Sajjan Kumar Vs Directorate Of Enforcement

Court: Delhi High Court

Date of Decision: June 13, 2022

Acts Referred: Constitution Of India, 1950 â€" Article 14, 21
Code Of Criminal Procedure, 1973 â€" Section 156(3), 439
Prevention of Money Laundering Act, 2002 â€" Section 3, 4, 19, 24, 44, 45, 45(1), 45(1)(ii), 50, 70
Customs Act, 1962 â€" Section 132, 135, 142
Narcotic Drugs and Psychotropic Substances Act, 1985 â€" Section 37
Companies Act, 212(6)
Unlawful Activities (Prevention) Act, 1967 â€" Section 43D(5)

Hon'ble Judges: Chandra Dhari Singh, J

Bench: Single Bench

Advocate: Vikas Pahwa, Abhishek Pati, Rohan Wadhwa, Nikhil Pahwa, Zoheb Hossain, Vivek Gurnani, Gaurav Vashisht, Ankur Tiwari, Shuriya Suri

Final Decision: Dismissed

Judgement

Chandra Dhari Singh, J

1. The instant third bail application under Section 439 of the Code of Criminal Procedure, 1973 (hereinafter Ã¢â‚¬Å“Cr.P.CÃ¢â‚¬) has been filed by the

applicant seeking grant of regular bail in proceedings emanating from ECIR NO. DLZO- 1/09/2019 dated 23rd December 2019 leading to filing of

prosecution complaint by the Directorate of Enforcement (hereinafter Ã¢â‚¬Å“EDÃ¢â‚¬) dated 23rd November 2021 under Section 3 read with Sections

4/44/45/70 of the Prevention of Money Laundering Act, 2002 (hereinafter Ã¢â‚¬Å“PMLAÃ¢â‚¬â€‹).

FACTUAL MATRIX

2. The background of the case is discussed as under: -

(i) The applicant is one of the directors in M/s Durga Apparels Pvt Ltd (Ã¢â‚¬Å“DAPLÃ¢â‚¬), having its registered office at L-93, Chanakaya Place Part 2,

New Delhi- 110059. The said company is involved in the business of export/import of garments and carpets.

(ii) A prosecution complaint was filed against the applicant by the Directorate of Revenue Intelligence (hereinafter Ã¢â‚¬Å“DRIÃ¢â‚¬) on 23rd April 2018,

alleging commission of predicate offences under Sections 132 and 135 of the Customs Act, 1962, during 2010-2011 with respect to disbursal of duty

drawback on the overvalued exports subsequently leading to extra duty drawbacks to the tune of Rs.32.25 Crores.

(iii) After investigating the case for almost 7 years, DRI registered the abovementioned ECIR on 23rd December 2019 on twin allegations:-

- that Low value invoices were submitted by Representative of foreign buyer for obtaining the Certificate of Origin of goods from Delhi Chamber of

Commerce.

- and that Full Exports proceeds received against value of goods were arranged by foreign buyer and sent through Bank to India.

(iv) The complaint was forwarded by DRI to Directorate of Enforcement (hereinafter Ã¢â‚¬Å“EDÃ¢â‚¬) on 19th November 2019 and on 23rd December

2019, an ECIR bearing no. DLZO-I/09/2019 was registered by the ED.

(v) The applicant was alleged to be the key person in managing various enterprises through which such availing of excess duty drawback was

facilitated.

(vi) Section 132 of the Customs Act was added as scheduled offence in 2015. At the time of commission of alleged offence during 2010-2011, it was

not a scheduled offence.

(vii) During one of the appearances on 7th April 2021, the applicant alleged to have been pressurized to bribe the ED officials with a sum of Rs.50

Lakhs to get a clean chit and when the applicant tried to resist, he was severely tortured and beaten up resulting in grave physical injury including

fracture leading to deep psychological trauma.

(viii) The applicant made a complaint to the concerned SHO against the inhuman physical assault against the officials of the ED, however, when no

action was taken, the applicant filed an application under Section 156(3) of Cr.P.C. before the Court concerned seeking registration of FIR, which is

still pending before the Court of learned CMM, Central District, Tis Hazari Courts, Delhi.

