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2024:DHC:8280

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

% Reserved on : 08.10.2024
Pronounced on : 24 .10.2024

\+ **BAIL APPLN. 3210/2024**

PANKAJ KUMAR TIWARI .....Petitioner

Through: Mr. Sanjay Jain, Sr. Advocate with Mr. Abhijit Mittal, Mr. Anukalp Jain, Ms. Palak Jain, Ms. Harshita Sukhija & Mr. Nishank Tripathi, Advocates

versus

ENFORCEMENT DIRECTORATE .....Respondent

Through: Mr. Manish Jain, Special Counsel for ED with Ms.Sougata Ganguly, Ms.Snehal Sharda and Ms.Gulnaz Khan, Advocates

\+ **BAIL APPLN. 3269/2024**

PANKAJ KUMAR .....Petitioner

Through: Ms. Rebecca M. John, Sr. Advocate with Mr. Tapan Sangal, Mr.Dharmendra Singh and Mr. Pravir Singh, Advocates

versus

DIRECTORATE OF ENFORCEMENT .....Respondent

Through: Mr. Manish Jain, Special Counsel for ED with Ms.Sougata Ganguly, Ms.Snehal Sharda and Ms.Gulnaz Khan, Advocates

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

1. The applicants seek regular bail in the Complaint Case No. 26 of 2023 arising out of ECIR No. ECIR/06/DLZO-II/2019 dated 28.08.2019. As both

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the applications were taken up for consideration together and common submissions have been addressed, the applications are considered and disposed of by this common judgment.

2. The predicate offence was investigated by the Serious Fraud Investigation Office (hereafter, the SFIO) which culminated into filing of complaint case being Complaint No. 770 of 2019 under Section 447 of Companies Act , 2013 and Sections 409, 467, 468, 471, 120B IPC. On the complaint filed by SFIO, cognizance stands taken.

As the said offences are also scheduled offences under PMLA, 2002, the subject ECIR was registered on 29.08.2019 and after investigation, the prosecution complaint came to be filed on 08.08.2023. A supplementary prosecution complaint was filed on 07.03.2024.

3. In the prosecution complaint filed by ED, the allegations in nutshell are that as per the SFIO investigation report, ex-promoters of M/s Bhushan Steel Ltd. (hereafter, the BSL) i.e., Brij Bhushan Singhal and Neeraj Singhal had obtained loan of Rs. 56,000 Crores from various banks and financial institutions before BSL went into insolvency and CIRP were initiated. The aforesaid accused needed to infuse capital in BSL in order to avail credit facilities from the lender banks for its teel plant in Orissa; and to do so as well as to maintain the required level of debt equity, the said accused persons assisted by their employees and close associates siphoned off funds from BSL and Bhushan Energy Ltd (hereafter, the BEL) by using complex web of companies and financial transactions starting from the year 2009-10 onwards. The funds were transferred from BSL and BEL to the connected category ‘B’ and ‘C’ companies (approx. 150 in number in which employees of BSL were appointed as Directors/signatories and whose effective control

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was with the promoters) terming them as 'Capital Advances'. The recipient companies through layering ultimately invested the said sum in BSL as promoter equity and for issuance of preference shares. Further, the layered funds were consolidated through bank accounts held by *Uma Singhal* and *Ritu Singhal* (the respective wives of Brij Bhushan Singhal and Neeraj Singhal).

Further, the said accused persons in the garb of availing credit facilities from banks used forged documents. BSL opened a Letter of Credit (LC) with consortium banks for availing non-fund based limits against forged invoices for supply of goods by M/s Jindal Steel Works (JSW) and M/s Hindustan Zinc Ltd. (HZL). On the basis of forged documents, the LCs were discounted by using account No. of BSL on the request letters of JSW and HZL. No goods were ever supplied by JSW/HZL to BSL against the said LCs. The fraud was covered up by showing false increase in valuation of assets and fraudulent valuation and inflated figures of Stock-in-Transit. In this manner public funds to the tune of Rs. 45,818 Crores were diverted during the period 2013-14 to 2016-17 to its accounts.

It is alleged that the in the said siphoning off of funds, the main accused persons were aided, amongst others, by the present applicants.

Submissions on behalf of Applicant-Pankaj Kumar Tewari

4. Mr. Sanjay Jain, learned Senior Counsel appearing on behalf of the applicant submits that the applicant is innocent and has been falsely roped in the present case. The applicant was working as Vice President (Finance) with BSL. He was arrested on 11.01.2024 and has been arrayed as accused no. 78 in the Supplementary Prosecution Complaint.

