AJAY KUMAR KUHAR
Special Judge (PC Act) CBI-09)
Court No. 602, Fifth Floor
Rouse Avenue Court Complex
New Delhi

IN THE COURT OF SH. AJAY KUMAR KUHAR, ADDITIONAL SESSIONS JUDGE / SPECIAL JUDGE (PC ACT), CBI-09, ROUSE AVENUE COURT COMPLEX, NEW DELHI

ECIR F.No.ECIR/HQ/04/2018 dated 29.8.2018

BAIL APPLICATION

Sh. D. K. Shivakumar
S/o Sh. D. K. Kempegowda
R/o 252, Sadashivnagar,
18th Cross, Bengaluru.

Versus

Assistant Director (PMLA)
Directorate of Enforcement
Headquarter Investigation Unit,
New Delhi.

Appearances :-

Sh. Mukul Rohatagi, Dr. Abhishek Manu Singhavi, Sh. Dayan Krishnan, learned Senior Advocates with Sh. Mayank Jain, Sh. Parmatama Singh and Sh. Madhur Jain, learned Counsel for applicant / accused D. K. Shivakumar.

Sh. K. M. Natraj, learned ASG with Sh. Amit Mahajan, learned CGSC, Sh. N. K. Matta and Sh. Nitesh Rana, learned SPP for DoE assisted by Sh. Sharath Nambiyar and Ms. Sanjana Rajput, learned Counsels and Sh. Saurabh Mehta, AD/ED/IO, for Directorate of Enforcement.

Special Judge (PC Act) CBI-09 ★ Rouse Avenue Court Complex, New Delhi

Arguments concluded on : 21.09.2019
Order pronounced on : 25.09.2019

ORDER

1. By this order I shall decide the bail application filed by accused / application D. K. Shivakumar under Section 439 Cr.PC and Section 65 of Prevention of Money Laundering Act, 2002, in ECIR/HQ/04/2018 dated 29.8.2018.

2. Pursuant to the notice of the application the Directorate of Enforcement has filed a reply opposing the bail application.

3. Before considering the rival contentions of the applicant and the Directorate of Enforcement (hereinafter ED) the factual background which led to the arrest of the applicant may be considered.

4. On 02.8.2017, a search under Section 132 (1) of the Income Tax Act was conducted on the premises of the applicant and other persons at Delhi and Bangalore by Income Tax Investigation Directorate of Karnataka. During the search conducted at various places, the Income Tax Authorities recovered cash, some loose sheets and dairy and other incriminating material.

5. The Income Tax authorities conducted searches at following four premises in Delhi which led to recovery of cash amount :-

i) Flat No.01, Karnataka Government Staff Quarters, Sector-6, R. K. Puram,

Special Judge (PC Act) CBI-09 Rouse Avenue Court Complex, New Delhi

ii) N-17, B-4, Safdarjung Enclave, New Delhi,

iii) N-107, B-2, Safdarjung Enclave, New Delhi and

iv) N-201, B-5, Safdarjung Enclave, New Delhi.

6. A sum of Rs.12,44,900/-, Rs.1,37,36,5000/-, Rs.41,03,600/- and Rs.6,68,84,100/- were recovered from these premises respectively. Thus, a total sum of Rs.859,69,100/- was recovered by income tax authorities.

7. The premises where search was conducted either belong to applicant D. K. Shivakumar or his associates. The person who were found in possession of the cash amount stated that it belonged to D. K. Shivakumar. Further, during the search at the residence of one Anjaneya Hanumanthaiah on 02.8.2017, it was found that the applicant D. K. Shivakumar has transacted with one Sh. Ajay Khanna to buy a property for a sum of Rs.Four crores in cash.

8. A complaint was filed by the Income Tax authority vide complaint no.129/2018 before the Special Court for Economic Offences, Bangalore for the offences punishable under Section 276 C (1), 277 and 278 of the Income Tax Act, 1961 read with Section 193, 199 and 120-B of Indian Penal Code, 1860 against the applicant D. K. Shivakumar, Sh. Anjaneya Hanumanthaiah (a public servant in Government of Karnataka), Sh. Sushil Kumar Sharma and Sh. Rajender N, for hatching criminal conspiracy among and between

Special Judge (PC Act) CBI-09 Rouse Avenue Court Complex, New Delhi different people for the purpose of concealing and projecting the tainted and illegal money as untainted property.

9. On the basis of the information received with regard to the complaint filed by Income Tax authority before the Special Court for Economic Offences, Bangalore, the Head Quarter Investigating Unit, Directorate of Enforcement, Government of India registered ECIR vide F.No.ECIR/HQ/04/2018 dated 29.8.2018 and started investigation for commission of offence under Section 3 of the Prevention of Money Laundering Act, 2002 (hereinafter PML Act), punishable under Section 4 of the Act.

