

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ASHOK MENON

MONDAY, THE 25TH DAY OF JANUARY 2021 / 5TH MAGHA, 1942

Bail Appl..No.7878 OF 2020

CRIME NO.ECIR/KCZO/31/2020 OF ENFORCEMENT DEPARTMENT, EKM

PETITIONER/S:

M. SIVASANKAR, AGED 57 YEARS
DEVADARSANA, KATTUROAD, POOJAPURA
THIRUVANANTHAPURAM DISTRICT, PIN - 695012.

BY ADVS.

SRI.S.RAJEEV
SRI.K.K.DHEERENDRAKRISHNAN
SRI.V.VINAY
SRI.K.ANAND (A-1921)
SRI.MANU SRINATH
SRI.JAIDEEP GUPTA (SR.)

RESPONDENT/S:

- 1 UNION OF INDIA
REP. BY SPECIAL PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.
CRIME NO ECIR.KCZO.31.2020 OF
ENFORCEMENT DEPARTMENT, PIN - 682031
- 2 DIRECTORATE OF ENFORCEMENT, GOVERNMENT OF
INDIA, REPRESENTED BY ITS ASSISTANT DIRECTOR,
KOCHIN ZONAL OFFICE, KANOOS CASTLE,
A.K. SHESHADRI ROAD (MULLASSERY CANAL ROAD
WEST), COCHIN
(CRIME NO ECIR/KCZO/31/2020 OF
ENFORCEMENT DEPARTMENT) PIN - 682011.

R1 BY ADV. ADDITIONAL SOLICITOR GENERAL OF
INDIA SRI.SURYAPRAKASH V.RAJU
R1-2 BY ADV. T.A.UNNIKRISHNAN, CGC
R1-2 BY ADV. SRI.P.VIJAYAKUMAR, ASGI
R1-2 BY ADV. SPECIAL COUNSEL ZOHEB HOSSAIN
R2 BY ADV. ADDITIONAL SOLICITOR GENERAL OF
INDIA SRI.SURYAPRAKASH.V.RAJU

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON
18.12.2020, THE COURT ON 25.01.2021 PASSED THE FOLLOWING:

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ASHOK MENON, J.

BA No.7878 of 2020

Dated this the 25th day of January, 2021

ORDER

Application for regular bail filed under Section 439 of the Cr.P.C by the applicant who is arraigned as the 5th accused in ECIR/KCZO/31/2020 of the Directorate of Enforcement, Cochin Zonal Office ('ED' for short) for having allegedly committed the offence punishable under Sections 3 and 4 of the Prevention of Money Laundering Act, 2002 ('PMLA' for short).

2. On 06/07/2020, OR No.7/2020 was registered by the Customs (Preventive) Commissionerate of Cochin against the person named Sarith P.S., the former PRO of the UAE Consulate for having smuggled 30 KGs of 24 karat gold worth ₹148,200,010/- camouflaged as diplomatic cargo. A bill of

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entry was filed claiming the consignee to be Mr Rashid Khamis Ali Musaiqri Ashima who is a Charge D' Affairs of the UAE Consulate, claiming benefits of exemption from payment of Customs duty as imported diplomatic cargo. On the basis of intelligence report, the Customs decided to check the baggage with the permission of the Ambassador of the United Arab Emirates in India. That is when a cylindrical-shaped gold as stated above was seized. The National Investigating Agency ('NIA', for short), Kochi registered Crime No.2/2020 on 10/07/2020 alleging offences punishable under Sections 16, 17 and 18 of Unlawful Activities (Prevention) Act ('UAPA', for short) against four persons namely, the above-mentioned Sarith, Swapna Prabha Suresh-former Secretary to the Counsel General of UAE Consulate, Fasil Fareed and Sandeep Nair. Based on the aforesaid activity of smuggling under the guise of diplomatic baggage, the ED registered the aforesaid crime initially against four persons, on 13/07/2020 and a complaint

