Before Deepak Sibal, J.

PARKASH GURBAXANI AND ORS.—*Petitioner*

versus

THE DIRECTORATE OF ENFORCEMENT THROUGH ASSISTANT DIRECTOR AND ORS.—*Respondents*

CRM-M No.12901 of 2021

June 02, 2021

Criminal Procedure Code, 1973—S.439— Prevention of Money Laundering Act, Ss. 3,4, 45—Haryana Development and Regulation of Urban Areas, 1975, S.10—Indian Penal Code, 1860— S. 420— Offences of Money Laundering— Regular Bail— Twin conditions for grant of bail— Held, twin conditions for grant of bail liable to be ignored based on Nikesh Tarachand Shah vs. Union of India and another (2018) 11SCC 1 and bail petitions are required to be considered under S. 439 Cr.P.C., 1973.

Held that when there is no bar of twin conditions contained in original Section 45(1)(ii) of the PMLA Act, the present application has to be considered and decided under Section 439 of the Code of Criminal Procedure with or without conditions.

(Para 20)

Vinod Ghai, Senior Advocate with
Keshav Pratap Singh, Advocate,
Kanika Ahuja, Advocate,
Kirti Ahuja, Advocate and
Edward Augustine George, Advocate,
for the petitionerin CRM-M-12901 of 2021.

Manav Gupta, Advocate,
Abhinav Sood, Advocate,
Sahil Garg, Advocate,
Esha Dutta, Advocate,
for the petitioner in CRM-M-12459-2021.

S.V.Raju, Additional Solicitor General of India with
Nitesh Rana, Advocate,
Zoheb Hossain, Advocate,
Shobit Phutela, Advocate,

Shaurya Rai, Advocate,

Guntur Pramod, Advocate,
Anshuman Singh, Advocate and
Agni Sen, Advocate,
for the respondent.

DEEPAK SIBAL, J.

(1) This order shall dispose of two petitions being CRM-M-12901of 2021 – Parkash Gurbaxani vs. The Directorate of Enforcement and CRM M-12459-2021 – Ashok Solomon vs. Assistant Director, Directorate of Enforcement both of which have been filed for the grant of regular bail in case bearing No.ECIR/01/HIU/2019 dated 25.01.2019 registered under Sections 3 and 4 of the Prevention of Money Laundering Act, 2002 (for short – the PMLA), arising out of FIR No.291 dated 13.12.2018 registered under Section 10 of the Haryana Development and Regulation of Urban Areas Act, 1975 (for short – the 1975 Act) and Section 420 IPC at Police Station Bajghera, District Gurugram.

(2) Briefly stated, the case of the prosecution is that on 31.03.2007, Chintels India Limited (for short – Chintels), which owned 149.093 acres of land in Gurugram, applied to the Director, Town andCountry Planning, Haryana (for short – DTCP) for the grant of a licence under the 1975 Act for developing a residential colony. Thereafter, on 28.03.2008, Chintels and QVC Realty Company Limited (for short – QVC), the assignors of the aforesaid land, entered into an agreement with Sobha Limited (for short – Sobha) for developing the aforesaid land on a salable area sharing basis and in support of the aforesaid application for the grant of licence, filed such agreement before the DTCP. On favourable consideration of the application, on 22.11.2008, Chintels and DTCP entered into an agreement on the basis of which a licence bearing No.190/2008dated 24.11.2008 was issued in favour of Chintels. As per the relevant term of the agreement, on which the licence was based, Chintels was required to reserve 25% of the developed residential plots on a 'No Profit No Loss' (for short – NPNL) basis. It was further agreed between the parties that 75% of the NPNL plots would be allotted to registered applicants through a draw of lots (if so required) and the remaining 25% would be allotted to Non Resident Indians against Foreign Exchange; land owners whose land had been purchased by Chintels for setting up the colony; plots falling in small pockets which subsequently are acquired by the colonizers as part of an area already developed as a colony by Chintels

and to such persons whom Chintels may like at its discretion (provided that such allotment did not exceed 5% of the total number of NPNL plots).

