

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

Date of decision: 25th October, 2021

IN THE MATTER OF:

+ **BAIL APPLN. 1947/2021 & CRL.M.As. 10935/2021 & 10937/2021**

AWANISH KUMAR MISHRA Petitioner

Through Mr. Dayan Krishnan, Senior Advocate with Mr. Sunil Jain, Mr. Rahul Goel, Mr. M.P.Srivignesh, Mr. Nitish Sharma and Mr. Sajeevi Sheshadri, Advocates

versus

STATE

..... Respondent

Through Ms. Kusum Dhalla, APP for the State Mr. Vijay Kumar Aggarwal, Mr. Mudit Jain, Mr. Hardik Sharma, Mr. Parth Parashar and Mr. Shekhar Pathak and Ms. Barkha Rastogi, Advocates for the complainant.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. The petitioner has filed the instant petition under Section 439 Cr.P.C seeking bail in FIR No.46/2019 registered at Police Station EOW, New Delhi for offences under Sections 406/420/467/468/471/120B of the Indian Penal Code, 1860.

2. Facts, in brief, leading to the present petition as under –:

- a) The instant FIR was registered on the complaint of one Dr. Sanjiv Gemawat who stated that his erstwhile subsidiaries namely OCL India Cements Ltd. and Dalmia Cement East Limited were

interested in making mutual fund investments in May 2017 and for this purpose, they availed the services of the depository NSDL National Securities Depository Ltd. (NSDL) and its participant, Allied Financial Service Private Limited (AFSPL) through which account opening forms were signed and the respective DMAT Accounts bearing client ID No. 1006126 in the name of Dalmia Cement East Ltd on 20.02.2017 and client ID No. 1006129 in the name of OCL India Cements Ltd. on 10.05.2017 were opened.

- b) After the initial investment, several further investments and redemption were made in the said accounts from time to time and the complainant held securities worth Rs. 344.07 Crores in the said account as on 28.12.2018. It is pertinent to note that vide orders dated 01.05.2018, 28.02.2018 and 20.04.2018 passed by the NCLT, OCL and DCEL merged to form DBCL (Dalmia Cement Bharat Ltd.) which then became the owner of the said securities.
- c) On 27.12.2018, the complainant submitted a redemption request to AFSPL and as per the rules and the market practice, the said securities should have been credited by 28.12.2019. However, despite several reminders, the redemption amount was not credited. On 16.01.2019, a fresh request was made. Thereafter, on 17.01.2019, the complainant reported the said matter to the NSDL and the NSDL vide reply dated 25.01.2019 enclosed the transaction statements for the period May 19, 2017 to January 24, 2019 and informed the complainant that there were no securities left in the DMAT Accounts as on the said date of reply.

- d) NSDL vide its reply further mentioned that the said securities were transferred to accounts of AFSPL, its sister companies, namely, Money Mishra Financial Services Ltd, Money Mishra Overseas Private Ltd. and Mr. Awanish Kumar Mishra. Through the clearing member-trading member agreement dated 14.11.2017 entered into between IL&FS and AFSPL, the investment was then transferred to IL&FS as collateral. Thereafter, the securities were offered to NSCCL (National Securities Clearing Corporation Limited) as collateral.
- e) However, the director of AFSPL through his email dated 31.01.2019 again confirmed the complainant's holding in the above DMAT accounts and regretted delay in the processing of redemption request. It assured that the same would be processed by 06.02.2019. As per the allegations, no such redemptions were made as on that date or any time afterwards.
- f) The accused has been arrested as on 16.08.2019 and the chargesheet has been filed as on 11.11.2019.
3. Mr. Dayan Krishnan, learned Senior Counsel appearing for the petitioner, contends that the petitioner herein is the managing director of AFSPL, which is a depository participant, that facilitates derivative trading on the NSDL platform. The mutual fund units were given to the petitioner herein by the complainant in the capacity of a depository participant.
4. Mr. Krishnan contends that the mutual fund units in question were voluntarily transferred by OCL and DCEL to three companies of the petitioner to utilize the dead assets of the company and offer the same as collateral, with a view to avail margin for trading. He contends that the

alleged transactions with the mutual fund units were done on the instructions of Mr. Puneet Dalmia, who is the managing director of the Dalmia Bharat Group of companies/complainant and the officials of Dalmia Bharat group were aware of the use of mutual fund units for the purposes of margin money. To substantiate his contention the learned Senior Counsel for the petitioner relied on the forensic Audit Report dated 14.08.2019, submitted to SEBI, which, at several places, mentioned the fact that the movement of mutual fund units and their use as collateral was known to the Dalmia Bharat Group.

