2023:DHC:4961

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

Date of decision: 19th July, 2023

\+ **BAIL APPLN. 1741/2022 & CRL.M.A.14727/2022**

SUMAN CHADHA ..... Petitioner

Through: Mr. Neeraj Kumar, Mr. Himanshu Bhasin, Mr. Vilas Sharma, Advocates.

versus

SERIOUS FRAUD INVESTIGATION OFFICE ..... Respondent

Through: Mr. Harish Vaidhyanathan Shankar, CGSC with Mr. Srish Kumar Mishra, Mr. Sagar Mehlawat and Mr. Alexander Mathai Paikaday, Advocates.

CORAM:
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI J.

By way of the present petition under section 439 of the Code of Criminal Procedure, 1973 ("Cr.P.C." for short), the petitioner, who is accused in complaint case No. 245/2021 titled ***SFIO vs. Parul Polymers Pvt. Ltd & Ors.*** pending before the learned Special Judge (Companies Act), Dwarka Courts, New Delhi, seeks regular bail.

2. The petitioner is arraigned as accused No. 2 in the trial court proceedings, among 12 other accused; 07 of the accused have been

granted bail or anticipatory bail either by the High Court or the Special Court, and cognizance has been declined against 01 accused.

3. Notice on this bail petition was issued on 02.06.2022; consequent whereupon the respondent/Serious Fraud Investigation Office ("SFIO" for short) has filed reply/counter-affidavit dated 11.11.2022 opposing grant of bail.

4. Nominal Roll dated 25.02.2023 has been received from the Jail Superintendent, which shows that the petitioner has been in custody for 6 months and 28 days as of that date, and that he has been released on bail in two other matters, and that his jail conduct is 'satisfactory'.

Brief Overview

5. Briefly, the petitioner was summonsed in the matter *vide* summoning order dated 07.03.2022 made by the learned Special Judge (Companies Act), Dwarka Courts (SW), taking cognisance of offences *inter-alia* under section 447 of the Companies Act, 2013 ("Companies Act" for short), the essential imputation against the petitioner being that he was director of M/s Parul Polymers Pvt Ltd. (accused No. 1) when the offences are alleged to have been committed.

6. Accused No. 1 company was engaged principally in the trade of plastic granules, and the gravamen of the offences alleged *inter-alia* under section 447 of the Companies Act are that the company indulged in cash sales, in fictitious sale of food grain and in creation of accommodation/adjustment accounting entries, apart from misuse of cheque discounting facilities. It is also the allegation that the

company manipulated financial statements in order to project substantial growth in its revenues, to mislead banks and to induce them to extend and enhance credit limits, which monies were however diverted and siphoned-off to other entities, with no genuine underlying business transactions. Thereby, it is alleged that the company indulged in fraudulent diversion of funds to sister concerns instead of applying the monies towards the business activities of the company.

7. A perusal of the summoning order, which is based upon the criminal complaint filed by the SFIO *inter-alia* under section 212(15) of the Companies Act, shows that the petitioner has been implicated for his role as an "officer who is in default" within the meaning of section 2(60) of the Companies Act, since the petitioner was a 'director' of the company at the relevant time; and was therefore liable for the affairs of the company.

8. The court has heard Mr. Neeraj Kumar, learned counsel appearing for the petitioner; as well as Mr. Harish Vaidyanathan Shankar, learned CGSC appearing for the SFIO. Counsel have also filed their respective written submissions in the matter.

Petitioner's Contentions

9. Learned counsel for the petitioner contends that the offences are alleged to have been committed between 2011-14, and some of the allegations relate to the period even prior to the enactment of the Companies Act, 2013; and that investigation in the matter was commenced in compliance of order dated 07.12.2015 made by a Co-

ordinate Bench of this court in Contempt Case (C) No. 531/2015; and after prolonged investigation and proceedings spanning more than 6 years, the SFIO filed the criminal complaint against the petitioner and other co-accused persons on 08.02.2021, which came to be registered as Complaint Case No. 245/2021.

10. It is submitted that cognisance of the offence was taken by the learned Special Judge *vide* order dated 07.03.2022, by which order the petitioner was directed to appear before the court on 25.05.2022.

11. It is emphasised that the petitioner was never arrested throughout the course of investigation and proceedings; and the complaint was also filed by the SFIO without arresting him.

12. That notwithstanding, it is argued, that when, in compliance of summons issued to him by the learned Special Judge, the petitioner appeared before the court on 25.05.2022, the bail application filed by him was rejected by the learned Special Judge there-and-then; he was "*taken into custody and sent to J/C*" on the spot; and the petitioner has been in prison ever-since. As of today therefore, the petitioner has spent about 14 months in jail as an under-trial.

13. It is further submitted that no material has been cited by the SFIO to support the contention that the petitioner is either a flight-risk or that he may influence witnesses or destroy evidence or commit any offence, if he is enlarged on bail. It is pointed-out that this is very relevant, especially since there is no allegation against the petitioner having done so even during the period of investigation which spanned almost 4 years.

14. On the merits of the case, counsel submits that there is no *specific role* attributed to the petitioner either in the final Investigation Report dated 16.03.2019 or in the summoning order. It is stated that the final investigation report proceeds essentially on the petitioner's statement recorded under oath; and it is alleged that the petitioner has admitted to certain allegations; with only scant reference to any *specific role* attributed to him in relation to the offence alleged.

15. It is also pointed-out that though the SFIO drew-up the final investigation report on 16.03.2019, the complaint was filed before the learned Special Judge almost 02 years later on 08.02.2021; and cognizance of the offence was taken by the learned Special Judge after lapse of another year on 07.03.2022, summoning the petitioner for 25.05.2022. It is accordingly the submission, that evidently, trial will take substantial time.

