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3-Judge Bench 2019 Dec. 4

(2020) 13 Supreme Court Cases 791

(BEFORE R. BANUMATHI, A.S. BOPANNA AND HRISHIKESH ROY, JJ.)

P. CHIDAMBARAM .. Appellant;

Versus

DIRECTORATE OF ENFORCEMENT .. Respondent.

Criminal Appeal No. 1831 of 2019†, decided on December 4, 2019

A. **Criminal Procedure Code, 1973 — S. 439 — Bail in economic offences involving corruption and abuse of high public office (of Union Finance Minister in present case) — When can be given — Held, it is not a rule that bail (with appropriate conditions) cannot be granted in case of such offences — It would depend upon facts of each case — Considerations for grant of bail in present case — Appellant directed to be released on bail subject to executing bail bonds for sum of Rs 2 lakhs with two sureties of like sum produced to satisfaction of Special Judge — Other conditions — Petitioner shall not leave country, shall make himself available for interrogation, shall not tamper with evidence, shall not attempt to intimidate or influence witnesses and shall not give any press interviews nor make any public comment in connection with this case qua him and other co-accused**

— It is not a rule that bail should be denied in case of economic offences — Basic jurisprudence relating to bail is that bail is the rule and refusal is the exception — A presumably innocent person must have freedom to enable him to establish his case — He must have opportunity of seeking fair trial — Though gravity of offence is an important factor and economic offences as in present case are considered grave, considerations for grant of bail would depend upon facts of each case — On facts, appellant entitled to bail in present case (Paras 18 to 23)

— Considerations why appellant entitled to bail — Appellant not named in FIR — Anticipatory bail earlier declined and appellant was available for custodial interrogation for more than 45 days — One co-accused granted bail — Another co-accused enjoying interim protection from arrest — Appellant aged about 74 yrs already suffered two bouts of illness during incarceration, put on antibiotics and advised to take steroids of maximum strength — Appellant not a "flight risk" and no possibility of his tampering with evidence or influencing/intimidating witnesses — Therefore, availability of appellant for further investigation, interrogation and facing trial is not jeopardised — Observations herein, should not be construed as opinion expressed on merits (Paras 28 to 30)

† Arising out of SLP (Crl.) No. 10493 of 2019. Arising from the Judgment and Order in *P. Chidambaram* v. *Directorate of Enforcement*, 2019 SCC OnLine Del 11129 (Delhi High Court, Bail Application No. 2718 of 2019, dt. 15-11-2019)

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— Plea with regard to tampering and influencing witnesses not tenable — Appellant not in political power — Appellant not holding any government post — Appellant would thus not be able to interfere collection of further material by investigation — With regard to a witness having written that he is not prepared to be confronted as he is from the same State, appellant cannot be held responsible for the same when there is no material to indicate that the appellant or anyone on his behalf had restrained or threatened witness concerned who refused to be confronted with appellant in custody — Public Accountability, Vigilance and Prevention of Corruption — Prevention of Corruption Act, 1988 — Ss. 8 and 13(2) r/w S. 13(1)(d) — Penal Code, 1860, S. 120-B r/w S. 420 (Para 17)

B. **Criminal Procedure Code, 1973 — S. 439 — Bail — Approach of High Court disapproved — Observations of High Court are in nature of finding relating to alleged offence — Findings recorded by High Court based on materials relating to investigation in sealed cover are not justified — But since High Court perused materials and arrived at certain conclusions and since order is under challenge, it is imperative in present proceedings to open sealed cover and peruse documents**

— High Court relied on allegations that son of appellant opened shell companies and purchased benami properties in name of relatives at various places in different countries — There is no need to advert to documents any further since ultimately, these are allegations which would have to be established in trial wherein accused/co-accused would have opportunity of putting forth their case, if any, and an ultimate conclusion would be reached — Hence, finding recorded by High Court based on material in sealed cover is not justified (Paras 24 to 28)

C. **Criminal Procedure Code, 1973 — S. 439 — Bail — Factors and considerations, reiterated — No hard-and-fast rule — Each case has to be considered on its facts and circumstances — Court has to exercise jurisdiction judiciously and not in an arbitrary manner — Principles to be followed while examining facts of each case (Para 16)**

D. **Criminal Procedure Code, 1973 — Ss. 439 and 438 — Principles for grant of anticipatory bail that can be relied on for grant of regular bail (Paras 20 and 21)**

The appellant was the Finance Minister of the Central Government. Allegedly in violation of norms and law, foreign investments were approved by the Central Government which benefited companies in which the son of the appellant had substantial interest. An FIR was lodged in respect of alleged economic offences but the appellant was not named in FIR. Said FIR was registered by CBI under Section 120-B r/w Section 420 IPC and Sections 8 and 13(2) r/w Section 13(1)(*d*) of the PC Act against some known and unknown suspects. The anticipatory bail had been declined earlier and the appellant was available for custodial interrogation for more than 45 days. The High Court by the impugned judgment rejected the regular bail application under Section 439 CrPC.