5. The learned Senior Counsel for the petitioner further submits that on examination, the petitioner provided copies of the account opening forms and delivery instruction slips used for the alleged transactions of mutual funds. He states that the said transactions were made with the consent of the complainant in order to share the profits through derivative trading income, which were transferred to the concerned companies of the complainant in advance.

6. The learned Senior Counsel appearing for the petitioner submits that to verify the version of the petitioner, bank statements of the complainant's companies namely, Contribute Technology Pvt Ltd, Glowhome Technology Pvt Ltd, Antordaya Commercial & Holding Pvt Ltd., Vinmay Developers Pvt Ltd and Primarc Projects Pvt Ltd, and that of AFSPL were analyzed and it was found that payments from the petitioner were received by these companies.

7. The learned Senior Counsel further submits that the petitioner was arrested on 16.08.2019 and he is in custody for nearly 16 months now, of which, he has spent nearly 13 months in custody after the chargesheet was

filed. He states that the petitioner was granted interim bail on medical grounds on 13.07.2020 and he surrendered on 21.03.2021 and is still in custody. The learned Senior Counsel appearing for the petitioner submits that the securities were attached under Section 102 of the CrPC after filing of the FIR No. 49/2019. Further, the Supreme Court vide order dated 16.03.2021 in C.A. No. 5395-5398.2019, SEBI v. IL&FS, directed for the release of the mutual fund units in question to the Dalmia Bharat Group. The accused does not have any possession or control over the said mutual fund units.

8. The learned Senior Counsel further contends that bail is the rule and jail is the exception. He states that if the petitioner is made to suffer custody in the present case which is pending trial, then the same shall amount to inflicting punishment, which defeats the presumption of innocence. To support his contention, the learned Senior Counsel placed reliance on the judgment of Dataram Singh v. Union of India (2018) 3 SCC 22. The learned Senior Counsel, relying on Sushila Agarwal v. State (NCT) of Delhi, (2020) 5 SCC 1, further contends that for the purpose of grant of bail, economic offences do not constitute a separate class of offences.

9. The learned Senior Counsel also contends that in terms of Aditya Kumar Bhandari v. SFIO, 2020 SCC Online Del 588, there is no prospect of this trial proceeding further on account of the ongoing covid-19 pandemic. Therefore, if the bail application is dismissed, the accused will remain in custody, unnecessarily, for a prolonged period of time which shall curtail his right to personal liberty under Article 21 of the Constitution of India.

10. The learned Senior Counsel contends that there is no reason for the petitioner to remain in custody as in terms of the settled parameters of bail.

He states that the evidence is primarily documentary in nature and, as per the chargesheet, all the relevant documents are already in the custody of police. He further submits that during investigation, the computer hard drives of the server of the petitioner's company were seized and deposited in the FSL for forensic examination and nothing incriminating was found. He further submits that the mobile phones and hard drives, which were in the possession of the petitioner herein, were seized by the Economic Offences Wing on 19.08.2019 and on 20.08.2019. The learned Senior Counsel for the petitioner also submits that the witnesses are exclusively formal in nature which precludes the possibility of influencing them. He further states that the petitioner has deep roots in the society and is willing to cooperate with the investigating authorities and abide by any conditions imposed by this Court.

11. The learned Senior Counsel further submits that the investigation *qua* the petitioner is complete, for which the petitioner cooperated fully even when he was on interim bail. He states that the continuation of further investigation that is mentioned in the chargesheet is in relation to other potential accused persons and not the petitioner herein. He states that the petitioner does not have any role in the ongoing investigation. He further submits that vide order dated 16.03.2021, the Supreme Court acknowledged that the mere filing of the charge sheet was not the conclusive proof of guilt. He, therefore, states that the petitioner be granted bail.

