In the High Court of Punjab and Haryana at Chandigarh

CRM-M No. 51885 of 2021 (O&M)
Date of Decision: 27.1.2022

Sukhpal Singh Khaira .....Petitioner

Versus

Assistant Director, Directorate of Enforcement .....Respondent

CORAM: HON'BLE MR. JUSTICE SURESHWAR THAKUR

Present: Mr. Vikram Chaudhri, Senior Advocate with
Mr. Parvez Chaudhary, Advocate
for the petitioner.

Mr. Zoheb Hossain, Advocate
for the respondent.

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SURESHWAR THAKUR, J.

1. Through the instant petition, as cast under Section 439 Cr.P.C., the petitioner seeks relief of his being released from judicial custody. The petitioner is in judicial custody in respect of FIR No. ECIR/02/STF/2021 of 21.1.2021, whereins, becomes constituted an offence embodied under Section 3, as, punishable under Section 4 of the Prevention of Money Laundering Act, 2002 (for short 'PML Act').

2. Learned counsel for the respondent has strongly opposed the according of indulgence of bail to the petitioner. His submission, opposing the grant of bail to the petitioner, is rested upon the necessity of this Court, recording an objective satisfaction, that there are reasonable grounds of believing that he is not guilty of such offence, and, that he is not likely to commit any offence while on bail.

3. The afore submission is further rested, upon an amendment, being made to Section 45 of the PML Act, hence subsequent to the decision, as, rendered by the Hon'ble Apex Court, in case titled '***Nikesh Tara Chand Shah',*** reported in ***2018 (11) Supreme Court Cases 1.*** He has, therefore, submitted that though in judgment (supra), the Hon'ble Apex Court had annulled the validity of the apposite pre-amended twin conditions, as cast in Section 45 of the PML Act. Nonetheless, he has submitted that since post the verdict (supra), as made by the Hon'ble Apex Court in case (supra)**,** rather through an amendment, being made to Section 45 of PML Act, the legislature resurrecting, reviving, and, validating the apposite twin conditions, which earlier became struck down, in *Nikesh Tara Chand's* case (supra). Therefore, he argues that unless this Court makes an objective satisfaction, that there are reasonable grounds of believing, that he is not guilty of such offence, and, that he is not likely to commit any offence while on bail, rather the facility of bail, be not accorded to the bail applicant. The pre-amended provisions of Section 45 of PML Act, which became struck down by the Hon'ble Apex Court, through a verdict made in case (supra), and, its provisions as now exist, rather after the apposite amendment, theretos hence being effected, reiteratedly subsequent to the making of a decision in *Nikesh Tara Chand*"s case (supra), are both extracted hereinafter. <u>The apposite amended provisions are hereafter emphasised through underlinings</u>.

> ***"<u>Section 45 Prior to Nikesh Tara Chand Shah</u>***
>
> 4***5. Offence to be cognizable and non-bailable****)- (1)Notwithstanding 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 unless-

(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:"

Section 45 post to Nikesh Tara Chand Shah

45. Offence to be cognizable and non-bailable*)- (2)Notwithstanding 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 unless-

(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:"

4. The reasons, as became assigned by the Hon'ble Apex Court in striking down, the twin conditions (supra), as were carried in the pre-amended annulled provisions of Section 45 of the PML Act, are carried in paragraphs 31 to 34 of the verdict (supra), as drawn by the Hon'ble Apex Court. The afore paragraphs are extracted hereinafter.

31. The statutory history of Section 45, read with the Schedule,

would, thus show that in its original avatar, as Clause 44 of the 1999 Bill, the Section dealt only with offences under the Act itself. Section 44 of the 2002 Act makes it clear that an offence punishable under Section 4 of the said Act must be tried with the connected scheduled offence from which money laundering has taken place. The statutory scheme, as originally enacted, with Section 45 in its present avatar, would, therefore, lead to the same offenders in different cases having different results qua bail depending on whether Section 45 does or does not apply. The first would be cases where the charge would only be of money laundering and nothing else, as would be the case where the scheduled offence in Part A has already been tried, and persons charged under the scheduled offence have or have not been enlarged on bail under the Code of Criminal Procedure and thereafter convicted or acquitted. The proceeds of crime from such scheduled offence may well be discovered much later in the hands of Mr. X, who now becomes charged with the crime of money laundering under the 2002 Act. The predicate or scheduled offence has already been tried and the accused persons convicted/acquitted in this illustration, and Mr. X now applies for bail to the Special Court/High Court. The Special Court/High Court, in this illustration, would grant him bail under Section 439 of the Code of Criminal Procedure– the Special Court is deemed to be a Sessions Court–and can, thus, enlarge Mr. X on bail, with or without conditions, under Section 439. It is important to note that Mr. X would not have to satisfy the twin conditions mentioned in Section 45 of the 2002 Act in order to be enlarged on bail, pending trial for an offence under the 2002 Act.

