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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **W.P.(CRL) 363/2018 & Crl.M.A. 2151/2018**

Reserved on: February 13, 2018
Decided on: February 19, 2018

RAJBHUSHAN OMPRAKASH DIXIT ..... Petitioner
Through: Mr. Vikram Chaudhary Senior Advocate with Mr. Sameer Rohatgi, Mr.Harshit Sethi, Mr.Wattan Sharma, Mr.Ashish Batra and Mr.Sankalp Sharma, Advocates.

versus

UNION OF INDIA & ANR ..... Respondents
Through: Mr.Amit Mahajan, CGSC, Mr.Anil Soni, CGSC with Mr.Gaurav Rohilla, GP.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE I.S. MEHTA

JUDGMENT

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Dr. S. Muralidhar, J.:

1. The Petitioner, Rajbhushan Omprakash Dixit, has filed the present writ petition on 1st February 2018 seeking issuance for a writ of *habeas corpus* for releasing the Petitioner from custody. He has sought a declaration that issuance of a non-bailable warrant (NBW) dated 24th January 2018, his arrest pursuant thereto on 25th January 2018 in ECIR/HQ/17/2017 and the consequent remand orders passed by the learned Additional Sessions Judge, (PMLA) (hereinafter referred to as the 'trial Court') is without the authority

of law and in violation of Articles 14, 21 and 22 of the Constitution of India. The Petitioner also prayed for mandamus to the Directorate of Enforcement (DOE) (Respondent No. 2) and the Union of India through the Department of Revenue, Ministry of Finance (Respondent No. 1) to provide him a certified copy of ECIR/HQ/17/2017 dated 27th October 2017, and the application filed by Respondent No. 2 before the trial Court for issuance of warrants and the grounds of arrest, if any, recorded while arresting the Petitioner.

2. Accompanying the writ petition is Criminal Miscellaneous Application No. 2151 of 2018 in which the Petitioner has prayed for grant of interim bail in the aforesaid ECIR/HQ/17/2017 during the pendency of the writ petition.

3. The writ petition came up for hearing on 5th February 2018 when notice was issued to the Respondents and accepted by Mr. Amit Mahajan, learned Central Government Standing counsel. The notice was made returnable on 13th February 2018 and the Respondents were permitted to file a short reply. Pursuant thereto, on 13th February 2018 a short affidavit dated 12th February 2018 of Mr. Mohit Redhu, Assistant Director (PMLA), has been filed on behalf of the Respondents.

4. The Court has heard the submissions of Mr. Vikram Chaudhary, learned Senior counsel appearing for the Petitioner and Mr. Amit Mahajan, learned counsel for the Respondents.

Factual background

5. The factual background is that the Income Tax Department conducted a

search operation in the premises of the group entities of Sterling Biotech Limited (SBL) under Section 132 of the Income Tax Act, 1961 ('IT Act'). The Petitioner, who is a permanent resident at Vadodara, Gujarat, is one of the directors of SBL.

6. During the income tax raid various documents were stated to have been seized. The documents are said to have revealed that "huge amount of cash had been given to various government servants." Following this the Central Bureau of Investigation (CBI) registered an FIR on 30th August 2017 for commission of offences under Section 13 (2) read with Section 13 (1) (d) of the Prevention of Corruption Act, 1988 (PC Act) read with Section 120 B IPC. Since the offences were also those mentioned in the Schedule to the Prevention of Money Laundering Act, 2002 (PMLA), the DOE recorded an Enforcement Case Information Report (ECIR) being ECIR/HQ/15/2017 in relation to the offence of money laundering under Section 3 PMLA punishable under Section 4 PMLA. It is stated that statements of certain persons were recorded in the said ECIR under Sections 50 (2) and 50(3) of the PMLA. It is stated by the Respondents that the promoters/directors of SBL including the Petitioner have since been absconding. Specific to the Petitioner it is stated that despite issuance of several summons in the months of September and October 2017, the last being 23rd October 2017, he did not join the investigation.

7. During the course of investigation, another FIR No. RCD-I/2017/E/0007 dated 25th October 2017 was registered by the CBI against SBL, its Directors including the Petitioner, one chartered accountant and a former

director of Andhra Bank as well as other known and unknown public servants for commission of offences under Sections 13 (2), 13 (1) of the PC Act and Sections 420, 467, 468 and 471 of the IPC read with Section 120-B IPC. The central allegation in the said FIR is that huge credit facilities and loans were obtained by SBL and its sister concerns from Andhra Bank and a consortium of banks led by Andhra Bank on the basis of forged and fabricated documents in criminal conspiracy with the accused persons. A huge sum of Rs. 5383 crores is stated to be outstanding.

8. Within two days thereafter, i.e., on 27th October 2017 the DOE registered another ECIR/HQ/17/2017 to undertake investigation into the related offence of money laundering under Section 3 PMLA punishable under Section 4 thereof. In the second ECIR/HQ/17/2017, summons was issued in the said ECIR to the Petitioner on 31st October, 20th November and 4th December 2017. Admittedly a copy of the said ECIR has till date not been furnished to the Petitioner.

9. Meanwhile, one Gagan Dhawan who was arrested by the DOE under Section 19 PMLA on 1st November 2017, filed Writ Petition (Crl) No. 202 of 2017 in the Supreme Court under Article 32 of the Constitution of India. Notice was issued in the said petition by the Supreme Court and is stated to be pending.

10. SBL filed Writ Petition (Crl) No. 262 of 2018 before this Court challenging the constitutional validity of Sections 3 and 45 of the PMLA and also sought quashing of the ECIRs against it.

