IA No. 9/2024
Bail Application of accused Mangelal Sunil Agarwal
in CC No. 112/2022
ECIR No. ECIR/35/DLZO-II/2020
Directorate of Enforcement Vs.
M/s Phoenix International FZC & Ors.

31.08.2024

This is an application under Section 483 BNSS read with Section 45 PMLA moved on behalf of the applicant/accused Mangelal Sunil Agarwal for seeking his regular bail.

Present: Sh. Simon Benjamin, Ld. SPP for ED has joined the court proceedings through VC whereas Advocate Sh. Aditya Jain is physically present in the court.
Sh. Vaibhav Suri and Sh. Saud Khan, Ld. Counsels for the applicant/accused.

1. Today, the matter is listed for orders on this application. Arguments have already been heard. The Case file; this application; its reply, convenience compilation and written arguments filed on behalf of the complainant/ED are carefully perused.

Factual Matrix:-

2. Briefly stated, an FIR bearing no. 01/2020 dated 01.01.2020 under Sections 409/467/468/471/477A/120B IPC was lodged at PS EOW, Delhi Police against Sanjay Godhwani (erstwhile Managing Director of M/s Ligare Aviation Ltd.) and 15 other accused persons including M/s Phoenix International FZC (hereinafter referred to in short as 'Phoenix FZC') on the basis of the complaint filed by Sh. Vinod Rajgopalan, authorized signatory of M/s Malav Holding Pvt. Ltd. As per said FIR, the accused persons hatched a criminal conspiracy to cheat M/s Ligare Aviation Ltd. (hereinafter referred to in short as 'LAL') by

siphoning of its funds to the tune of Rs.18.88 Crores on the basis of fake/fictitious invoices. Based upon the said FIR, this ECIR was registered on 24.09.2020 for the offence punishable under Sections 3 and 4 of Prevention of Money Laundering Act, 2002 (hereinafter referred to in short as 'PMLA').

3. After conclusion of its investigation, criminal prosecution complaint against 08 accused persons was filed on 01.10.2022 and the applicant was cited as one of the prosecution witnesses. In the complaint, it was mentioned that further investigation is still going on. During further investigation, the applicant was arrested on 06.08.2024 and since then he is in custody.

The alleged role of the applicant:-

4. As per allegations, the applicant is resident of Dubai, UAE for the last 31 years and proprietor of M/s Metal and Steel Solutions FZE, UAE (hereinafter referred to in short as 'MSS') which deals in steel & metal spares and equipments. In connivance with other accused persons, he generated a bogus invoice MSS/10/2014/ 0078 dated 30.10.2014 purportedly for "*Supply of Spares and Equipments and Maintenance Repairs for HS-125*" to LAL for an amount of USD 1.3 Millon without actually supplying the same to LAL. The said amount was received by the applicant in Bank Account of MSS maintained with NBD, Emirates, Dubai Branch on 13.11.2014. Pertinently, the said amount is alleged to be proceeds of crime (hereinafter referred to in short as 'POC') of the said predicate FIR. Out of the said USD 1.3 Million, he transferred AED 73,540 to Dubai Land Department on 16.11.2014, USD 300,000 to Tumas Group on 03.12.2014 and USD 960,000 to Phoenix FZC on 03.12.2014.

Thus, in essence, after the said transfers and deduction of bank charges and other commissions, he retained USD 4725 out of the said USD 1.3 Million (alleged POC). Therefore, it is alleged that the main accused Sanjay Godhwani erstwhile Managing Director of LAL and others, through the applicant, channeled the substantial amount of POC (excluding commissions and bank charges) from LAL to their allied/associate companies.

5. In his statement under Section 50 PMLA, the applicant admitted issuance of the said invoice and conceded that he did not supply the spare parts or render services to LAL as mentioned in the said invoice. However, in the said statement, he denied that he knew that the said amount was POC. He even denied that he knew any person in LAL or any person in other alleged companies. He stated that he made the said invoice and did the said transactions on the asking or instructions of Iqlaque Khan, resident of Dubai, as he was informed by him that LAL wanted to make immediate payment to their vendors in Dubai for availing regular services and for the said purpose, they required letter of credit discounting facility. He further stated that his company was authorized and allowed to do discounting and he did the said transaction for earning legible commission of USD 9450. He further stated that out of the said earning, he shared approximately USD 4725 with Iqlaque Khan and thus, he retained USD 4725 as commission in the said transactions.

Arguments on behalf of the applicant:-

6. Ld. Counsel for the applicant submitted that he is innocent and has been falsely implicated in this case. He further submitted that Iqlaque Khan was a broker based in Dubai and was known to

him for the last 20 years. He approached the applicant at Dubai in the year 2014 as his bank was offering bill discounting facility. He informed the applicant that LAL wanted to make instant payments to their vendors in Dubai for availing regular services and for the said purpose, they needed letter of credit discounting facility from his bank. The applicant agreed to the said offer against a nominal commission as per prevailing market practice in Dubai as its consideration. Thereafter, as per instructions of Iqlaque Khan, he innocuously issued the said invoice dated 30.10.2014 for an amount of USD 1.3 Millon for earning the said commission without knowing that the said amount transferred to him against the said invoice on 13.11.2014 in his NBD Bank Account, Emirates was POC. Subsequently, on the instructions of Iqlaque Khan through three e-mails dated 16.11.2014, 03.12.2014 and 03.12.2014, he transferred AED 73,540 to Dubai Land Department, USD 300,000 to Tumas Group and USD 960,000 to Phoenix FZC on the said respective dates out of the said received amount. For the said services, he charged a meager commission of USD 4725 i.e. only an amount of Rs.2,88,000/- as per the exchange currency rates applicable at the relevant time. The said commission is only 0.37% of the said alleged POC of USD 1.3 Million about which he did not know that it was tainted money. He further submitted that he did not know any of the main accused persons including the erstwhile Managing Director of LAL namely Sanjay Godhwani and others. Therefore, it is apparent that he did not have any *mens rea* to commit this offence.

