REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.2178 OF 2011
(Arising out of SLP (Crl.) No. 5650 of 2011)

Sanjay Chandra …… Appellant

versus

CBI …… Respondent

along with

CRIMINAL APPEAL NO.2179 OF 2011
(Arising out of SLP (Crl.) No. 5902 of 2011)

Vinod Goenka …… Appellant

versus

Central Bureau of Investigation …… Respondent

along with

CRIMINAL APPEAL NO.2180 OF 2011
(Arising out of SLP (Crl.) No. 6190 of 2011)

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Gautam Doshi ..... Appellant

versus

Central Bureau of Investigation ..... Respondent

along with

CRIMINAL APPEAL NO.2181 OF 2011
(Arising out of SLP (Crl.) No. 6288 of 2011)

Hari Nair ..... Appellant

versus

Central Bureau of Investigation ..... Respondent

along with

CRIMINAL APPEAL NO.2182 OF 2011
(Arising out of SLP (Crl.) No. 6315 of 2011)

Surendra Pipara ..... Appellant

versus

Central Bureau of Investigation ..... Respondent

J U D G M E N T

H.L. DATTU, J.

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1) Leave granted in all the Special Leave Petitions.

2) These appeals are directed against the common Judgment and Order of the learned Single Judge of the High Court of Delhi, dated 23rd May 2011 in Bail Application No. 508/2011, Bail Application No. 509/2011 & Crl. M.A. 653/2011, Bail Application No. 510/2011, Bail Application No. 511/2011 and Bail Application No. 512/2011, by which the learned Single Judge refused to grant bail to the accused-appellants. These cases were argued together and submitted for decision as one case.

3) The offence alleged against each of the accused, as noticed by the Ld. Special Judge, CBI, New Delhi, who rejected bail applications of the appellants, vide his order dated 20.4.2011, is extracted for easy reference :

Sanjay Chandra (A7) in Crl. Appeal No. 2178 of 2011 [arising out of SLP (Crl.)No.5650 of 2011]:

"6. The allegations against accused Sanjay Chandra are that he entered into criminal conspiracy with accused A. Raja, R.K. Chandolia and other accused persons during September 2009 to get UAS licence for providing telecom services to otherwise an ineligible company to get UAS licences. He, as Managing Director of M/s Unitech Wireless (Tamil Nadu) Limited, was looking after the business of telecom through 8 group companies of Unitech Limited. The first-come-first-served procedure of allocation of UAS Licences and spectrum was manipulated by the accused persons in order to benefit M/s Unitech Group Companies. The cutoff date of 25.09.2007 was decided by accused public servants of DoT primarily to allow consideration of Unitech group applications for UAS licences. The Unitech Group Companies were in business of realty and even the objects of companies were not changed to 'telecom' and registered as required before applying. The companies were ineligible to get the licences till the grant of UAS licences. The Unitech Group was almost last within the applicants considered for allocation of UAS licences and as per existing policy of first-come-first-served, no licence could be issued in as many as 10 to 13 circles where sufficient spectrum was not

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available. The Unitech companies got benefit of spectrum in as many as 10 circles over the other eligible applicants. Accused Sanjay Chandra, in conspiracy with accused public servants, was aware of the whole design of the allocation of LOIs and on behalf of the Unitech group companies was ready with the drafts of Rs. 1658 crores as early as 10th October, 2007."

Vinod Goenka (A5) in Crl. Appeal No. 2179 of 2011 [arising out of SLP(Crl)No.5902 of 2011] :

"5.The allegations against accused Vinod Goenka are that he was one of the directors of M/s Swan Telecom (P) Limited in addition to accused Shahid Usman Balwa w.e.f. 01.10.2007 and acquired majority stake on 18.10.2007 in M/s Swan Telecom (P) Limited (STPL) through DB Infrastructure (P) Limited. Accused Vinod Goenka carried forward the fraudulent applications of STPL dated 02.03.2007 submitted by previous management despite knowing the fact that STPL was ineligible company to get UAS licences by virtue of clause 8 of UASL guidelines 2005. Accused Vinod Goenka was an associate of accused Shahid Usman Balwa to create false documents including Board Minutes of M/s Giraffe Consultancy (P)

Limited fraudulently showing transfer of its shares by the companies of Reliance ADA Group during February 2007 itself. Accused/applicant in conspiracy with accused Shahid Usman Balwa concealed or furnished false information to DoT regarding shareholding pattern of STPL as on the date of application thereby making STPL an eligible company to get licence on the date of application, that is, 02.03.2007. Accused/applicant was an overall beneficiary with accused Shahid Usman Balwa for getting licence and spectrum in 13 telecom circles.

12. Investigation has also disclosed pursuant to TRAI recommendations dated 28.08.2007 when M/s Reliance Communications Ltd. got the GSM spectrum under the Dual Technology policy, accused Gautam Doshi, Hari Nair and Surendra Pipara transferred the control of M/s Swan Telecom Pvt. Ltd., and said structure of holding companies, to accused Shahid Balwa and Vinod Goenka. In this manner they transferred a company which was otherwise ineligible for grant of UAS license on the date of application, to the said two accused persons belonging to Dynamix Balwa (DB) group and thereby facilitated them to cheat the DoT by getting issued UAS Licences despite the ineligibility

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on the date of application and till 18.10.2007.