11. The DOE on 23rd December 2017 filed a complaint under Section 45 PMLA before the learned Special Judge, PMLA with the prayer for further investigation. In the said complaint, cognizance was taken by the learned Special Judge on 23rd December 2017 itself under Section 44 (1) (b) PMLA.

12. Thereafter on 12th January 2018 one Anup Prakash Garg was arrested by the DOE under Section 19 of the PMLA.

Arrest of the Petitioner

13. On 20th January 2018 an application was filed by the DOE under Section 70 of the Code of Criminal Procedure 1973 (Cr PC) read with Section 65 of the PMLA before the learned Special Judge, PMLA for issuance of an 'Open-ended' NBW against the Petitioner who was stated to be absconding. A copy of the said application has been enclosed with the short affidavit is Annexure R-3.

14. In the said application, *inter alia* a reference was made to the registration by the CBI of the aforesaid FIR on 25th October 2017 and the corresponding registration of ECIR/HQ/17/2017 by the DOE on 27th October 2017. It was *inter alia* stated by the DOE that all attempts at getting the Petitioner to appear personally before the Investigating Officer (IO) through summons issued to him had failed and he could not be traced. It was stated that summons had been served by way of affixation at his last known address. Since his presence was required for collecting evidence and other information that was exclusively within his own knowledge., the DOE prayed for issuance of 'Open-ended NBW' to be executed by the officers of

the DOE or the police authorities in accordance with law.

15. Pursuant thereto, an open-ended NBW was issued by the learned trial Court on 24th January 2018. A copy of the warrant served on the Petitioner, the receipt of which was acknowledged by him, has been enclosed as Annexure R-4 to the short reply. There are two endorsements on the said copy of the warrant. One states, ‘received copy’, i.e., copy of the warrant and the other endorsement states: ‘grounds of arrest informed to me’. Below the said endorsements is the signature of the Petitioner with the date of 25th January 2018.

16. The NBW was executed by the DOE in Vadodara. On 26th January 2018 the Petitioner was produced before the learned Duty Magistrate in the Patiala House Courts, New Delhi. On that date itself, the DOE applied for ‘ED custody remand of the Petitioner’ by filing an application under Section 65 of the PMLA read with Section 167 (2) Cr PC. A copy of the said application has been enclosed as Annexure R-8 to the short affidavit. The ‘ED custody’ remand was requested for 14 days. On 26th January 2018 itself a remand for one day was granted to the DOE by the learned Duty Magistrate. The first two sentences of the order read: “Legal aid offered to accused, but he refused. Accused submits that he will engage his private counsel”.

Proceedings in the trial Court

17. On 27th January 2018 the Petitioner was produced before the trial Court before whom an application for extension of ED custody remand was filed by the DOE. By an order dated 27th January 2018, the trial Court extended

the ED custody remand of the Appellant for 11 days. He was asked to be produced before the trial Court on 7th February 2018.

18. In the meanwhile two separate applications dated 31st January 2018 and 1st February 2018 were moved on behalf of the Petitioner before the trial Court. The applications were listed on 5th February 2018. While the first application dated 31st January 2018 was withdrawn, the second application dated 1st February 2018 seeking permission to permit the wife of the Petitioner to meet him and also permit his Advocate to get the *vakalatnama* signed was moved. These prayers were allowed by the trial Court. The Petitioner's wife was permitted to meet him in the office of the DOE at Jam Nagar House at 5 pm for 15 minutes in the presence of the IO.

19. The case came up again for hearing before the learned trial Court on 7th February 2018. The prayer of the DOE for extension of the ED custody was opposed by the Petitioner. Although on that day a copy of the remand application was provided to learned counsel for the Petitioner, the grounds of arrest were not. Learned counsel for the Petitioner pointed out in opposition to the remand application that the Petitioner had filed the present writ petition in which notice had been issued. It was *inter alia* submitted on behalf of the Petitioner that the prescribed procedure under Chapter XII of Cr PC had not been followed despite the order dated 22nd March 2017 of the Supreme Court in Criminal Appeal No. 566 of 2017 (***Ashok Munilal Jain v. Assistant Director, Directorate of Enforcement).*** It was further mentioned that there was a violation of Articles 14, 21 and 22 of the Constitution as well as the guidelines laid down by the Supreme Court in ***D.K. Basu v. State***

of West Bengal (1997) 1 SCC 416.

20. By the order dated 7th February 2018 the learned trial Court extended the ED custody remand for two days and directed the production of the Petitioner before the learned trial Court on 9th February 2018.

21. On 9th February 2018 the Petitioner was remanded to judicial custody for a period of 14 days and directed to be produced before the learned trial Court on 23rd February 2018.

Submissions on behalf of the Petitioner

22. Mr. Vikram Chaudhary, learned Senior counsel appearing for the Petitioner, prayed for interim bail and in that process made the following submissions:

(i) The trial Court erroneously issued the NBW at the very first instance without first issuing summons followed by bailable warrant. The order directing issuance of NBW straightaway was in the teeth of the decision of the Supreme Court in ***Inder Mohan Goswami v. State of Uttaranchal (2007) 12 SCC 1.***

(ii) The offences under Section 3 PMLA were non-cognizable as was evidenced by the PMLA Amendment Act 20 of 2005 by which Section 45 of the PMLA stood amended with effect from 1st July 2005. The failure to amend the heading of Section 45 of PMLA to bring it in line with the amendment was perhaps inadvertent. Relying on ***Guntaiah v. Hambamma (2005) 6 SCC 228*** he submitted that the marginal notes and headings were

not catchwords, and did not control the interpretation of the amendment that was differently worded. Reference was made to the Statement of Objects and Reasons (SOR) for the 2005 Amendment and the Lok Sabha Debates during which the Finance Minster explained the reason for making the offences under the PMLA non-cognizable.