(3) Two other licences bearing Nos.58/2013 and 79/2014 for 3.947 acres and 13.375 acres respectively, which also contained similar terms with regard to reserving and allotting NPNL plots, were also obtained by Chintels.

(4) On the strength of the licences obtained by Chintels and the collaboration/ development agreements between Chintels, Sobha and QVC, the land, which was covered under the licences and was situated in Sectors 106, 108 and 109, Gurugram, was started to be developed as a residential colony under the name of 'International City'.

(5) On 10.12.2018 the DTCP wrote to the Station House Officer, Police Station village Bajghera, District Gurugram through which the police was informed that as per the agreement/ terms of the licence Chintels was required to reserve and allot 249 NPNL plots. However, it had been found that only 84 NPNL plots had been allotted and out of these 84 plots, 55 had been allotted by Sobha to Limited Liability Partnerships (for short – LLPs) created by Sobha itself. Thus, by allotting the NPNL plots to virtually itself,Sobha, Chintels and QVC had conspired to commit fraud as also had violated the terms of the licence/ agreement. Therefore, the police was requested to take penal action against Chintels, Sobha, QVC and the LLPs under Section 10 of the 1975 Act.

(6) On the basis of the above complaint FIR No.291 under Section 420 IPC and Section 10 of the 1975 Act was registered at Police Station Bajghera, District Gurugram and after going through the aforesaid FIR, since the Enforcement Directorate (for short – ED) believed that an offence for laundering of money had also been committed, on 25.01.2019, the ED lodged Enforcement Case Information Report No.ECIR/01/HIU/2019 (for short – ECIR) under Sections 3 and 4 of the PMLA and started its own investigations.

(7) Investigations conducted by the Haryana Police in the FIR lodged by them revealed that the accused therein were guilty of breach ofthe terms of the agreement/ licence but had not committed any offenceunder Section 420 IPC. Accordingly, the Haryana Police filed a report under Section 173 Cr.P.C. seeking therein to prosecute the accused only under Section 10 of the 1975 Act.

(8) Since the accused in the FIR lodged by the Haryana police

wereno longer being prosecuted under Section 420 IPC, which was the only scheduled offence under the PMLA of which the petitioners were accusedof, Chintels knocked the doors of the Delhi High Court through WP (CRL) 979-2020 - M/s Chintels India Limited vs. Union of India seeking therein quashing of the ECIR. Such petition was disposed of on 07.08.2020 with a direction that since at that stage the impugned ECIR was sans any scheduled offence under the PMLA the same be treated as closed. However, liberty was granted to the ED to revive the ECIR in case on the filing of a supplementary charge sheet and/ or framing of a charge against the accused they are sought to be prosecuted for any scheduled offence(s) under the PMLA.

(9) On 20.08.2020 the Haryana Police filed a supplementary charge sheet under Section 173(8) Cr.P.C. through which it was inter-alia alleged that qua licences Nos. 58/2013 and 79/2014 Chintels had not obtained any permission from the DTCP for change in beneficiary interest/ joint development rights and since for seeking such permission a fee was required to be paid, which remained unpaid, financial loss had been caused to the government resulting in playing of fraud with the public as also the State of Haryana. Accordingly, in addition to Section 10 of the 1975 Act, the accused were also sought to be prosecuted under Section 420 IPC. On the happening of such an event, in terms of the liberty granted by the Delhi High Court, the ED revived the ECIR and again commenced their investigations culminating in the filing of a complaint under Sections 44 and 45 of the PMLA against Chintels, QVC and the petitioners, who are Managing Directors of QVC and Chintels respectively, seeking therein their prosecution under Sections 3 and 4 of the PMLA. In the said complaint it was inter-alia alleged that under licence No.190/2008 212 NPNL plots had been sanctioned by the DTCP in the lay out plan but Sobha, Chintels and QVC allotted only 93 such plots and out of these 93 plots Sobha had allotted 59 of them to LLPs created by Sobha. The purpose of formation of LLPs by Sobha was to fraudulently retain ownership of the NPNL plots with itself with a further dishonest intention to show on paper that these plots had been allotted to different parties, as NPNL plots, at the rates determined by the DTCP. Sobha then constructed Villas on these 59 plots to sell them at rates at par with Villas sold under the General Category. So far as Chintels and QVC were concerned, they were alleged to have got constructed Villas on 18 and 16 NPNL plots respectively through Sobha andthen having sold these Villas at rates which were equal to or even higher than the