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was also filed before the special Court on 06/10/2020. During the course of investigation, all the persons acquainted with the facts and circumstances of this case were questioned in their statements recorded. The NIA and the Customs also had recorded statements of various persons including the accused. Investigation revealed that the accused persons have indulged in criminal activities and committed scheduled offences and huge amount of proceeds of crime were generated which they are possessing/concealing/using. The statement of the witnesses and the persons arrayed as accused initially indicated the involvement of the applicant also. He was therefore intended to be questioned. Apprehending arrest, he approached this Court for anticipatory bail by filing BA No. 6752/2020 under Section 438 of the Cr.P.C. The same was dismissed by this Court on 28/10/2020. On the same day, he was arrested and remanded to judicial custody as he was arrayed as the 5th accused for the offence under the PMLA. The

investigation revealed that the accused, including the applicant, have committed offence of money laundering under Section 3, punishable under Section 4 of the PMLA. The mobile phone and the laptop of 2nd accused Swapna Suresh were seized and mirror-image of the applicant's phone was obtained from C-DAC. Supplementary prosecution complaint would be filed in the light of the incriminating material unearthed during investigation. The applicant was taken into custody and his statements under Section 50 of the PMLA were recorded. There are no reasonable grounds to believe that the accused is not guilty and that he is not likely to commit an offence of similar nature while on bail. The investigation reveals that the applicant has played a significant role in the offence.

3. The applicant states that he is an Engineering Graduate with an MBA. He joined service as a Deputy Collector in State service, and was thereafter conferred with IAS. He had

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held many important and responsible positions in the Government. He was working as the Principal Secretary, IT and Principal Secretary to the Chief Minister. In these capacities, he used to contact different agencies and Consulates of different countries to coordinate activities in Kerala. During floods in Kerala, he had been in contact with the Consulates and several countries had offered help to the State Government and the same was being coordinated through the office of the Chief Minister. A2 was then the Secretary to the Consulate General, UAE. She was arrested in connection with the gold smuggling case involving diplomatic baggage to the Consulate. Her mobile phone calls revealed several calls between her and the applicant. The applicant was therefore, summoned by the investigating agencies for questioning about those calls between him and A2. He was summoned by the ED, NIA and Customs several times between 14/07/2020 and 15/10/2020. He states that he was questioned by the ED for more than fifty

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hours on different dates. Signed statements were obtained from him and throughout he has been cooperating in the investigation. When such questioning continued disregarding his health conditions, he approached this Court for a pre-arrest bail, but the same was rejected by this Court. A story about the involvement of the accused in the Crime has been contrived on the basis of the statements allegedly given by A2 and Sri Venugopal, a Chartered Accountant, whom he had introduced to A2 for her financial solutions. A locker was arranged by Sri.Venugopal for A2 to keep her money. How she handled her money was none of his concern. The locker was got by A2 much before her involvement in the gold smuggling case. She alone had operated that locker. The applicant was arrested while he was undergoing Ayurvedic treatment. He was not permitted to complete the treatment. The details of the days and time he was interrogated by the different agencies are mentioned in Annexure-I. Consequent to his arrest, he was

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given to the custody of ED for a total period of 14 days. He sought bail from the jurisdictional Court, but the same was rejected. He has therefore approached this Court for indulgence.

4. The respondent (ED) has opposed the bail application with much vehemence and has produced documents pertaining to the investigation, including statements of the applicant, A1 and A2 obtained under Section 50 of the PMLA, in a sealed cover. A detailed written objection was also filed. It is contended that the material unearthed during the investigation has revealed that the applicant has played a significant role in the offences under the PMLA. He has admitted that he had facilitated A2 to open a bank locker jointly with his Chartered Accountant – Sri P.Venugopal, with SBI, Thiruvananthapuram. A2 was directly involved in the smuggling of gold through diplomatic baggage and had earned lucrative profits from the said activity. The applicant