10. The applicant/accused was summoned under Section 50 (2) of PML Act, 2002 for his statement which was recorded on 30.8.2019, 31.8.2019, 02.9.2019 and 03.9.2019. He was arrested in the present case on 03.9.2019 on the grounds *inter-alia*, that the transactions recorded in the incriminating documents recovered indicate that he has generated large sum of money by misuse of his official position. There has been a phenomenal growth in the assets of the accused and his family members when he was holding high position in the Government of Karnataka. The investigation is going on to ascertain all his known / unknown entities / accounts / properties in which the accused and his family members have beneficial interests. The source of the tainted money and its use is yet to be ascertained.

11. In the bail application, the accused has pleaded that in the

search under Section 132 (1) of Income Tax Act on 02.08.2017, an amount of Rs.41,03,600/- was recovered in cash which he has explained and it is also reflected in his Income Tax Return for the Assessment Year 2018-19. It is submitted that the applicant received a summon under Section 50 of the PML Act in ECIR/04/HQ 2018. He had referred a Writ Petition WP No.6210/2019 before Hon'ble High Court of Karnataka against the issuing of summons under Section 50 of the Act which however was dismissed by the Hon'ble Karnataka High Court. The applicant / accused has joined the investigation on 30.08.2019, 31.08.2019, 01.09.2019, 02.09.2019 and 03.09.2019. Despite being cooperative in the investigation conducted by the Enforcement Directorate, he has been arrested in the case.

12. The applicant / accused has submitted that since no Schedule Offence is mentioned in the complaint filed by the Income Tax Department under Section 200 Cr.P.C., the provisions of PML Act will not be attracted as there is no "predicate offence". It is pertinent to mention that the offences under Income Tax Act are not mentioned in the Schedule of the PML Act. It is submitted that Section 120 B of IPC cannot be invoked in the absence of a predicate offence. It is submitted that the amount of cash seized by the Income Tax Department in the search conducted on 02.08.2017 has already been shown in the Income Tax Return of the applicant / accused. It is submitted that despite the applicant joining the interrogation on short

notices, he has been arrested just to extort his confession by using illegal means. He was interrogated from 30.08.2019 to 03.09.2019 for about 33 hours as a result his health deteriorated and he had to be admitted in RML Hospital. It is submitted that the object of the Enforcement Directorate is to malign his image and humiliate him in the society. It is submitted that the applicant / accused is a public figure and was elected Member of Legislative Assembly, Karnataka, seven times and is a former Minister. It is submitted that his harassment is due to political vendetta of the government. It is also submitted that the applicant is not linked in any manner with money laundering and the Enforcement Directorate is trying to impute criminality with a motive. It is submitted that the complaint filed before the Special Judge, Bangalore invoking Section 276 C (1) and 277 of the Income Tax Act which are compoundable offences. It is submitted that the applicant / accused has no criminal antecedent and there is no question of his committing any offence in any manner whatsoever on his release on bail. It is further submitted that the case of the Enforcement Directorate is based on documents and there is no ground for having any apprehension of tampering with evidence or influencing the witnesses by the applicant / accused.

13. The respondent / ED filed a reply to the application of accused for bail. It was submitted that the applicant / accused hatched a criminal conspiracy with other persons for the purposes of concealing

Special Judge (PC Act) CBI-(09) Rouse Avenue Court Complex, New Delhi and projecting the tainted and illegal money as untainted property. It is submitted that the applicant / accused has been a public servant being Member of Legislative Assembly from 1989 onwards. It is submitted that during the investigation, the scrutiny of transaction recorded in incriminating documents recovered in the search, reveal unaccounted cash transaction and its laundering running into at least 143 crores. It is submitted that the cash amount of Rs.8,59,69,100/- found and seized during the search is part of this amount of 143 crores. It is further submitted that during investigation it has transpired that the applicant / accused purchased a property from Sh. Ajay Khanna, a partner of AN Build Prop. LLP New Delhi in which transaction of tainted amount of Rs.4 crore took place. It is further submitted that the applicant / accused in criminal conspiracy with at least 53 associates / confidente and family members has earned illegal money by abusing his official position. It is submitted that during the investigation, documents and material have been collected from different agencies, banks, etc. and statements of number of persons have been recorded which shows generation of proceeds of crime through misuse of his official position.

