**IN THE SPECIAL COURT DESIGNATED UNDER THE PML ACT, 2002**
**GR. BOMBAY**

ORDER BELOW EXH.36
IN
PMLA SPL. CASE NO.404 OF 2021

Rana Kapoor ... **Applicant(A3)**

Versus

The Directorate of Enforcement
Through the Assistant Director,
Zonal Office, Ballard Estate,
Mumbai-400001. ... **Respondent**

**Appearance:**
Mr. Vijay Aggarwal, Ld. Counsel alongwith Mr. Rahul Agarwal, Mr. Yash Agrawal and Ms. Jasmin Purani, Ld. Adv. for the applicant.
Mr. Sunil Gonsalves, Ld. Spl. P.P.

**CORAM :** M. G. DESHPANDE,
DESIGNATED SPECIAL COURT
UNDER THE PML ACT, 2002.
(C.R.N.16)
**DATE :** April 1, 2023.

**ORDER**

1. Applicant Rana Kapoor is accused No.3 in this case claimed bail under Sec.439 Cr.P.C. specifically contending that he is entitled to leniency in the matter of bail in terms of the first Proviso to Sec.45 of the Prevention of Money Laundering Act, 2002 (hereinafter referred to as 'the PML Act') and the Proviso to Sec.437 (1) Cr.P.C. (read into Sec.439 Cr.P.C.) and also on medical grounds (paragraph BBB, page 38 of the bail application Exh.36). Various contentions and grounds are raised which will be discussed afterwards. On the basis thereof it is contended to allow the application granting bail to the applicant (A3).

2. Respondent ED filed their say at Exh.37, denied the allegations made in the bail application, contended active involvement of the applicant(A3) in an offence of money-laundering. It is also contended that offence alleged against the applicant(A3) is serious, therefore, bail cannot be granted considering the gravity and magnitude of the offence. With this, it is contended to reject the application. The applicant(A3) has also filed rejoinder (Exh.36A) to the reply of ED (Exh.37) claiming additional contentions to qualify the bail application under Sec.45 of the PML Act.

3. Heard Ld. Counsel Mr. Vijay Aggarwal for the applicant(A3) and Ld. SPP Mr. Sunil Gonsalves at length. Also carefully read the rejoinder filed by the applicant(A3) to the reply of the ED (Exh.37). Following points arise for my determination. I am recording following findings thereon for the reasons discussed below :-

| | **POINTS** | **FINDINGS** |
|---|---|---|
| 1. | Whether the applicant (A3) is entitled to the parity as claimed ? | Yes |
| 2. | Is there any likelihood of speedy trial and conclusion thereof in near future as per Sec.44(1)(c) of the PML Act, particularly when the applicant (A3) is in judicial custody since 27.01.2021 without trial ? | No |
| 3. | What Order ? | As per final order. |

## REASONS

## FACTS

4. On 23.09.2020 Central Bureau of Investigation (CBI), ACB, Mumbai registered FIR No. RC 0262020A0012 under Sec.120B r.w. Ss. 420, 409 IPC and Ss. 13(2) r.w. 13(1)(d) of the Prevention of Corruption Act, 1988 (PC Act). On the basis thereof, as it relates to the Predicate Offence (Ss. 420, 120B IPC ), the Directorate of Enforcement (ED) recorded ECIR/MBZO-I/39/2020, on 19.10.2020 under Ss.3 and 4 of the PML Act. In this way, the case of the prosecution is that M/s Mack Star Market Pvt. Ltd. (for short 'Mack Star') was a joint venture between M/s. Ocean Deity Investment Holdings Ltd. (for the foreign investor, for short 'M/s ODIL'), the company incorporated under the laws of Mauritius, which held 78.9% shares and HDIL alongwith one Mr. Waryam Singh together holding the remaining 21.91% shares. Mac Star developed an office building in Andheri (East) called 'Kaledonia' for Rs.1000 Crore invested by M/s. ODIL. Rs.900 Crore thereof was used for acquisition and Rs.100 Crore for the construction of the building Kaledonia. Rakesh Wadhawan (A1), Sarang Wadhawan (A2), HDIL promoters and Mr. Lakhminder Dayal Singh, were appointed on the Board of Directors of Mack Star, at different times, who exercised full control over the day-to-day management and operation of Mack Star from 2008 to January,2019. All bank accounts of Mack Start were controlled by the Wadhawans/Wadhawan Directors, commonly seen in joint ventures.

5. The Articles of Association of Mack Star contained clauses to protect the interest of M/s. ODIL Article 14.1.2 gave rights to

appoint two Directors on the Board of Mack Star. The Articles of Association also restricted Mack Star from taking any loans/entering into any contracts of a value exceeding Rs.20 Lakh without consent of M/s. ODIL. Rs.1000 Crore was invested by M/s DE Shaw alongwith Wadhawans (A1 and A2), Mr. Waryam Singh (former Chairman of PMC), Mr. Amanpreet Singh (Director of HDIL Group of companies), Mr. Venkatvarthan N., Iynger (Sr. Vice President and Director of HDIL Group of Companies) and Mr. Lakhminder Singh Dayal (Director of HDIL Group of Companies) were appointed members of Board of Directors in Mac Star. Since Wadhawans had significant experience in developing and managing commercial real estate projects in Mumbai, they and certain directors appointed by them, unofficially called 'Wadhawan Directors', in this way, exercised full control over day-to-day management and operations of Mac Star from 2008 until January,2019. Wadhawans (A1 and A2) and Wadhawan Directors also operated the bank accounts of Mac Star. Such arrangement is common in joint ventures between foreign investors and domestic entities. In order to safeguard the interest of M/s. ODIL which had a passive role in Mack Star's management, the Article of Association of Mack Star embedded some prohibitions like Art.14.1.2 of the Association Memorandum which provides the right to appoint two directors (Investors Directors) to Board of Directors meetings of Mack Star. Similarly Art.14.4.2 of the Association Memorandum prohibits Mack Star and its shareholders and Directors from (a) selling assets, (b) taking loans, (c) creating mortgages and (d) entering into contracts, whose value exceeds INR 20 Lakh, without investors' consent i.e. M/s HDIL. HDIL Group and Wadhawans had been in severe financial stress and were struggling to discharge liabilities/repay loans owned by them to several persons/ entities. Wadhawans and Wadhawan directors who were in operational

control of Mack Star and its bank accounts until the beginning of 2019, took advantage of their controlling position and took 6 loans of Rs.200.3 Crore from Yes Bank Ltd. during the period from 2011-2016 in the name of M/s Mack Star Marketing Pvt. Ltd. without approval or the knowledge of the investors. Most of this loan amount was used in order to discharge liability owed by the HDIL group and the Wadhawans to the Yes Bank Ltd. and thereby prevented them from being NPA.

6. Although Mack Star was sanctioned a loan of Rs.200.3 Crore, only a sum of Rs.138 Crore was credited in the current accounts of Mack Star and the remaining Rs.64 Crore was directly transferred for the settlement of liabilities owned by HDIL Group to Yes Bank through bank accounts of HDIL. Further Rs.135 Crore was also transferred from the Yes Bank accounts of Mack Star to the bank accounts of M/s Housing Development and Infrastructure Ltd (HDIL), M/s. Privilege Power and Infrastructure Pvt. Ltd. (PPIPL) and M/s Sapphire Land Development Pvt. Ltd (SLDPL), all HDIL Group companies, on the same dates of loan disbursement. The companies used more than Rs.96 Crore of the money to pay their liabilities with the Yes Bank Ltd.

7. In this way, these transactions were orchestrated without the knowledge of the investors of the investors' directors. The investors were not able to discover any of these fraudulent transactions from Mack Star's audited financial statements, because the statutory auditor of the Mack Star, M/s. Ashok Jayesh Associates (the audit firm) was acting in collusion with Wadhawans and HDIL. The Senior partner of the audit firm Mr. Jayesh Sanghani, is closely associated with Wadhawans. Further even the other senior partner of the audit firm,

M/s. Ashok Kumar Gupta (a) was a director of HDIL till November,2016 and is a very close business associate of the Wadhawans and (b) has himself participated these fraudulent transactions and misappropriated two office units owned by Mack Star.

8. In January, 2016 the investors realized that the Wadhawans had taken fraudulent loan from the Yes Bank in the name of M/s. Mack Star Marketing Pvt. Ltd. They informed Yes Bank Ltd. even after this Yes Bank Ltd disbursed three installments of loan amounting to Rs.19.60 Crore to Mack Star's account on 23.03.2016, 26.04.2016 and 25.05.2016. Three such loans of Rs.140 Crore were sanctioned to Mack Star for the purpose of expenditure for modification, renovation and refurbishment of Kaledonia property and other capex in company. The purposes assigned for these loans are fictitious, because Kaledonia was a newly constructed building and that total cost of construction was only Rs.100 Crore. Therefore, actual purpose of sanctioning and disbursement of loans was to siphon off the amounts and transfer the misappropriated funds to the struggling HDIL Group companies, so that the cash strapped HDIL Group companies could repay loans and discharge liabilities owned in the same Yes Bank. Yes Bank disbursed these loans to Mack Star without the satisfaction of a key condition of Yes Bank's Sanction Letter that required Yes Bank to obtain Non-Disposal Undertakings (NDUs) from the investors prior to disbursement. Yes Bank obtained NDUs from each of Wadhawan owned minority shareholder and never approached the major investors to hide the transaction from them. Unknown officials of Yes Bank dishonestly ignored the terms of Mack Star's articles that expressly prohibited Mack Star from availing any loans without approval of its

majority shareholder i.e. the investor. The said unknown officials of Yes Bank Ltd. deliberately avoided alerting the investor about these fraudulent loans and disbursed these loans to Mack Star without the satisfaction of a key condition of Yes Bank's sanction letter. They did not verify the end use of these loans. The entire circulation of funds was happening within the Yes Bank system i.e. Loans disbursed by Yes Bank into Mack Star's Yes Bank account, were immediately diverted to Yes Bank's account of HDIL group companies, which used these funds on the same day to discharge liabilities owned by these HDIL Group companies to Yes Bank.

9. In this background the FIR was registered under Ss. 120B, 409, 420 of IPC r.w. Ss. 13(2) r.w. 13(1) (d) of PC Act against Sarang Wadhawan (A2) and Rakesh Wadhawan (A1), Promoters of M/s HDIL, Waryam Singh, Director, Mr. Amanpreet Singh, Director, M/s. HDIL, M/s Ashok Jayesh and Associates, Chartered Accountant, M/s Jayesh Sanghani, private person, Mr. Ashok Kumar Gupta, private person and unknown public servants and private persons. These are the facts alleged in the case of ED.