7. He further submitted that before filing of the first criminal prosecution complaint, the applicant was summoned by ED and was examined 04 times. His four statements under Section 50 PMLA were recorded and in all those statements, he fairly and consistently conveyed all the said facts to the IO. He had no knowledge as regards the real intentions and motives behind the incriminating transactions and therefore, knowledge of the true nature of the transactions cannot possibly be imputed to him. Based upon the evidence collected by the previous IO including his statements under Section 50 PMLA, he concluded that the said amount was received by the applicant without his knowledge of it being POC. Therefore, the applicant was cited as a prosecution witness in the first criminal prosecution complaint. However, during further investigation, he was again summoned by the successor IO and based upon the same material, he was unreasonably arrested. He submitted that after filing of first criminal prosecution complaint, no subsequent evidence has come on record against him to change his status from a witness to the accused.

8. He further submitted that whatever information he had about Iqlaque Khan including his passport number, address and phone number has already been furnished to the complainant/ED in his statements under Section 50 PMLA. He has been arrested on the basis of unreasonable subjective interpretation of the said statements by the present IO in contradiction with the view of this court and the previous IO.

9. He further submitted that the applicant is neither accused nor witness in the predicate offence. He does not have any

previous criminal involvement and has deep roots in the society. Therefore, his flight risk is negligible. He is no more required for the purpose of investigation of this case. The entire evidence in this case is in the form of documents including electronic devices and the same is within the control and possession of the complainant/ED. Therefore, there is no apprehension of it being tampered by the applicant, if released on bail. The main accused persons namely Sanjay Godhwani and Ramesh Manglani have already been enlarged on bail. Neither the said accused persons nor any of the prosecution witnesses have claimed to have known the applicant. Therefore, the applicant is also entitled to the sought relief on the ground of parity as well as for the reasons submitted above.

10. Ld. Counsel for the applicant has relied upon the following judgments:-

Vijay Mandanlal Choudhary & Ors. Vs. Union of India & Ors. *2022 SCC OnLine 929;* ***Rohit Tandon Vs. Directorate of Enforcement*** *2018 11 SCC 46;* ***Directorate of Enforcement Vs. M/s Moser Baer India Ltd. & Ors.*** *(Nitin Bhatnagar Vs. ED) – IA No. 59/2024;* ***Sanjay Kansal Vs. Asstt. Directorate of Enforcement*** *(Hon'ble Delhi High Court) in Bail Application No. 1268/2023;* ***Mr. Dennis Sagaya Jude Vs. Directorate of Enforcement*** *(Hon'ble High Court of Karnataka) Crl. Pet. No. 10026/2023;* ***Razorpay Software Pvt. Ltd. Vs. Union of India*** *(Hon'ble High Court of Karnataka) WP No. 10329/2023;* ***A.K. Sudevan Vs. Asstt. Director, Directorate of Enforcement*** *(Hon'ble High Court of Madras) Crl. OP No. 23632 of 2022;* ***Manish Sisodia Vs. Directorate of Enforcement*** *2024 SCC*

OnLine SC 1920; and ***Sanjay Jain Vs. Enforcement of Director in Bail Application No. 3807/2022*** *decided on 07.03.2024 by Hon'ble Delhi High Court.*

Arguments on behalf of the complainant/ED:-

11. Ld. SPP for the complainant/ED conceded that in addition to the evidence collected against the applicant before filing of the first criminal prosecution complaint, nothing additional had come on record at the time of his arrest. However, he submitted that further investigation in this case is in progress and the present IO is within his rights to arrive at a different and independent opinion than that of previous IO based upon the same material. He further submitted that the material available on record including five e-mails exchanged between the applicant and the prosecution witness Sahil Mehta during the period of the said transactions, demonstrate that the applicant had knowledge that the said transactions were related to POC. He further alleged that the applicant has knowingly acquired POC and assisted in placing the POC for the benefit of co-accused persons namely Sanjay Godhwani and Sandeep Bhatt. He further submitted that even otherwise, knowledge of POC is not a pre-requisite for the culpability of the accused for the offence punishable under Sections 3/4 of PMLA, if it is established that he acquired or used the same. In support of his said submissions, he has placed reliance upon the judgment of Hon'ble Supreme Court in ***Anoop Bartaria Vs. Directorate of Enforcement*** *2023 SCC OnLine 477.*

12. He further submitted that the co-accused Iqlaque Khan is yet to be arrested as his whereabouts could not be confirmed. He submitted that investigation qua the applicant is still in progress.