32. The second illustration would be of Mr. X being charged with an offence under the 2002 Act together with a predicate offence contained in Part B of the Schedule. Both these offences would be tried together. In this case, again, the Special Court/High Court can enlarge Mr. X on bail, with or

without conditions, under Section 439 of the Code of Criminal Procedure, as Section 45 of the 2002 Act would not apply. In a third illustration, Mr. X can be charged under the 2002 Act together with a predicate offence contained in Part A of the Schedule in which the term for imprisonment would be 3 years or less than 3 years (this would apply only post the Amendment Act of 2012 when predicate offences of 3 years and less than 3 years contained in Part B were all lifted into Part A). In this illustration, again, Mr. X would be liable to be enlarged on bail under Section 439 of the Code of Criminal Procedure by the Special Court/High Court, with or without conditions, as Section 45 of the 2002 Act would have no application.

33. The fourth illustration would be an illustration in which Mr. X is prosecuted for an offence under the 2002 Act and an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule. In this illustration, the Special Court/High Court would enlarge Mr. X on bail only if the conditions specified in Section 45(1) are satisfied and not otherwise. In the fourth illustration, Section 45 would apply in a joint trial of offences under the Act and under Part A of the Schedule because the only thing that is to be seen for the purpose of granting bail, under this Section, is the alleged occurrence of a Part A scheduled offence, which has imprisonment for over three years. The likelihood of Mr. X being enlarged on bail in the first three illustrations is far greater than in the fourth illustration, dependant only upon the circumstance that Mr. X is being prosecuted for a Schedule A offence which has imprisonment for over 3 years, a circumstance which has no nexus with the grant of bail for the offence of money laundering. The mere circumstance that the offence of money laundering is being tried with the Schedule A offence without more cannot naturally lead to the grant or denial of bail (by applying Section 45(1)) for the offence of money laundering and the predicate offence.

34. Again, it is quite possible that the person prosecuted for the scheduled offence is different from the person prosecuted for the offence under the 2002 Act. Mr. X may be a person who is liable to be prosecuted for an offence, which is contained in Part A of the Schedule. In perpetrating this offence under Part A of the Schedule, Mr. X may have been paid a certain amount of money. This money is ultimately traced to Mr. Y, who is charged with the same offence under Part A of the Schedule and is also charged with possession of the proceeds of crime, which he now projects as being untainted. Mr. X applies for bail to the Special Court/High Court. Despite the fact that Mr. X is not involved in the money laundering offence, but only in the scheduled offence, by virtue of the fact that the two sets of offences are being tried together, Mr. X would be denied bail because the money laundering offence is being tried along with the scheduled offence, for which Mr. Y alone is being prosecuted. This illustration would show that a person who may have nothing to do with the offence of money laundering may yet be denied bail, because of the twin conditions that have to be satisfied under Section 45(1) of the 2002 Act. Also, Mr. A may well be prosecuted for an offence which falls within Part A of the Schedule, but which does not involve money laundering. Such offences would be liable to be tried under the Code of Criminal Procedure, and despite the fact that it may be the very same Part A scheduled offence given in the illustration above, the fact that no prosecution for money laundering along with the said offence is launched, would enable Mr. A to get bail without the rigorous conditions contained in Section 45 of the 2002 Act. All these examples show that manifestly arbitrary, discriminatory and unjust results would arise on the application or non application of Section 45, and would directly violate Articles 14 and 21, inasmuch as the procedure for bail would become harsh, burdensome, wrongful and discriminatory depending upon whether a person is being tried for an offence which also

> *happens to be an offence under Part A of the Schedule, or an offence under Part A of the Schedule together with an offence under the 2002 Act. Obviously, the grant of bail would depend upon a circumstance which has nothing to do with the offence of money laundering. On this ground alone, Section 45 would have to be struck down as being manifestly arbitrary and providing a procedure which is not fair or just and would, thus, violate both Articles 14 and 21 of the Constitution.*

5. The predicate, and, scheduled offence, as alleged to be committed by the bail applicant-petitioner, is constituted under the NDPS Act.