**10. GROUNDS FOR THE APPLICATION AND ARGUMENT OF LD. COUNSEL MR. VIJAY AGGARWAL.**

**i.** Under caption **(A)** of the bail application, the applicant (A3) referred case of the prosecution and particular allegations in the complaint that Rana Kapoor (A3) was closely associated with Mr. Rakesh Wadhawan (A1) and Sarang Wadhawan (A2) and there was an understanding between them under which the loans of Rs.200.3 Crore were sanctioned to Mack Star, which were siphoned by Wadhawans (A1 and A2). The applicant(A3) as Head of the Management Credit Committee of Yes Bank, sanctioned the said loans. Hence, he was the abettor of the crime and involved in laundering the POC.

**ii.** Under the caption **(B)** of the bail application, some dates set out in the complaint and Relied Upon Documents (RUD) are given alongwith chronology of the dates.

**iii.** Under the caption **(C)** relevant details of the term loans are given and also a civil dispute between private parties is referred, alleging that the FIR was filed at the instance of the CBI/ACB even though the entire case is purely of civil nature and between private parties.

**iv.** It is contended that the foreign investors first approached the Hon'ble Bombay High Court and the NCLT and the applicant was not a party in any of the said proceedings. Even if the case of foreign investors (M/s. ODIL) is considered, the applicant was not personally responsible for any of the alleged transactions.

**v.** The foreign investor (M/s ODIL) failed to obtain any relief in the civil suit and NCLT, only thereafter FIR was registered, which is afterthought.

**vi.** The allegations in the FIR, ECIR and the prosecution complaint even if accepted to be true, appear to be a private civil grievance by a party foreign investor (M/s ODIL) and no case of money-laundering has been made out against the applicant(A3).

**vii.** Even assuming the allegations in the PC to be true, there is no money-laundering nor any money to be recovered from the applicant(A3).

**viii.** PC has no allegations that the applicant(A3) received any undue monies/kick backs and it is the ED's own case that no money or benefit has been received by the applicant(A3). Therefore, the offences under the PC Act being scheduled offences in the FIR, do not attract. Hence, invocation of the offences under the PMLA is completely unsubstantiated, for the same reasons.

**ix.** Whatever monies by way of Term Loans advanced to Mack Star from March,2011 – December, 2015, were through official banking channels and the same are identifiable in the banking system and the question of tracing it does not arise. All funds are accounted and the record thereof is in the possession of the ED. Hence, nothing is to be recovered from the applicant(A3).

**x.** As per PC the monies purportedly siphoned by Mr. Rakesh

Wadhawan (A1) and Sarang Wadhawan (A2) are shown as POC. Hence, the applicant(A3) neither siphoned any monies nor had a recipient of POC nor involved in any process or activity of projecting or claiming the POC as his personal untainted monies/property.

**xi.** It was malafide arrest of the applicant(A3). The PC has two limbs, (I) the receipt of loans by Mack Star from Yes Bank and utilization of monies, and (ii) the immovable properties sold to third person. The applicant(A3) was arrested for first limb, which was unwarranted.

**xii.** The letter dt.28.01.2021 indicates that even Yes Bank had confirmed that the loan transactions were done by carrying on 'Due process'. Hence, the applicant(A3) was arrested malafide.

**xiii.** Arnab Manonranjan Goswami Vs. State of Maharashtra and Ors., (in Criminal Appeal No.742 of 2020) is relied upon and it is argued that it is the duty of the courts across the spectrum – the district judiciary, the High Courts and the Supreme Court – to ensure that the criminal law does not become a weapon for the selective harassment of citizens. Court should be alive to both ends of the spectrum – the need to ensure the proper enforcement of criminal law on the one hand and the need, on the other, of ensuring that the law does not become a ruse for targeted harassment. This applicant(A3) has absolutely nothing to do with alleged siphoning of money and is not in possession of any alleged POC, yet arrested.

**xiv.** Other persons named in the FIR, ECIR and the PC against whom serious allegations of money-laundering are made, have not been arrested. Moreover, persons who have allegedly played a role in the purported crime have not been questioned and others have been dropped as accused, which shows that applicant's arrest was motivated and malafide and he is being victimized though not involved in the crime.

**xv.** On 27.01.2021 the applicant(A3) was produced from Taloja Jail before this Court at 2.30 p.m. and the arrest memo was served on him in the Court itself without informing him the grounds of his arrest, which is in contravention of Sec.19 (1) of the PML Act. Hence, his arrest under Sec.19 of the PML Act is illegal.

**xvi.** Loans granted and disbursed by Yes Bank are bonafide and by following due process by taking adequate security. All necessary protocols were followed by Yes Bank at all levels of senior management, as contended by the Yes Bank in the

affidavit which was filed in the interim application on 02.01.2020 as well as in its letter to the ED dt.28.01.2021.

**xvii.** When the Term Loans No.I to IV were sanctioned and disbursed, the foreign investor (M/s ODIL) was only 0.04% equity shareholder in Mack Star. Therefore, question of obtaining Non-Disposal Undertakings (NDUs) from the foreign investor did not arise.

**xviii.** Foreign Investor (M/s. ODIL) became an equity shareholder in Mack Star in September,2014 and after that Term Loan No.V and VI were disbursed and Term Loan No.V, as per record, there was no requirement of NDU. Only Term Loan No.VI, NDU from the foreign investor (M/s. ODIL) was necessary. When Foreign Investor (M/s. ODIL) became a major shareholder and Mack Star were obliged to inform this fact to Yes Bank, but did not inform the same to the bank as well as the applicant. Hence, the applicant was not a responsible for the same.

**xix.** Yes Bank wrote two letters to the foreign investor (M/s. ODIL) in May/June, 2016 asking about the change in shareholding, but could not get any response to the said queries. Therefore, the applicant(A3) is not liable for not obtaining NDU from the foreign investor (M/s. ODIL) for Term Loan No.VI or for any wrongdoing on the part of Mack Star or its Directors or Shareholders.

**xx.** All details of the Term Loans were disclosed in the balance sheets of Mack Star and were publicly available. The Foreign Investor (M/s. ODIL) was entitled to obtain all information/ documents from Mack Star, under the Articles of Association and as per the Companies Act. Hence, it cannot be said that the foreign investor was unaware of the Term Loans and the applicant(A3) is not responsible for the same.

**xxi.** No intentions can be attributed to the applicant(A3) for any internal mismanagement/non-compliance within Mack Star. If the persons who were the directors of Mack Star, allegedly perpetrated the fraud, are not arrested for such allegations and the selective prosecution, arrest and continued incarceration of the applicant is made when the applicant(A3) had no connection with Mack Star and its management.

**xxii.** The affidavit in reply filed by Mr. Vishal Aralgudagi on behalf of Suraksha is material, which throw light on the real circumstances of transaction.

**xxiii.** PC has allegation that despite a letter sent by the foreign investor (M/s. ODIL) on 18.03.2016, Yes Bank disbursed

three tranches of Term Loan No.VI on 23.06.2016, 26.04.2016 and 25.05.2016 amounting to Rs.19.60 Crore. This allegation has been made against Yes Bank and not against the applicant(A3) in his individual capacity. Blame put on the applicant for allegedly taking all decisions in Yes Bank is without justification.

xxiv. The letter dt.18.03.2016 was not addressed to the applicant, but received by employee of Yes Bank, named Mr. Sumit, on 11.04.2016, which was never brought to the notice of the applicant(A3). Even the said letter has simple allegation that Mack Star without their (foreign investor's) consent obtained Term Loans, but there is no allegation of any fraud or misappropriation by the shareholder/directors of Mack Star. Therefore, blame cannot be put on the Yes Bank for releasing the remaining tranches.

xxv. The letter was issued on 18.03.2016 after the Term Loan VI had already been sanctioned by Yes Bank in December,2015 and the said letter was replied by Yes Bank in detail, hence for that the applicant (A3) cannot be held responsible and kept in judicial custody.

xxvi. Even after sending letter on 18.03.2016 the foreign investor (M/s. ODIL) did not commence any legal proceedings for three years. In September,2019, the civil suit was filed by foreign investor (M/s. ODIL) after Suraksha had filed the Petition in the NCLT against Mack Star.

xxvii. The applicant(A3) was not aware of nor had any concern with the internal management of Mack Star and the restrictions imposed upon HDIL by the foreign investor. Those restrictions were applicable only to HDIL and not to Yes Bank. Hence, the applicant cannot be made personally liable for the alleged non-compliance by HDIL. The foreign investor may have a grievance against HDIL, but cannot have a grievance against Yes Bank and the applicant(A3).

xxviii. **Internal protocol to be followed to sanction a loan at Yes Bank is referred stating that, no single senior management official of Yes Bank including the applicant(A3) was solely responsible for the lending functions of Yes Bank or had any sole loan sanctioning powers.**

xxix. **Although the applicant(A3) was the Chairman of the MCC had a veto right, there were minimum four additional authorized senior management officers of the Yes Bank alongwith him, who had to unanimously approve any loan proposal for it to be accepted. Every single officer of the**

**MCC had a veto right to reject a loan proposal. Even if one person on the MCC did not agree to sanction a particular loan, the proposal would have been rejected.**

**xxx.** While approving Credit Appraisal Memorandum comprehensive minutes of the MCC Proceeding were duly made representing various points made by the Approving Officer and those minutes were further submitted at the Risk Management Committee (RMC) of the Board and thereafter to the Board of Directors. In this way the term loans sanctioned by Yes Bank to Mack Star had gone through several layers of checks, balances and internal protocols of Yes Bank including compliance management, regulatory management, risk management, audit management and credit administration of Yes Bank. Therefore, the allegation that the applicant individually sanctioned loans to Mack Star for enabling HDIL to siphon monies, is not tenable. Merely because the applicant was the MD & CEO of Yes Bank, he cannot be held liable for the acts of all other Yes Bank officials.

**xxxi.** The first two term loans out of the six term loans advanced by Yes Bank, were fully repaid to Yes Bank. The said six term loans were adequately collateralized (2 X the value of the term loans) by Yes Bank. Out of Rs.200.3 Crore loan amount approximately Rs.96 Crore has been repaid to Yes Bank and Yes Bank earned approximately Rs.50 Crore by way of interest.

**xxxii.** Prosecution case is not that loan sanctioned by Yes Bank were bad nor Yes Bank is made accused for various allegations made in the scheduled offence as well as PC. The applicant cannot be made vicariously liable for any crime.

**xxxiii.** The term loans and supporting documentations were analyzed, recommended, signed and approved by several high ranking officers of Yes Bank and the said terms loans, therefore, passed several layers of scrutiny. Hence, the applicant cannot be made singularly liable for disbursing term loans and allegation as such is erroneous.

**xxxiv.** Though the applicant was the MD & CEO of Yes Bank, yet Yes Bank is a public limited company, governed by the provisions of the Companies Act, 1956 and the Board of Directors is responsible for the management of the company, yet it is illogical to hold that the applicant(A3) yet alone controlled Yes Bank and responsible for alleged term loans.