16. Counsel further submits that the gravity of the offence alone is not a ground to deny bail, since the object of bail is neither punitive nor preventative; and since in the present case the evidence is essentially documentary in nature, no purpose will be served by keeping the petitioner in judicial custody any longer.

17. Attention of the court is also drawn to the fact that the petitioner has already been admitted to regular bail by the learned Special Judge (CBI), Rouse Avenue District Courts, New Delhi *vide* order dated 27.09.2022 in connected case bearing No. CBI/13/2021 titled *CBI vs.*

Parul Polymers Pvt. Ltd. & Ors., which case also emanates from same set of allegations as the present one.

18. Counsel submits, that other things apart, the petitioner deserves to be granted regular bail also on grounds of parity since co-accused Komal Chadha[1], Deepak Jha[2] and Taranjeet Singh Bagga[3] have already been admitted to bail by this court.

19. Another plank of the legal submissions made on behalf of the petitioner is that in ***Satender Kumar Antil vs. Central Bureau of Investigation & Anr.***,[4] the Supreme Court has held that the twin-conditions in special statutes would apply only *after* an accused is *already under incarceration*, observing that : "*To clarify this position, we may hold that if an accused is already under incarceration, then the same would continue, and therefore, it is needless to say that the provision of the Special Act would get applied thereafter*" (emphasis supplied). It is submitted that therefore, in the present case, the learned Special Judge misdirected himself in applying the twin-conditions as specified in section 212(6)(ii) of the Companies Act, since on the date when the petitioner appeared before the learned Special Judge, he was not under incarceration. It is also submitted that at the time when he appeared before the learned Special Judge, the SFIO had not even sought that the petitioner be detained in judicial custody. It is therefore argued, that the order of the learned Special

[1] ***Komal Chadha vs. Serious Fraud Investigation Office***, 2022 SCC OnLine Del 4543

[2] ***Deepak Jha vs. State NCT of Delhi & Ors***, Bail Appln No. 2633/2022, Order dated 06.02.2023 (Delhi High Court)

[3] ***Taranjeet Singh Bagga vs. Serious Fraud Investigation Office***, 2023 SCC OnLine Del 893

[4] (2022) 10 SCC 51 at para 89

Judge denying bail to the petitioner by applying the twin-conditions, is bad in law.

SFIO's Contentions

20. On the other hand, opposing the grant of bail, Mr. Shankar, learned CGSC has urged that since the petitioner is the main accused in the case; that charges are yet to be framed against the petitioner; and evidence is yet to be recorded, there is reasonable apprehension that if released on bail, the petitioner would attempt to intimidate or influence witnesses, especially since the witnesses are either his employees or his close associates. It is also alleged that the petitioner was the 'mastermind' on whose directions the other co-accused worked; and therefore, the petitioner cannot seek bail on grounds of parity.

21. The learned CGSC also submits that a stringent view must be taken of the offences alleged against the petitioner since these are economic offences; and that the nature and gravity of the offences is severe, inasmuch as the fraud in question affects public interest since the huge sums of money siphoned-off were taken from public sector banks and such offences impact the economy of the country. It is further submitted that the twin conditions in section 212(6)(ii) of the Companies Act are mandatory, and are required to be applied in addition to the restrictions contained in section 439 Cr.P.C.

22. It is further alleged that the petitioner has himself admitted that there was no actual sale or purchase of food grain; and that tax invoices were issued without any actual movement of goods. It is also alleged

that the petitioner was involved in 'kite-flying operations', *viz.* of using bank accounts of companies and entities owned by him to issue cheques without any genuine underlying business transactions only to deceptively avail unauthorized credit on the basis of such cheques. It is also pointed-out that the petitioner is alleged to have manipulated the financial statements of the Company Under Investigation *i.e.* Parul Polymers Pvt Ltd., by submitting fictitious financial statements, to falsely project revenue growth of the company and fraudulently avail enhanced credit limits. It is alleged that the funds so received were siphoned-off into the petitioner's personal bank accounts and were used to purchase personal property.

23. Lastly, learned CGSC submits that merely because the petitioner was not arrested during the course of investigation, that cannot lead to the conclusion that he would not tamper with evidence or influence witnesses; and given his key role in the offending transactions, those factors cannot be disregarded. Besides, it is argued that the petitioner was not arrested during investigation only since the investigating officer was cautious in exercising the discretion conferred upon him by section 212(8) of the Companies Act; which however did not prevent the learned Special Judge from directing judicial custody of the petitioner once cognizance was taken, based upon material available after investigation.

24. In support of his submissions, learned CGSC places reliance on the following judgments : ***Vijay Madanlal Choudhary & Ors. vs. Union***

of India & Ors.[5]***, Serious Fraud Investigation Office vs. Nittin Johari & Anr.***[6]***, Prahlad Singh Bhati vs. NCT. Delhi & Anr.***[7]***, Gudikanti Narashimhulu & Ors. vs. Public Prosecutor, High Court of Andhra Pradesh***[8] and ***Rohit Tandon vs. Directorate of Enforcement.***[9]

Discussion & Conclusions

25. To begin with, a brief recap of the principles for grant of bail as enunciated by the Supreme Court, including in the context of the stringent, additional twin-conditions imposed under section 212(6) of the Companies Act, as relevant for the present petition, would be useful :

25.1. In ***Moti Ram & Ors. vs. State of Madhya Pradesh.***[10] the Supreme Court has observed that the consequences of pre-trial detention are grave, since they subject an undertrial to psychological and physical deprivations of jail life, which are usually even more onerous than those imposed on convicts. It has further been observed that an undertrial in custody is prevented from contributing to the preparation of his defence at the trial, which burden then falls heavily upon innocent family members.