13. Investigation has disclosed that accused Shahid Balwa and Vinod Goenka joined M/s Swan Telecom Pvt. Ltd. and M/s Tiger Traders Pvt. Ltd. as directors on 01.10.2007 and DB group acquired the majority stake in TTPL/ M/s Swan Telecom Pvt. Ltd. (STPL) on 18.10.2007. On 18.10.2007 a fresh equity of 49.90 lakh shares was allotted to M/s DB Infrastructure Pvt. Ltd. Therefore on 01.10.2007, and thereafter, accused Shahid Balwa and Vinod Goenka were in-charge of, and were responsible to, the company M/s Swan Telecom Pvt. Ltd. for the conduct of business. As such on this date, majority shares of the company were held by D.B. Group."

Gautam Doshi (A9), Surendra Pipara (A10) and Hari Nair (A 11) in Crl. Appeal Nos.2180,2182 & 2181 of 2011 [arising out of SLP (Crl) Nos. 6190,6315 & 6288 of 2011] :

"7. It is further alleged that in January-February, 2007 accused Gautam Doshi, Surendra Pipara and Hari Nath in furtherance of their common intention to cheat the Department of Telecommunications, structured/created net worth of M/s Swan Telecom Pvt. Ltd., out of funds arranged from M/s Reliance Telecom Ltd. or its associates,

for applying to DoT for UAS Licences in 13 circles, where M/s Reliance Telecom Ltd. had no GSM spectrum, in a manner that its associations with M/s Reliance Telecom Ltd. may not be detected, so that DOT could not reject its application on the basis of clause 8 of the UASL Guidelines dated 14.12.2005.

8. In pursuance of the said common intention of accused persons, they structured the stake-holding of M/s Swan Telecom Pvt. Ltd. in a manner that only 9.9% equity was held by M/s Reliance Telecom Ltd. (RTL) and rest 90.1% was shown as held by M/s Tiger Traders Pvt. Ltd. (later known as M/s Tiger Trustees Pvt. Ltd. – TTPL), although the entire company was held by the Reliance ADA Group of companies through the funds raised from M/s Reliance Telecom Ltd. etc.

9. It was further alleged that M/s Swan Telecom Pvt. Ltd. (STPL) was, at the time of application dated 02.03.2007, an associate of M/s Reliance ADA Group / M/s Reliance Communications Limited / M/s Reliance Telecom Limited, having existing UAS Licences in all telecom circles. Investigations have also disclosed that M/s Tiger Traders Pvt. Ltd., which held majority stake (more than 90%) in M/s Swan Telecom Pvt. Ltd. (STPL), was also an associate company of Reliance ADA Group. Both the

companies has not business history and were activated solely for the purpose of applying for UAS Licences in 13 telecom circles, where M/s Reliance Telecom Ltd. did not have GSM spectrum and M/s Reliance Communications Ltd. had already applied for dual technology spectrum for these circles. Investigation has disclosed that the day to day affairs of M/s Swan Telecom Pvt. Ltd. and M/s Tiger Traders Pvt. Ltd. were managed by the said three accused persons either themselves or through other officers/consultants related to the Reliance ADA group. Commercial decisions of M/s Swan Telecom Pvt. Ltd. and M/s Tiger Traders Pvt. Ltd. were also taken by these accused persons of Reliance ADA group. Material inter-company transactions (bank transactions) of M/s Reliance Communications / M/s Reliance Telecommunications Ltd. and M/s Swan Telecom Pvt. Ltd. (STPL) and M/s Tiger Traders Pvt. Ltd. were carried out by same group of persons as per the instructions of said accused Gautam Doshi and Hari Nair.

10. Investigations about the holding structure of M/s Tiger Traders Pvt. Ltd. has revealed that the aforesaid accused persons also structured two other companies i.e. M/s Zebra Consultancy Private Limited & M/s Parrot Consultants Private

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Limited. Till April, 2007, by when M/s Swan Telecom Pvt. Ltd. applied for telecom licences, 50% shares of M/s Zebra Consultancy Private Limited & M/s Parrot Consultants Private Limited, were purchased by M/s Tiger Traders Pvt. Ltd. Similarly, 50% of equity shares of M/s Parrot Consultants Private Limited & M/s Tiger Traders Private Limited were purchased by M/s Zebra Consultancy Private Limited. Also, 50% of equity shares of M/s Zebra Consultancy Private Limited and M/s Tiger Traders Private Limited were purchased by M/s Parrot Consultants Private Limited. These 3 companies were, therefore, cross holding each other in an inter-locking structure w.e.f. March 2006 till 4th April, 2007.

11. It is further alleged that accused Gautam Doshi, Surendra Pipara and Hari Nair instead of withdrawing the fraudulent applications preferred in the name of M/s Swan Telecom (P) Limited, which was not eligible at all, allowed the transfer of control of that company to the Dynamix Balwa Group and thus, enabled perpetuating and (sic.) illegality. It is alleged that TRAI in its recommendations dated 28.08.2007 recommended the use of dual technology by UAS Licencees. Due to this reason M/s Reliance Communications Limited, holding company of M/s Reliance Telecom

Limited, became eligible to get GSM spectrum in telecom circles for which STPL had applied. Consequently, having management control of STPL was of no use for the applicant/accused persons and M/s Reliance Telecom Limited. Moreover, the transfer of management of STPL to DB Group and sale of equity held by it to M/s Delphi Investments (P) Limited, Mauritius, M/s Reliance Telecom Limited has earned a profit of around Rs. 10 crores which otherwise was not possible if they had withdrawn the applications. M/s Reliance Communications Limited also entered into agreement with M/s Swan Telecom (P) Limited for sharing its telecom infrastructure. It is further alleged that the three accused persons facilitated the new management of M/s Swan Telecom (P) Limited to get UAS licences on the basis of applications filed by the former management. It is further alleged that M/s Swan Telecom (P) Limited on the date of application, that is, 02.03.2007 was an associate company of Reliance ADA group, that is, M/s Reliance Communications Limited/ M/s Reliance Telecom Limited and therefore, ineligible for UAS licences.