**xxxv.** Mr. Aneesh Pandey filed an affidavit-in-reply on 02.01.2020 on behalf of Yes Bank in the civil suit.

**xxxvi.** Six term loans were sanctioned by following due procedure and conducting the required due diligence and obtaining all necessary documents/approvals and sworn statements were made accordingly in the said affidavit by Mr. Aneesh Pandey. He also made sworn statement in the said affidavit that, there has been no complicity or collusion or involvement of Yes Bank or any of its officers in fraud, siphoning of or diversion of funds and also there was no loss caused to Yes Bank.

**xxxvii.** Yes Bank and all other banks across the industry rely on End Use Certificate issued by a Chartered Accountant for the purpose of maintaining vigilance over the usage of funds.

**xxxviii.** In the present case for all six term loans Mack Star provided Yes Bank with the necessary End Use Certificates. Once the End Use Certificate provided there was thus no occasion to doubt the utilization of the monies.

**xxxix.** Reliance on the statement of present director of Mack Star Mr. Sumit Rajan Saha cannot be placed as it was given to the ED in another ECIR being MBZO/ECIR/3/2020. He appears to be protecting the interest of Mack Star and trying to shift the blame on the applicant, which itself entitles the applicant(A3) to bail.

**xl.** Submissions made in the civil suit by Mack Star (November 2019) significantly differ from and are contradictory to the subsequent statement of Mr. Saha **dt.14.03.2020**.

**xli.** In the civil suit the foreign investor (M/s. ODIL) and Mr. Saha made no reference to the applicant(A3) in any manner whatsoever nor the applicant was made a party to the civil suit, when there is no allegations against the applicant(A1) of his personal involvement in any manner. However, after the ODIL failed to get any relief from the Hon'ble Bombay High Court in **December 2019** and from the NCLT in **February, 2020**, Mr. Saha has then tried to implicate the applicant in his statement recorded in **March, 2020**. In this way by subsequent statement Mr. Saha tried to falsely implicate the applicant(A3) as the ODIL got no relief in the civil proceedings.

**xlii.** The statements of the present two and one ex-employees of Yes Bank that they allegedly followed blindly the direction of the applicant(A3) cannot be believed, as those were all held senior managerial position in Yes Bank, independent professionals and were part of high level decision making process and had served Yes Bank for substantial period of time. Therefore, they could never act as a rubber stamp and

same cannot be believed. Their statements were extracted only to implicate the applicant in this case.

**xliii.** None of the employees have made any specific allegations in respect of 6 term loans to suggest that the applicant(A3) pressurized them to disburse any of the term loans.

**xliv.** ED had recorded the statement of the applicant(A3) during his ED custody, wherein he has clearly explained the loan sanctioning and disbursal process followed at Yes Bank. He has clarified that the loans could not and were not directly handled by him (A3) as MD & CEO, but in fact the Corporate Finance Urban Infrastructure Team in consultation with Risk Management specializing in Real Estate Loans, handled the said loans. Those were Mr. Punit Malik, Mr. Sanjay Palve and Mr. Ashish Agarwal.

**xlv.** After interrogating the applicant from **27.01.2021** to **30.01.2021**, ED had not made his (A3) further interrogation in Taloja Jail, once he was remanded to judicial custody. On **19.03.2021** the investigation qua the applicant was complete, hence he is not required to be kept in judicial custody.

**xlvi.** 6 weeks after the arrest of the applicant(A3), on **09.03.2021** statements of Rakesh Kumar Wadhawan (A1) and Sarang Wadhawan (A2) were recorded. Wherein they stated that, the loans from Yes Bank were used for their declared purpose. Kaledonia was initially constructed upto 8 storeys and two floors were subsequently added with the expenses incurred by Mack Star for the said addition, were fulfilled by taking loans from HDIL and its associates companies. Therefore, the statements recorded under Sec.50 of the PML Act are not of much importance.

**xlvii.** The applicant(A3) is 63 year old, sick and infirm, suffers from multiple chronic ailments including Gerd, Asthma and hypertension and major depressive disorder. Hence, entitled to leniency for bail in terms of the First Proviso to Sec.45 of the PML Act r.w. Proviso to Sec.437(1) of Cr.P.C.

These are the main grounds and detailed argument advanced by the Ld. Counsel Mr.Vijay Aggarwal for the applicant(A3).

11. On the other hand ED and Ld. SPP Mr. Gonsalves placed reliance on allegations made in the ECIR, PC and details relating to 6

Terms Loans sanctioned and disbursed by the Yes Bank for its siphoning to various companies of Wadhawans and Wadhawan directors, which were in financial crises. Therefore, according to ED the applicant (A3) is not entitled to bail. I carefully examined these arguments. Also, I carefully read the whole PC and various voluminous documents filed with it.

**POINT NO.1**.

WHICH ONE, EITHER PREROGATIVE AND CHOICE OF ED TO ARREST OR THE RIGHT OF THE ACCUSED TO CLAIM PARITY, TO BE ACKNOWLEDGED AT LAW?

12. This is the first consideration for this application. Everywhere the Prosecution Complaint ED has alleged how Rakesh Wadhawan (A1), Sarang Wadhawan (A2) and the applicant (A3) connived and hatched criminal conspiracy for raising funds by way of new loans for altogether different purpose, but used the same for making green all outstanding overdue loan accounts of Wadhawans and their HDIL (group of companies). According to the ED in the said conspiracy the applicant (A3), the then MD and CEO of Yes Bank, connived with Wadhawans (A1 and A2) and further sanctioned 6 loans for total Rs.200.3 Crore to M/s Mack Star, which then came in accounts of various HDIL group companies. On the very same day it was further transferred in various overdue loan accounts of HDIL group companies, which were unpaid and outstanding. Therefore, Wadhawans (A1 and A2) and the applicant (A3) are mentioned as main accused persons in this case.

13. In this case, excluding various companies, who are made accused, there are number of accused persons. They are Rakesh Wadhawan (A1), Sarang Wadhawan (A2), the applicant (A3), Mehul

Thakur (A9), Madan Gopal Chaturvedi (A11), Parag G. Gorakshakar (A12), Sanjay Palve (A13), Saurabh Jaiman (A14), Mukesh Doshi (A15), Kaushal Doshi (A16), Ashish Agarwal (A18) and Punit Malik (A19). I have already referred above the role attributed to Wadhawans (A1 and A2). Role attributed to **Parag Gorakshakar (A12)** is that he was the Chief Credit Officer (Risk Management) in Yes Bank and was also on the Board of Management Credit Committee, which had approved the loan of approximately Rs. 200 Crore to M/s Mack Star. It was his responsibility to evaluate the loan proposals received from business team and highlight its objection in case there was any deficiency in the proposal. **However, in this case he and his team failed to discharge his responsibilities**. (Page 49 of the Prosecution Complaint).

14. It is material to note that, roles attributed to Rakesh Wadhawan (A1) and Sarang Wadhawan (A2) indicate that they were the main conspirators in this scam. Everything what has been alleged in the Prosecution Complaint was allegedly an outcome of their conspiracy and illegal activities. From the allegations made in the complaint it appears that they are the alleged main persons who indulged in the criminal activity relating to Scheduled Offence for generating POC by way of Rs.200.3 Crore loans from Yes Bank which were sanctioned in favour of Mack Star, from where it was percolated into various accounts of HDIL group companies and again it was transferred on the same day in various overdue outstanding loan accounts of HDIL group companies with Yes Bank, in order to green the overdue outstanding loans. All this they allegedly did in connivance with the applicant (A3). Therefore, both of them (A1 and A2) are the main accused persons. On the contrary Prosecution Complaint indicates that Wadhawans (A1 and A2)

were not only generators of POC but also were placers, layerers and integrators thereof, yet they were not arrested **under Sec.19** of the PML Act.

15. Total loan amount was not a small amount, but it was huge i.e. Rs.200.3 Crore. No bank would sanction and disburse the same to any one only because their MD/CEO alone directs the same. Careful perusal of various statements of witnesses and co-accused clearly indicates that,

> **Parag Gorakshakar (A12)** was the Chief Credit Officer (Risk Management) in Yes Bank and was also on the Board of Management Credit Committee, which had approved the loan of approximately Rs. 200 Crore to M/s Mack Star. It was his responsibility to evaluate the loan proposals received from business team and highlight its objection in case there was any deficiency in the proposal. **However, in this case he and his team failed to discharge his responsibilities**. **(Page 49 of the Prosecution Complaint)**.

> **Sanjay Palve (A13) was the Sr. Group President in Yes Bank and Business Head for Infrastructure Banking Group and Corporate Banking in Yes Bank**. He was looking after Corporate Finance, Agri Lending, Real Estate and was also on the Board of Management Credit Committee (MCC) which had approved the loan of Rs.200 Crore to M/s. Mack Star.
> **(Page 49 of the Prosecution Complaint).**

> **Saurabh Jaiman (A14)** was the Sr. President (Risk Management Team) in Yes Bank having responsibility on his shoulder to evaluate all the In-principal Approvals (IPA) received from his business team and to raise objections in case there was any deficiency in the proposal. **In the instant case he though being Sr. President (Risk Management Team) failed to discharge is responsibilities during his tenure in Yes Bank** two loans of Rs.40 Cr. And Rs.60 Cr. had been sanctioned by Yes Bank to Mack Star in August, 2015 and December, 2015.
> **(Page 50 of the Prosecution Complaint).**

**Ashish Agarwal (A18) was the Sr. Group President in Risk Management Department of Yes Bank and was also on the Board of Management Credit Committee (MCC) which had approved the loan of approximately Rs.200 Cr. to M/s Mack Star**. It was his responsibility to evaluate the loan proposals received from the business team and highlight its objections in case there was any deficiency. **In the instant case he being Sr. President of the Risk Team failed to discharge his responsibility**. During the period 2011-2016 six loans of Rs.200.3 Crore from Yes Bank were sanctioned to **M/s Mack Star without approval or knowledge of the investors of M/s. Mack Star**.
**(Page 28 of the Supplementary Prosecution Complaint).**

**Punit Malik (A19) was the Sr. Group President in Yes Bank handling relationship and business development, product management in health care, hotels, real estates and education. He was also on the Board of Management Credit Committee (MCC) which had** approved the loan of Rs.200 Crore to Mack Star. It was his responsibility to evaluate loan proposals **received by the business teams and highlight his objections if any. In this case he failed to discharge his responsibilities and therefore, six loans of Rs.200.3 Crore from Yes Bank Ltd. were sanctioned to Mack Star**.
**(Page 34 of the Supplementary Prosecution Complaint).**

Roles attributed to everyone referred above indicates how everyone of them were responsible for granting these loans.