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Allowing the bail application of the appellant, subject to conditions, the Supreme Court

Held :

Regular bail — Factors and considerations

In the instant appeal the consideration is limited to the aspect of rejection of regular bail sought by the appellant under Section 439 CrPC. (Para 16)

The jurisdiction to grant bail has to be exercised on the basis of the well-settled principles having regard to the facts and circumstances of each case. The following factors are to be taken into consideration while considering an application for bail: (*i*) the nature of accusation and the severity of the punishment in the case of conviction and the nature of materials relied upon by the prosecution; (*ii*) reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant or the witnesses; (*iii*) reasonable possibility of securing the presence of the accused at the time of trial or the likelihood of his abscondence; (*iv*) character, behaviour and standing of the accused and the circumstances which are peculiar to the accused; (*v*) larger interest of the public or the State and similar other considerations. There is no hard-and-fast rule regarding grant or refusal to grant bail. Each case has to be considered on the facts and circumstances of each case and on its own merits. The discretion of the court has to be exercised judiciously and not in an arbitrary manner. (Paras 16, 20 and 21)

P. Chidambaram v. *CBI*, (2020) 13 SCC 337; *Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465; *Sanjay Chandra* v. *CBI*, (2012) 1 SCC 40 : (2012) 1 SCC (Cri) 26 : (2012) 2 SCC (L&S) 397, *relied on*

P. Chidambaram v. *Directorate of Enforcement*, 2019 SCC OnLine Del 11129, *reversed*

State of Bihar v. *Amit Kumar*, (2017) 13 SCC 751 : (2017) 4 SCC (Cri) 771; *Nimmagadda Prasad* v. *CBI*, (2013) 7 SCC 466 : (2013) 3 SCC (Cri) 575; *CBI* v. *Ramendu Chattopadhyay*, 2019 SCC OnLine SC 1491; *Serious Fraud Investigation Office* v. *Nittin Johari*, (2019) 9 SCC 165 : (2019) 3 SCC (Cri) 706; *Y.S. Jagan Mohan Reddy* v. *CBI*, (2013) 7 SCC 439 : (2013) 3 SCC (Cri) 552; *State of Gujarat* v. *Mohanlal Jitamalji Porwal*, (1987) 2 SCC 364 : 1987 SCC (Cri) 364; *P. Chidambaram* v. *Directorate of Enforcement*, (2019) 9 SCC 24 : (2019) 3 SCC (Cri) 509; *P. Chidambaram* v. *CBI*, 2019 SCC OnLine Del 9703 : (2019) 263 DLT 218; *Rohit Tandon* v. *Directorate of Enforcement*, (2018) 11 SCC 46 : (2018) 2 SCC (Cri) 339, *referred to*

Prahlad Singh Bhati v. *State (NCT of Delhi)*, (2001) 4 SCC 280 : 2001 SCC (Cri) 674; *Nagendra Nath Chakravarti, In re*, 1923 SCC OnLine Cal 318 : AIR 1924 Cal 476 : 1924 Cri LJ 732; *Emperor* v. *Joglekar*, 1931 SCC OnLine All 60 : AIR 1931 All 504 : 1932 Cri LJ 94; *Emperor* v. *H.L. Hutchinson*, 1931 SCC OnLine All 14 : AIR 1931 All 356 : 1931 Cri LJ 1271, *cited*

SS-D/63405/SR

Advocates who appeared in this case :

Kapil Sibal and Abhishek Manu Singhvi, Senior Advocates (Arshdeep Singh Khurana, Kunal Vajani, Amit Bhandari, Hitesh Rai, Akshat Gupta, Ayush Agarwal, Aman Brar, Savya Baweja and Jayant Mohan, Advocate), for the Appellant;

Tushar Mehta, Solicitor General, K.M. Nataraj, Additional Solicitor General and Ms Sonia Mathur, Senior Advocate (Amit Mahajan, Rajat Nair, Kanu Agrawal, Shantanu Sharma, Bhuvan Kapoor, Sushil Kumar Dubey, Ms Divya Nair, Puneet Pathak, Anuj Aggarwal and B. Krishna Prasad, Advocates), for the Respondent.

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1. (2020) 13 SCC 337, *P. Chidambaram* v. *CBI* 798*g*, 799*b-c*, 801*d*
2. (2019) 9 SCC 165 : (2019) 3 SCC (Cri) 706, *Serious Fraud Investigation Office* v. *Nittin Johari* 802*g*
3. (2019) 9 SCC 24 : (2019) 3 SCC (Cri) 509, *P. Chidambaram* v. *Directorate of Enforcement* 796*a*, 805*f-g*
4. 2019 SCC OnLine Del 11129, *P. Chidambaram* v. *Directorate of Enforcement* **(reversed)** 794*f*, 797*g*, 802*a*, 807*e-f*
5. 2019 SCC OnLine Del 9703 : (2019) 263 DLT 218, *P. Chidambaram* v. *CBI* 795*h*, 805*f-g*
6. 2019 SCC OnLine SC 1491, *CBI* v. *Ramendu Chattopadhyay* 802*f-g*
7. (2018) 11 SCC 46 : (2018) 2 SCC (Cri) 339, *Rohit Tandon* v. *Directorate of Enforcement* 798*e-f*
8. (2017) 13 SCC 751 : (2017) 4 SCC (Cri) 771, *State of Bihar* v. *Amit Kumar* 802*f-g*
9. (2013) 7 SCC 466 : (2013) 3 SCC (Cri) 575, *Nimmagadda Prasad* v. *CBI* 802*f-g*
10. (2013) 7 SCC 439 : (2013) 3 SCC (Cri) 552, *Y.S. Jagan Mohan Reddy* v. *CBI* 802*g*
11. (2012) 1 SCC 40 : (2012) 1 SCC (Cri) 26 : (2012) 2 SCC (L&S) 397, *Sanjay Chandra* v. *CBI* 799*d*, 804*b-c*
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17. 1923 SCC OnLine Cal 318 : AIR 1924 Cal 476 : 1924 Cri LJ 732, *Nagendra Nath Chakravarti, In re* 803*c*

The Judgment of the Court was delivered by

A.S. Bopanna, J.— Leave granted. The instant appeal has been filed by the appellant assailing the final order dated 15-11-2019 passed by the High Court of Delhi at New Delhi in *P. Chidambaram* v. *Directorate of Enforcement*[1] whereby the High Court declined to grant regular bail to the appellant.