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5. The applicant is alleged to be involved in creating fraudulent documents for availing LC facility from the banks. In this regard, it is stated that draft letters of LC discounting were seized from his home. It is submitted that the seized documents were mere draft templates of bill discounting applications and were unsigned. On the aspect of allegations relating to incorporating approximately 150 companies, it is stated that the co-accused *Neeraj Singhal* in his statement did not attribute any role the applicant. The applicant is not a Director in any company

Insofar as allegation of the applicant being involved in the diversion and sale of 'Zinc Ingots' is concerned, it is submitted that the erstwhile BSL has entered in statutory settlement with the Excise Department before the Custom and Excise Settlement Commission and the same is reflected in the final order dated 27.05.2015 issued by the Additional Director General of DGCEI settling Central Excise duty at Rs. 24,01,19,291 alongwith interest amounting to Rs. 2,84,82,857 and penalty to the tune of Rs.1,00,00,000 /-. Once the matter is settled, then the same cannot be reagitated by the respondent to punish the applicant. Moreover, there is no allegation of money coming to applicant's account.

6. Learned Senior Counsel submits that ED to substantiate its allegations has only cited applicant's own statement recorded under Section 50 as well as those of Shri Rajat Kumar Jain (PW-15), Shri Kumud Kumar Gupta (PW-17) and Shri Rajesh Kumar Sharma (PW-18) etc, who were employees of BSL and despite being arrayed as an accused in the proceedings under the predicate offence, are deliberately not made accused in this complaint by ED.

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7. On the aspect of twin conditions under Section 45 PMLA, it is sated that the same are *pari materia* to Section 212(6) of the Companies Act, 2013. ED's case being mirror image to that investigated by SFIO in which the applicant was not even arrested and enlarged on bail, the parameters under Section 45 PMLA stand satisfied.

It is also stated that the applicant is 55 years of age, has deep roots in society, lives with his 86 year old mother, his wife and two children, is a chartered accountant by profession currently employed by Angul Energy Ltd and is not a flight risk. It is further stated that the applicant has joined investigation 7 times prior to his arrest and 3 times post arrest as well and all the material has been collected from him. The main accused i.e., Brij Bhushan Singhal, Neeraj Singhal, Nitin Johari and Ajay Mittal have already released on bail. The investigation was initiated in the year 2019 and the prosecution has named 156 accused persons and cited 82 witnesses. The trial would inevitably take a long time and the applicant's right to life and liberty is being affected as the trial is yet to commence.

Submissions on behalf of Applicant-Pankaj Kumar

8. Ms. Rebecca M John, learned Senior Counsel appearing on behalf of the applicant submits that he was employed as VP (Accounts) in BSL and his responsibilities included routine bookkeeping and recording transactions post facto and the applicant was not clothed with any authority to initiate, approve, or make strategic decisions regarding financial transactions. He joined BSL as an accountant in the year 2005 and resigned in the year 2018. The role of the applicant was primarily administrative and that the main accused *Neeraj Singhal, Brij Bhushan Singhal* along with the Board of Directors and various committees were the key decision makers. The

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applicant was neither a part of these decision-making bodies, nor he was ever a shareholder or promoter. Moreover, the allegation of the applicant managing transactions in more than 150 companies is not supported by any specific evidence nor any details have been provided by the respondent about the exact role allegedly played by the applicant in management of these companies.

9. With regard to the allegation that the applicant purportedly was instrumental in making the employees of BSL to act as nominal Directors for associated companies, it is argued that the same does not hold any water and the emphasis which the respondent has put on statements of witnesses is negated by the fact that these witnesses are people who are deeply connected to the erstwhile promoters of BSL and themselves are implicated in the predicate offence investigated by SFIO. These witnesses, many of whom continue as Directors in associated companies, are clearly interested parties, and their testimonies must be viewed with caution due to their vested interests in the outcome of the case. Attention is drawn to the fact that one *Ruchin Maheshwari* (PW5), arrayed as an accused in SFIO complaint, is made as a witness in the present complaint. He is stated to be the direct employee of the main accused and even today continues to be the Director in 20 companies associated with the ex-promoters of BSL. *Sunil Saxena* (PW9) has been arrayed as the Accused No 251 in SFIO complaint and as per the MCA records, even today, he continues to be a Director in 20 companies associated with ex-promoters of BSL. *Rohit Sinha* (PW10) is arrayed as the Accused No. 218 in SFIO complaint and is a co-accused with the applicant in the said matter. He is the erstwhile Personal Assistant of *Brij Bhushan Singhal* and he continues to be under their employment. Records show that

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Shuvinder Prasad (PW60) was a Director in some of these companies starting from 2003, long before the applicant joined Bhushan group. Similarly, *Padam Kant Aggarwal*, a co-accused from whom cash and Gold bars were seized, has been cited as a prosecution witness in the present complaint.