16. Any simple, normal ordinary loan proposal always undergo through the detailed scrutiny, scanning as per the norms of the Bank and it is sanctioned only after the same qualifies the mandatory requirements of the bank. Whenever loan amount is huge, it is a task of different departments of which above referred accused persons are in-charge and responsible.

17. In the instant case unless the clearances from each and every department and their heads (A12, A13, A14, A18, A19) are made,

such huge loans of Rs.200.3 Crore Yes Bank would not have sanctioned. Even such members in the Managing Committee of the Bank Management and high level officials having right of Veto not to consider and grant such loan proposals, would have exercised the same. However, the prosecution complaint itself indicates how all other accused, which are referred above, were also equally responsible for dealing with the public money of the Yes Bank and aided the process of generation of proceeds of crime. ED while opposing applications of co-accused under Sec.88 Cr.P.C. raised similar contentions and had objected them. None of such release of the co-accused under Sec.88 Cr.P.C. has even been challenged by the ED till date, allowing it to attain finality. The applicant (A3) stands on the same footing. Alleged laundered money had never come to him nor there is anything to show that he received any kickback for the same.

18. The Prosecution Complaint further clearly indicates that the officer authorized by the ED was quite aware having subjective satisfaction and belief that, these persons (A9, A12, A13, A14, A1 and A2) have been guilty of an offence punishable under Section of the PMLA Act as required under Sec.19 thereof, yet not arrested anyone of them. When ED was asked for this disparity, a typical submission is made by Ld. SPP Mr. Sunil Gonsalves that,

a. **Both Wadhawans (A1 and A2) were already arrested and undergoing judicial custody in another crime.**
b. **Their statements were recorded by the ED.**
c. **It is the prerogative of ED who is to be arrested and who should not.**

19. I carefully examined this argument. Considering the allegations made in the Prosecution Complaint and roles attributed to

various other accused persons, it is prima-facie evident that, even Yes Bank officials for example, **Parag Gorakshakar (A12), Sanjay Palve (A13) , Saurabh Jaiman (A14)** etc. had played role, which is equal and similar to the role of the applicant (A3) and contributed the alleged conspiracy for generating POC Rs.200.3 Crore by way of 6 loans and left it to be laundered by Wadhawans (A1 and A2). As noted above all of them were top officials of Yes Bank could not have given sanction to the loan proposals blindly. Even Prosecution Complaint states the same. In this way, if the allegations in the Prosecution Complaint are accepted, all other accused persons referred above (A1, A2, A9, A12, A13 and A14), squarely fall in the opening word **"Whosoever"** and further **"directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected......."** of Sec.3 of the PML Act. Astonishingly, none of them was ever arrested by the ED during investigation. Only the applicant (A3), Mehul Thakur (A9) and Madan Chaturvedi (A11) were arrested contending non-arrest of other accused persons being ED's prerogative for the above three reasons. **Whether such prerogative on the part of ED can be acknowledged at law?**

20. It has to be noted that, making assessment of a person whether he is guilty, during the course of investigation empowers the Authorized Officer for executing arrest. The Officer cannot make any discrimination among the accused persons having similar roles that one should be arrested and another should be relieved for availing him benefit of Sec.88 Cr.P.C. In the same way, a person whom the ED officer does not give any benefit as such, gets dragged into Sec.19 of the PML Act attracting rigours of stringent twin conditions of Sec.45(1) of the PML Act. The Investigating Officer cannot be make such discrimination

in the guise his powers under Sec.19 of the PML Act. This aspect is being discussed afterwards in detail.

21. Before answering the above highlighted question, it is necessary to refer certain provisions which empowers the ED officer to arrest any person and the legal consequences thereof. ED can arrest any person through their empowered officer as per Sec.19 of the PML Act. Basically, arrest of a person in general is an extreme end of power, which has far reaching consequences. This extreme power of arrest has to be used very carefully and cautiously by the ED officer. The language of Sec.19 itself demonstrates that before exercising discretion there should be a subjective satisfaction of the authorized officer on following aspects before effecting arrest,

a. **Such officer must have in his possession material forming basis.**
b. **On the basis of such material, such officer has reason to believe (the reason for such belief to be recorded in writing) that,**
c. **Any person has been guilty of an offence punishable under this Act.**

22. It is only after subjective satisfaction of the Officer as above, he may exercise discretion for arresting such person. At the relevant time the Officer concerned dealing with investigation was quite aware of the fact that both Wadhawans (A1 and A2) for themselves and their companies were deeply involved in the criminal activity relating to the Scheduled Offence and out of the same they generated six loans total Rs.200.3 Crore for M/s Mack Star. It is therefore clear that even if the I.O. was quite aware and knowing well the deep rooted involvement of Wadhawans (A1 and A2), yet did not arrest them. It is not as easy as

contended by ED that, Wadhawans (A1 and A2) were under judicial custody in another crime and they had given their statements, hence they were not arrested. Because, non-arrest of any accused under Sec.19 of the PML Act has far reaching, serious and damaging consequences. Once any accused is arrested under Sec.19 of the PML Act, the barrier of stringent twin conditions under Sec.45 of the PML Act automatically creates embargo for granting bail. If any person is not arrested like Wadhawans (A1 and A2) they can automatically get their safe rescue from the clutches of stringent twin conditions under Sec.45 of the PML Act. In such situation even if they are deeply rooted in a serious economic offence having high gravity and magnitude, can get their release at the mercy of ED Officer only as a formality under Sec.88 Cr.P.C. leaving no alternative with the Court rather than releasing them on bond with or without surety. In this way Wadhawans (A1 and A2) even if had prominent role, were the beneficiaries and recipients of such discretion and mercy of the authorized officer. Same is the situation with A12, A13, A14, A18 and A19. Whereas, the applicant (A3) has been undergoing undue incarceration. Word “may” in Sec.19 nowhere awards any authority or power to the authorized officer to use the said discretion as a mercy in such discriminatory manner and fashion. All this caused great injustice wherein a similarly situated group of accused persons got easy rescue and have been enjoying their foreign trips (A12 and A13) eversince. Wadhawans (A1 and A2) even if in judicial custody in another case, yet got free from the stringent twin conditions of Sec.45. Whereas, the applicant (A3) has been languishing in Jail since 2 years 2 months and 3 days without trial and awaiting commitment as per Sec.44(1)(c) of the PML Act, which even ED does not know. Is it not a case of parity? What more is required to extend him benefit of parity? I hold that this is a fit case to

grant parity to the applicant (A1), when he has already paid the price for the alleged gravity and magnitude of the offence, by languishing in jail since 2 years 2 months and 3 days.

23. In this way if a person is not arrested under Sec.19 of the PML Act, Sec.45 does not come in picture. Recently the Hon'ble Allahabad High Court in **Govind Prakash Pandey Vs. Directorate of Enforcement, Government of India (in Criminal Misc. Bail Application No.1443 of 2023, decided on 20.02.2023)**, clearly held as, **"Section 45 of the PML Act is not applicable when arrest is not made under Sec.19."** Therefore, in the instant case it is no one else but the ED who paved way for rescue of Wadhawans (A1 and A2) and other Yes Bank Top Officials, very easy so that they would not come in the clutches of Sec.45 of the PML Act, saying that both of them were already in judicial custody for another crime, when the applicant (A3) too was similarly situated and in the judicial custody of another crime.

24. It has to be noted that, at the relevant time when the ED paved way for the easy rescue of Wadhawans (A1 and A2), the main accused and conspirators, noting that they were already in judicial custody in another crime and not arrested them under Sec.19 of the PML Act, the present applicant Rana Kapoor (A3) was also in the judicial custody of ECIR/MBZO-I/03/2020. One fine morning on 22.01.2021 ED filed an application (Exh.23) when the applicant (A3) was not even named in the FIR RC0262020A0012 as well as in ECIR of the present case and requested the Court to issue production warrant for bringing the applicant (A3) before the Court. Accordingly, on 27.01.2021 the applicant (A3) was produced before this Court on production warrant. It is pertinent to note that, without any subjective satisfaction of the Authorized Officer, his formal arrest was effected in the Court before my Ld. Predecessor under Sec.19 of the PML Act. This act

on the part of the Authorized ED Officer dragged the applicant (A3) in the clutch of stringent twin conditions under Sec.45(1) of the PML Act. It is the ED who made the rescue of main accused Wadhawans (A1 and A2), Parag G. Gorakshakar (A12), Sanjay Palve (A13), Saurabh Jaiman (A14), Mukesh Doshi (A15), Kaushal Doshi (A16), Ashish Agarwal (A18) and Punit Malik (A19), very easy under Sec.88 Cr.P.C. had made very difficult and miserable to the applicant (A3). All this ED did when the name of the applicant (A3) was not anywhere in the FIR relating to the Predicate Offence nor any criminal activity relating to the Predicate Offence, which allegedly led generation of POC was attributed to him in the said FIR. Can ED is permitted to say that, it is their prerogative who is to be arrested and who is not to be?

25. Uniformity and certainty in the decision of the court are the foundations of judicial dispensation. Persons accused with same offence shall never be treated differently either by the same court or by the same or different courts. This aspect cannot be ignored while looking to the non-arrest of Wadhawans (A1, A2, A9, A12, A13 and A14), by ED. Even their contention that both of them were in judicial custody of another crime, is unfounded, baseless and cannot be accepted as this applicant (A3) was also in judicial custody of another ECIR (Special Case No.452/2020). The case of the ED clearly indicates that Wadhawans (A1 and A2) are main accused and had been guilty of an offence under Sec.3, 4, yet they were not arrested under Sec.19 of the PMLA Act, whereas the applicant (A3) was brought before the Court on production warrant and arrested under Sec.19 of the PML Act. Can it be said as prerogative of ED? Whether such prerogative can be acknowledged at law? ED may mould the discretion given under Sec.19 of the PML Act as per their wish, but the Court which has bounden duty

and under legal obligation, not to allow undue incarceration of any undertrial prisoner, cannot put premium on such prerogative.

