and as such, heavy burden lies on the applicant to show as to what material change has taken place in the fact situation of the case. It was also averred that further time spent in jail is not a material change in circumstance and insofar as the applicant's contention that since the earlier dismissal orders, an opinion by the UNHRC WGAD has been filed, is concerned, the same being a report by a third party cannot be considered as a material change in circumstance either. In support of his submissions, reliance was placed by the learned ASG on the decisions in Kalyan Chandra Sarkar *v.* Rajesh Ranjan alias Pappu Yadav and Another reported as **(2005) 2 SCC 42,** Virupakshappa Gouda and Another *v.* State of Karnataka and Another reported as **(2017) 5 SCC 406** and Rakesh Makhabhai Bamaniya *v.* State of Gujarat reported as **2020 SCC OnLine Guj 1801**.

(D) While referring to the parameters for consideration of bail application, learned ASG submitted that the applicant is a British national, having no roots in India and is accused of a grave economic offence. He urged that since the applicant was not available during investigation, he had to be extradited. It was further submitted that despite being a British national, the applicant has not been residing in UK for the last 7-8 years, and he had also evaded investigation/trial in Italy. Thus, he is a flight risk, as also observed by a Co-ordinate Bench of this Court in the order dated 06.04.2020 passed in BAIL APPLN. 2716/2019.

(E) Learned ASG further contended that in view of his powerful connections, the applicant, if enlarged on bail, may influence the witnesses.

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

However, in the present case, the earlier dismissal order referred to by the learned ASG came to be passed in an interim bail application. Though the applicant had filed an earlier application for regular bail before this Court, the same was withdrawn with liberty to seek redressal before the Trial Court. On 13.04.2021, this Court had permitted the application to be

withdrawn, with liberty aforementioned, and was not considered on merits. In this backdrop, the submission made on behalf of the ED is discounted and this Court proceeds to consider the bail application on its own merits.

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

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

> *"**21.** In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.*
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> ***22.** From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be*

deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.

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

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

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

26. While taking special note of cases involving economic offences, it has been propounded by the Supreme Court that such offences constitute a class apart and should be visited with a different approach in matters of bail

[Refer: Y.S. Jagan Mohan Reddy *v.* Central Bureau of Investigation reported as **(2013) 7 SCC 439**, Anil Kumar Yadav *v.* State (NCT of Delhi) and Another reported as **(2018) 12 SCC 129** and Rohit Tandon *v.* Directorate of Enforcement reported as **(2018) 11 SCC 46].**

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

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

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

> *"**21.** The jurisdiction to grant bail has to be exercised on the basis of the well-settled principles having regard to the facts and circumstances of each case. The following factors are to be taken into consideration while considering an application for bail:*
>
> > *(i) the nature of accusation and the severity of the punishment in the case of conviction and the nature of the materials relied upon by the prosecution;*

(ii) reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant or the witnesses;

(iii) reasonable possibility of securing the presence of the accused at the time of trial or the likelihood of his abscondence;

(iv) character, behaviour and standing of the accused and the circumstances which are peculiar to the accused;

(v) larger interest of the public or the State and similar other considerations.

[Vide Prahlad Singh Bhati v. State (NCT of Delhi).]

22. *There is no hard-and-fast rule regarding grant or refusal to grant bail. Each case has to be considered on the facts and circumstances of each case and on its own merits. The discretion of the court has to be exercised judiciously and not in an arbitrary manner. At this stage itself, it is necessary for us to indicate that we are unable to accept the contention of the learned Solicitor General that "flight risk" of economic offenders should be looked at as a national phenomenon and be dealt with in that manner merely because certain other offenders have flown out of the country. The same cannot, in our view, be put in a straitjacket formula so as to deny bail to the one who is before the court, due to the conduct of other offenders, if the person under consideration is otherwise entitled to bail on the merits of his own case. Hence, in our view, such consideration including as to "flight risk" is to be made on individual basis being uninfluenced by the unconnected cases, more so, when the personal liberty is involved."*

29. Subsequently, in P. Chidambaram *v.* Directorate of Enforcement reported as **(2020) 13 SCC 791,** the Supreme Court, after going through the entire conspectus of law on the aspect of determining factors to be taken into account at the time of consideration of bail, has observed that one of the

circumstances to consider the gravity of offence is the term of sentence, which has to be kept in mind besides the triple test.