6. The predicate or the scheduled offence, as alleged to be committed by the bail applicant-petitioner, is carried in FIR No. 35 of 5.3.2015. Sessions case No. 289 of 2015, as arose from the above FIR, became decided on 31.10.2017. Through the verdict (supra) accused Harbans Singh, Subhash Chander, Gurdev Chand, Gurdev Singh, Manjit Singh son of Boota Singh, Sonia, Manjit Singh son of Satnam Singh, Shunty Singh, and, Nirmal Singh @ Nimma, became convicted by the learned Special Court, Fazilka. However, through an order made on the date (supra), the learned Additional Sessions Judge, Fazilka also allowed the application, as became preferred under Section 319 Cr.P.C., by the prosecution rather seeking the addings as accused in FIR supra, of Joga Singh, PSO of Sukhpal Singh Khaira, Sukhpal Singh Khaira, Manish, P.A. of Sukhpal Singh Khaira, Charanjit Kaur, and, Major Singh Bajwa. The aggrieved (supra) challenged the above order, through instituting Criminal Revision Petition No. 4070 of 2017, and, Criminal Revision Petition No. 4113 of 2017, before this Court. This Court, through an order, made on 17.11.2017, upon the petitions (supra), dismissed the revisions petitions,

and, it also passed the hereinafter extracted directions:-

> *i) Criminal Revision No. 4070 of 2017 and Criminal Revision No. 4113 of 2017 are dismissed.*
>
> *ii) The order directing filing of supplementary charge-sheet is modified and shall be read as under:-*
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> *"Liberty is reserved in favour of the Investigating Agency to file supplementary charge-sheet against the additional accused persons, if so advised."*
>
> *iii) The order issuing non-bailable warrants for securing presence of the petitioners in both these petitions is quashed and set aside. Liberty is reserved in favour of the petitioners to apply to the trial Court for anticipatory/regular bail, which shall be considered by the trial Court on its own merits without being influenced by the observations in the order made by it under Section 319, Code of Criminal Procedure.*

7. Necessarily, liberty became reserved to the investigating agency concerned to file supplementary charge sheet against the additional accused concerned, if so advised.

8. The dismissal of the above respective criminal revision petitions, of the aggrieved (supra), occurred post or subsequent to the verdict of conviction becoming pronounced on 31.10.2017, vis-a-vis the co-accused (supra).

9. The aggrieved preferred SLP bearing No. 9063 of 2017, before the Hon'ble Apex Court. On the SLP (supra), the Hon'ble Apex Court, made an order on 1.12.2017. Through the order (supra), the Hon'ble Apex Court, ordered for stay of proceedings before the trial Court concerned. The above made order of the Hon'ble Apex Court, has not been shown to be vacated. In consequence, the concurrent orders, as made upon the

prosecution's application, cast under Section 319 Cr.P.C., hence against the bail applicant-petitioner, and, others, does not, at this stage hold any force. Moreover, the Hon'ble Apex Court, did also make apposite directions, on cases respectively titled '***Sukhpal Singh Khaira versus State of Punjab, and, Joga Singh and another versus State of Punjab, reported in (2019) 6 Supreme Court Cases 638,*** and, appertaining to the validity of the concurrent orders, as, made against the bail applicant-petitioner and others, both by the learned trial Court, and, by this Court, upon the prosecution application cast under Section 319 Cr.P.C., especially when the afore application became decided on the date of making of an order of conviction, upon, the accused concerned, along with whom, all above were *prima facie* simultaneously triable for the predicate or the scheduled offence.

10. The Hon'ble Apex Court, in the verdict (supra), made a reference therein, to the decision recorded in ***Hardeep Singh versus State of Punjab reported in (2010) 2 Supreme Court Cases (CRL) 355.*** The Hon'ble Apex Court, while making a reference to Hardeep Singh's case (supra), had deemed it fit to detail, that in the verdict (supra), the Hon'ble Constitution Bench, had proceeded to assess the ambit of the statutory coinage “trial, and, also the stage, during which the power under Section 319 Cr.P.C., could be validly exercised. In the afore context, the Hon'ble Apex Court, expressed in ***Sukhpal Singh Khaira versus State of Punjab, and, Joga Singh and another versus State of Punjab, reported in (2019) 6 Supreme Court Cases 638***, that in Hardeep Singh's case (supra), the Constitution Bench rather leaning to take the hereinafter extracted view:-

> *“47. Since after the filing of the charge-sheet, the court reaches the stage of inquiry and as soon as the court frames the charges, the trial commences, and therefore, the power*

under Section 319(1) Code of Criminal Procedure can be exercised at any time after the charge-sheet is filed and before the pronouncement of judgment, except during the stage of Section 207/208 Code of Criminal Procedure, committal etc., which is only a pre-trial stage, intended to put the process into motion. This stage cannot be said to be a judicial step in the true sense for it only requires an application of mind rather than a judicial application of mind."