14. It is submitted further that investigation has revealed that the applicant / accused has generated illegal money which is evident from increase in his assets and that of his family members. It is further submitted in the reply that the applicant / accused, his family members

and associates are maintaining around 317 bank accounts wherein deposits and transfers have been made. It is further submitted that the tainted cash deposited and transferred in bank accounts of distant relatives and associates was transferred to close family relatives like mother, father, wife and daughter. This amount was transferred for purchase of lands / building at throwaway prices in auction and for purchase of agricultural land in the name of relatives. The land use thereafter was converted to commercial use for entering into Joint Development Agreement. It is further submitted that during the investigation, statement of Sh. Sunil Kumar Sharma, Sh. Sachin Narayan, Sh. Tanuj Anjaneya Hanumanthaiya, Sh. Anil Jain, Sh. Ajay Khanna, Sh. N. N. Somesh and Aishwarya D.K. Shivakumar have been recorded on different dates from 04.09.2019 to 12.09.2019. It is submitted that there is deposit / transfer of more than Rs.200 crores including substantial amount in cash in three bank accounts, statement of which was received from the respective banks during interrogation. The applicant / accused could not explain the source of these deposits. It is submitted that there has been high value transaction in these bank accounts which are still to be examined and explained by the applicant / accused. It is further submitted that this high value deposits have moved through circuitous route from one bank account to another bank account of the applicant / accused, his family members and close associates without any plausible reason.

15. It is further submitted in the reply that during investigation, number of properties and large sum of money, bank account of the applicant / accused, his family members have come to the notice of ED in as much as it is found that there is a transaction to the tune of Rs.1.8 Crore in the name of Ms. Aishwarya D. K. Shivakumar, daughter of the applicant / accused for which there is no plausible explanation with regard to the source of investment. The investment made by the applicant / accused in the name of his family , associates and accomplices is enormous and as per his own Election Affidavit submitted in year 2018, he holds the assets worth Rs.800 crores for which he was unable to provide the source of acquisition.

16. It is submitted that investigation is still in progress and is at crucial stage, the prosecution has to ascertain the source of tainted money, the role of various related persons and end use of the fund involved in the case. It is submitted that the quantum of proceeds of crime is yet to be ascertained.

17. Opposing the bail application, it is submitted by the ED that the applicant / accused is a powerful public figure and can influence the witnesses and tamper with the evidence thereby adversely affecting the ongoing investigation. Further, the applicant is accused of commission of grave economic offence for which strict parameters for grant of bail have been laid down by the Apex Court. It is further submitted that investigation is on to trace the proceeds of crime and

crack the modus operandi of the applicant / accused. It is further submitted that Section 45 of PML Act imposes two conditions for grant of bail to any person accused of an offence punishable under PML Act.

18. I have heard the arguments from Sh. Abhishek Manu Singhavi, Sh. Mukul Rohatgi and Sh. Dayan Krishnan, learned Senior Advocates for the accused and Sh. K. M. Natraj, learned Additional Solicitor General for the ED.

19. The submissions made by the learned Counsels for the ED and the accused may be summerised as under :-

(i) It was argued by learned Senior Counsels for the accused that the predicate offence in the present case as claimed by the ED is the complaint filed by the Income Tax Department with respect to the offences under Section 276 C, 277 of IT Act and Section 193, 199 read with 120-B of IPC. It was argued that Section 120-B IPC is only a penal provision and there has to some criminal act attached to it and it cannot by itself be substantive offence. Section 120-B of IPC has been mentioned in the Schedule of PML Act. It was submitted that the scope of investigation in the present case can only be with regard to the criminal conspiracy between the accused and co-accused in the criminal complaint filed by Income Tax Department as regard Hawala dealing of unaccounted cash which was recovered during the search.

(ii) It was submitted that the ED in reply to bail application has referred to criminal activities which have no connect with the 'Schedule Offence' i.e. Section 120 B IPC as mentioned in the complaint of the Income Tax Department.

(iii) It is further submitted that the ED rely upon the recovery of some diary and loose sheets in the search conducted on 02.08.2017 in different premises in Delhi, one of which belongs to the accused / applicant. It was submitted that the diary and loose sheets have been recovered from one Mr. Rajendra and only he can explain about the contents of the same. The learned Counsel referred to the judgment in the case of **CBI vs. V. C. Shukla**, (1998) 3 SCC 410 wherein it was observed by the Hon'ble Supreme Court that loose sheets of paper are wholly irrelevant as evidence being not admissible under Section 34 (of Evidence Act) to constitute evidence with respect to the transaction mentioned therein.

