IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

219 **CRM-M-36693-2019**
Date of decision : 13.11.2019

JAINAM RATHOD ...PETITIONER

VERSUS

STATE OF HARYANA & ORS ...RESPONDENTS

CORAM: HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present: Mr. Vikram Chaudhri, Senior Advocate with
Mr. Sangram Saron, Mr. Sartaj Singh Gill, and
Mr. Rahil Mahajan, Advocate for the petitioner.
Mr. Chetan Mittal, Assistant S.G.I. with
Mr. Alok Kumar Jain, Senior Panel Counsel and
Mr. Himanshu Gupta, Advocate for SFIO.
Mr. Deepak Sabharewal, Additional Advocate General, Haryana.
Mr. Parshant Baliyan, Investigating Officer in person.

RAJBIR SEHRAWAT, J.

This petition under Section 439 of the Code of Criminal Procedure has been filed for grant of regular bail pending trial in Criminal Complaint No.3 of 18.05.2019 **CIS No. COMA/05/2019 CNR NO. HRGR01-007022-2019 titled as SFIO VS. ADARSH BUILD ESTATE ETC.** under Sections 120-B, 417, 418, 420, 467,468, 471, 474 and 477 of the Indian Penal Code (for short 'the IPC'), and Section 447 of Companies Act, 2013 pending in the Court of Sessions Judge, Gurugram.

It deserves to be pointed out at the outset that this case is one of the cases in a bunch; which were heard together. However, for making the things more distinct these cases are being decided vide separate judgments. However, since several aspects of the matter are common to all the cases and have even been argued on similar lines and even jointly, therefore, some aspects of the matter would form part of all the judgments.

The brief facts constituting allegations in this case are that one Multilevel Co-operative Society was got registered by one Mukesh Modi and family in the name of Adarsh Credit Co-operative Society Ltd. (hereinafter referred to as the Co-operative Society or (ACCSL). That Co-operative Society collected deposits from about 22 lakh investors. In the process about Rs.5000Crores were collected from investors from general public; which remained unreturned to the investors and, accordingly an amount of approximately Rs.9253Crores, including interest, is reflected in the accounts of the Society ACCSL, as payable to the investors. After collecting this money from the public, Mukesh Modi and family created a large number of Companies under the aegis of Adarsh Group of Companies Ltd. (AGCL), with their associates and relatives as the Directors. Subsequently these companies were shown having been advanced the loans of about Rs.1700Crores by the Co-operative Society ACCSL. Loans were required to be returned to the Co-operative Society by these Companies

with interest, as per the alleged agreements of advancement of money. However, the same were not returned by the Companies. Therefore the money of the Co-operative Society was allegedly, being siphoned off through the Companies created by Adarsh Group of Companies Limited. When the matter came to knowledge of the Central Government, the Central Government, through Ministry of Corporate Affairs, vide the order dated 28/06/2018, passed in exercise of powers conferred under section 212 (1) (c) of Companies Act 2013 and section 43(2) & (3)(c)(i) of LLP Act 2008, ordered an investigation into the affairs of the said companies, through the Serious Fraud Investigation Office (hereinafter referred to as SFIO), which is an instrumentality created under the new Companies Act for investigation into the affairs of the companies. During investigation it came out that 70 Companies of the Adarsh Group of Companies Ltd. had shown Rs.4140Crores approximately as payable to the said Co-operative Society; as the loan yet to be repaid. Still further, during investigation some companies out-side the Adarsh Group of Companies were also found to be the alleged collaborators of the Adarsh Group and those companies were also taken under investigation. Accordingly, a total of about 125 Companies (hereinafter referred to as CUIs), and some individuals, including the petitioner and his Companies as conspirators; were taken under investigation. After completion of the investigation and taking necessary

permissions from the Central Government, SFIO presented the investigation report in the form of a statutory Complaint before the Special Court at Gurugram on 18.5.2019. In this Complaint / report the petitioner is arrayed as Accused No.130. Under the provisions of section 212 (15) of Companies Act 2013, such a report be taken as a report presented under section 173 of Cr.PC, 2013. After receipt of the report from the SFIO, the Special Court summoned various accused including the CUIs and other individuals, under different sections of the Old Companies Act and the New Companies Act.

The petitioner was summoned by the Special Court under Section 447 of Companies Act, 2013 and under Sections 417, 418, 420, 467, 468, 471, 474 and 477 of the IPC, some of which are cognizable and non-bailable as per the provisions of the New Companies Act, 2013; and which are punishable with upto 10 years of imprisonment. However, during investigation the investigating officer had not arrested the present petitioner. But since the petitioner was also summoned for non-bailable offences, inviting severe punishments, therefore after appearing before the Special Court the petitioner applied for bail pending trial before the Special Court. Since the case involved a large number of accused and their bail applications were being taken-up by the Special Court for decision collectively, which would have taken lot of time for final decision,

therefore, in the first instance; the petitioner was granted the interim bail by the trial court, however, ultimately the bail was declined by the Special Court vide order dated 28-08-2019. Hence, the present petition has been filed by the petitioner seeking bail pending trail.

Further elaboration of the allegations of the prosecution, specific to the petitioner is; that when the account of the above said 70 CUI of Adarsh Group of Companies were investigated; it was found that these Companies were having an amount of Rs.90.03Crores as Cash-in-Hand on 31-03-2016. However, by the end of the financial year on 31-03-2017, this Cash-in-Hand was reduced to Rs.1.15Crores. During this period the Government of India head announced 'Demonetization' of currency notes of denomination of Rs1000/- and Rs.500/-. As per this policy decision of the Government of India, the entire cash available with the companies and the individuals was required to be deposited in the Scheduled Banks within specified time. However none of this amount was ever deposited with the Banks by these CUIs. Hence the cash-in hand had gone missing from these Companies. Further investigation had shown that the above-said amount was shown as having been paid to the Co-operative Society, ACCSL, as advance Share Application Money (SAM) pending allotment. However this cash amount was not deposited in the accounts of the Co-operative Society.

When further coordinated investigation of the CUIs and The

Co-operative Society was carried out then it was found in the accounts of the Co-operative Society that there were the bills and invoices for an amount of Rs.223.77Crores, for alleged purchase of Suit Lengths (Cloth) by the Co-operative Society from 27 Companies; including the Companies of the petitioner. But besides the alleged part-supply from the Companies of the petitioner, even the remaining; entire supply of the cloth from the Companies/Firms of the other persons; was also shown as having been arranged through petitioner Jainam Rathod. Out of the above purchase of cloth, purchase worth Rs.89.23Crores was found to have been made during the period from 31-03-2016 to 31-10-2017. Bills and invoices for these purchases were reflecting the petitioner or his Companies/Firms as the supplier; therefore, this led the investigation to the petitioner and his Companies to the extent of these transaction. The investigating officer found the computer in the company office of the petitioner. From that the relevant data was picked up and sealed in a pen drive in the presence of the petitioner. The invoices and bills found in the data and the computer of the petitioner perfectly matched with the invoices and bills which were recovered from the record of the Co-operative Society. Still further, some transport receipts; which were recovered from the records of the Cooperative Society; were admitted by the petitioner to have been transacted by him. The receipts were verified from the mentioned

transporter; J. K. Movers. The said transporter denied having transported any material; which was reflected in the transportation receipts showing his company to be the transporter. These entries were not even reflected in his ledger for the relevant financial year 2016-17. Hence, these fake transport receipts showing transport of suit lengths; created doubt about the actual supply and transport of the suit lengths by or through the petitioner or his Companies. On further verification of the accounts of the co-operative society, it was allegedly found; and it was so confirmed by the accounting software used by the Co-operative Society; for maintaining its accounts; that all these entries regarding the purchase of suit lengths were actually made within a few days after the announcement of demonetization by the Central Govt., whereas, these were shown in the records for different dates; by ante-dating the entries as per the dates mentioned on the allegedly fake invoices and bills issued by the petitioner. Hence, it was found during investigation that in connivance and in conspiracy with the Adarsh Group of Companies Ltd. and for helping them in embezzling the cash; which was in the hands of the Companies of the Adarsh Group, the petitioner and his company provided fake and antedated bills and invoices, without actually supplying any material. The petitioner allegedly did this all by charging a commission of 0.1% of the amount of the bills/invoices. Accordingly, Adarsh Group of Companies swindled an amount of about Rs.90Crores of

public money, whereas the petitioner got about 22 lakhs as the Commission through fabricating the entries.

Arguing the case learned counsel for the petitioner submitted that starting with September 2018, the petitioner has joined the investigation by appearing before the investigating officer of the case, as and when he was called. The petitioner had not even applied for anticipatory bail. Despite that the petitioner was not taken into custody by the investigating officer. On completion of collection of the alleged evidence, when the complaint was filed by the investigating officer, then the Special Court had taken cognizance of the offence on 03-06-2019, that is, after about 5 months of the petitioner last joining the investigation. The petitioner was summoned by the special court. The petitioner appeared before the special court on 13/07/2019 in compliance of the summons issued by the court. Even at that stage the petitioner was granted interim bail by the trial court. Although there was not even any allegation that the petitioner had misused his liberty or the interim bail granted by the trial court, yet the application for bail pending trial, moved by the petitioner, was finally dismissed on 28-08-2019 and then petitioner has been taken into custody. Since then he is suffering incarceration. Continuing his argument, learned Counsel for the petitioner submitted that section 4 of Cr.P.C. provides that except as otherwise provided in some special statute, the trial of criminal cases shall be

conducted as per the provisions of Cr.P.C. No special provisions have been made under the new Companies Act for conduct of the trial of the offences under the Companies Act. Hence the proceedings of the trial would be governed by the provisions of Cr.P.C. As per the provisions of the Cr.P.C., whether complaint is filed as a private complaint or the proceedings are initiated as on the police report, the court takes cognizance under section 190 of Cr.P.C. and the process is to be issued against the accused under section 204 of Cr.P.C. The provision of section 204 (5) of Cr.P.C. makes the issuance of the summons or warrants of process subject to the provision of section 87 of Cr.P.C. which contains the rules regarding process. Section 87 empowers the court to issue summons or warrant, as the case may be. But section 87 is followed by section 88 of Cr.P.C. which prescribes that when a person against whom the court is empowered to issue summons or warrant; is present in the court the court may require him to execute a bond with or without sureties for his appearance. Hence it is argued that when an accused is already present before the court then the court is not empowered to issue warrant for taking a person in custody. Such a person is entitled to be released on bail on bonds or sureties. Therefore, once the petitioner had appeared before the trial court, pursuant to the summons issued by that court, then the petitioner had got an un-defeatable right to get bail as per the provisions contained in section 88 of Cr.P.C. Ld. Counsel has relied upon

the judgment of the Supreme Court in case of **Data Ram Singh V/s State of Uttar Pradesh and another, 2018 SCC Online SC 88** and a judgment of this court in case of **CRM-M-28490 of 2015, decided on 01-10-2015 Dalip Singh Mann and another V/s Niranjan Singh, Assistant Director, Directorate of Enforcement, Govt. of India**. Carrying forward the arguments, Ld. Counsel for the petitioner submitted that under the provisions of section 212(8) the investigating officer has been given power to arrest a person, if on the basis of the material in his possession; he has reasons to believe, and such reasons are to be recorded in writing, that the said person is guilty of an offence punishable; being covered under section 447 of the new Companies Act. Still further under section 217 (4) the investigating officer of the case has been conferred power to examine a person on oath and under section 217(5) the investigation officer has been given enormous powers of the civil court as well; for summoning the witnesses and for enforcing their presence. Therefore the investigating officer had the trappings of the court also, besides being an investigating officer who could have arrested the petitioner; if he had some material in his possession. Under the provisions of the section 439 Cr.P.C. the bail pending trial is to be considered by the trial court by applying the criteria as prescribed in section 439 Cr.P.C. The requirements prescribed for arresting a person during investigation under section 212(8); by the investigating

officer; for the offences under new Companies Act, stand at much higher pedestal than the conditions required to be considered by the trial court for releasing such an accused on bail pending trial by exercising powers under section 439 Cr.P.C. Hence, if the investigating officer himself had not arrested the petitioner during the investigation; that shows he did not have the requisite material in his possession to justify the arrest of the petitioner, as required under the Act. The complaint has also been filed by him on the basis of the same material. Therefore there was no reason for the trial court to decline the bail to the petitioner and send him to the judicial custody by getting him arrested, particularly, when the petitioner had not misused his concession of interim bail.