30. Coming to the facts of the case, it is noted that the applicant is stated to be the key accused. He is accused of having played a pivotal role in the entire case, being a middleman engaged by *M/s AgustaWestland* for obtaining confidential information regarding the procurement process of VVIP helicopters by the Government of India.

As per the allegations, one *J.B. Subramanian* was engaged by the applicant for typing and sending dispatches/reports in relation to developments in the procurement process to co-accused persons. He is further accused of having facilitated payment of kickbacks/bribes to IAF personnel, bureaucrats and politicians in India in order to influence the outcome of the procurement process with the end goal to benefit AWIL.

31. From a perusal of the material placed on record, it is apparent that the applicant, through his companies *M/s Global Trade & Commerce Ltd.*, London and *M/s Global Services FZE*, Dubai, UAE, entered into various contracts with *M/s Finmeccanica, M/s AgustaWestland, M/s Westland Helicopters*, UK etc. to camouflage the receipt of kickbacks/bribe amounts. In furtherance, his companies were paid an amount of Euro 30 million, even though no work was carried out. One of these contracts is reported to have been for Euro 6,050,000 between *M/s AgustaWestland Holdings Ltd.* and *M/s Global Services FZE*, Dubai, and the second, for Euro 18.2 million between *M/s Westland Helicopters* and *M/s Global Trade and Commerce Ltd.*, UK.

32. It has been alleged that the funds received by the applicant in his companies constituted proceeds of crime, out of which, money was diverted by the applicant to one *M/s Media Exim Pvt. Ltd* and later projected as untainted.

In the investigation, it has come that *M/s Media Exim Pvt. Ltd*. was a shell company with no business transaction done at all, formed by *Mr. R.K. Nanda* on the instructions of the applicant and used only for the purpose of sale and purchase of properties and/or to launder money. Reportedly, *Mr. R.K. Nanda* and *Mr. J.B. Subramanium* were appointed Directors in the said company on the directions of the applicant and an amount of Rs.6.33 crores (approx.) was transferred to the account of the said company by the applicant through his company *M/s Global Services FZE (Dubai)*. This amount was then used to purchase immoveable properties, one *Honda Civic Car*, one *Ford Endeavour*, paintings, jewellery, etc. It has also been revealed that the applicant facilitated the transfer of money, including cash/other items through his aides to desired recipients, who are in receipt of the proceeds of crime.

It is reported that when the allegations in the present case came to light, the applicant instructed *R.K. Nanda* to dispose of the immovable properties purchased out of the proceeds of crime aforementioned. As a result of the sale/purchase of the properties, *M/s Media Exim Pvt. Ltd.* recorded a net gain of Rs.7.75 crores, and Rs.6.33 crores (approx.) received earlier from the applicant's company were transferred back to it. It has been alleged that the assets of *M/s Media Exim Pvt. Ltd.*, worth Rs.2,77,70,000/-, include properties purchased but not disposed of, cash, etc., and having come from *M/s AgustaWestland* with the help of the applicant, also

constitute proceeds of crime.

33. During investigation**,** incriminating documents against the applicant are stated to have been recovered, including a partly typed and partly handwritten agreement dated 08.05.2011, alleged to be in the handwriting of the applicant. Further, a payment sheet prepared by *Guido Haschke* on the instructions of the applicant is also stated to have been recovered, showing that an amount of Euro 30 million was paid/proposed to be paid to Bureaucrats, Politicians, etc. for influencing the VVIP helicopters deal.

34. During the course of submissions, learned counsel for the applicant argued that the twin conditions under Section 45(1) PMLA are not applicable to the present case, as there can be no retrospective application of the amendment made in Section 45 PMLA vide the Finance Act, 2018. Per contra, learned ASG submitted that the twin conditions have been revived by way of the amendment made in Section 45 PMLA vide the Finance Act, 2018 and are thus applicable to the present case. A plain reading of the provision would show that the embargo imposed thereby on grant of bail takes form of twin conditions – (i) that the Public Prosecutor shall be given an opportunity to oppose the application for release, and (ii) where the Public Prosecutor opposes such application, the Court should be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offence and that he is not likely to commit any offence while on bail. The limitations so imposed are in addition to those imposed under Cr.P.C. and have an overriding effect over the provisions of the Code, in case there occurs any inconsistency between the provisions of the two. Though stringent, they were earlier held by the Supreme Court to be mandatory [Refer: Gautam Kundu *v.* Directorate of Enforcement (Prevention of

Money-Laundering Act), Government of India through Manoj Kumar, Assistant Director, Eastern Region reported as **(2015) 16 SCC 1** and Rohit Tandon (Supra)].