2. The genesis of the case in question lies in FIR No. RC2202017-E0011 dated 15-5-2017, registered by CBI under Section 120-B r/w Section 420 IPC and Sections 8 and 13(2) r/w Section 13(1)(*d*) of the PC Act against some known and unknown suspects with allegations that M/s INX Media (P) Ltd. (Accused 1 in the FIR) sought approval of Foreign Investment Promotion Board (FIPB) for permission to issue by way of preferential allotment, certain equity and convertible, non-cumulative, redeemable preference shares for engaging in the business of creating, operating, managing and broadcasting of bouquet of television channels. The company had also sought approval to make a downstream financial investment to the extent of 26% of the issued and outstanding equity share capital of M/s INX News (P) Ltd. (Accused 2). FIPB

1 2019 SCC OnLine Del 11129

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Board recommended the proposal of INX Media for consideration and approval of the Finance Minister. However, the Board did not approve the downstream investment by INX Media (P) Ltd. in INX News (P) Ltd. Further, in the press release dated 30-5-2007 issued by FIPB unit indicating details of proposals approved in FIPB meeting, quantum of FDI/NRI inflow against M/s INX media was shown as Rs 4.62 crores. Contrary to the approval of FIPB, M/s INX Media (P) Ltd. deliberately and in violation of conditions of approval, made a downstream investment to the extent of 26% capital of INX News and also generated more than Rs 305 crores FDI in INX Media (P) Ltd. against the approved foreign inflow of Rs 4.62 crores is the allegation.

3. A complaint is stated to have been received by the investigation wing of the Income Tax Department which sought clarifications from FIPB unit of the Ministry of Finance. FIPB unit vide letter dated 26-5-2008, sought clarifications from M/s INX Media Ltd. It was further alleged in the FIR that upon receipt of this letter, M/s INX Media in order to avoid punitive action entered into criminal conspiracy with Mr Karti Chidambaram (Accused 3 in the FIR who is the son of the appellant). Mr Karti Chidambaram is alleged to have exercised his influence over the officials of FIPB unit which led to the said officials showing undue favour to M/s INX News (P) Ltd. Thereafter by deliberately concealing the investment received in INX Media (P) Ltd., M/s INX News (P) Ltd. again approached FIPB unit and sought permission for the downstream investment. This proposal was favourably considered by the officials of the Ministry of Finance and approved by the then Finance Minister. It was also stated in the FIR that Mr Karti Chidambaram, in lieu of services rendered to M/s INX Group, received consideration in the form of payments. Information disclosed that invoices for approximately Rs 3.5 crores were got raised in favour of M/s INX Group in the name of companies in which Mr Karti Chidambaram was having sustainable interests either directly or indirectly. The appellant herein, who was the then Union Finance Minister, was not however named in the said FIR.

4. On the basis of the aforementioned FIR, the respondent Directorate of Enforcement registered Case No. ECIR/07/HIU/2017 (hereinafter referred to as "the ECIR case") under Section 3 of the Prevention of Money Laundering Act, 2002 (hereinafter "PMLA"), punishable under Section 4 of the said Act against the accused mentioned in the FIR. The allegations in the said ECIR case were the same as those in the aforementioned FIR. The appellant was not named an accused in this case as well.

5. On 23-7-2018, apprehending his arrest by the respondent, the appellant filed an application before the High Court of Delhi seeking grant of anticipatory bail in the aforementioned ECIR case. The High Court extended interim protection to the appellant until 20-8-2019, when the appellant's application seeking anticipatory bail was dismissed[2].

2 *P. Chidambaram* v. *CBI*, 2019 SCC OnLine Del 9703 : (2019) 263 DLT 218

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6. The appellant then approached this Court by filing Criminal Appeal No. 1340 of 2019 [arising out of SLP (Crl.) No. 7523 of 2019] wherein while dismissing the appeal of the appellant, the Court concluded[3] that in the instant case, grant of anticipatory bail to the appellant will hamper the investigation and that this is not a fit case for exercise of discretion to grant anticipatory bail. This Court applied the following rationale for coming to the said conclusion: there are sufficient safeguards enshrined in the PMLA to ensure proper exercise of power of arrest; grant of anticipatory bail is not to be done as a matter of rule, especially in matters of economic offences which constitute a class apart. Regard must be had to the fact that grant of anticipatory bail at the stage of investigation may frustrate the investigating agency in interrogating the accused and in collecting useful information and also materials which might have been concealed.

7. In the meanwhile, on 21-8-2019, the appellant was arrested in CBI case (arising out of the abovementioned FIR). Since then he has been in custody. In the ECIR case, he was arrested on 16-10-2019 on the grounds that payment of approximately Rs 3 crores was made at the appellant's instance to the companies controlled by his son on account of FIPB work done for INX Group. Further it was stated in the grounds of arrest that the investigation is not fruitful due to the appellant's non-cooperation; the appellant has withheld relevant information which is within his exclusive knowledge and thus his custodial interrogation is necessary.

8. After dismissal of his application seeking anticipatory bail by this Court, the appellant moved an application dated 5-9-2019 praying to surrender before the trial court [Court of Special Judge (PC Act), CBI] in the ECIR case. This application was rejected on 13-9-2019 in view of the submission on behalf of the respondent Directorate that it was not willing to arrest the appellant at that particular stage since it was completing investigation pertaining to some aspect of the money laundering and only on this background investigation was completed, the interrogation of the appellant would be meaningful. Thereafter, on 11-10-2019, the respondent Directorate moved an application under Section 267 CrPC seeking issuance of production warrant against the appellant for the purpose of arrest and remand. The allegations which were levelled against the appellant in this application are that in lieu of granting FIPB approval to INX Media (P) Ltd., he and his son received a sum of approximately Rs 3 crores through companies controlled by the son of the appellant-accused Karti P. Chidambaram. Though INX Media in its application did not mention the total amount of FDI inflow which they intended to bring, the appellant without ascertaining their competency, granted approval. Further the appellant became fully aware about the violations made by INX Group when the matter was highlighted by the Income Tax Department and a complaint was also received by him regarding the investment by M/s INX Media into M/s INX News without due approval. Despite this knowledge, the appellant again approved the downstream proposal of INX Group treating it as a fresh approval. Further investigation has revealed that