He submitted that his custody is required for ascertaining the trail of the POC retained by him and the purpose for which the remaining POC was transferred. Further, the data seized from his mobile phone and e-mail ID is voluminous which is being analyzed to find out if it contains any allegations of incriminating evidence against him. He further submitted that after his arrest and during analysis of the said data, another invoice dated 14.02.2016 purportedly issued by him in favour of Empire Aviation Group (hereinafter referred to in short as 'EAG') for an amount of USD 300,000 for rendering maintenance consultancy services was recovered though the said services were not rendered by the applicant to EAG. The said EAG also issued a fake invoice dated 12.03.2014 in favour of LAL for USD 1.3 Million for management of Hawker 800 XP Aircraft and other variable expenses without rendering any services contained in the said invoice to LAL. The said recovered invoice is between the applicant and EAG, which had carried out fake transactions with the LAL. Therefore, they are inter-connected transactions and as per Section 23 PMLA, presumption has to be drawn that the said invoice/transaction dated 14.02.2016 is also related to the POC of this case.

13. He further submitted that as the applicant has been found to have acquired or used POC of this case, as per Section 24 PMLA, there is a mandatory presumption against him that he is involved in money laundering. He further submitted that on the basis of material available on record, the applicant has failed to satisfy the rigors of twin conditions of bail contained in Section 45 PMLA. In absence thereof, he is not entitled to be released on

bail.

14. Additionally, he submitted that the applicant is a flight risk as he is resident of Dubai. Therefore, if released on bail, it would be difficult to secure his presence during trial of the case. On the aspect of parity, it has been contended that the co-accused persons were granted bail after about 09 months to 01 year of their custody whereas, the applicant has been in custody for nearly 20 days. Therefore, it is not a fit case for invoking the grounds of parity. With these submissions, he has sought dismissal of this application.

15. Ld. SPP for the complainant/ED has relied upon the following judgments:-

Vijay Madanlal Choudhary & Ors. Vs. Union of India & Ors. *2022 SCC OnLine 929;* ***Tarun Kumar Vs. Assistant Director*** *SLP (Crl.) No. 9431 of 2023;* ***Nimmagadda Prasad Vs. CBI*** *(2013) 7 SCC 466;* ***Y.S. Jagan Mohan Reddy Vs. CBI*** *(2013) 7 SCC 439;* ***Serious Fraud Investigation Office Vs. Nitin Johari*** *(2019) 9 SCC 165;* ***P. Chidambaram Vs. Directorate of Enforcement*** *(2018) 11 SCC 46;* ***Rohit Tandon Vs. The Enforcement Directorate*** *(2018) 11 SCC 46;* ***Kalyan Chandra Sarkar Vs. Rajesh Ranjan*** *(2005) 2 SCC 42; and* ***Anoop Bartaria Vs. Directorate of Enforcement*** *2023 SCC OnLine 477.*

Rebuttal on behalf of the applicant:-

16. In rebuttal, Ld. Counsel for the applicant has substantially reiterated the contentions raised by him in his arguments and has countered the allegations made on behalf of the complainant/ED. Additionally, he has contended that the said invoice dated 14.02.2016 was issued to EAG and it is not related to the present

case or its POC. The said transaction is independent of the alleged transactions related to POC. Merely because EAG also had business relations with LAL does not connect the said invoice with the present case. He has argued that the complainant/ED itself had withdrawn Look Out Circular (LOC) against Paras Prakash Dhamecha, the owner/Director of EAG and the said fact is reflected in order dated 02.12.2022 of Hon'ble Delhi High Court passed in WP (Crl.) 789/2022 & Crl. MA No. 6671/2022. Thus, if ED itself has concluded that EAG is not complicit in the present case, any transaction of the applicant with EAG cannot be brought into the ambit of this case. Besides, the complainant has failed to prove the foundational fact that the amount contained in the said invoice is, in any manner, related to POC of this case. Therefore, as per judgment of Hon'ble Apex Court in ***Vijay Madanlal Choudhary (supra)***, in absence of the establishment of foundational facts, presumption under Section 24 PMLA cannot be drawn against the applicant. Further, in respect of e-mails exchanged with Sahil Mehta, it is contended that he does not know him and he had exchanged e-mails with him on the instructions of Iqlaque Khan as he was told to be a mediator in the said deal on behalf of LAL. Further, in his statement under Section 50 PMLA, Sahil Mehta himself has admitted that he does not know the applicant. He further contended that in the said transactions, Sahil Mehta was acting on behalf of LAL and therefore, in the reasonable circumstances, he was supposed to have more knowledge about the POC of this case as compared to the applicant but despite that, the applicant has been arrested and Sahil Mehta has been cited as a prosecution

witness.

Finding and Analysis:-

17. Before adverting to the facts of the case, it is expedient to analyze the relevant provisions of PMLA i.e. Section 2(u) 'Proceeds of Crime' and Section 3 'Offence of Money Laundering'. As per Section 3 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 including its (i) concealment; (ii) possession; (iii) acquisition; (iv) use; (v) projecting; and (vi) claiming it as untainted property. In ***Vijay Madanlal Chaudhary's case (supra)***, the Hon'ble Apex Court has clarified that handling or dealing with the proceeds of crime in any form including its possession, concealment, acquisition, use or projecting it as untainted property comes within the ambit of this offence. It dispelled the misinterpretation of Section 3 PMLA that unless POC is projected as untainted money/property, it does not come within the mischief of this offence. Thus, even possession of POC with requisite *mens rea* is covered under this offence. The relevant portion of the said judgment is as under:-