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[5] 2022 SCC Online SC 929
[6] (2019) 9 SCC 165
[7] (2001) 4 SCC 280
[8] (1978) 1 SCC 240 at para 7
[9] (2018) 11 SCC 46 at para 21
[10] (1978) 4 SCC 47 at para 14

25.2. Furthermore, in a matter concerning a serious economic offence in ***Sanjay Chandra vs. Central Bureau of Investigation***[11] the Supreme Court says that where a person was not arrested in connection with the alleged offence, nor is there any allegation that the person would commit any offence while on bail, such person *could* be admitted to bail.

25.3. In ***Rana Kapoor vs. Directorate of Enforcement***[12], again a case involving a serious economic offence, a Co-ordinate Bench of this court has taken the view that where the accused, though accused of an offence under the Prevention of Money Laundering Act, 2002 ("PMLA" for short), was never arrested during or after investigation despite the Enforcement Directorate having statutory powers to do so, the accused *may* be admitted to bail.

25.4. Emphasising the necessity of protecting Constitutional rights of an accused, in ***Jainam Rathore vs. State of Haryana & Anr.***[13] and ***Sujay U. Desai vs. Serious Fraud Investigation Office***[14], the Supreme Court has emphasised that apart from enforcing the provisions of section 212(6) of the Companies Act, the Constitutional rights of an accused to expeditious trial are also required to be protected, further observing that where there are

[11] (2012) 1 SCC 40 at para 46
[12] 2022 SCC OnLine Del 4065 at para 34
[13] 2022 SCC OnLine SC 1506 at para 9
[14] 2022 SCC OnLine SC 1507 at para 7

a large number of accused persons, delay in trial is bound to occur.

25.5. On the weightage to be given to a final report filed by an investigating officer under section 173 Cr.P.C., which is the equivalent of a criminal complaint filed by the SFIO, in ***K Veeraswami vs. Union of India & Ors.***[15] the Supreme Court has expressed the view that the final report is nothing more than the opinion of the investigating officer.

25.6. On the broader principles of grant of bail, in ***Dataram Singh vs. State of Uttar Pradesh & Anr.***[16] the Supreme Court has observed that discretion in the matter of grant of bail must be exercised judiciously, and in a humane and compassionate manner.

25.7. Though, in ***Gurcharan Singh & Ors. vs. State (Delhi Administration)***[17] the well-worn principles that likelihood of an accused fleeing from justice and tampering with prosecution evidence have been reiterated as the two paramount considerations for grant of bail, in ***Ashok Sagar vs. State (NCT of Delhi)***[18] it has been observed that equally it cannot be overlooked that *theoretically every undertrial* is a flight-risk if granted bail.

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[15] (1991) 3 SCC 655 at para 76
[16] (2018) 3 SCC 22 at paras 4, 6
[17] (1978) 1 SCC 118 at paras 24, 29
[18] 2018 SCC OnLine Del 9548 at para 35(ii)

25.8. It may also be noticed that though the gravity of an offence is certainly *one of the considerations* for deciding bail, in ***P. Chidambaram vs. Directorate of Enforcement***[19], the Supreme Court has also observed that the *gravity of the offence will beget the length of the sentence*, meaning thereby that merely because an offence alleged is serious, does not mean that the court should necessarily deny bail and pre-emptively make an undertrial suffer a sentence, even though such sentence *may* eventually be awarded to him *if* he is convicted.

25.9. Most pertinently, interpreting the additional conditions imposed by section 37 of the NDPS Act for grant of bail, which conditions are worded exactly as those in section 212(6) of the Companies Act, in its recent decision in ***Mohd. Muslim alias Hussain vs. State (NCT of Delhi)***[20], the Supreme Court has said this :

> *"19. The conditions which courts have to be cognizant of are that there are reasonable grounds for believing that the accused is "not guilty of such offence" and that he is not likely to commit any offence while on bail.* ***What is meant by "not guilty" when all the evidence is not before the court ? It can only be a prima facie determination****. That places the court's discretion within a very narrow margin. Given the mandate of the general law on bails (Sections 436, 437 and 439, CrPC) which classify offences based on their gravity, and instruct that certain serious crimes have to be dealt with differently while considering bail applications,* ***the additional***

[19] (2020) 13 SCC 791 at para 12

[20] 2023 SCC OnLine SC 352

condition that the court should be satisfied that the accused (who is in law presumed to be innocent) is not guilty, has to be interpreted reasonably. *Further the classification of offences under Special Acts (NDPS Act, etc.), which apply over and above the ordinary bail conditions required to be assessed by courts, require that the court records its satisfaction that the accused might not be guilty of the offence and that upon release, they are not likely to commit any offence. These two conditions have the effect of overshadowing other conditions. In cases where bail is sought, the court assesses the material on record such as the nature of the offence, likelihood of the accused co-operating with the investigation, not fleeing from justice : even in serious offences like murder, kidnapping, rape, etc. On the other hand, the court in these cases under such special Acts, have to address itself principally on two facts : likely guilt of the accused and the likelihood of them not committing any offence upon release. This court has generally upheld such conditions on the ground that liberty of such citizens have to - in cases when accused of offences enacted under special laws - be balanced against the public interest.*

"*20.* ***A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well***. ***Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a prima facie look at the material on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation, would result in complete denial of the bail to a***

person accused of offences such as those enacted under Section 37 of the NDPS Act.