12. *Per Contra*, Mr. Vijay Kumar Aggarwal, learned counsel appearing for the complainant, vide the forensic audit report dated 14.08.2019, clarified to the court that it had opened a Demat Account, only for the purpose of holding and redemption of mutual funds, and not a trading account for the purpose of any trade or to use the same as a margin. It

neither gave consent, nor did it authorize AFSPL to deal with the mutual fund units in any manner whatsoever. He, therefore, states that the petitioner defaulted in using the said securities for trading derivatives.

13. It was brought to the attention of the court that since the accounts were not trading accounts, the investment was first transferred to the accounts of Money Mishra Financial Services, Money Mishra Overseas Private Ltd. and the petitioner herein and from there it was transferred to IL&FS, as collateral. The learned counsel for the complainant, relying on the FSL report dated 06.09.2019, contends that all sixty-six-delivery instruction slips, through which transactions were initiated from the said accounts, were alleged to be forged and fabricated. He further submits that as per the investigation, securities which were transferred on 13.07.2017 and 17.07.2017 (Instruction Nos. 28818-19 and 28924-26 as reflected in the ledger account of the NSDL) were transferred without any delivery instruction slips. Therefore, there was no authorization on behalf of the complainant for any of the above transfer of securities.

14. The learned counsel for the complainant contends that for the sole purpose of his personal gain, the petitioner herein transferred the securities to its own accounts and those of its related entities and then subsequently offered the same as collateral to IL&FS, without any mandate, consent and knowledge of the complainant. He further submits that the petitioner received a premium of Rs. 380 Crores by using the mutual funds of Rs. 344.07 Crores of the complainant as his own margin money. He, therefore, submits that the petitioner along with other accused persons gained a sum of Rs. 380 crores illegally and wrongfully by causing illegal and wrongful loss to the complainant to the tune of Rs. 344.07 Crores.

15. The learned counsel for the complainant also submits that the five companies mentioned by the petitioner, for which payments were made on behalf of AFSPL, namely, Contribute Technology Pvt. Ltd., Glowhome Technology Pvt Ltd, Antordaya Commercial Holding Pvt Ltd, Vinimay Developers Pvt Ltd and Primarc Projects Pvt Ltd., are distinct from the DMAT Accounts of OCL and DCEL. The said companies are related to one of the directors of the complainant, who did their separate business through separate trading accounts that is maintained with the accused.

16. The learned counsel for the complainant contends that the accused herein fraudulently entered incorrect credentials of the complainant in NSDL's server, contrary to the one provided by the complainant through the Account Opening Forms that were submitted for the purpose of opening the Demat accounts. This was done to prevent the complainant from getting alert messages for any transaction carried out by the accused from the said accounts. The following table, vide status report dated 22.06.2021 mentions the changes that were carried out by the accused.

Changes/fabrication	As per the scanned copy of AOF	As per AOF uploaded
Corresponding address	Dalmiapuram Distt Tiruchirapalli, Tamil Nadu	H. No. 130, Sector- 530, Gautam Budh Nagar
E-Mail	agrawal.bijay@dalmiabh arat.com	uditagri@gmail.com
Regd. M. No.	9999329795	7530920535

	Request for updation	Wrongly updated
Email	agrawal.bijay@dalmiabharat.com	agarwal.bijay@dalmiabharat.com
Regd M. No.	9999329795	9999329975

17. The learned counsel for the complainant contends that the petitioner sent forged and fabricated client master list to the complainant and forged holding statements dated 31.03.2017 and 01.07.2017 with the purpose to give a false picture that correct details of the complainant vide KYC and Account opening forms were uploaded to NSDL's server. He further submits that the petitioner also sent forged and fabricated holding statements of the Complainant's Demat Account in order to give a false assurance to the complainant that its securities are intact. He states that the attached holding statements of the Demat accounts of OCL and DCEL as on 31.12.2018 showed that the mutual funds were intact, however, the holding statement collected from NSDL showed that there were no mutual fund units available in the Demat Accounts of OCL and DCEL.