11. However, it was further therein observed by the Hon'ble Apex Court, that significantly, since the facts, carried in Sukhpal Singh Khaira's case (supra), were starkly different, from the foundational facts occurring in the judgment, as, made by the Constitution Bench in Hardeep Singh's case (supra), inasmuch as, the aggrieved concerned, did not hold any opportunity to cast any light about the validity of the summoning orders, as, pronounced after the passing of the judgment. Therefore, the Hon'ble Apex Court, after accepting the contentions of the aggrieved, that the above extracted portions, as carried in the Constitution Bench Judgment, delivered in Hardeep Singh's case (supra), rather cannot become diluted, except by a Bench strength of the Hon'ble Apex Court, larger in size, than the one, which was dealing with the *lis* concerned, also hence proceeded to formulate the hereinafter extacted substantial questions of law.

(i) *Whether the trial court has the power under Section 319 of CrPC for summoning additional accused when the trial with respect to other co-accused has ended and the judgment of conviction rendered on the same date before pronouncing the summoning order?*

(ii) *Whether the trial court has the power under Section 319 of the CrPC for summoning additional accused when the trial in respect of certain other absconding*

accused (whose presence is subsequently secured) is ongoing/pending, having been bifurcated from the main trial?

(iii) What are the guidelines that the competent court must follow while exercising power under Section 319 Cr.P.C?

12. Moreover, the Hon'ble Apex Court directed the Registry to place these matters before the Hon'ble Chief Justice of India, for the constitution of a Bench of appropriate strength, for considering the afore said questions.

13. It is not disputed amongst the learned counsels appearing for the bail applicant-petitioner, and, for the respondent concerned, that the afore formulated substantial questions of law, have not yet been answered by a Bench of the Hon'ble Apex Court, larger in strength, than the one formulating them. The effect of till date no answers, being meted by the Hon'ble Apex Court, to the above formulated substantial questions of law, is that, the concurrent affirmative verdicts, drawn on the prosecution application cast under Section 319 Cr.P.C., rather bringing the inevitable consequence of the trial, against the bail applicant-petitioner, and, others, as arises from FIR No. 35 of 5.3.2015, cannot being permitted to commence. Moreover, it also obviously appears that in case, the Hon'ble Apex Court proceeds to set aside the convicts' conviction, as made upon them, in Sessions case No. 289 of 2015, arising FIR No. 35 of 5.3.2015, thereupon also, the jurisprudential principle of trial of accused, who became added, as such, through an application under Section 319 Cr.P.C., rather commencing or starting simultaneously along with the convicts concerned, hence *prima facie*, cannot at all become furthered, and, nor also the commission of predicate or the scheduled offence, by the bail applicant-petitioner, can

prima facie be construed to be committed by him along with others, who are to be added along with him, as accused, in the Sessions case (supra). Moreso, since there is also an unvacated order of stay by the Hon'ble Apex Court, in the SLP directed against the above concurrent verdicts (supra), as, made against the aggrieved concerned. Therefore also, at this stage, no firm conclusion can be formed, that the bail applicant along with other co-accused, as, named in the application under Section 319 Cr.P.C., have *prima facie* committed the scheduled or the predicate offence.

14. The effect of supra has to be considered along with the effect of the contents of the complaint, as instituted against the bail applicant-petitioner, by the respondent. For fathoming the above, a conjoint reading of the application cast under Section 319 Cr.P.C., and, of the apposite complaint, rather becomes necessitated. Predominantly, in the application cast under Section 319 Cr.P.C., as instituted against the bail applicant-petitioner, and, others, the incriminatory evidence, as gathered, by the investigating officer concerned, is comprised in his receiving a secret information, that Gurdev Singh, Ex-Chairman, and, Manjit Singh son of Boota Singh, being engaged in cross border smuggling of heroin, gold, and, illegal weapons. Moreover, it is also referred in the application, that the investigating officer concerned, after conducting search, had rather recovered, 300 grams of heroin from accused Harbans Singh, 290 grams of heroin from accused Subhash Chander, 260 grams of heroin from accused Gurdev Chand, 350 grams of heroin from accused Gurdev Singh, 300 grams of heroin from accused Manjit Singh son of Boota Singh, and, 100 grams of heroin each from accused Sonia, Shunty, and, Nimma @ Nirmal. The above application is filed in sessions trial, arising from FIR No. 35 of 5.3.2015. In

the complaint filed under Section 44 read with Section 45 of the PML Act, against the bail applicant-petitioner, and, others, for commission of an offence of money laundering, as defined under Section 3, and, as, punishable under Section 4 of the PML Act, there is a palable reference to FIR (supra). Moreover, there is also a reference therein, to a verdict of conviction, recorded on 31.10.2017, by the Special Court concerned, vis-a-vis the co-accused concerned. Convict Gurdev Singh, Ex-Chairman, who is alleged in the application, cast under Section 319 Cr.P.C., to be complicit with the bail applicant-petitioner, in the commission of a scheduled offence, or the predicate offence, and, also to finance the elections of the bail applicant, is the maker of a statement under Section 50 of the PML Act, before the officer concerned. In the complaint, the enforcement officer, also recorded the statement of Gurdev Chand, besides the statements of convicts Sonia, and, Harbans Singh. The statements of the above convicts in sessions trial, as arises from FIR No. 35 of 5.3.2015 decided on 31.10.2017, became recorded in the year 2021, hence post the verdict of conviction (supra) becoming pronounced in the year 2017.