(iv) The learned Senior Counsels have also argued that the assets of Rs.800 crores which the ED is now investigating is the total asset which include the asset of his family members i.e. his wife and dependents. It was submitted that the asset which are shown in the Election Affidavit are the same only the market value of these assets has increased over a period of time. It was submitted that the applicant belongs to Vokallinga Community who are agriculturist having large chunks of land since beginning and with the commercialization, some of the land has been given to builders, under a Joint Development

Agreement, against which advances were received as 'deposits', which is one of the reason for increase in the assets of the applicant in the Election Affidavit of 2018.

(v) It is submitted that in the reply to the bail application, ED has referred to transaction of Rs.108 crore in the name of Ms. Aishwarya, daughter of the applicant / accused. It is submitted that it has already been reported by the applicant / accused in its Election Affidavit of 2018. Further, it is the market value of the asset on the date. It is submitted that it is a Mall, purchased at the cost of Rs.79 crore out of which Rs.40 Crores were taken as loan from Vijaya Bank and rest from family members and other persons. The asset, loan along with the aforesaid transaction are duly reflected in the Balance Sheet of the daughter of the applicant and as such no criminality can be attached to taking a loan from the family members. Moreover, this allegation does not even form part of the ED complaint in the 'predicate offence' on basis of which proceedings under the PML Act have commenced.

(vi) It is submitted by the learned Senior Counsels for the accused that the ED in the reply to the bail application has submitted that there are 317 bank accounts in the name of the family members, associates and other entities connected with the accused. It was asserted that the family members of the applicant are having only 20 active accounts and there is nothing on the record to connect the applicant / accused with those 317 bank accounts.

(vii) It was submitted that the ED in its reply has stated that Rs.200 crores were deposited or transacted in the account of the applicant, which is an incorrect statement. It is submitted that in the last ten years, the applicant / accused has deposited only Rs.60,24,200/- in his account in cash.

(viii) It is further submitted that the allegation that applicant and his brother have purchased 24 and 27 properties respectively since 1990 without known sources of income, is baseless and has no relation whatsoever with the scheduled offence investigated by the ED.

(ix) It is further submitted that the allegation that the applicant / accused has made payment of Rs.4 crores in cash to Sh. Ajay Khanna is incorrect rather, Rs.3.5 crores was paid to Sh. Ajay Khanna by way of cheque. It is further submitted that the ED has mentioned in the reply that applicant / accused has conspired with about fifty three persons / associates in the conspiracy but it is pertinent to note that in the complaint lodged by the Income Tax Department for the predicate offence, there are only five accused.

(x) The learned Senior Counsel for the applicant / accused has argued that at this stage, the court need not go into the merit of the case and has to consider the grounds of bail as per the settled principle of law. It was argued that the ED can only investigate the criminal activity 'related' or 'relatable' to the Schedule Offence. It was argued that the 'proceeds of crime' as defined in Section 2 (u) of PML Act has

Special Judge (PC Act) CBI-09 ★ Rouse Avenue Court Complex, New Delhi ★

to have direct nexus with the Schedule Offence. In this case, but for Section 120 B of IPC, there is no Schedule Offence. The proceeds of crime therefore, must emanate from this Schedule Offence. It was submitted that Section 120 B IPC only provides for punishment for the criminal conspiracy. Therefore, the ED must show what is the criminal activity for which there is a conspiracy between the applicant / accused and other persons. The conspiracy has to be with regard to a 'Schedule Offence'. It was submitted that the offence in the complaint under Section 200 Cr.P.C. filed before Special Judge, Bangalore the offences are under Section 276 C and 277 of the Income Tax Act which are not mentioned in the Schedule of the PML Act, moreover, they are compoundable offences.

(xi) It was further argued by the learned Senior Counsel for the applicant / accused that the offences under the PML Act are punishable for imprisonment upto seven years, therefore, not in the category of grievous offence; the applicant / accused is a public figure, being elected as Member of Legislative Assembly seven times; the applicant has joined the investigation from 30.08.2019 to 03.09.2019 and thereafter, till 17.09.2019; he has cooperated in the investigation; the submission of the ED that he was evasive and non cooperative is incorrect; the accused by virtue of Article 20 (3) of the Constitution of India has a right of silence and not to say anything incriminating against him.

Special Judge (PC Act) CBI-05 ★ Rouse Avenue Court Complex, New Delhi

(xii) It was argued that the applicant / accused is not a flight risk and there is nothing on record to say that he will tamper with evidence or influence the witnesses. The applicant / accused has no criminal antecedent and has roots in the society. Reliance was placed on the judgment in the case of **R. Vasudevan vs. CBI**, (Bail Application No.2381/2009) wherein Hon'ble Delhi High Court considering the high position and deep roots of the accused, granted bail.