3 *P. Chidambaram* v. *Directorate of Enforcement*, (2019) 9 SCC 24 : (2019) 3 SCC (Cri) 509

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there were at least 17 overseas bank accounts opened by the appellant and co-conspirators. In this regard, summons was issued to 11 persons and statements of some of these persons revealed that the overseas assets were acquired in the name of various shell companies on the instructions of the appellant's son. Thus, it was stated that a need arises to confront the appellant with the material gathered. This application was allowed by the trial court vide order dated 11-10-2019. Thereafter on 14-10-2019, the respondent inter alia moved an application seeking permission to arrest the appellant. The trial court treated this application as an application for interrogation of the appellant and allowed it. Subsequently, on 16-10-2019, the appellant was arrested for the grounds stated supra. Vide order dated 17-10-2019, the trial court remanded the appellant to the custody of the respondent for a period of 7 days.

9. After his arrest, on 23-10-2019, the appellant moved a regular bail application (Bail Application No. 2718 of 2019) before the High Court under Section 439 CrPC averring that he is a law-abiding citizen having deep roots in the society; he is not a flight risk and is willing to abide by all conditions as may be imposed by the court while granting bail. It was also submitted that the instant case is a documentary case and being a respectable citizen and former Union Minister, he cannot and will not tamper with the documentary record of the instant case which is currently in the safe and secure possession of the incumbent Government or the trial court. On merits, it was stated by the appellant that he merely accorded approval to the unanimous recommendation made by FIPB which was chaired by the Secretary, Economic Affairs and included 5 other Secretaries who were all among the seniormost IAS officers (one among them was a senior IFS officer) and had a long and distinguished record of service. Anyone familiar with the working of FIPB would know that no single officer can take a decision on any proposal. Therefore, it is preposterous to allege that any person could have influenced any official of FIPB, including all 6 senior Secretaries to the Government of India. Moreover, the ECIR case is a verbatim copy of the FIR dated 15-5-2017 and allegations registered therein and thus the Special Judge erred in granting remand of the appellant in the ECIR case since the offences allegedly committed in both the cases arise out of the same occurrence and have been committed in the course of the same transaction. Further, the Special Court committed an error in not accepting the surrender application of the appellant which was an application limited to surrendering before the trial court. The Special Court proceeded on an erroneous basis that the desire of an accused is contingent upon the desire of the investigating agency to arrest the accused and that arrest is a condition precedent for surrendering before the Court.

10. Vide the impugned order, the High Court observed[1] that it has not even been alleged by the respondent Enforcement Directorate in its counter-affidavit that the appellant is a flight risk. Regarding tampering of evidence also the Court observed that it is neither argued nor any material is available on record in this regard. Moreover, there is no chance to tamper the material on

1 *P. Chidambaram* v. *Directorate of Enforcement*, 2019 SCC OnLine Del 11129

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record as the same is with the investigating agencies, Central Government or courts. Regarding influencing of witnesses, the Court noted that three witnesses have stated in their statements that the appellant and his family members have pressurised them and asked them not to appear before the Enforcement Directorate. However, since their statements have already been recorded, at this stage when the complaint is almost ready to be filed, the Court held that there is no chance to influence any witness. The High Court also took notice of the fact that the co-accused have been granted bail. The Court was cognizant of the fact that the appellant has been suffering from illness but the Court opined that the Court has already issued directions to the Jail Superintendent in this regard and therefore this ground is no longer available to the appellant at this stage. The Court noted that during investigation, it has been revealed that there has been layering of proceeds of crime by use of shell companies, most of which are only on paper, and opined that there is cogent evidence collected so far that these shell companies are incorporated by persons who can be shown to be close and connected with the appellant. Next, the Court held that the material in the present case is completely distinct, different and independent from the material which was collected by CBI in the predicate offence. Even the witnesses in the PMLA investigation are different from the investigation conducted by CBI. The High Court concluded that prima facie, allegations are serious in nature and the appellant has played key and active role in the present case. On the basis of all these observations, the High Court dismissed the bail application.

11. It is the contention of the learned Senior Counsel Shri Kapil Sibal and Dr Abhishek Manu Singhvi on behalf of the appellant before us that the High Court ought to have granted regular bail to the appellant after holding the triple test of flight risk, tampering with evidence and influencing of witnesses in favour of the appellant. The impugned order deserves to be set aside only on the ground that the allegations of a completely unrelated case (*Rohit Tandon* v. *Directorate of Enforcement*[4]) have been considered by the High Court as allegations relating to the instant case and findings on merits against the appellant have been rendered based on such unrelated allegations. Next, it has been contended by the appellant that the High Court erred in law in going into and rendering findings on merits of the case in order to deny bail to the appellant despite the settled position of law that merits of a case ought not to be gone into at the time of adjudication of a bail application. This Court in the appellant's own case seeking regular bail in the case registered by CBI against him titled *P. Chidambaram* v. *CBI*[5] has held that (at SCC p. 348, para 16) "At the stage of granting bail, an elaborate examination of evidence and detailed reasons touching upon the merit of the case, which may prejudice the accused, should be avoided." It has also been contended on behalf of the appellant that the High Court erred in accepting at face value the allegations made on merits of the case in the counter-affidavit filed by the respondent and converting such allegations verbatim into findings by the Court and declining to grant