(iii) If the offences under the PMLA were non-cognizable, compliance with the procedure under Section 155 (1) Cr PC was mandatory but not followed in the instant case. The investigation could not have commenced except upon information being entered in a book, and the informant being referred to the competent Magistrate. Further, no order for investigation into such non-cognizable offence was obtained from the Magistrate as mandated by Section 155 (2) Cr PC. No application was filed before the Magistrate under Section 155 (3) Cr PC for issuance of a warrant of arrest in a non-cognizable case.

(iv) In the event the offence was, despite the amendment to Section 45 PMLA treated as cognizable, then the corresponding procedure of entering the substance of such information in a book as mandated by Section 154 Cr PC, forwarding a report to the Magistrate empowered to take cognisance as mandated by Section 157 Cr PC, maintaining a case diary in a duly paginated volume entering therein the day-to-day proceedings in the investigation and other material particulars as mandated by Section 172 Cr PC and producing such case diary before the Magistrate upon arrest of the accused as mandated by section 167 Cr PC had to be followed. In the present case, that procedure was not followed either. Reliance was placed on

the decisions in ***State of Haryana v. Bhajan Lal 1992 Suppl. 1 SCC 335, Lalita Kumari v. Govt. of Uttar Pradesh 2014 2 SCC 1,Keshav Lal Thakur v. State of Bihar (1996) 11 SCC 557.*** In support of the submission that Chapter XII of the Cr PC would apply to the PMLA, reliance was placed on the decisions in ***Ashok Munilal Jain v. Assistant Director, Directorate of Enforcement*** (*supra*), ***Directorate of Enforcement v. Deepak Mahajan 1994 (3) SCC 440***, ***Om Prakash v. Union of India (2011) 14 SCC 1***. The decisions of this Court in ***Asmita Agarwal v. Enforcement Directorate ILR (2001) II Del 643*** and of the learned Single Judge of the Kerala High Court in ***M.K. Ayoob v. Superintendent, Customs Intelligence Unit, Cochin 1984 Crl LJ 949*** were also referred to.

(v) The non-communication of the grounds of arrest either at the time of arrest or immediately thereafter was in violation of Section 19 of PMLA read with Rules 2 (g), 2 (h) and 2 (6) read with Form III of the Prevention of Money Laundering (the Forms and Manner of forwarding a copy of order of arrest of a person along with material to the Adjudicating Authority and its period of detention) Rules 2005 (hereinafter the PML Arrest Rules 2005). The mere conveying or informing the grounds of arrest to the Petitioner would not satisfy the legal requirement. In support of this contention, reliance was placed on the decision, ***C.B. Gautam v. Union of India (1993) 1 SCC 79.*** Further the arrest itself was in violation of the mandatory legal requirements as laid down by the Supreme Court in ***D.K. Basu v. State of West Bengal*** (*supra*).

(vi) Mr. Chaudhary also referred to the decision of the Division Bench of

this Court dated 27th April 2016 in Writ Petition (Criminal) No. 307 of 2016 ***(Gurucharan Singh v. Union of India)*** which has been affirmed by the Supreme Court by dismissal of the Union of India's SLP (Crl) (CrlMP No. 19020-19022) of 2016 by the order dated 5th January 2017 and the order dated 3rd August 2015 of the High Court of Gujarat at Ahmedabad in Special Criminal Application (Habeas Corpus) No. 4247 of 2015 (***Rakesh Manekchand Kothari v. Union of India)*** which was affirmed by the Supreme Court by its order dated 23rd November 2015 in SLP (Crl) No. 9727 of 2015 (***Union of India v. Rakesh Manekchand Kothari***).

(vii) Finally it is submitted that even the subsequent orders of remand orders passed by the learned Special Court could not cure the initial illegality of the arrest. Reliance was placed on the decision in ***Re: Madhu Limaye AIR 1969 SC 1014.***

(viii) A chart to show to what extent the provisions of Cr PC were displaced, if at all, by the corresponding provisions of the PMLA was handed over. It was pointed out that as far as the procedure for arrest was concerned, Section 19 PMLA read with the PML Arrest Rules constituted an even stricter regime than the Cr PC when it came to non-cognizable offences. The procedure outlined even under Section 19 PMLA was not followed.

(ix) The Petitioner has been in custody pursuant to his illegal arrest on 25th January 2018. The trial Court has itself not extended his ED Custody. Therefore, his custody was no longer required. In any event the Petitioner is prepared to co-operate with the DOE and will appear as and when required. He will abide by whatever terms the Court may impose. He should be

granted interim bail during the pendency of the petition.

Submissions on behalf of the Respondents

23. In reply, Mr. Amit Mahajan, learned counsel for the Respondents submitted as under:

(i) The Petitioner's continued detention after 25th January 2018 was pursuant to the orders passed by the Competent Court, i.e. the trial Court. Therefore, as of date, his detention could not be termed as illegal. The present petition seeking a writ of *habeas corpus* was accordingly not maintainable. The remedy available to the Petitioner was to seek regular bail before the trial Court. In support of the plea that the writ of habeas corpus would not lie since the detention of the Petitioner was no longer illegal, reliance was placed on the decision in ***Kalu Sanyal v. District magistrate (1974) 4 SCC 141***.