> *"51. We may also note that argument that removing the necessity of projection from the definition will render the predicate offence and money-laundering indistinguishable. This, in our view, is ill founded and fallacious. This plea cannot hold water for the simple reason that the scheduled offences in the 2002 Act as it stands (amended upto date) are independent criminal acts. It is only when money is generated as a result of such acts that the 2002 Act steps in as soon as proceeds of crime are involved in any process or activity.* ***Dealing with such proceeds of crime can be in any form —being process or activity. Thus, even assisting in the process or activity is a part of the crime of money-laundering. We must keep in***

mind that for being liable to suffer legal consequences of ones action of indulging in the process or activity, is sufficient and not only upon projection of the ill-gotten money as untainted money*. Many members of a crime syndicate could then simply keep the money with them for years to come, the hands of the law in such a situation cannot be bound and stopped from proceeding against such person, if information of such illegitimate monies is revealed even from an unknown source." (emphasis supplied)*

18. The most important and crucial ingredient of the offence of money laundering is "proceeds of crime" and it is defined under Section 2(u) PMLA. It means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad. In ***Vijay Madanlal Chaudhary's case (supra)***, the Hon'ble Apex Court has interpreted the meaning, extent and scope of the "proceeds of crime" and its relevant portion is reproduced as under:-

*"31. **The "proceeds of crime" being the core of the ingredients constituting the offence of money-laundering, that expression needs to be construed strictly**. In that, all properties recovered or attached by the investigating agency in connection with the criminal activity relating to a scheduled offence under the general law cannot be regarded as proceeds of crime. There may be cases where the property involved in the commission of scheduled offence attached by the investigating agency dealing with that offence, cannot be wholly or partly regarded as proceeds of crime within the meaning of Section 2(1)(u) of the 2002 Act — so long as the whole or some portion of the property has been derived or obtained by any person "as a result of" criminal activity relating to the stated scheduled offence. To be proceeds of crime, therefore, the property must be derived or obtained, directly or indirectly, "as a result of" criminal activity relating to a scheduled offence.*

To put it differently, the vehicle used in commission of scheduled offence may be attached as property in the concerned case (crime), it may still not be proceeds of crime within the meaning of Section 2(1)(u) of the 2002 Act. ***Similarly, possession of unaccounted property acquired by legal means may be actionable for tax violation and yet, will not be regarded as proceeds of crime unless the concerned tax legislation prescribes such violation as an offence and such offence is included in the Schedule of the 2002 Act. For being regarded as proceeds of crime, the property associated with the scheduled offence must have been derived or obtained by a person "as a result of" criminal activity relating to the concerned scheduled offence.*** *This distinction must be borne in mind while reckoning any property referred to in the scheduled offence as proceeds of crime for the purpose of the 2002 Act. Dealing with proceeds of crime by way of any process or activity constitutes offence of money-laundering under Section 3 of the Act.*

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33. ***Tersely put, it is only such property which is derived or obtained, directly or indirectly, as a result of criminal activity relating to a scheduled offence can be regarded as proceeds of crime. The authorities under the 2002 Act cannot resort to action against any person for money-laundering on an assumption that the property recovered by them must be proceeds of crime and that a scheduled offence has been committed, unless the same is registered with the jurisdictional police or pending inquiry by way of complaint before the competent forum absolved by a Court of competent jurisdiction owing to an order absolved by a Court of competent jurisdiction owing to an order of discharge, acquittal or because of quashing of the criminal case (scheduled offence) against him/her, there can be no action for money-laundering against such a person or person claiming through him in relation to the property linked to the stated scheduled offence.*** *This interpretation alone can be countenanced on the basis of the provisions of the 2002 Act, in particular Section 2(1)(u) read with Section 3. Taking any other view would be rewriting of these provisions and disregarding the express language of definition clause "proceeds of crime", as it obtains as of now." (emphasis supplied)*

19. Therefore, POC has to be construed strictly in accordance with law and its quantum cannot be arbitrarily overblown on unfounded assumptions in violation of law. Only such property

which is derived or obtained, directly or indirectly, as a result of criminal activity relating to a scheduled offence can be regarded as POC. The authorities under the PMLA cannot resort to action against any person for money laundering on an assumption that the property recovered by them must be POC and that a scheduled offence has been committed, unless the same is registered with the jurisdictional police or pending inquiry by way of complaint before the competent forum.

20. The limitation of jurisdiction of investigating agency in PMLA case has been unequivocally re-emphasized by Hon'ble Supreme Court in the subsequent paragraphs of ***Vijay Madanlal Chaudhary's judgment (supra)*** to hold that it has to be confined to POC derived or obtained directly or indirectly through and relatable to scheduled offence only. It has made it crystal clear that even recovery of the huge amount of undisclosed money and transactions unrelated to POC of the scheduled offence, does not extend its jurisdiction to probe the same. It cannot *suo moto* assume authority to probe the said extraneous sphere unrelated to the registered scheduled offence as it is beyond its jurisdiction even if any kind of illegality or irregularity in relation to it is observed unless the said illegality or irregularity falls within the ambit of unreported/unregistered scheduled offence and the concerned authority by resorting to Section 66(2) PMLA, makes a complaint regarding its commission to the jurisdictional police. Its relevant paragraph is reproduced as under:-

> *"53. Be it noted that the authority of the Authorised Officer under the 2002 Act to prosecute any person for offence of money-laundering gets triggered only if there exists proceeds of crime within the meaning of Section 2(1)(u) of the 2002 Act and further it is involved in any process*

or activity. ***Not even in a case of existence of undisclosed income and irrespective of its volume, the definition of "proceeds of crime" under Section 2(1)(u) will get attracted, unless the property has been derived or obtained as a result of criminal activity relating to a scheduled offence. It is possible that in a given case after the discovery of huge volume of undisclosed property, the authorised officer may be advised to send information to the jurisdictional police (under Section 66(2) of the 2002 Act) for registration of a scheduled offence contemporaneously, including for further investigation in a pending case, if any.*** *On receipt of such information, the jurisdictional police would be obliged to register the case by way of FIR if it is a cognizable offence or as a non-cognizable offence (NC case), as the case may be.* ***If the offence so reported is a scheduled offence, only in that eventuality, the property recovered by the authorised officer would partake the colour of proceeds of crime under Section 2(1)(u) of the 2002 Act, enabling him to take further action under the Act in that regard.*** *" (emphasis supplied)*