rates of the Villas sold under the general category and in this manner they had generated over Rs.50 crores and Rs.60 crores respectively. When the purchaser of such Villas came to Chintels and QVC for documentation, such purchaser was first asked to sign a document which would show that at an earlier point of time he/ she had been allotted a NPNL plot at the rate determined by the DTCP and that thereafter he/ she had sought construction of a Villa thereupon through Sobha. After the purchaser had been made to sign such document(s) the petitioners then incorporated in the sale/ conveyance deed the price of the land at the rate so determined by the DTCP and correspondingly inflated the cost of the construction to reach at the final sale price which was equivalent to or even higher than the price of Villas sold under the general category.

(10) During the search operations conducted by the ED on the premises of Sobha, Chintels and QVC several incriminating documents are alleged to have been found which include documents showing payment of over Rs.220 crores by Sobha to Chintels/ QVC including Rs.120 crores (approximately) as non-refundable deposit paid by Sobha to Chintels/ QVC much before the issuance of the licence.

(11) It has been contended on behalf of the petitioners that they have been falsely implicated in this case; the petitioners are in custody since 16.02.2021; both of the petitioners have already been questioned by the ED on over ten occasions and during such questioning they have duly cooperated with the investigating agency; since in the case in hand investigation is complete and even the supplementary report under Section 173(8) Cr.P.C. / complaint under Sections 44 and 45 of the PMLA has been filed the petitioners are neither needed by the prosecution for investigation purposes nor are they in any position to influence the investigation; the entire case of the prosecution is based on documents which have already been seized in the course of several raids conducted by the ED on the premises of both the petitioners; properties of both the petitioners for over Rs.50 crores and Rs.60 crores respectively have already been siezed by the ED; the ECIR itself is illegal as the only scheduled offence under the PMLA on which the ECIR rests i.e. Section 420 IPC, is not made out because the allegations to attract applicability of Section 420 IPC are based on an alleged breach of the terms of the agreement/ licence between Chintels and DTCP which breach is exclusively covered under Section 10 of the 1975 Act; even in the initial complaint filed by the DTCP, which became thebasis for lodging of the FIR by the Haryana Police, the only

allegation contained therein was that the accused had breached the terms of theagreement/ licence and therefore they be proceeded against under Section 10 of the 1975 Act; contravention of Section 10 of the 1975 Act is bailableas it entails a punishment for imprisonment which may extend to three years along with fine; in the supplementary charge sheet filed by the Haryana police the petitioners are sought to be prosecuted under Section 420 IPConly on the ground that qua licence Nos. 58/2013 and 79/2014 Chintels had not obtained prior permission from the DTCP for change in beneficiary interest/ joint development rights which had caused financial loss to the government which permission has since been taken; for the delay in taking such permission the applicable administrative charges, in terms of the order of the DTCP dated 01.04.2016, have already been deposited by Chintelsand thus there was no wrongful loss caused by the petitioners to any person/ authority; there is no complainant, including the DTCP, who/ which even alleges that the petitioners have played any fraud; the prayer made by theED seeking police remand has been repeatedly rejected by the Trial Court and that in any case violation of the terms of the agreement/ licence with regard to selling of NPNL plots at a rate higher than the rates so determined by the DTCP is compoundable under Section 3(7) of the 1975 Act at thetime of completion of the project which stage is yet to reach.

(12) The petitioners, who are both senior citizens, aged 61 and 75 years respectively, further seek bail in view of the emergent situation being faced in the country due to rising cases under the Covid-19 pandemic. In addition petitioner in CRM-M-12459-2021 claims to be suffering from heart ailments and his wife from cancer.