(ii) The offences under the PMLA continued to be cognizable as was evident from the fact that heading of Section 45 remained unchanged. This stand of the DOE was accepted by the Division Bench of this Court by the decision dated 8th May 2017 in Writ Petition (Criminal) No. 852 of 2017 (***Vakamulla Chandrashekhar v. Enforcement Directorate)*** and the decision dated 1st December 2017 in Writ Petition (Criminal) No. 2465 of 2017 (***Moin Akhtar Qureshi v. Union of India)***. Further, a learned Single Judge of this Court in a decision dated 3rd July 2017 in Writ Petition (Criminal) No. 856 of 2017 (***Virbhadra Singh v. Enforcement Directorate)*** also held likewise. The decision of the Bombay High Court in ***Chhagan Chandrakant Bhujbal v. Union of India 2016 SCC Online Bom 9938*** and the decision dated 22nd

December 2015 of the Division Bench of the Punjab & Haryana High Court in CWP No. 3317 of 2015 (O&M) (***Karam Singh v. Union of India)*** also held likewise. The decisions of this Court in ***Gurucharan Singh v. Union of India*** (*supra*) and of the Gujarat High Court in ***Rakesh Manekchand Kothari v. Union of India*** (*supra*) were at the interim stage and were therefore not binding precedents.

(iii) The decision of the Supreme Court in ***Ashok Munilal Jain v. Assistant Director, Directorate of Enforcement*** (*supra*) was in the context of applicability of Section 167 (2) Cr PC to the proceedings under the PMLA and this position was not contested by the DOE. However, that decision would have no applicability to the arrest and detention of the Petitioner for which the PMLA and not the CrPC applied.

(iv) There was no violation of the procedure laid down in PMLA regarding arrest and detention of the Petitioner. It was only pursuant to the complaint filed before the learned trial Court under Section 45 PMLA, that further steps have been taken by the DOE in the matter. After the investigation against the Petitioner is completed, a supplementary complaint would be filed before the trial Court. The question of application of Chapter XII CrPC did not arise at this stage.

(v) If the arrest of the Petitioner is held not to have been strictly in accordance with the PMLA Rules and Form III appended thereto, reason was that there was a genuine confusion in the DOE whether Section 19 PMLA with the PML Arrest Rules would apply in view of the fact that an NBW was obtained from the trial Court by filing an application under

Section 70 read with Section 65 PMLA. Nevertheless, the DOE would now proceed to cure that irregularity by issuing an arrest order in Form III appended to PML Arrest Rules. For the same reason communication to the adjudicating authority of the fact of arrest to the Petitioner in terms of Rule 3 of the PML Arrest Rules has not taken place as yet and this too would be rectified. This in any event did not render the arrest and detention of the Petitioner illegal.

(vi) As regards arrest, the DOE was guided by the final judgment of this Court in ***Moin Akhtar Qureshi v. Union of India*** (*supra*), ***Vakamulla Chandrashekhar v. Enforcement Directorate*** (*supra*) and the decision of the Bombay High Court in ***Chhagan Chandrakant Bhujbal v. Union of India*** *(supra).*

(vii) The grounds of arrest were now provided with the short affidavit. In any event, there was no requirement under Section 19 of PMLA to furnish a copy thereof to the Petitioner at the time of arrest. Admittedly, he was informed of the grounds of arrest. As regards a copy of the remand application it had been provided on 7th February 2018, i.e., before the returnable date in the present writ petition. It was not provided earlier since the Petitioner was not represented by counsel.

(viii) As regards the prayer for interim bail, the Petitioner could well advance such plea before the trial court which will consider it on merits. In any event, since the allegations against the Petitioner were grave, and given that he was absconding for a long time, no case was made out for grant of interim bail. Reference was made to the decision in ***Y.S. Jagan Mohan***

Reddy v. Central Bureau of Investigation (2013) 7 SCC 439.

Are the PMLA offences cognizable?

24. It must be noted at the outset that although PMLA was passed by the Parliament in 2002 it was not notified and did not became operational till 1st July 2005. While tabling the PML Amendment Bill in 2005 the Finance Minister explained that two kinds of steps were required to be taken to implement the PMLA. One was to appoint an authority to gather intelligence and information, and the other was an authority to investigate and prosecute. Since a number of lacunae were noticed in the PMLA, it became necessary to remove them.

25. Specific to the question whether the offences under PMLA were cognizable or non-cognizable, the Finance Minister said:

> "Under the existing provisions in Section 45 of the Act, every offence is cognizable. If an offence is cognizable, then any police officer in India can arrest an offender without warrant. At the same time, under Section 19 of the Act, only a Director or a Deputy Director or an Assistant Director or any other officer authorised, may arrest an offender. Clearly, there was a conflict between these two provisions. Under Section 45(1) (b) of the Act, the Special Court shall not take cognizance of any offence punishable under Section 4 except upon a complaint made in writing by the Director or any other officer authorised by the Central Government. So, what would happen to an arrest made by any police officer in the case of a cognizable offence? Which is the court that will try the offence? Clearly, there were inconsistencies in these provisions.
>
> They have now been removed. We have now enabled only the Director or an officer authorised by him to investigate offences. Of course, we would, by rule, set up a threshold: and, below that threshold, we would allow State police officers also to take action

………

What we are doing is; we are inserting a new Section, 2 (n) (a) defining the term, 'investigation'; making an amendment to Sections 28, 29 and 30, dealing with tribunals; **amending Sections 44 and 45 of the Act to make the offence non-cognisable so that only the Director could take action**; and also making consequential changes in Section 73. I request hon. Members to kindly approve of these amendments so that the Act could be amended quickly and we could bring it into force." (emphasis supplied)