21. In the instant case, there is no dispute that USD 1.3 Million received in the account of MSS of the applicant maintained with NBD, Emirates on 13.11.2014 from LAL against invoice dated 30.10.2014 issued by him is tainted money or POC of the predicate offence/FIR. Admittedly, the applicant is neither an accused nor a witness in the predicate offence. Further, there is no evidence on record to show that he and the main accused of the said FIR or the accused persons of first criminal prosecution complaint in this ECIR were known to each other. Moreover, there is not even any communication in the form of e-mail or any other mode between them. Rather, in their respective statements under Section 50 PMLA, they have denied to have known each other.

22. The applicant has consistently stated that he issued the said invoice dated 30.10.2014 on the instructions of a broker namely

Iqlaque Khan based in Dubai as he told him that LAL wanted to make immediate payment to their vendors in Dubai for availing regular services and for the said purpose, they required letter of credit discounting facility. He further stated that his company was authorized and allowed to do discounting and he did the said transaction for earning legible commission of USD 9450. He further stated that out of the said earning, he shared approximately USD 4725 with Iqlaque Khan and thus, he retained USD 4725 as commission in the said transactions. The relevant bank statements of the applicant and the e-mails dated 16.11.2014, 03.12.2014 and 03.12.2014 sent by Iqlaque Khan to the applicant corroborates the said version of the applicant that after receipt of USD 1.3 Million in his account of MSS on 13.11.2014, on the instructions of Iqlaque Khan, he transferred AED 73,540 to Dubai Land Department on 16.11.2014, USD 300,000 to Tumas Group on 03.12.2014 and USD 960,000 to Phoenix FZC on 03.12.2014. Thereafter, he retained USD 4725 as a commission for the said services.

23. It is contention of the applicant that he dealt with the said POC unknowingly and on instructions of a broker namely Iqlaque Khan. However, the prosecution has tried to impute knowledge of POC upon the applicant on the basis of five e-mails exchanged between the applicant and one Sahil Mehta through Iqlaque Khan during the alleged transactions. In their respective statements under Section 50 PMLA, applicant and Sahil Mehta have categorically denied to have known each other. As per case of the prosecution, Sahil Mehta was mediating in the said transactions on behalf of LAL and he has been cited as a

prosecution witness. However, it is extremely paradoxical that the complainant/ED assumed absence of knowledge of POC upon Sahil Mehta though he was operating on behalf or instructions of LAL as its broker but imputed its knowledge upon the applicant who did not have any direct or indirect connections with accused persons in LAL from where POC of this case got generated. In these circumstances, the prosecution has unreasonably imputed knowledge of POC upon the applicant based upon unfounded assumptions.

24. Consequently, the complainant/ED has failed to collect and place on record any admissible and credible evidence to show that the applicant entered into the said transactions knowingly that he was dealing with POC of this case. Hon'ble Apex Court in ***Anoop Bartaria (supra)*** held that knowledge of the accused that he was dealing with POC is not a condition precedent for invoking the provisions of Section 3 PMLA against him. Its relevant portion is reproduced as under:-

> *"27. Having regard to the definition contained in Section 3, it would be a folly to hold that the knowledge of the accused that he was dealing with the proceeds of crime, would be a condition precedent or sine qua non required to be shown by the prosecution for lodging the complaint under the said Act. As the definition itself suggests 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 including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering. Hence, apart from having knowledge, if a person who directly or indirectly attempts to indulge or is actually involved in the process or activity connected with the proceeds of crime, is also guilty of the offence of money laundering. In the instant case, the direct involvement of the petitioners in the activities connected with the proceeds of crime has been alleged, along with the material narrated*

in the complaint which would require a trial to be conducted by the competent court."

25. However, the Hon'ble Delhi High Court while granting bail in ***Sanjay Kansal (supra)*** noted that Hon'ble Supreme Court in ***Vijay Madanlal Choudhary (supra)*** (3 Judge Judgment) has held that the court at the stage of grant of bail is expected to consider the issue as to whether the accused had the requisite *mens rea.* Its relevant portion is reproduced as under:-

> *"22. As noted hereinabove, the Hon'ble Supreme Court in Vijay Madanlal Choudhary (supra) has held that the Court at the stage of grant of bail is expected to consider the issue as to whether the accused had requisite 'mens rea'. It was further observed by the Hon'ble Supreme Court that the Court is not required to record a positive finding that the accused has not committed an offence under the Act. In other words, the Court at the stage of bail can examine the case on the basis of broad probabilities and can give a finding on the basis of material on record for the purposes of bail.*
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> *23. The Coordinate Benches of this Court in Vijay Agrawal (supra) and Sanjay Jain (supra) have taken a similar view."*