12. Investigation has also disclosed pursuant to TRAI recommendations dated 28.08.2007 when M/s Reliance Communications

Ltd. got the GSM spectrum under the Dual Technology policy, accused Gautam Doshi, Hari Nair and Surendra Pipara transferred the control of M/s Swan Telecom Pvt. Ltd., and said structure of holding companies, to accused Shahid Balwa and Vinod Goenka. In this manner they transferred a company which was otherwise ineligible for grant of UAS license on the date of application, to the said two accused persons belonging to Dynamix Balwa (DB) group and thereby facilitated them to cheat the DoT by getting issued UAS Licences despite the ineligibility on the date of application and till 18.10.2007."

4) The Special Judge, CBI, New Delhi, rejected Bail Applications filed by the appellants by his order dated 20.04.2011. The appellants moved the High Court by filing applications under Section 439 of the Code of Criminal Procedure (in short, "Cr. P.C."). The same came to be rejected by the learned Single Judge by his order dated 23.05.2011. Aggrieved by the same, the appellants are before us in these appeals.

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5) Shri. Ram Jethmalani, Shri. Mukul Rohatgi, Shri Soli J. Sorabjee and Shri. Ashok H. Desai, learned senior counsel appeared for the appellants and Shri. Harin P. Raval, learned Additional Solicitor General, appears for the respondent-CBI.

6) Shri. Ram Jethmalani, learned senior counsel appearing for the appellant Sanjay Chandra, would urge that the impugned Judgment has not appreciated the basic rule laid down by this Court that grant of bail is the rule and its denial is the exception. Shri. Jethmalani submitted that if there is any apprehension of the accused of absconding from trial or tampering with the witnesses, then it is justified for the Court to deny bail. The learned senior counsel would submit that the accused has cooperated with the investigation throughout and that his behavior has been exemplary. He would further submit that the

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appellant was not arrested during the investigation, as there was no threat from him of tampering with the witnesses. He would submit that the personal liberty is at a very high pedestal in our Constitutional system, and the same cannot be meddled with in a causal manner. He would assail the impugned Judgment stating that the Ld. Judge did not apply his mind, and give adequate reasons before rejecting bail, as is required by the legal norms set down by this Court. Shri. Jethmalani further contends that it was only after the appellants appeared in the Court in pursuance of summons issued, they were made to apply for bail, and, thereafter, denied bail and sent to custody. The learned senior counsel states that the trial Judge does not have the power to send a person, who he has summoned in pursuance of Section 87 Cr.P.C to judicial custody. The only power that the trial Judge had, he would contend, was to

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ask for a bond as provided for in Section 88 Cr.P.C. to ensure his appearance. Shri. Jethmalani submits that when a person appeared in pursuance of a bond, he was a free man, and such a free man cannot be committed to prison by making him to apply for bail and thereafter, denying him the same. Shri. Jethmalani further submits that if it was the intention of the Legislature to make a person, who appears in pursuance of summons to apply for bail, it would have been so legislated in Section 88 Cr.P.C. The learned senior counsel assailed the Judgment of the Delhi High Court in the '*Court on its own motion v. CBI'*, 2004 (I) JCC 308, by which the High Court gave directions to Criminal Courts to call upon the accused who is summoned to appear to apply for bail, and then decide on the merits of the bail application. He would state that the High Court has ignored even the CBI Manual before issuing these directions, which provided

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for bail to be granted to the accused, except in the event of there being commission of heinous crime. The learned senior counsel would also argue that it was an error to have a "rolled up charge", as recognized by the *Griffiths'* case (*R vs. Griffiths and Ors.,* (1966) 1 Q.B. 589). Shri.Jethmalani submitted that there is not even a prima facie case against the accused and would make references to the charge sheet and the statement of several witnesses. He would emphatically submit that none of the ingredients of the offences charged with were stated in the charge sheet. He would further contend that even if, there is a prima facie case, the rule is still bail, and not jail, as per the dicta of this Court in several cases.

7) Shri. Mukul Rohatgi, learned senior counsel appearing for the appellant Vinod Goenka, while adopting the arguments of Shri. Jethmalani, would further supplement by arguing that the Ld.

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Trial Judge erred in making the persons, who appeared in pursuance of the summons, apply for bail and then denying the same, and ordering for remand in judicial custody. Shri. Rohatgi would further contend that the gravity of the offence charged with, is to be determined by the maximum sentence prescribed by the Statute and not by any other standard or measure. In other words, the learned senior counsel would submit that the alleged amount involved in the so-called Scam is not the determining factor of the gravity of the offence, but the maximum punishment prescribed for the offence. He would state that the only bar for bail pending trial in Section 437 is for those persons who are charged with offences punishable with life or death, and there is no such bar for those persons who were charged with offences with maximum punishment of seven years. Shri. Rohatgi also cited some case laws.