Still further, it is argued by the Counsel for the petitioner that the trial court has wrongly taken into consideration the twin conditions, as prescribed under section 212 (6) of the new Companies Act for declining bail to the petitioner. Referring to the judgment of the Hon'ble Supreme Court, in case of **Nikesh Tara Chand Shah V/s Union of India and another (2018) 11 SCC 1**, learned Counsel for the petitioner has submitted that the Language of section 212 (6) of the new Companies Act is *pari-materia* with the languages of section 45 of the Prevention of Money Laundering Act. However the Supreme Court has already declared the language of the twin conditions used in the Prevention of Money

Laundering Act, as *ultra vires*. Hence the twin conditions, as contained in section 212 (6) of the new Companies Act, has also to be treated as *ultra vires* the Constitution of India and as infringing upon the rights of the individual. Hence the trial court could not have invoked the twin conditions, as prescribed under section 212 (6) of the new Companies Act, for declining bail to the petitioner. Referring to the same judgment, and Counsel for the petitioner has submitted that even if those twin conditions are to be applied, those would have been applicable only in case the petitioner would have been arrested during the investigation by the investigating officer and then produced before the trial court in custody. However, in the present case the investigating officer himself had not found a case against the petitioner sufficient to justify the arrest of the petitioner, therefore, the twin conditions prescribed under section 212 (6) of the new Companies Act have no application in case of the petitioner. Still further it has been argued by the Counsel for the petitioner that even if the twin conditions are taken to be existing on the statute book, still the same cannot be pleaded by the state authorities for opposing the bail application of the petitioner; because these conditions are infringing not only the right to life and liberty of the petitioner guaranteed by Article 21 of the Constitution, rather, are also in violation of the provisions of Article 14, being irrational, illogical and requiring the court to record something which is impossible by any means.

The learned Counsel for the petitioner has relied upon the judgment of this court rendered in **Ankush Kumar @ Sonu V/s State of Punjab, 2018 SCC Online P&H 1259** to support his argument. Again referring to the judgment of the Supreme Court rendered in case of **Nikesh Tara Chand Shah (Supra)** the learned Counsel for the petitioner has further argued that even if the applicability of twin conditions, as prescribed under section 212(6) of the new Companies Act; is to be invited to the case of the petitioner, then interpretation of these conditions has to be toned down to see only the probability of conviction of the petitioner; and the probability of conviction under the new Companies Act only. However, the evidence, allegedly collected by the prosecution, against the petitioner is not sufficient to bring out the probability of conviction of the petitioner for the offences under the Companies Act, nor is there any material on record; to show that the petitioner is likely to commit the offence under new Companies Act, if he is released on bail.

Referring to the alleged evidence collected by the prosecution, learned Counsel for the petitioner submitted that there is no evidence whatsoever against the petitioner. The prosecution is relying upon the alleged disclosure statement of the petitioner. As argued above, since the investigating officer of the case also had the power of recording the statement on oath and also very wide power to arrest a person during the

investigation, therefore he had the potential to pressurize the accused, and hence any inculpating statement, allegedly recorded by him during the investigation; cannot be relied upon against the petitioner. Besides the disclosure of the statement of the petitioner, there is either the statement of the co-accused, which again, is not admissible in evidence against the petitioner, or there is statement of one more witness, which is nothing but the hearsay account of the incident, as might have been put up to the said witness by the investigating officer of the case by referring him to the alleged computer records of the petitioner. Therefore even the statement of the said witness is no evidence in the eyes of law. Still further it is submitted by the Counsel for the petitioner that the petitioner is not involved in directly dealing with the public money, which was allegedly in the hands of the Company of Adarsh Group of Companies. The embezzlement of the money, even as per the case of the prosecution, has been committed by the controllers of the Adarsh Group of Companies Limited, through their subsidiary entities. Petitioner was not connected with those companies, as such.

Learned Counsel for the petitioner has further submitted that the petitioner and his companies were not even part of the sanction initially granted by the Central Government for investigation of the Companies. Subsequently 20 more companies were also involved in the investigation

with the prior sanction of the central government. However the companies of the petitioner were not involved even at this stage. So whatever are the Companies of the petitioner; same were conducting the business only through legitimate business transactions and through legitimate means. The amount of about Rs.90Crores, allegedly, cash-in-hand of the 30 Companies of the Adarsh Group of Companies, if any, was being circulated among themselves only. The petitioner has no concern with that money of those Companies. The petitioner had no equity transaction with those companies. Hence it is clear that petitioner is an innocent person and he is a law abiding gentleman and legitimate businessman. He has not committed any crime as alleged against him. Hence he deserves to be released on bail during the pendency of the trial.

On the other hand, learned Asstt. Solicitor General of India, appearing for SFIO, has argued that the fact that the investigating officer had not arrested the petitioner during the investigation is totally inconsequential. Referring to the provision of section 212(8) of the new Companies Act, learned counsel appearing for SFIO has submitted that the provision itself speaks of the words investigating officer 'may arrest' such a person. Hence it is clear that it is the discretion of the investigating officer, whether to arrest the person or not; of course he has to satisfy the statutory condition; if he so desire to effect the arrest. However, even if there are

reasons to believe that such a person is guilty of the offence under the Companies Act and even if the investigating officer had the necessary material to support the allegations against such person, investigating officer may not arrest such a person, keeping in view various other factors, including the co-operation during the investigation and any undertaking by such a person that he would be appearing before him or before the court, as and when he is required. However, that does not mean that such a person has got a right to be released on bail, in case the charge-sheet is filed against such person and he is produced or appears before the court. Once a person facing the charge-sheet appears before the trial court or he is brought before the court, thereafter it is for the Court to take a call on custody of the accused. If the court finds it appropriate to release such a person on bail, keeping in view the facts and circumstances of the case, then he may be released on bail. However, if the court comes to the conclusion otherwise, then court may send the person to the custody during the pendency of the trial. Just for example, learned Counsel for the SFIO has submitted that even section 437 Cr.P.C. contemplate such a situation; where a person appears before a Magistrate and such a person is accused of the offences specified therein, then there is a prohibition in that provision that such a person is to be released on bail, unless the Magistrate had some special reasons for granting bail. Elaborating further it is submitted that even where

there is prohibition against the grant of the bail, law contemplates situations where the court can grant bail if there are some special reasons for doing so. Hence it is submitted that; by no means; the right to be released on bail can be a right of the accused, rather, the mandate of the law is clear that whether an accused is arrested during investigation or not, the question of granting the bail to a person accused of an offence is to be finally decided only by the Court. In the present case, the Special Court has considered all the aspects and has declined bail to the petitioner. The court below has exercised its statutory discretion. The petitioner has not been able to find fault with this exercise of discretion by the court below. Relying upon the judgment of the Supreme Court in **Serious Frauds Investigation Office V/s Nitin Johari 2019 SCC Online 1178**; and drawing parallel therewith, learned Counsel for SFIO has submitted that merely because the petitioner had himself appeared before the court after the charge-sheet was filed against him or merely because he was granted interim bail, in the first instance, does not mean that the bail cannot be denied to the petitioner during the pendency of the trial or that such person cannot be taken into custody. Question of bail still has to be considered and decided by the court as per the relevant and applicable factors. It is, accordingly, submitted by the Counsel that in case of **Nitin Johari (Supra)** also, though the charge-sheet had been filed and the High Court had granted bail, yet the Supreme

Court set aside the order of the High Court and remanded the matter to the High Court for fresh consideration, by considering the relevant factors. Had this been the valid proposition of law; that when the charge-sheet stands filed and accused appear before the court; then the petitioner cannot be taken into custody, then the Supreme Court would not have sent the matter back to the High Court for reconsideration; which could have very well; led to denial of bail in that case.

Still further, relying upon the judgment of the Supreme Court rendered in **Pankaj Jain V/s Union of India and another, 2018 (5) SCC 743** and another judgment of Delhi High Court in case of **Court on its own Motion V/s State, 2018 SCC Online Del 12306**, counsel for the SFIO has submitted that section 88, Cr.P. C. itself gives discretion to the court. That section itself uses the word 'may'. Hence there is no question of an accused getting automatic right to bail if he appears before the court pursuant to the summons issued by a court. As submitted above, and as clarified by the judgments of the Supreme Court mentioned herein above, it is the discretion of the court whether to grant bail to the accused or not. In case of **Pankaj Jain (Supra)** even the judgment in case of **Dalip Singh (Supra),** being relied upon by the petitioner, has been considered by the Supreme Court. Therefore, while considering the question of bail to the accused, the court has to take into consideration the relevant factors; meant

for consideration of the bail with reference to the provision under which the accused is sought to be prosecuted, besides the other factors, as has been specified by the judicial pronouncements from time to time.

Coming to the factors required to be taken into consideration in case of the petitioner; for granting bail, the Counsel for the SFIO has submitted that the petitioner has been charge-sheeted under section 447 of the new Companies Act. Section 212(6) of the new Companies Act provides that in case of chage-sheet being filed for the offences covered by section 447 no court shall grant bail to the accused unless the twin conditions prescribed under section 212(6) are fulfilled. Hence before granting bail to the petitioner, the court was required to consider the objection of the public prosecutor. Since bail to the petitioner was objected to by the public prosecutor, therefore, finding no grounds to fulfill the twin conditions, the trial court has rightly declined bail to the petitioner. It is further submitted that even if this court is to consider the case of the petitioner for bail, the same condition would be required to be considered by this court as well. Referring to the reliance of the counsel for petitioner upon the case of **Nikesh Tarachand Shah (supra)** case, qua *vires* of the twin conditions, ld. Counsel for the SFIO has submitted that after that judgment of the Supreme Court, the Parliament has amended the Prevention of Money Laundering Act and has removed the inconsistency qua the offences punishable under

the Prevention of Money Laundering Act, and therefore, has rectified the aspect which had earlier led to declaration of the twin conditions under that Act as *ultr-vires*. Still further it is submitted by the ld. Counsel that although constitutional validity of the twin conditions, as prescribed under section 212 (6) of the Companies Act is under challenge before the Supreme Court in case of **Serious Frauds Investigation Office V/s Neeraj Singhal 2018 SCC Online SC 1573** and other cases, however, the Supreme Court has again reiterated the applicability of the twin conditions for the purpose of consideration for bail, in case of **Nitin Johari (supra).** So far as the reliance of the Counsel for the petitioner upon the judgment of this Court in case of **Ankush Kumar (Supra)** is concerned, it is submitted by the Counsel for the SFIO that when this court had considered the applicability of the twin conditions in the above said case, this court had specifically observed that the *vires* of the twin conditions would be considered by the appropriate Court / Bench in some appropriate matter. But now the validity of the twin conditions is very much under challenge before the Supreme Court. However, despite pendency of the challenge to the *vires* of the twin conditions, the Supreme Court has set aside the order of the High Court granting bail in case of **Nitin Johari (Supra)** and has remanded the matter to the High Court for reconsideration; with a direction to consider the scope and effect of the twin conditions as prescribed under section 212 (6) of the

new Companies Act; as well as by taking into consideration the other relevant factors; which were spelt out in case of **Y.S. Jagan Mohan Reddy V/s Central Bureau of Investigation, (2013) 7 SCC 439**, and which have been reiterated in case of **Nitin Johari (supra).** Hence this court should also take into consideration the scope and effect of the twin conditions as prescribed under section 212(6) of the Companies Act.