(13) Learned Additional Solicitor General of India sought dismissal of the present petitions and submitted that since he was opposing the grant of bail to the petitioners, in terms of the twin conditions prescribed in Section 45 of the PMLA, this Court could grant bail to the petitioners only after recording a satisfaction that there were reasonable grounds for believing that the petitioners were not guilty of the alleged offences and that while on bail they were not likely to commit any offence; though in ***Nikesh Tarachand Shah*** versus ***Union of India and another***[1] Section 45(1) of the PMLA, as it then stood, had been declared unconstitutional by the Supreme Court but the defect pointed out by the Supreme Court which formed the

[1] (2018) 11 SCC 1

basis to declare Section 45(1) to be unconstitutional had since been cured by the Legislature through its Act No.13 of 2018 which came into force from 19.04.2018; as per Act No.13 of 2018 the offending expression "punishable for a term of an imprisonment of more than three years under Part A of the Schedule" has been substituted with "under this Act"; in view of the afore amendment the twin conditions prescribed under Section 45(1) of the PMLA stood revived; the amended Section 45(1) of the PMLA has not been challenged by the petitioners and therefore the petitioners as also this Court was bound by the aforesaid twin conditions prescribed therein; in terms of the law laid down by the Supreme Court in ***Nagaland Senior Government Employees Welfare Association and others*** versus ***State of Nagaland and others***[2] a statute is deemed tobe constitutionally valid till struck down by a competent Court; in ***Molar Mal (dead) through L.Rs.*** versus ***M/s. Kay Iron Works (Pvt.) Ltd***[3] the Supreme Court had held that where the constitutional validity of a provision was not under challenge such provision would bind the Court; in ***Ashutosh Gupta*** versus ***State of Rajasthan***[4] the Supreme Court has opined that where the challenge is made to a statutory provision allegations in the petition should be specific, clear and unambiguous andthat there is a presumption in favour of the constitutionality of an enactment with the burden upon the person who attacks the provision to show that the same is unconstitutional; the Delhi High Court in ***Upendra Rai*** versus ***Enforcement Directorate***[5] **and** ***Dr. Shivinder Mohan Singh*** versus ***Directorate of Enforcement***[6] held that Act 13 of 2018 would not revive or resurrect the twin conditions for grant of bail contained in Section 45(1) of the PMLA and on challenge before the Supreme Court such orders passed by the Delhi High Court have been stayed.

(14) Responding to the plea raised on behalf of the petitioners that Section 420 IPC was not attracted to the present case, the learned ASG contended that in the supplementary charge sheet filed by the State police the petitioners are sought to be prosecuted under Section 420 IPC; such charge sheet has not been challenged by the petitioners; in any case, the petitioners have acted dishonestly and

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[2] (2010) 7 SCC 643
[3] (2000) 4 SCC 285
[4] (2002) 4 SCC 34
[5] (2019) SCC Online Delhi 9086
[6] 2020 SCC Online Del 766

fraudulently by not abiding by the terms of the contract between Chintels and the DTCP as they did not reserve NPNL plots for allocation; rather, the petitioners got constructed Villas on the NPNL plots and sold these Villas at the same or higher rates than the Villas sold under the general category; at the time of execution of the conveyance deed in favour of the purchaser of the Villas built on NPNL plots the petitioners made the purchaser to sign documents to show that he had, on an earlier point of time, been allotted a NPNL plot and after such allotment he had wanted such plot to be developed by the developer of the choice of the petitioners; thereafter, in the conveyance deed the petitioners wrote in the column pertaining to the sale price of the land the price so determined by the DTCP for the NPNL plots and to adjust the lower price of the land for such plot inflated the cost of construction; no person on the general public could benefit with regard to the allotments to be made under the NPNL category; all this was due to the fraudulent acts of the petitioners as also their greed; while joining investigation the petitioners have always been evasive/ non-cooperative and that since the petitioners are having deep pockets, if they released on bail, they are likely to influence the course of their trial. With regard to applicability of Section 420 IPC to the facts of the present case the learned ASG relied on the following observations of the Supreme Court in ***Tulsi Ram etc.*** versus ***State of Uttar Pradesh***[7]