(ix) Searches were carried out at the residential premises of the applicant on 24th September 2021 and subsequently he was arrested on 25th

September 2021 at 4:15 AM.

(x) The applicant was remanded to Police Custody till 7th October 2022 and has been in Judicial Custody since then.

(xi) The learned Trial Court took cognizance of the said complaint and the applicantÃ¢â‚¬â„¢s first and second bail applications were dismissed vide orders

dated 9th December 2021 and 10th February 2022, respectively.

(xii) Learned Special Judge dismissed the second bail application on the grounds that :-

a. Various companies caused fraudulent export of goods to claim undue DEPB/Duty Drawback scheme, thus caused a loss of Rs. 32,25,62,967/- to

the exchequer.

b. The accused/applicant was the key person in entire fraudulent export and was directly involved in export operations, in association with suppliers he

indulged in exporting the goods at inflated values.

c. The investigation was also conducted with the banks and during investigation, it was found that the accused/applicant received the duty drawback in

the bank account of DAPL, M/s Om Shreem Ananda Foods Pvt Ltd, M/s Threepence Graft, M/s Designer Innovation and M/s White Swan Inc.

d. The accused/applicant converted the duty drawback and other benefits into cash through entry operators.

e. The applicant used the services of Mr. Deep Chand Singhal, Ghanshyam Das Gupta and Rajeev Goel to get fund reintroduced into the banking

channels and then utilized the same for purchasing assets and in this regard relevant bank account statements, registry documents and statements

were recorded.

f. The applicant also got prepared forged documents of the property at Sainik Enclave to depict the purchase of subject property in the year 2006, so

as to dissociate the purchase made in the year 2011 from the proceeds of crime. The roles of individuals and firms were also recorded who knowingly

indulged in the said activity.

g. The main issue before the Court was whether the twin conditions as envisaged under Section 45 of the PMLA are applicable even after

amendment the stage of bail or not. The latest position before the HonÃ¢â‚¬â„¢ble Supreme Court on 4th January 2021 was that the mandate of Section

45 has to be dealt before deciding the anticipatory bail. This is equally applicable for deciding regular bail when the accused is in custody.

h. No prima facie case was made out and therefore, because of embargo under Section 45 of the PMLA, the plea that the accused had been custody

since 25th September 2021 and the fact that he was arrested in inhuman manner or the case is not likely to be concluded soon, could not have been

considered by the Court.

3. Hence, the applicant has preferred the instant bail application.

SUBMISSIONS

4. Mr. Vikas Pahwa, learned senior counsel for the applicant submitted that the ECIR was registered in the year 2019 and the applicant was

summoned by the ED officers to join investigation. On all such occasions, the applicant appeared before the officers of ED, fully cooperated with the

investigating authorities and got his statement recorded. It is further submitted that the statement of applicant was recorded as many as 13 times

during his police custody, after which the prosecution complaint in the instant matter was also filed indicating thereby that the investigation qua the

applicant was complete at their end and his further custody was not needed for conducting and carrying out the process of investigation at the end of

ED authorities.

5. Learned senior counsel submitted that the curtailment of the liberty of the applicant was not necessary for the unhindered, unhampered and smooth

investigation at the end of investigating authorities of ED inasmuch as the entire evidence is in the domain of documentary evidence, available with the

ED and each transaction related to the present case is duly accounted for.

6. Learned senior counsel vehemently submitted that the search, seizure and arrest of the applicant is nothing but a counterblast to the complaint filed

by the applicant to the concerned SHO, Central Vigilance Commission and application filed under Section 156(3) of Cr.P.C. for registration of FIR by

the applicant. The applicant has only been arrested in the present case to fulfil the vendetta developed by the officers of ED pursuant to filing of the

complaint and application under Section 156(3) of Cr.P.C. against the ED officials. The allegations levelled against the applicant are unsustainable as

the total quantum of the alleged money laundering is calculated using extra duty draw back availed by the five firms/companies namely M/s Durga

Apparels Pvt Ltd, M/s Om Shreem Ananda Foods Pvt Ltd, M/s Threepence Graft, M/s Designer Innovation and M/s White Swan Inc. It is submitted

that the applicant is only the director of M/s Durga Apparels Pvt Ltd and is in no way involved in the conduct of the business by the other four

companies/firms. Apart from few isolated transactions the applicant never conducted any business with them. Moreover, none of these

companies/firms or any of the persons engaged in the conduct of these business are arraigned as an accused in the present case.