On the point of evidence against the petitioner, the counsel for the SFIO has submitted that the petitioner and his companies have been instrumental in swindling of an amount of Rs.90Crores approximately out of total swindled amount of Rs.4140Crores; which was swindled by the Adarsh Group of Companies through their subsidiaries. The petitioner has issued fake bills for an amount of space 223.775Crores to the Co-operative Society and to Companies of the Adarsh Group of Companies, for supply of the suit lengths and some other cloth materials. Most of these transactions are stated to be in cash. However there is no deposit of the corresponding amounts in the account of the petitioner or his Companies. The petitioner has been indulging in creating fake bills/invoices since the year 2012. Hence the petitioner is a habitual entry-maker, and is known as such in his area of operation. Coming to the specifics, the learned Counsel for the SFIO has pointed out that investigation has led to the seizure and recovery of the material and the data showing that from April 2016 to October 2016

the petitioner is shown to have supplied suit length to Co-operative Society for an amount of 89.23Crores. However this material has been found not to have actually been supplied by him or his Companies. Although the petitioner has shown entries for an amount of Rs.31.9Crores in his balance sheet, however, even this amount is not found to have been deposited in the bank accounts of the petitioner or his companies. Hence these were paper entries only, to help about 30 companies of the Adarsh Group of Companies to swindle the money of the cash-in-hands; which was the public money. In lieu of this help and conspiracy with the above said companies, the petitioner has availed commission of about 22lakhs. The fakeness of the invoices, the Bill and the entries created by the petitioner has been duly established by the evidence collected by the investigating officer from the accounts of the Cooperative Society, maintained on the SAP accounting software, wherein it has been found that most of these entries were actually made within few days after the demonetization of certain currency notes by the Central Government, although these were shown as spread over a long duration during the financial year; by antedating the entries and the bills and the invoices supporting those entries. The fake bills/ invoices were recovered from the Co-operative Society and the perfectly matching and identical copies of said bills and the invoices were recovered from the computer of the petitioner. Pointing out further evidence, counsel for SFIO

has submitted that the suit lengths were shown to have been supplied / transported to the Cooperative Society through the transporter J. K. Movers. However, when joined into the investigation, the owner of the J. K. Movers has denied having transported any such material to the Co-operative Society. Still further, some of the bills/invoices were showing that although the said material was arranged by the petitioner or his Companies, but actually the said material was shown to have been supplied by the Company of one Ajay Agrawal. However, the owner of the said company has also been joined into the investigation and he has also stated that neither he had ever supplied the said material to the Co-operative Society, nor had he ever authorized the petitioner to issue any bills / invoices on behalf of his Companies. Hence the petitioner has been found to be creating the bills/invoices on behalf of other persons also, which has been totally denied by the concerned persons. The petitioner has made admission regarding the said entries and the data was taken from his computer in his presence and was also sealed in his presence. All the requisite certificates under section 65-B of the Evidence Act has been duly submitted to the court qua all the electronic records. Hence there is a disclosure statement of the petitioner and also the disclosure statement of the co-accused, which have led to the recoveries. Beside this there are independent witnesses who have deposed against the petitioner. Therefore if the entire material on record against the

petitioner is taken into consideration, by any means; it cannot be said that petitioner is not guilty of the offences under the Companies Act. Still further since the petitioner is given to manipulations, for earning commissions, therefore by nature the petitioner is manipulative. Hence if the petitioner is released on bail, he is most likely to influence the witnesses of the case and also to destroy the evidence against him. The argument of the learned Counsel for the petitioner that the petitioner had been joining the investigation and was released on interim bail as well; and that during that duration he had not made any attempt to influence the witnesses or to destroy the evidence, is totally irrelevant. At that time the petitioner was not sure of him being made an accused in the case. Therefore he might not have resorted to that exercise. But now, when the petitioner knows that his crime has been detected, no straightforward conduct is expected from the petitioner, who is manipulative by disposition. In the same vein, the counsel for the SFIO has also submitted that since the vocation of the petitioner and his Companies is only to commit crimes to earn the money, therefore, by any means, it cannot be said that if the petitioner is released on bail, he would not commit any offence again.

In the end it has been argued by the learned counsel for the SFIO that even if the conditions, as prescribed under section 212(6) of the new Companies Act, 2013 are not to be taken into consideration, at least

the factors which has been laid down by the Supreme Court in case of **Y. S. Jagan Mohan Reddy(supra)** and which has been reiterated by the Supreme Court in case of **Nitin Johari (supra),** for the economic offences, has to be considered by the court while considering grant of bail to the petitioner. However, the charge-sheet against the petitioner is under section 447 of the Companies Act, which is a serious offence, inviting punishment of imprisonment up to 10 years. Still further, although the Counsel for the petitioner had submitted that the petitioner is not directly involved in embezzlement of the cash-in-hand of the companies of the Adarsh Group, however, the fraud, as defined under the new Companies Act, does not contemplate any gain by one person and the loss to another person or to a company. Participation of the petitioner in the crime of embezzlement of the money, per se, is sufficient for conviction of the petitioner. It is also submitted that as per the record; the companies had authorized the petitioner to collect cash from 30 companies of the Adarsh Group of Companies. That cash amount is stated to have been received by the petitioner, but is not found to have been deposited in the bank accounts. These facts were confirmed even by the confirmation ledger signed by the petitioner. The participation of the petitioner has duly been established as per the record. Conduct of the petitioner has also not been exemplary in the past. Appreciating it from the disposition of the petitioner, it cannot be ruled out

that the petitioner is likely to influence the witnesses and to destroy the evidence against him. Hence the petitioner does not deserve to be granted bail. The court below has rightly dismissed the bail application filed by the petitioner. Hence the present petition be also dismissed.

Replying to the argument of the counsel for the SFIO, Ld. Counsel for the petitioner submitted that there is absolutely no evidence against the petitioner. There has been no irregularity in the accounts of the petitioner for the year 2014-2016. The antedated entries, if any, are found only in the accounts of the Co-operative Society and not in the accounts of the petitioner or his companies. So far as the entries/bills and invoices, stated to have been recovered from the computer of the petitioner are concerned, the same are only the draft templates of the bills/invoices and not the actual bill/invoices. Therefore these cannot be taken as the same bills/invoices as have been found in the accounts of the Co-operative Society. So far as the evidence in the form of the statements and the witnesses is concerned, it is submitted by the Counsel for the petitioner that since the investigating officer has the power akin to the police, therefore, any self-incriminating statement of the petitioner recorded by the investigating officer cannot be relied upon against him. For the same reason the confession of the co-accused cannot be relied against the petitioner. It has also been submitted by the Counsel for the petitioner that even the

Supreme Court has granted bail in case of **Sanjay Chandra V/s Central Bureau of investigation, (2012) 1 SCC 40** despite the fact that the offences in that case involved economic offences. The Supreme Court has granted bail even by observing in para No.46 of that judgment that it was conscious of the fact that the offences involved were the economic offences of huge magnitude, and if proved, may even jeopardize the economy of the country. Still the accused in that case were released on bail. The para relied upon by the petitioner reads as under:-

> **"46**. We are conscious of the fact that the accused are charged with economic offences of huge magnitude. We are also conscious of the fact that the offences alleged, if proved, may jeopardise the economy of the country. At the same time, we cannot lose sight of the fact that the investigating agency has already completed investigation and the charge-sheet is already filed before the Special Judge, CBI, New Delhi. Therefore, their presence in the custody may not be necessary for further investigation. We are of the view that the appellants are entitled to the grant of bail pending trial on stringent conditions in order to ally the apprehension expressed by CBI."

This judgment was followed even by this Court in case **CRM-M 46946 of 2017 decided on 24-09-2018, D.K. Sethi V/s Central Bureau of Investigation**. It is also vehemently argued by learned Counsel for the petitioner that since the question of bail relates to the life and liberty of the

petitioner, therefore, the court has to be liberal in granting the bail, because bail is the rule and the jail is only an exception.

This court has heard the learned Counsel for the parties at length and has perused the record. But at the outset it deserves mention that although the counsel for the parties have raised the arguments in extensive details; concerning all the aspects of the matter, including those of the facts and the questions of law, including the ones touching upon the constitutional validity of certain provisions involved in this case, however this court is of the opinion that it may not be appropriate to deal with and decide all the arguments in the same extensive details; in the present proceedings, lest the case of either side should be prejudiced at this stage itself. However, since in this fiercely contested matter the parties have pressed the arguments, therefore, this court is, obviously, expected to deal with the same, at least, in skeletal manner. Accordingly, the arguments are being considered by this court.

First of all, although it is much stressed by the counsel for the petitioner that since he was not arrested during the investigation by the investigating officer and he himself had appeared before the trial court on receipt of summons from that court, therefore, he is entitled to bail during the trial, as a matter of right under Section 88 of Cr.P.C., however, this court does not find any substance in the arguments raised by the Counsel for

the petitioner. Chapter VI of Cr.P.C. wherein the section 88 is contained; itself speaks that it deals with 'Processes to compel appearance'. Even a co-joint reading of the provisions contained in this chapter shows that it is restricted to the aspect of bringing a person to the door of the court; and nothing more. The provisions of this chapter does not have anything to do with release of a person on bail as such. Rather; the provisions of this chapter are neutral to the status of a person as an 'accused', as a 'witness', or simply as only a 'person present in the court'; without any legal capacity qua trial as such. The sections included in this chapter do not even use the word 'accused', except in some sections relating to a person, who has already avoided ordinary process of the summons or warrant and therefore; is to be dealt with through the proceedings for proclamation. Hence; this chapter is prescribing simply the procedure for ensuring the presence of a person before the court, whether as an accused or as a witness. Once a person is brought to or appears before the court; it is for the court to deal with the person in accordance with the procedure prescribed under the Cr.P.C. If the person is called by the court through the above prescribed procedure as a witness ; then he shall be dealt with the procedure meant for a witness. But if such a person is called by the court through the above prescribed procedure as an accused, then he shall be dealt with under the provisions relating to the 'bail', prescribed elsewhere in Cr.P.C.. Nothing

much can be read in section 88 Cr.P.C. to argue that if a person is present before the court then he has can be required only to execute bonds or furnish surety only, and that he cannot be taken into custody. Needless to say; that this section is included in part 'D' of the Chapter and relates to 'Other rules regarding processes'. The sections contained in parts preceding this part, contemplate a graded exercise of power and discretion by the court for compelling appearance of the person before it, by issuing summons, bailable warrant and preferably only thereafter the issuance of the non-bailable warrant. However, section 87 of the Cr.P.C. creates an exception to this general procedure and empowers the court to issue warrant of arrest in the first instance itself; if it is of the opinion of the existence of the factors mentioned in this section. Likewise, Section 88 contemplates a general provision for making sure that a person whom the court has already called through the summons or warrant or whom the court considered appropriate to remain present in subsequent dates; can be bound down for such appearance. In fact, this section is more in the nature of inclusive power of the criminal court to seek presence of any person connected with the case, in any manner whatsoever, even if such person may not be mentioned in the case; either as an accused or as a witness. This provision is intended to include even those persons who may be present before the court by chance or who might be watching the proceedings as such. Even if a person is