26. Therefore, absence of *mens rea* of the accused in dealing with the POC has been held to be a very relevant factor for favourable consideration of his bail application. The observations in ***Anoop Bartaria (supra)*** were passed in a quashing petition of ECIR. Thus, they were made in different context and not for the purpose of bail. Accordingly, it is not applicable at the present stage. For this stage of bail, ***Vijay Madanlal Choudhary (supra)*** declares more relevant and appropriate law on bail to the effect that at the stage of grant of bail, it is expected to consider the issue as to whether the accused had requisite *mens rea.*

27. In respect of another alleged evidence dug out of the e-mail records of the applicant i.e. invoice dated 14.02.2016 for an amount of USD 300,000 in favour of EAG for rendering maintenance consultancy services without rendering the said services to EAG, it is an independent transaction and it is unconnected to the present case. EAG is stated to had some business transactions with LAL. During investigation, LOC was got opened against the Director of EAG. However, the same was closed by ED as reflected in order dated 02.12.2022 of Hon'ble Delhi High Court passed in WP (Crl.) 789/2022 & Crl. MA No. 6671/2022. Therefore, it is apparent that the complainant/ED concluded that EAG is not involved in the present case. In these circumstances, there is no reason to assume that an independent transaction between the applicant and EAG is related to the present case. The presumption contained in Section 23 PMLA cannot be drawn in respect of the said transaction unless the prosecution establishes the foundational facts including the fact that the amount involved in the said transaction/invoice is POC of this case. In absence of the said indispensable proof coupled with the fact that the said independent transaction is between the applicant and an entity which is unrelated to LAL or other alleged companies, the said invoice or transaction cannot be held to be related to this case. Consequently, the said transaction even if sham or illegal but it is absolutely irrelevant for the case in hand.

28. In order to arrive at the aforementioned conclusion in the preceding paragraphs, the following observations in ***Vijay Madanlal Choudhary (supra)*** may be profitably quoted as under:-

"99. Be it noted that the legal presumption under Section 24(a) of the 2002 Act, would apply when the person is charged with the offence of money-laundering and his direct or indirect involvement in any process or activity connected with the proceeds of crime, is established. ***The existence of proceeds of crime is, therefore, a foundational fact, to be established by the prosecution, including the involvement of the person in any process or activity connected therewith. Once these foundational facts are established by the prosecution, the onus must then shift on the person facing charge of offence of money-laundering — to rebut the legal presumption that the proceeds of crime are not involved in money-laundering, by producing evidence which is within his personal knowledge****. In other words, the expression "presume" is not conclusive. It also does not follow that the legal presumption that the proceeds of crime are involved in money-laundering is to be invoked by the Authority or the Court, without providing an opportunity to the person to rebut the same by leading evidence within his personal knowledge.*

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101. .....Notably, the legal presumption in the context of Section 24(b) of the 2002 Act is attracted once the foundational fact of existence of proceeds of crime and the link of such person therewith in the process or activity is established by the prosecution. The stated legal presumption can be invoked in the proceeding before the Adjudicating Authority or the Court, as the case may be. The legal presumption is about the fact that the proceeds of crime are involved in money-laundering which, however, can be rebutted by the person by producing evidence within his personal knowledge."

Section 45 PMLA of Bail and its Twin Conditions

29. The Hon'ble Supreme Court of India while upholding the constitutional validity of the rigors of twin conditions contained in Section 45 PMLA in ***Vijay Madanlal Chaudhary (supra)*** observed that the offence of money laundering being a separate class of offence requires effective and stringent measures to combat its menace as fallout of its activities have transnational

impact. The offence of money laundering itself is a very serious offence. It is not only a threat to the financial health of the country but it may also adversely impacts its integrity and sovereignty. Therefore, basic principle of jurisprudence regarding bail that bail is rule and jail is an exception is tweaked in the PMLA by stipulating twin mandatory conditions in its bail provision provided under Section 45 PMLA. However, at the same time, the cherished fundamental right of life and personal liberty conferred to every individual by Article 21 of the Constitution of India should not be lost sight of while determining bail applications.

30. In the instant case, as the applicant has been arrested for the offence of money laundering defined under Section 3 PMLA and punishable under Section 4 PMLA, he is first required to qualify the test of twin mandatory conditions contained in Section 45 PMLA in order to be favourably considered for grant of bail.

31. The twin mandatory conditions stipulated in Section 45 PMLA are as under:-

> *"(i) The court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence; and*
> *(ii) That he is not likely to commit any offence while on bail".*

32. While dealing with the scope of twin conditions contained in Section 45 PMLA and its application, the Hon'ble Apex Court in ***Vijay Madanlal Chaudhary (supra)*** made the following relevant observations:-

"127. There is no challenge to the provision on the ground of legislative competence. The question, therefore, is: whether such classification of offenders involved in the offence of moneylaundering is reasonable? Considering the concern expressed by the international community regarding the money-laundering activities world over and the transnational impact thereof, coupled with the fact that the presumption that the Parliament understands and reacts to the needs of its own people as per the exigency and experience gained in the implementation of the law, the same must stand the test of fairness, reasonableness and having nexus with the purposes and objects sought to be achieved by the 2002 Act. Notably, there are several other legislations where such twin conditions have been provided for 617 . Such twin conditions in the concerned provisions have been tested from time to time and have stood the challenge of the constitutional validity thereof. The successive decisions of this Court dealing with analogous provision have stated that the Court at the stage of considering the application for grant of bail, is expected to consider the question from the angle as to whether the accused was possessed of the requisite mens rea. The Court is not required to record a positive finding that the accused had not committed an offence under the Act. The Court ought to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. The duty of the Court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. Further, the Court is required to record a finding as to the possibility of the accused committing a crime which is an offence under the Act after grant of bail.