"*21.* ***The standard to be considered therefore, is one, where the court would look at the material in a broad manner, and reasonably see whether the accused's guilt may be proved***. *The judgments of this court have, therefore, emphasized that the satisfaction which courts are expected to record, i.e., that the accused may not be guilty, is only prima facie,* ***based on a reasonable reading, which does not call for meticulous examination of the materials collected during investigation*** *(as held in Union of India v. Rattan Malik (2009) 2 SCC 624). Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref. Satender Kumar Antil supra). Having regard to these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail."*

(emphasis supplied)

25.10. In fact in *Mohd Muslim* (supra) the Supreme Court also cites certain observations of the Kerala High Court that bring-out the stark reality and the enormity of consequences of prison detention, especially pre-trial detention, when an inmate is only an accused under trial and not a convict serving a sentence awarded :

"*23. The danger of unjust imprisonment, is that inmates are at risk of "prisonisation" a term described by the Kerala High Court in A Convict Prisoner v. State as "a radical transformation" whereby the prisoner:*

> *"loses his identity. He is known by a number. He loses personal possessions. He has no personal*

> *relationships. Psychological problems result from loss of freedom, status, possessions, dignity any autonomy of personal life. The inmate culture of prison turns out to be dreadful. The prisoner becomes hostile by ordinary standards. Self-perception changes."*

25.11. The observations of the Supreme Court in the context of judicial remand at the stage of taking cognizance, are also pertinent. In ***Mithabhai Pashabhai Patel & Ors. vs. State of Gujarat***[21] the Supreme Court has said this :

> "*17. The power of remand in terms of the aforementioned provision is to be exercised when investigation is not complete.* ***Once the charge-sheet is filed and cognizance of the offence is taken, the court cannot exercise its power under sub-section (2) of Section 167 of the Code. Its power of remand can then be exercised in terms of sub-section (2) of Section 309*** *which reads as under:*
>
> > *"309. Power to postpone or adjourn proceedings.—*
> > *(1)* * * * * *
> > *(2) If the court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:*
> >
> > *Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:*

[21] (2009) 6 SCC 332

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing:

Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him.

Explanation 1.— If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, ***and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand****.*

Explanation 2.—The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused."

(emphasis supplied)

25.12. In ***State through CBI vs. Dawood Ibrahim Kaskar & Ors.***[22] the following observations of the Supreme Court must also be noted :

"*11. There cannot be any manner of doubt that the remand and the custody referred to in the first proviso to the above sub-section are different from detention in custody under Section 167. While remand under the former relates to a stage after cognizance and can only be to judicial custody, detention under the latter relates to the stage of investigation and can initially be either in police custody or judicial custody. Since, however, even after cognizance is taken of an*

[22] (2000) 10 SCC 438

> *offence the police has a power to investigate into it further, which can be exercised only in accordance with Chapter XII, we see no reason whatsoever why the provisions of Section 167 thereof would not apply to a person who comes to be later arrested by the police in course of such investigation. If Section 309(2) is to be interpreted — as has been interpreted by the Bombay High Court in Mansuri* ***[Mohamad Ahmed Yasin Mansuri v. State of Maharashtra, (1994) CriLJ 1854 (Bom) : 1994 SCC OnLine Bom 28 : (1994) 1 Mah LJ 688]*** *— to mean that after the Court takes cognizance of an offence it cannot exercise its power of detention in police custody under Section 167 of the Code, the Investigating Agency would be deprived of an opportunity to interrogate a person arrested during further investigation, even if it can on production of sufficient materials, convince the Court that his detention in its (police) custody was essential for that purpose.* ***We are, therefore, of the opinion that the words "accused if in custody" appearing in Section 309(2) refer and relate to an accused who was before the Court when cognizance was taken or when enquiry or trial was being held in respect of him and not to an accused who is subsequently arrested in course of further investigation. So far as the accused in the first category is concerned he can be remanded to judicial custody only in view of Section 309(2),*** *but he who comes under the second category will be governed by Section 167 so long as further investigation continues. That necessarily means that in respect of the latter the Court which had taken cognizance of the offence may exercise its power to detain him in police custody, subject to the fulfilment of the requirements and the limitation of Section 167."*
>
> (emphasis supplied)

25.13. Another facet that requires to be understood, is the *legal meaning* of the word 'arrest'. The word 'arrest' has not been defined either in the Cr.P.C. nor in the IPC. It has however

been explained by the Supreme Court in ***Union of India vs. Padam Narain Aggarwal & Ors.***[23] in the following way :

> "*20. The term "arrest" has neither been defined in the Code of Criminal Procedure, 1973 nor in the Penal Code, 1860 nor in any other enactment dealing with offences. The word "arrest" is derived from the French word "arrater" meaning "to stop or stay". **It signifies a restraint of a person. "Arrest" is thus a restraint of a man's person, obliging him to be obedient to law**. "Arrest" then may be defined as "the execution of the command of a court of law or of a duly authorised officer*"."

(emphasis supplied)

26. Another important decision of the Supreme Court which enunciates the distinction between *custody*, *detention* and *arrest* is also pertinent for purposes of this matter. The following relevant para of ***Sundeep Kumar Bafna vs. State of Maharashtra & Anr.***[24] may be referred to for this purpose :

> *"**16.** It appears to us from the above analysis that **custody, detention and arrest** are sequentially cognate concepts. On the occurrence of a crime, the police is likely to carry out the investigative interrogation of a person, in the course of which the liberty of that individual is not impaired, suspects are then preferred by the police to undergo custodial interrogation during which their liberty is impeded and encroached upon. If grave suspicion against a suspect emerges, he may be detained in which event his liberty is seriously impaired. Where the investigative agency is of the opinion that the detainee or person in custody is guilty of the commission of a crime, he is charged of it and thereupon arrested. In Roshan Beevi [Roshan Beevi v. State of T.N., 1984 Cri LJ 134 : (1984) 15 ELT 289 (Mad)], the Full Bench of the High Court of Madras, speaking through S. Ratnavel Pandian, J. held that the terms "custody" and "arrest" are not synonymous even though in every arrest there is a*