7. Learned senior counsel for the applicant submitted that the arrest effected on 25th September 2021 at 4:15 AM is manifestly arbitrary not only on

the ground and for the reason that, in the predicate offence the investigating authorities of DRI have already placed the prosecution complaint on

record on 23rd April 2018 before the designated trial Court without arresting the applicant but also on the ground that the cognizance of offence and

summoning order qua the applicant had already been passed. It would be pertinent to mention here that in the predicate offence, the liberty of the

applicant was never curtailed and he has been charge sheeted without arrest. Therefore, the very arrest of the applicant ex-facie is needless and does

not subserve the cause of justice.

8. Learned senior counsel further submitted that the allegations in the complaint suffer from a fundamental error as to the definition of Ã¢â‚¬Å“proceeds of

crimeÃ¢â‚¬. The duty drawback on the export of goods is determined and assessed by the custom officers at the time of export which was in 2010-2011.

The determination of drawback payable is contingent upon verification assessment and statutory satisfaction arrived at by the proper officer by

following the procedure established by law and export is completed on receipt of the full assessed value of the export goods in foreign exchange. The

disbursement of excess or erroneous drawback is recoverable only in terms of Section 142 of the Customs Act. and therefore, the disbursed duty

drawback on export cannot be said to be the Ã¢â‚¬Å“proceeds of crimeÃ¢â‚¬â€‹.

9. It is further submitted that Section 135 of the Customs Act is not applicable to the facts of the case as wrongly alleged in the predicate offence.

Moreover, a declaration subjected to verification and determination by the authority is not a misdeclaration and would not invite the application of

Section 132 of the Customs Act, hence there is no scheduled offence for respondent to proceed against the applicant under the PMLA.

10. It is submitted that the DRI has no authority to re-assess the imported or exported goods after assessment by the Proper Officer. Reliance has

been placed upon judgment of HonÃ¢â‚¬â„¢ble Supreme Court in the case of Canon India (P) Ltd, vs. Commissioner of Customs, 2021 SCC Online SC

200.

11. It is submitted that existence of the power to arrest is one thing, the justification for the exercise of it is another. The Investigating AgencyÃ¢â‚¬â„¢s

power to arrest under the PMLA is not challenged, however, what is in question before this Court is that there is no justification given for the arrest of

the applicant. The Arresting Officer or the Commissioner has not even alleged anywhere that the applicant is not joining the investigation or, he is at a

flight risk or is capable of tampering with the witnesses or the evidence in any manner whatsoever. The HonÃ¢â‚¬â„¢ble Supreme Court in order dated

16th December 2021 clarified that in Ã¢â‚¬ËœSatender Kumar Antil vs. CBIÃ¢â‚¬â„¢ decided on 7th October 2021, stating that in the said order dated 7th

October 2021 Section 45 of the PMLA is inadvertently mentioned in Ã¢â‚¬ËœCategory CÃ¢â‚¬â„¢ and that Section 45 of PMLA stands stuck down. Thus, the

twin conditions of bail as laid in Section 45 of PMLA do not exist and normal principles of bail would apply.