10. Insofar as the allegation that the applicant was involved in manipulating accounts to inflate stock-in-transit and create bogus debtors is concerned, it is submitted that the applicant was not a part of the committees involved in preparing the financial statements and in fact, the applicant even tried to raise bona fide concerns regarding certain accounting entries and transactions. With respect to the allegation that the applicant was a Director in the companies used for money laundering, coordinating transactions for Neeraj Singhal, it is submitted that the applicant was made a dummy Director in eight category 'B' companies and nine category 'C' companies by the main accused, without applicant having any knowledge of their business affairs or financial transactions. The applicant had no role in these financial decisions and was not a beneficiary of these transactions and had in fact, came to know about the activities of these companies in 2013 after the Income Tax department conducted a search and the applicant resigned from these companies, as evident from the MCA records, with the last resignation being in March 2014, within the same financial year.

11. Seeking parity with co-accused, it is submitted that the main accused Neeraj Singhal who is the alleged mastermind, has been granted bail by the Supreme Court vide order dated 06.09.2024. Ajay S. Mittal, who had directly received funds from the promoters, was released on bail by the Trial Court vide order dated 19.07.2024. That accused Archana Ajay Mittal, who

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also received substantial amounts was granted bail by the Special Judge vide its order dated 14.02.2024.That accused Nitin Johari, who held a senior position being CFO and was directly implicated in the predicate offence has also been released on bail by the Special Judge vide its order dated 12.07.24. With respect to the documents seized by respondent agency from this applicant, it is submitted that the same were documents which were received by the applicant in the SFIO proceedings.

Lastly, it is submitted that the applicant has deep roots in the society, does not have any criminal antecedents, the trial has been severely delayed, infringing the applicant's right to speedy trial. Moreover, the applicant is suffering from severe Obstructive Sleep Apnoea and multiple other co-morbidities including hypertension, Asthma, diabetes mellitus, and cardiac issues which cannot be adequately managed in custody. The applicant had joined investigation on multiple occasions prior to his arrest. It is further submitted that there are 156 accused persons including 82 witnesses and 2.5 lac pages of documents which need to be analysed and the trial which has not even commenced naturally has no possibility of concluding in the near future.

Submissions on behalf of respondent

12. Mr. Manish Jain, learned Special Counsel submitted that the present applicants have played an integral part in the commission of the offence of money laundering at a large scale and are a flight risk and thus not entitled to bail. The banks have been duped of a humongous amount of around 46,000 Crore rupees and the accused persons fraudulently used LC facilities to receive more than 24,000 Crore rupees in the account of BSL. Reference is also made to the statement of Rajiv Pitty, GM (Finance) in HZL and

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Pravin John Sequeria, DGM, at JSW, both of whom have denied issuing any documents in favour of BSL qua sale of Zinc Ingots. The attention was also drawn to the statement of one *Latesh Sainani*, partner in Ms. Mewar Transport Company (hereinafter, "MTC") which was transport partner of HZL, who stated that on instructions of applicant, Zinc Ingots meant for Khopoli plant was diverted to other places such as Delhi/Agra/Ghaziabad etc. *Sushil Kumar Agarwal*, proprietor of M/s Shree Ram Overseas, one of the purchases of the diverted zinc, stated in his Section 50 statement that the payment for zinc was made on the directions of the applicant and that all the transactions were done in cash.

13. Learned Special counsel further contended that though Neeraj Singhal is the mastermind, the applicants have misused their professional qualifications to aid in the commission of offence. He further submits that the applicants fail to meet the rigours of the twin conditions enumerated in Section 45 of the PMLA as well as that of the triple test. With respect to validity of the statements made under Section 50 of the PMLA, it is submitted that the same are admissible in nature, and can be relied upon at the stage of remand or even to reject bail. It is further submitted that the contention of the applicants that they have been granted bail in the predicate offence is meritless as it is settled law that the offence of money laundering is an independent offence.

14. With respect to the contention that the trial would take some time and hence the applicants should be released on bail, ld. Special Counsel submits that the offences are serious in nature and considering the peculiarity of fraud and conspiracy involved in the case, the applicants are not entitled to be released on bail. It is also stated that there is no parity with the other co-

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accused as the main accused Neeraj Singhal has been given a release order by the Supreme Court and it is not a bail decided on merits. Moreover, Nitin Johari has been released on medical grounds and again not on merits, and the release of Archana Mittal was founded on the consideration of her being a woman.

15. With the assistance of learned Senior Counsels and the Special counsel, this Court has gone through the entire material placed on record.

16. Pertinently, as noted above, the SFIO filed Complaint No.770/2019 dated 16.08.2019 under various provisions of Companies Act, 2013 including Section 447 and Sections 409, 467, 468, 471 and 120B of Indian Penal Code, 1860 against the accused persons without arrest. It has investigated allegations of obtainment of loans worth Rs. 46,646 Crores by the accused from various banks and financial institutions. The cognizance of the complaint was taken by Special Judge (Companies Act) Dwarka District Court on 16.08.2019. Indisputably, the complaint against the applicants was filed without arrest and they were granted bail. It is stated that the trial is yet to begin.