26. There was a debate in the Lok Sabha on Section 45 PMLA and the proposed amendment. In his reply, the Finance Minister again clarified, as under:

> "Sir, first to answer Mr. Sudhakar Reddy, Section 45(1)(a) is being omitted because, if the offence is cognizable, then any police officer in this country can arrest without a warrant. Section 19 says, only the Director or Assistant Director should investigate the offence. There is a conflict. **Therefore, we are making it non-cognizable**. But, investigation will be by the Director. We will authorise, up to a threshold, State police officers also to investigate offences. That is why Section 45(1) (a) is being omitted." (emphasis supplied)

27. Further the SOR to the PML Amendment Bill 2005 *inter alia* noted in para 2 (c) that one of the purposes for the amendment was to "omit clause (a) of sub-section (1) of Section 45 of the Prevention of Money Laundering Act, 2002, which provides that every offence punishable under that Act shall be cognizable."

28. It is clear, therefore, that as far as the Parliament was concerned, the amendment to Section 45 was with the specific intention of making the offences under the PMLA non-cognizable. Yet, for some reason which could only be explained as inadvertence, the heading of Section 45 PMLA

was not changed.

29. Section 45 prior to the 2005 amendment read as under:

> "45. Offences to be cognizable and non-bailable
>
> (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)
>
> (a) every person punishable under this Act shall be cognizable;
>
> (b) no person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule shall be released on bail or on his own bound unless –
>
> (i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and
>
> (ii) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:
>
> Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs:
>
> Provided further that the Special Court shall not take cognizance of any offence punishable under Section 4 except upon a complaint in writing made by –
>
> (i) the Director; or
>
> (ii) any officer of the Central Government or a State Government authorized in writing in this behalf by the Central Government by a general or special order made in this behalf by that Government.
>
> (2) The limitation on granting of bail specified in clause (b) of sub-

section (1) is in addition to the limitations under the Code of Criminal Procedure 1973 (2 of 1974) or any other law for the time being in force on granting of bail."

30. After the 2005 amendment, Section 45 reads as under:

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

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

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

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

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

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

(i) the Director; or

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

(1A) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or any other provision of this Act, no police officer shall investigate into an offence under this Act unless

specifically authorised, by the Central Government by a general or special order, and, subject to such conditions as may be prescribed.]

(2) The limitation on granting of bail specified in 29 [***] sub-section (1) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail."

31. A comparison of two provisions shows that although the heading of Section 45 has not undergone a change, the provision itself clearly has. Section 45 (1) (a) as it stood prior to 1st July 2005 was deleted and this was now consistent with the second proviso which states that the special court shall not take cognizance except on a complaint in writing,

32. In ***Guntaiah v. Hambamma*** (*supra*) the Supreme Court explained that:

"Side notes cannot be used as an aid to construction. They are mere catchwords and I have never heard... that an amendment to alter a side note could be proposed in either House.... So side notes cannot be said to be enacted in the same sense as the long title or any part of the body of the Act."

33. Further, in ***Union of India v. National Federation of the Blind (2013) 10 SCC 772*** it was explained that "heading of a section or marginal note may be relied upon to clear any doubt or ambiguity" but not when a plain reading of the Section itself does not give rise to any doubt or ambiguity.

34. The Court is conscious that in ***Vakamulla Chandrashekhar v. Enforcement Directorate*** (*supra*) a Division Bench of this Court came to the opposite conclusion and held that notwithstanding the 2005 amendment to Section 45 PMLA, there is no positive indication in Section 45 that the

offences under the PMLA had become non-cognizable. Despite noting in para 28 of the judgment that "after the amendment, the police cannot take cognizance of the offence under Section 3 of the PMLA", the Division Bench observed that "even if the offence is no longer cognizable for the purposes of the Code, i.e., the police cannot take cognizance for the said offence, it does not follow that the authority under the Act would not carry out investigation on their own."

35. With respect, this Court is of the view that the said conclusion in ***Vakamulla Chandrashekhar v. Enforcement Directorate*** (*supra*) requires reconsideration since it is not in consonance with the express legislative intent that is so evident not only on a plain reading of the amended Section 45 PMLA but even with reference to the SOR to the PML Amendment Bill, and the debates in the Lok Sabha. The decision of the learned Single Judge in ***Virbhadra Singh v. Enforcement Directorate*** (*supra*) also does not appear to be correct in its understanding of the purport of the amendment to Section 45 PMLA. Despite quoting the speech of the Finance Minister, which this Court has also extracted hereinabove, the learned Single Judge has erroneously concluded in para 97 that the offence under PMLA is still cognizable. The Court notes that in ***Chhagan Chandrakant Bhujbal v. Union of India*** *(supra)* a Division Bench of the Bombay High Court proceeded on the basis that it does not matter whether the offence was cognizable or non-cognizable since the power of arrest conferred under Section 19 of the PMLA was not restricted by such characterisation.

Does Chapter XII of the Cr PC apply to the PMLA?

