IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

FRIDAY, THE 27TH DAY OF MAY 2022 / 6TH JYAISHTA, 1944

BAIL APPL. NO. 2840 OF 2022

CRL.MISCELLANEOUS PETITION NO.375/2022

ECIR NO.KZSZO/07/2021 OF ENFORCEMENT DIRECTORATE

PETITIONER/ACCUSED:

ABDUL GAFOOR @ KUNHUMON
AGED 37 YEARS, S/O SIDHEEQUE (LATE)
KONDADAN HOUSE, VALLUVAMBRAN POST, POOKKOTTUR,
MALAPPURAM DISTRICT - 673642

BY ADV AMAL GEORGE

RESPONDENTS/COMPLAINANT:

1 ASST. DIRECTOR, DIRECTORATE OF ENFORCEMENT,
3RD FLOOR, KENDRIYA BHAVAN,
KALLAI, KOZHIKODE, PIN 673003., PIN - 673003

2 STATE OF KERALA REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM, PIN 682031, PIN - 682031

BY ADV SRI.SUVIN R. MENON, CGC

OTHER PRESENT:

SRI GEORGE THOMAS- SR ADV

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 22.04.2022, THE COURT ON 27.05.2022 DELIVERED THE FOLLOWING:

“C.R.”

O R D E R

Dated this the 27th day of May, 2022

This is an application for regular bail filed by the accused No.12 in ECIR No. KZSZO/07/2021 of the Enforcement Directorate, Kozhikode under Section 439 of the Code of Criminal Procedure, 1973 (for short, “Cr. P.C”).

2. The accused is alleged to have committed the offences punishable under Sections 3 and 4 of the Prevention of Money Laundering Act, 2002 (for short, 'PMLA').

3. Multiple FIRs were registered at various police stations in Kerala against one Sri. Nishad (the accused No.1 in the above ECIR) and others alleging the offences punishable under Sections 406, 420 and 506 r/w 34 of IPC from January 2021 to March 2021. It was alleged in those FIRs that Sri. Nishad, the main accused, along with the remaining accused had cheated several investors by accepting investment under an investment scheme

through his three Bangalore based companies (1) Long Reach Global (2) Long Reach Technologies and (3) Morris Trading, by promising high returns of dividend. As per the scheme, the investors will be able to exchange Morris Coins – Crypto currency after the 300-day lock-up period. It was further alleged that the accused also offered high commission income for those who bring more investors to invest in the Morris Coin Crypto currency. It was also alleged that even though the dividend was paid as agreed initially, the accused persons neither paid any dividend thereafter, nor returned the money collected from the investors. The investigation revealed that the accused persons defrauded a total amount of ₹1200 crore under the above-mentioned scheme.

4. The Deputy Superintendent of Police, C-Branch, Malappuram who conducted the investigation into one of the crimes (Cr.No.356/2020 of Pookottumpadam PS) forwarded a report about all the crimes registered against Sri. Nishad and others to the Directorate of Enforcement, Kochi on 11/05/2021. On the basis of the said information, since the offences committed under Section 420 of IPC is a scheduled offence under

Section 2(1)(x) and 2(1)(y) of PMLA, an Enforcement Case Information Report (ECIR) was recorded vide number ECIR/KZSZO/07/2021 dated 2/8/2021 and investigation under the PMLA was initiated by the Director of Enforcement. Altogether 12 persons were arrayed as the accused. The petitioner is the accused No.12 and Sri. Nishad is the accused No.1.

5. According to respondent No.1, during the investigation by the Enforcement Directorate, it was revealed that Sri. Nishad, the main accused, appointed pin stockists to those who had invested a minimum of ₹10,00,000/- in his scheme and he promised them that he would give 5% as commission on the investment. It is alleged that Sri. Nishad and pin stockists of the scheme in their hot pursuit of making quick and easy money, fraudulently and dishonestly promoted the three companies mentioned above and made aggressive enrolment of new members into an illegal money circulation scheme under the grab of multi-level marketing and resorted to the fraudulent practice of investing the money received from the investors in the scheme by inducing the downline members for such further enrolment

which led to the viral proliferation of the network of the scheme and thereby made huge wrongful gain noted against each and wrongful loss to a large number of downline members. It is further alleged that the petitioner is one of the main pin stockists of the scheme who promoted and conducted the said scheme. It is also alleged that the petitioner has directly received funds from various investors which were later on utilized to facilitate the layering of the proceeds of the crime. Thus, Sri. Nishad and other accused persons including the petitioner have indulged in criminal activities and committed scheduled offences and by indulging in criminal activities related to scheduled offences, a huge amount of proceeds of crime was generated and they are processing/concealing/using such proceeds of crime, it is alleged.