26. Sec.19 of the PML Act does not permit the Investigating Officer to make such discrimination while exercising the extreme power to arrest under Sec.19 of the PML Act and give tolerance to one accused and shut it off permanently for another making him extremely difficult. This is not the object of the PML Act nor the Authorized Officer vested with such discriminatory powers. When all other accused, including main accused Wadhawans (A1 and A2) were released under Sec.88 Cr.P.C., the applicant (A3) is entitled to be released as a matter parity, as the progress of trial is in dark. Such conduct of ED gives rise to following question,

- **i. Is ED permitted to say that, it is their prerogative as to who is to be arrested and who is not to be?**
- **ii. Is ED permitted to say that, non-arrested main accused have tendered their statements, therefore, they were not arrested?**
- **v. Whether such attitude and disparity is contemplated under Sec.19 of the PML Act?**
- **vi. Can the Court still accept the contention of ED regarding their prerogative, when the right of a person like the applicant (A3) in respect of parity is in question?**
- **vii. Whether the so called right of prerogative, as contended by ED, will prevail upon the right of parity of the applicant (A3)?**

Certainly, answers to all these questions are in the negative. the Court cannot entertain such contention of prerogative of ED in view of selected arrests they have made in this case. If the Court still accepts such contentions and rejects the right of parity of the

accused No.3, that will amount putting premium on illegal acts of ED in the garb of so called prerogative. In my opinion such misconceived prerogative cannot be acknowledged at law, especially when the accused No.3 has genuinely exercising his right to parity. Whenever there is disparity, the Court is bound to make parity. Therefore, such disparity and oblique attitude of the ED in making selective arrests under alleged prerogative cannot be garbed by a legal order.

27. The Hon'ble Supreme Court in **Babubhai Vs State of Gujarat and Ors. (Criminal Appeal No.1599 of 2010, decided on 26.08.2010)** clearly laid down that, not only the fair trial but fair investigation is right of accused. In the instant case, as usual of ED, investigation is still contended to be going on, when they themselves do not know, where the case relating to the Scheduled Offence has been lying and at which stage? All this ED is saying without filing any Progress Report. Certainly fair investigation is a valuable right of the applicant (A3) and the Court is its custodian. When the Investigating Officer of ED has made disparity while not arresting Wadhawans (A1 and A2) and Parag G. Gorakshakar (A12), Sanjay Palve (A13), Saurabh Jaiman (A14), Mukesh Doshi (A15), Kaushal Doshi (A16), Ashish Agarwal (A18) and Punit Malik (A19), some of them were high level Yes Bank's management and officers, involved in the scam, certainly the applicant (A3) is entitled to the parity for bail by discarding such prerogative and misconceived concept of "further investigation" contended by the ED.

28. Another aspect requires consideration. I have already discussed above how Wadhawans (A1 and A2) who are the main accused were not arrested by the ED under Sec.19 of the PML Act

making their release very easy under Sec.88 Cr.P.C. Even the bank officials having roles similar to the role of the applicant (A3) were not arrested but released under Sec.88 Cr.P.C. Apart from this, the Hon'ble High Court granted temporary bail to Mehul Thakur (A9) on medical grounds and lastly gave him liberty to agitate the same grounds and merits before this Court. He was released on bail vide order dt.27.02.2023. In the meantime Madan Chaturvedi (A11) whose bail application was rejected by this Court noting that he destroyed the hard-disc of the laptop containing material evidence in the presence of ED officers. Later on the Hon'ble High Court vide order dt. 27.04.2022 granted him bail on merits. The following table will elaborate this situation with particulars indicating how the applicant (A3) alone is behind bars awaiting trial by compliance of Sec.44(1)(c) of the PML Act when his name is not mentioned in the FIR and ECIR nor even after three years the CBI filed chargesheet relating to FIR RC 0262020A0012 . It is as follows,

| Sr. No. | Name of Accused | Status of Arrest | Date of Grant of Bail/Release. | Remarks. |
|---|---|---|---|---|
| 1. | Rakesh Wadhawan (A1) | Never arrested | 07.04.2022 | **Under Sec.88 Cr.P.C.** |
| 2. | Sarang Wadhawan (A2) | Never arrested | 07.04.2022 | **Under Sec.88 Cr.P.C.** |
| 3. | Parag Gorakshkar (A12) | Never arrested | 23.09.2021 | **Under Sec.88 Cr.P.C.** |
| 4. | Sanjay Palve (A13) | Never arrested | 23.09.2021 | **Under Sec.88 Cr.P.C.** |
| 5. | Saurabh Jaiman (A14) | Never arrested | 23.09.2021 | **Under Sec.88 Cr.P.C.** |
| 6. | Mehul Thakur (A9) | Arrested | 27.02.2023 | **Bail Granted.** |
| 7. | Madan Chaturvedi (A11) | Arrested | 27.04.2022 | **Bail Granted on merits by the Hon'ble High Court** |

29. How the trial of this case alongwith trial of the case relating to the Predicate Office cannot begin and conclude in near future even after 2 years 2 months will be discussed in detail in Point No.1. This is a fit case to grant parity to the applicant (A3) in the above discussed background. Hence, Point No.1 is answered in the affirmative.

**POINT NO.2.**

**"MORE THE RIGOUR, THE QUICKER THE ADJUDICATION OUGHT TO BE"**

30. This is the second consideration for this application. Recently the Hon'ble Supreme Court in the case of **Satender Kumar Antil Vs CBI [(2022)10 SCC 51]** laid down this important preposition and principle while discussing Category 'C' relating to **Special Acts.** Even recently in the case of **Mohd. Muslim @ Hussain Vs State (NCT of Delhi) [Criminal Appeal No(S) 943 of 2023 @ Special Leave Petition (CRL.) NO(S). 915 of 2023** decided on March 28, 2023 held as,

> "23. There is a further danger of the prisoner turning to crime, "as crime not only turns admirable, but the more professional the crime, more honour is paid to the criminal" (also see Donald Clemmer's 'The Prison Community' published in 19403). Incarceration has further deleterious effects - where the accused belongs to the weakest economic strata: immediate loss of livelihood, and in several cases, scattering of families as well as loss of family bonds and alienation from society. The courts therefore, have to be sensitive to these aspects (because in the event of an acquittal, the loss to the accused is irreparable), and ensure that trials – **especially in cases, where special laws enact stringent provisions, are taken up and concluded speedily.**"

31. ED started investigation of this ECIR way back in 2021. ED finished initial investigation and filed prosecution complaint on

**20.03.2021.** Initially the applicant (A3) was not arrested in this ECIR. He was arrested and undergoing judicial custody in another ECIR/MBZO-I/03/2020(PMLA Spl. Case No.452 and 579/2020). At that time except the said case and ECIR therein the applicant (A3) was not in judicial custody in respect of any other Crime/ECIR/Case. On **22.01.2021 Ld. SPP** filed application Exh.23 in PMLA Case No.452 and 549/2020 pertaining to ECIR/MBZO-I/03/2020 for production of Rana Kapoor (A3) on **27.01.2021** in connection with the present ECIR. The roznama dt. **27.01.2021** in Remand Application No.112/2021 indicates that the applicant(A3) was produced before the Court pursuant the said production warrant, arrested formally and thereafter remanded in ED custody till **30.01.2021.** From **30.01.2021** he (A3) has been in judicial custody till date. It is therefore clear that the applicant (A3) has been in judicial custody in respect of the present ECIR No.ECIR/MBZO-I/39/2020. Since about **2 years, 2 months and 3 days**. Prosecution complaint against him was filed on **20.03.2021** with the usual stereo type contention of ED that "further investigation" is going on. However, except such bald and bare words till date no progress report showing any progress of investigation is filed by the ED. ED is quite aware that the only undertrial prisoner in this case is applicant Rana Kapoor (A3). ED is quite aware of the settled legal position that trial of undertrial prisoner has to begin at the earliest and conclude when this Special Law ie. the PML Act enacted stringent provisions i.e. twin conditions under Section 45(1).

32. Stringent twin conditions under Section 37 of the NDPS Act and stringent twin conditions under Section 45 of the PML Act are analogous. Though the gravity and magnitude of the offence under the PML Act is material consideration and the economic offences stand on

different footing, yet the principle of expeditious trial of the undertrial prisoners in NDPS offence and the offence under the PML Act, is same and equally applicable to both these Acts. The object of the PML Act is to secure the wealth of the Nation (i.e. Public money), whereas the object of the NDPS Act is to secure the fate of young generation of India as our young generation is getting addicted of drugs. Young generation of our Country is also a wealth of the Nation. Therefore the object of NDPS Act and the PML Act is somewhat similar as the same is to secure wealth of the Nation and for welfare of the Nation. Hence, undertrial prisoners for the offences under both Acts cannot be kept languishing in Jail without trial.

33. Another aspect requires consideration that maximum punishment provided under the PML Act is with rigorous imprisonment for a term which may extend to 7 years with fine and the minimum punishment shall not be less than 3 years. Once the prosecution complaint is filed by the ED with the general contention that "further investigation" is going on, that too in the absence of any progress report, that does not mean that the ED can investigate the crime under Section 3 of the PML Act till the completion of 7 years (outer limit of punishment) or beyond that and hold the judicial custody of the accused for the whole period of 7 years on this reason.

34. It is material to note that the paramount consideration and the core of Money-laundering under Section 3 of the PML Act is proceeds of crime defined under Sec. 2(1)(u) of the PML Act. In the case of **Vijay Madanlal Choudhary and others Vs. Union of India and others, [Special Leave Petition (Criminal) No.4634 of 2014, decided on 27.07.2022]** the Hon'ble Supreme Court laid down the concept of

proceeds of crime in paragraph 31 as follows,

**a.** Definition of **“proceeds of crime”** being the core of the ingredients constituting the offence of money laundering, **that expression needs to be construed strictly**. **(para 31)**

**b.** 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. **(para 31)**

**c.** 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**. **(Para 31)**

**d.** 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.**(Para 31)**

35. Admittedly, in the instant case there is nothing to show that CBI has filed chargesheet in respect of Predicate Offence registered vide RC 0262020A0012 till date. There is nothing to show that after recording **FIR RC0262020A0012 dt. 23.09.2020** CBI had never investigated the same. No one was arrested for the same nor even investigated. Even complainant-ED never thought to comply the mandate under Sec.44(1)(c) of the PML Act, till the Court started giving repeated directions to the ED enlightening the true purport and mandate under Sec.44(1)(c) of the PML Act. Though the compliance of Sec.44(1)(c) of the PML Act is a legal obligation on ED, yet in the present case it is revealed that ED were completely unaware of the status of the case relating to Predicate Offence, which is shocking. This Court when noticed undue incarceration of the applicant (A3) and ED's ignorant attitude in utter disregard to the mandate

under Sec.44(1)(c) of the PML Act, gave repeated directions to the ED for making compliance of mandate under Sec.44(1)(c) of the PML Act and only thereafter ED started hunting (searching) where the case relating to the Scheduled Offence is lying and what is its present status. It is very serious and shocking when it is obligatory on the part of the ED to begin the trial of an undertrial prison. However, ED has been idle since long after leaving the applicant (A3) in judicial custody for his fate.