12. It is submitted on behalf of the applicant that the Court below rejected the first bail application of the applicant on 9th December 2021 on the

ground of seriousness of allegation and nature of offence, while as the second bail application was rejected on the ground of moratorium of twin

conditions of Section 45 of the PMLA due to order of the HonÃ¢â‚¬â„¢ble Supreme Court in the case of Assistant Director, Directorate of Enforcement

vs Dr. V.C Mohan, 2022 SCC OnLine SC 452. The order rejecting bail has been passed ignoring the fact that applicantÃ¢â‚¬â„¢s matter is about 10 years

old, that he is already on bail in the scheduled offence and that there is no scope of him repeating the offence and even twin conditions have already

been declared ultra vires by the HonÃ¢â‚¬â„¢ble Supreme Court in the case of Nikesh Tarachand Shah Vs. UOI, 2018 (11) SCC 1. Therefore, the order

of the HonÃ¢â‚¬â„¢ble Supreme Court in the case of Dr. V.C. Mohan (Supra) does not over-ride the judgment of Nikesh Tarachand Shah (Supra). In

view of the above law settled, the applicant is entitled to bail.

13. The law qua PMLA, specifically Section 45, stands well settled that the twin conditions for the purposes of grant of bail have been declared ultra

vires in the landmark judgment of Nikesh Tarachand (Supra) and recently this Court amongst various other decisions and specifically in Sai

Chandershekhar vs. E.D. (2021) SCC Online Del 1081, has reiterated that the twin conditions under Section 45 of the PMLA stand declared illegal

and ultra vires. It is also submitted that the ED has not challenged the aforesaid judgment and therefore, the same has attained finality in law. The

aforesaid view has been also endorsed by Hon'ble High Court of Manipur in the case of Okram Ibobi Singh vs. Enforcement Directorate (2020) SCC

Online Mani 365. As a matter of fact, the Hon'ble Supreme Court of India in Kiran Prakash Kulkarni vs. Enforcement Directorate & Another vide

judgment and order dated 11th April 2019 in SLP (Crl.) No.1698/2019, has reiterated the principles of Nikesh Tarachand (Supra) as regards the twin

conditions of Section 45 of the PMLA.

14. It is submitted that the applicant has deep roots in society, his family is residing in India and he has business in New Delhi from last several years.

The applicantÃ¢â‚¬â„¢s availability to the Investigating Agency at the very first instance leading upto his undeserved arrest leaves no doubt whatsoever

that he is not a flight risk, has cooperated with the Investigation and will be available to before concerned Court, as and when required. It is submitted

that there is no scope for any doubt or apprehension regarding the applicantÃ¢â‚¬â„¢s availability in future in that he has no propensity to evade the

process of law.

15. It is further submitted that in the light of the aforesaid discussions, it is crystal clear that applicant passes the triple test of bail as laid down in

decision passed by the HonÃ¢â‚¬â„¢ble Supreme Court in P. Chidambaram v. EDÃ¢â‚¬â„¢ 2019 SCC Online SC 1380 and Arnab Goswami v. State of

Maharashtra & Ors. 2020 SCC Online SC 964, wherein it is observed as under:-

Ã¢â‚¬Å“Ã¢â‚¬Â¦.it is our earnest hope that our courts will exhibit acute awareness to the need to expand the footprint of liberty and use our

approach as a decision-making yardstick for future cases involving the grant of bailÃ¢â‚¬â€‹.

16. It is submitted that the applicant is innocent and has been wrongly implicated in the present case. The applicantÃ¢â‚¬â„¢s undeserved arrest is a gross

abuse of process and his inclusion in the present case, alleging commission of serious offences, is a travesty of justice and amounts to a complete

misuse of investigative powers.

17. It is submitted that the Hon'ble Supreme Court of India in the landmark judgment of Arnesh Kumar vs. State of Bihar (2014) 8 SCC 273 very

clearly held that where the concerned Court/Magistrate before whom an accused is produced post arrest, finds that the arrest is in violation of law, he

is bound to release the accused forthwith. As the very intent of the legislature has been violated in the present case, the investigating authorities have

blatantly violated the solemn and sacrosanct principle of presumption of innocence in favour of the applicant in the present case. Learned senior

counsel for the applicant, on instructions, undertakes that the applicant would not tamper with evidence and would always make himself available

before the learned Trial Court during the course of trial, except when he is exempted with the prior permission of learned Trial Court. The applicant

also undertakes to join the further investigation being conducted by the respondent and that the applicant has no criminal antecedents.