[23] (2008) 13 SCC 305

[24] (2014) 16 SCC 623

deprivation of liberty is custody but not vice versa. This thesis is reiterated by Pandian, J. in Deepak Mahajan [Directorate of Enforcement v. Deepak Mahajan, (1994) 3 SCC 440 : 1994 SCC (Cri) 785] by deriving support from Niranjan Singh v. Prabhakar Rajaram Kharote [Niranjan Singh v. Prabhakar Rajaram Kharote, (1980) 2 SCC 559 : 1980 SCC (Cri) 508]. The following passages from Deepak Mahajan [Directorate of Enforcement v. Deepak Mahajan, (1994) 3 SCC 440 : 1994 SCC (Cri) 785] are worthy of extraction : (SCC p. 460, para 48)

> *"48. Thus the Code gives power of arrest not only to a police officer and a Magistrate but also under certain circumstances or given situations to private persons. Further, when an accused person appears before a Magistrate or surrenders voluntarily, the Magistrate is empowered to take that accused person into custody and deal with him according to law. Needless to emphasise that the arrest of a person is a condition precedent for taking him into judicial custody thereof. To put it differently, the taking of the person into judicial custody is followed after the arrest of the person concerned by the Magistrate on appearance or surrender. It will be appropriate, at this stage, to note that in every arrest, there is custody but not vice versa and that both the words 'custody' and 'arrest' are not synonymous terms. Though 'custody' may amount to an arrest in certain circumstances but not under all circumstances. If these two terms are interpreted as synonymous, it is nothing but an ultra legalist interpretation which if under all circumstances accepted and adopted, would lead to a startling anomaly resulting in serious consequences, vide Roshan Beevi [Roshan Beevi v. State of T.N., 1984 Cri LJ 134 : (1984) 15 ELT 289 (Mad)] .*
>
> *49. While **interpreting the expression 'in custody'** within the meaning of Section 439 CrPC, Krishna Iyer, J. speaking for the Bench in Niranjan Singh v. Prabhakar Rajaram Kharote [Niranjan Singh v. Prabhakar Rajaram Kharote, (1980) 2 SCC 559 : 1980 SCC (Cri) 508] observed that : (SCC p. 563, para 9)*
>
> > *'9. He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. **He can be stated to be in judicial custody when he surrenders before the court and submits to its directions**.'"*
>
> *(emphasis supplied)*

> *If the third sentence of para 48 is discordant to Niranjan Singh [Niranjan Singh v. Prabhakar Rajaram Kharote, (1980) 2 SCC 559 : 1980 SCC (Cri) 508], the view of the coordinate Bench of earlier vintage must prevail, and this discipline demands and constrains us also to adhere to Niranjan Singh [Niranjan Singh v. Prabhakar Rajaram Kharote, (1980) 2 SCC 559 : 1980 SCC (Cri) 508];* ***ergo, we reiterate that a person is in custody no sooner he surrenders before the police or before the appropriate court****. This enunciation of the law is also available in three decisions in which Arijit Pasayat, J. spoke for the two-Judge Benches, namely, (a) Nirmal Jeet Kaur v. State of M.P. [Nirmal Jeet Kaur v. State of M.P., (2004) 7 SCC 558 : 2004 SCC (Cri) 1989], (b) Sunita Devi v. State of Bihar [Sunita Devi v. State of Bihar, (2005) 1 SCC 608 : 2005 SCC (Cri) 435], and (c) Adri Dharan Das v. State of W.B. [Adri Dharan Das v. State of W.B., (2005) 4 SCC 303 : 2005 SCC (Cri) 933], where the co-equal Bench has opined that since an accused has to be present in court on the moving of a bail petition under Section 437, his physical appearance before the Magistrate tantamounts to surrender. The view of Niranjan Singh [Niranjan Singh v. Prabhakar Rajaram Kharote, (1980) 2 SCC 559 : 1980 SCC (Cri) 508] (see extracted para 49 supra) has been followed in State of Haryana v. Dinesh Kumar [State of Haryana v. Dinesh Kumar, (2008) 3 SCC 222 : (2008) 1 SCC (Cri) 722]. We can only fervently hope that members of the Bar will desist from citing several cases when all that is required for their purposes is to draw attention to the precedent that holds the field, which in the case in hand, we reiterate is Niranjan Singh [Niranjan Singh v. Prabhakar Rajaram Kharote, (1980) 2 SCC 559 : 1980 SCC (Cri) 508] .”*
>
> (emphasis supplied)

26.1. Also relevant are the instructions of the Supreme Court in ***Joginder Kumar vs. State of U.P. & Ors.***[25] and ***Siddharth vs. State of Uttar Pradesh & Anr.***[26], where the Supreme Court says :

[25] (1994) 4 SCC 260

[26] (2022) 1 SCC 676

Joginder Kumar vs. State of U.P. & Ors.[27]

"*20. In India, Third Report of the National Police Commission at p. 32 also suggested:*

> *"An arrest during the investigation of a cognizable case may be considered justified in one or other of the following circumstances:*
>
> > *(i) The case involves a grave offence like murder, dacoity, robbery, rape etc., and it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terror-stricken victims.(ii) The accused is likely to abscond and evade the processes of law.*
> >
> > *(iii) The accused is given to violent behaviour and is likely to commit further offences unless his movements are brought under restraint.*
> >
> > *(iv) The accused is a habitual offender and unless kept in custody he is likely to commit similar offences again.*
>
> *It would be desirable to insist through departmental instructions that a police officer making an arrest should also record in the case diary the reasons for making the arrest, thereby clarifying his conformity to the specified guidelines ...."*

The above guidelines are merely the incidents of personal liberty guaranteed under the Constitution of India. ***No arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so.*** *Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person.* ***No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person****. It would be prudent for a police*

[27] (1994) 4 SCC 260

officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. ***Denying a person of his liberty is a serious matter****. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom.* ***A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified.*** *Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave the Station without permission would do."*

(emphasis supplied)

Siddharth vs. State of Uttar Pradesh & Anr.[28]

"*9. We are in agreement with the aforesaid view of the High Courts and would like to give our imprimatur to the said judicial view. It has rightly been observed on consideration of Section 170 CrPC that it does not impose an obligation on the officer-in-charge to arrest each and every accused at the time of filing of the charge-sheet. We have, in fact, come across cases where the accused has cooperated with the investigation throughout and yet on the charge-sheet being filed non-bailable warrants have been issued for his production premised on the requirement that there is an obligation to arrest the accused and produce him before the court.* ***We are of the view that if the investigating officer does not believe that the accused will abscond or disobey summons he/she is not required to be produced in custody. The word "custody" appearing in Section 170 CrPC does***

[28] (2022) 1 SCC 676

not contemplate either police or judicial custody but it merely connotes the presentation of the accused by the investigating officer before the court while filing the charge-sheet.