otherwise present before the court, the court may ask such a person to execute the bonds or the securities for his appearance in future. The only requirement is that court requiring such bonds and sureties must, otherwise, have a power to issue summons or warrant against that person. That means that even the 'chance presence' of a person before a criminal court can lead to his being bound down for appearance in future, if the court considers his presence as relevant to the case, either as an accused or as witness or otherwise. This strand of general power of the court, qua 'chance presence' is not restricted only to Section 88 of the Cr.P.C. This power is available to the criminal court throughout the proceedings of the trial and at all stages thereof. Besides power of asking to furnish the bonds or sureties for appearance; under section 88, similar power is found in section 311 Cr.P.C.; where the court can require the deposition as witness from any person in attendance of the court, though such a witness may not have been cited as a witness by either side. Not only this, section 319 Cr.P.C. also empower the court to add any person in attendance of the court as an additional accused in the trial, if in the opinion of the court such person is required to be added as an accused as per the standards prescribed for such addition. Hence, under Cr.P.C.; a criminal court always have a power to deal with a person, who is otherwise present in the court; maybe even by chance. Section 88 is only one manifestation of such power of the criminal court; at the stage of

compelling appearance of such a person before the court. Although the counsel for the petitioner have relied upon the judgment of the Supreme Court rendered in case of **Data Ram (Supra),** however, this court finds the said judgments to be totally distinguishable on the particular facts of those cases vis-à-vis the facts of the present case and was not followed in the subsequent case of **Pankaj Jain (Supra)** case. The section 88 Cr.P.C itself uses the word 'may', with no further duty cast upon the court to necessarily grant bail to the accused person. Hence there is no question of an accused getting automatic right to bail if he appears before the court pursuant to the summons issued by a court. As observed above, and as clarified by the judgments of the Supreme Court mentioned relied upon by the counsel for the SFIO, it is the discretion of the court whether to grant bail to the accused or not. In case of **Pankaj Jain (Supra)** even the judgment of this court in case of **Dalip Singh (Supra**), being relied upon by the petitioner, has been considered by the Supreme Court and it has been held that question of grant of bail is primarily a matter of judicial discretion of the court and not any right of the accused.

Although learned Counsel for the petitioner has also raised an allied argument on the same lines, by submitting that question of 'Bail' would arise only if a person is first arrested by the investigating officer and then he is brought before the court, and further that if a person himself has

appeared before the court; pursuant to the summons issued by the court, then he is not to be sent to the custody, rather, he should be released on bail by asking him to furnish the bonds/sureties under section 88 of Cr.P.C. However, this court does not find any substance even in this allied argument. As observed above, Chapter VI; which contains section 88, is relating only to ensure the presence of a person before the court. If a person is summoned by the court as an accused, then the question of bail to him is to be decided by the court as per the provisions contained in Chapter XXXIII of Cr.P.C. This is so made clear by the bare language of sections 436 and 437 and the Section 439 of the Cr.P.C. The Relevant Sections in this regard are as reproduced hereinbelow :-

> 436. In what cases bail to be taken :- When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail :
>
> Provided that such officer or Court, if he or it thinks fit, [may, and shall, if such person is indigent and is unable to furnish surety, instead of taking bail] from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided :
>
> Provided further that nothing in this section shall be deemed to affect the provisions of sub-section (3) of section 116 [or section 446A
>
> [Explanation. - Where a person is unable to give bail within a week of the date of his arrest, it shall be a sufficient ground for the officer or the Court to presume that he is an indigent person for the purposes of this proviso.]

(2) Notwithstanding anything contained in sub-section (1), where a person has failed to comply with the conditions of the bail-bond as regards the time and place of attendance, the Court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the Court or is brought in custody and any such refusal shall be without prejudice to the powers of the Court to call upon any person bound by such bond to bond to pay the penalty thereof under section 446.

437. When bail may be taken in case of non bailable offence:-

[(1) When any person accused of, or suspected of, the commission of any non-bailable offence, is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but -

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more but not less than seven years.

Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm :

Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason :

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court] :

[Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more, be released on bail by the Court under this sub-section without giving an opportunity of hearing to the Public Prosecutor.]

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are no reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, subject to the provisions of section 446A and pending such inquiry, be released on bail, or, at the discretion of such officer or Court on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI, or Chapter XVII or more or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1) the Court shall impose the condition , -

(a) that such person shall attend in accordance with the conditions of the bond executed under this chapter,

(b) that such person shall not commit an offence similar to the offence of which he is accused or suspected, of the commission of which he is suspected, and

(c) that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case or to any police officer or tamper with the evidence,

and may also impose, in the interests of justice, such other conditions as it considers necessary.]

otherwise in the interests of justice.

(4) An officer or a Court releasing any person on bail under sub-section (1), or sub-section (2), shall record in writing his or its reasons or special reasons for so doing.

(5) Any Court which has released a person on bail under sub-section
(1), or sub-section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.

(6) If, in any case triable by a Magistrate, the trial of a person

accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

(7) If, at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

SECTION 439 : SPECIAL POWERS OF HIGH COURT OR SESSIONS COURT REGARDING BAIL:-

(1) A High Court or Court of Session may direct -

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section.

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified :

Provided that the High Court or the Court of Session shall before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the public prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.

A bare reading of the language of sections 436 and 437 of the Cr.P.C. show that these sections provide for dealing with bail not only of those persons who are arrested by the investigating officer during the

investigation, but also provide for dealing with bail to that person who 'appears or is brought before the court'. It is a different matter whether such a person would get the concession of bail or not, depending upon the facts and circumstances of the case. But mere fact that the investigating officer had not arrested the accused during the investigation is, *ipso facto*, no ground to exclude the discretion of the court in the matter of grant of bail. Such an argument not only tends to make discretion of the court subservient to the discretion of the Investigation Officer in the matter of bail to the accused, but also is in direct negation of language of section 436 and 437 of the Cr.P.C. Only section 439 contemplates a person being arrested and being in custody for being considered for grant of bail by a Sessions Court or High Court. However, even this section provides that even if such a person is released on bail, these courts can order such a person to be taken into custody again, depending upon the facts and circumstances of the case. Hence mere fact that a person was not arrested during the investigation, in itself, is totally irrelevant so far as a claim of the accused to get bail in a particular case, as a matter of right, is concerned, although this fact may have some relevance qua some other factors which may be relevant for exercise of discretion by the court for granting bail to such a person. However, such indirect relevance in the facts of the present case would be assessed by this court in succeeding paras, at another place.

Having considered general arguments regarding grant of bail to the accused, the stage is now set for consideration of grant of bail, particularly, to the petitioner, and with the reference to the provisions and the offences under the New Companies Act 2013. However, before proceeding further, it would be appropriate to have a reference to the relevant provisions of the new Companies Act 2013, which are as reproduced hereinbelow:-

> **"SECTION 210. Investigation into affairs of company.-** (1) Where the Central Government is of the opinion, that it is necessary to investigate into the affairs of a company,—
>
> (*a*) on the receipt of a report of the Registrar or inspector under section 208;
>
> (*b*) on intimation of a special resolution passed by a company that the affairs of the company ought to be investigated; or
>
> (*c*) in public interest,
>
> it may order an investigation into the affairs of the company.
>
> (2) Where an order is passed by a court or the Tribunal in any proceedings before it that the affairs of a company ought to be investigated, the Central Government shall order an investigation into the affairs of that company.
>
> (3) For the purposes of this section, the Central Government may appoint one or more persons as inspectors to investigate into the affairs of the company and to report thereon in such manner as the Central Government may direct."
>
> **"212. Investigation into affairs of Company by Serious Fraud Investigation Office.-**(1) Without prejudice to the provisions of Section 210, where the Central Government is of the opinion, that it is necessary to investigate into the affairs of a company by the Serious Fraud Investigation Office—
>
> (*a*) on receipt of a report of the Registrar or inspector under section 208;
>
> (*b*) on intimation of a special resolution passed by a company that its affairs are required to be investigated;

(*c*) in the public interest; or

(*d*) on request from any Department of the Central Government or a State Government,

the Central Government may, by order, assign the investigation into the affairs of the said company to the Serious Fraud Investigation Office and its Director, may designate such number of inspectors, as he may consider necessary for the purpose of such investigation.

(*2*) Where any case has been assigned by the central government to the serious fraud investigation office for investigation under this act, no other investigating agency of central government or any state government shall proceed with investigation in such case in respect of any offence under this act and in case any such investigation has already been initiated, it shall not be proceeded further with and the concerned agency shall transfer the relevant documents and records in respect of such offences under this act to serious fraud investigation office.

(*3*) Where the investigation into the affairs of a company has been assigned by the Central Government to Serious Fraud Investigation Office, it shall conduct the investigation in the manner and follow the procedure provided in this Chapter; and submit its report to the Central Government within such period as may be specified in the order.

(*4*) The Director, Serious Fraud Investigation Office shall cause the affairs of the company to be investigated by an Investigating Officer who shall have the power of the inspector under section 217.

(*5*) The company and its officers and employees, who are or have been in employment of the company shall be responsible to provide all information, explanation, documents and assistance to the Investigating Officer as he may require for conduct of the investigation.

(*6*) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, (2 of 1974) (offences covered under section 447) of this Act shall be cognizable and no person accused of any offence under those sections 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 :

Provided further that the Special Court shall not take cognizance of any offence referred to this sub-section except upon a complaint in writing made by —

(*i*) the Director, Serious Fraud Investigation Office; or

(*ii*) any officer of the Central Government authorised, by a general or special order in writing in this behalf by that Government.

(*7*) The limitation on granting of bail specified in sub-section (*6*) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.

(*8*) If the Director, Additional Director or Assistant Director of Serious Fraud Investigation Office authorised in this behalf by the Central Government by general or special order, has on the basis of material in his possession reason to believe (the reason for such belief to be recorded in writing) that any person has been guilty of any offence punishable under sections referred to in sub-section (*6*), he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.

(*9*) The Director, Additional Director or Assistant Director of Serious Fraud Investigation Office shall, immediately after arrest of such person under sub-section (*8*), forward a copy of the order, along with the material in his possession, referred to in that sub-section, to the Serious Fraud Investigation Office in a sealed envelope, in such manner as may be prescribed and the Serious Fraud Investigation Office shall keep such order and material for such period as may be prescribed.

(*10*) Every person arrested under sub-section (*8*) shall within twenty-four hours, be taken to a Judicial Magistrate or a Metropolitan Magistrate, as the case may be, having jurisdiction:

Provided that the period of twenty-four hours shall exclude the time necessary for the journey from the place of arrest to the Magistrate's court.

(*11*) The Central Government if so directs, the Serious Fraud Investigation Office shall submit an interim report to the Central Government.

(*12*) On completion of the investigation, the Serious Fraud Investigation Office shall submit the investigation report to the Central Government.

(*13*) Notwithstanding anything contained in this Act or in any other law for the time being in force, a copy of the investigation report may be obtained by any person concerned by making an application in this regard to the court.

(*14*) On receipt of the investigation report, the Central Government may, after examination of the report (and after taking such legal advice, as it may think fit), direct the Serious Fraud Investigation Office to initiate prosecution against the company and its officers or employees, who are or have been in employment of the company or any other person directly or indirectly connected with the affairs of the company.

(*15*) Notwithstanding anything contained in this Act or in any other law for the time being in force, the investigation report filed with the Special Court for framing of charges shall be deemed to be a report filed by a police officer under section 173 of the Code of Criminal Procedure, 1973.

(*16*) Notwithstanding anything contained in this Act, any investigation or other action taken or initiated by Serious Fraud Investigation Office under the provisions of the Companies Act, 1956 shall continue to be proceeded with under that Act as if this Act had not been passed.

(*17*) (*a*) In case Serious Fraud Investigation Office has been investigating any offence under this Act, any other

investigating agency, State Government, police authority, income-tax authorities having any information or documents in respect of such offence shall provide all such information or documents available with it to the Serious Fraud Investigation Office;

(*b*) The Serious Fraud Investigation Office shall share any information or documents available with it, with any investigating agency, State Government, police authority or income tax authorities, which may be relevant or useful for such investigating agency, State Government, police authority or income-tax authorities in respect of any offence or matter being investigated or examined by it under any other law."