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8) Shri. Ashok H. Desai, learned senior counsel appearing for the appellants Hari Nair and Surendra Pipara, adopted the principal arguments of Shri.Jethmalani. In addition, Shri. Desai would submit that a citizen of this country, who is charged with a criminal offence, has the right to be enlarged on bail. Unless there is a clear necessity for deprivation of his liberty, a person should not be remanded to judicial custody. Shri. Desai would submit that the Court should bear in mind that such custody is not punitive in nature, but preventive, and must be opted only when the charges are serious. Shri. Desai would further submit that the power of the High Court and this Court is not limited by the operation of Section 437. He would further contend that Surendra Pipara deserves to be released on bail in view of his serious health conditions.

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9) Shri. Soli J. Sorabjee, learned senior counsel appearing for Gautam Doshi, adopted the principal arguments of Shri. Jethmalani. Shri. Sorabjee would assail the finding of the Learned Judge of the High Court in the impugned Judgment that the mere fact that the accused were not arrested during the investigation was proof of their influence in the society, and hence, there was a reasonable apprehension that they would tamper with the evidence if enlarged on bail. Shri. Sorabjee would submit that if this reasoning is to be accepted, then bail is to be denied in each and every criminal case that comes before the Court. The learned senior counsel also highlighted that the accused had no criminal antecedents.

10) Shri. Haren P. Raval, the learned Additional Solicitor General, in his reply, would submit that the offences that are being charged, are of the nature that the economic fabric of the

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country is brought at stake. Further, the learned ASG would state that the quantum of punishment could not be the only determinative factor for the magnitude of an offence. He would state that one of the relevant considerations for the grant of bail is the interest of the society at large as opposed to the personal liberty of the accused, and that the Court must not lose sight of the former. He would submit that in the changing circumstances and scenario, it was in the interest of the society for the Court to decline bail to the appellants. Shri. Raval would further urge that consistency is the norm of this Court and that there was no reason or change in circumstance as to why this Court should take a different view from the order of 20th June 2011 in *Sharad Kumar Etc. v. Central Bureau of Investigation* [in SLP (Crl) No. 4584-4585 of 2011] rejecting bail to some of the co-accused in the same case. Shri. Raval would

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further state that the investigation in these cases is monitored by this Court and the trial is proceeding on a day-to-day basis and that there is absolutely no delay on behalf of the prosecuting agency in completing the trial. Further, he would submit that the appellants, having cooperated with the investigation, is no ground for grant of bail, as they were expected to cooperate with the investigation as provided by the law. He would further submit that the test to enlarge an accused on bail is whether there is a reasonable apprehension of tampering with the evidence, and that there is an apprehension of threat to some of the witnesses. The learned ASG would further submit that there is more reason now for the accused not to be enlarged on bail, as they now have the knowledge of the identity of the witnesses, who are the employees of the accused, and there is an apprehension that the witnesses may be tampered

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with. The learned ASG would state that Section 437 of the Cr.P.C. uses the word “appears”, and, therefore, that the argument of the learned senior counsel for the appellants that the power of the trial Judge with regard to a person summoned under Section 87 is controlled by Section 88 is incorrect. Shri. Raval also made references to the United Nations Convention on Corruption and the Report on the Reforms in the Criminal Justice System by Justice Malimath, which, we do not think, is necessary to go into. The learned ASG also relied on a few decisions of this Court, and the same will be dealt with in the course of the judgment. On a query from the Bench, the learned ASG would submit that in his opinion, bail should be denied in all cases of corruption which pose a threat to the economic fabric of the country, and that the balance should tilt in favour of the public interest.

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11) In his reply, Shri. Jethmalani would submit that as the presumption of innocence is the privilege of every accused, there is also a presumption that the appellants would not tamper with the witnesses if they are enlarged on bail, especially in the facts of the case, where the appellants have cooperated with the investigation. In recapitulating his submissions, the learned senior counsel contended that there are two principles for the grant of bail – firstly, if there is no prima facie case, and secondly, even if there is a prima facie case, if there is no reasonable apprehension of tampering with the witnesses or evidence or absconding from the trial, the accused are entitled to grant of bail pending trial. He would submit that since both the conditions are satisfied in this case, the appellants should be granted bail.

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12) Let us first deal with a minor issue canvassed by Mr. Raval, learned ASG. It is submitted that this Court has refused to entertain the Special Leave Petition filed by one of the co-accused *[Sharad Kumar Vs. CBI (supra)]* and, therefore, there is no reason or change in the circumstance to take a different view in the case of the appellants who are also charge- sheeted for the same offence. We are not impressed by this argument. In the aforesaid petition, the petitioner was before this Court before framing of charges by the Trial Court. Now the charges are framed and the trial has commenced. We cannot compare the earlier and the present proceedings and conclude that there are no changed circumstances and reject these petitions.

13) The appellants are facing trial in respect of the offences under Sections 420-B, 468, 471 and 109 of Indian Penal Code and Section 13(2) read

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with 13(i)(d) of Prevention of Corruption Act, 1988. Bail has been refused first by the Special Judge, CBI, New Delhi and subsequently, by the High Court. Both the courts have listed the factors, on which they think, are relevant for refusing the Bail applications filed by the applicants as seriousness of the charge; the nature of the evidence in support of the charge; the likely sentence to be imposed upon conviction; the possibility of interference with witnesses; the objection of the prosecuting authorities; possibility of absconding from justice.

14) In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless

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it can be required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, 'necessity' is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if

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left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un-convicted person for the purpose of giving him a taste of imprisonment as a lesson.