18. The learned counsel for the complainant also brought to the attention of the court that on 08.02.2019 SEBI was apprised of the matter and vide order dated 02.07.2021, it confirmed the allegations against the accused and held that the accused caused fraudulent and unfair treatment to DECL and OCL. He states that the SEBI restrained AFSPL and the petitioner herein from accessing the securities market or selling or dealing in securities, either directly or indirectly, in any manner whatsoever, for a period of 7 years from the date of the said order. He further submits that SEBI also restrained the petitioner herein from associating with a listed entity, a material subsidiary

of a listed entity or a SEBI registered intermediary in any capacity, either directly or indirectly, in any manner whatsoever, for a period of 7 years from the date of order.

19. The learned counsel for the complainant also submits that on 13.07.2020, the petitioner was granted interim bail vide order dated 13.07.2020 passed by Ld. ASJ-06, East District, Delhi which has been extended on various dates as per the orders passed by the Hon'ble High Court in W.P. (C) 3037/2020 followed by an order dated 29.10.2020 passed by the Hon'ble Supreme Court in SLP (Civil) No, 13021/2020. It was further submitted that vide order dated 12.02.2021 passed by SH. Kuldeep Narayan, Ld. ASJ Karkadooma Court, the petitioner was asked to surrender, however, the petitioner only surrendered on 21.03.2021.

20. The learned counsel for the complainant contends that on several occasions, the bail application of the petitioner has been rejected. The same is summarized as follows :

- *18.12.2019 – Order passed by Sh. Surinder Kumar Ld. ASJ Karkadooma Court, New Delhi.*
- *12.03.2020 – Order passed by the Hon'ble High Court in first regular bail application moved by the accused bearing bail application no. 43/2020 before this Hon'ble Court vide which bail application was dismissed as withdrawn*
- *29.05.2020- Order passed by the Ld. Additional Sessions Judge, East district, Karkadooma Courts, New Delhi,*
- *18.02.2021 – Order passed by Sh. Ritesh Singh, Ld. ASJ, Karkadooma Courts.*
- *08.05.2021 – Order passed by Sh. Ritesh Singh, Ld. ASJ, Karkadooma Courts,*

21. The learned counsel for the complainant further contends that the order of the Supreme Court dated 16.03.2021 does not result in any change of circumstance since, prior to the said order, the securities were already attached under Section 102 of the Code of Criminal Procedure, 1973. The order merely vests the possession of the mutual fund units with the complainant subject to the furnishing of a requisite bank guarantee of an equivalent value as the mutual fund units, to the satisfaction of the Trial Court.

22. The learned counsel for the complainant contends that as mentioned in the charge sheet, in light of serious complications in the matter and the involvement of various authorities, further investigation is still going on to unearth any criminality in the fraudulent transfer of the Mutual Fund units in question. During this crucial stage, if the petitioner is released on bail, then he will attempt to tamper evidence, influence the witnesses and is likely to abscond, thereby, will hinder the entire proceedings.

23. The learned counsel for the complainant contends that the bail application for the petitioner must be dismissed since the petitioner is involved in grave economic offences, for which the punishment is severe, particularly, for Section 409 and 467 of the Indian Penal Code, 1860, which prescribe a period of imprisonment which may extend to life. In order to support his contention, the counsel placed reliance on Religare Finvest Ltd. v. State of NCT Delhi, **Crl (MC) 796/2021** decided on 14.06.2021.

24. The learned counsel relying on YS Jagan Mohan Reddy v. CBI (2013) **7 SCC 439**, State of Gujarat v. Mohanla Jiamalji Porwal, (1987) **2 SCC 364**, Nimmagadda Prasad v. CBI, (2013) **7 SCC 466**, and State of Bihar v. Amita Kumar, (2017) **13 SCC 751**, further contends that since the present matter

involves socio-economic offences, bail should not be granted. Further, the learned counsel of the complainant contends that filing of the charge sheet does not lessen the allegations of the prosecution in any manner, rather, it establishes incriminating evidence against the accused persons which includes the petitioner herein. In order to support his contention, the counsel placed reliance on Virupakshappa Gouda v. State of Karnataka, **AIR 2017 SC 1685**.

25. The learned counsel for the complainant further contends that the petitioner has made various false and frivolous statements before the court on various occasions, for which, an appeal under Section 341 CrPC in CrI M.C. 1911/2021 is already pending before this court.