XXXX XXXX XXXX XXXX

131. It is important to note that the twin conditions provided under Section 45 of the 2002 Act, though restrict the right of the accused to grant of bail, but it cannot be said that the conditions provided under Section 0045 impose absolute restraint on the grant of bail. The discretion vests in the Court which is not arbitrary or irrational but judicial, guided by the principles of law as provided under Section 45 of the 2002 Act. While dealing with

a similar provision prescribing twin conditions in MCOCA, this Court in Ranjitsing Brahmajeetsing Sharma 634 , held as under:

"44. The wording of Section 21(4), in our opinion, does not lead to the conclusion that the court must arrive at a positive finding that the applicant for bail has not

committed an offence under the Act. If such a construction is placed, the court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an event, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the legislature. Section 21(4) of MCOCA, therefore, must be construed reasonably. It must be so construed that the court is able to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. Similarly, the Court will be required to record a finding as to the possibility of his committing a crime after grant of bail. However, such an offence in futuro must be an offence under the Act and not any other offence. Since it is difficult to predict the future conduct of an accused, the court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence. 45. It is, furthermore, trite that for the purpose of considering an application for grant of bail, although detailed reasons are not necessary to be assigned, the order granting bail must demonstrate application of mind at least in serious cases as to why the applicant has been granted or denied the privilege of bail.

46. The duty of the court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. However, while dealing with a special statute like MCOCA having regard to the provisions contained in sub-section (4) of Section 21 of the Act, the court may have to probe into the matter deeper so as to enable it to arrive at a finding that the materials collected against the accused during the investigation may not justify a judgment of conviction. The findings recorded by the court while granting or refusing bail undoubtedly would be tentative in nature, which may not have any bearing on the merit of the case and the trial court would, thus, be free to decide the case on the basis of evidence adduced at the trial, without in any manner being prejudiced thereby"

(emphasis supplied)

We are in agreement with the observation made by the Court in Ranjitsing Brahmajeetsing Sharma. The Court while dealing with the application for grant of bail need not delve deep into the merits of the case and only a view of the Court based on available material on record is required. The Court will not weigh the evidence to find the guilt of the accused which is, of course, the work of Trial Court.

The Court is only required to place its view based on probability on the basis of reasonable material collected during investigation and the said view will not be taken into consideration by the Trial Court in recording its finding of the guilt or acquittal during trial which is based on the evidence adduced during the trial. As explained by this Court in Nimmagadda Prasad, the words used in Section 45 of the 2002 Act are "reasonable grounds for believing" which means the Court has to see only if there is a genuine case against the accused and the prosecution is not required to prove the charge beyond reasonable doubt."

33. The said observations were crystallized by Hon'ble Delhi High Court in ***Sanjay Jain (supra)*** to the following effect:-

"49. It thus, emerges that at the stage of considering a bail application under the PMLA, the Court has to bear in mind the following aspects:

i. Whether the accused possessed the requisite mens rea.

ii. The words used in Section 45 of the 2002 Act are "reasonable grounds for believing" which means the Court has to see only if there is a genuine case against the accused and the prosecution is not required to prove the charge beyond reasonable doubt.

iii. A positive finding that the accused had not committed an offence under the Act is not required to be recorded. A delicate balance between a judgment of acquittal/conviction and an order granting bail much before commencement of the trial is to be maintained.

iv. The evidence is not to be weighed meticulously but a finding is to be arrived at on the basis of broad probabilities with reference to the material collected during investigation. The weighing of evidence to find the guilt of the accused is the work of Trial Court.

v. A finding is also required to be recorded as to the possibility of the bail applicant committing a crime after grant of bail. This aspect has to be considered having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence."

34. Thus, the position that emanates from the above judgments is that for qualifying the twin conditions contained in Section 45

PMLA, the court is only required to place its view based on the broad probabilities with reference to material collected during investigation and a positive finding of acquittal/conviction is not required to be given at the time of consideration on bail.

35. The Hon'ble Apex Court in its latest judgment ***Prem Prakash Vs. Union of India through the Directorate of Enforcement*** *in SLP (Crl.) No. 5416/2024 dated 28.08.2024* held that Section 45 PMLA by imposing twin conditions does not re-write the principle "bail is the rule and jail is the exception" to mean that deprivation is the norm and liberty is the exception.

36. In view of the discussion on the facts of the case based upon the material available on record, there is no admissible evidence on record to establish that the applicant had a *mens rea* when he dealt with the alleged POC of this case. Accordingly, there are reasonable grounds to believe that the applicant is not guilty of the present offence. Further, he does not have any other criminal involvement. Therefore, in these circumstances, there is no reason to believe that he is likely to commit any offence while on bail. Therefore, he has successfully managed to qualify the rigors of the mandatory twin conditions contained in Section 45 PMLA.

Triple Test

37. The Hon'ble Apex Court in ***P. Chidambaram (supra)*** has highlighted that for determination of bail, three tests are required to be considered. The said tests are flight risk of the applicant, possibility of influencing of witnesses and tampering with the evidence, if released on bail.

Flight Risk

38. The applicant is the citizen of India with Indian Passport. He has deep roots in the society. Admittedly, he is resident of Dubai, UAE. However, the possibility of his abscondence from the trial of this case can be taken care of by imposing stringent conditions in that regard.