15) In the instant case, as we have already noticed that the “pointing finger of accusation” against the appellants is ‘the seriousness of the charge’. The offences alleged are economic offences which has resulted in loss to the State exchequer. Though, they contend that there is possibility of the appellants tampering witnesses, they have not placed any material in

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support of the allegation. In our view, seriousness of the charge is, no doubt, one of the relevant considerations while considering bail applications but that is not the only test or the factor : The other factor that also requires to be taken note of is the punishment that could be imposed after trial and conviction, both under the Indian Penal Code and Prevention of Corruption Act. Otherwise, if the former is the only test, we would not be balancing the Constitutional Rights but rather "recalibration of the scales of justice." The provisions of Cr.P.C. confer discretionary jurisdiction on Criminal Courts to grant bail to accused pending trial or in appeal against convictions, since the jurisdiction is discretionary, it has to be exercised with great care and caution by balancing valuable right of liberty of an individual and the interest of the society in general. In our view, the reasoning

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adopted by the learned District Judge, which is affirmed by the High Court, in our opinion, a denial of the whole basis of our system of law and normal rule of bail system. It transcends respect for the requirement that a man shall be considered innocent until he is found guilty. If such power is recognized, then it may lead to chaotic situation and would jeopardize the personal liberty of an individual. This Court, in Kalyan Chandra Sarkar Vs. Rajesh Ranjan- (2005) 2 SCC 42, observed that *"under the criminal laws of this country, a person accused of offences which are non-bailable, is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 of the Constitution, since the same is authorized by law. But even persons accused of non-bailable offences are entitled to bail if the*

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Court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the Court is satisfied by reasons to be recorded that in spite of the existence of prima facie case, there is need to release such accused on bail, where fact situations require it to do so."

16) This Court, time and again, has stated that bail is the rule and committal to jail an exception. It is also observed that refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution. In the case of *State of Rajasthan v. Balchand,* (1977) 4 SCC 308, this Court opined:

> *"2. The basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like, by the petitioner who seeks enlargement*

on bail from the Court. We do not intend to be exhaustive but only illustrative.

3. It is true that the gravity of the offence involved is likely to induce the petitioner to avoid the course of justice and must weigh with us when considering the question of jail. So also the heinousness of the crime. Even so, the record of the petitioner in this case is that, while he has been on bail throughout in the trial court and he was released after the judgment of the High Court, there is nothing to suggest that he has abused the trust placed in him by the court; his social circumstances also are not so unfavourable in the sense of his being a desperate character or unsocial element who is likely to betray the confidence that the court may place in him to turn up to take justice at the hands of the court. He is stated to be a young man of 27 years with a family to maintain. The circumstances and the social milieu do not militate against the petitioner being granted bail at this stage. At the same time any possibility of the absconsion or evasion or other abuse can be taken care of by a direction that the petitioner will report himself before the police station at Baren once every fortnight."

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(17) In the case of *Gudikanti Narasimhulu v. Public Prosecutor*, (1978) 1 SCC 240, V.R. Krishna Iyer, J., sitting as Chamber Judge, enunciated the principles of bail thus:

> *"3. What, then, is "judicial discretion" in this bail context? In the elegant words of Benjamin Cardozo:*
>
> *"The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life". Wide enough in all conscience is the field of discretion that remains."*
>
> *Even so it is useful to notice the tart terms of Lord Camden that*
>
> *"the discretion of a Judge is the law of tyrants: it is always unknown, it is different in different men; it is casual, and depends upon constitution, temper and passion. In the best, it is oftentimes caprice; in the worst,*

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it is every vice, folly and passion to which human nature is liable....”

Perhaps, this is an overly simplistic statement and we must remember the constitutional focus in Articles 21 and 19 before following diffuse observations and practices in the English system. Even in England there is a growing awareness that the working of the bail system requires a second look from the point of view of correct legal criteria and sound principles, as has been pointed out by Dr Bottomley.

6. Let us have a glance at the pros and cons and the true principle around which other relevant factors must revolve. When the case is finally disposed of and a person is sentenced to incarceration, things stand on a different footing. We are concerned with the penultimate stage and the principal rule to guide release on bail should be to secure the presence of the applicant who seeks to be liberated, to take judgment and serve sentence in the event of the Court punishing him with imprisonment. In this perspective, relevance of considerations is regulated by their nexus with the likely absence of the applicant for fear of a severe sentence, if such be plausible in the case. As Erle. J. indicated, when the crime charged (of which a conviction has been sustained) is of the highest

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magnitude and the punishment of it assigned by law is of extreme severity, the Court may reasonably presume, some evidence warranting, that no amount of bail would secure the presence of the convict at the stage of judgment, should he be enlarged. Lord Campbell, C.J. concurred in this approach in that case and Coleridge J. set down the order of priorities as follows:

"I do not think that an accused party is detained in custody because of his guilt, but because there are sufficient probable grounds for the charge against him as to make it proper that he should be tried, and because the detention is necessary to ensure his appearance at trial .... It is a very important element in considering whether the party, if admitted to bail, would appear to take his trial; and I think that in coming to a determination on that point three elements will generally be found the most important: the charge, the nature of the evidence by which it is supported, and the punishment to which the party would be liable if convicted.

In the present case, the charge is that of wilful murder; the evidence contains an admission by the prisoners of the truth of the charge, and the punishment of the offence is, by law, death."

7. It is thus obvious that the nature of the charge is the vital

factor and the nature of the evidence also is pertinent. The punishment to which the party may be liable, if convicted or conviction is confirmed, also bears upon the issue.