17. The investigation under PMLA was initiated vide F. No. ECIR/06/DLZO-II/2019 in Enforcement Directorate, Delhi Zone-I in respect of the scheduled offence. The main prosecution complaint was filed on 08.08.2023 against a total of 76 accused persons. The cognizance was taken against 72 accused persons vide order dated 07.11.2023.

Later, a supplementary Prosecution Complaint was filed on 07.03.2024 against a total of 84 accused persons including the present applicants. Process have been issued against the said accused persons vide order dated 26.07.2024.

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18. Insofar as the applicant-Pankaj Kumar Tewari is considered, the case against him is twofold. Firstly, it is alleged that this applicant was involved in creating documents for fraudulently availing LC facility from banks and the proceeds from fraudulent discounting were routed in bank account of BSL. In support of this contention, reliance is placed on the three specimen letters for LC discounting dated 11.07.2017 which were seized from his house. Secondly, it is alleged that the applicant was involved in the out of book sales of Zinc Ingots.

19. As regards the first contention, it is contended that the documents that were seized to support the contention were only draft templates of bill discounting applications and were not signed by anybody. This contention was not disputed by the ED. As regards to the out of book sale of Zinc Ingots, it is informed that the erstwhile BSL has entered in statutory settlement with the Excise Department before the Custom and Excise Settlement Commission and a penalty has also been paid.

Moreover, the applicant is not stated to be a Director or having played any role in creating of shell companies. No money is said to have travelled to this applicant's account.

20. Coming to the case of the applicant-Pankaj Kumar, the material cited against him is the statements recorded under Section 50 including that of co-accused persons and other current or ex-employees of BSL. Again, there is no allegation of money travelling to his account or him being a beneficiary. Indeed in terms of sub section (4) of Section 50, the statements are recorded in proceedings that are deemed to be judicial proceedings, and are also held to be admissible in evidence. At the same time, this Court makes a positive

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reference to the observations of the Co-ordinate bench which while being seized with the same issue observed as under[1]:

> *"56. The principle that emerges from Vijay Madanlal Choudhary (supra), as well as the above decisions as regards the statement recorded under Section 50 of the Act is that such statements are recorded in a proceeding which is deemed to be a judicial proceeding within the meaning of Section 193 and Section 228 of the Penal Code, 1860 and is admissible in evidence. The said statements are to be meticulously appreciated only by the Trial Court during the course of the trial and there cannot be a mini-trial at the stage of bail. However, when the statements recorded under Section 50 of PMLA are part of the material collected during investigation, such statements can certainly be looked into at the stage of considering bail application albeit for the limited purpose of ascertaining whether there are broad probabilities, or reasons to believe, that the bail applicant is not guilty. Meaning thereby, the statements under Section 50 of the PMLA have to be taken at their face value, but in case any such statement is patently self-contradictory or two separate statements of the same witness are inconsistent with each other on material aspects, then such contradictions and inconsistencies will be one of the factors that will enure to the benefit of the bail applicant whilst ascertaining the broad probabilities, though undoubtedly the probative value of the statement(s) of the witnesses and their credibility or reliability, will be analyzed by the trial court only at the stage of trial for arriving at a conclusive finding apropos the guilt of the applicant."*

21. From above, it is discernible that the only material cited against both the applicants is the statements recorded under Section 50 PMLA. As contended, some of the statements relied upon by the respondents are of persons who are co-accused in the investigation conducted by SFIO and therefore the veracity of same would be tested in trial.

22. Since the offence pertains to money laundering, apart from the usual considerations, it would have to be seen whether the twin conditions stipulated in Section 45 of the PMLA are met. A plain reading of Section 45 of the PMLA shows that the public prosecutor must be given an opportunity to oppose the application and the Court should have reasonable grounds for

[1] Sanjay Jain v. Enforcement Directorate 2024 SCC OnLine Del 16

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believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail. The twin conditions though restricts the right of accused to be released on bail but do not impose absolute restraint and the discretion vests in the Court. [2]

23. At this juncture, the Court also takes note of another important aspect of the case i.e., whether the trial is likely to be concluded in near future and if the answer is in negative, then should this circumstance inure to the benefit of the accused. This aspect is to be seen in light of the period of incarceration and the nature of allegations.

24. Bail is the rule and jail is the exception. This principle is nothing but a crystallisation of the constitutional mandate enshrined in Article 21, which says that that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Liberty is the usual course of action, and deprivation of it a detour, which is why there are safeguards imposed to ensure that the deprivation of liberty is only by procedure established by law. This procedure should be fair and reasonable, and right of the accused to speedy trial is an important aspect which the Court must keep in contemplation when deciding a bail application as the same are higher sacrosanct constitutional rights, which ought to take precedence.