26. The learned counsel for the complainant also referred to the observations of this Hon'ble court in its judgement dated 1.12.2020 passed in Bail Application No. 1097/2020 titled V. Hansprakash v. State. It was submitted that the role of the accused therein, V. Hansprakash, head of Business Department and Chief Business Strategy Officer of IL&FS is similar to the present petitioner/accused, Mr. Awanish Kumar Mishra. It was further submitted that the above contentions made by Mr. Awanish Kumar Mishra/petitioner before this court have been made before the Hon'ble High Court by Mr. V Hansprakash and the Hon'ble High Court vide its detailed judgement was pleased to reject the same. Therefore, the rejection of the bail application of the co-accused in the said case by the Hon'ble High Court will have to be considered while dealing with the present bail application. He contends that there is no change in circumstances and the petitioner ought not to be granted bail. He further contends that the petitioner is accused of

committing multiple acts of forgery and he is liable to be awarded life sentence on each of the forgeries committed by him.

27. Heard both the parties and perused the material on record.

28. The petitioner is the managing director of AFSPL with whom the complainant opened Demat Accounts on behalf of its group companies namely DCEL bearing client ID 1006126 and OCL bearing client ID 1006129. The allegations against the petitioner were that he, in his capacity as the depository participant, was the custodian of the complainant's securities valued at Rs. 344.07 Crores. However, the petitioner committed gross breach of trust by fraudulently transferring the said securities to his own accounts and accounts of his own companies in order to use them for his personal gain. This was done on the basis of forged and fabricated documents which not only kept the complainants in the dark but also made it seem as if the transactions, which were carried out by the accused, were authorized by the complainant. By utilizing the securities of the complainant as their own, the petitioner, along with the other co-accused, gained Rs. 380 Crores and caused an illegal and wrongful loss to the petitioner to the tune of Rs. 344.07 Crores.

29. Charge-sheet has been filed. It is stated in the charge-sheet that the petitioner is the Director of AFSPL and he is responsible for day to day affairs of the company. It is stated that the petitioner induced the complainant to open Demat accounts of OCL and DCEL with his company and further induced them to transfer their Mutual Fund units in their Demat accounts. It is stated that the petitioner manipulated the credentials namely, correspondence addresses, contact number and e-mail ID, provided in Account Opening forms, and uploaded different credentials with NSDL

system to deprive the complainant in getting transaction alerts. It is further stated that the petitioner sent false and fabricated client master list of the OCL and DCEL to the complainant through e-mail to make him believe that the registered credentials of the companies with the NSDL is correct. It is also stated that the petitioner fraudulently and dishonestly transferred the Mutual Fund units of the complainant in his accounts by using delivery instruction slips bearing forged signatures of authorized signatories. It is further stated that the petitioner also pledged the Mutual Fund units of the complainant with ISSL (clearing member) for getting margin for derivative trading transactions. Thus he misappropriated the mutual fund units of the complainant for his personal use. It is further stated that the petitioner sent false and fabricated holding statements of the OCL and DCEL to the complainant through e-mail to make the complainant to believe that the Mutual Fund units of the complainant are intact.

30. It would be pertinent to note that SEBI vide its order dated 02.07.2021 confirmed the allegations against the accused and passed directions against him. The findings of said order are as follows :

"85.1. From the very start of the relationship with DCEL and OCL, AFSPL laid the groundwork to ensure that details of any transactions in these accounts would not come to the notice of DCEL and OCL. This was done by way of entering incorrect communication details in the DPM system of NSDL so that the CAS and transaction alerts would never reach the clients.

85.2. At the same time, DCEL and OCL were given the impression that their correct communication details are on record. This was done by sending them CMLs, which reflected the communication details given by DCEL and OCL. In fact, these details were

completely different from the details captured In the DPM system of NSDL.

85.3. *AFSPL has sent statement of holdings to DCEL and OCL which do not depict the true status of their holdings. AFSPL has knowingly misrepresented to DCEL and OCL that their units were, available In their accounts as on a particular date, when actually these units were not In these accounts on those dates.*

85.4. *The holding statement, purportedly stamped and signed by NSDL, which was provided by AFSPL to DCEL and OCL at their request, was non-genuine and misleading In nature and did not reflect the true status of the holdings In the accounts of DCEL and OCL.*

85.5. *This conduct of AFSPL in actively concealing the status of the holdings of DCEL and OCL can also be seen In its email dated November 09, 2018, wherein It has confirmed that the holdings of DCEL and OCL are Intact with It, whereas actually these accounts had nil holdings as on that date and had been posted as collateral with the clearing member, ISSL.*