"217. Procedure, powers etc., of inspectors.- (1) It shall be the duty of all officers and other employees and agents including the former officers, employees and agents of a company which is under investigation in accordance with the provisions contained in this Chapter, and where the affairs of any other body corporate or a person are investigated under section 219, of all officers and other employees and agents including former officers, employees and agents of such body corporate or a person—

(*a*) to preserve and to produce to an inspector or any person authorised by him in this behalf all books and papers of, or relating to, the company or, as the case may be, relating to the other body corporate or the person, which are in their custody or power; and

(*b*) otherwise to give to the inspector all assistance in connection with the investigation which they are reasonably able to give.

(2) The inspector may require any body corporate, other than a body corporate referred to in sub-section (1), to furnish such information to, or produce such books and papers before him or any person authorised by him in this behalf as he may consider necessary, if the furnishing of such information or the production of such books and papers is relevant or necessary for the purposes of his investigation.

(3) The inspector shall not keep in his custody any books and papers produced under sub-section (1) or sub-section (2) for more than one hundred and eighty days and return the same to the company, body

corporate, firm or individual by whom or on whose behalf the books and papers were produced:

Provided that the books and papers may be called for by the inspector if they are needed again for a further period of one hundred and eighty days by an order in writing.

(4) An inspector may examine on oath—

(*a*) any of the persons referred to in sub-section (1); and

(*b*) with the prior approval of the Central Government, any other person, in relation to the affairs of the company, or other body corporate or person, as the case may be, and for that purpose may require any of those persons to appear before him personally:

Provided that in case of an investigation under section 212, the prior approval of Director, Serious Fraud Investigation Office shall be sufficient under clause (*b*).

(5) Notwithstanding anything contained in any other law for the time being in force or in any contract to the contrary, the inspector, being an officer of the Central Government, making an investigation under this Chapter shall have all the powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit in respect of the following matters, namely:—

(*a*) the discovery and production of books of account and other documents, at such place and time as may be specified by such person;

(*b*) summoning and enforcing the attendance of persons and examining them on oath; and

(*c*) inspection of any books, registers and other documents of the company at any place.

(6) (*i*) If any director or officer of the company disobeys the direction issued by the Registrar or the inspector under this section, the director or the officer shall be punishable with imprisonment which may extend to one year and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

(*ii*) If a director or an officer of the company has been convicted of an offence under this section, the director or the officer shall, on and from the date on which he is so convicted, be deemed to have vacated his office as such and on such vacation of office, shall be disqualified from holding an office in any company.

(7) The notes of any examination under sub-section (4) shall be taken down in writing and shall be read over to, or by, and signed by, the person examined, and may thereafter be used in evidence against him.

(8) If any person fails without reasonable cause or refuses—

(*a*) to produce to an inspector or any person authorised by him in this behalf any book or paper which is his duty under sub-section (1) or sub-section (2) to produce;

(*b*) to furnish any information which is his duty under sub-section (2) to furnish;

(c) to appear before the inspector personally when required to do so under sub-section (4) or to answer any question which is put to him by the inspector in pursuance of that sub-section; or

(*d*) to sign the notes of any examination referred to in sub-section (7), he shall be punishable with imprisonment for a term which may extend to six months and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees, and also with a further fine which may extend to two thousand rupees for every day after the first during which the failure or refusal continues.

(9) The officers of the Central Government, State Government, police or statutory authority shall provide assistance to the inspector for the purpose of inspection, inquiry or investigation, which the inspector may, with the prior approval of the Central Government, require.

(10) The Central Government may enter into an agreement with the Government of a foreign State for reciprocal arrangements to assist in any inspection, inquiry or investigation under this Act or under the corresponding law in force in that State and may, by notification, render the application of this Chapter in relation to a foreign State with which reciprocal arrangements have been made subject to such modifications, exceptions, conditions and qualifications as may be deemed expedient for implementing the agreement with that State.

(11) Notwithstanding anything contained in this Act or in the Code of Criminal Procedure, 1973 (2 of 1974) if, in the course of an investigation into the affairs of the company, an application is made to the competent court in India by the inspector stating that evidence is, or may be, available in a country or place outside India, such court may issue a letter of request to a court or an authority in such country or place, competent to deal with such request, to examine orally, or

otherwise, any person, supposed to be acquainted with the facts and circumstances of the case, to record his statement made in the course of such examination and also to require such person or any other person to produce any document or thing, which may be in his possession pertaining to the case, and to forward all the evidence so taken or collected or the authenticated copies thereof or the things so collected to the court in India which had issued such letter of request:

Provided that the letter of request shall be transmitted in such manner as the Central Government may specify in this behalf:

Provided further that every statement recorded or document or thing received under this sub-section shall be deemed to be the evidence collected during the course of investigation.

(12) Upon receipt of a letter of request from a court or an authority in a country or place outside India, competent to issue such letter in that country or place for the examination of any person or production of any document or thing in relation to affairs of a company under investigation in that country or place, the Central Government may, if it thinks fit, forward such letter of request to the court concerned, which shall thereupon summon the person before it and record his statement or cause any document or thing to be produced, or send the letter to any inspector for investigation, who shall thereupon investigate into the affairs of company in the same manner as the affairs of a company are investigated under this Act and the inspector shall submit the report to such court within thirty days or such extended time as the court may allow for further action:

Provided that the evidence taken or collected under this sub-section or authenticated copies thereof or the things so collected shall be forwarded by the court, to the Central Government for transmission, in such manner as the Central Government may deem fit, to the court or the authority in country or place outside India which had issued the letter of request."

Section 219 Power of inspector to conduct investigation into affairs of related companies, etc. - If an inspector appointed under section 210 or section 212 or section 213 to investigate into the affairs of a company considers it necessary for the purposes of the investigation, to investigate also the affairs of—

(*a*) any other body corporate which is, or has at any relevant time been the company's subsidiary company or holding company, or a subsidiary company of its holding

company;

(*b*) any other body corporate which is, or has at any relevant time been managed by any person as managing director or as manager, who is, or was, at the relevant time, the managing director or the manager of the company;

(c) any other body corporate whose Board of Directors comprises nominees of the company or is accustomed to act in accordance with the directions or instructions of the company or any of its directors; or

(*d*) any person who is or has at any relevant time been the company's managing director or manager or employee,

he shall, subject to the prior approval of the Central Government, investigate into and report on the affairs of the other body corporate or of the managing director or manager, in so far as he considers that the results of his investigation are relevant to the investigation of the affairs of the company for which he is appointed."

"Section 229 "Penalty for furnishing false statement, mutilation, destruction of documents-

Where a person who is required to provide an explanation or make a statement during the course of inspection, inquiry or investigation, or an officer or other employee of a company or other body corporate which is also under investigation,

(a) destroys, mutilates or falsifies, or conceals or tampers or unauthorisedly removes, or is a party to the destruction, mutilation or falsification or concealment or tampering or unauthorised removal of, documents relating to the property, assets or affairs of the company or the body corporate;

(b) makes, or is a party to the making of, a false entry in any document concerning the company or body corporate; or

(c) provides an explanation which is false or which he knows to be false, he shall be punishable for fraud in the manner as provided in section 447."

"SECTION 436. OFFENCES TRIABLE BY SPECIAL COURTS. - (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

(*a*) *all offences specified under sub-section (1) of section 435]* shall be triable only by the Special Court established for the area in which the registered office of the company in relation

to which the offence is committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the High Court concerned;

(*b*) where a person accused of, or suspected of the commission of, an offence under this Act is forwarded to a Magistrate under sub-section (2) or sub-section (2A) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate:

Provided that where such Magistrate considers that the detention of such person upon or before the expiry of the period of detention is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;

(c) the Special Court may exercise, in relation to the person forwarded to it under clause (*b*), the same power which a Magistrate having jurisdiction to try a case may exercise under section 167 of the Code of Criminal Procedure, 1973 (2 of 1974) in relation to an accused person who has been forwarded to him under that section; and

(*d*) a Special Court may, upon perusal of the police report of the facts constituting an offence under this Act or upon a complaint in that behalf, take cognizance of that offence without the accused being committed to it for trial.

(2) When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974) be charged at the same trial.

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the Special Court may, if it thinks fit, try in a summary way any offence under this Act which is punishable with imprisonment for a term not exceeding three years:

Provided that in the case of any conviction in a summary trial, no sentence of imprisonment for a term exceeding one year shall be passed:

Provided further that when at the commencement of, or in the

course of, a summary trial, it appears to the Special Court that the nature of the case is such that the sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Special Court shall, after hearing the parties, record an order to that effect and thereafter recall any witnesses who may have been examined and proceed to hear or rehear the case in accordance with the procedure for the regular trial."

"Section 438 of the Companies Act, 2013 : Application of Code to proceedings before Special Court.- Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure 1973 (2 of 1974), shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor."

"Section 446 of the Companies Act, 2013 : Application of fines .- The Court imposing any fine under this Act may direct that the whole or any part thereof shall be applied in or towards payment of the costs of the proceedings, or in or towards the payment of a reward to the person on whose information the proceedings were instituted."

"Section 446-A of the Companies Act, 2013, the Court or the Special Court while deciding the amount of fine or imprisonment under this Act, shall have due regard to the following factors, namely :-

(a) Size of the company ;

(b) nature of business carried on by the company ;

(c) injury to public interest ;

(d) nature of the default ; and

(e) repetition of the default.

"Section 447 of the Companies Act, 2013 : Punishment for fraud .- Without prejudice to any liability including repayment of any debt under this Act or any other law for the time being in force, any person who is found to be guilty of fraud, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud:

> Provided that where the fraud in question involves public interest, the term of imprisonment shall not be less than three years.
>
> Provided further that where the fraud involves an amount less than ten lack rupees or one per cent of the turnover the company, whichever is lower, and does not involve public interest, any person guilty of such fraud shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to twenty lakh rupees or with both."
>
> *Explanation*.- For the purposes of this section -
>
> (i) "fraud" in relation to affairs of a company or any body corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss;
>
> (ii) "wrongful gain" means the gain by unlawful means of property to which the person gaining is not legally entitled;
>
> (iii) "wrongful loss " means the loss by unlawful means of property to which the person losing is legally entitled;"