25. The right of bail was read into the provisions of Section 45 by the Supreme Court where the accused was incarcerated for about a year and the case was pending at the stage of charge[3]. The Court also deems it apposite to refer to some recent decisions where the above-noted issue has been

[2] Vijay Madanlal Choudhary v. Union of India, reported as 2022 SCC OnLine SC 929
[3] Ramkripal Meena v. Directorate of enforcement SLP (Crl) No. 3205 of 2024 dated 30.07.2024

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categorically addressed.

26. The Supreme Court in the case of Manish Sisodia v Directorate of Enforcement,[4] reiterated the right of an accused for expeditious trial even in PMLA cases and held as under;-

> *37. Insofar as the contention of the learned ASG that since the conditions as provided under Section 45 of the PMLA are not satisfied, the appellant is not entitled to grant of bail is concerned, it will be apposite to refer to the first order of this Court. No doubt that this Court in its first order in paragraph 25, after recapitulating in paragraph 24 as to what was stated in the charge-sheet filed by the CBI against the appellant, observed that, in view of the aforesaid discussion, the Court was not inclined to accept the prayer for grant of bail at that stage. However, certain paragraphs of the said order cannot be read in isolation from the other paragraphs. The order will have to be read in its entirety. In paragraph 28 of the said order, this Court observed that the right to bail in cases of delay, coupled with incarceration for a long period, depending on the nature of the allegations, should be read into Section 439 Cr.P.C. and Section 45 of the PMLA. The Court held that the constitutional mandate is the higher law, and it is the basic right of the person charged of an offence and not convicted that he be ensured and given a speedy trial. It further observed that when the trial is not proceeding for reasons not attributable to the accused, the court, unless there are good reasons, would be guided to exercise the power to grant bail. The Court specifically observed that this would be true where the trial would take years. It could thus clearly be seen that this Court, in the first round of litigation between the parties, has specifically observed that in case of delay coupled with incarceration for a long period and depending on the nature of the allegations, the right to bail will have to be read into Section 45 of PMLA.*
>
> *xxx*
>
> *49. We find that, on account of a long period of incarceration running for around 17 months and the trial even not having been commenced, the appellant has been deprived of his right to speedy trial.*
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> *50. As observed by this Court, the right to speedy trial and the right to liberty are sacrosanct rights. On denial of these rights, the trial court as well as the High Court ought to have given due weightage to this factor.*

[4] 2024 SCC OnLine SC 1920

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27. Again, in the case of Prem Prakash v. Union of India through the Directorate of Enforcement,[5] the Supreme Court reiterated that the fundamental right enshrined under Article 21 cannot be arbitrarily subjugated to the statutory bar in Section 45 of the Act by holding as follows:-

> *11....All that Section 45 of PMLA mentions is that certain conditions are to be satisfied. The principle that, "bail is the rule and jail is the exception" is only a paraphrasing of Article 21 of the Constitution of India, which states that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Liberty of the individual is always a Rule and deprivation is the exception. Deprivation can only be by the procedure established by law, which has to be a valid and reasonable procedure. Section 45 of PMLA by imposing twin conditions does not re-write this principle to mean that deprivation is the norm and liberty is the exception. As set out earlier, all that is required is that in cases where bail is subject to the satisfaction of twin conditions, those conditions must be satisfied.*
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> *12. Independently and as has been emphatically reiterated in Manish Sisodia (II) (supra) relying on Ramkripal Meena v. Directorate of Enforcement (SLP (Crl.) No. 3205 of 2024 dated 30.07.2024) and Javed Gulam Nabi Shaikh v. State of Maharashtra, 2024 SCC OnLine SC 1693, where the accused has already been in custody for a considerable number of months and there being no likelihood of conclusion of trial within a short span, the rigours of Section 45 of PMLA can be suitably relaxed to afford conditional liberty. Further, Manish Sisodia (II) (supra) reiterated the holding in Javed Gulam Nabi Sheikh (Supra), that keeping persons behind the bars for unlimited periods of time in the hope of speedy completion of trial would deprive the fundamental right of persons under Article 21 of the Constitution of India and that prolonged incarceration before being pronounced guilty ought not to be permitted to become the punishment without trial. In fact, Manish Sisodia (II) (Supra) reiterated the holding in Manish Sisodia (I) v. Directorate of Enforcement (judgment dated 30.10.2023 in Criminal Appeal No. 3352 of 2023) where it was held as under:—*
>
> > *"28. Detention or jail before being pronounced guilty of an offence should not become punishment without trial. If the trial gets protracted despite assurances of the prosecution, and it is clear that case will not be decided within a foreseeable time, the prayer for bail may be meritorious. While the prosecution may pertain to an*