15. Importantly, the statements of all convicts (supra), is made post the verdict of conviction, made upon them. Therefore, *prima facie,* their respective statements, may not, till each becomes put to cross-examination, rather hold any sanctity. Moreover, when qua the scheduled or predicate offence, as arises from FIR (supra), the convicts concerned, suffered a verdict of conviction, yet post the verdict of conviction (supra), the bail applicant-petitioner along with others, through concurrent orders, becomes ordered to be arrayed as accused in FIR (supra), hence embodying the predicate offence or the scheduled offence constituted under the NDPS Act.

However, when the Hon'ble Apex Court, through a verdict (supra), has drawn the above referred substantial questions of law, and, has not decided them. Therefore, when the offence under the PML Act is directly linked, or, is connected with the scheduled offence, and/or, when the bail applicant-petitioner is an offender, in the offence under the PML Act, and, is also an offender in the scheduled or predicate offence. Consequently, until the Hon'ble Apex Court, gives an answer to the above formulated questions, thereupto *prima facie*, this Court cannot firmly draw an objective conclusion, that the alleged moneys, drawn by the bail applicant-petitioner, from his allegedly committing the scheduled predicate offence (supra), has also resulted in his allegedly committing an offence under the PML Act. Moreover, since the Hon'ble Apex Court has made an unvacated order of stay of trial, upon, the concerned, upon the apposite SLP, directed against the concurrent orders, as made by the learned Special Judge concerned, and, latter affirmed by this Court, upon the prosecution application, cast under Section 319 Cr.P.C. Therefore, also *prima facie*, at this stage, the bail applicant is not an offender in the predicate offence, and, nor qua the offence constituted in the PML Act, emphasizingly when there is an inter-link *inter se* both. Moreover also, as stated above, upon the convicts' concerned conviction becoming set aside, thereupon, *prima facie,* there may be no occasion for the bail applicant-petitioner, for his being tried along with others, nor also there may be any permissible re-opening of trial, against the bail applicant-petitioner along with other convicts, vis-a-vis charges, as arise from FIR No. 35 of 5.3.2015. The legal consequences of the above, are but obvious.

16. Be that as it may, the respondent concerned, despite its being

aware of the above formulated substantial questions of law, by the Hon'ble Apex Court, and, also despite it being aware that the convicts, except one MLA Gurdev Chand, during the course of trial of Sessions Case No. 289 of 2015, making imputations of guilt with respect to the commission of a scheduled offence, under the NDPS Act, vis-a-vis, the bail applicant, yet has taken to record the statements of the convicts concerned, in the year 2021, hence much beyond the formulation of the above substantial questions of law, by the Hon'ble Apex Court, and, also obviously when a decision thereons is still awaited. Importantly also, reiteratedly when there is *prima facie* an interlink inter se the predicate offence, and, the offence under the PML Act. Moreover, reiteratedly since *prima facie*, except MLA Gurdev Chand, none has during the pendency of trial arising from FIR No. 35 of 5.3.2015, hence chosen to make inculpatory echoings against the bail applicant-petitioner. Therefore, it appears that *prima facie,* the respondent concerned, has yet obtained the statements of the convicts concerned. Cumulatively, hence the afore statements, *prima facie*, at this stage, and, only for the purpose of deciding this bail application, rather can become construed to be made with some tinge of skewedness or over zealousness of the investigating officer. The above also, *prima facie,* appears to untenably sidetrack, and, to overreach the above formulated unanswered substantial questions of law, by the Hon'ble Apex Court. Therefore, cumulatively, and, for all above reasons, prima facie, at this stage, no firmest credence can be assigned to the afore made statements, nor even any *prima facie* conclusion can become formed, qua the inculpation of the petitioner, either in the scheduled offence, or in the offence under the PML Act.