36. Simultaneous trials of the case relating to the Scheduled Offence and the PMLA case is the mandate and true purport of Sec.44(1)(c) of the PML Act. Therefore, Trial of PMLA case is peculiar. Sec.44(1)(c) of the PML Act mandates that, "if the court which has taken cognizance of the scheduled offence is other than the Special Court which has taken cognizance of the complaint of the offence of money-laundering under sub-clause (b), it shall, **on an application by the authority authorized to file a complaint under this Act, commit the case relating to the scheduled offence to the Special Court and the Special Court shall, on receipt of such case proceed to deal with it from the stage at which it is committed."** This language itself demonstrates the simultaneous trial of the PMLA case and a case relating to the Predicate Offence. Unless the case relating to Predicate Offence is committed to the Designated PMLA Court, the trial of this PMLA case cannot begin.

37. Recently, the Hon'ble Supreme Court in the case of **Rana Ayub Vs. Directorate of Enforcement [Writ Petition (Criminal) No.12 of 2023, decided on 07.02.2023]** clearly laid down in paragraphs 24 to 26 as follows,

> "24. After mapping out/laying down such a general but fundamental rule, the Act then proceeds to deal with a

more complicated situation in Section 44(1)(c). The question as to what happens if the Court which has taken cognizance of the scheduled offence is other than the Special Court which has taken cognizance of the offence of money-laundering, is what is sought to be answered by clause (c) of sub-section (1) of Section 44. If the Court which has taken cognizance of the scheduled offence is different from the Special Court which has taken cognizance of the offence of money-laundering, then the authority authorised to file a complaint under PMLA should make an application to the Court which has taken cognizance of the scheduled offence. On the application so filed, the Court which has taken cognizance of the scheduled offence, should commit the case relating to the scheduled offence to the Special Court which has taken cognizance of the complaint of money-laundering.

**25. Therefore, it is clear that the trial of the scheduled offence should take place in the Special Court which has taken cognizance of the offence of money-laundering. In other words,the trial of the scheduled offence, insofar as the question of territorial jurisdiction is concerned, should follow the trial of the offence of money-laundering and not vice versa.**

**26. Since the Act contemplates the trial of the scheduled offence and the trial of the offence of money-laundering to take place only before the Special Court constituted under Section 43(1), a doubt is prone to arise as to whether all the offences are to be tried together. This doubt is sought to be removed by Explanation(i) to Section 44(1). Explanation (i) clarifies that the trial of both sets of offences by the same Court shall not be construed as joint trial."**

38. It is, therefore, clear that the positive fruitful activity and movement was expected from ED for the commitment of the case relating to the Predicate Offence to this Designated Special Court under the PML Act. Shockingly, the ED has been reluctant since long which forced this Court to make them aware of this aspect as it is noticed that ED simply opposes bail applications heavily, but never takes any active

step in proceeding with trials, particularly as per the mandate of Sec.44(1)(c) of the PML Act and accused is an undertrial prisoner. Like this, in many other cases the Court is repeatedly directing ED to follow the true spirit and mandate of Sec.44(1)(c) of the PML Act. Not only this but also the Court has made correspondence with ED Authorities and brought this fact to their notice. However, it is found that after repeated directions to ED for the compliance under Sec.44(1)(c) of the PML Act, whatever hurry pretended by the ED is only for the trial of cases wherein **all accused have been bailed out long ago**. All that was only a pretendence of the ED and not a bonafide response given to the Court in respect of the trial of undertrial prisoners, who have been languishing in jail without trial since long. There has been absolutely no progress in the cases of undertrial prisoners. This case is the best example how ED has completely overlooked the true purport and mandate of Sec.44(1)(c) of the PML Act. It is this attitude of the ED, which compelled the Court to direct them repeatedly for commitment of the case relating to the Scheduled Offence.

39. "Further investigation" as per Explanation (ii) to Sec.44 of the PML Act does not mean that whole tenure of the maximum/minimum punishment provided under Sec.44 of the PML Act, should be consumed for the same by putting on hold and suspending the valuable right of the undertrial prisoner of being tried expeditiously, for the whole length of punishment. If such situation which has already arisen in this as well as many other PMLA cases of undertrial prisoners continues, then there will no trial in any ED cases, wherein accused are undertrial prisoners. I am constrained to refer the present situation of ED cases wherein accused are undertrial prisoners.

in this Court, as follows,

| Sr. No. | Case No. | Name of accused | Total No. of under-trial Prisoners In the case | Date from which accused Is/are Under-trial |
|---|---|---|---|---|
| | | | | |
| 1 | PMLA 7/19 | A-1 Haroon Aleem Yusuf<br>A-2 Humanyu Merchant<br>A- Kapil Wadhawan | 3 | A-1. 10/10/2019<br>A-2 20/10/2019 |
| 2 | PMLA 8/19 | A-1 Rakeshkumar Wadhawan<br>A-2 Sarang Wadhawan | 2 | 17/10/19 |
| 3 | Spl.1090/20 | A-1 Peter Kerkar ,<br>A-2- Narendra Jain,<br>A-3 - Anil Khandelwal | 3 | A-1-27/11/2020,<br>A-2,3-<br>06/10/2020 |
| 4 | SPL 1082/21 | Gopal Thakur | 1 | 02/07/21 |
| 5 | Spl 1390/21 | Vinod Chaturvedi | 1 | 18/09/21 |
| 6 | SPL 145/22 | Badshah Malik | 1 | 21.12.2021 |
| 7 | Spl.409/22 | Iqbal Kaskar | 1 | 06/17/22 |
| 8 | Spl. 518/22 | Nihal Garware | 1 | 03/25/22 |
| 9 | Spl. 588/22 | A-1 Satish Uke<br>A-2 Pradip Uke | 2 | 04/01/22 |
| 10 | Spl. 734/22 | 1.Mahadeve Deshmukh<br>2. Appasaheb Deshmukh | 2 | 09/05/2022<br>17/06/2022 |
| 11 | CBI 830/21 @ 965/21 | | | 26/04/2020<br>26/04/2020<br>06/10/2020<br>13/05/2022 |
| | | | **17** | |

In all these cases, accused are undertrial prisoners. No active step is taken by the ED for the commitment of the cases relating to the Scheduled Offence as per Sec.44(1)(c) of the PML Act and begin the trials. Hence, the trials could not begin. Even if bail/discharge applications have been pending in some of the cases, that does not preclude ED to take immediate step under Sec.44 (1)(c) of the PML Act, when the accused are undertrial prisoners and without trial. Rather doing so, ED is committing cases of accused who were bailed out long ago. This is significant.

40. In the aforesaid premises on **12.01.2023** this Court was constrained to direct ED as follows,

> "While dictating Bail order in respect of accused No.3, Rana Kapoor it is found necessary to examine the facts and surrounding circumstances in respect of criminal activity relating to scheduled offence by which POC was allegedly generated. This being core of Money Laundering offence, ED shall furnish / submit all details regarding the status of case relating to the scheduled offence, its stage and the progress thereof and where it is presently pending. ED shall make compliance without delay as the dictation of Bail order cannot conclude without referring this aspect."

In spite of direction as such, no details and clear status of the case relating to the Scheduled Offence is produced by the ED. Therefore, on **17.01.2023** this Court again reminded the ED as follows,

> "The direction dt.12.01.2023 given by the Court in respect of status of the case is once again brought to the notice of Investigating Officer and Ld. SPP and **they are directed to submit the clear status of the case relating to Scheduled Offence since when the said case has been pending ? Which Court ? And what is its stage today?** Both of them undertaken to submit all details accordingly. Further dictation in Rana Kapoor's bail order cannot be concluded unless ED furnishes details in respect of Scheduled Offence."

When the Court directed as above, only thereafter ED started making contact with CBI as to where their case (Scheduled Offence) is lying and what is its status? This fact is evident from Exh.307. Since 12.01.2023 till 01.03.2023 the Court was repeatedly directing ED to commit the case relating to the Scheduled Offence as mandated in Sec.44(1)(c) of the PML Act, as the applicant (A3) is the only undertrial prisoner in this case since 2 years 2 months and 3 days, ED submitted correspondence (Exh.307) on 01.03.2023. Paragraphs

(4) and (5) thereof are reproduced as follows,

| | |
|---|---|
| 4. | That, in compliance to the order dated 12.01.2023, a letter dated 13.01.2022 was written to CBI with request to provide following details/informations w.r.t. the investigating of the scheduled offence relating to the present case being conducted by them vide FIR No. RC0262020A0012 dated 23.09.2020 :<br><br>a. Status of the case?<br>b. Stage at which presently the case is?<br>c. Progress thereof?<br>d. where the case is pending?<br><br>Letter dated 13.01.2023 issued to CBI is annexed as Annexure B. In email in this regard was also issued to CBI on 13.01.2023 and the same is annexed as Annexure C. |
| 5. | That, the CBI vide its letter dated 27.01.2023 has informed this office that the case under FIR No. RC0262020A0012 dated 23.09.2020 is pending investigation and once report u/s 173 Cr.P.C. **is filed by CBI the same would be informed to this office**. Letter dated 27.01.2023 of CBI is annexed as Annexure D. |

It is, therefore, clear that even chargesheet for the Scheduled Offence was not filed till date since FIR relating to Scheduled Offence i.e. **RC0262020A0012 registered on 23.09.2020**, after 2 years 2 months and 3 days, particularly when the applicant (A3), who is undertrial prisoner, awaiting his trial is on the verge of crossing the limit of minimum punishment of three years provided in Sec.3 of the PML Act. All this is shocking. It is evident that, the applicant (A3) had undergone **undue incarceration for 73%** of the minimum punishment of 3 years provided under Sec.4 of the PML Act. In this long period of undue incarceration both, CBI and ED, had never taken any care to follow the true spirit of Sec.44(1)(c) of the PML Act. Of course, Economic Offences are different in nature and have to be looked from the perspective of its gravity and magnitude, that does not mean that undertrial prisoner should be kept without trial and should be dragged to undergo minimum sentence without trial. Undue incarceration of

the applicant for 2 years 2 months and 3 days without trial is the price he (A3) has paid for the alleged gravity, magnitude and different nature of the economic offences. Further incarceration on such reasons without any trial cannot be continued, simply on the words of CBI that investigation is pending without support of any Progress Report.