"*10. We may note that personal liberty is an important aspect of our constitutional mandate. The occasion to arrest an accused during investigation arises when custodial investigation becomes necessary or it is a heinous crime or where there is a possibility of influencing the witnesses or accused may abscond.* ***Merely because an arrest can be made because it is lawful does not mandate that arrest must be made. A distinction must be made between the existence of the power to arrest and the justification for exercise of it*** *[Joginder Kumar v. State of U.P., (1994) 4 SCC 260 : 1994 SCC (Cri) 1172]. If arrest is made routine, it can cause incalculable harm to the reputation and self-esteem of a person. If the investigating officer has no reason to believe that the accused will abscond or disobey summons and has, in fact, throughout cooperated with the investigation we fail to appreciate why there should be a compulsion on the officer to arrest the accused.*

* * * * *

"12. ***In the present case when the appellant has joined the investigation, investigation has completed and he has been roped in after seven years of registration of the FIR we can think of no reason why at this stage he must be arrested before the charge-sheet is taken on record****. We may note that the learned counsel for the appellant has already stated before us that on summons being issued the appellant will put the appearance before the trial court."*

(emphasis supplied)

26.2. The observations of the Supreme Court in ***Manubhai Ratilal Patel vs. State of Gujarat & Ors.***[29] on the necessity of

[29] (2013) 1 SCC 314

application of mind before *remanding* an accused are also extremely relevant :

> "*23. Keeping in view the aforesaid concepts with regard to the writ of habeas corpus, especially pertaining to an order passed by the learned Magistrate at the time of production of the accused, it is necessary to advert to the schematic postulates under the Code relating to remand. There are two provisions in the Code which provide for remand i.e. Sections 167 and 309. The Magistrate has the authority under Section 167(2) of the Code to direct for detention of the accused in such custody i.e. police or judicial, if he thinks that further detention is necessary.*
>
> *"24.* ***The act of directing remand of an accused is fundamentally a judicial function****. The Magistrate does not act in executive capacity while ordering the detention of an accused.* ***While exercising this judicial act, it is obligatory on the part of the Magistrate to satisfy himself whether the materials placed before him justify such a remand*** *or, to put it differently, whether there exist reasonable grounds to commit the accused to custody and extend his remand. The purpose of remand as postulated under Section 167 is that investigation cannot be completed within 24 hours. It enables the Magistrate to see that the remand is really necessary. This requires the investigating agency to send the case diary along with the remand report so that the* ***Magistrate can appreciate the factual scenario and apply his mind whether*** *there is a warrant for police remand or justification for judicial remand or* ***there is no need for any remand at all. It is obligatory on the part of the Magistrate to apply his mind and not to pass an order of remand automatically or in a mechanical manner.****"*
>
> (emphasis supplied)

26.3. Now, to understand the distinction between arrest and remand in a scenario where the additional twin-conditions contained in

section 212(6) of the Companies Act apply, attention may be drawn to the following observations of the Supreme Court in *Satendar Kumar Antil* (supra) :

> *"89. We may clarify on one aspect which is on the interpretation of Section 170 of the Code. Our discussion made for the other offences would apply to these cases also. To clarify this position, we may hold that* ***if an accused is already under incarceration, then the same would continue****, and therefore, it is needless to say that* ***the provision of the Special Act would get applied thereafter****.* ***It is only in a case where the accused is either not arrested consciously by the prosecution or arrested and enlarged on bail, there is no need for further arrest at the instance of the court****. Similarly, we would also add that the existence of a pari materia or a similar provision like Section 167(2) of the Code available under the Special Act would have the same effect entitling the accused for a default bail. Even here the court will have to consider the satisfaction under Section 440 of the Code.*
>
> (emphasis supplied)

27. Now, in the backdrop of the legal position summarised above, the following factual aspects appear to be relevant in the present case :

27.1. Section 212(8) of the Companies Act says that an investigating officer of the SFIO has the power to arrest an accused *if he has reason to believe on the basis of material available with him that the person is guilty of commission of an offence under section 212(6)*. Though, no doubt, this power of arrest is meant to enforce 'police custody' in aid of investigation, what is important to note is that arrest is permissible ***if*** the investigating officer has reason to believe that the accused is guilty of the

offence based on available material. In the present case, the record shows that *the investigating officer never arrested the petitioner throughout the investigation, further investigation and other pre-cognizance stages, all of which took more than 06 years*. Even at the stage when the final investigation report was filed before the learned Special Judge, the investigating officer did not seek that the petitioner be either arrested or remanded to judicial custody. This was presumably guided by the words of the Supreme Court in *Joginder Kumar* (supra) and *Siddharth* (supra).