17. Therefore, even assuming that the Parliament, post the decision,

as made by the Hon'ble Apex Court, in Nikesh Tara Chand's case (supra) has hence resurrected, or, revived the mandate of Section 45 of the PML Act, and/or, has cured the defect, if any, in the twin conditions, carried in Section (supra), which conditions became earlier declared to be ultra vires. Nonetheless, *prima facie*, the mandate of the twin conditions does work in favour of the bail applicant-petitioner. In other words, reiteratedly it cannot, *prima facie*, at this stage, be concluded that the bail applicant-petitioner, has, committed the offence under the PML Act. However, it is clarified that the above observations are only for the decision of the bail application, and, they shall not effect the merits of the main case, nor shall bar the prosecution to move an appropriate application before the learned Special Judge concerned, and, nor shall bar the latter to make a decision thereons, in accordance with law.

18. Though, the learned counsel for the respondent has contended that the offence of money laundering, as embodied in Section 3 of the Act, is an independent offence, and, has submitted that since explanation (i) to Section 44, as is extracted hereinafter, does not make dependent, the jurisdiction of the Special Court, while dealing with the offence under this Act, especially during inquiry or trial thereof, rather upon any orders passed in respect of a scheduled or a predicate offence, also hence, alleged to be committed by the bail applicant-petitioner.

> ***"Offences triable by Special Courts***.— *(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—*
>
> *(a) an offence punishable under section 4 and any scheduled offence connected to the offence under that section shall be triable by the Special Court constituted for the area in which the offence has been committed:*

(b) a Special Court may, upon a complaint made by an authority authorised in this behalf under this Act take cognizance of offence under section 3, without the accused being committed to it for trial;

(c) if the court which has taken cognizance of the scheduled offence is other than the Special Court which has taken cognizance of the complaint of the offence of money-laundering under sub-clause (b), it shall, on an application by the authority authorised to file a complaint under this Act, commit the case relating to the scheduled offence to the Special Court and the Special Court shall, on receipt of such case proceed to deal with it from the stage at which it is committed.

(d) a Special Court while trying the scheduled offence or the offence of money-laundering shall hold trial in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) as it applies to a trial before a Court of Session.

Explanation

(i) the jurisdiction of the Special Court while dealing with the offence under this Act, during investigation, enquiry or trial under this Act, shall not be dependent upon any orders passed in respect of the scheduled offence, and the trial of both sets of offences by the same Court shall not be construed as joint trial.

(2) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under section 439 of the Code of Criminal Procedure, 1973 (2 of 1974) and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to "Magistrate" in that section includes also a reference to a "Special Court" designated under section 43."

19. Therefore, he argues that when explanation (i) to Section 44 of the PML Act, which becomes above extracted, also declares that the trial of both sets of offences, by the same Court, shall not be construed a joint trial.

Consequently, he argues that the formulation of questions of law (supra), by the Hon'ble Apex Court, and, also the factum of theirs yet not being decided, besides the further factum that there being a stay against the concurrent verdicts made by the learned Special Judge concerned, and, by this Court, upon the prosecution application under Section 319 Cr.P.C., yet cannot snatch the jurisdiction of Special Court, to enquire into or enter upon a trial against the bail applicant-petitioner, for an offence (supra) under the PML Act, as it is a distinct, and, separate offence from the above scheduled or predicate offence.

20. The afore made argument would hold vigour, in case the offender in both the scheduled, or, predicate offence, and, the offence under the PML Act, were uncommon, or were different. It *prima facie* does not hold vigour when the alleged offences became committed by common offenders, and, or when offenders, both in the scheduled or predicate offences, and, in the offence under the PML Act, are common. The reason for taking the above view becomes rested, upon the fact that the explanation (supra), does not take away, or abridge the mandate of clause (c) of Sub-section (1) of Section 44 of the PML Act, relevant clause(s) whereof become(s) extracted hereinabove, rather merely makes an explanation thereto.

> "*if the court which has taken cognizance of the scheduled offence is other than the Special Court which has taken cognizance of the complaint of the offence of money-laundering under sub-clause (b), it shall, on an application by the authority authorised to file a complaint under this Act, commit the case relating to the scheduled offence to the Special Court and the Special Court shall, on receipt of such case proceed to deal with it from the stage at which it is*

committed.