41. The applicant has been in jail and already undergone 73% of sentence of minimum punishment, when trial of the case is not proceeded even by a millimeter. All this is shocking. More shocking is that the Court was compelled to accelerate ED for observing mandate under Sec.44(1)(c) otherwise ED would not have taken its care even if undue incarceration of the applicant (A3) would have crossed outer limit of the punishment i.e. 7 years. Even after the insistance made by the Court what ED did? Only a correspondence which CBI replied in a single line that investigation is pending and once report under Sec.173 Cr.P.C. is filed it will be communicated. Already 3 years have been lapsed, CBI has not filed chargesheet. Is it lawfully permissible to allow CBI to consume 7 years for filing report under Sec.173 Cr.P.C. without any Progress Report and till then suspend the right of undertrial prisoner (A3) for his expeditious trial? This is serious. ED cannot make capital that applicant's bail application was pending and therefore, trial could not begin. Yes, bail application of the applicant (A3) was pending but except FIR No.**RC0262020A0012 on 23.09.2020** there was nothing to examine criminal activity relating to Scheduled Offence which allegedly led generation of POC. Admittedly, CBI's FIR No.**RC0262020A0012 on 23.09.2020** does not have name of the applicant (A3). Nor his role attributing any criminal activity relating for generating POC was mentioned therein. In order to ascertain the same the case of CBI was necessary. Thats why it was mentioned in the

Rojnama dt.12.01.2023 and ED was informed to bring its status. Hence, ED cannot make capital that bail application of the applicant (A3) was pending. This aspect has absolutely no concern nor cause any impact on the mandate under Sec.44(1)(c) of the PML Act. Bail Applications preferred by various accused would take its own course and the same cannot prevent or preclude the ED to take effective and positive steps for making commitment of the case relating to the Scheduled Offence and begin the trial of both cases as mandated under Sec.44(1)(c) of the PML Act. In fact, ED was completely unaware and had never looked into the true purport of Sec.44(1)(c) of the PML Act coupled with the valuable rights of undertrial prisoners and this fact is evident from various Notings taken by this Court in number of rojnamas, but the dry response, such as Exh.307 dt.01.03.2023, lastly given by ED.

42. It it pertinent to note that, FIR in respect of Predicate Offence bearing **FIR RC 0262020A0012 was registered on 23.09.2020**. Even after two and half years till date no chargesheet has been filed for the same and this fact is revealed when the ED was repeatedly accelerated for bringing details relating to the Scheduled Offence. It is pertinent to note that, the name of the applicant (A3) is not mentioned in the FIR alongwith 11 accused persons mentioned therein. This fact is evident from the FIR RC 0262020A0012 and paragraph No.3.1 of the Prosecution Complaint. Careful examination of the allegations made in the FIR indicates no role of the applicant (A3). Whatever contended against the applicant (A3) in Prosecution Complaint is the story of ED. However, specific criminal activity on the part of the applicant in respect of the Predicate Offence is not

mentioned in the FIR. Admittedly, till date CBI has not filed chargesheet for the same. Examination and confirmation of the criminal activities relating to Predicate Offence by which the proceeds of crime is generated, is a material and paramount consideration in order to find out whether rigors of stringent twin conditions under Sec.45(1) of the PML Act attract or not. Except FIR which is silent about the applicant, there is absolutely no material for such examination. Even the applicant's name is not mentioned in the FIR nor criminal activity relating to the said offence is attributed to him. First of all it has to be found out whether there is any criminal activity relating to the Predicate Offence. Thereafter generation of proceeds of crime from the said criminal activity relating to the Predicate Offence has to be ascertained. The third step is to find out the role of the applicant in the criminal activity relating to the Scheduled Offence by which the proceeds of crime is allegedly generated. In the absence of chargesheet as well as any specific role attributed to the applicant in the FIR relating to the Predicate Offence, involvement of the applicant (A3) cannot be ascertained as laid down by the Hon'ble Supreme Court in the case of Vijay Madanlal Choudhary (supra).

43. It has to be noted that, so many co-accused had participated the process of sanctioning alleged loans, they had right of Veto to endorse that the loans being granted are illegal, fraudulent etc. but none of them did anything as such and continued processing and forwarding those loans. In this background without making any examination and ascertainment as laid down in the case of Vijay Madanlal Choudhary (supra) holding that, rigors of Sec.45 (1) of the PML Act attract will amount premature conclusion. Surprisingly all top officials of Yes Bank who dealt with the said loan proposals had Veto

right, yet they continued. Surprisingly all of them are now free as per Sec.88 Cr.P.C. at the mercy of ED.

44. At the cost of repetition it has to be noted that, expeditious trial of an undertrial prisoner is his valuable right and the Court is custodian thereof. Thats why, when the Court realized such passive approach of ED in utter disregard to Sec.44(1)(c) of the PML Act, compelled it to direct the ED repeatedly as mentioned in various rojnamas. For example though ED is permitted under Second Explanation to Sec.44 to make further investigation for bringing further evidence and file subsequent complaint as provided therein, does not mean that such further investigation would last and cross the limit of minimum and maximum punishment provided in Sec.4 of the PML Act. Similarly, when the trial of the case relating to the Scheduled Offence has to be conducted simultaneously with the trial of the PMLA Special case, as per Sec.44(1)(c) of the PML Act, the Agency dealing with the investigation relating to the Scheduled Offence, cannot fetch the investigation beyond the period of minimum and maximum sentence provided under Sec.4 of the PML Act when they are bound to file chargesheet within 60/90 days. There is nothing to show that the CBI Court has accepted Progress Report and granted extension for further investigation of **RC 0262020A0012**. If both Investigating Agencies are making further investigation, as contended by ED and CBI herein, without filing Progress Report, there will be no end and the outer limit of the sentence of 7 years will be crossed in the guise of further investigation, keeping the accused i.e. Rana Kapoor (A3), in undue incarceration, without any trial.

45. All this both Agencies have been doing without submitting any progress reports. How, it can be believed? In my opinion this is not the true purport and object of the PML Act as well as that of The Prevention of Corruption Act. It is material to note that, none of these two agencies i.e. CBI and ED, while contending "further investigation" had ever filed any progress report to this Court. On the contrary not filing Progress Reports and keeping the Court in dark clearly reflect that, bonafides of both Agencies (ED and CBI) are not clear. If such vague concept of ED and CBI about "further investigation" is acknowledged at law, no accused person would be entitled to claim benefit of Sec.167(2) of Cr.P.C. on the pretext that, Prosecution Complaint is filed but further investigation is going on.

46. Recently the Hon'ble Supreme Court in the case of **Enforcement Directorate, Government of India Vs. Kapil Wadhawan & Anr. Etc. (in Criminal Appeal Nos.701-702 of 2020 dt.27.03.2023)** granted Wadhawan brothers benefit for failure of ED in filing prosecution complaint within the prescribed period 60/90 days and released them on bail. Therefore, it is clear that in the absence of genuine and remarkable Progress Report of investigation, there is no substance in the contention of ED and CBI that still further investigation is going on and trial cannot begin even after 3/7 years. Whether the Court can accept such contention keeping undertrial prisoner in undue incarceration, when he had undergone 73% of sentence out of the minimum punishment provided as per Sec.4 of the PML Act? Certainly, this is not the true purport and real object of the PML Act. If the Court accepts such modus-operandi of both Agencies (ED and CBI) in extending undue incarceration of the applicant (A3) to uncertain extent, that will amount putting premium on such illegal acts.

**NATURE AND VOLUME OF TRIAL OF THE PMLA CASE**

47. In the instant case the present applicant (A3) is trial-less and has undergone 73% incarceration of the minimum punishment provided under Sec.4. In order to understand the real reason thereof, one has to know how peculiar, voluminous and exceptional the trial of the PMLA Special Case is? It is not a trial of a single case. As per Sec.44(1)(c) of the PML Act, the case relating to the Scheduled Offence has to be committed to this Court, which has taken cognizance of the PMLA case as recently held by the Hon'ble Supreme Court in the case of Rana Ayub (supra). After commitment, both cases have to be tried simultaneously, but separately and not jointly. It is also necessary to understand that, even if the PMLA Special Case is only one, there may be number of cases relating to the Scheduled Offence, which have to be committed and tried simultaneously with PMLA Special Case. There are so many cases which have been pending in this Court to show that, for a single PMLA case there are multiple cases relating to the Scheduled Offence. For example,

| PMLA Spl. Case | Name of the accused | Case/s relating to the Scheduled Offences. |
|---|---|---|
| 03/2013 | Sayed Masood and ors. | **132 cases** which are scattered all over India and have to be tried with PMLA Special Case as directed by the Hon'ble Supreme Court. |
| 1090/2020 | Ajay Ajit Peter Kerkar and ors. | **5 cases. But total 12 crimes were registered with EOW and certainly the cases relating to them will have to be tried with PMLA Special Case.** |
| 07/2019 | Humayun Merchant and ors. | **5 crimes bearing No. 27/201992, 38/1993, 07/1994, 83/1994 and 176/1994, expecting five cases, which are yet to be committed.** |
| 08/2019 | Wadhawans and ors. | **Number of cases and Prosecution Complaint indicate no certainty.** |
| 588/2022 | Satish Uke and anr. | **4-5 Cases.** |

These are few examples to show that,

i) Trial of one PMLA case at Sr.No.1 i.e. 03/2013, is a simultaneous trial of 1 PMLA case + 132 cases relating to the Scheduled Offence = **133 cases**.

ii) Likewise trial of PMLA case at Sr.No.2 i.e. 1090/2020, is a simultaneous trial of 1 PMLA case + 5 cases relating to the Scheduled Offence = **6 cases**.

iii) Similarly, trial of PMLA at Sr.No.3 i.e. 07/2019, is simultaneous trial of 1 PMLA case + 5 cases relating to the Scheduled Offence = **6 cases**.

48. These are the few examples of the PMLA cases pending in this Court, awaiting commitment of the cases relating to the Scheduled Offence as per Sec.44(1)(c) of the PML Act. No evidence is required to hold that, the trial of a PMLA case is not as simple as other IPC/CBI cases, but in fact it is an exceptionally gigantic, colossal trial. It will take a very long time to begin and conclude such trials. In every such case Discharge Applications have to be decided. When this is a peculiar situation of trials of PMLA cases, the Agencies like ED/CBI should be utmost careful, vigilant, punctual to begin and conclude the PMLA case trials as early as possible, particularly when the accused are undertrial prisoners. Otherwise, whole span of sentence provided under Sec.4 of the PML Act would go in undue incarceration. Keeping under-trial prisoner accused without trial, is nothing but thwarting of his valuable right of quick trial. Certainly this is not the true purport of any provision under the PML Act when the object of PML Act is “Confiscation” and not “an undue incarceration”. In each and every confiscation/attachment is already done by ED. No one is sure when such gigantic, colossal trials would begin and when those would conclude. This is hight time to think on this situation seriously, because

maximum PMLA cases are in Mumbai Designated Special Court and since inception of this Designated Special PMLA Court, none of them has reached to the conclusion. If ED, who is under legal obligation, but not following the true spirit of Sec.44(1)(c) of the PML Act, then who will comply the same? This is the reason the Court had to elaborate how gigantic PMLA case trial is and how it should begin at the earliest in order to secure the valuable right of the undertrial prisoner.