36. On the question whether Chapter XII of the Cr PC would apply to the PMLA, the question is no longer *res integra* after the decision dated 24th March 2017 of the Supreme Court in ***Ashok Munilal Jain v. Assistant Director, Directorate of Enforcement*** (*supra*) where it was explained:

> "We may record that as per the provisions of Section 4(2) of the Cr.P.C., the procedure contained therein applies in respect of special statutes as well unless the applicability of the provisions is expressly barred. Moreover, Sections 44 to 46 of the PMLA Act specifically incorporate the provisions of Cr.P.C. to the trials under the PMLA Act. Thus, not only that there is no provision in the PMLA Act excluding the applicability of Cr.P.C., on the contrary, provisions of Cr.P.C. are incorporated by specific inclusion. Even Section 65 of the PMLA Act itself settles the controversy beyond any doubt in this behalf which reads as under:
>
> > "65. Code of Criminal Procedure, 1973 to apply.-
> >
> > The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply, in so far as they are not inconsistent with the provisions of this Act, to arrest, search and seizure, attachment, confiscation, investigation, prosecution and all other proceedings under this Act."
>
> We may also refer to judgment of this Court in 'Directorate of Enforcement v. *Deepak Mahajan and Another' [1994 (3) SCC 440]* wherein it was held as under:
>
> > "141. In the result, we hold that sub-sections (1) and (2) of Section 167 are squarely applicable with regard to the production and detention of a person arrested under the provisions of Section 35 of FERA and 104 of Custom Act and that the Magistrate has jurisdiction under Section 167(2) to authorise detention of a person arrested by any authorised officer of the Enforcement under FERA and taken to the Magistrate in compliance of Section 35(2) of FERA."

We, thus, do not agree with the opinion of the High Court that the provisions of Section 167(2) Cr.P.C. would not be applicable to the proceedings under PMLA Act. "

37. Although the Supreme Court was specifically referring to a question of applicability of Section 167 (2) Cr PC to the PMLA it cannot be lost sight of that the Supreme Court was categorical that Sections 44 to 46 PMLA specifically incorporate the provisions of Cr PC prior to the PMLA and that there was no provision in the PMLA including the applicability of Cr PC. Further the Supreme Court was categorical that Section 65 of PMLA settled the controversy.

38. The decision of the Supreme Court in ***Ashok Munilal Jain*** was rendered on 22nd March 2017, whereas the decision in ***Vakamulla Chandrashekhar*** (*supra*) by a Division Bench of this Court was rendered later on 8th May 2017. Yet in ***Vakamulla Chandrashekhar*** (*supra*) without referring to the binding decision of the Supreme Court in ***Ashok Munilal Jain*** (*supra*) it was concluded that "the provisions of Chapter XII of the Code would not be attracted to investigation under the PMLA at all." Therefore, the decision in ***Vakamulla Chandrashekhar*** (*supra*) is in effect *per incuriam.*

39. The decisions of the Punjab & Haryana High Court in ***Karam Singh v. Union of India*** (*supra*), of the Bombay High Court in ***Chhagan Chandrakant Bhujbal v. Union of India*** (*supra*) and of the Jharkhand High Court in ***Hari Narain Mishra v. Union of India 2010 SCC Online Jha 475*** are no longer good law in view of the categorical subsequent pronouncement of the Supreme Court in ***Ashok Munilal Jain*** (*supra*).

40. If the correct legal position is that Chapter XII of the Cr PC would apply to the PMLA, then whether the offences under the PMLA are cognizable or non-cognizable, the Cr PC has to be followed. As explained in ***State of Haryana v. Bhajan Lal*** (*supra*) and ***Lalita Kumari v. Govt. of Uttar Pradesh*** (*supra*), if it is a cognizable offence, then the procedure of entering the substance of the information in a book under Section 154 Cr PC, forwarding a report to the Magistrate as mandated by Section 157 Cr PC, maintaining a case diary as mandated by Section 172 Cr PC and producing such case diary before the Magistrate upon arrest of the accused as mandated by Section 167 Cr PC has to be followed. If the offence is non-cognizable the procedure under Sections 155, 167 (1) and 172 Cr PC would have to be followed. The law in this regard has further been made clear in the decisions of the Supreme Court in ***Deepak Mahajan*** (*supra*) and ***Om Prakash v. Union of India*** (*supra*) and of this Court in ***Asmita Agarwal v. Enforcement Directorate*** (*supra*).

41. It appears to this Court that there is no alternative to the DOE but to follow the Cr PC, except where there are specific provisions in the PMLA that provide an alternative procedure. Given the mandate of Articles 21 and 22 of the Constitution of India the powers under the PMLA in relation to the offences under the PMLA, have to be governed by the Cr PC, if not by the PMLA. This is expressly recognised and acknowledged by Section 65 PMLA. It is, therefore, not open to the DOE to choose to not follow the Cr PC in an area where the PMLA is silent. Here again, therefore, this Court is unable to subscribe to the contrary conclusion reached by the co-ordinate Division Bench of this Court in ***Vakamulla Chandrashekhar*** (*supra*).

Powers of arrest under the PMLA

42. Even as regards the grounds of arrest it must be noted at the outset that in the present case the DOE has admittedly in fact not followed Section 19 of the PMLA.

43. In the first place it must be noticed that in para 19 of the short affidavit it has been wrongly asserted that in ***Deepak Mahajan*** *(supra)* the Supreme Court had laid down that offences under PMLA are cognizable. This is a plainly erroneous assertion since that decision had nothing to do with the PMLA. Mr. Mahajan was unable to explain how such an assertion could be made on affidavit and sought to characterise it as a mistake.

44. Nevertheless it is asserted in the short affidavit that in para 17 that:

> "consequent to the investigation and the material collected and after recording reasons to believe that the accused is guilty of the offence of money laundering, the accused was arrested on 25th January 2018 in terms of Section 19 of PMLA. In terms of the provisions of the Act, the Petitioner was immediately informed about the grounds of such arrest, and a copy of the arrest memo and the NBW dated 24th January 2018 were communicated supplied."