21. Since clause (c) mandates, that the Special Court concerned, which is taking cognizance of the scheduled or predicate offence, is different, or, separate from the Special Court, which has taken cognizance on the complaint, as filed for the offence of Money Laundering, under sub clause (b), then, it shall, on an application made by the authorized authority, under the PML Act, commit the case relating to the scheduled offence to the Special Court, and, the Special Court, shall on receipt of such case, proceed to deal with it from the stage, at which it is committed. Since there is order of stay of trial of the scheduled offence against the bail applicant-petitioner, and, others, through, as conjointly stated at the bar, an unvacated order becoming made by the Hon'ble Apex Court. Consequently, the mandate of clause (c) cannot be furthered, whereas, it is to be made workable, than rendered otiose. Therefore, *prima facie* the officer authorized under the PML Act, cannot, till the Hon'ble Apex Court, makes a decision upon the questions of law (supra), and/or, upon the SLPs filed by the accused concerned, challenging the concurrent orders, as made on the application under Section 319 Cr.P.C., or/and makes a decision on the convicts appeal, hence move an application for committing of trial of the bail applicant-petitioner, and, others to the Special Court concerned, as becomes created for trial of offenders qua, commission of an offence under the PML Act. Nonetheless, it is also clarified that the afore observation is only for the decision of this bail application and, may not to be construed to fetter the right of the respondent concerned, to move an appropriate application before the learned trial Judge concerned, and, also the learned trial Judge concerned, may make thereons an appropriate decision, but in accordance with law.

22. Strength to the afore made reasoning, is derived from paragraph 26 of the verdict, as made by the Hon'ble Apex Court, in case titled ***Dyani Antony Paul and others versus Union of India and others***, W.P. No. 38642/2016, para whereof stands extracted hereinafter.

> *The offence of money laundering under Section 3 of the Act is an independent offence. A reference to criminal activity relating to a schedule offence has wider connotation and it may extend to a person, who is connected with criminal activity relating to schedule offence, but may not be the offender of schedule offence. It is in this background, it has to be necessarily held that money laundering is a stand alone offence under the PML Act. In this background, when Section 44 of the PML Act is perused, it would clearly indicate that special court may take cognizance of the offence upon a complaint by authorized signatory, which means cognizance will be taken of an offence which is separate and independent. The object of issuance of summons is to trace or ascertain the proceeds of crime if any and to take steps in that regard like attaching the proceeds of crime if proved in a given case.*

23. The reason being, that in the verdict (supra), the Hon'ble Apex Court has declared the provisions of PML Act, to be stand alone, only in the context of the offender in the scheduled, or predicate offence, being different from the offender in the PML Act. Therefore, when the bail applicant, for reasons (supra), is alleged to be an offender in the scheduled offence, and, is also in sequel thereof, alleged to commit the offence under the PML Act. Consequently, in respect of the foundational fact of the instant case, and, when there is an interlink inter se the predicate offence, and, the offence under the PML Act. As a corollary, and, in the afore context, the provisions of PML Act, cannot prima facie, be construed to be stand alone or independent from the predicate or the scheduled offence, as

alleged to be committed by the bail applicant-petitioner, and, nor can this Court make any objective conclusion that the bail applicant-petitioner has committed an offence under the PML Act.

24. Be that as it may, assuming that post the verdict in *Nikesh Tara Chand's* case (supra), the amendment, as made to Section 45 of the PML Act, is resurrected, or, revived. However, in the above light also, the High Court of Bombay, while deciding application No. 286 of 2018, titled as ***Sameer M. Bhujbal versus Assistant Director, Directorate of Enforcement and another***, has proceeded to grant bail to the bail applicant-petitioner, rather without making an objective satisfaction, about the bail applicant therein, *prima facie*, not allegedly committing the offence under the PML Act. In the above judgment, the Bombay High Court, has concluded, that the apposite twin conditions, irrespective of a validating amendment being carried to Section 45 of the PML Act, rather post the verdict made by the Hon'ble Apex Court, in case titled Nikesh Tara Chand, and, wherethrough the pre amended provisions of Section 45 of the PML Act, became struck down by the Hon'ble Apex Court, through its delivering a verdict in Nikesh Tara Chand's case, rather do not revive, nor become resurrected. Moreover, the Apex Court while dealing with the challenge, as, made to the above order, through an SLP, being filed, has not stayed the operation of the afore made order.

25. Even the Madhya Pradesh High Court, in case titled as ***Vinod Bhandari versus Assistant Director 2018 SCC OnLine MP 1559,*** has taken a view similar to the one taken by the Bombay High Court in Sameer M. Bhujbal's case (supra). Therefore, the afore order of the Bombay High Court, made in Sameer M. Bhujbal's case (supra), does hold some guiding

light for this Court.

26. The learned senior counsel appearing for the bail applicant-petitioner, has submitted, that the afore decision, as made by the Madhya Pradesh High Court, in Vinod Bhandari's case (supra), has attained finality, as the SLP filed against it, has been dismissed by the Hon'ble Apex Court. The learned senior counsel has further submitted, that in the case (supra), the bail applicant-petitioner was granted bail without the making of an objective satisfaction, by this Court, about the bail applicant therein, *prima facie*, not committing the offence under the PML Act. Therefore, he has submitted that even the verdict (supra) supports the claim for bail as strived for, from this Court.