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and A2 had also received kickbacks from M/s.Unitac Builders for facilitating award of the contract of one of the projects under the LIFE Mission, the prestigious and ambitious initiative by the Kerala Government to provide low budget housing to the homeless and poor people in the State. It is alleged that the proceeds of crime so derived from the aforesaid illegal activities had been kept in the bank locker in the form of gold and in cash which were seized by the NIA, Kochi. The applicant has despite being a Senior public officer, holding a responsible post was actively involved in various activities with the other accused who were involved in grave offences of gold smuggling through diplomatic channel and also for offences under the UAPA and under the PMLA in this crime. The applicant had allegedly accompanied A2 to the office of Sri.Venugopal and advised him to manage her finances. It was the applicant who had directed Sri.Venugopal to open a joint locker with the A2 in the SBI to be operated by them. A2 had in

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the presence of the applicant handed over a bag containing ₹30 lakhs to be kept in the locker. Initially, Sri.Venugopal was hesitant to handle such huge money in cash. However, A2 convinced him that the amount was received through genuine sources and the applicant was present throughout. Thereafter, Sri.Venugopal conveyed WhatsApp messages to the applicant about the deposit in the locker as also the withdrawals made by A2 from that locker. The investigation by the NIA resulted in the seizure of ₹64 lakhs in cash and gold from that locker and a further amount of ₹36.50 lakhs in cash was seized from another locker in Federal Bank, Thiruvananthapuram. The applicant has in his statement admitted that A2 was not financially well off and that he had tried his best to help her in all possible ways and had also secured a good job for her when she lost her job in the UAE Consulate. He was very close to A2 and they exchanged WhatsApp messages all day long. Both A2 and Sri.Venugopal have admitted that the locker in SBI was

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opened under the instructions of the applicant and he was fully aware of the deposits and the withdrawals made therefrom. In their chats, A2 had even requested the applicant to intervene and contact the Terminal Manager/Airport Authority/Customs Authority with regard to clearance of diplomatic baggage without subjecting the same to customs examination. The applicant has himself admitted that he did speak to a senior customs officer on 15/10/2020 and made a request on behalf of A2. This intervention by the applicant led to diplomatic cargoes to the UAE Consulate go and examined despite the customs officers entertaining suspicion about the ingredients of those packages. A2 has admitted that the applicant was fully aware of the gold smuggling through diplomatic channel. The applicant was also aware of the kickbacks that was paid by M/s.Unitac Builders to A2 and her close associates including one Mr.Khalid, Finance Head of the UAE Consulate for facilitating the award of contract from Red Crescent under the

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LIFE Mission Project. It is assumed that Khalid had paid an amount of approximately rupees one crore to A2 and the said amount was intended to be paid as kickbacks to the applicant. It was this amount which was seized from the lockers belonging to A2. It is revealed that the applicant had shared confidential information with A2 relating to KFON and LIFE Mission Projects. Messages pertaining to the auction were also exchanged between the applicant and A2 even prior to the tender was opened. 26 of the 36 projects under the LIFE Mission went to two entities whose names figure in the WhatsApp chats between the applicant and A2. The applicant was during the relevant time, in overall charge of the implementation of the project. The applicant is very influential and was holding important positions in the government service. In case he is released on bail, there is every possibility of his tampering with evidence and influencing witnesses. The possibility of his absconding also cannot be ruled out. It is also

submitted on behalf of the respondents that Section 45 of the PMLA requires twin conditions to be followed before granting of bail. The Court should be convinced that there are reasonable grounds to believe that the applicant is not guilty of the offence alleged against him and that he is not likely to commit any offence while on bail. Section 45 of the PMLA has been subsequently amended in 2018 consequent to the decision of the Apex Court in *Nikesh Tarachand Shah v. Union of India [(2018) 11 SCC 1]* to substitute the words, “imprisonment for a term of more than three years under Part A of the schedule” with the words “accused of an offence under this Act...”. Thus, the embargo under Section 45(1) is made applicable to all offences under the PMLA. In the light of the facts and legal submissions made, the respondent urges that the application for bail may be dismissed as it is devoid of any merits.

5. Heard the learned Senior Counsel Sri. Jaideep Gupta

appearing for the applicant and and Sri.S.V. Raju, the learned ASG. Written submissions were also made on behalf of both.