35. Be that as it may, in 2017, the constitutional validity of Section 45 PMLA came to be challenged before the Supreme Court in Nikesh Tarachand Shah (Supra), wherefore, by a judgment rendered in 2018, explicating the defects inherent in the provision and the challenges posed thereby, the Supreme Court held that the twin conditions imposed by Section 45(1) PMLA were manifestly arbitrary, discriminatory and violative of Articles 14 and 21 of the Constitution of India. Post the decision in Nikesh Tarachand Shah (Supra), an amendment was made to Section 45 PMLA vide the Finance Act, 2018 and brought into effect from 19.04.2018.

36. Learned counsels for the parties have informed that the issues raised in the present proceedings in connection with Section 45 PMLA have already been taken up for hearing by the Supreme Court and are under active consideration.

37. Insofar as learned ASG has raised an apprehension that the applicant may influence witnesses and/or tamper with evidence, suffice it to note, the respondent has failed to bring out any credible circumstance to show that the applicant has directly or indirectly influenced any witness till date. Further, statements of witnesses/accused under Section 50 PMLA are stated to have been recorded and all the material relevant to the case, being documentary in nature, is stated to have already been seized and filed alongwith the prosecution complaint/supplementary complaints. In this backdrop, this Court is of the opinion that the apprehensions of the applicant influencing

witnesses/tampering with evidence are not supported by any material placed on record, and on this aspect, mere pendency of further investigation is of no consequence. In this regard, the Supreme Court in P. Chidambaram *v.* Central Bureau of Investigation (Supra) and Sanjay Chandra (Supra) has also observed that mere apprehension of the accused influencing witnesses/tampering with evidence, without any material supporting the allegations, cannot be a basis to keep him in jail.

38. So far as the third prong of triple test, i.e. of the applicant being a flight risk, is concerned, learned counsel for the applicant has submitted that the applicant's passport lies seized with CBI and another accused person who is a foreign national has been granted bail. On the other hand, learned ASG has stressed that the applicant is a British national having no roots in India and continues to be a flight risk. It has also been submitted on behalf of ED that prior to his role becoming public, the applicant was a frequent visitor to India, however, when co-accused *Giuseppe Orsi* was arrested by the Italian authorities on 12.02.2013, the applicant left India on the same day, and thereafter, never returned, until he was extradited.

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

stated to have been granted bail.

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

40. At this stage, this Court deems it apposite to advert to the two recent decisions by the Supreme Court in The Directorate of Enforcement *v.* Parkash Gurbaxani etc., **SLP(Crl.) 7666-7667/2021** and The Asst. Director Enforcement Directorate *v.* Dr. V.C. Mohan, **Criminal Appeal No. 21/2022,** which are briefly discussed hereunder.

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

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

Although the Supreme Court declined to interfere with the impugned order in the circumstances of the case, including the fact that the respondent(s) were reportedly senior citizens and had cooperated in the

investigation, it was directed that the same shall not be treated as precedent in other cases. The question of law, however, was left open.

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

> *"This appeal takes exception to the judgment and order dated 25.06.2021 passed by the High Court of Telangana at Hyderabad in Criminal Petition No. 4134 of 2021, whereby the High Court granted anticipatory bail to the respondent in connection with offence concerning the Prevention of Money Laundering Act (for short 'PMLA Act') being F.No. ECIR/HYZO/20/2019/2246 bearing summons dated 11.05.2021.*
>
> *xxx*
>
> *Indeed, the offence under the PMLA Act is dependent on the predicate offence which would be under ordinary law, including provisions of Indian Penal Code. That does not mean that while considering the prayer for grant of anticipatory bail in connection with PMLA offence, the mandate of Section 45 of the PMLA Act would not come into play*
>
> .
>
> *Mr. Dama Seshadri Naidu, learned senior counsel appearing for the respondent invited our attention to the dictum in paragraph 42 of the judgment in Nikesh Tarachand Shah vs. Union of India & Anr. reported in (2018) 11 SCC 1. The observations made therein have been misunderstood by the respondent. It is one thing to say that Section 45 of the PMLA Act to offences under the ordinary law would not get attracted but once the prayer for anticipatory bail is made in connection with offence under the PMLA Act, the underlying principles and rigors of Section 45 of the PMLA Act must get triggered — although the application is under Section 438 of Code of Criminal Procedure. As aforesaid, the High Court has not touched upon this aspect at all.*

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

Accordingly, we deem it appropriate to set aside the impugned judgment and order and relegate the parties before the High Court for reconsideration of Criminal Petition No. 4134 of 2021 afresh for grant of anticipatory bail filed under Section 438 of the Code of Criminal Procedure in connection with stated PMLA offence."