45. Although the file was not produced before the Court, even if the above assertion regarding reasons to believe having been recorded, is taken to be present in the file, it is difficult to believe that without the participation of the Petitioner, the DOE could have concluded that he is guilty of the offence of money laundering. However, at this stage the Court would not want to further comment on this aspect of compliance with the requirements of Section 19 of the PMLA which, as rightly pointed out by Mr. Chaudhary, places a higher onus on the DOE than even the Cr PC.

46. The power of arrest specified in Section 19 of the PMLA undoubtedly displaces the corresponding powers of arrest vested in a police officer under the Cr PC. Section 19 PMLA requires certain conditionalities to be fulfilled prior to the arrest. In particular the reasons to believe have to be recorded in writing in the file. The second aspect of Section 19 of PMLA is the communication of the grounds of arrest. Although Section 19 uses the word 'inform' in the context in which it appears a mere communication of the grounds would, in the considered view of the Court, not suffice. Merely reading out the grounds of arrest to the detenu would defeat the very object of requiring the reasons to believe to be recorded in writing and communicated to the detenu. As explained the Constitution Bench of the Supreme Court in ***C.B. Gautam*** (*supra*), in the context of the IT Act, the obligation to record reasons and convey the same to the party concerned operates as a deterrent against possible arbitrary action by the quasi-judicial or the executive authority invested with judicial powers. Also it is not understood why the DOE did not want to provide the detenu the copy of grounds of arrest as recorded by it. It would not prejudice the DOE in any way.

47. The Notes on Clauses accompanying the PML Bill, 1999 clarified what was intended as follows:

> "Clause 18 proposes to empower the Director, the Deputy Director, the Assistant Director or any other authorized officer to arrest a person if he has reason to believe that the person is guilty of an offence under the proposed legislation. Necessary safeguards such as **furnishing the grounds of arrest** and production before the Judicial Magistrate or a Metropolitan Magistrate within twenty-four hours are also sought to be provided." (emphasis supplied)

48. Rules 2 (1) (g) and (h) of the PMLA Arrest Rules define "material" and "order" respectively. Rule 2 (1) (h) states that 'order' means the order of arrest "and includes the grounds of such arrest under sub Section (i) of Section 19 of the Act." The arrest order is specified in Form III. In terms of Rule 6 it is required to be signed by the arresting officer while exercising the power under Section 19 (1) PMLA. Form III itself indicates that the arrest order is to be communicated to the person arrested. The foot of Form III reads thus:

> "To
> ....
> ....
> [Name and complete address of the person arrested]"

49. When Form III uses the word 'order' that has to include, as per Rule 2 (1) (h) of the PML Arrest Rules, the grounds of arrest. The basic idea is not merely to inform the person arrested of the grounds of arrest but to also furnish him a copy thereof. Even Rule 3 (1) of the PML Arrest Rules requires the order and material to be forwarded to the Adjudicating Authority.

50. Admittedly the arrest of the Petitioner in the present case has taken place without following Section 19 PMLA read with the relevant PML Arrest Rules and Form III. The grounds of arrest were furnished not "as soon as may be" as mandated by Section 19 (1) PMLA but only along with the short reply filed on 13th February 2018 more than two weeks after the arrest. Also,

it is doubtful that the said grounds would have been furnished if the present petition had not been filed. That *prima facie* renders the arrest of the Petitioner illegal. Added to this is the failure to follow the detailed guidelines pertaining to arrest as laid down in ***D.K. Basu v. State of West Bengal*** *(supra)* which as clarified by the Supreme Court in para 37 (SCC) of the said decision applies with equal force to "other governmental agencies" which expressly included the DOE.

51. Here again the Court is conscious that a Division Bench of this Court has reached the opposite conclusion in ***Moin Akhtar Qureshi v. Union of India*** (*supra*) and held that the words "as soon as may be" Section 19 (1) PMLA implies that the grounds of arrest need not be supplied at the time of arrest and the failure to do so would not render the arrest illegal. This Court is unable to subscribe to that view in view of the above discussion. It appears to this Court that there can ordinarily be nothing secret, *qua* the detenu, about his own grounds of arrest.

52. Further, in the present case, the grounds of arrest enclosed with the short affidavit of the DOE, filed in response to the writ petition, runs into four pages. It is not the case of the DOE that anything in the grounds of arrest is covered by the Official Secrets Act or any such law prohibiting it from being communicated. The basic idea is for the Petitioner to know why he has been arrested. How could he be expected to apply for bail or oppose a request of the DOE for extending his remand without knowing the grounds of his arrest? How would the object of Section 19 (1) PMLA be served if the four page grounds of arrest are merely read out to him or offered for inspection

without providing a copy thereof? Why the DOE should fight shy of providing the Petitioner the grounds of arrest to the Petitioner at the time of his arrest is not clear at all.

53. In the considered view of the Court, the interpretation placed on Section 19 (1) PMLA by the Division Bench of this Court in ***Moin Akhtar Qureshi*** (*supra*) does not appear to be consistent with the constitutional requirement as spelt out in Articles 21 and 22 of the Constitution of India and, therefore requires reconsideration.