18. It is further submitted that the applicant undertakes to abide by any directions or conditions imposed by this Court in granting bail including joining

the further investigation, if any, as and when required.

19. Per Contra, learned counsel appearing on behalf of the respondent submitted that the scheduled offence is squarely made out against the applicant

as DRI has already filed a complaint and cognizance has already been taken by the concerned Court. There is no challenge by the applicant of the

said cognizance. It is further submitted that the present applicant, in unique modus operandi, procured the goods from various places within India to

export the same in the name of different firms/companies by inflating the value by several times. Two sets of invoices bearing the same serial number

and dates were prepared. The invoices of inflated value were produced before Indian Custom Authorities and actual values were sent to consignee,

therefore, on the basis of inflated values, extra duty drawbacks were claimed by applicant other than what was admissible, and in this manner, Rs.

32.25 crores were fraudulently availed by the applicant.

20. It is submitted that the ED during investigation has recorded the statement of a number of witnesses in this regard, and also regarding the fact of

conversion of proceeds of crime so acquired in bank accounts to cash through entry operators and other modes, subsequent reintroduction of cash in

banking channels and its utilization in purchase of assets through forged property papers to show the transaction from 2011 to 2016. Learned counsel

for the respondent further submitted that during investigation the documents, bank transaction statements and statements under Section 50 of the

PMLA of the witnesses and applicant were recorded which are admissible in evidence and cannot be brushed aside at this stage.

21. It is submitted that cognizance has already been taken in this case and there is an embargo under Section 45 of the PMLA before grant of bail and

in this regard, reliance is placed upon the judgment passed by the Bombay High Court in Ajay Kumar vs. Directorate of Enforcement, 2022 SCC

OnLine Bom 196, wherein it is categorically held that amending act is not stuck down by any of the Court and challenge is still pending. The legislative

amendment is in existence, therefore, the twin conditions have to be satisfied.

22. Learned counsel for the respondent has relied upon Satender Kumar Antil (Supra) wherein it is held that 37 of NDPS, Section 45 of PMLA,

Section 212(6) of Companies Act, 43 d (5) of UAPA, POCSO, etc are to be complied before grant of bail.

23. It is also submitted that placing of reliance on various Single Bench decisions of the High Courts in connection with the issue is of no use to the

applicant, considering the decision rendered by the Division Bench in Ajay Kumar (Supra) and the recent decisions of the HonÃ¢â‚¬â„¢ble Supreme Court

in the case of Directorate of Enforcement vs. Parkash Gurbaxani 2021 SCC OnLine SC 3185 and Dr. V.C. Mohan (Supra). It is further submitted

that the economic offences constitute a class apart and bail should not be granted in such cases. In this regard learned counsel has relied upon the

judgment of the HonÃ¢â‚¬â„¢ble Supreme Court in the case of Rohit Tandon vs. Directorate of Enforcement (2018) 11 SCC 46. In this case the

HonÃ¢â‚¬â„¢ble Supreme Court held as under:-

Ã¢â‚¬Å“21. The consistent view taken by this Court is that economic offences having deep-rooted conspiracies and involving huge loss of public

funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing

serious threat to the financial health of the country. Further, when attempt is made to project the proceeds of crime as untainted money and

also that the allegations may not ultimately be established, but having been made, the burden of proof that the monies were not the proceeds

of crime and were not, therefore, tainted shifts on the accused persons under Section 24 of the 2002 Act.