[5] 2024 SCC OnLine SC 2270

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> *economic offence, yet it may not be proper to equate these cases with those punishable with death, imprisonment for life, ten years or more like offences under the Narcotic Drugs and Psychotropic Substances Act, 1985, murder, cases of rape, dacoity, kidnaping for ransom, mass violence, etc. Neither is this a case where 100/1000s of depositors have been defrauded. The allegations have to be established and proven. The right to bail in cases of delay, coupled with incarceration for a long period, depending on the nature of the allegations, should be read into Section 439 of the Code and Section 45 of the PML Act. The reason is that the constitutional mandate is the higher law, and it is the basic right of the person charged of an offence and not convicted, that he be ensured and given a speedy trial. When the trial is not proceeding for reasons not attributable to the accused, the court, unless there are good reasons, may well be guided to exercise the power to grant bail. This would be truer where the trial would take years."*
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> *It is in this background that Section 45 of PMLA needs to be understood and applied. Article 21 being a higher constitutional right, statutory provisions should align themselves to the said higher constitutional edict.*

(emphasis added)

28. The view taken in the Manish Sisodia and Prem Prakash cases (Supra) was reiterated by the Supreme Court in the case of Vijay Nair v. Directorate of Enforcement,[6] decided on 02.09.2024 in **SLP (Crl) Diary No. 22137/2024**, where it was held as under:-

> *12. Here the accused is lodged in jail for a considerable period and there is little possibility of trial reaching finality in the near future. The liberty guaranteed under Article 21 of the Constitution does not get abrogated even for special statutes where the threshold twin bar is provided and such statutes, in our opinion, cannot carve out an exception to the principle of bail being the rule and jail being the exception. The cardinal principle of bail being the rule and jail being the exception will be entirely defeated if the petitioner is kept in custody as an under-trial for such a long duration. This is particularly glaring since in the event of conviction, the maximum sentence prescribed is only 7 years for the offence of money laundering.*

[6] Vijay Nair v. Directorate of Enforcement, decided on 02.09.2024 in SLP (Crl) Diary No. 22137/2024

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29. Supreme Court, in the case of V. Senthil Balaji v. The Deputy Director, Directorate of Enforcement,[7] while underscoring the importance of Article 21 and the effect of delays in trial in PMLA cases held as under:-

> *" 21. Hence, the existence of a scheduled offence is sine qua non for alleging the existence of proceeds of crime. A property derived or obtained, directly or indirectly, by a person as a result of the criminal activity relating to a scheduled offence constitutes proceeds of crime. The existence of proceeds of crime at the time of the trial of the offence under Section 3 of PMLA can be proved only if the scheduled offence is established in the prosecution of the scheduled offence. Therefore, even if the trial of the case under the PMLA proceeds, it cannot be finally decided unless the trial of scheduled offences concludes. In the facts of the case, there is no possibility of the trial of the scheduled offences commencing in the near future. Therefore, we see no possibility of both trials concluding within a few years.*
>
> *25…Inordinate delay in the conclusion of the trial and the higher threshold for the grant of bail cannot go together. It is a well settled principle of our criminal jurisprudence that "bail is the rule, and jail is the exception." These stringent provisions regarding the grant of bail, such as Section 45(1)(iii) of the PMLA, cannot become a tool which can be used to incarcerate the accused without trial for an unreasonably long time.*
> *xxx*
>
> *27. Under the Statutes like PMLA, the minimum sentence is three years, and the maximum is seven years. The minimum sentence is higher when the scheduled offence is under the NDPS Act. When the trial of the complaint under PMLA is likely to prolong beyond reasonable limits, the Constitutional Courts will have to consider exercising their powers to grant bail. The reason is that Section 45(1)(ii) does not confer power on the State to detain an accused for an unreasonably long time, especially when there is no possibility of trial concluding within a reasonable time. What a reasonable time is will depend on the provisions under which the accused is being tried and other factors. One of the most relevant factor is the duration of the minimum and maximum sentence for the offence. Another important consideration is the higher threshold or stringent conditions which a statute provides for the grant of bail. Even an outer limit provided by the relevant law for the completion of the trial, if any, is also a factor to be considered. The extraordinary powers, as held*