6. The learned Senior Counsel Sri.Gupta submits that no offence under Section 3 of the PMLA is made out or even properly alleged against the applicant. Referring to Section 3 of the PMLA, it is submitted that for an offence of money laundering to be attracted under Section 3, it is necessary that the prosecution must be able to show the existence of applicant's involvement in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and also the applicant's projection of claiming the said proceeds of crime as untainted property. It is pointed out that the ED has two different narratives with regard to the proceeds of crime. As per the earlier narrative, proceeds of the crime in this case has been generated out of gold smuggling, while the later version appears to be that the proceeds of the crime is derived from

kickbacks received in implementing the LIFE Mission project. Be that as it may, even if one is to assume and accept that the case against the applicant is brewed with respect to the proceeds of the crime, then also no offence of money laundering is made out under Section 3 of the PMLA as the elements and ingredients necessary under the provision of the of the applicant having projected are claiming the proceeds of the crime as untainted property is not even alleged or shown. Even if it is assumed that the applicant had parked in the bribe money in the bank locker of A2 is true that *per se* will not attract Section 3 and may amount to an offence under the Prevention of Corruption Act and the Customs Act only. The learned Senior Counsel submits that any contrary interpretation would create an irrational consequence of converting every property related and money related offence into a money laundering offence automatically.

7. The learned Senior Counsel Sri Gupta also draws the

attention of this Court to the dictum in *Nikesh Tarachand Shah* (*supra*) wherein the Hon'ble Apex Court has declared that the twin test stipulated under Section 45(1) of the PMLA for being eligible for bail as unconstitutional and not good law, and that the indiscriminate application of the said provision would certainly violate Article 21 of the Constitution. It is submitted that the aforesaid declaration of law by the Apex Court is binding on all courts as per the mandate of Article 141 of the Constitution of India. The learned Senior Counsel submits that the amendment of Section 45 as per amendment Act 13 of 2018 is not capable of saving the vires of the already non-existing provision.

8. The learned Senior Counsel further argues that even if it is assumed that Section 45 (1) of the PMLA applies, then also the applicant is saved from the operation of the twin considerations due to the proviso which exempts persons who are sick or is accused either on his own or along with other co-

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accused of money laundering a sum of less than rupees one crore from the rigours of the twin test. There are 2 bank lockers allegedly operated by the 2nd accused. The one which was issued to A2 jointly with the Shri P. Venugopal, the Chartered Accountant, alone is indicated to have some connection with the applicant even if the statements of Shri Venugopal and A2 are to be believed in its entirety. The applicant did not even have any remote connection with the locker belonging to A2 in the Federal Bank. The statement of A2 dated 10/08/2020 indicates that she had opened the locker in August 2019 along with the A1-Sarith. The NIA had seized the ₹ 64 lakhs and 982.5 grams of gold jewellery from the SBI locker. They seized ₹3,650,000/- from the Federal Bank locker on 23/08/2020 as is evident from the complaint filed by the NIA as also the seizure mahazar prepared on that day. Thus the applicant could be said to have been involved in money laundering only to the tune of ₹64 lakhs which was

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seized from the SBI locker and therefore, the proviso to Section 45 (1) would operate in such a scenario and would exempt the applicant from the rigours as stated earlier. Moreover, it is also submitted that the applicant is a sick person suffering from chronic degenerative disc disease. He was admitted to the Arya Vaidyasala for 15 days in 2019. He also a cancer survivor for having undergone treatment at the Amritha Institute of Medical Sciences in the year 2005 with cancer affecting his upper jaw on the right side. He was operated upon on 12/07/2005 and there were CT scan evaluations to rule out recurrence during a subsequent visits. He had obstructive symptoms later and has been advised to regular follow-up visits. His nasal block collection is prone for recurrence as it is due to dense scarring and this can lead to drainage problem of the sinuses and subsequent sinusitis. It is the Dr. Subramani Iyer, the Professor and HOD, Head and Neck/Plastic and Reconstructive Surgery, Amritha Institute of Medical Sciences and Research Centre