85.6. *Just before quarter end 31/12/2017 and financial year end 31/03/2018, AFSPL ensured that It fraudulently transferred these MF units to the accounts of DCEL and OCL. As explained above, the reason could be to escape scrutiny of independent auditor verification when finalizing financial statements. It is seen that immediately after the quarter and financial year ends, the MF units are again moved out of the accounts. It is noted that without prejudice to the above reason, the conduct of transfer of MF units was to only conceal the true state of affairs i.e., that the MF units were encumbered and that the holdings would be taken away soon again, thereby, making such transfers a fraudulent one on this score.*

85.7. *ASPL has fraudulently misrepresented to NEPL, the status of the MF units in its demat account by sending a non-genuine holding statement, while the*

MF units were actually fraudulently transferred for using as collateral by AFSPL."

31. Vide the same order, SEBI was pleased to pass the following directions against the accused :

"150. In view of the above, I, in exercise of the powers conferred upon me under Sections 11(1), 11(4A), 11B(1) and 11B(2) of the SEBI Act, 1992, and Sections 19(1), 19(2) and 19G of the Depositories Act, 1996, read with Section 19 of the SEBI Act, 1992, hereby issue the following directions:

150.1. AFSPL and Mr. Awanish Kumar Mishra are restrained from accessing the securities market and from buying, selling or dealing in securities, either directly or indirectly, in any manner whatsoever, for a period of seven (07) years from the date of this Order.

150.2. Mr. Awanish Kumar Mishra is restrained from associating with a listed entity, a material subsidiary of a listed entity or a SEBI registered intermediary in any capacity, either directly or Indirectly, in any manner whatsoever, for a period of seven (07) years from the date of this Order.

150.3. Mr. Himanshu Arora Is restrained from accessing the securities market and from buying, selling or dealing in securities, either directly or indirectly, in any manner whatsoever, for a period of three (03) years from the date of this Order.

150.4. Mr. Jitendra Tiwari is restrained from accessing the securities market and from buying, selling or dealing in securities, either directly or indirectly, in any manner

whatsoever, for a period of one (01) year from the date of this Order.

150.5. The following penalty Is levied on the Noticees:

Under Section	AFSPL	Awanish Kumar Mlshra	HImanshu Arora	Jitendra Tiwari
Section 15HA of the SEBI Act, 1992	Rs. 2,00,00,000/- (Rs. Two Crores only)	Rs. 2,00,00,000 /- (Rs. Two Crores only)	Rs. 10,00,000/- (Rs. Ten lakhs only)	Rs. 5,00,000 /- (Rs. Five lakhs only)
Section 15HB of the SEBI Act, 1992	Rs. 50,00,000 /- (Rs. Fifty lakhs only)	Rs. 50,00,000/- (Rs. Fifty lakhs only)	Rs. 2,00,000/- (Rs. Two lakhs only)	Rs. 1,00,000 /- (Rs. One lakh only)
Section 19G of the Depositories Act, 1996	Rs. 50,00,000 /- (Rs. Fifty lakhs only)	Rs. 50,00,000/- (Rs. Fifty lakhs only)	Rs. 2,00,000/- (Rs. Two lakhs only)	Rs. 1,00,000 /- (Rs. One lakh only)
Total	Rs. 3,00,00,000/- (Rs. Three Crores only)	Rs. 3,00,00,000 /- (Rs. Three Crores only)	Rs. 14,00,000/- (Rs. Fourteen lakhs only)	Rs. 7,00,000 /- (Rs. Seven lakhs only)

151. Needless to say that in view of the prohibition on sale of securities, during the period of restraint, the existing holding. Including units of mutual funds, of ail the Noticees shall remain frozen.

152. The penalty shall be paid by the Noticees within a period of forty-five (45) days, from the date of receipt of this order. Payment can be made online by following the below path at SEBI website www.sebi.gov.in

ENFORCEMENT > Orders > Orders of Chairman/Members > Click on PAY NOW or at [https://siportal.sebi.gov.in/intermediary/AOPayment Gateway.html](https://siportal.sebi.gov.in/intermediary/AOPaymentGateway.html) and selecting Type of Category as 11B orders.