Influencing Witnesses

39. The prosecution has already recorded statements of witnesses under Section 50 PMLA. There is no evidence on record that he knows any of the accused or witness in this case. Further, he joined investigation as and when directed by the IO. There are no allegations that he tried to influence any witness, though has been made part of investigation for the last four years. He has no control over any witness. Therefore, he is not in position to influence the witnesses.

Tampering with Evidence

40. The prosecution has already seized all the relevant documents connected to the applicant including electronic devices. The applicant does not have access to the said documents. Hence, the applicant does not have any capacity, reach or control on the evidence of this case. Therefore, there appears to be no reasonable ground to assume that the applicant may tamper with the evidence, if released on bail.

41. In view of the above discussion, the applicant has successfully satisfied the said triple test. Further, stringent conditions can be imposed to ensure that the said test are not flouted by him.

42. The co-accused persons namely Sanjay Godhwani and Ramesh Manglani with more serious allegations as compared to the applicant have already been enlarged on bail. Therefore, there seems to be enough justifiable reason for invoking the principles of parity in favour of the applicant.

43. Before parting, the glaring and disturbing aspect of this case is required to be noted. The hallmark of investigation is its objectivity. Subjective interpretation of IO must be deprecated as it would make a supposed objective investigation dependent upon his uncontrolled whims and fancies, who has been conferred extreme power of arrest that leads to curtailing liberty of an individual. In the instant case, there is very unpleasant situation wherein one IO choose to cite the applicant as a witness and the next IO opted to arrest him based upon exactly same evidence available on record. In these circumstances, it is apparent that one of the IOs was/is wrong and either acted upon the considerations extraneous to law for the reasons to be ascertained or he was incompetent to comprehend the facts of the case in proper perspective. Both the situations are perilous as it may allow an accused getting scot free or result in unlawful curtailment of liberty of an individual thereby impinging his cherished Fundamental Rights of Liberty.

44. In the first criminal prosecution complaint of this ECIR, the court while taking cognizance on 26.11.2022 was within its rights and had jurisdiction to summon the applicant on the basis of evidence available on record. However, it did not opt to do so. In these circumstances, the only inference that can be drawn is that the court did not find the evidence collected on record

against the applicant to be sufficient to consider him as a complicit or an accused enough to face trial for the present offence. It appears that the IO, while arresting the applicant on the basis of the same evidence, chose to sit as an Appellate Forum on the wisdom of the court which desisted to summon the applicant for the offence based upon the same evidence. After arresting the applicant on the same evidence that was available with the IO and the court at the time of filing of criminal prosecution complaint, the investigating agency has been trying to collect additional evidence against him by evaluating his mobile data and e-mails with a despair hope to hit anything relevant in dark. That is putting a cart ahead of horse and nothing more, but an attempt to justify the arrest. Admittedly, the IO has prerogative to take a decision to arrest or not arrest any person. However, it cannot be arbitrary and when the evidence available with the IO and the court are exactly similar and the court desisted to summon him as an accused, the act of the IO to arrest him on the same evidence is an apparent overreach of his powers that deserves to be disapproved.

45. The power to arrest must be directly proportional to its checks and balances coupled with unambiguous regulations or Standard Operating Protocol (SOP). Accordingly, worthy Director, ED is requested to apprise this court if there is any SOP or regulation for affecting arrest and what process is adopted by seniors to monitor the arrest of an accused. If these systems are evolved and are in place, this case is classic example of its violation. Therefore, it is expedient in interest of justice to call upon worthy Director, ED to conduct an inquiry for ascertaining

the reasons for adopting absolutely diametrically opposite approach by two IOs confronted with exactly same evidence against the accused. The inquiry report be filed within a month from today with a finding if anyone of them faulted in his duties and what action, if any, is taken against the erring official. In case the opposite views of both of them are found to be justifiable, though doesn't appeal to common sense, it be clarified as to how to reconcile with this distasteful situation.

46. For the aforesaid reasons, the application is allowed and the applicant namely **Mangelal Sunil Agarwal S/o Late Sh. Mangelal Munshiram Agarwal** granted bail subject to the following terms and conditions:

(a) He shall furnish personal bonds with one surety in the sum of Rs.2,00,000/- to the satisfaction of this Court;

(b) He shall not leave the country without prior permission of the court;

(c) He shall join the investigation as and when directed by the IO concerned;

(d) He shall appear before the Court as and when the matter is taken up for hearing;

(e) He shall provide his mobile number to the IO concerned at the time of release, which shall not switch off, or change the same without prior intimation to the IO concerned, during the period of bail;

(f) In case he changes his address, he shall inform the IO concerned and this Court;

(g) He shall not indulge in any criminal activity during

the bail period;

(h) He shall not communicate with or intimidate or influence any of the prosecution witnesses for dissuading them from revealing the truth to the court;

(i) He shall deposit his passport in the Court; and

(j) He shall not tamper with the evidence of the case.

47. It is clarified that nothing expressed herein above shall tantamount to an expression of opinion on merits of the case.

48. Bail bonds and surety bonds are furnished on behalf of the applicant and the same are accepted. Further, the passport of the applicant has been deposited with the court. His release warrants be issued and be sent to the concerned Jail Superintendent along with copy of this order with directions to release him forthwith, if not required in any other case.

49. The application is accordingly disposed off and the proceedings of the present application be annexed with the main file.

50. As prayed, copy of this order be given *dasti* to all the parties.

51. Copy of this order be sent to worthy Director, ED for its compliance.

(Dheeraj Mor)
ASJ-06/NDD/PHC
New Delhi:31.08.2024