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Kochi who has issued a treatment summary on 23/12/2020. The learned Senior Counsel also submits that the applicant would satisfy the rigours of the twin test under Section 45 of PMLA for grant of bail even if it is held to be applicable. It is pointed out that the applicant had no real association with the SBI locker owned and operated by A2 and Venugopal. Even if it is to be believed that A2 and Venugopal had opened the locker in SBI under instructions of the applicant, the association of Venugopal with the said locker in debt on 20/06/2019 by when, all the money deposited by Venugopal in the said locker was removed in 2-3 trenches and there he handed over the key and the money to A2. This is evident from the WhatsApp communication between A2 and Venugopal and is also further supported by the statement of A2 dated 10/08/2020. ₹64 lakhs seized by the NIA is subsequent to 20/06/2019. The initial deposit of ₹30-34 lakhs handed over to Venugopal by A2 in the presence of the applicant in December 2018 is not

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proceeds of crime even going by the case of the ED. It is pertinent to note that the gold smuggling had happened between November 2019 to June 2020 while the execution of the LIFE Mission projects is at the end of July 2019 or the beginning of August 2019. Hence it is to be stated with certainty that the money that was deposited in the SBI locker during November 2018 is different and distinct from the money that was ultimately seized by the NIA on 23/07/2020.

9. It was alleged that the grounds of arrests of the applicant was that the applicant was involved in helping the commission of crime regarding the 21 consignments sent between 2019 and 2020. It directly accused the applicant of having assisted in the process of the activity connected with the proceeds of the crime in this regard. The case of the ED was registered on the basis of the earlier crime registered by the NIA on 10/07/2020 and the NIA had registered a case upon seizure of 30 KGs of 24 karat gold. It is pursuant to the

further investigation by NIA that an amount of more than rupees one crore from different accounts held by A2 was seized. In the grounds of arrests, the ED contends that the amounts recovered from A2 are proceeds of crime from smuggling activities in which she was involved with the applicant's active support. The learned Senior Counsel points out that in the most shocking and unethical manner, the ED has changed the whole narrative relating to the proceeds of crime in its application for extension of custody of the applicant. There the ED has stated that the applicant had received kickbacks through A2 and others regarding LIFE Mission projects. The ED has however desisted from disclosing the actual role of the applicant in the alleged kickbacks received by A2 and others. There are glaring contradictions in the aspects of proceeds of crime and is therefore highly suspicious and smacks of malice. There is material change in the allegations as well as in the predicate offence alleged.

10. The claim of the ED that the applicant had tried to influence the customs officials is not true. The ED has not made any claim or statement regarding the nature of the communication made by the applicant or as to whom the applicant had spoken to. The allegations are therefore very vague and purposefully designed to confuse and mislead the Court. In the affidavit filed by the ED on 29/10/2020, it is stated that the applicant has denied the statement recorded on 28/10/2020. There is every likelihood that the statement dated 15/10/2020 is a fabrication and this statement alleged to be given by A2 on 10/11/2020 also cannot be relied upon. In her statement, A2 has answered in the negative to the query whether the applicant was aware of the gold smuggling. The learned Senior Counsel has pointed out to the portions of the statements given by A2. The allegation that confidential details regarding KFON and LIFE Mission were shared with A2 is also not true. The nature of those confidential details have not been

made clear by the ED.

11. In the light of the decision of the Hon'ble Supreme Court In *P Chidambaram v. Directorate of Enforcement [2019 (16) SCALE 870]*, the learned Senior Counsel argues that the findings based on materials produced by the prosecution in a sealed cover is not justified and must therefore not have any bearing on the granting or denial of bail.

12. The learned Senior Counsel also points out that the he could the ingredients of the statements given by the other accused and also that of Venugopal to the media/press which is aimed at a media trial of the applicant by the ED.

13. It is submitted that the applicant is an honest IAS officer having an unblemished service record of 30 years, registration of this case and he is currently under suspension and hence is unlikely to tamper with evidence or influence witnesses. He has cooperated with the investigation and is not likely to abscond. The applicant has spent more than 203

hours of interrogation. Out of the said time 134.5 hours of interrogation was done by the ED alone. There is no justification in keeping the applicant behind bars and therefore it is requested that he may be released on bail as the investigation with regard to the involvement of the applicant is complete and no purpose will be served by his further incarceration.