[7] 2024 INSC 739

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in the case of K.A. Najeeb, can only be exercised by the Constitutional Courts. The Judges of the Constitutional Courts have vast experience. Based on the facts on record, if the Judges conclude that there is no possibility of a trial concluding in a reasonable time, the power of granting bail can always be exercised by the Constitutional Courts on the grounds of violation of Part III of the Constitution of India notwithstanding the statutory provisions. The Constitutional Courts can always exercise its jurisdiction under Article 32 or Article 226, as the case may be. The Constitutional Courts have to bear in mind while dealing with the cases under the PMLA that, except in a few exceptional cases, the maximum sentence can be of seven years. The Constitutional Courts cannot allow provisions like Section 45(1)(ii) to become instruments in the hands of the ED to continue incarceration for a long time when there is no possibility of a trial of the scheduled offence and the PMLA offence concluding within a reasonable time. If the Constitutional Courts do not exercise their jurisdiction in such cases, the rights of the undertrials under Article 21 of the Constitution of India will be defeated. In a given case, if an undue delay in the disposal of the trial of scheduled offences or disposal of trial under the PMLA can be substantially attributed to the accused, the Constitutional Courts can always decline to exercise jurisdiction to issue prerogative writs. An exception will also be in a case where, considering the antecedents of the accused, there is every possibility of the accused becoming a real threat to society if enlarged on bail. The jurisdiction to issue prerogative writs is always discretionary."

(emphasis added)

30. On similar lines is the decision of Supreme Court in Sunil Dammani v. Directorate of Enforcement[8], where considering the one year custody of the accused and the factum of investigation being complete, the bail was granted noting that the prosecution had cited 98 witnesses.

31. The right to speedy trial was also upheld and other special legislations where provisions akin to Section 45 PMLA exist. Notable ones being, the decision in the case of Javed Gulam Nabi Shaikh v. State of Maharashtra,[9] wherein Supreme Court while granting bail to an accused under UAPA, observed as under:-

[8] Criminal Appeal No. 4108/2024 decided on 03.10.2024
[9] 2024 SCC OnLine SC 1693

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> *"19. If the State or any prosecuting agency including the court concerned has no wherewithal to provide or protect the fundamental right of an accused to have a speedy trial as enshrined under Article 21 of the Constitution then the State or any other prosecuting agency should not oppose the plea for bail on the ground that the crime committed is serious. Article 21 of the Constitution applies irrespective of the nature of the crime."*
>
> *(Emphasis added)*

On similar lines is the case of Union of India v. K.A. Najeeb (Three Judge bench)[10], wherein the Supreme Court is held:-

> *"12. Even in the case of special legislations like the Terrorist and Disruptive Activities (Prevention) Act, 1987 or the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the NDPS Act") which too have somewhat rigorous conditions for grant of bail, this Court in Paramjit Singh v. State (NCT of Delhi) [Paramjit Singh v. State (NCT of Delhi), (1999) 9 SCC 252 : 1999 SCC (Cri) 1156] , Babba v. State of Maharashtra [Babba v. State of Maharashtra, (2005) 11 SCC 569 : (2006) 2 SCC (Cri) 118] and Umarmia v. State of Gujarat [Umarmia v. State of Gujarat, (2017) 2 SCC 731 : (2017) 2 SCC (Cri) 114] enlarged the accused on bail when they had been in jail for an extended period of time with little possibility of early completion of trial. The constitutionality of harsh conditions for bail in such special enactments, has thus been primarily justified on the touchstone of speedy trials to ensure the protection of innocent civilians.*
>
> *15. This Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India [Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India, (1994) 6 SCC 731, para 15 : 1995 SCC (Cri) 39] , it was held that undertrials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter. However, owing to the practicalities of real life where to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial, the courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be*

[10] (2021) 3 SCC 713

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possible and the accused has suffered incarceration for a significant period of time, the courts would ordinarily be obligated to enlarge them on bail.

17. It is thus clear to us that the presence of statutory restrictions like Section 43-D(5) of the UAPA per se does not oust the ability of the constitutional courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a statute as well as the powers exercisable under constitutional jurisdiction can be well harmonised. Whereas at commencement of proceedings, the courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence. Such an approach would safeguard against the possibility of provisions like Section 43-D(5) of the UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial."

(Emphasis added)

Taking note of above decision , In the case of Sk. Javed Iqbal v. State of U.P.,[11] the Supreme Court held that:-

"42. This Court has, time and again, emphasised that right to life and personal liberty enshrined under Article 21 of the Constitution of India is overarching and sacrosanct. A constitutional court cannot be restrained from granting bail to an accused on account of restrictive statutory provisions in a penal statute if it finds that the right of the accused-undertrial under Article 21of the Constitution of India has been infringed. In that event, such statutory restrictions would not come in the way. Even in the case of interpretation of a penal statute, howsoever stringent it may be, a constitutional court has to lean in favour of constitutionalism and the rule of law of which liberty is an intrinsic part. In the given facts of a particular case, a constitutional court may decline to grant bail. But it would be very wrong to say that under a particular statute, bail cannot be granted. It would run counter to the very grain of our constitutional jurisprudence. In any view of the matter, K.A. Najeeb [Union of India v. K.A. Najeeb, (2021) 3 SCC 713] being rendered by a three-Judge Bench is binding on a Bench of two Judges like us."