> "17. But, in an offence under Section 420 IPC a pecuniary question necessarily arises. The first part of Section 464 IPC provides that a person is said to make a false document who dishonestly or fraudulently makes, signs etc., a document with a particular intention and covers cases both of acts which are dishonest and acts which are fraudulent. Where no pecuniary question arises the element of dishonesty need not be established and it would be sufficient to establish that the act was fraudulent and, therefore, it may be, as the learned judge has held, that where an act is fraudulent the intention to cause injury to the person defrauded must be established. But where the allegation is that a person has dishonestly induced another to part with property something different has to be considered and that is whether he has thereby caused a

[7] AIR 1963 SC 666

wrongful loss tothe person who parted with property or has made a wrongful gain to himself. These are the two facets of the definition of dishonesty and it is enough to establish the existence of one of them. The law does not require that both should be established."

(15) The PMLA, as enacted by the Parliament in the year 2002, contained Section 45(1) which read as under:-

"**Section 45. Offences to be cognizable and non-bailable**.—

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule shall be released on bail or on his own bond unless—

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

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:

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

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

(i) the Director; or any officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government by a general or special order made in this behalf by that Government."

(16) The afore quoted provision imposed two conditions before bail could be granted to a person accused of an offence punishable for a term of imprisonment for more than three years under Part A of the Schedule attached to the PMLA. These conditions were that before grant of bail the Public Prosecutor was required to be given an opportunity to oppose the plea for bail and that where the Public Prosecutor opposed such plea the Court could order release of the

accused on bail only after recording a satisfaction that there were reasonable grounds for believing that the person to be released was not guilty of the offence he was accused of and that while on bail he was not likely to commit any offence.

(17) The constitutional validity of the afore quoted provision imposing the twin conditions for grant of bail was questioned before the Supreme Court in ***Nikesh Tarachand Shah's*** case (supra) and the Supreme Court, after holding that the prescribed twin conditions for release on bail were violative of Articles 14 and 21 of the Constitution of India declared Section 45(1) of the PMLA, to that extent, to be unconstitutional. The operative part of judgment of the Supreme Court is as follows:-

> "54. Regard being had to the above, we declare Section 45(1) of the Prevention of Money Laundering Act, 2002, insofar as it imposes two further conditions for release on bail, to be unconstitutional as it violates Articles 14 and 21 of the Constitution of India. All the matters before us in which bail has been denied, because of the presence of the twin conditions contained in Section 45, will now go back to the respective Courts which denied bail. All such orders are set aside, and the cases remanded to the respective Courts to be heard on merits, without application of the twin conditions contained in Section 45 of the 2002 Act. Considering that persons are languishing in jail and that personal liberty is involved, all these matters are to be taken up at the earliest by the respective Courts for fresh decision. The writ petitions and the appeals are disposed of accordingly."

(18) By Act 13 of 2018 Section 45(1) of the PMLA was sought to beamended w.e.f. 19.04.2018. Through such amendment the words "punishable for a term of imprisonment of more than three years under Part A of the Schedule" as occurring in Section 45(1) before the judgment of the Supreme Court in ***Nikesh Tarachand Shah's*** case (supra) were substituted with the words "under this Act". As per learned ASG, after such amendment, the defect on the basis of which the Supreme Court had declared Section 45(1) of the PMLA to be unconstitutional was cured and consequently the twin conditions prescribed in Section 45(1) stood revived.

(19) The declaration by the Supreme Court in ***Nikesh***

Tarachand Shah's case (supra) would render the twin conditions prescribed in Section 45(1) of the PMLA for release of an accused on bail to be void in toto; such conditions have to be disregarded of any legal force from its inception; they cease to be law; the same are rendered inoperative and that they are to be regarded as if they had never been enacted. That being so, the twin conditions for grant of bail under Section 45(1) of the PMLA as are now sought to be pressed into service by the ED cannot be considered to have revived or resurrected only on the prospective substitution of the words "punishable for a term of imprisonment of more than three years under Part A of the Schedule" with the words "under this Act" especially without there being any amendment with regard to the twin conditions for grant of bail which had specifically been declared to be unconstitutional as also in the absence of any validating law in this regard with retrospective effect.