8. Another relevant factor is as to whether the course of justice would be thwarted by him who seeks the benignant jurisdiction of the Court to be freed for the time being.

9. Thus the legal principles and practice validate the Court considering the likelihood of the applicant interfering with witnesses for the prosecution or otherwise polluting the process of justice. It is not only traditional but rational, in this context, to enquire into the antecedents of a man who is applying for bail to find whether he has a bad record – particularly a record which suggests that he is likely to commit serious offences while on bail. In regard to habituals, it is part of criminological history that a thoughtless bail order has enabled the bailee to exploit the opportunity to inflict further crimes on the members of society. Bail discretion, on the basis of evidence about the criminal record of a defendant is therefore not an exercise in irrelevance.

13. Viewed from this perspective, we gain a better insight into the rules of the game. When a person, charged with a grave offence, has

been acquitted at a stage, has the intermediate acquittal pertinence to a bail plea when the appeal before this Court pends? Yes, it has. The panic which might prompt the accused to jump the gauntlet of justice is less, having enjoyed the confidence of the Court's verdict once. Concurrent holdings of guilt have the opposite effect. Again, the ground for denial of provisional release becomes weaker when the fact stares us in the face that a fair finding – if that be so – of innocence has been recorded by one Court. It may not be conclusive, for the judgment of acquittal may be ex facie wrong, the likelihood of desperate reprisal, if enlarged, may be a deterrent and his own safety may be more in prison than in the vengeful village where feuds have provoked the violent offence. It depends. Antecedents of the man and socio-geographical circumstances have a bearing only from this angle. Police exaggerations of prospective misconduct of the accused, if enlarged, must be soberly sized up lest danger of excesses and injustice creep subtly into the discretionary curial technique. Bad record and police prediction of criminal prospects to invalidate the bail plea are admissible in principle but shall not stampede the Court into a complacent refusal."

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(18) In *Gurcharan Singh v. State (Delhi Admn.), (1978) 1 SCC 118,* this Court took the view:

> *"22. In other non-bailable cases the Court will exercise its judicial discretion in favour of granting bail subject to sub-section (3) of Section 437 CrPC if it deems necessary to act under it. Unless exceptional circumstances are brought to the notice of the Court which may defeat proper investigation and a fair trial, the Court will not decline to grant bail to a person who is not accused of an offence punishable with death or imprisonment for life. It is also clear that when an accused is brought before the Court of a Magistrate with the allegation against him of an offence punishable with death or imprisonment for life, he has ordinarily no option in the matter but to refuse bail subject, however, to the first proviso to Section 437(1) CrPC and in a case where the Magistrate entertains a reasonable belief on the materials that the accused has not been guilty of such an offence. This will, however, be an extraordinary occasion since there will be some materials at the stage of initial arrest, for the accusation or for strong suspicion of commission by the person of such an offence.*

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24. Section 439(1) CrPC of the new Code, on the other hand, confers special powers on the High Court or the Court of Session in respect of bail. Unlike under Section 437(1) there is no ban imposed under Section 439(1), CrPC against granting of bail by the High Court or the Court of Session to persons accused of an offence punishable with death or imprisonment for life. It is, however, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused. Even so, the High Court or the Court of Session will have to exercise its judicial discretion in considering the question of granting of bail under Section 439(1) CrPC of the new Code. The overriding considerations in granting bail to which we adverted to earlier and which are common both in the case of Section 437(1) and Section 439(1) CrPC of the new Code are the nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim and the witnesses; the likelihood, of the accused fleeing from justice; of repeating the offence; of

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jeopardising his own life being faced with a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as of its investigation and other relevant grounds which, in view of so many valuable factors, cannot be exhaustively set out."

19) In *Babu Singh v. State of U.P., (1978) 1 SCC 579,* this Court opined:

"8. The Code is cryptic on this topic and the Court prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice, public safety and burden on the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process. As Chamber Judge in this summit Court I had to deal with this uncanalised case-flow, ad hoc response to the docket being the flickering candle light. So it is desirable that the subject is disposed of on basic principle, not improvised brevity draped as discretion. Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the curial power to negate it is a great trust exercisable, not casually but judicially, with

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lively concern for the cost to the individual and the community. To glamorise impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of "procedure established by law". The last four words of Article 21 are the life of that human right.

…

16. Thus the legal principle and practice validate the Court considering the likelihood of the applicant interfering with witnesses for the prosecution or otherwise polluting the process of justice. It is not only traditional but rational, in this context, to enquire into the antecedents of a man who is applying for bail to find whether he has a bad record—particularly a record which suggests that he is likely to commit serious offences while on bail. In regard to habituals, it is part of criminological history that a thoughtless bail order has enabled the bailee to exploit the opportunity to inflict further crimes on the members of society. Bail discretion, on the basis of evidence about the criminal record of a defendant, is therefore not an exercise in irrelevance.

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17. The significance and sweep of Article 21 make the deprivation of liberty a matter of grave concern and permissible only when the law authorising it is reasonable, even-handed and geared to the goals of community good and State necessity spelt out in Article 19. Indeed, the considerations I have set out as criteria are germane to the constitutional proposition I have deduced. Reasonableness postulates intelligent care and predicates that deprivation of freedom by refusal of bail is not for punitive purpose but for the bi-focal interests of justice—to the individual involved and society affected.