6. The petitioner was arrested on 24/3/2022 and he was remanded to judicial custody. The bail application filed by him before the Special Court was dismissed on 01/04/2022. It was thereafter the petitioner approached this court with the above bail application.

7. The respondent No.1 filed an objection statement to

the bail application stoutly opposing the bail.

8. I have heard Sri. George Thomas, the learned Senior Counsel for the petitioner and Sri.Suvin R.Menon, the learned Central Government Counsel for respondent No.1.

9. The learned Senior Counsel for the petitioner Sri.George Thomas submitted that the petitioner is absolutely innocent of the offences alleged against him and he has been falsely implicated in the case. According to the learned Counsel, the petitioner is the Director of the Company namely Stoxglobal Brokers Private Limited which was appointed as a pin stockist of Long Reach company run by the accused No.1, Sri.Nishad. The Counsel submitted that the petitioner's company only accepted payments from the clients for the purchase of the pins of Long Reach Company issued through their bank and he is in no way involved with the alleged money scam. The Counsel further submitted that the petitioner has no responsibility to answer or explain all the transactions of the accused No.1 or his companies or schemes evolved by them. The Counsel also submitted that the petitioner has already been given in enforcement custody for

a period of 14 days, he has been extensively questioned for days together and the investigation as against him is practically over and hence his further detention is not necessary. As far as the rigour of Section 45(1) of the PMLA is concerned, the learned Senior Counsel submitted that the twin conditions therein were struck down and declared as unconstitutional by the Apex Court in ***Nikesh Tarachand Shah v. Union of India and Another*** (AIR 2017 SC 5500) and hence, the embargo under Section 45 would not apply to the case.

10. The learned Central Government Counsel Sri.Suvin R.Menon appearing for respondent No.1 submitted that there are materials on record to show the involvement of the petitioner in the crime and that he has actively and knowingly involved and assisted in the investment scheme mooted by the accused No.1. The learned Counsel sought to impress upon me the magnitude of the offence arguing that the economic offence forms a class apart. In such cases, the court must account for several factors while granting bail, especially, the gravity of the offence involved. Hence, for money launders, “jail is the rule and bail is an

exception", which finds support from many landmark judgments of the Apex Court, submitted the learned Central Government Counsel. Lastly, it was submitted that the petitioner is highly influential and is likely to tamper with evidence and influence the witnesses if he is released on bail.

11. The law in regard to grant or refusal of bail is well settled. The considerations which normally weigh with the court in granting bail in non-bailable offences are:- the nature and seriousness of the offence; the character of the evidence; circumstances which are peculiar to the accused; a reasonable possibility of the presence of the accused not being secured at the trial; reasonable apprehension of witnesses being tampered with; the larger interest of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case. Although "bail is the rule and jail is an exception" is well established in our criminal jurisprudence, the gravity of the offence is an important aspect which is required to be kept in view by the Court before releasing a person on bail. It is well settled that the socio-economic offences constitute a class

apart and need to be visited with a different approach in the matter of bail [***Y.S.Jagan Mohan Reddy v. C.B.I*** (2013) 7 SCC 439]. Usually, the socio-economic offence has deep-rooted conspiracies altering the moral fibre of the society and causing irreparable harm, which needs to be considered seriously [***State of Bihar and Another v. Amit Kumar,*** (2017) 13 SCC 751]. In ***Chidambaram P. v. Directorate of Enforcement*** (2019 KHC 7201), the Apex Court has held that the economic offence would fall under the category of "grave offence" and in such circumstances, while considering the application for bail in such matters, the court will have to deal with the same, being sensitive to the nature of the allegation made against the accused.

12. The jurisdiction of the Court to grant bail to a person accused of an offence under PMLA is circumscribed by the provisions of Section 45 as amended in 2018. The bail can be granted in a case where there are reasonable grounds for believing that the accused is not guilty of such an offence and that he is not likely to commit any offence while on bail. The twin