Referring to the provision of the section 212 the counsel for the petitioner has laid stress on the above-mentioned argument that the Investigating Officer has vast powers to arrest the accused if he had the valid reasons and material with him to justify the arrest. If during the investigation he had the material and he did not find the arrest of the petitioner to be justified then there is no reason for the court to take the petitioner into custody on the basis of the same material which the investigation officer had placed on record before the Court. In effect, the

argument of the counsel is that the same material cannot be interpreted in two different manners, one by the Investigating Officer and the other by the Trial Court. However, this court does not find any substance in this argument as well. The provision regarding arrest of a person during investigation under the new Companies Act is contained in section 212(8). The perusal of this provision shows that under the new Companies Act, the investigating officer does not have unbridled or as much liberal powers to arrest a person, as are available under Cr.P.C. Under the new Companies Act, 2013; before arresting a person, investigating officer is required to have material in his possession and on the basis of that material, is required to record reasons in writing that a person 'has been guilty' of offence punishable under sections, which are mentioned in section 212 (6) of this Act. Therefore despite having the material in his possession justifying the arrest of a person, the investigating officer under the Companies Act may not choose to arrest a person, so as to avoid onerous duty of recording reasons. The section itself confers discretion upon the investigating officer; to arrest or not to arrest an accused. This again; is clear from the fact that the section is using the word 'may' and it is not casting any mandatory duty upon the Investigating Officer to arrest the accused. On the other hand, after the investigation report is filed before the court, which is given a deeming fiction of being a charge-sheet filed under Section 173 of Cr.P.C. under

section 212(15) of the Companies Act, the Special Court would have that entire material before it on the basis of which such a person is sought to be prosecuted. The trial court is under a mandatory duty to appreciate the said material in the manner a judicially trained minds should appreciate, while considering the matter for grant of bail to such an accused. Otherwise also, provision of section 212(6), if read as it is, requires consideration for grant of bail by much higher standards as compared to the standards prescribed for consideration for arrest by the investigating officer. Therefore in a given case, investigating officer may think that despite the availability of the material with him, since the accused has been cooperating during the investigation, therefore, he need not arrest such a person and that this job would be better left to be done by the court. In another given situation, the investigating officer of the case might be even colluding with the accused, and therefore, he may not arrest such an accused despite the availability of material sufficient to arrest such an accused. Hence; the fact that the accused was not arrested by the investigating officer under Section 212(8) during the investigation, does not show either the non-existence of the material sufficient to arrest such an accused nor does such a non-arrest, necessarily, has any reference to any application of mind by the Investigating Officer; to the material available with him; qua the guilt of the accused. Needless to say, that under section 212(8) the investigating officer

of the case is required to consider the material and record reasons only when he decides to arrest a person and not otherwise. But when the matter comes to the court, it becomes otherwise. While considering the question of bail to the accused, who has appeared or been produced before the court, the court would be, necessarily, required to apply its judicial mind before arriving at the conclusion, whether to grant bail to such a person, on merits, or not. Therefore there is a whole lot of difference in the requirements for and actual consideration, quantitatively as well as qualitatively; and in nature and scope thereof, qua the same material, by the investigating officer on the one hand and by the Special Court on the other hand. There can't be any comparison between the two appreciations of the material available on record. The appreciation of the material on record by the court has to be independent of any such appreciation or non-appreciation of the material by the investigating officer. Therefore despite the fact that the investigating officer may have arrested a person during the investigation, the court may grant him the bail during the pendency of the trial; on its appreciation of the evidence filed in the charge-sheet. On the contrary; the trial court may not grant any bail to the accused, on the appreciation of the material placed before it in the form of the charge-sheet, despite the fact that the accused was not arrested by the investigating officer even in the face of the availability of the same material before him. However, whether there is any

material available against the petitioner in this case, is separately argued by the Counsel for the petitioner and, therefore, would be dealt with in the coming paragraph separately.

This Court does not find any force in the other argument of the counsel for the petitioner as well, that since the investigating officer had not obtained prior approval from Central Government for investigating the petitioner or his companies separately, therefore, the investigation qua him is unauthorised and, hence, even the cognizance by the Court taken upon such investigation stands vitiated. To understand this argument one need to read the Chapter XIV of the Companies Act relating to Inspection, Inquiry and Investigation, as a whole. Rather the entire Act has to be gone through. There are lot many provisions in the Companies Act which make various Acts, omissions, non-filing, non-disclosure, not keeping proper records and other defaults and defects qua affairs of a Company as punishable, although with smaller quantum of punishments of imprisonment and/or fine. These provisions are strewn with throughout the body of the Act. To inspect the records of Companies and to investigate these minor offences, the Central Government is to appoint 'Inspectors' of Companies, who shall work as the ordinary Inspectors to investigate the said firms. The investigation, under the Companies Act can be initiated in three different manners and for different reasons, which might come to the knowledge of the Central

Government. If during routine inspection something criminal comes to the knowledge of Inspectors, on that the investigation can be started under Section 208 of the Companies Act. If certain other misconduct or fraud in the affairs of a Company comes to the knowledge of the Central Government, and for the reasons mentioned therein, the Central Government can order investigation under Section 210 of the Companies Act. Still further, if during some proceedings some default or even fraudulent affairs in relation to the conduct of affairs of the company comes to the knowledge of the Company Tribunal then under Section 213, the Tribunal can require the investigation. However, all these investigations, ordered by the Government under Sections 208 or 210 or ordered by the Tribunal under Section 213, are to be conducted by ordinary Inspector of Companies. But 'serious frauds' in relation to affairs of companies have been carved out as separate and distinct category for their investigation and punishment. For investigating serous frauds a separate investigating agency, called 'Serious Fraud Investigation Office' has been provided under Section 211 of the Companies Act. The investigation in serious frauds is to be ordered by Central Government under Section 212 of the Companies Act and is to be carried out by SFIO. This investigation is not to be carried out by ordinary Inspectors of Companies, but is to be carried out by the Director, Additional Director or other Officers of SFIO, authorised by

the Director SFIO. However, the person carrying out the investigation under SFIO is also given a deeming faction of being an 'Inspector' for the purpose of powers of Investigating Officer; defined under Section 217 of the Companies Act. Hence all the Investigating Officers, whether investigating at the instance of Central Government under Section 208 or Section 210 or acting at the instance of Tribunal under Section 213 or acting at the instance of SFIO under Section 212, are to be known as 'Inspector' and are to conduct investigation as per procedure prescribed under Section 217. But Officer of SFIO, authorised to conduct investigation under Section 212; is further bound by the restrictions and prohibitions as prescribed under Section 212 of Companies Act as well. One more fact which comes out is that if an investigation is ordered by the Central Government, whether under Sections 208, 210, 213 or 212, and in the process the affairs of some other subsidiary or controlled company of the company under investigation are also found worth investigation, then even for the investigation of the affairs of subsidiary or controlled company; a separate approval from the Central Government is required and the same is to be granted by the Government, as required under Section 219 of the Companies Act. Again, whether it is the investigation originally initiated under Section 208, 210, 212 or 213 or approved additionally under Section 219, all have to be conducted under the procedure given under Section 217 of Companies Act; additionally

controlled by restrictive provisions of Section 212 for officers of SFIO.

Under Section 217, when an investigation Officer feels the need to join any person or other body corporate in investigation qua the affairs of the company which he is already authorised to investigate, then under Section 217(2) he can seek record from such any other person or body corporate, as he considers relevant for the purpose of his investigation. Under Section 217(4) he can also record the statement on Oath, of the Officers and employees etc of the Company under investigation. Additionally he can also record statement on Oath of any other person or body corporate, which is not directly connected with, or controlled by the Company under investigation. At this stage of investigation, the provisions of Section 217(4) makes a distinction between the ordinary Inspector of Companies, investigating as per the mandate of Sections 208, 210 and 213 on the one hand; and the Officer of SFIO investigating the serious fraud as per the mandate of Section 212 on the other hand. If a statement on Oath is to be recorded, of a person who is officer or employee etc., of the Company under investigation, then Ordinary Inspector and Officer of SFIO, both are authorised to record the same under provision of Section 217(4)(a), being a person already covered by Section 217(1). But if the statement of any other person, who is not the employee or Officer etc. of the Company under investigation, is to be recorded on Oath then under

provisions of Section 217 (4) (b) the ordinary Inspector of Companies shall be required to obtain prior approval from the Central Government. However, if the Officer of the SFIO, investigating the case under approval granted under Section 212 is to record statement on Oath; of a person who is not connected with the management and control of the affairs of the Company under investigation as employee or officer etc., then as per the proviso to Section 217(4)(b) he shall require approval only from the Director SFIO, instead of the Central Govt. This distinction has been made by the statute keeping in view the specialized function of SFIO and nature of the offences; which SFIO is required to investigate. **R**eason for prescribing condition of requiring approval only from Director, SFIO is because, originally, the investigation is entrusted by the Central Government under Section 212 to SFIO only and not to any Inspector. The Inspector is specified, further, only by the SFIO. Hence, being delegate of Director, SFIO, the Inspector requires prior approval only from the Director, SFIO under Section 217(4)(b) proviso. In the present case the approval from the Director SFIO has been obtained by the investigation officer. Therefore, there is nothing wrong with joining the petitioner also qua the investigation of affairs of the Companies of the Adarsh Group. Since, as per the provisions of Section 212 (14), on receipt of investigation report the Central Government can order initiation of prosecution; not only against the officers and employees etc. of the Company under investigation; but also against 'any person' directly or indirectly connected with affairs of the company under investigation as well, therefore, if a person, not otherwise the employee or officer etc. of the Company under investigation, is also found colluding or conspiring in perpetuation of serious fraud; in relation to the affairs of the Company under investigation, then prosecution can be initiated against such person

as well, despite the fact that the affairs of his own company were not directly under investigation for serious fraud in relation to their own affairs. A person can, very well, be prosecuted as a person abetting or as a conspirator or perpetrator of fraud in relation to a company not owned or controlled by him. Hence this Court finds that the investigation, the complaint or the cognizance of the offences against the petitioner are not vitiated in any manner.

At the same time this court does not find any substance in the argument of the learned Counsel for the SFIO has that the twin conditions prescribed under section 212(6) of the New Companies Act, 2013 start with negation of bail to the accused and the court could grant bail to such an accused only if the court records a satisfaction qua the accused being 'not guilty' of the alleged offence and also a satisfaction that if released on bail the accused is not likely to commit any similar offence again. Also this court does not find substance in the insistence of the learned counsel for the SFIO that the application of the twin conditions, as prescribed under Section 212 (6), are mandatory and have to be applied to all the considerations of grant of bail to the accused facing charge covered by section 447 of the New Companies Act. No doubt the statutory language of section 212 (6) has prescribed the twin conditions to be considered by the court, in case the prosecutor raises his objection to the grant of bail, however a similar

language existing in the Prevention of Money Laundering Act, which was *para materia* to the language of the twin conditions contained in section 212(6) of the new Companies Act, had earlier come-up for consideration of the Supreme Courts in case of **Nikesh Tarachand Shah (Supra)** case and such language has already been declared to be *ultra vires* by the Supreme Court in that case. Not only this, even this court had an occasion of considering the nature and scope and the operational functionality of the language of these twin conditions, as contained in the Narcotic Drugs and Psychotropic Substances Act, in case of **Ankush Kumar (supra).** After threadbare analyzing the operational functionality of the language of the twin conditions, as used in the statute, this court had come to conclusion that the language of the twin conditions requires impossibility from the court, besides defying the human logic in its operational functionality. This language, if made operational in a case, even by adopting the semi-cooked concept of 'reading down' the language - and thereby ignoring the celebrated 'Doctrine of Severability' and the touchstone of Articles 14 & 21; both, qua test of constitutional validity, then also it turns on their head some well established principles of criminal jurisprudence as well as, goes in negation of the provisions of Cr.P.C. dealing with the further progress of the trial in a criminal case, besides requiring prophesy from the court, which by no means, is a job of a criminal court. Hence this court had held in case

of **Ankush Kumar(supra**), that since the operational functionality of the language of twin conditions is based upon totally indeterminate criteria which are required for exercise of this power by the court; and also expects the impossible from the court, therefore, the language of these twin conditions is in direct conflict with the rights of an individual guaranteed by Article 14, which protects him from irrationality and arbitrariness in application of law against him, as well, his right to life and liberty protected by Article 21 of the Constitution of India. In case of conflict between the rights guaranteed by the Articles 14 & 21 of the Constitution on one hand and the language in a statute on the other hand, the latter has to give in to the former. This has also been so held by the Supreme Court in another case where the Supreme Court has held that despite prohibition of suspension of sentence under NDPS Act, the Courts can suspend the sentence. Hence it was held by this court that, despite the fact that the constitutional *vires* of the language of the twin conditions might be considered by some other court in some other appropriate proceedings, the state could not be permitted to take the twin conditions as an objection to the grant of the bail to the accused. This court does not find any reason to take a different view now. This judgment of this court was even challenged before the Hon'ble Supreme Court in case of **SLP(Criminal) Diary No. 42609 of 2018, State of Punjab V/s Ankush Kumar @ Sonu**. However, the Hon'ble Supreme

Court had not found any reason to interfere with that judgment of this court; and SLP was, accordingly, dismissed by the Supreme Court. It would not be appropriate to reproduce only some part of that judgment of this court in a mutilated form, lest the essence of the matter should be lost in the process. Rather to truly appreciate the matter of the operational functionality of the twin conditions; the said judgment has to be read as an organic whole. Since the said judgment is reported one, thus, the reasoning given in that judgment can be taken as a supplement to the decision of the present case as well.