27.2. When the petitioner appeared before the learned Special Judge on having been summonsed, *he was not under arrest*. No prayer for either arresting or remanding him to judicial custody was made by the investigating officer. *What then prompted the learned Special Judge to remand the petitioner to judicial custody in the first place ?* Based on the final investigation report filed by the SFIO, did the learned Special Judge record any satisfaction that he had reason to believe that the petitioner was guilty of the offences charged ? Was any apprehension expressed by the investigating officer that the petitioner was a flight-risk or that he would influence witnesses or tamper with evidence ? Did the learned Special Judge articulate any apprehension as to witness intimidation, evidence tempering, flight-risk or such other matter in the order sending the petitioner to judicial custody ? The answer to all these questions is a clear ‘No’.

27.3. In view of the verdict of the Supreme Court in *Sundeep Kumar Bafna*[30] (supra), what is settled is that a person is 'in custody', no sooner he surrenders before the appropriate court. But that custody does not tantamount to being "under incarceration" as referred to in *Satender Kumar Antil* (supra)[31]. Now, the word 'incarceration' has not been defined either in the Code of Criminal Procedure 1973, nor in the Indian Penal Code 1860, nor in the Prisoners Act 1900, nor even in the Prisons Act 1894. Some effort at researching the meaning of this word shows, that it has been used in legal context in quite the same way as it is understood in common English parlance. In the Merriam-Webster Dictionary (Online)[32], "incarceration" has been defined to mean "confinement in a jail or prison : the act of imprisoning someone or the state of being imprisoned". In the Cambridge Dictionary (Online)[33], "incarceration" is defined as the "the act of putting or keeping someone in prison or in a place used as a prison; or "the act of keeping someone in a closed place and preventing them from leaving it". Furthermore, in Words and Phrases (Permanent Edition)[34] one of its several usages shows that the term "incarceration" means " … imprisonment or confinement in jail or penitentiary; or,

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30 (2014) 16 SCC 623; para 16

31 (2022) 10 SCC 51; para 89

32 "Incarceration." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/incarceration. Accessed 17 July 2023

33 "Incarceration." Dictionary.com, Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/incarceration. Accessed 17 July 2023

34 *Words and Phrases (Permanent Edition)*, Volume 20A, (Thomson Reuters, 2008) at pp. 303, 305

"For purpose of statute governing computation of terms of imprisonment, "incarceration" means to confine in prison or jail, and it does not encompass pre judgement house arrest".

27.4. Therefore, taking cue from what the Supreme Court has held in *Satender Kumar Antil* (supra), evidently when the petitioner appeared before the learned Special Judge in compliance of the summons issued to him, he was '*in custody*' of the court but not '*under incarceration*'. Accordingly, the twin-conditions contained in section 212(6) of the Companies Act did not get actuated. Furthermore, in the context of section 170 Cr.P.C, in *Siddharth*[35] (supra) the Supreme Court has held that *custody* does not contemplate either police custody or judicial custody. Also, as held in *Manubhai Ratilal Patel*[36] (supra), remand requires application of mind on the part of the court, and is not to be dealt-with lightly or in a mechanical manner. Incarceration therefore *must be for some justifiable and articulated reason, based upon material available against a person*.

27.5. The decisions of the Supreme Court cited by the SFIO regarding the twin-conditions have to be read and understood in the context in which they were rendered[37]. In *Nittin Johari* (supra) and *Rohit Tandon* (supra), the accused had already been

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35 (2022) 1 SCC 676; para 9

36 (2013) 1 SCC 314; para 24

37 ***Bharat Petroleum Corpn Ltd & Anr. vs. NR Vairamani & Anr.,*** (2004) 8 SCC 579 at paras 9-12; ***State of Orissa vs. Sudhansu Sekhar Misra & Ors.,*** AIR 1968 SC 647 at para 12; ***Kalyan Chandra Sarkar vs. Rajesh Ranjan***, (2005) 2 SCC 42 at para 42

arrested in the course of investigation and had also been remanded to judicial custody, and the bail application was filed only thereafter. Therefore, those cases did not deal with a situation where the accused had *never been arrested* as of the date the court took cognisance of the offence, or even thereafter upto the date on which summons were returnable.

27.6. On the other hand the observations in paras 410-412 (SCC OnLine) of *Vijay Madanlal Choudhary* (supra), which judgment is generally on the scheme of the PMLA, are in the context of *applicability of section 45 PMLA to anticipatory bail applications.* It is in this context that the Supreme Court has held that the twin-conditions would apply even to anticipatory bail applications, by noting that there cannot be a difference between someone who applies for bail *after arrest* (regular bail) and someone who is *yet to be arrested* (anticipatory bail). Thus, it can safely be said that the interpretation of section 45 PMLA in *Vijay Madanlal Choudhary* does not contemplate a situation where the accused has never been arrested.

27.7. Accordingly, the judgments in *Nittin Johari, Rohit Tandon* and *Vijay Madanlal Choudhary* are all distinguishable on facts. On the other hand, a reasonable interpretation of the twin-conditions as mandated by *Mohd Muslim* (supra)[38] read with the observations in *Satendar Kumar Antil* (supra)[39] that twin-

[38] 2023 SCC OnLine SC 352 at para 19
[39] (2022) 10 SCC 51 at para 89

conditions in special statutes would *only apply after incarceration*, leads to the inevitable conclusion that the twin-conditions in section 212(6) of the Companies Act *would not apply to a case where the accused has never been arrested* even till the stage of cognisance, and appears against summons issued by the court.

27.8. The above position is also bolstered by a decision of this court in ***Ashish Mittal vs. Serious Fraud Investigation Office***[40] which takes the view that the opposition by the public prosecutor contemplated in section 212(6) must be *reasoned opposition*. In the present case, a perusal of the order of the learned Special Judge declining bail shows that no reasoned opposition was offered by the public prosecutor in relation to the offence alleged under the Companies Act, except a pedantic recitation that the allegations *inter-alia* against the petitioner " ... are of grave nature ... "; that the investigation in the matter was initiated as per directions of the Delhi High Court; and that, according to the final investigation report filed in the matter *inter-alia* the petitioner has " ... committed offence punishable under Section 447 of Companies Act, 2013 alongwith other offences ... ".