(xiii) It was argued that ED opposed bail application on the ground that Section 45 of PML Act puts a twin conditions on bail. But the twin conditions have been done away with by the Hon'ble Supreme Court in case of **Nikesh Tarachand Shah vs. Union of India**, (2018) 11 SCC 1. The Amendment made in Section 45 PML Act w.e.f 14.08.2018 have not resurrected the twin conditions. Reference is made to judgment of the Hon'ble Delhi High Court in **Upender Rai vs. Directorate of Enforcement** (Bail Application No.249/2019, DoD 06.07.2019).

20. The learned Counsel for the accused has further made the submission that the bail of the applicant / accused may be considered on medical ground as well. It is submitted that the applicant / accused was hospitalized four times in the last two weeks. He has unstable angina and fluctuating blood pressure. He was admitted in the hospital on 14.09.2019 and discharged on 17.09.2019 when again he was

Special Judge (PC Act) CBI-09 ★ Rouse Avenue Court Complex, New Delhi ★

admitted in the hospital for his check up as per the directions of the court. An angiography was performed upon him on 18.09.2019. He was discharged on 19.09.2019. It is submitted that the applicant / accused be given benefit of bail on account of his medical condition.

21. The learned Additional Solicitor General while opposing the bail application has made the following submissions :

(i) The learned Additional Solicitor General has submitted that applicant / accused has hatched the criminal conspiracy for the purpose of concealing and projecting tainted and illegal money as untainted property.

(ii) The investigation has so far revealed that there are series of transactions, evident from the documents recovered, which shows unaccounted cash transaction and its laundering running into at least Rs.143 crores. The recovery of Rs.8,59,69,100/- is a part of this laundering of money.

(iii) It is submitted that the applicant / accused was a Minister in the State of Karnataka from October, 1990 to November 1992, October 1999 to May 2002 and from January 2014 to May 2018 and from May 2018 to July 2019. The investigation has revealed that he abused his official position to generate illegal money which is evident from the substantial increase in his assets.

(iv) It is submitted that during investigation, 317 bank accounts have been traced belonging to the family members / associates and other entities wherein deposit and transfer had been made. A huge cash has been deposited / transferred in the bank accounts. It is further submitted that the tainted cash deposited or transferred in bank accounts of relatives and associates was transferred to close family members, which was then used for purchase of land / building. It is submitted that many immovable properties have been acquired in the name of family members from this tainted money.

(v) It is further submitted that investigation has revealed that there is transaction of Rs.200 crores substantially in cash in three bank accounts. The accused during custody with ED did not explain the source of these deposits. It is further submitted that high value deposits have moved through a circuitous route from one bank to another bank with the sole intention to make tracing of money trail arduous.

(vi) The learned Additional Solicitor General has further argued that mere filing of Income Tax Return will not be a bar for application of PML Act. No doubt, the applicant / accused has declared assets in Election Affidavit 2018 but the investigation is for the source of this assets.

(vii) With regard to the predicate offence, it was submitted that Section 120 B IPC is a Schedule Offence. Any criminal activity pursuant to a conspiracy would be covered under the Schedule of PML Act. He refers to the judgments of Hon'ble Karnataka High

Court in **Sh. Sachin Narayan vs. Income Tax Department & Ors.**, Writ Petition No.5299/2019 date of decision 28.08.2019, wherein the Hon'ble Karnataka High Court while dealing with the same issue has observed that Section 120 B IPC is a predicate offence by itself or in other words, it is a stand-alone offence. He submitted that the judgment of the Hon'ble Karnataka High Court has come in the petiton filed by the applicant / accused challenging the summons issued to him under Section 50 of the PML Act. Since, the Hon'ble High Court has held that Section 120 B IPC is a predicate offence, the issue with regard to it being the Schedule Offence can not be raised in this forum because the constitutional validity of incorporation of Section 120B IPC as a Schedule Offence in Part A Para 1 of the Schedule to PML Act has never been challenged.

(viii) It is further argued that applicant / accused claimed his agricultural income as the source for his assets. However, the analysis of his accounts has shown that since 1997 till date, his total agricultural income is only 1.38 crore which is a meager amount compared to the assets generated by him. He further submitted that HUF has granted loan to the family members of the applicant / accused but the said HUF has never filed any Income Tax Return.

(ix) The learned Additional Solicitor General has argued that considering the provisions of law applicable i.e. Section 45 of PML Act, the stage of investigation and the nature of offence, the applicant / accused does not deserve the bail.