Maintainability of the writ of habeas corpus

54. Finally, on whether a petition seeking a writ of *habeas corpus* is maintainable, the Court is again unable to subscribe to the view expressed in ***Moin Akhtar Qureshi*** (*supra*) that only because the trial Court is now seized of the matter and has ordered the remand of the Petitioner, this Court cannot entertain the present petition. In ***Re: Madhu Limaye*** (*supra*), the Supreme Court was categorical when it explained the legal position:

> "12. Once it is shown that the arrests made by the police officers were illegal, it was necessary for the State to establish that at the stage of remand the Magistrate directed detention in jail custody after applying his mind to all relevant matters. This the State has failed to do. The remand orders are patently routine and appear to have been made mechanically. All that Mr. Chagla has said is that if the arrested persons wanted to challenge their legality the High Court should have been moved under appropriate provisions of the Criminal Procedure Code. But it must be remembered that Madhu Limaye and others have, by moving this court under Article 32 of the Constitution, complained of detention or confinement in jail without compliance with the constitutional and legal provisions. **If their detention in custody could not continue after their arrest because of the violation of Article 22(1) of the Constitution they were entitled to**

> **be released forthwith. The orders of remand are not such as would cure the constitutional infirmities**. This disposes of the third contention of Madhu Limaye." (emphasis supplied)

55. There is nothing to the contrary stated in ***Kanu Sanyal*** (*supra*) since the above issue was left open. In ***Moin Akhtar Qureshi*** (*supra*) the Division Bench has made an extensive reference to the decision of the Full Bench of this Court in ***Rakesh Kumar v. State 53 (1994) DLT 609 (FB)*** which came to a conclusion different from that in ***Re: Madhu Limaye*** (*supra*) although the latter decision is still good law and has not been overruled by any later Bench of the Supreme Court. Even on this aspect, therefore, the Court is unable to subscribe to view of the Division Bench in ***Moin Akhtar Qureshi*** (*supra*).

56. Consistent with judicial discipline, since this Bench is of the view that the decisions of the coordinate Bench of this Court in ***Moin Akhtar Qureshi v. Union of India*** (*supra*) and ***Vakamulla Chandrashekhar v. Enforcement Directorate*** (*supra*) require reconsideration, it refers to a larger Bench, the following questions for consideration:

(i) Consequent upon the amendment in Section 45 of the PMLA with effect from 1st July 2005, are the offences under the PMLA cognizable or non-cognizable?

(ii) Do the provisions of Chapter XII Cr PC apply to PMLA insofar as the offences under the PMLA are concerned and if so, to what extent?

(iii) Under Section 19 of PMLA read with Rules 2 (h) and 2 (g) of the PML

Arrest Rules read with Rule 6 and Form III thereof, does a person arrested under Section 19 (1) of the PMLA have to be furnished a copy of the grounds of arrest? If so, should they be furnished soon enough to enable the person arrested to apply for bail or to oppose the application for remand? What are the consequences of the failure to do so?

(iv) Notwithstanding that the remand of the person arrested is under the orders of a Competent Court under the PMLA, will a writ of habeas corpus still maintainable if the initial arrest is itself shown to be unlawful?

(v) In the context of the above questions, do the decisions of the Division Bench of this Court in ***Vakamulla Chandrashekhar v. Enforcement Directorate*** (*supra*) ***Moin Akhtar Qureshi v. Union of India*** (*supra*) require reconsideration?

57. The writ petition now be placed before the Hon'ble the Acting Chief Justice for being referred to a larger Bench to answer the above questions.

Crl.M.A. 2151/2018 (interim relief)

58. Now turning to the application for interim bail, the Court at the outset notes that the Supreme Court has in its decision dated 23rd November 2017 in W.P. (Crl.) No. 67 of 2017 (***Nikesh Tarachand Shah v. Union of India***) struck down the restrictive conditions in Section 45 (1) PMLA as regards the grant of bail to be unconstitutional. The prayer of the Petitioner for grant of interim bail during the pendency of the present petition would therefore have to be considered as any other bail application in a case involving an offence of a similar nature, without applying those restrictive conditions.

59. The Court finds that the Petitioner has made out a *prima face* case as explained in detailed in the above order. He has *prima facie* demonstrated that his arrest on 25th January 2018 was contrary to Section 19 PMLA. Further, he has *prima facie* shown that the procedure adopted *qua* him by the DOE was not inconsonance with the Chapter XII of Cr PC.

60. The Petitioner has been in custody since 25th January 2018. The DOE had, through orders of the trial Court, his custody extended till 7th February 2018. He now stands remanded to judicial custody by the order of the trial Court. The DOE has not explained why it requires the Petitioner to remain in judicial custody.

61. On the part of the Petitioner, the Court has been assured that he would continue to cooperate with the DOE and appear as and when required subject to whatever terms that the Court may direct.

62. For the aforementioned reasons, the Court directs that the Petitioner be released on bail during the pendency of the present writ petition subject to the following:

(i) The Petitioner will execute a personal bond of Rs.2 lakhs with two sureties of the like amount to the satisfaction of the trial Court;

(ii) The Petitioner will not leave the country without the prior permission of this Court;

(iii) The Petitioner will surrender his passport to the trial Court;

(iv) The Petitioner will appear before the Investigating Officer of the DOE as and when called upon to do so and cooperate in the investigation;

(v) The Petitioner will furnish to the IO his current address both in Vadodara and in Delhi if any and the mobile number on which he can be contacted. If there is any change in either the address or the mobile number, the Petitioner will promptly inform the IO as well as the trial Court.

(vi) If any of the above conditions is violated, it will be open to the DOE to apply to this Court for cancellation of the bail.

63. The application is disposed of.

S. MURALIDHAR, J.

I.S. MEHTA, J.

FEBRUARY 19, 2018
Rm

HIGH COURT OF DELHI
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