Although the learned Counsel for the SFIO has, additionally, referred to the language used in Section 437 of Cr.P.C to argue that a similar language is already used in the said provision of bail; and has also relied upon the judgment of the Supreme Court rendered in **Kartar Singh V/s State of Punjab, 1994 (3) SCC 569**, wherein referring to the language of section 437 Cr.P.C. the *para materia* language of twin conditions used in Terrorist and Disruptive Activities Act was upheld. However, although this court has no competence to comment upon this judgment of the Supreme Court, yet it has to be noted that the same judgment was cited even before the Supreme Court in **Nikesh Tarachand Shah (Supra)** case and the Hon'ble Supreme Court had not found it worth reliance to the extent of being sufficient for upholding the *para-materia* language of twin conditions used in the Prevention of Money Laundering Act. Beyond that; this court

can only observe that any further relevance of this judgment can be assessed only by the Hon'ble Supreme Court in the case which is now stated to be pending before the Supreme Court itself and in which the constitutional validity of twin conditions as prescribed under section 212(6) is directly under challenge. However, so far as the language of section 437 Cr.P.C. is concerned, although in itself that cannot be a ground for pleading constitutional validity of the section 212(6) of the Companies Act, yet otherwise also; that language is drastically different than the language used in section 212(6) of Companies Act. A bare perusal of this section shows that the section 437 Cr.P.C. uses two different phrases, qua satisfaction of the court for releasing an accused on bail, at two drastically different stages of the trial. Section 437(1)(i) is dealing with a stage when an accused appears or brought before the trail court for the first time to start proceedings against him. This provision, for declining bail to such a person; requires the satisfaction and belief of the court that the said person 'has been guilty' of the offence mentioned in that provision. On the other hand Section 437(7) deals with a situation where the trial stands concluded but the decision is not yet pronounced. In this Situation; this provision provides that the accused need not be unnecessarily incarcerated and he can be released on bail if the court has a satisfaction and belief; on the basis of the evidence of the prosecution; that the accused 'is not guilty' of the offence.

Both these provisions are perfectly in tandem with the other provisions of Cr.P.C. relating to the stages and progress of trial, like framing of charge, discharge and acquittal of an accused as per the progress of trial and availability of evidence on record. On the other hand, section 212(6) of the Companies Act requires from the court; at the start of the trial itself; what section 437(7) requires from the court at the end of the trial. Even if, by hook or crook, the court manages to record, while granting bail to an accused, as is required under section 212(6), that the accused 'is not guilty', then it negates the entire process of further trial of that accused. It goes against framing of the charge by the same court and it may require even discharge of such an accused; because by recording a satisfaction that a person 'is not guilty' the court surpasses the level of satisfaction required for framing charge itself; and goes near to recording the satisfaction required for his discharge.

Similarly, holding the twin conditions to be mandatorily followed in all situations for release of an accused on bail; can lead the court to hit against the wall in a given situation. This can be clear from another inconvenient question, which has not been shown by the learned Counsel for the SFIO to have been answered by any court so far, including the Hon'ble Supreme Court. The question is - for how long an accused can be kept in custody on the basis of non-fulfillment of the requirement

prescribed under section 212(6)? This question was specifically referred to Delhi High Court by way of reference by a judicial officer, in case of **Court on its Own Motion (Supra)** case. However, even there the question does not find any answer. Unless this question is categorically answered to say that till the conclusion of the trial such a person cannot be released on bail without satisfying the conditions mentioned in section 212(6), the twin condition cannot be held to be mandatory. This is so because if a person can be released on bail without satisfying the twin conditions of the section 212(6), say, after 3 years, then there is no reason why he cannot be released without complying the said twin condition today itself. But this court has come across the unfortunate situations where a court may not even find the moral courage or the legal sanctity to tell to the accused that he shall have to wait in custody till conclusion of the trial, despite and in face of the legislative policy contained in provisions of section 436A of the Cr.P.C. If an accused is in custody for years together without his fault and without any effective proceedings being conducted against him, this may turn into a totally unfair procedure, which cannot be used to curtail the liberty of an accused in violation of Article 21 of the Constitution of India. And in our system of criminal adjudication these situations are not uncommon. In fact, this court has come across the cases where this court had to order taking the police officers into custody and keeping them in custody till their

examination and cross-examination before the trial court, as prosecution witnesses, was completed, because in those cases only the police persons were the witnesses and they were not appearing before the trial court, for 19 dates in one case and for 41 dates in another case; despite the fact that the accused was in continuous custody or was regularly appearing before the trial court. Such kind of cases does galore. In such a situation the court would do substantial justice; or would stick to the conditions; like the ones prescribed under section 212(6); to deny even the bail to such an accused? Even if the courts are to stick to such condition; then how much injustice to the accused would be sufficient to off-set or to balance with the rigor of the twin condition? This court finds the answer to these inconvenient questions to be in negative and, therefore, constrained to observe that in humble view of this court; the twin conditions mentioned in section 212(6) are not mandatory in their compliance.

Although learned Counsel for the SFIO has submitted that in the case of **Nitin Johari (Supra)** the Hon'ble court has remanded the matter to the Delhi High Court for reconsideration on bail by considering the scope and effect of the twin conditions, as laid down in the section 212(6) of the Companies Act, however, this court finds that; in that case, the Hon'ble Supreme Court has also observed that even if conditions prescribed under section 212(6) are not to be followed, still the criteria meant for bail

in cases of economic offences was required to be considered by the High Court of Delhi. Hence, the primary reason for remand in that case was that the High Court of Delhi had not considered the material on record of the case and had granted bail even without adverting to the factors considered relevant by the Supreme Court for economic offences. Additionally, the Supreme Court had also directed the Delhi High Court to consider the 'scope and effect' of the twin conditions prescribed under section 212(6) of the Companies Act. However, in the present case, as mentioned above, this court has already considered the 'scope and effect' of the operational functionality of the language *para materia* to the one contained in the twin conditions, as prescribed under section 212(6) of the Companies Act and has found in the case of **Ankush Kumar (Supra)** that the languages is in conflict with the right of the accused guaranteed under Article 14 and Article 21 of the Constitution and thus has to give way to the fundamental rights of the accused; qua his consideration for grant of bail. That judgment of this court was even challenged before the Hon'ble Supreme Court in case of **SLP(Criminal) Diary No. 42609 of 2018, State of Punjab V/s Ankush Kumar @ Sonu**. However, the Hon'ble Supreme Court had not found any reason to interfere with that judgment of this court; and SLP was, accordingly, dismissed by the Supreme Court. Hence this court is of the view that bail to the petitioners cannot be denied only on the strength of

insistence by the public prosecutor upon twin conditions, as prescribed under section 212(6) of the Companies Act.

However, this court finds substance in the argument of the learned Counsel for the SFIO that the offences involved in this case are the economic offences and therefore, the factors and the criteria laid down by the Supreme Court for consideration for granting bail in economic offences have to be considered by this court. The said criteria have found elucidation in several judgments of the Supreme Court. Even in case of **Nitin Johari (Supra)** the Supreme Court had emphasized the fact that in case of consideration of bail to the accused in case of economic offences, the factors and criteria mentioned by the Supreme Court in case of **Y.S. Jagan Mohan Reddy (Supra)** are to be followed. Observation of the Hon'ble Supreme Court, as approvingly quoted in the case of **Nitin Johari (Supra)**, are as under:-

> **"34**. Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The 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 posting serious threat to the financial health of the country."
>
> **35**. While granting bail, the court has to keep in mind the

> nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/state and other similar considerations."

Therefore this court is under obligation to consider the nature of offence and the material placed on record before the special court, by way of charge-sheet against the petitioner, for consideration of question of granting bail to petitioner.

To discredit the concept of economic offences being a class apart; learned Counsel for the petitioner has submitted that concept of economic offences constituting a class apart has not been carried forward consistently even by the Supreme Court. He has also submitted that the Supreme Court has granted bail to the accused in cases involving economic offices. Not only this, the Supreme Court has granted bail to such accused even by writing that it was conscious of the fact that the offences involved in those cases were economic offences and that offences would have an adverse effect upon the economy as such. The counsel has relied upon the judgment in case of **Sanjay Chandra (Supra)** and in case of **D. K. Sethi (Supra).** Therefore, it is submitted that applying the concept of economic

offences selectively would tantamount to discrimination in application of law. Hence it is submitted by the Counsel for the petitioner and the distinction between 'economic offences' and the other offences; qua the consideration of bail to the accused; no more holds good. Saying otherwise would give an impression that the courts are adopting a different approach in case of rich and high-ups and a different approach qua ordinary mortals. However, for the purpose of this case this court finds the argument to be not relevant. This court finds that in a case relating to the same offences under the new Companies Act 2013 only, the Supreme Court of India, in case of **Nitin Johari (supra)** has specifically directed the High Court of Delhi to take into consideration the factors which are required to be considered for economic offences; for the purpose of consideration of bail to an accused. This court is under duty to adopt the same approach while considering the question of the bail to the petitioner. Any perceived inconsistency, if any, in the approach and in the judgments of the Supreme Court in this regard, can only be raised before and can be clarified only by the Hon'ble Supreme Court. So far as this court is concerned, it finds a clear-cut guidance in the judgment of the Supreme Court rendered in **Nitin Johari's (supra)** case in this regard. Otherwise also the fact that the offences under the new Companies Act are the 'economic offences' and have to be treated a 'class apart' is clear from the provision of section 446A of the Companies Act

itself. This section creates an extraordinary provision to bind-down the discretion of the Special Court even in the matter of award of punishment to the convict. This section has specifically made the nature, the scale and machinations of the offence and the fraud, size of the Company, Nature of the Business of the Company and the Injury to the Public Interest; to be the guiding factor to grade the quantum of the punishment to be awarded accused by the Court. Hence there is no doubt that the offences under the Companies Act constitute a class apart and these offences are prescribed by the Companies Act itself as to be treated as the serious economic offences.

So far as the seriousness of the offences and the material against the petitioner is concerned, this court finds weight in the arguments of the learned Assistant Solicitor General representing SFIO that there are serious allegations against the petitioner and there is enough material inculpating the petitioner in the offence. As per the allegations the petitioner and his companies have been instrumental in swindling of an amount of about Rs.90Crores out of total swindled amount of Rs.1700Crors (Rs 4140 Crores including interest); which was, allegedly, swindled by the Adarsh Group of Companies through their subsidiaries and co-conspirators. The petitioner or his companies are alleged to have issued fake bills for an amount of space 223.77Crores to the Co-operative Society and to Companies of the Adarsh Group of Companies, for supply of the suit

lengths and some other materials. As per the further allegations the petitioner has been indulging in creating fake bills/invoices since the year 2012. Hence a petitioner is alleged to be a habitual entry-maker, and is alleged to be known as such in his area of operation.