(x) It was further submitted that the investigation is still going on. The applicant / accused has been evasive and non cooperative in the investigation. Though, Article 20 (1) of the Constitution is available to the applicant / accused to keep silence, but it does not entitle him to remain silent on the issues which are only in his knowledge. He further submitted that voluminous record is to be analysed; summons have been issued to various persons who are to be examined and the accused being an influential person may tamper with evidence and influence the persons who are being summoned in the investigation, if he is released on bail. He submitted that one of the witness retracted his statement under Section 50 of the PML Act under his influence which shows his propensity to further influence the witnesses. It was also submitted that the court is not supposed to hold a mini trial at this stage. Considering the stage of investigation and the fact that it is an economic offence, the court has to take a strict view and reject the bail application. He further added that the amendment to Section 45 of PML Act in 2018, has resurrected the twin conditions.

(xi) He has relied upon following judgments to oppose the grant of bail to the applicant :

(i) **Union of India v. Hassan Ali Khan & Anr.**, (2011) 10 SCC 235

(ii) **Gautam Kundu vs. Diorectorate of Enforcement**, (2015) 16

SCC 1

(iii) **Rohit Tandon v. Directorate of Enforcement**, (2018) 11 SCC 46

(iv) **P. Chidambaram vs. Directorate of Enforcement**, Cr. Appeal 1340 of 2019 (Arising out SLP (Crl.) No.7523 of 2019.

(v) **Serious Fraud Investigation Office vs. Nittin Johari & Anr.**, Cr. Appeal No.1381 of 2019 (arising out of SLP (Crl.) No.7437 of 2019)

(vi) **Y. S. Jagan Mohan Reddy v. Central Bureau of Investigation**, (2013) 7 SCC 439

(vii) **State of Gujarat vs. Mohanlal Jitamalji Porwal**, (1987) 2 SCC 364

(viii) **Sachin Narayan Sharma vs. IT**, WP (C) No.5299 of 2019 Karnataka High Court

(ix) **Nikesh Tarachand Shah v. Union of India & Anr.**, 2017 SCC Online SC 1355

22. The learned Senior Advocates for the applicant / accused have rebutted the argument of learned Additional Solicitor General. It was submitted that the judgment in Upender Rai's case (supra) is very categorical that the twin conditions have not been resurrected in Section 45 of PML Act. It was submitted that the judgment on which reliance is placed by learned Additional Solicitor General are not

relevant. It was argued that the judgment in P. Chidambaram's case (supra), did not overrule the judgment in Nikesh Tarachand Shah's case. Similarly, in SFIO vs. Nitin Johari (supra), the court has not dealt with the issue of Section 45 of the PML Act. It was submitted that reliance on the judgment of Rohit Tandon's case, Gautam Kundu's case and Hassan Ali's case (supra) is misplaced because these judgments are prior to the judgment in Nikesh Tarachand Shah's case. It was submitted by the learned Senior Advocates for the accused that the principle that bail is rule and jail is exception has been reiterated by the Hon'ble Supreme Court in **Dataram Singh vs. State of Uttar Pradesh**, (2018) 3 SCC 22. It was submitted further that the applicant / accused having roots in the society is entitled for bail. Reliance is placed on **R. Vasudevan vs. CBI**, Bail Application No.2381/2009. It was submitted that mere allegation of tampering with evidence is not sufficient to keep the applicant / accused in custody. Reliance was placed on **State of Maharashtra vs. Nailmal Punjaji Shah**, (1969) 3 SCC 904.

23. The applicant / accused has been arrested on 03.09.2019 in the abovesaid ECIR registered by Headquarter, Investigation Unit, Directorate of Enforcement, New Delhi for commission of offence under Section 3 of PML Act. The ECIR was registered on the basis of the criminal complaint filed before the Special Court for Economic

Offences, Bangalore by the Income Tax Authority for offences punishable under Section 276 C (1), 277 and 278 of the Income Tax Act and Section 193, 199 and 120-B of IPC. This complaint is premised on the allegation that the applicant along with his co-accused has hatched the criminal conspiracy for the purpose of concealing and projecting tainted and illegal money as untainted property. Thus, the crux of the said conspiracy is concealment and projection of ill gotten money / tainted money as untainted property. The ED has registered the ECIR and started investigation in the matter. It has collected documents and examined several persons. It has found multiple bank accounts (about 317) in the name of different entities which are connected with the applicant / accused or with his family members in one way or the other. It has found a transaction of about Rs.143 crores from the documents recovered in the search conducted in different premises in New Delhi on 02.08.2017. It has found a substantial increase in the asset of the applicant / accused over a period of time while the source of acquisition of those assets is yet to be ascertained. Thus, the case of the ED is that accused / applicant has committed money laundering.

24. Section 3 of PML Act, 2002 describe money laundering as under :-

> **'Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is**

actually involved in any process or activity connected with proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money laundering.'