conditions under sub-section (1) of Section 45 of PMLA as it originally stood were made applicable only to the offences punishable for a term of imprisonment of more than three years under Part A of the Schedule II of the Act. The Apex Court in its decision ***Nikesh Shah*** (supra) has declared Section 45(1) of PMLA, in so far as it imposes two further conditions for release of bail, to be unconstitutional as it violates Articles 14 and 21 of the Constitution of India. Thereafter, in 2018, Section 45(1) of PMLA has been amended thereby inserting the words “under this Act” in place of the words “punishable for a term of imprisonment of more than three years under part A of the Schedule” in sub-section 45(1). The learned Senior Counsel for the petitioner submitted that even though after effecting amendment of Section 45(1), the words “under the Act” are added to sub-section (1) of Section 45, the original Section 45(1) (ii) has not been revived or resurrected by amending the Act and therefore, as of today, there is no rigour of the said two further conditions under the original Section 45(1)(ii) of PMLA for releasing the accused on bail. *Per contra*, the learned Central Government Counsel submitted that in view of the amendment of Section 45(1) of PMLA which came

into effect from 19/04/2018, original sub-section (ii) of Section 45 (1) of PMLA has to be inferred and treated as still exists in the statute book and holds the field even as of today for deciding an application for bail by an accused under PMLA. He further submitted that by amending Section 45(1) of the Act and by inserting the words, “under this Act”, the judgment delivered by the Apex Court in ***Nikesh Shah*** (supra) has virtually become ineffective and therefore, the prayer for bail of the petitioner has to be considered in view of the amended provisions of Section 45(1) of the PMLA. The question thus arises is whether the 2018 amendment can restore the validity of the twin conditions and will an accused charged with an offence under the Act still have to satisfy the rigours of the “twin conditions” notwithstanding the judgment of the Apex Court in ***Nikesh Shah*** (supra)?

13. The impact of the Amendment on the revival of the twin conditions prescribed under Section 45(1) and the issue of applicability of twin conditions of amended Section 45 of PMLA has arisen before the various Hon’ble High Courts and divergent views have come across. The High Courts of Orissa (***Muhammad***

Arif v. Directorate of Enforcement (2020) SCC Online Ori 544), Bombay (***Ajay Kumar v. Directorate of Enforcement,*** (2022 Live Law (Bom) 27), Madras (***N.Umashankar and Others v. The Assistant Director,*** Crl.O.P.Nos.3381, 3383 and 3385 of 2021 decided on 10 March, 2021) and Jharkhand (***Bindeshwar Ganjhu @ Bindu Ganjhu. v. Union of India through Directorate of Enforcement***, B.A. No. 16501 of 2021 decided on 28/04/2022) took the view and held that Section 45(1), though struck down by the Apex Court, was revived by the 2018 amendment and that the bail application has to be considered in view of the amended provisions satisfying the twin conditions. The High Court of Kerala in ***M. Sivasankar v. Union of India*** [LAWS (KER)-2021-1-177] held that in view of the changes brought about by way of amendment, the embargo under Section 45(1) would continue to stand in the way of granting bail to the accused except under the conditions mentioned therein. However, the High Courts of Patna (***Ahilya Devi v. State of Bihar and Others***, 2020 Crl.Law Journal 2810), Delhi (***Upendra Rai v. Directorate of Enforcement*** AIR Online 2019 Delhi 1177), Madhyapradesh (***Dr.Vinod Bhandari***

v. Assistant Director, Directorate of Enforcement (M.Cr.C.No.34201 of 2018 decided on 29th August 2018)) and Chhattisgarh (***Anil Tuteja and Others v. The Director, Directorate of Enforcement and others*** (M.Cr.C.(A) Nos. 469 & 484 of 2020 decided on 14/08/2020)) took a contra view that the amendment in Section 45(1) of PMLA introduced after the Apex Court's decision in ***Nikesh Shah*** (supra) does not have the effect of reviving twin conditions for grant of bail which has been declared *ultra vires* to Articles 14 and 21 of Constitution of India and as such, there is no bar of twin conditions contained in Section 45(1) of PMLA and the application for bail has to be considered and decided under Section 439 Cr.P.C. However, the decision of the Delhi High Court in ***Upendra Rai*** (supra) has been stated by the Hon'ble Apex Court in SLP (Criminal) No.515/2020 dated 03/06/2020.