22. It is not necessary to multiply the authorities on the sweep of Section 45 of the 2002 Act which, as aforementioned, is no more res

integra. The decision in Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra [Ranjitsing Brahmajeetsing Sharma v. State of

Maharashtra, (2005) 5 SCC 294 : (2005) SCC (Cri) 1057] and State of Maharashtra v. Vishwanath Maranna Shetty [State of Maharashtra

v. Vishwanath Maranna Shetty, (2012) 10 SCC 561 : (2013) 1 SCC (Cri) 105] dealt with an analogous provision in the Maharashtra

Control of Organised Crime Act, 1999. It has been expounded that the Court at the stage of considering the application for grant of bail,

shall consider the question from the angle as to whether the accused was possessed of the requisite mens rea. The Court is not required to

record a positive finding that the accused had not committed an offence under the Act. The Court ought to maintain a delicate balance

between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. The duty of the Court at

this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. Further, the Court is

required to record a finding as to the possibility of the accused committing a crime which is an offence under the Act after grant of bail.Ã¢â‚¬‹

24. It is further submitted that the authorized officer, on the basis of the material in his possession and after having reasons to believe that the applicant

was guilty of an offence punishable under PMLA, arrested him in terms of Section 19 of the Act. It is further submitted that the bail application of the

applicant was rightly rejected by the Sessions Court as there was no change in circumstances since dismissal of his first bail application. In support of

his arguments, learned counsel has placed reliance upon Virupakshappa Gouda and Another vs. State of Karnataka and Another, (2017) 5 SCC 406

and Kalyan Chandra Sarkar vs. Rajesh Ranjan alias Pappu Yadav and Another, (2005) 2 SCC 42. Learned counsel for the respondent vehemently

submitted that considering the seriousness and high magnitude of the offence, the period of incarceration in jail should not be a governing factor in the

present case. Learned counsel for the respondent submitted that the present application is devoid of any merit and is liable to be dismissed.

ANALYSIS AND FINDINGS

25. Heard learned counsel for the parties at length and have also gone through the written submissions which have been placed on record on their

behalf.

26. The allegation against the applicant is that he procured goods from various places within India to export the same in the name of different

firms/companies by inflating the value by several times and also prepared two sets of invoices bearing the same serial number and dates and on the

basis of inflated values, extra duty drawbacks were claimed and obtained Rs. 32.25 Crores. The proceeds were converted from bank accounts to

cash through various modes and then reintroduction of cash in banking channels and its utilization. Direct utilization of cash, purchase of assets,

documentary evidence as well as statement of witnesses and applicant under Section 50 of the PMLA were recorded to substantiate the case against

the applicant.

27. In the matter of regular bail under Section 439 of the Cr.P.C., a Court must consider aspects, including but not limited to, the larger interest of the

State or public, whether the accused is a flight risk, whether there is likelihood of his tampering with evidence, whether there is likelihood of his

influencing witnesses, etc. Apart from these, another factor relevant would be the gravity of the alleged offence and/or nature of the allegations

levelled, which may serve as an additional test that can be applied while keeping in view the severity of the punishment that the offence entails.

28. It is equally well-settled that economic offences constitute a class apart and need to be visited with a different approach, given their severity and

magnitude. Albeit these offences are likely to adversely impact the economic fabric of the Country. But each case must be adjudged on the basis of

the peculiar facts and circumstances, while striking a balance between the right to personal liberty of the applicant and the interest of the society in

general.

29. The main course of arguments on behalf of the parties was an issue regarding applicability of Section 45 of the PMLA. In connection therewith,

this Court shall advert, at the very outset, to the provision, as it stood prior to the amendment in 2018:-

Ã¢â‚¬Å“45. Offences to be cognizable and non-bailable.Ã¢â‚¬¬

(1) [Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence punishable

for a term of imprisonment of more than three years under Part A of the Schedule shall be released on bail or on his own bond unlessÃ¢â‚¬"]

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not

guilty of such offence and that he is not likely to commit any offence while on bail :

Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, may be released on bail, if the Special

Court so directs :

Provided further that the Special Court shall not take cognizance of any offence punishable under Section 4 except upon a complaint in

writing made byÃ¢â‚¬¬

(i) the Director; or

(ii) any officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government by a

general or special order made in this behalf by that Government.