Coming to the material against the petitioner, learned Counsel for the SFIO has pointed out that investigation has led to the seizure and recovery of the material and the data showing that from April 2016 to October 2016 the petitioner is shown to have supplied suit length to Co-operative Society for an amount of Rs.89.23Crores, however, this material has been found not to have actually been supplied by him or his Companies. Although the petitioner is alleged to have shown entries for an amount of Rs.31.90Crores approximately in his balance sheet in this regard, however, even this amount is not found to have been deposited in the bank accounts of the petitioner or his companies. Hence, as per the allegations, these were the paper entries only, to help about 30 companies of the Adarsh Group of Companies to swindle the money of the cash-in-hands; which was the public money. In lieu of this help and conspiracy with the above said companies, the petitioner is alleged to have availed commission of about Rs.22lakhs. The fakeness of the invoices, the Bill and the entries created by the petitioner is alleged to have been duly established by the evidence collected by the investigating officer from the accounts of the Cooperative

Society, maintained on the SAP accounting software, wherein it has been found that most of these entries were actually made within few days after the demonetization of certain currency notes by the Central Government, although these were shown as spread over a long duration during the financial year; by antedating the entries and the bills and the invoices supporting those entries. The fake bills/ invoices were, allegedly, recovered from the Co-operative Society and the perfectly matching and identical copies of said bills and the invoices are alleged to have been recovered from the computer of the petitioner. Still further, the suit lengths were shown to have been supplied/transported to the Cooperative Society through the transporter J. K. Movers. However, when joined into the investigation, the owner of the J. K. Movers is stated to have denied having transported any such material to the Co-operative Society. Still further, some of the bills/invoices were showing that although the said material was arranged by the petitioner or his Companies, but actually the said material was shown to have been supplied by the Company of one Ajay Agrawal. However, the owner of the said company, Ajay Agrawal, has also been joined into the investigation and he has also stated to have made a statement that neither he had ever supplied the said material to the Co-operative Society, nor had he ever authorized the petitioner to issue any bills/invoices behalf of his Companies. Hence the petitioner has, allegedly, been found to be creating

the bills/invoices on behalf of other persons as well, which bills/invoices have been totally denied by the concerned persons. The petitioner himself has also made admission regarding the said entries and the concerned data has, statedly, been taken from his computer in his presence and was also sealed in his presence. All the requisite certificates under section 65-B of the Evidence Act have been duly submitted to the court qua all the electronic records. Hence there is a disclosure statement of the petitioner and also the disclosure statement of the co-accused, which have led to the recoveries. Beside this there are independent witnesses who have deposed against the petitioner. Hence, considering the entire material on record against the petitioner, by any means; it cannot be said that petitioner is not involved in the offences alleged against him.

Although the learned Counsel for the petitioner has submitted that the since the statement of the petitioner was recorded by the investigating officer who has powers akin to the police powers, therefore, the alleged admission by the petitioner has to be treated as a confession, which is not admissible under section 25 of the Evidence Act, however, this court does not find any substance in this argument. The Companies Act 2013 is a special statute. As per the provision contained in section 212(3) the investigation of the offences by the authorities under this Act has to be carried out only as per the provisions of this Act. Still further, under

sections 435, 436 and section 439 the trial of an offender under this Act is to be conducted by the Special Court in accordance with Cr.P.C. and the procedure as modified under this Act. Section 217(7) specifically provides that the statement made by a person before the investigating officer shall be admissible against such person and can be used against him. The Companies Act is a special statute; therefore any provision specifically enacted under this Act shall have overriding effect over any other provision in any other general law, like Cr.P.C. and the Evidence Act, dealing with the same aspect. Otherwise also, to repose confidence in and to provide due protection to the corporate world, unlike the free-hand powers of the police qua arrest, search and seizure, the powers of the investigating officers under the Companies Act are far more controlled and circumscribed by the conditions, restrictions and even the prohibitions under the relevant provisions of the Companies Act. Accordingly, under the Companies Act the investigating officer has also been conferred commensurate sanctity and his work has been conferred more authenticity as compared to that of the ordinary police officers. Therefore, under the provisions of the section 217(4) and section 217(5) Companies Act the investigating Officers has been given the power to record even the statements on oath and to summon person as the civil court does. The statement recorded by an authority having powers to record the statement on oath can never be put at par with

the one recorded by an ordinary police officer. Such a statement recorded by the investigating officer under Companies Act, even if it is of ‘admission’ of certain fact; though could not be taken as sufficient for conviction on its own, however, the same would not be discarded as a ‘confession’ hit by section 25 of the evidence Act. As per the mandate of the section 217(7) of the Companies Act, this can certainly be relied upon as evidence against the petitioner. Therefore, the same can be considered for the purpose of bail as well. For the same reasons, even the statement of a co-accused would be relevant under section 10 of the Evidence Act, and the same can be relied upon under section 30 of the Evidence Act. Although, the question of reliance upon such statement as ‘evidence’ would come-up during the trial only after the same is ‘proved’, however, for the purpose of bail its ‘relevance’ as ‘material’ against the petitioner cannot be excluded at this stage. There is nothing on record that the prosecution shall not prove this statement during the trial or that it would be prohibited from proving the same during the trial. Although in the first blush it can occur to the mind that such provision; which makes the statement made before the investigating officers as admissible in evidence; is in negation of fair trial due to inbuilt possibility of pressure and coercion in making such statement, however, it deserves to be noted that the trial of an accused is only a mean to achieve the end i.e. to do substantial justice. The end-product of the

criminal trial can very well be the total deprivation of the liberty of the accused. Therefore, some element of coercion is bound to creep-in in all the procedures of criminal trial. Although, even the means also have to be such which are not in conflict with the fundamental rights of the accused, however, all kinds of coercion and all the degrees of the same cannot be pleaded to be in conflict with the fundamental rights of the accused. Under the provisions of the section 212 and section 217 of the Companies Act a person, when joined into investigation, is bound to state only the truth. There are punishments and the penalties provided for making incorrect statements or for furnishing wrong information or false records. At the same time, although the investigating officer is bound by several conditions and restriction prescribed under the Companies Act; but at the same time, he has also been conferred the power to record the statement on oath and certain powers of Civil Court for enforcing attendance and seeking documents etc. So whatever coercion is inbuilt in this procedure; is the coercion of law and not of the individual investigating officer. Legal coercion to speak the truth; accompanied by the legal protection against unjust harassment; cannot be branded as unfair process. If at all the individual investigating officers is alleged to have exercised actual coercion as of fact or the pressure in some case, the accused would be at liberty to expose such aspect by getting an opportunity to cross-examine such an investigating officer and by leading

other evidence to this effect. Hence this court finds no ground to discard the statement of the petitioner and his co-accused; even for the purpose of consideration of bail.

There is other independent witness as well against the petitioner who is stated to have made a statement fixing the petitioner in the crime involved in this case. Statement of Ajay Agrawal is also on record of the case in which he has stated that bills which are alleged to have been raised by the petitioner in the name of his Companies were never issued by his Companies, nor had he ever authorized the petitioner to issue these bills. Hence these bills; some of which have even been admitted by the petitioner are shown to be fake. In view of this, the court finds that there is material against the petitioner showing his culpability in the heinous economic crime.

Still further the charge-sheet against the petitioner under section 447 of the Companies Act, which is a serious offence, inviting punishment of imprisonment up to 10 years. Although a Counsel for the petitioner had submitted that the petitioner is not directly involved in embezzlement of the cash-in-hand of the companies of the Adarsh Group, however, the fraud, as defined under the new Companies Act, 2013 does not contemplate any gain by one person and the loss by another person or a company. Participation of the petitioner in the crime of embezzlement of the

money, per se, is sufficient for conviction of the petitioner, if otherwise proved. It is also alleged; that as per the record; the companies had authorized the petitioner to collect cash from 30 companies of the Adarsh Group of Companies. Cash amount is stated to have been received by the petitioner, but is not found to have been deposited in the bank accounts. These facts are alleged to have been confirmed even by the confirmation ledger signed by the petitioner. The participation of the petitioner has duly been reflected as for the record.

Lastly, this court also does not find any substance in the argument of the counsel for the petitioner that since the petitioner had joined investigation, was never arrested by the arresting officer and has never made any effort to run away from the process of the law, therefore there is no material with the prosecution that either the petitioner would influence the witnesses or he shall flee from country if he is released on bail. Although the learned Counsel has heavily relied upon the judgment of Supreme Court in case of **P. Chidambram V/s CBI, 2019 SCC Online SC 1380** to argue that unless there is independent material to show the effort of the accused to flee from country or to influence the witnesses, he should not be denied bail, however, this court finds that even in that case the Hon'ble Supreme Court has observed that no straight-jacket formula can be devised in this regard. Otherwise also, no such universal rule is possible or even

desirable. At the best this argument can be raised when the court had initially granted bail on merits of the case and thereafter the prosecution moves the court for cancellation of such bail. What is meant, essentially, to be a criterion to be used for cancellation of bail, cannot, legitimately, be used for consideration of grant of bail in the first instance. Otherwise also; insisting upon independent material from the investigating officer; to show that the accused is likely to flee from country or to influence the witnesses or to destroy the evidence, is again, asking impossible from him, besides extending a dangerous inbuilt suggestion to him that he should always go beyond his brief of investigation and should try to find out or even to create some evidence or material to ensure that the accused could be denied bail. Unfortunately, if he succeeds in bringing some such material before the court and the court believes the same for denying bail to the accused, would not the same create a totally uncalled for bias against the accused during the trial? Only a mind which thinks of human thought process to be a compartmentalized aspect and in distinct water-tight segments, instead of being a rational and interdependent continual process, can deny this logical conclusion. Conspiracies and the designed intentions; being those aspects of human psychology which are concealed deep within the grey matter; normally do not have easy external direct material to manifest. Even the Social or the political status of a person; or his economic clout; are no more

easy indicators of moral moorings of a person; when it comes to crime, particularly the economic crime. After all, no investigating officer could have any material or anticipation that a Member of Parliament would flee from the country after committing alleged huge economic crime and the country would be forced to contest his extradition proceeding in a foreign land for years together; just to bring him to the justice, or that the business tycoons owning hundreds of companies and business of hundreds of billions of rupees would flee from the country after committing the alleged crime and would even start denying their Indian Citizenship. Although one can say that a few individuals cannot be made example to deny bail in deserving cases, but then, there is no pressing necessity for the courts to create concepts which neither withstands test of logic nor are contemplated by the statutory law. Grant or not to grant bail is discretion of the court. This discretion is better left to be guided by the material on record qua the crime and the attending possible conclusion which can be drawn therefrom than to be pushed to frontiers unchartered for the investigating agency. Therefore in view of this court; the possibility of the petitioner influencing the witnesses, fleeing from the process of the law or destroying the evidence, if at all required to be considered at this stage, has been seen with reference to the material forming part of charge-sheet against him.

In view of the above, this court finds substance in the argument of

the learned Counsel for the SFIO that since, as per the charge-sheet the petitioner is given to manipulations, for earning commissions, therefore, it cannot be denied that by nature, the petitioner could be manipulative. Hence, this court has no reason to believe that if the petitioner is released on bail, he is not likely to influence the witnesses of the case and also not likely to destroy the evidence against him. The past conduct of the petitioner has also not been exemplary. The argument of the learned Counsel for the petitioner that the petitioner had been joining the investigation and was released on interim bail as well; and that during that duration he had not made any attempt to influence the witnesses or to destroy the evidence also does not find favour with this court. Rather; this court finds force in the argument of the counsel for the SFIO that at that time the petitioner was not sure of him being made an accused in the case. Therefore he might not have resorted to that exercise. But now, when the petitioner is fully aware that his alleged crime has been detected, it may not be in the fitness of the things to expect the same straightforward conduct from the petitioner, who is alleged to be manipulative by disposition. Also the argument of the counsel for the SFIO that since the vocation of the petitioner and his Companies is only to commit crimes to earn money, therefore, by any means, it cannot be said that if the petitioner is released on bail, he would not commit any offence again, also finds favor with this court.

In view of the above, this Court does not find any merit in the petition and the same is dismissed.

(RAJBIR SEHRAWAT)
JUDGE

13.11.2019
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Whether speaking / reasoned : Yes No
Whether Reportable : Yes No