14. The learned Senior Counsel appearing for the applicant has relied on a number of decisions in support of his argument. They are as follows:

- 1. Nikesh Tarachand Shah vs. Union of India [(2018) 11 SCC 1]***
- 2. Ahilya Devi vs. State of Bihar [2020 CrLJ 2810]***
- 3. Dr. Shivindir Mohan Singh vs. Directorate of Enforcement [2020 SCC OnLine Del 766]***
- 4. Upendra Rai vs. Enforcement Directorate [AIR OnLine 2019 Delhi 1177]***
- 5. Arvind Rajta vs. CBI [2020 SCC OnLine HP 1713]***
- 6. D K Sivakuamr vs. Directorate of Enforcement [BA 2484/2019 dated 23.10.2019 Delhi HC]***

7. ***Gaurav Gupta vs. Director of Enforcement [2015 SCC OnLine Del 9929]***
8. ***Anil Tuneja vs. M.Cr. C(A) 469/2020 Chattisgarh HC***
9. ***P Chidambaram vs. Directorate of Enforcement [(2019) 9 SCC 24]***
10. ***Court on its own Motion vs State of Kerala dated 25.03.2020 in WPC 9400/2020***
11. ***Tofan Singh vs. State of Tamilnadu [2020 SCC OnLine SC 882]***
12. ***Chidambaram vs Directorate of Enforcement [(2019) SCC Online SC 1549]***

These decisions are relied upon to point out that Section 45 of the PMLA has been declared to be unconstitutional and that the subsequent amendment in 2018 is not going to salvage the situation.

15. Per contra, the learned ASG, Sri S.V. Raju has relied upon the Decision of the Orissa High Court in ***Mohammed Arif vs. Directorate of Enforcement [2020 SCC OnLine Ori 544]*** to argue that the amendment has cure the deficiency, and the

embargo under Section 45(1) PMLA holds good to all offences under the Schedule.

16. The learned ASG has relied on the decision in ***State of Gujarat v. Mohanlal Jitamalji Porwal [(1987) 2 SCC 364]***

where it is held thus:

“The entire Community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the Community. A disregard for the interest of the Community can be manifested only at the cost of forfeiting the trust and faith of the Community in the system to administer justice in an even handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the National Economy and National Interest.”

He has also relied on the following decisions :

- 1. State of Bihar v. Amit Kumar [(2017) 13 SCC 751]**
- 2. Nimmagadda Prasad v. CBI [(2013) 7 SCC 466]**
- 3. CBI v. Ramendu Chattopadhyaya [Crl. Appeal No. 1711 of 2019]**
- 4. Serious Fraud Investigation Office v. Nitin Johari [(2009) 9 SCC 165]**
- 5. Y.S. Jagan Mohan Reddy v. CBI [(2013) 7 SCC 439]**
- 6. Anil Kumar Yadav v. State [(NCT of Delhi) (2018) 12 SCC 129]**
- 7. Gautam Kundu v. Directorate of Enforcement [(PMLA) (2015) 16 SCC 1]**
- 8. Rohit Tandon v. Directorate of Enforcement [(2018) 12 SCC 46]**

Consequent to the amendment, the original expression "imprisonment for a term more than three years under part A of the Schedule" stands substituted by the expression "no person accused of an offence under this Act shall be released on bail or on his own bond". In view of the changes brought about by way of amendment, I find that the embargo under Section 45 (1) of the PMLA would continue to stand in the way of granting bail to the applicant except under the conditions

mentioned therein. In *Chidambaram's case* also the application for anticipatory bail was dismissed keeping in view the embargo under Section 45 (1) of the PMLA. That decision had come after the amendment came into force and the decision in *Nikesh Shah* did not interfere with the finding of the Supreme Court.