4 (2018) 11 SCC 46 : (2018) 2 SCC (Cri) 339
5 (2020) 13 SCC 337

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bail to the appellant solely on the basis of the said findings. On merits, the appellant has submitted that he is neither a shareholder nor Director of any allegedly connected company nor does he have any connection with any of these companies. No material linking the appellant directly or indirectly with the alleged offence of money laundering has either been put to the appellant so far or been placed on record before the High Court. Further, the 12 officers who signed the file pertaining to the approval of the FDI proposal of INX Media were not even arrested. Only the appellant, who was the 13th signatory has been arrested and denied bail. Moreover, all the other co-accused in the instant ECIR case have also been granted bail or have not been arrested. The High Court also failed to appreciate that the appellant has already been granted regular bail by this Court in the predicate offence FIR vide its order dated 22-10-2019[5]. The High Court erred in denying bail to the appellant on the specious ground that allegations are of a serious nature. It is the submission of the learned Senior Counsel for the appellant that the gravity of an offence is to be determined from the severity of the prescribed punishment. In the instant case, the alleged offence of money laundering is punishable by imprisonment for a term which shall not exceed 7 years. Thus, the offence is not "grave" or "serious" in terms of the judgment of this Court in *Sanjay Chandra* v. *CBI*[6]. The High Court should also have considered that the appellant is a 74 year old person whose health is fragile and while being lodged in judicial custody of the respondent Enforcement Directorate between 16-10-2019 and 30-10-2019 and thereafter being lodged in judicial custody between 30-10-2019 till date, the appellant has suffered multiple bouts of chronic and persistent pain in his abdomen, for which he was taken to AIIMS and Dr Ram Manohar Lohia Hospital on various occasions (viz. on 23-10-2019, 26-10-2019, 28-10-2019, 30-10-2019 and 1-11-2019) for consultation, diagnosis and tests. The appellant's health continues to deteriorate and with the onset of the cold weather, the appellant will become more vulnerable.

12. Between 5-9-2019 and 16-10-2019 though the appellant was available in custody the respondent did not choose to interrogate but remand period was sought on 17-10-2019 and 24-10-2019, while the third remand sought was rejected and accordingly the remand period expired on 30-10-2019. No witness was confronted despite seeking remand for that purpose. It is contended that the very manner in which the whole process is being conducted is only to see that the appellant remains in custody. It is contended that the liberty of the appellant cannot be denied in such manner by adopting an unfair procedure. Though much is sought to be made out as if the offence committed is grave there is absolutely no material to indicate that the appellant is involved and even otherwise it is a matter of trial wherein the charge is to be established. The gravity can only beget the length of sentence provided in law and by asserting

5 *P. Chidambaram* v. *CBI*, (2020) 13 SCC 337
6 (2012) 1 SCC 40 : (2012) 1 SCC (Cri) 26 : (2012) 2 SCC (L&S) 397

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that the offence is grave, the grant of bail cannot be thwarted. The respondent cannot contend as if the appellant should remain in custody till the trial is over.

13. Shri Tushar Mehta, learned Solicitor General while seeking to oppose the petition has made reference to the counter-affidavit filed on behalf of the respondent. It is contended that though the High Court has held that there is no possibility of tampering with the evidence and has not influenced any witnesses and has ultimately denied the bail, such conclusion is not justified. It is contended that the appellant having held a very high position and also due to his status is likely to influence the witnesses and one of the witness had already indicated that he hails from the same State to which the appellant belongs and is not in a position to appear for the purpose of being confronted. Hence even in that regard it should be held against the appellant. It is further contended that even otherwise despite holding the triple test in favour of the appellant the gravity of the offence can be considered as a standalone aspect as the gravity of the offence in a particular case is also important while considering bail. In that circumstance, the three aspects to be taken note of are the manner in which the offence has taken place, gravity of the offence and also the contemporaneous documents to show that the accused either in custody or otherwise, wields influence over the witnesses. Hence, he contends that the finding of the High Court insofar as saying that the appellant has not tampered is factually incorrect.

14. The learned Solicitor General further contends that the economic offences are graver offences which affect the society and the community suffers. The common man loses confidence in the establishment. It is contended that the investigating agency has collected documentary evidence such as emails exchanged between the co-conspirators on behalf of the appellant and documents to indicate investment of laundered money in benami properties whose beneficial owners can be traced to the appellant and his family members. The respondent has also recorded the statement of material witnesses who are the part of process of money laundering. It is his contention that the appellant has knowledge of all these aspects and the material will show the shareholding pattern of the 16 companies. It is further contended that the learned Judge of the High Court has referred to the documents produced in a sealed cover and in that light has arrived at the conclusion to deny bail. The High Court has, however, not properly considered while recording that a complaint is ready to be filed and therefore, he would not influence the witnesses. Even if the complaint/charge-sheet is filed in 60 days it is only to avoid default and the investigation which is not complete would continue. In that light it is contended that when economic offences are premeditated it would require detailed investigation to unearth material and, in such circumstances, if bail is granted it would defeat the case of the prosecution. The learned Solicitor General has also referred to the decisions which would be taken note of at the appropriate stage.

15. The learned Senior Counsel for the appellant in reply to the submissions contended that not a single document is available to indicate that the appellant is involved in the offence. The allegation of the appellant tampering with the

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evidence or influencing the witnesses as sought to be made out on behalf of the respondent cannot be accepted for the reason that the alleged offence is of the year 2007-08 and though the proceedings were initiated in the year 2017, the appellant was arrested only in the year 2019. In such event when the appellant has not influenced any person while he was at large, the allegation of tampering while in custody is not acceptable. The statement of the alleged witnesses is stated to have been recorded in the year 2018 and the case of the respondent that they are seeking to confront the witnesses is being put forth at this stage only to indicate as if the custody of the appellant is still required by them. When there is no document to indicate that the appellant is involved, the mere allegation against the alleged co-conspirators cannot be the basis to indicate that an economic offence has been committed by the appellant. In that light it is contended that the prayer made in the petition be accepted.