30. A plain reading of the provision would show the embargo imposed by Section 45(1) PMLA on grant of bail that has taken form of twin conditions

Ã¢â‚¬" (i) that the Public Prosecutor shall be given an opportunity to oppose the application for release, and (ii) where the Public Prosecutor opposes such

application, the Court should be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offence and that he is not

likely to commit any offence while on bail. The limitations so imposed are in addition to those imposed under Cr.P.C. and have an overriding effect

over the provisions of the Code, in case there occurred any inconsistency between the provisions of the two. Though stringent, they were held by the

Supreme Court to be mandatory. In Rohit Tandon (Supra) observed as under:-

Ã¢â‚¬Å“18. The argument though attractive at the first blush deserves to be rejected. In our opinion, the order dated 10-8-2017 [Rohit Tandon

v. Directorate of Enforcement, 2017 SCC OnLine Del 11786] passed by the High Court directing interim release of the appellant was

primarily on account of the illness of his mother. No more and no less. The other observations in the said order will have no bearing on the

merits of the controversy and required to be reckoned whilst considering the prayer for grant of regular bail. For that, the appellant must

succeed in overcoming the threshold of the rigors of Section 45 of the 2002 Act. Indubitably, the appellant having withdrawn the regular

(second) bail application, the consideration of prayer for grant of interim release could not have been taken forward. Besides, in the

backdrop of the opinion recorded by the Coordinate Bench [Rohit Tandon v. Directorate of Enforcement, 2017 SCC OnLine Del 8174 :

(2017) 241 DLT 758] of the High Court (in its decision dated 5-5-2017) whilst considering the application for grant of regular bail, which

was after filing of the initial complaint CC No. 700 of 2017 (on 23-2-2017), was binding until reversed or a different view could be taken

because of changed circumstances. Suffice it to observe that indulgence shown to the appellant in terms of order dated 10-8-2017 [Rohit

Tandon v. Directorate of Enforcement, 2017 SCC OnLine Del 11786] will be of no avail. In that, the facts such as the appellant never tried

to evade the investigation or that he has suffered incarceration for over 7Ã‚Â½ months or that the charge-sheet has been filed in the predicate

offence registered under FIR No. 205/2016 or the factum of illness of the mother of the appellant or the observation that no definite reason

has been assigned by the respondents for substantiating the allegation that the appellant would tamper with the evidence, may become

relevant only if the threshold stipulation envisaged under Section 45 of the 2002 Act was to be fulfilledÃ¢â‚¬Â¦Ã¢â‚¬â€‹

31. Be that as it may, in 2017, the constitutional validity of Section 45 of the PMLA came to be challenged before the Supreme Court in Nikesh

Tarachand Shah (Supra), wherefore, by a judgment rendered in 2018, explicating the defects inherent in the provision and the challenges posed

thereby, the Supreme Court held that the twin conditions imposed by Section 45(1) of the PMLA were manifestly arbitrary, discriminatory and

violative of Articles 14 and 21 of the Constitution of India.

32. Post the decision in Nikesh Tarachand Shah (Supra), an amendment was made to Section 45 of the PMLA vide the Finance Act, 2018 and

brought into effect from 19th April 2018. The new Section 45(1) PMLA reads as follows:-

Ã¢â‚¬Å“45. Offences to be cognizable and non-bailable.Ã¢â‚¬

(1) [Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence [under this

Act] shall be released on bail or on his own bond unlessÃ¢â‚¬"]

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not

guilty of such offence and that he is not likely to commit any offence while on bail : Provided that a person, who, is under the age of sixteen

years, or is a woman or is sick or infirm [or is accused either on his own or along with other co-accused of money-laundering a sum of less

than one crore rupees], may be released on bail, if the Special Court so directs: Provided further that the Special Court shall not take

cognizance of any offence punishable under Section 4 except upon a complaint in writing made byÃ¢â‚¬

(i) the Director; or

(ii) any officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government by a

general or special order made in this behalf by that Government.Ã¢â‚¬â€‹

33. It is informed that the issue relating to the Constitutional validity of the amendment made in Section 45 of the PMLA vide the Finance Act, 2018 as

well as revival of the twin conditions thereby, alongwith other issues relating to PMLA, has already been taken up for hearing by the HonÃ¢â‚¬â„¢ble

Supreme Court and is under active consideration.