153. The Order shall come Into force with Immediate effect.

154. If there Is a failure to pay the penalty, as mentioned above, SEBI may recover the amount from the Notlcee as per applicable law."

32. It is pertinent to mention that the co-accused, V. Hansprakash, had approached this Court for grant of bail by filing BAIL APPLN. 1097/2020. This Court *vide* order dated 01.12.2020 held that V. Hansprakash was in a fiduciary capacity and has allegedly committed gross breach of trust in relation thereto in alleged connivance with other co-accused persons of an alleged amount of Rs.344.07 crores. This Court further held that the complainant is a public limited company, and that the members of the public have consequently also been allegedly defrauded of the amount of Rs.344.07 crores by alleged fraudulent use of mutual funds units of the complainant of Rs.344.07 crores by the accused persons inclusive of the applicant therein by *inter alia* creating 350 shell companies. This Court also relied on the investigation conducted by the SEBI and referred to the audit report filed by Grand Thornton Forensic. The said report, in great detail, lays down the method adopted by the AFSPL and IL & FS to use the Mutual Fund units

given by the complainant to the AFSPL. The Audit Report submitted by the Grand Thornton Forensic indicates that the petitioner herein and V. Hansprakash had changed the data which was sent to the Exchange as well as to the Bank and sent the data to the Exchange without reducing the collaterals value in violation of the Exchange Rules and there was a fraudulent transfer of Mutual Fund units. This Court denied bail to the co-accused, V. Hansprakash, after taking into account the quantum of the economic fraud and held that the economic offence committed by the accused affects the moral fabric of the society.

33. In Prasanta Kumar Sarkar v. Ashis Chatterjee, (2010) 14 SCC 496, the Supreme Court has laid down the parameters for granting or refusing bail which are as under :

- i. whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;*
- ii. nature and gravity of the accusation;*
- iii. severity of the punishment in the event of conviction;*
- iv. Danger of the accused absconding or fleeing, if released on bail;*
- v. character, behavior, means, position and standing of the accused;*
- vi. Likelihood of the offence being repeated;*
- vii. Reasonable apprehension of the witnesses being influenced; and*
- viii. Danger, of course, of justice being thwarted by grant of bail.”*

34. Undoubtedly, the petitioner is accused of an economic offence of about Rs.344 Crores. The charge-sheet has been filed on 11.11.2019. The charge-sheet details out the role of the petitioner. The SEBI appointed a Forensic Auditor to look into the aspect. Its report has been submitted and

the SEBI has held the petitioner guilty of various acts which are in violation of various statutes of the SEBI Act. The SEBI has also restrained the petitioner and his company, AFSPL, from accessing the securities market and from buying, selling or dealing in securities, either directly or indirectly, in any manner whatsoever, for a period of seven (07) years. SEBI has also restrained the petitioner from associating with a listed entity, a material subsidiary of a listed entity or a SEBI registered intermediary in any capacity, either directly or indirectly, in any manner whatsoever, for a period of seven (07) years.

35. The short question which arises for consideration is whether the petitioner, who is alleged of committing an offence involving about Rs.344 Crores, is entitled to bail or not ?

36. The Supreme Court in Sanjay Chandra v. CBI, (2012) 1 SCC 40, has observed as under :

"21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases,

"necessity" is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.

23. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson.

24. In the instant case, we have already noticed that the "pointing finger of accusation" against the appellants is "the seriousness of the charge". The offences alleged are economic offences which have resulted in loss to the State exchequer. Though, they contend that there is a possibility of the appellants tampering with the witnesses, they have not placed any material in support of the allegation. In our view, seriousness of the charge is, no doubt, one of the relevant considerations while considering bail applications but that is not the only test or the factor : the other factor that also requires to be taken note of is the punishment that could be imposed after trial and conviction, both under the Penal Code and the Prevention of Corruption Act. Otherwise, if the former is the only test, we would not be balancing the constitutional rights but rather "recalibrating the scales of justice".