16. Though we have heard the matter elaborately and also have narrated the contention of both sides in great detail including those which were urged on the merits of the matter we are conscious of the fact that in the instant appeal the consideration is limited to the aspect of regular bail sought by the appellant under Section 439 CrPC. While stating so, in order to put the matter in perspective it would be appropriate to take note of the observation made by us in the case of this very *P. Chidambaram* v. *CBI*[5], in Criminal Appeal No. 1603 of 2019 which reads as hereunder: (SCC pp. 349-50, paras 21-22)

> "*21*. The jurisdiction to grant bail has to be exercised on the basis of the well-settled principles having regard to the facts and circumstances of each case. The following factors are to be taken into consideration while considering an application for bail:
>
> (*i*) the nature of accusation and the severity of the punishment in the case of conviction and the nature of the materials relied upon by the prosecution;
>
> (*ii*) reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant or the witnesses;
>
> (*iii*) reasonable possibility of securing the presence of the accused at the time of trial or the likelihood of his abscondence;
>
> (*iv*) character, behaviour and standing of the accused and the circumstances which are peculiar to the accused;
>
> (*v*) larger interest of the public or the State and similar other considerations.
>
> [Vide *Prahlad Singh Bhati* v. *State (NCT of Delhi)*[7].]
>
> "*22*. There is no hard-and-fast rule regarding grant or refusal to grant bail. Each case has to be considered on the facts and circumstances of each case and on its own merits. The discretion of the court has to be exercised judiciously and not in an arbitrary manner."

5 (2020) 13 SCC 337
7 (2001) 4 SCC 280 : 2001 SCC (Cri) 674

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17. In the above background, perusal of the order dated 15-11-2019[1] impugned herein indicates that the learned Single Judge having taken note of the rival contentions insofar as the triple test or the tripod test to be applied while considering an application for grant of regular bail under Section 439 CrPC, has answered the same in paras 50 to 53 of the order, in favour of the appellant herein. The learned Solicitor General has however sought to contend that though there is not much grievance with regard to the conclusion on "flight risk", the finding on likelihood of tampering and influencing witness has not been considered in its correct perspective. The finding in that regard has not been assailed and in such event, the appellant in our opinion cannot be taken by surprise. Even otherwise as rightly observed by the learned Single Judge the evidence and material stated to have been collected is already available with the investigating agency. The learned Solicitor General would however contend that still further materials are to be collected and letter rogatory has been issued and as such tampering cannot be ruled out. In the present situation, the appellant is not in political power nor is he holding any post in the Government of the day so as to be in a position to interfere. In that view such allegation cannot be accepted on its face value. With regard to the witness having written that he is not prepared to be confronted as he is from the same State, the appellant cannot be held responsible for the same when there is no material to indicate that the appellant or anyone on his behalf had restrained or threatened the witness concerned who refused to be confronted with the appellant in custody.

18. The only other aspect therefore for consideration is as to whether the further consideration made by the learned Judge of the High Court, despite holding the triple test in the appellant's favour was justified and if consideration is permissible, whether the learned Judge was justified in his conclusion.

19. While opposing the contention put forth by the learned Senior Counsel for the appellant that the learned Judge of the High Court ought not to have travelled beyond the consideration on the triple test and holding it in favour of the appellant, the learned Solicitor General would contend that the gravity of the offence and the role played by the accused should also be a part of consideration in the matter of bail. It is contended by the learned Solicitor General that the economic offences is a class apart and the gravity is an extremely relevant factor while considering bail. In order to contend that this aspect has been judicially recognised, the decisions in *State of Bihar* v. *Amit Kumar*[8]; *Nimmagadda Prasad* v. *CBI*[9]; *CBI* v. *Ramendu Chattopadhyay*[10]; *Serious Fraud Investigation Office* v. *Nittin Johari*[11]; *Y.S. Jagan Mohan Reddy* v. *CBI*[12] and *State of Gujarat* v. *Mohanlal Jitamalji Porwal*[13] are relied upon. Perusal of the cited decisions would indicate that this Court has held that economic offences are also of

1 *P. Chidambaram* v. *Directorate of Enforcement*, 2019 SCC OnLine Del 11129
8 (2017) 13 SCC 751 : (2017) 4 SCC (Cri) 771
9 (2013) 7 SCC 466 : (2013) 3 SCC (Cri) 575
10 2019 SCC OnLine SC 1491
11 (2019) 9 SCC 165 : (2019) 3 SCC (Cri) 706
12 (2013) 7 SCC 439 : (2013) 3 SCC (Cri) 552
13 (1987) 2 SCC 364 : 1987 SCC (Cri) 364

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grave nature, being a class apart which arises out of deep-rooted conspiracies and effect on the community as a whole is also to be kept in view, while consideration for bail is made.

20. On the consideration as made in the abovenoted cases and the enunciation in that regard having been noted, the decisions relied upon by the learned Senior Counsel for the appellant and the principles laid down for consideration of application for bail will require our consideration. The learned Senior Counsel for the appellant has relied upon the decision of the Constitution Bench of this Court in *Gurbaksh Singh Sibbia* v. *State of Punjab*[14] with reference to para 27 which reads as hereunder: (SCC pp. 586-87)