27. The learned senior counsel for the bail applicant has, further submitted that similarly, the High Court of Chhattisgarh, Bilaspur, in case titled as ***Anil Tuteja versus Director, Directorate of Enforcement***, the High Court of Judicature of Rajasthan Bench at Jaipur in case ***titled as Mohit Sharma versus Directorate of Enforcement***, the High Court of Manipur at Imphal in case titled as ***Okram Ibobi Singh versus Directorate of Enforcement***, and, the High Court of Judicature at Patna in case titled as Most. Ahilya Devi @ Ahilya Devi, all have granted bail to the bail-applicant(s), without making an objective satisfaction about the bail applicants therein, *prima facie*, not committing the offence under the PML Act.

28. The Learned counsel for the respondent, has, however submitted that since the Hon'ble Apex Court, in case titled as ***The Assistant Director Enforcement Directorate versus Dr. V.C.Mohan, Criminal***

Appeal No. 21 of 2022, has taken a contrary view, therefore, he has submitted that bail be denied to the bail applicant.

29. However, it is clear from the above, that there are divergent views expressed by the Hon'ble Apex Court, with respect to the resurrection, or, revival of twin conditions, as, carried in Section 45 of the PML Act, upon, a validating amendment being made thereto, post the decision made in Nikesh Tara Chand's case. Obviously, this Court is left with no alternative but to, in view of the above discussion, rather grant, than deny bail to the applicant, as the rule is of grant of bail, than of denial of bail. Moreover, when no evidence has been adduced, at this stage, by the prosecution, that in the event of grant of bail to the bail applicant-petitioner, there is any likelihood of his fleeing from justice, and, tampering with the prosecution evidence.

30. Moreover, also when the Hon'ble Apex Court, in its order made on 23.11.2017, has made therein, the hereinafter extracted directions:-

> *"Regard being had to the above, we declare Section 45(1) of the Prevention of Money Laundering Act, 2002, insofar as it imposes two further conditions for release on bail, to be unconstitutional as it violates Articles 14 and 21 of the Constitution of India. All the matters before us in which bail has been denied, because of the presence of the twin conditions contained in Section 45, will now go back to the respective Courts which denied bail. All such orders are set aside, and the cases remanded to the respective Courts to be heard on merits, without application of the twin conditions contained in Section 45 of the 2002 Act. Considering that persons are languishing in jail and that personal liberty is involved, all these matters are to be taken up at the earliest by the respective Courts for fresh decision. The writ petitions and the appeals are disposed of accordingly."*

31. Since the question(s) supra, appertaining to the apposite validating amendment, rather reviving, or resurrecting the twin conditions (supra), are still subjudice, before the Hon'ble Apex Court. Consequently, also this Court deems it fit to accord the indulgence of bail to the bail applicant-petitioner. The reason being till the validating amendment to Section 45 of the PML Act, as made, post the decision in case Nikesh Tara Chand's case (supra), becomes upheld, by the Hon'ble Apex Court, thereupto, it may not be appropriate to fetter the personal liberty of the bail applicant-petitioner.

32. Accordingly, the petition is allowed. However, the granting of bail to the bail applicant-petitioner, is subject to following conditions:-

i. The bail applicant-petitioner shall furnish personal and surety bonds, in the sum of Rs. 5.00 lacs, with one or two solvent local sureties in the like amount, before, and, to the satisfaction of the learned trial Court concerned.

ii. Till the bail applicant complies with the process of furnishing sureties, the applicant is directed to be released on furnishing cash bail of Rs. 5.00 lacs, and, the applicant shall comply with the formalities of furnishing sureties within a period of six weeks from his actual release from jail.

iii. The bail-applicant shall submit his residential address along with proof of his staying there to the respondent, and, in the even of change of address, shall update the same before, and, to the satisfaction of the learned trial Court concerned;

iv. The bail-applicant shall surrender his passport with the investigating agency, if not already surrendered, before, the learned trial Court concerned;

v. The bail-applicant shall remain present before the Special Court concerned, on the fixed dates without fail unless and until prevented for medical reasons;

vi. The bail-applicant shall not leave the jurisdiction of the Punjab and Haryana High Court, without obtaining the prior permission of the trial Court;

vii. Needless to state that the respondent shall be at liberty to take recourse as available under law, if the bail applicant violates any of the conditions imposed, as aforesaid;

viii. The bail applicant shall not tamper with the evidence and/or prosecution witnesses.

33. However, any observations made in this order, shall not effect the decision, on merits of the trial.

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Since the main petition has been decided, the instant application becomes infructuous, and, is disposed of as such.

(SURESHWAR THAKUR)
JUDGE

January 27, 2022
Gurpreet

Whether speaking/reasoned : Yes
Whether reportable : Yes