14. Before the amendment, the twin conditions laid down in Section 45 did not relate to an offence under the PMLA (Section 3 or 4) at all, but only to a separate and distinct offence found under Part A of the Schedule. Thus, in ***Nikesh Shah*** (supra), the

Apex Court stated:

> *"Obviously, the twin conditions laid down in Section 45 would have no nexus whatsoever with a bail application which concerns itself with the offence of money laundering, for if section 45 is to apply, the Court does not apply its mind to whether the person prosecuted is guilty of the offence of money laundering, but instead applies its mind to whether such person is guilty of the scheduled or predicate offence".*

Now, this has been remedied as the court will now apply its mind to see whether the person is guilty of an offence of money laundering under the PMLA or not. A close reading of ***Nikesh Shah*** (supra) would show that the Apex Court declared clause (ii) sub-section (1) of Section 45 of PMLA *ultra vires* because of the first part of the provision which controlled the twin conditions which has been subsequently amended. The twin conditions mentioned in sub-section 45(1) have been declared *ultra vires* in ***Nikesh Shah*** (supra) not because of any inherent defect in those two conditions in themselves, but because of its dependence on the applicability, relatable only to the offences in Part A of the Schedule; for the reason that the offences under Part A of the schedule are not offences of money laundering but different

predicate offences. The amendment has been introduced after taking note of the decision in ***Nikesh Shah*** (supra). The lacuna the court found has been cured by way of amendment, for in place of the term "punishable for a term of imprisonment of more than three years under Part A of the schedule", the term "under this Act" has been substituted. Thus, twin conditions for bail declared unconstitutional by the Apex Court in ***Nikesh Shah*** (supra) stood restored by Amendment in 2018. That apart, the Apex Court in ***P.Chidambaram v. Directorate of Enforcement*** (AIR 2019 SC 4198), which is a judgment subsequent to the amendment to Section 45(1) of PMLA, dismissed the application for grant of anticipatory bail applying the provisions under Section 45(1) of PMLA as well. It did not lay down that the twin conditions would not survive in view of ***Nikesh Shah*** (supra). The Apex Court again in **The *Assistant Director Enforcement Directorate v. Dr. V.C. Mohan*** [2022 Live Law (SC) 16] decided on 4/1/2022 held that once the prayer for bail is made for the offence under PMLA 2002, the rigours and principles underlying Section 45 get triggered on although the application is under Section 438 of Cr.P.C. Recently, the Apex Court (SLP (Crl.No.620-622 of 2022

decided on 25/2/2022)) rejected the challenge against Madras High Court's decision in ***Umashankar*** (supra) that the 2018 Amendment revived twin conditions for bail under Section 45. Hence, I have no hesitation to hold that the twin conditions as amended in Section 45(1) in 2018 have now become referrable and reliable to the offences punishable under PMLA and an accused charged with an offence under the Act still has to satisfy the rigours of those conditions notwithstanding the judgment of the Apex Court in ***Nikesh Shah*** (supra).

15. Section 65 of PMLA requires that the provisions of the Cr.P.C. shall apply, in so far as they are not inconsistent with the provisions of the Act and Section 71 of PMLA provides that the provisions of PMLA shall have overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. PMLA has an overriding effect and the provisions of the Cr.P.C would apply only if they are not inconsistent with the provisions of the said Act. Therefore, the conditions enumerated in Section 45 of the PMLA will have to be complied with even in respect of an application for bail made

under Section 439 of Cr.P.C. Sub-section (2) of Section 45 says that the limitation on granting of bail specified in sub-section (1) is in addition to the limitations under the Cr.P.C. or any other law for the time being in force on granting of bail. Thus, the power to grant bail to a person accused of having committed an offence under the PMLA is not only subject to the limitations imposed under Section 439 of Cr.P.C, but also subject to the restrictions imposed by the twin conditions of sub-section (1) of Section 45 of PMLA. In other words, while considering the bail application, the Court has to account for the twin conditions specified in sub-section (1) of Section 45 of PMLA as well as all the general principles governing the grant of bail under Section 439 of Cr.P.C.

16. Bearing in mind the above principles, let me consider the merits of the bail application. The case records would reveal that the accused No.1, Sri. Nishad, through his three Bangalore based companies viz., Long Reach Global, Long Reach Technologies and Morris Trading introduced an investment scheme viz., Study Mojo - Morris Coin Investment Plan for 300 days by offering high returns of dividend such as 3% to 5% per

day. A huge amount of money transaction had taken place in the said scheme for the period from 1/1/2020 to 30/9/2020 and a total amount of ₹1200 crores was deposited in the bank account of Sri. Nishad and the Companies operated by him during the said period. In the statement given by the petitioner under Section 50 of PMLA, he has admitted that, in 2019, he invested a sum of ₹1,00,000/- in the above-said scheme ran by the company named Long Reach Technology belonging to the accused No.1 and later on he was appointed as the pin stockist of the said company. The petitioner further admitted that he along with his wife started a company namely Stoxglobal Brokers (P) Ltd. in 2020 and the said company has been appointed as the pin stockists of Long Reach Technology ran by Sri. Nishad and transaction of around ₹40 crores have been done through this company. He also admitted that the money of the investors were invested in the account of M/s Long Reach Technology through the accounts of the pin stockists like him as per the instruction given by Sri.Nishad. The statement made before the Enforcement Officials under Section 50 of PMLA is not a statement recorded under Section 161 of Cr.P.C. The Apex Court in ***Rohit Tandon v.***