> "*27.* It is not necessary to refer to decisions which deal with the right to ordinary bail because that right does not furnish an exact parallel to the right to anticipatory bail. It is, however, interesting that as long back as in 1924 it was held by the High Court of Calcutta in *Nagendra Nath Chakravarti, In re*[15], AIR Cal at pp. 479, 480 that the object of bail is to secure the attendance of the accused at the trial, that the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial and that it is indisputable that bail is not to be withheld as a punishment. In two other cases which, significantly, are the "Meerut Conspiracy cases" observations are to be found regarding the right to bail which deserve a special mention. In *Emperor* v. *Joglekar*[16] it was observed, while dealing with Section 498 which corresponds to the present Section 439 of the Code, that it conferred upon the Sessions Judge or the High Court wide powers to grant bail which were not handicapped by the restrictions in the preceding Section 497 which corresponds to the present Section 437. It was observed by the Court that there was no hard-and-fast rule and no inflexible principle governing the exercise of the discretion conferred by Section 498 and that the only principle which was established was that the discretion should be exercised judiciously. In *Emperor* v. *H.L. Hutchinson*[17], AIR All at p. 358 it was said that it was very unwise to make an attempt to lay down any particular rules which will bind the High Court, having regard to the fact that the legislature itself left the discretion of the Court unfettered. According to the High Court, the variety of cases that may arise from time to time cannot be safely classified and it is dangerous to make an attempt to classify the cases and to say that in particular classes a bail may be granted but not in other classes. It was observed that the principle to be deduced from the various sections in the Criminal Procedure Code was that grant of bail is the rule and refusal is the exception. An accused person who enjoys freedom is in a much better position to look after his case and to properly

14 (1980) 2 SCC 565 : 1980 SCC (Cri) 465
15 1923 SCC OnLine Cal 318 : AIR 1924 Cal 476 : 1924 Cri LJ 732
16 1931 SCC OnLine All 60 : AIR 1931 All 504 : 1932 Cri LJ 94
17 1931 SCC OnLine All 14 : AIR 1931 All 356 : 1931 Cri LJ 1271

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defend himself than if he were in custody. As a presumably innocent person he is therefore entitled to freedom and every opportunity to look after his own case. A presumably innocent person must have his freedom to enable him to establish his innocence."

21. We have taken note of the said decision since even though the consideration therein was made in the situation where an application for anticipatory bail under Section 438 was considered, the entire conspectus of the matter relating to bail has been noted by the Constitution Bench.

22. The learned Senior Counsel for the appellant has also placed reliance on the decision in *Sanjay Chandra* v. *CBI*[6] with specific reference to para 39, which reads as hereunder: (SCC pp. 62-63)

> "*39*. Coming back to the facts of the present case, both the courts have refused the request for grant of bail on two grounds: the primary ground is that the offence alleged against the accused persons is very serious involving deep-rooted planning in which, huge financial loss is caused to the State exchequer; the secondary ground is that of the possibility of the accused persons tampering with the witnesses. In the present case, the charge is that of cheating and dishonestly inducing delivery of property and forgery for the purpose of cheating using as genuine a forged document. The punishment for the offence is imprisonment for a term which may extend to seven years. It is, no doubt, true that the nature of the charge may be relevant, but at the same time, the punishment to which the party may be liable, if convicted, also bears upon the issue. Therefore, in determining whether to grant bail, both the seriousness of the charge and the severity of the punishment should be taken into consideration."

The said case was a case of financial irregularities and in the said circumstance this Court in addition to taking note of the deep-rooted planning in causing huge financial loss, the scope of consideration relating to bail has been taken into consideration in the background of the term of sentence being seven years if convicted and in that regard it has been held that in determining the grant or otherwise of bail, the seriousness of the charge and severity of the punishment should be taken into consideration.

23. Thus, from cumulative perusal of the judgments cited on either side including the one rendered by the Constitution Bench of this Court, it could be deduced that the basic jurisprudence relating to bail remains the same inasmuch as the grant of bail is the rule and refusal is the exception so as to ensure that the accused has the opportunity of securing fair trial. However, while considering the same the gravity of the offence is an aspect which is required to be kept in view by the Court. The gravity for the said purpose will have to be gathered from the facts and circumstances arising in each case. Keeping in view the consequences that would befall on the society in cases of financial irregularities, it has been held that even economic offences would fall under

6 (2012) 1 SCC 40 : (2012) 1 SCC (Cri) 26 : (2012) 2 SCC (L&S) 397

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the category of "grave offence" and in such circumstance while considering the application for bail in such matters, the Court will have to deal with the same, being sensitive to the nature of allegation made against the accused. One of the circumstances to consider the gravity of the offence is also the term of sentence that is prescribed for the offence the accused is alleged to have committed. Such consideration with regard to the gravity of offence is a factor which is in addition to the triple test or the tripod test that would be normally applied. In that regard what is also to be kept in perspective is that even if the allegation is one of grave economic offence, it is not a rule that bail should be denied in every case since there is no such bar created in the relevant enactment passed by the legislature nor does the bail jurisprudence provide so. Therefore, the underlining conclusion is that irrespective of the nature and gravity of charge, the precedent of another case alone will not be the basis for either grant or refusal of bail though it may have a bearing on principle. But ultimately the consideration will have to be on case-to-case basis on the facts involved therein and securing the presence of the accused to stand trial.

24. In the above circumstance, it would be clear that even after concluding the triple test in favour of the appellant the learned Judge of the High Court was certainly justified in adverting to the issue relating to the gravity of the offence. However, we disapprove the manner in which the conclusions are recorded in paras 57 to 62 wherein the observations are reflected to be in the nature of finding relating to the alleged offence. The learned Senior Counsel for the appellant with specific reference to certain observations contained in the abovenoted paragraphs has pointed out that the very contentions to that effect as contained in paras 17, 20 and 24 of the counter-affidavit has been incorporated as if, it is the findings of the Court. The learned Solicitor General while seeking to controvert such contention would however contend that in addition to the counter-affidavit the respondent had also furnished the documents in a sealed cover which was taken note of by the learned Judge and conclusion has been reached.