25. By the Finance (No.2) Act, 2019 No.23 of 2019 notified on 01.08.2019 has added an explanation to the Section 3 of PML Act as under :-

"Explanation – For the removal of doubts, it is hereby clarified that -

(i) a person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely :-

(a) concealment; or

(b) possession; or

(c) acquisition; or

(d) use; or

(e) projecting as untainted property; or

(f) claiming as untainted property,

in any manner

(ii) the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever.'

26. The essence of offence of money laundering as defined in Section 3 of PML Act above is involvement of any person in any process or activity connected with 'proceeds of crime'.

27. Section 2 (u) of PML Act defines proceeds of crime as under :-

''proceeds of crime' means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a schedule offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country. '

28. By the Finance (No.2) Act, 2019 No.23 of 2019 notified on 01.08.2019 has added an explanation to the Section 2 (u) of PML Act as under :-

'Explanation – For the removal of doubts, it is hereby clarified that "proceeds of crime" include property not only derived or obtained from the schedule offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence.'

29. The proceeds of crime as defined in Section 2 (u) of PML Act has to have the nexus with the Schedule Offence. Section 2 (y) of PML Act defines Schedule Offence as under :-

"Scheduled Offence" means -
(i) the offences specified under Part A of the Schedule; or
(ii) the offences specified under Part B of the Schedule if the total value involved in such offences is one crore rupees or more; or
(iii) the offences specified under Part C of the Schedule.'

30. Section 120-B of IPC find mention as a Schedule Offence in Part A Paragraph 1 of the Schedule to PML Act, 2002.

31. It was argued that ED could investigate only such criminal activity related or relatable to the schedule offence. The offences under the Income Tax Act are not scheduled offence. Section 120 B of IPC, therefore, cannot be invoked without there being a predicate offence mentioned in the Schedule. It was submitted that the 'proceeds of crime' when merged in the mainstream only then it would attract the offence of money laundering under Section 3 of the PML Act. The learned Additional Solicitor General has however referred to the judgment of Karnataka High Court in Sachin Narayan vs. IT (supra) and submitted that same contention was raised before the Hon'ble High Court and the argument was not accepted. It was specifically held that Section 120 B of IPC is a predicate offence by itself and thereby a stand-alone offence. Since, it is mentioned in the Schedule Part A Paragraph 1, it acquires the character of a Schedule Offence. It is not in dispute that Section 120 B of IPC is placed in list of Schedule Offences. However, this question whether there need to be some other Schedule Offence under PML Act with which Section 120 B of IPC can be read together amounts to a challenge to the constitutionality to the inclusion of Section 120 B of IPC independently as a Schedule Offence in Part A Paragraph 1. So far as this court is concerned, it has

to treat Section 120 B IPC as a Schedule Offence, moreso, because the Hon'ble Karnataka High Court in this case has already held that Section 120 B of IPC is a predicate and independent offence. Therefore, it will not be appropriate at this stage to delve in this issue further.

32. So far as the question of Section 45 of PML Act is concerned, the learned Additional Solicitor General has referred to a judgment in P. Chidambaram's case and SFIO vs. Nitin Johari (supra). The learned Senior Advocates for the accused however, have submitted that the amendment made in Section 45 of PML Act have not resurrected the twin conditions of Section 45 (1) after they were held to be violative of Article 14 and 21 of the Constitution by the Hon'ble Supreme Court in Nikesh Tarachand Shah's case. Reference was made to Upender Rai's case wherein the Hon'ble Delhi High Court discussed Nikesh Tarachand Shah's case in the light of the amendment brought in Section 45 in the year 2018 whereby the words 'under this Act' have been inserted in Sub Section 1 of Section 45 of PML Act. A reference was made to the judgment by the Bombay High Court in Sameer M. Bhujbal vs. Assistant Director, Directorate of Enforcement, wherein it was held :-

> **'9. It is to be noted that, after effecting amendment to Section 45 (1) of the PMLA Act, the words 'under this Act' are added to sub Section 1 of Section 45 of the**

Special Judge (PC Act) CBI-09

PMLA Act. However, the original Section 45 (1) (ii) has not been revived or resurrected by the said amending Act.'

33. The Hon'ble High Court expressed its agreement with the reasoning given by the Bombay High Court whereby it held that original Sub Section 45 (1) (ii) of PML Act has neither revived nor resurrected by the amending Act and therefore, as of today there is no rigor of said two further conditions under original section 45 (1) (ii) of PMLA Act for releasing the accused on bail under the said Act.

34. Coming to the present case, I am of the view that the issue of the twin conditions in Section 45 (1) (ii) of PMLA Act would arise for consideration only when the applicant / accused is found eligible for bail under the general law under Section 439 Cr.P.C.