18. We must weigh the contrary factors to answer the test of reasonableness, subject to the need for securing the presence of the bail applicant. It makes sense to assume that a man on bail has a better chance to prepare or present his case than one remanded in custody. And if public justice is to be promoted, mechanical detention should be demoted. In the United States, which has a constitutional perspective close to ours, the function of bail is limited, "community roots" of the applicant are stressed and, after the Vera Foundation's Manhattan Bail Project, monetary suretyship is losing ground. The considerable public expense in keeping in custody where no danger of

disappearance or disturbance can arise, is not a negligible consideration. Equally important is the deplorable condition, verging on the inhuman, of our sub-jails, that the unrewarding cruelty and expensive custody of avoidable incarceration makes refusal of bail unreasonable and a policy favouring release justly sensible.

20. Viewed from this perspective, we gain a better insight into the rules of the game. When a person, charged with a grave offence, has been acquitted at a stage, has the intermediate acquittal pertinence to a bail plea when the appeal before this Court pends? Yes, it has. The panic which might prompt the accused to jump the gauntlet of justice is less, having enjoyed the confidence of the Court's verdict once. Concurrent holdings of guilt have the opposite effect. Again, the ground for denial of provisional release becomes weaker when the fact stares us in the face that a fair finding – if that be so – of innocence has been recorded by one Court. It may be conclusive, for the judgment of acquittal may be ex facie wrong, the likelihood of desperate reprisal, it enlarged, may be a deterrent and his own safety may be more in prison than in the vengeful village where feuds have provoked the violent offence. It depends. Antecedents of the man

and socio-geographical circumstances have a bearing only from this angle. Police exaggerations of prospective misconduct of the accused, if enlarged, must be soberly sized up lest danger of excesses and injustice creep subtly into the discretionary curial technique. Bad record and police prediction of criminal prospects to invalidate the bail plea are admissible in principle but shall not stampede the Court into a complacent refusal."

20) In *Moti Ram v. State of M.P.,* (1978) 4 SCC 47, this Court, while discussing pre-trial detention, held:

"14. The consequences of pre-trial detention are grave. Defendants presumed innocent arc subjected to the psychological and physical deprivations of jail life, usually under more onerous conditions than are imposed on convicted defendants. The jailed defendant loses his job if he has one and is prevented from contributing to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family."

21) The concept and philosophy of bail was discussed by this Court in *Vaman Narain Ghiya v. State of Rajasthan,* (2009) 2 SCC 281, thus:

> *"6. "Bail" remains an undefined term in CrPC. Nowhere else has the term been statutorily defined. Conceptually, it continues to be understood as a right for assertion of freedom against the State imposing restraints. Since the UN Declaration of Human Rights of 1948, to which India is a signatory, the concept of bail has found a place within the scope of human rights. The dictionary meaning of the expression "bail" denotes a security for appearance of a prisoner for his release. Etymologically, the word is derived from an old French verb "bailer" which means to "give" or "to deliver", although another view is that its derivation is from the Latin term "baiulare", meaning "to bear a burden". Bail is a conditional liberty. Stroud's Judicial Dictionary (4th Edn., 1971) spells out certain other details. It states:*
>
> *"… when a man is taken or arrested for felony, suspicion of felony, indicted of felony, or any such case, so that he is restrained of his liberty. And, being by law bailable, offereth surety to those*

which have authority to bail him, which sureties are bound for him to the King's use in a certain sums of money, or body for body, that he shall appear before the justices of goal delivery at the next sessions, etc. Then upon the bonds of these sureties, as is aforesaid, he is bailed—that is to say, set at liberty until the day appointed for his appearance."

Bail may thus be regarded as a mechanism whereby the State devolutes upon the community the function of securing the presence of the prisoners, and at the same time involves participation of the community in administration of justice.

7. Personal liberty is fundamental and can be circumscribed only by some process sanctioned by law. Liberty of a citizen is undoubtedly important but this is to balance with the security of the community. A balance is required to be maintained between the personal liberty of the accused and the investigational right of the police. It must result in minimum interference with the personal liberty of the accused and the right of the police to investigate the case. It has to dovetail two conflicting demands, namely, on the one hand the requirements of the society for being shielded from the hazards of being exposed to the misadventures of a person alleged

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to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence viz. the presumption of innocence of an accused till he is found guilty. Liberty exists in proportion to wholesome restraint, the more restraint on others to keep off from us, the more liberty we have. (See A.K. Gopalan v. State of Madras)

8. The law of bail, like any other branch of law, has its own philosophy, and occupies an important place in the administration of justice and the concept of bail emerges from the conflict between the police power to restrict liberty of a man who is alleged to have committed a crime, and presumption of innocence in favour of the alleged criminal. An accused is not detained in custody with the object of punishing him on the assumption of his guilt."

22) More recently, in the case of *Siddharam Satlingappa Mhetre v. State of Maharashtra,* (2011) 1 SCC 694, this Court observed that *"(j)ust as liberty is precious to an individual, so is the society's interest in maintenance of*

peace, law and order. Both are equally important." This Court further observed :

> *"116. Personal liberty is a very precious fundamental right and it should be curtailed only when it becomes imperative according to the peculiar facts and circumstances of the case."*

This Court has taken the view that when there is a delay in the trial, bail should be granted to the accused [See *Babba v. State of Maharashtra,* (2005) 11 SCC 569, *Vivek Kumar v. State of U.P.,* (2000) 9 SCC 443, *Mahesh Kumar Bhawsinghka v. State of Delhi,* (2000) 9 SCC 383].