(Emphasis added)

[11] (2024) 8 SCC 293

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To the similar extent are the decisions in Mohd. Muslim alias Hussain v State (NCT of Delhi[12], Jitendra Jain v. Narcotics Control Bureau[13], Rabi Prakash *v.* State of Odisha[14] and Man Mandal and Anr. *v.* State of West Bengal[15], wherein while taking into account the prolonged custody and unlikelihood of completion of trial in immediate future, the accused was granted bail.

32. Examining the present case in the aforenoted backdrop, it is noted that the investigation was initiated in the year 2019 and the prosecution has named 156 accused persons and cited 82 witnesses. There are 2.5 lac pages of documents which need to be analysed. Learned Special Judge took cognizance of the supplementary chargesheet vide order dated 26.07.2024. It is also observed that in the supplementary complaint dated 08.03.2024, permission was taken by the ED under Section 173(8) Cr.P.C. for further investigation into the matter. As such, the Trial is yet to commence.

33. When there are multiple accused persons, lacs of pages of evidence to assess, scores of witnesses to be examined, the trial is not expected to end anytime in the near future. Importantly, the delay being not attributable to accused, keeping the accused in custody by using Section 45 PMLA as a tool for incarceration is not permissible. Flow of liberty cannot be dammed by Section 45 without taking all other germane considerations into account. It is the duty of Constitutional Courts to champion the constitutional cause of Liberty and uphold the majesty of Article 21.

[12] 2023 SCC OnLine SC 352
[13] 2022 SCC OnLine SC 2021
[14] 2023 SCC OnLine SC 1109
[15] reported as 2023 SCC OnLine SC 1868

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34. Moreover, as repeatedly held, Constitutional Courts can always exercise their powers to grant bail on the grounds of violation of Part III of the Constitution of India and stringent provisions for the grant of bail such as those provided in Section 45 of the PMLA do not take away the power of Constitutional Courts to do so. The right of liberty and speedy trial guaranteed under Article 21 is a sacrosanct right which needs to be protected and duly enforced even in cases where stringent provisions have been made applicable by way of special legislation. The stringent provisions would have to be interpreted with due regard to Article 21 and in case of a conflict, the stringent provisions, such as section 45 of the PMLA in the instant case, would have to give way.

35. Thus, where it is evident that the trial is not likely to conclude in a reasonable time, Section 45 cannot be allowed to become a shackle which leads to unreasonably long detention of the accused persons. What is reasonable and unreasonable would have to be assessed in light of the maximum and minimum sentences provided for in the statute. In cases under the PMLA that, except in a few exceptional cases, the maximum sentence can be of seven years. The same has to be kept in mind while considering the period of incarceration which has been undergone.

36. In the present cases, both the applicants were arrested on 11.01.2024. They have been in custody since more than 9 months. Moreover, the trial in the predicate as well as the present complaint is yet to commence and would take some time to conclude. It is also pertinent to note that the main accused and other similarly placed co-accused persons have been enlarged on bail.

No evidence has been led to show that the present applicants are a

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flight risk. In fact, records would show that both the applicants have joined investigation on multiple occasions. There is no incident alleged by the respondent wherein the applicants have tried to tamper with evidence or influence witnesses.

37. Considering the totality of the facts and circumstances, the fact that the main accused are out on bail, the period of custody undergone and that the trial is yet to commence, keeping in mind the import of the Catena of decisions of Supreme Court discussed hereinabove, it is directed that both the applicants be released on regular bail subject to them furnishing a personal bond in the sum of Rs.1,00,000/- with one surety of the like amount each to the satisfaction of the concerned Jail Superintendent/concerned Court/Duty J.M. and subject to the following further conditions: -

i) The applicants shall not leave Delhi/NCR without prior permission of the concerned Court and surrender their passports, if any.

ii) The applicants shall provide their mobile numbers to the Investigating Officer on which they will remain available during the pendency of the trial.

iii) In case of change of residential address or contact details, the applicants shall promptly inform the same to the concerned Investigating Officer as well as to the concerned Court.

iv) The applicants shall not directly/indirectly try to get in touch with the prosecution witnesses or tamper with the evidence.

v) The applicants shall regularly appear before the concerned Court during the pendency of the trial.

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38. The bail applications are disposed of in the above terms.

39. Copy of the order be communicated to the concerned Jail Superintendent electronically for information and necessary compliance.

40. Copy of the order be uploaded on the website forthwith.

41. Needless to state that this Court has not expressed any opinion on the merits of the case and has made the observations only with regard to present bail applicants and nothing observed hereinabove shall amount to an expression on the merits of the case and shall not have a bearing on the trial of the case as the same has been expressed only for the purpose of the disposal of the present bail application.

MANOJ KUMAR OHRI
(JUDGE)

OCTOBER 24, 2024
js/ry