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

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

44. With regard to the parameters for adjudication of bail application in terms of Section 45(1)(ii) PMLA, reference may be made to the observations made in Rohit Tandon (Supra), where while relying on its earlier decisions in Ranjitsing Brahmajeetsing Sharma *v.* State of Maharashtra and Another reported as **(2005) 5 SCC 294** and State of Maharashtra *v.* Vishwanath Maranna Shetty reported as **(2012) 10 SCC 561**, the Supreme Court held as under:

*"**22.** It is not necessary to multiply the authorities on the sweep of Section 45 of the 2002 Act which, as aforementioned, is no more res integra. The decision in Ranjitsing Brahmajeetsing*

Sharma v. State of Maharashtra and State of Maharashtra v. Vishwanath Maranna Shetty dealt with an analogous provision in the Maharashtra Control of Organised Crime Act, 1999. It has been expounded that the Court at the stage of considering the application for grant of bail, shall consider the question from the angle as to whether the accused was possessed of the requisite mens rea. The Court is not required to record a positive finding that the accused had not committed an offence under the Act. The Court ought to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. The duty of the Court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. Further, the Court is required to record a finding as to the possibility of the accused committing a crime which is an offence under the Act after grant of bail."

45. From a perusal of the material placed on record, it is discernible that the applicant never joined proceedings before the Court in Italy, and for that reason European Non-Bailable Warrants were issued against him. In India, summons were initially issued by ED to the applicant on 23.09.2015, but he failed to join investigation. As a result, open ended NBWs were issued by the learned Special Judge on 23.10.2015. Subsequently, a Red Corner Notice bearing Control No. A-20/1-2016 was issued by INTERPOL, which came to be published on 04.01.2016. Thereafter, the applicant came to be arrested in UAE. A request for extradition of the applicant was forwarded by ED to UAE on 05.02.2018. Subsequently, the applicant came to be extradited to India on 04.12.2018, i.e. after filing of the third supplementary complaint. He was taken into custody by the ED on 22.12.2018.

The allegations levelled against the applicant are serious in nature, for having committed a grave economic offence. He is reported to have transferred confidential information regarding the VVIP helicopters deal to AWIL, in order to influence the deal in its favor. He is also accused of

having facilitated the payment of kickbacks/bribe amounts by AWIL to Indian bureaucrats, politicians, etc. in connection with the deal. For his services, he is alleged to have received Euro 30 million from AWIL, which amount is stated to have been routed further through his companies to co-accused persons/entities and later projected as untainted.

46. Even though the applicant has spent considerable time in custody, on a consideration of the peculiar facts and circumstances of the case, including the factum of the applicant evading process/investigation in India/Italy and eventually having been extradited to India, this Court is of the opinion that the applicant, having no roots in the Indian society, is a flight risk. Further, keeping in view the parameters set out in Section 45(1) PMLA and the discussion undertaken hereinbefore, this Court finds no reasonable ground to believe that the applicant is not guilty of the alleged offence or that he is not likely to commit any such offence while on bail. Accordingly, the present bail application is dismissed.

47. In closing, it may also be mentioned that after the arguments were concluded and while the order was being reserved in the present case, an unverified letter dated 07.02.2022 from one *Mr. Edward Bossley*, HM Consul to India, was shown on behalf of the applicant, in respect of the apprehension that if enlarged on bail, he may be issued travel documents which may ultimately lead to his fleeing from justice. Learned ASG raised a strong objection regarding the same. It was pointed out that a similar letter from *Mr. Bossley* was sent to the Special Court through e-mail at the time of adjudication of the applicant's bail application on which, the Special Court had observed that the letter having come from a third party was not permissible material. Under these circumstances, this Court finds the letter

dated 07.02.2022 to be of no persuasive value and the reliance placed thereon unmerited.

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

MANOJ KUMAR OHRI, J

MARCH 11, 2022
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