25. The provisions of CrPC confer discretionary jurisdiction on criminal courts to grant bail to the

accused pending trial or in appeal against convictions; since the jurisdiction is discretionary, it has to be exercised with great care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. In our view, the reasoning adopted by the learned District Judge, which is affirmed by the High Court, in our opinion, is a denial of the whole basis of our system of law and normal rule of bail system. It transcends respect for the requirement that a man shall be considered innocent until he is found guilty. If such power is recognised, then it may lead to chaotic situation and would jeopardise the personal liberty of an individual."

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 allay the apprehension expressed by CBI."

37. A perusal of the abovementioned judgment indicates that the magnitude of the offence cannot be the only criterion for denying bail. The object of bail is to secure the presence of the accused at the Trial. The object of bail is neither punitive nor preventative and the person who has not been convicted should be held in custody pending Trial only to ensure his attendance at Trial; and to ensure that the evidence is not tampered with and

the witnesses are not threatened. If there is no apprehension of interference in administration of justice in a criminal trial by an accused then a person should not be deprived of his liberty. Only a vague belief that he will tamper with evidence cannot be a ground to deprive a person of his liberty.

38. It is pertinent to note that the Hon'ble Supreme Court vide order dated 16.03.2021 has transferred the securities in favor of the complainant, on the basis of a bank guarantee. The Apex Court has observed as under:-

"We agree with Respondent No.1 to the extent that mere filing of a charge-sheet would not constitute a material change in circumstances showing mala fide on part of ISSL. The same is not conclusive proof of guilt. Indeed, we find it imperative to note that we do not wish to express any opinion on the merits of the allegations made by the parties against each other at this stage."

39. The order of the Supreme Court has been passed after the dismissal of the bail application of V. Hansprakash in BAIL APPLN No.1097/2020 on 24.11.2020. By its order dated 16.03.2021 after being made aware filing of the charge sheet, the Apex Court has held that mere filing of the charge sheet does not constitute material change in circumstances showing *mala fide* on the part of the IL&FS. The same logic would also apply to the AFSPL. In addition to this, SEBI vide order dated 02.07.2021 has restrained the accused from accessing and dealing in the securities market and associating with entities or registered intermediaries therein, for a period of seven years from the date of the order. This order has also been passed after the dismissal of the BAIL APPLN No.1097/2020 of V. Hansprakash. There is, therefore, change in circumstances after the dismissal of BAIL APPLN 1097/2020 inasmuch as the securities have been handed over to the complainant and

SEBI has restrained the petitioner from accessing securities market and the petitioner cannot commit the same offence again.

40. Gravity of the offence cannot be the sole ground to deny bail to the accused. The investigation against the accused has been completed and the charge sheet has been filed as on 11.11.2019. The further investigation that is being carried out is with respect to other authorities and the accused has no role to play therein. The evidences are documentary in nature and all the relevant documents are within the custody of the prosecution. Therefore, there is no likelihood of tampering of evidence. In light of the orders dated 16.03.2021 and 02.07.2021, the hands of the accused have virtually been tied. Moreover, the accused herein has deep roots in the society and has agreed to cooperate with the conditions of bail.

41. In view of the law laid down in Sanjay Chandra (supra), this court is inclined to grant bail, subject to the following conditions :

- a) The Petitioner shall furnish a personal bond in the sum of ₹5,00,000/- with two sureties of the like amount, who should be the relatives of the petitioner, to the satisfaction of the Trial Court/Duty Magistrate.
- b) The petitioner shall deposit his Passport with the Court.
- c) It is stated in the Memo of Parties that the petitioner resides at Flat No.1807, Mahagun Maple, Sector – 50, Noida, U.P. The petitioner is directed to reside at the same address till further orders and if there is any change in the address, the petitioner is directed to intimate the same to the IO.
- d) The petitioner is directed not to leave the Delhi NCR without the

permission of the Court.

- e) The Petitioner is directed to give all his mobile numbers to the Investigating Officer and keep them operational at all times.
- f) The Petitioner shall not, directly or indirectly, tamper with evidence or try to influence the witnesses.
- g) Violation of any of these conditions will result in the cancellation of the bail given to the Petitioner.

42. It is made clear that the observations made in this Order are only for the purpose of grant of bail and cannot be taken into consideration during the trial.

43. Accordingly, the bail application is disposed of along with the pending application(s), if any.

OCTOBER 25, 2021
Rahul

SUBRAMONIUM PRASAD, J

नात्यमेव जयते