34. By way of the impugned order in Prakash Gurbaxani (Supra), passed in the context of grant of regular bail, the Punjab and Haryana High Court

had held that the twin conditions under Section 45(1) of the PMLA do not stand revived by virtue of the amendment made by the Finance Act, 2018.

Vide order dated 20th October 2021, the HonÃ¢â‚¬â„¢ble Supreme Court observed as under:-

Ã¢â‚¬Å“Ã¢â‚¬Â¦We are in agreement with his grievance that the High Court has not dealt with the mandatory twin requirements but has granted

indulgence to the respondent(s) on extraneous consideration.Ã¢â‚¬â€‹

Ã, Although the HonÃ¢â‚¬â„¢ble Supreme Court declined to interfere with the impugned order in the circumstances of the case, the question of law was,

however, left open.Ã, Ã,

35. In Dr. V.C. Mohan (Supra), on a challenge made by the Directorate of Enforcement to the grant of anticipatory bail to the respondent, the

HonÃ¢â‚¬â„¢ble Supreme Court set aside the impugned order and remanded the matter back for re-consideration.

36. At this stage, this Court deems it apposite to refer to the observation made in Rohit Tandon (Supra), where while relying on its earlier decision in

Ranjitsin Brahmajeetsing Sharma vs. State of Maharashtra and Another (2005) 5 SCC 294 and State of Maharashtra vs. Vishwanath Maranna Shetty

(2012) 10 SCC 561, the HonÃ¢â‚¬â„¢ble Supreme Court outlined the parameters for adjudication of bail application in terms of Section 45(1)(ii) PMLA

and held as under:-

Ã¢â‚¬Å“22. It is not necessary to multiply the authorities on the sweep of Section 45 of the 2002 Act which, as aforementioned, is no more res

integra. The decision in Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra and State of Maharashtra v. Vishwanath Maranna

Shetty dealt with an analogous provision in the Maharashtra Control of Organised Crime Act, 1999. It has been expounded that the Court

at the stage of considering the application for grant of bail, shall consider the question from the angle as to whether the accused was

possessed of the requisite mens rea. The Court is not required to record a positive finding that the accused had not committed an offence

under the Act. The Court ought to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail

much before commencement of trial. The duty of the Court at this stage is not to weigh the evidence meticulously but to arrive at a finding on

the basis of broad probabilities. Further, the Court is required to record a finding as to the possibility of the accused committing a crime

which is an offence under the Act after grant of bail.Ã¢â‚¬â€‹

37. In the instant case, the offence is squarely made out against the applicant as DRI has already filed a complaint and cognizance has already been

taken by the concerned Court. As per the allegations, the applicant is unique modus operandi to procure the goods from various places within India to

export the same in the name of different firms/companies by inflating the value by several times. Two sets of invoices bearing the same serial number

and dates were prepared. The invoices of inflated value were produced before Indian custom authorities and actual values were sent to consignee

therefore on the basis of inflated values, extra duty drawbacks were claimed by accused other than what was admissible, and in this manner, Rs.

32.25 crores were fraudulently availed by applicant/accused. In this regard, reliance was placed on the statement of witnesses recorded under Section

50 of PMLA. The applicant is alleged the main accused in the instant FIR. The DRI has already filed a complaint against the applicant and

cognizance has been taken by the concerned Court and there is no challenge to the cognizance and, therefore, there is no force in the argument of the

applicant that no schedule offence is made out.

CONCLUSION

38. Considering the aforesaid facts, circumstances and parameters of Section 45 of the PMLA, this Court finds no reasonable ground for believing

that the applicant is not guilty of the alleged offence. From a prima facie view of the material placed on record and in light of the gravity of alleged

offence, it cannot be said that the applicant is not likely to commit any such offence while on bail. Accordingly, the bail application is dismissed.Ã,

39. Pending application, if any, also stands disposed of.

40. It is made clear that any observation made hereinabove shall not have any bearing in the proceedings before the Court below, at any stage of trial.

41. The judgment be uploaded on the website forthwith.