27.9. Though detailed submissions have been made on behalf of the SFIO to urge that since the petitioner was the main person incharge of the affairs of the company, he *is* guilty of

[40] 2023 SCC OnLine Del 2484 at paras 20-24

commission of the offence *inter alia* under section 447 of the Companies Act, suffice it to say that as observed by the Supreme Court in *Sanjay Chandra* (supra) and *P Chidambaram* (supra), seriousness of the allegations is not the only test or factor to deny bail, and the gravity of the allegations will beget the length of sentence, if and once, the petitioner is convicted of the offence charged. This court therefore does not consider it necessary to delve any deeper into the allegations made against the petitioner on merits.

27.10. In view of the above discussion, a reasonable interpretation of the twin-conditions leads to the conclusion that since the petitioner had not been arrested throughout the course of investigation; he had appeared before the learned Special Judge against summons - *not arrest warrants* - issued to him; and most importantly, when the investigating officer had not even sought police custody or judicial custody of the petitioner, the twin conditions *would not apply*. At that point in time, the twin-conditions stipulated in section 212(6) of the Companies Act *did not automatically get actuated*. What really transpired was that merely upon appearing before the learned Special Judge, *as if by reflex action*, the court remanded the petitioner to judicial custody; whereupon the petitioner filed a bail application; which also came to be dismissed there-and-then invoking section 212(6).

27.11. In the present case, this court is at pains to explain, that when the petitioner appeared before the learned Special Judge in compliance of the summons issued to him, *he was not under arrest*. It must also be re-emphasised that on taking cognizance of the offence, the learned Special Judge issued only *summons* for the petitioner to appear and did not deem it necessary to issue *warrants* for his arrest.

27.12. Clearly therefore, learned Special Judge misdirected himself in applying section 212(6) of the Companies Act, on the flawed premise that that that was the stage *for grant of bail*, whereas, it was the stage of considering whether there was any need to *remand* the petitioner to judicial custody at all. As discussed above, it was for the Investigating Officer to seek that the petitioner be remanded to judicial custody, for justifiable reasons based on material gathered during investigation, which he did not do.

27.13. Even insofar as the usual and ordinary triple-test for bail is concerned, the Investigating Officer nowhere alleged that the petitioner had attempted to tamper with evidence; or that he had influenced witnesses; or that he was a flight risk. In fact, the Investigating Officer had not filed any application seeking that the petitioner be placed in judicial custody, even upto the stage when the petitioner appeared before the learned Special Judge on being summonsed. Since the Investigating Officer did not arrest the petitioner during the more than 06-year long

proceedings and investigation, evidently, the Investigating Officer did not consider it necessary to do so based on the material in his possession collected in the course of investigation.

27.14. As observed by this court in ***Komal Chadha vs. Serious Fraud Investigation***[41], without any additional material or evidence having been placed before the learned Special Judge, there was no basis for the court to draw any inference *other than* the reasonable belief entertained by the Investigating Officer, who never considered the petitioner being a flight risk, or otherwise being likely to tamper with evidence or influence witnesses, for which reason he had never arrested the petitioner.

27.15. To add to this, trial in the matter is bound to take considerable time; and this court sees no reason to wait for further time to elapse before lamenting that the petitioner has suffered pre-trial detention for an unduly long period. As cited above, the Supreme Court has held in *Jainam Rathore* (supra) and *Sujay U. Desai* (supra) that even where section 212(6) of the Companies Act applies, that does not detract from an accused's right to an expeditious trial. To quote ***Mohd Hakim vs. State (NCT of Delhi)***[42], a judgment rendered by a Division Bench of this court, of which the undersigned was a member :

> *"28.* ***Courts must not play coroner and attend to legal or constitutional rights only after they are 'dead'. Instead we***

[41] 2022 SCC OnLine Del 4543 at para 30.7

[42] 2021 SCC OnLine Del 4623

> ***must play doctor, and save such rights from demise before they are extinguished****. Courts should pro-actively step-in to protect such rights from being stifled and buried. If equity calls upon affected persons to be vigilant to protect their rights, then surely the courts must also be vigilant, and, to quote the Hon'ble Supreme Court, act as sentinels on the qui vive when it comes to protecting constitutional and legal rights."*
>
> (emphasis supplied)

28. In the above view of the matter, this court is inclined to admit the petitioner to regular bail, subject to the following conditions :

28.1. The petitioner shall furnish a personal bond in the sum of Rs. 5,00,000/- (Rs. Five Lacs Only) with 02 sureties in the like amount from family members, to the satisfaction of the learned Special Judge;

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

28.3. If the petitioner has a passport, he shall surrender the same to the learned Special Judge and shall not travel out of the country without prior permission of the learned Special Judge;

28.4. The petitioner shall not contact, nor visit, nor offer any inducement, threat or promise to any of the prosecution witnesses or other persons acquainted with the facts of case. The petitioner shall not tamper with evidence nor otherwise

indulge in any act or omission that is unlawful or that would prejudice the proceedings in the pending trial;

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

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

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

30. Needless to add, that nothing in this judgment should be taken to detract from the position that economic offences are serious in nature, and the allegations against the petitioner and other co-accused, if proved at the trial, must be met with requisite punishment. However, that punishment must *follow* conviction, and the severity of the allegations by themselves cannot be justification for pre-trial incarceration.

31. The petition stands disposed-of in the above terms.

32. Pending applications, if any, also stand disposed-of.

33. Let a copy of this judgment be sent to the concerned Jail Superintendent *forthwith*.

ANUP JAIRAM BHAMBHANI, J

JULY 19, 2023
HJ/*uj*