17. The argument of the learned Senior Counsel that the predicate offence has not been identified and that the prosecution initially started with the proceeds of crime as that from the act of smuggling has later gone to 'kickbacks' in LIFE Mission project. This Court had the opportunity to consider the application for anticipatory bail filed by the applicant and it was held that the materials suggested the complicity of the applicant and that the prosecution has to get opportunity to delve further into the allegations in the light of the statements recorded. The applicant was confronted with the statements of the co-accused in this case pertaining to his involvement and

he has not been able to give a satisfactory explanation regarding the variance between his version and the versions of the other witnesses as an accused. The applicant could not give a satisfactory explanation regarding why he was anxious to introduce the 2nd accused to the witness Venugopal to facilitate parking of her money in a locker. A2 has given statements to the effect that the applicant was aware of the deposits and withdrawals from the locker. It is true that the prosecution may not have been able to establish with precision how the proceeds of crime was generated. But indications about the applicant having knowledge of the smuggling activities in which A2 was involved suggests that he also had a share in the proceeds of crime. The term "proceeds of crime" is wide enough to include proceeds which have been directly or indirectly obtained as a result of criminal activities mentioned as scheduled offences. The argument of the learned Senior Counsel for the applicant relying on *Thofan Singh's* case to

submit that the statement of the co-accused recorded under Section 50 of PMLA is not acceptable against the applicant is not something which can be decided at this stage. *Thofan Singh's* case was with respect to confession statement recorded under the provisions of the Narcotic Drugs and Psychotropic Substance Act. That may not have much binding for an offence under the PMLA. There is no illegality in looking into materials produced in the sealed cover. What is stated in *P Chidambaram's* case is that while the judge was empowered to look at the materials produced in a cover to satisfy his judicial conscience, it ought not have recorded a finding based on the materials produced in the sealed cover.

18. Reverting to the rigour of the twin test under Section 45 of the PMLA, it has to be considered whether the applicant would qualify to get bail. There is no doubt about the complicity of the applicant and there are no reasonable grounds to believe that he is not guilty. However, it should also

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be considered whether there is a likelihood of the applicant committing any offence while on bail. I am afraid that the prosecution has not been able to establish this fact. Going by the allegations made by the ED, the applicant was indulged in laundering of ₹64 lakhs which was seized from the SBI locker. There is no indication that the applicant had anything to do with the locker belonging to A2 in Federal Bank. Thus the proviso to Section 45 (1) of the PMLA would operate in view of the fact that the money allegedly laundered is less than rupees one crore. The fact that the applicant is suffering from various illness would also come to his benefit as the proviso to Section 45 exempts a sick person from the rigours of the Section. As was held by the Hon'ble Supreme Court in *P Chidambaram's* case, the applicant is neither a flight risk nor has he been shown to have any propensity to tamper with evidence or influencing witnesses, apart from the fact that the evidence is all documentary in nature and has already been collected

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according to the ED. In *Sanjay Chandra v. CBI 2011 KHC 5051: AIR 2012 SC 830* it was held that the they object of bail is not punitive but to secure the presence of the accused for trial. The accused may not be detained just to give him a taste of imprisonment is what the Supreme Court held.

19. The applicant has been in custody since 28/10/2020. He has been subjected to interrogation including custodial interrogation in a number of times. The present pandemic times also does not encourage incarceration of an accused indefinitely. I find no rationale for continuing the applicant's judicial custody as an undertrial in this case The applicant is therefore, entitled to be released on regular bail on stringent conditions.

In the result, the bail application is allowed and the applicant is directed to be released on bail on execution of bond for ₹5,00,000/- (Rupees five lakhs only) with two solvent sureties for like amount each to the satisfaction of the

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jurisdictional Court, and on following further conditions:

1. He shall surrender his passport and shall not go abroad except with the permission of the jurisdictional Court. The passport shall also be released to the applicant only on conditions as may be imposed by the jurisdictional Court, in case such contingency arises.
2. He shall appear before the investigating officer as and when called for.
3. He shall not attempt to influence or intimidate the witnesses or tamper with evidence.
4. He shall not get involved in similar offences during the currency of the bail.

In case of breach of any of the bail conditions, the prosecution shall be at liberty to apply for cancellation of the bail before the jurisdictional court.

Sd/-

ASHOK MENON

JUDGE

jg