(20) Through an order dated 06.06.2018 passed by the Bombay High Court in Bail Application No.286 of 2018 ***Sameer M. Bhujbal*** versus ***Assistant Director Directorate of Enforcement and another***, a similar objection raised on behalf of the ED was considered and repelled throughthe following observations:-

> "9. It is to be noted here that, after effecting amendment to Section 45(1) of the PMLA Act the words "under this Act" are added to Sub Section(1) of Section 45 of the PMLA Act. However, the original Section 45(1)(ii) has not been revived or resurrected by the said Amending Act. The learned counsel appearing for the applicant and the learned Additional Solicitor General of India are not disputing about the said fact situation and in fact have conceded to the same. It is further to be noted here that, even Notification dated 29.3.2018 thereby amending Section 45(1) of the PMLA Act which came into effect from 19.4.2018, is silent about its retrospectiveapplicability.
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> In view thereof, the contention advanced by the learned A.S.G. cannot be accepted. It is to be further noted here that, the original Sub-section 45(1)(ii) has therefore neither revived nor resurrected by the Amending Act and therefore, as of today there is no rigor of said two further conditions under original Section 45(1)(ii) of PMLA Act for releasing the accused on bail under the said Act.
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> 10. In view of the above, when there is no bar of twin

conditions contained in original Section 45(1)(ii) of the PMLA Act, the present application has to be considered and decided under Section 439 of the Code of Criminal Procedure with or without conditions. **Sameer M. Bhujbal's** case (supra) was considered and followed by the Bombay High Court in its judgment dated 25.03.2020 rendered in Bail Application No.1322 of 2020 – Deepak Virendra Kochhar vs. Directorate of Enforcement and another. The relevant observations in this regard are as follows:-

38. The question is the provision which was held constitutional by Apex Court in the case of Nikesh Shah (supra) stands revived in view of Amendment as stated above to Section 45 of the Act. This Court in the case of Sameer Bhujbal (supra) has turned down the submission of respondents therein that Government has brought an amendment to Finance Act, 2018 which has come into effect from 19.04.2018 to Section 45(1) of PMLA thereby inserting words "under this Act" in Section 45 (1) of the Act. In view of amendment, the original sub- Section (ii) of Section 45(1) which imposes the said twin conditions automatically stands revived and the said condition therefore remain on statute book. The original Section 45(1) (ii) has to be inferred and treated as it still exists on the statute book and holds the field even as of today for deciding application forbail by an accused under PMLA. It was further argued that by inserting words "under this Act", the Judgment delivered by Supreme Court in Nikesh Shah (supra) has become in effective. The Court held that the Apex Court in Nikesh Shah (supra) has declared Section 45(1) of PMLA in so far as it imposes two further conditions for release on bail to be unconstitutional as it violates Articles 14 and 21 of Constitution of India. After effecting amendment to Section 45 (1) of PMLA. The words "under this Act" are added to sub- Section (1) of Section 45 of PMLA. However, the original Section 45(1) (ii) has not been revived or resurrected by Amending Act. Even notification dated 29.03.2018 amending Section 45(1) of PMLA which came into effect from 19.04.2018 is silent about its retrospective applicability. Hence,

> contention of respondent cannot be accepted. The Original sub-Section 45 (1) (ii) has neither revived nor resurrected by amending Act and therefore there is no rigour of twin conditions. This decision is still in the field. Although it is contended that, the decision has been challenged before Apex Court, it has not been set aside nor there is stay on the decision."

(21) To the same effect are the following observations by the Delhi High Court in ***Sai Chandrasekhar*** versus ***Directorate of Enforcement***[8]**:**

> "17. Twin conditions mentioned in Section 45 of the PML Act continue to be struck down as being unconstitutional in view of the judgment of the Apex Court in the case of Nikesh Tarachand Shah vs. Union of India (2018) 11 SCC 1. Theamendment in Section 45 by the Finance Act 2018 is only with respect to substituting the term 'offence punishable for 3 years' with 'offence under this Act'. The said amendment does not revive the twin conditions already struck down by the aforesaid judgment.
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> 18. Since the twin conditions for bail in section 45 of the PML Act have been struck down by the Hon'ble Supreme Court and the same are neither revived nor resurrected by the Amending Act therefore, as of today there is no rigor of said two conditions under original Section 45(l)(ii) of the PML Act for releasing the Petitioner on bail. The provisions of Section 439 of Cr.P.C and the conditions therein will only apply in the case of the Petitioner for grant of bail."