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23) The principles, which the Court must consider while granting or declining bail, have been culled out by this Court in the case of *Prahlad Singh Bhati v. NCT, Delhi*, (2001) 4 SCC 280, thus:

"The jurisdiction to grant bail has to be exercised on the basis of well-settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the court has to keep in mind the nature of accusations, the nature of the evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the court dealing with the grant of bail can only satisfy it (sic itself) as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."

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24) In *State of U.P. v. Amarmani Tripathi,* (2005) 8 SCC 21, this Court held as under:

> *"18. It is well settled that the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail [see Prahlad Singh Bhati v. NCT, Delhi and Gurcharan Singh v. State (Delhi Admn.)]. While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused. We may also refer to the following principles relating to grant or refusal of bail stated in*

Kalyan Chandra Sarkar v. Rajesh Ranjan: (SCC pp. 535-36, para 11)

"11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:

(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.

(b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.

(c) Prima facie satisfaction of the court in support of the charge. (See Ram Govind Upadhyay v. Sudarshan Singh and Puran v. Rambilas.)"

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22. While a detailed examination of the evidence is to be avoided while considering the question of bail, to ensure that there is no prejudging and no prejudice, a brief examination to be satisfied about the existence or otherwise of a prima facie case is necessary."

25) 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 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 the possibility of the accused persons tempering with the witnesses. In the present case, the charge is that of cheating and dishonestly inducing delivery of property, forgery for the purpose of cheating using as genuine a forged document. The punishment of the offence is punishment 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

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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 grant or refusal to grant bail lies within the discretion of the Court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the Court, whether before or after conviction, to assure that he will submit to the jurisdiction of the Court and be in attendance

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thereon whenever his presence is required. This Court in *Gurcharan Singh and Ors. Vs. State* AIR 1978 SC 179 observed that two paramount considerations, while considering petition for grant of bail in non-bailable offence, apart from the seriousness of the offence, are the likelihood of the accused fleeing from justice and his tampering with the prosecution witnesses. Both of them relate to ensure of the fair trial of the case. Though, this aspect is dealt by the High Court in its impugned order, in our view, the same is not convincing.

26) When the undertrial prisoners are detained in jail custody to an indefinite period, Article 21 of the Constitution is violated. Every person, detained or arrested, is entitled to speedy trial, the question is : whether the same is possible in the present case. There are seventeen accused persons. Statement of the witnesses runs to several hundred pages and the

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documents on which reliance is placed by the prosecution, is voluminous. The trial may take considerable time and it looks to us that the appellants, who are in jail, have to remain in jail longer than the period of detention, had they been convicted. It is not in the interest of justice that accused should be in jail for an indefinite period. No doubt, the offence alleged against the appellants is a serious one in terms of alleged huge loss to the State exchequer, that, by itself, should not deter us from enlarging the appellants on bail when there is no serious contention of the respondent that the accused, if released on bail, would interfere with the trial or tamper with evidence. We do not see any good reason to detain the accused in custody, that too, after the completion of the investigation and filing of the charge-sheet. This Court, in the case of *State of Kerala Vs. Raneef* (2011) 1 SCC 784, has stated :-

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"15. In deciding bail applications an important factor which should certainly be taken into consideration by the court is the delay in concluding the trial. Often this takes several years, and if the accused is denied bail but is ultimately acquitted, who will restore so many years of his life spent in custody? Is Article 21 of the Constitution, which is the most basic of all the fundamental rights in our Constitution, not violated in such a case? Of course this is not the only factor, but it is certainly one of the important factors in deciding whether to grant bail. In the present case the respondent has already spent 66 days in custody (as stated in Para 2 of his counter-affidavit), and we see no reason why he should be denied bail. A doctor incarcerated for a long period may end up like Dr. Manette in Charles Dicken's novel A Tale of Two Cities, who forgot his profession and even his name in the Bastille."

27) In 'Bihar Fodder Scam', this Court, taking into consideration the seriousness of the charges alleged and the maximum sentence of imprisonment that could be imposed including the fact that the

appellants were in jail for a period more than six months as on the date of passing of the order, was of the view that the further detention of the appellants as pre-trial prisoners would not serve any purpose.

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

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29) In the view we have taken, it may not be necessary to refer and discuss other issues canvassed by the learned counsel for the parties and the case laws relied on in support of their respective contentions. We clarify that we have not expressed any opinion regarding the other legal issues canvassed by learned counsel for the parties.

30) In the result, we order that the appellants be released on bail on their executing a bond with two solvent sureties, each in a sum of `5 lakhs to the satisfaction of the Special Judge, CBI, New Delhi on the following conditions :-

a. The appellants shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts or the case so as to dissuade him to disclose such facts to the Court or to any other authority.

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b. They shall remain present before the Court on the dates fixed for hearing of the case. If they want to remain absent, then they shall take prior permission of the court and in case of unavoidable circumstances for remaining absent, they shall immediately give intimation to the appropriate court and also to the Superintendent, CBI and request that they may be permitted to be present through the counsel.

c. They will not dispute their identity as the accused in the case.

d. They shall surrender their passport, if any (if not already surrendered), and in case, they are not a holder of the same, they shall swear to an affidavit. If they have already surrendered before the Ld. Special Judge, CBI, that fact should also be supported by an affidavit.

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e. We reserve liberty to the CBI to make an appropriate application for modification/recalling the order passed by us, if for any reason, the appellants violate any of the conditions imposed by this Court.

31) The appeals are disposed of accordingly.

.....J.
[G. S. SINGHVI]

.....J.
[H. L. DATTU]

New Delhi,
November 23, 2011

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