35. It was vehemently argued by the learned Additional Solicitor General that it is an economic offence for which the courts have always adopted a strict view. He refers to a judgment in Gautam Kundu's case (supra) and Y. S. Jagan Mohan Reddy's case (supra) wherein the court have declined to grant bail considering the nature of the offence and observing that economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The learned Senior Advocates of the accused, however, submitted that the judgments referred are firstly prior to the judgment in Nikesh Tarachand Shah's case and secondly, they are given in the

facts peculiar to the case. The learned Additional Solicitor General has vehemently opposed the bail application on the ground that number of documents have been seized, a huge transaction was made by the accused in the name of family members, particularly the daughter and there are about 317 bank accounts in which the transactions have been found connected with the bank accounts of the applicant and his family members and the investigation in this regard is still going on and is at a crucial stage. He submitted that the source of these transactions is illegal, the generation of the assets and the investment in different properties is still being investigated. The release of the applicant at this stage will hamper the investigation considering his status and position. He also expressed apprehension about winning over of the witnesses.

36. The learned Senior Advocates for the applicant / accused has argued that the applicant is not a flight risk and had already joined the investigation and has been interrogated for more than hundred hours so nothing more can be extracted from him and it would not serve any purpose if he is kept in custody.

37. In the case of Dataram Singh (supra), the Hon'ble Supreme Court has no doubt stated that bail is not to be withheld as a punishment but at the same time that grant or refusal of bail is considered as the discretion of the court, which though is unfettered, is to be exercised judiciously and in a humane manner. However, the

view of the Hon'ble Supreme Court in case of economic offences is a bit different as reflected in the case of State of Gujarat vs. Mohan Lal Jitamalji Porwal (supra).

38. No doubt that while considering the bail application court has to be conscious of the liberty of an individual but it cannot ignore the interest of society as such. A balance has to be struck between the two. In Ash Mohammad vs. Shiv Pal Singh (2012) 9 SCC 446, it was observed that societal concern has to be kept in view in juxtaposition to individual liberty.

39. **The investigation in the present case is still at the initial stage. In the course of arguments, the ED has shown certain documents like the list of 317 bank accounts and other documents of properties, etc. which show that investigation is still at the crucial stage of examining the documents and their nexus with the assets of the applicant / accused. The applicant / accused, as argued, is an influential person, therefore, the apprehension that he may influence the witnesses or have some tampering with documents, cannot be treated as unfounded. The investigating agency must have a full, fair and free chance to investigate in depth so that it can reach to a logical conclusion. The release of the applicant at such crucial stage of investigation may hamper the investigation. Therefore, I am of the considered view that the**

applicant / accused is not entitled for bail at this stage of investigation.

40. The learned Senior Advocates for the accused in the alternative claim medical ground citing his medical condition that he was admitted in hospital four times during the investigation stage when he was in custody of the ED. He has also undergone angiography in RML Hospital on 18.09.2019. Therefore, considering his medical condition, he may be granted bail. The learned Additional Solicitor General has submitted that it cannot be a ground for bail. The applicant / accused can be provided all medical facility while in custody and medical assistance is available at call in the Tihar Jail, Delhi.

41. In this regard, a report was called from the Superintendent, Central Jail, Tihar, Delhi. The report from Dr. V. K. Tiwari, Director and Medical Superintendent, RML Hospital, New Delhi and Dr. Ashutosh Kumar Singh, Medical Officer, Central Jail, Tihar, Delhi, has been received. As per the report, the applicant / accused has undergone angiography. His condition is stable. There is no fresh complaint and his vitals are within normal limits. He has been advised to continue medication as advised by RML Hospital, New Delhi.

42. Though the applicant / accused has undergone angiography and earlier he complained of fluctuation in the blood pressure but his present condition is stable as per the medical opinion and there is no fresh complaint. Still, the court consider it appropriate to direct the

Superintendent, Central Jail, Tihar, Delhi to ensure that all medical needs of the applicant are attended to immediately and in case of any urgent need, he may be taken to RML Hospital, Safdarjung Hospital or AIIMS, New Delhi at the earliest.

43. Medical ground by itself considering the nature of the offence and the stage of investigation, is not considered a justified ground for bail.

44. The bail application is dismissed.

—Sd/-

Announced in the open court on 25.9.2019

(AJAY KUMAR KUHAR)
ASJ/Special Judge (PC Act),
CBI-09, RACC, New Delhi : 25.9.2019 (a)

AJAY KUMAR KUHAR
Special Judge (PC Act) CBI-09)
Rouse Avenue Court Complex
New Delhi

Special Judge (PC Act) CBI-09 * Rouse Avenue Court Complex, New Delhi *