(22) This issue has also been dealt in a similar manner by the Madhya Pradesh High Court in *M.Cr.C. No.34201/2018* - ***Dr.Vinod Bhandari*** versus ***Assistant Director, Directorate of Enforcement,*** decided on 29.08.2018 and the High Court of Patna in Criminal Miscellaneous No.41413 of 2019 – ***Ahilya Devi*** versus ***The State of Bihar and others***, decided on 28.05.2020.

(23) In view of the above discussion as also the reasoning given in the afore referred judgments by different High Courts, operation of none of which has been stayed by the Supreme Court and

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[8] 2021SCC Online Delhi 1081

with which this Court concurs, this Court has no hesitation to hold that as on date the twin conditions for grant of bail, as sought to be pressed by the learned ASG, are liable to be ignored and that the present petitions are required to be considered under Section 439 Cr.P.C.

(24) Learned counsel appearing for the petitioners contended that Section 420 IPC was not attracted to the facts of the present case whereas the learned ASG argued otherwise. Lengthy and elaborate submissions of both the sides on this issue have been referred to in detail in the earlier partof this judgment.

(25) In the supplementary charge sheet filed by the Haryana Policein FIR No.291 dated 13.12.2018 registered under Section 10 of the 1975 Act and Section 420 IPC at Police Station Bajghera, District Gurugram the petitioners are sought to be prosecuted both under Section 420 IPC as also Section 10 of the 1975 Act. The complaint filed by the ED also contains specific allegations with regard to the petitioners having played fraud and acting dishonestly. There is no challenge by the petitioners to either the supplementary charge sheet filed by the Haryana Police or the complaint filed by the ED. Therefore, the weighty claims/ counter claims raised by both sides, which contain elaborate reference to documents and applicable law on the subject, with regard to the applicability of Section 420 IPC to the present proceedings are better left to be considered on a specific challenge, if any, to be made in this regard or by the Trial Court at the appropriatestage. In the facts of the present case, at this stage, this Court is not inclined to hold a mini trial on this crucial aspect especially when such consideration and any finding thereupon may prejudice either party's right to a fair trial.

(26) After considering the entire matter with the seriousness that it deserves and in particular that investigations in the case are complete since a report under Section 173 Cr.P.C. as also a supplementary report under Section 173(8) Cr.P.C. by the Haryana Police and a complaint under Sections 44/ 45 of the PMLA by the ED have already been filed; both the petitioners have been in custody since 16.02.2021; all the relevant documents on the basis of which the prosecution seeks to prosecute the petitioners already stand seized in the course of 16 raids conducted by theED on different premises of the petitioners; the petitioner in CRM-M- 12901-2021 has joined the investigation 11 times whereas the petitioner in CRM-M-12459-2021 has joined the investigation on 13 occasions; properties of both the

petitioners, to the extent of the alleged money laundered by them, already stands attached; both the petitioners are senior citizens aged 61 and 75 years respectively with presently there being an emergent situation in this country due to spike in infected cases under Covid-19 warranting decongestion of prisons and that the petitioner in CRM-M-12459-2021 got placed two stents in the clogged arteries of his heart in the year 2008 and till date is going for regular follow ups, this Court is of the considered opinion that, subject to the satisfaction of the Trial Court/ Illaqa Magistrate/ Duty Magistrate, Gurugram which shall include deposit of the petitioners' Passports and furnishing of heavy local sureties, the petitioners be released on regular bail.

(27) It is clarified that the above observations have been made only for the limited purpose of deciding the present petitions for regular bail and the same would not be construed to be an expression of opinion on the merits of the case.

(28) A photocopy of this order be placed on the file of the other connected case.

Ritambhra Rishi