Enforcement Directorate (2017 KHC 6767) observed that the statement of the accused recorded under Section 50 of PMLA is admissible in evidence. The provisions of Section 50 of PMLA are analogous to the provisions of Section 108 of the Customs Act. Both Sections are similarly worded. Identical power is conferred upon the Customs Officer under Section 108 of the Customs Act. The Apex Court in ***Naresh J.Sukhawani v. Union of India*** (AIR 1996 SC 522) considering Section 108 of the Customs Act held that statement made before the Customs Officials under Section 108 of the Customs Act is not a statement recorded under Section 161 of Cr.P.C and therefore, it is a material piece of evidence which can certainly be used to connect the accused in contravention of the provisions of the Act. In ***Assistant Collector of Central Excise Rajamundry v. Duncan Agro Industries Ltd. and Another*** (AIR 2000 SC 2901), the Apex Court held that the statement recorded by the Customs Officers under Section 108 of the Customs Act is admissible in evidence. In ***Percy Rustomji Basta v. State of Maharastra*** (1971 Crl.Law Journal 933), one of the questions before the Apex Court was whether Section 24 of the Evidence Act was a bar to the

admissibility of the statement given by a person/accused having committed the offence under the Customs Act. The Apex Court repelled the contention. In ***Bhan Bhal Kalpa Bhai v. Collector of Customs and Another*** (1994 KHC 946), the Apex Court took the view that the statement of the accused recorded under Section 108 of the Customs Act can be used against him. In ***Naresh J.Sukhawani*** (supra), the Apex Court has held that the statement of a co-accused under Section 108 of the Customs Act incriminating himself and other accused can certainly be used to connect the accused in contravention of the provisions of the Act. The above said principles of law can be applied to Section 50(3) of PMLA as well. Thus, any confession made by a person summoned under Section 50(3) of PMLA before the Investigating Officer is admissible in law since it is not hit by Section 25 or 26 of the Evidence Act. Hence, the statement of the petitioner given under Section 50 of PMLA can be looked into for the consideration of this bail application.

17. The statement given by the petitioner under Section 50 of PMLA as well as the bank statement of the petitioner seized

during the investigation would show that the petitioner accepted money from the public in the above mentioned scheme run by the accused No.1 and through his company, Stoxglobal Brokers Private Limited, a total transaction of ₹50 crores has been made with the accused No.1 and he has earned ₹1.5 crores as commission. The records would further show the companies owned and managed by the petitioner were opened at the time of commission of scheduled offences. On the basis of the bank account statement as well as the statement of the petitioner, it has been *prima facie* established that the petitioner has directly received funds from various investors in the investment plan run by the accused No.1 and he has also received the commission from the accused No.1. As per Section 3 of PMLA, whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime and projecting or claiming it as untainted property, shall be guilty of the offence of money-laundering. The materials mentioned above would *prima facie* indicate that the petitioner knowingly assisted in the layering of possession of proceeds of crime acquired by the

accused No.1.

18. On a careful analysis of the materials placed on record, the factual discussions made above and the legal submissions advanced, it is not possible for me at this stage to record satisfaction that there are reasonable grounds for believing that the petitioner is not guilty of the offences alleged. The reasonable ground mentioned in Section 45(1)(ii) of PMLA connotes substantial probable causes for believing that the accused is not guilty of the offence charged. The investigation is going on and the same is at a crucial stage. Undoubtedly, the investigating agency may require further time to collect all the materials, particularly, the alleged nexus of the petitioner with the crime. The accused No. 1 is absconding. It is made clear that it is for the limited purpose of considering this bail application, that too at this stage, these findings have been arrived at. Indeed, different yardsticks might be required at different stages of the investigation.

For the reasons stated above, without expressing any opinion as to the merits of the case and also with regard to the

claim of the Enforcement Directorate and the defence, I am of the view that the petitioner cannot be released on bail at this stage. The bail application, accordingly, stands dismissed.

Sd/-
DR. KAUSER EDAPPAGATH
JUDGE

Rp

//True copy//

PS to Judge