25. The question as to whether the Court could look into the documents while considering an application for bail had arisen for consideration in the very case between the parties herein in Criminal Appeal No. 1340 of 2019 wherein through the judgment dated 5-9-2019[3] while considering the matter relating to the order dated 20-8-2019[2] whereby the High Court had rejected the bail, this Court had held that it would be open for the Court to receive the materials/documents collected during the investigation and peruse the same to satisfy its conscience that the investigation is proceeding in the right lines and for the purpose of consideration of grant of bail/anticipatory bail, etc. At the same time, this Court had disapproved the manner in which the learned Judge of the High Court in the said case had verbatim quoted a note produced by the respondent. If

3 *P. Chidambaram* v. *Directorate of Enforcement*, (2019) 9 SCC 24 : (2019) 3 SCC (Cri) 509
2 *P. Chidambaram* v. *CBI*, 2019 SCC OnLine Del 9703 : (2019) 263 DLT 218

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that be the position, in the instant case, the learned Judge while adverting to the materials, ought not have recorded a finding based on the materials produced before him. While the learned Judge was empowered to look at the materials produced in a sealed cover to satisfy his judicial conscience, the learned Judge ought not to have recorded finding based on the materials produced in a sealed cover.

26. Further, while deciding the same case of the appellant in Crl. Appeal No. 1340 of 2019, after holding so, this Court had consciously refrained from opening the sealed cover and perusing the documents lest some observations are made thereon after perusal of the same, which would prejudice the accused pre-trial. In that circumstance, though it is held that it would be open for the Court to peruse the documents, it would be against the concept of fair trial if in every case the prosecution presents documents in sealed cover and the findings on the same are recorded as if the offence is committed and the same is treated as having a bearing for denial or grant of bail.

27. Having said so, in the present circumstance we were not very much inclined to open the sealed cover although the materials in sealed cover was received from the respondent. However, since the learned Single Judge of the High Court had perused the documents in sealed cover and arrived at certain conclusion and since that order is under challenge, it had become imperative for us to also open the sealed cover and peruse the contents so as to satisfy ourselves to that extent. On perusal we have taken note that the statements of persons concerned have been recorded and the details collected have been collated. The recording of statements and the collation of material is in the nature of allegation against one of the co-accused Karti Chidambaram, son of the appellant of opening shell companies and also purchasing benami properties in the name of relatives at various places in different countries. Except for recording the same, we do not wish to advert to the documents any further since ultimately, these are allegations which would have to be established in the trial wherein the accused/co-accused would have the opportunity of putting forth their case, if any, and an ultimate conclusion would be reached. Hence, in our opinion, the finding recorded by the learned Judge of the High Court based on the material in sealed cover is not justified.

28. Therefore, at this stage while considering the bail application of the appellant herein what is to be taken note of is that, at a stage when the appellant was before this Court in an application seeking for interim protection/anticipatory bail, this Court while considering the matter in Criminal Appeal No. 1340 of 2019 had in that regard held that in a matter of present nature wherein grave economic offence is alleged, custodial interrogation as contended would be necessary and in that circumstance the anticipatory bail was rejected. Subsequently, the appellant has been taken into custody and has been interrogated and for the said purpose the appellant was available in custody in this case from 16-10-2019 onwards. It is, however, contended on behalf of the respondent that the witnesses will have to be confronted and as such custody is required for that purpose.

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29. As noted, the appellant has not been named as one of the accused in the ECIR but the allegation while being made against the co-accused it is indicated the appellant who was the Finance Minister at that point, has aided the illegal transactions since one of the co-accused is the son of the appellant. In this context, even if the statements on record and materials gathered are taken note of, the complicity of the appellant will have to be established in the trial and if convicted, the appellant will undergo sentence. For the present, as taken note of, the anticipatory bail had been declined earlier and the appellant was available for custodial interrogation for more than 45 days. In addition to the custodial interrogation if further investigation is to be made, the appellant would be bound to participate in such investigation as is required by the respondent.

30. Further, it is noticed that one of the co-accused has been granted bail by the High Court while the other co-accused is enjoying interim protection from arrest. The appellant is aged about 74 years and as noted by the High Court itself in its order, the appellant has already suffered two bouts of illness during incarceration and was put on antibiotics and has been advised to take steroids of maximum strength. In that circumstance, the availability of the appellant for further investigation, interrogation and facing trial is not jeopardised and he is already held to be not a "flight risk" and there is no possibility of tampering with the evidence or influencing/intimidating the witnesses. Taking these and all other facts and circumstances including the duration of custody into consideration the appellant in our considered view is entitled to be granted bail. It is made clear that the observations contained touching upon the merits either in the order of the High Court or in this order shall not be construed as an opinion expressed on merits and all contentions are left open to be considered during the course of trial.

31. For the reasons stated above, we pass the following order:

31.1. The instant appeal is allowed and the judgment dated 15-11-2019 passed by the High Court of Delhi in *P. Chidambaram* v. *Directorate of Enforcement*[1] impugned herein is set aside.

31.2. The appellant is ordered to be released on bail if he is not required in any other case, subject to executing bail bonds for a sum of Rs 2 lakhs with two sureties of the like sum produced to the satisfaction of the learned Special Judge.

31.3. The passport ordered to be deposited by this Court in CBI case shall remain in deposit and the appellant shall not leave the country without specific orders to be passed by the learned Special Judge.

31.4. The appellant shall make himself available for interrogation in the course of further investigation as and when required by the respondent.

31.5. The appellant shall not tamper with the evidence or attempt to intimidate or influence the witnesses.

1 2019 SCC OnLine Del 11129

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31.6. The appellant shall not give any press interviews nor make any public comment in connection with this case qua him or other co-accused.

31.7. There shall be no order as to costs.

32*. After pronouncement of the judgment in the abovementioned matter, Mr Tushar Mehta, learned Solicitor General appearing for the respondent, Directorate of Enforcement, has submitted that the findings in the judgment may not have a bearing qua the other accused.

33. Considering the above submission, we make it clear that the findings in the judgment, as above, shall not have any bearing qua the other accused in the case and the same shall be considered independently on its own merits.

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* **Ed.**: Paras 32-33 added later by order of the same date i.e. 4-12-2019.