49. I am constrained to note that, in the present case Ld. SPP has filed draft charge (Exh.318) to pretend that ED/Prosecution is ready to conduct the trial. ED is quite aware that unless the case relating to the Scheduled Offence is committed to this Court as per Sec.44(1)(c) of the PML Act, Court cannot begin the trial. Rojnamas referred above, clearly indicate how this Court has been continuously pursuing ED for the compliance of mandate under Sec.44(1)(c) of the PML Act. Rather making the said compliance, Ld. SPP filed draft charge, which speaks volumes reflecting the reasons best known to the ED. It is only to pretend that ED is ready for trial knowing well that the Court cannot begin the same unless and until the case relating to the Scheduled Offence is committed. It is only after repeated directions given to the ED, letter was sent to CBI, their reply was collected and filed in the Court stating as CBI would inform once they filed report under Sec.173 Cr.P.C. All this clearly indicates that the ED has clear knowledge that there is no use of filing draft charge, yet filed the same for the reasons best known to them only to avoid the blame of their inaction. In this background is ED permitted to harp the same general contention that, economic offences stand on different footing, and gravity and magnitude are always considerations? Basically the applicant (A3) is without trial for more than 2 years 2 months and 3 days and there is no

possibility of commitment of the case relating to Scheduled Offence, in near future.

50. In the aforesaid premises, there is absolutely no likelihood that in near future CBI, who simply registered **FIR RC0262020A0012 on 23.09.2020**, and dealing with the case relating to the Scheduled Offence, would file their chargesheet and thereafter ED will take step under Sec.44(1)(c) of the PML Act and thereafter, the trial will begin. In short, there is absolutely no possibility nor any likelihood of beginning the trial of this PMLA case in near future when the applicant has already been jailed without trial for 2 years 2 months and 3 days. All this is thwarting the valuable right of an undertrial prisoner (A3) of getting tried and concluding the same at the earliest. Two days ago the Hon'ble Supreme Court in the case of Mohd. Muslim @ Hussain Vs. State (NCT of Delhi) **Mohd. Muslim @ Hussain Vs State (NCT of Delhi) [Criminal Appeal No(S) 943 of 2023 @ Special Leave Petition (CRL.) NO(S). 915 of 2023 dt.38.03.2023]** dealt with such contingency and further specifically laid down in paragraph 15 as follows,

> "15. Even in the judgment reported as Vijay Madanlal Chaudhary v. Union of India 15 this court while considering bail conditions under the Prevention of Money Laundering Act, 2002, held that:
> "If the Parliament/Legislature provides for stringent provision of no bail, unless the stringent conditions are fulfilled, it is the bounden duty of the State to ensure that such trials get precedence and are concluded within a reasonable time, at least before the accused undergoes detention for a period extending up to one-half of the maximum period of imprisonment specified for the concerned offence by law."

51. In the instant case there is no possibility as such. No one knows whether even after **FIR RC0262020A0012 dt. 23.09.2020** CBI has been really investigating it since 2 ½ years? When would they (CBI) file chargesheet? or would submit a Summary Report? Inference of such conduct of CBI can be drawn that except recording **FIR RC0262020A0012 on 23.09.2020** they (CBI) have not investigated it, hence not filed chargesheet even after 2 ½ years. It has to be noted that all other accused persons in this case (some of them have similar roles like the role of the present applicant (A3)), have been released on bail by the Hon'ble High Court or under Sec.88 Cr.P.C. by this Court. This long period of undue incarceration of 2 years 2 months and 3 days of the applicant (A3) was ignored making capital of alleged gravity, magnitude and seriousness of the offence. Same cannot be allowed to cross the limit of minimum punishment and also thereafter by keeping the accused (A3) trial-less. In this way, the applicant (A3) is without trial from 2 years 2 months and 3 days and there is no likelihood in future that trial will begin and conclude as early as possible. Therefore, time has come to apply the guidelines laid down by the Hon'ble Supreme Court in the case of **Satender Kumar Antil Vs CBI [(2022)10 SCC 51]** wherein it is laid down that, **"More the rigour, the quicker the adjudication ought to be"** (paragraph 86). Hence, this aspect is discussed under the same heading which has been laid down by the Hon'ble Supreme Court.

52. It is settled that, rigours of twin conditions under Sec.45(1) of the PML Act are very very stringent. Certainly, ED is under legal obligation to take each and every prompt step to follow the true spirit and mandate of Sec.44(1)(c) scrupulously. The way in which ED has been dealing with this case and even not aware of the said mandate

until prevailed upon the Court to give repeated directions. If the same continues, the trial will never begin and the conclusion thereof will be only a dream. On the contrary rather honouring and following the mandate of Sec.44(1)(c) scrupulously, ED appears to have sabotaged the same. Certainly the undertrial applicant (A3) who is trial-less since more than 2 years 2 months and 3 days is entitled for claiming benefit thereof. Till date except **FIR RC0262020A0012 dt.23.09.2020** there is absolutely nothing i.e. chargesheet etc. to find out which were the criminal activities relating to the Scheduled Offence those gave lead for generating proceeds of crime? Applicant (A3) was not named in the said FIR nor any criminal activity for POC, was attributed to him therein.

53. I have already answered Point No.1 in the affirmative. I also hold that, there is no likelihood in near future, CBI will file chargesheet for RC 0262020A0012 and it will be committed to this Court as per Sec.44(1)(c) of the PML Act. The applicant (A3) is trial-less for 2 years 2 months and 3 days. I have further noted how after repeated instructions to ED pointing out mandate under Sec.44(1)(c), recently very slowly they took first step after 2 years 2 months and 3 days and wrote first letter to CBI and thereafter submitted only whatever communicated by CBI. All this is frustrating the object of the PML Act.

54. Apart from this, the Court has to examine whether the POC was generated from the criminal activities relating to the Scheduled Offence as laid down by the Hon'ble Delhi High Court in the case of Prakash Industries **[W.P.(C) 13361/2018, CM APPL. 51972/2018 (Stay), CM APPL. 53437/2018 (Direction), CM APPL. 33666/2022**

**(E.H.) decided on 24.01.2023]** , wherein Vijay Madanlal Choudhary (supra) has been relied on. In the instant case except FIR RC 0262020A0012 dt. 23.09.2020 lodged by CBI, there is absolutely nothing to examine this aspect. Admittedly, name of the applicant (A3) is not mentioned anywhere in FIR RC 0262020A0012 dt. 23.09.2020, nor any criminal activity or role was attributed to him demonstrating generation of POC. Like Wadhawans (A1 and A2), he (A3) was also in the judicial custody in another crime and ED had recorded his statement also by straight way taking his custody under Sec.19 of the PML Act. All grounds (i) to (xlvii) raised by the applicant (A3) referred above in paragraph 10, are supported by the documents, which are relied on by him (A3). All this raises serious issues clearly indicating as follows,

**a.** The M/s Mack Star loan was originated by Line Management and the applicant (A3) was the last one to approve the loan.

**b.** It was approved by all members unanimously of the Management Credit Committee, which included three Yes Bank employees who are A12, A13 and A14 and have been released under Sec.88 Cr.P.C. Everyone of them had Veto rights, yet not exercised the same but facilitated the same.

**c.** The C.A. certified end - use certificates were in place to confirm that the funds were used by the M/s Mack Star for general corporate purposes.

**d.** ED's own case is that, no POC had come in the hands of the applicant (A3) or the applicant related entities. On the contrary Wadhawans (A1 and A2) were the persons who actively made placement, layering and integration of the funds received by M/s Mack Star, however they could get easy release under Sec.88 Cr.P.C.

**e.** The new management of Yes Bank post the applicant (A3) demitting office in January,2019 has also confirmed that the loan was a bonafide transaction with no complicity or collusions of any Yes Bank officials to any fraud.

**f.** M/s Mack Star's Management changed and they also filed a Commercial Suit against the Yes Bank and Suraksha ARC who defended allegations in January, 2020 in their affidavits that, this was a complete bonafide, fully secured transaction.

**g.** The legality of the loans in question has also been affirmed by the NCLT in Insolvency Proceedings initiated by Suraksha ARC against Mack Star. In the said petition Mack Star attempted to disassociate from the loans taken from Yes Bank by alleging that these loans were fraudulent, bogus term loans, hence cannot amount to imposing any lawful liability on the Mack Star.

**h.** The NCLT rejected this argument vide order dt.20.09.2021.

**i.** Even NCLT arrived at conclusion that these loans were in fact taken by Mack Star and Mack Star had been held to be liable for the repayment of these loans, indicating that the same are lawful debts, insofar as Yes Bank is concerned.

These issues and questions raised by the applicant (A3) are supported by documents and orders of NCLT. It is a fact that, the Hon'ble Supreme Court has been pleased to expunge the remarks against Yes Bank. All these questions have to be tested with the alleged criminal activities relating to the Scheduled Offence for allegedly generating POC and except FIR, that too without name of the applicant (A3) or any criminal activity attributed to him, there is absolutely nothing for making such examination. At the cost repetition it has to be noted that CBI has simply filed **FIR RC0262020A0012** dt. 2309.2020 and not filed chargesheet even after two and half years when bound to file the same within 60/90 days. Their contention which they have

recently communicated to ED cannot be accepted in the absence of any genuine progress report. On the contrary at this stage, when there is no chargesheet relating to the Predicate Offence, prima-facie it appears doubtful that CBI is still investigating the said crime. In these premises and on the basis of above detailed discussion for both points it is doubtful whether rigours of Sec.45 of the PML Act attract or not. Cumulative effect of the above detailed discussion, points out entitlement of the applicant (A3) for getting bail. Hence, Point No.2 is answered in the negative and following order is passed :-

**ORDER**

1. Application (Exh.36) is allowed.

2 Applicant Rana Kapoor (A3) be released on bail **IN THE PRESENT CASE ONLY** in respect of **ECIR/MBZO-I/39/2020** on executing PR bond of Rs.1,00,000/- with one or more sureties in the like amount, **IF NOT REQUIRED IN ANY OTHER CRIMES/ECIRs/CASES.**

3. The applicant (A3) is permitted to furnish provisional cash security of Rs.1,00,000/- for a period of two months, with PR bond as directed above.

4. The applicant (A3) shall undertake not to leave India without prior permission of the Court.

5. The applicant (A3) shall undertake to remain present before the Court during the course of trial, unless exempted.

6. The applicant (A3) shall cooperate the Investigating Agency in further investigation, if any.

7. The applicant (A3) shall not directly or indirectly make any attempt to contact or influence the prosecution witnesses and also shall not tamper with the prosecution evidence.

8. The applicant (A3) shall provide ED, address of his residence with proof thereof and his contact number as well as contact numbers of his close relatives, who can be contacted and provide all details of the applicant (A3).

9. The applicant (A3) shall not indulge in any activity which is detrimental to the case and interest of ED.

10. Dictated and declared in the open Court.

Dt.: 01.04.2023

( M.G. Deshpande )
Designated Special Court,
under the PML Act, 2002.

Checked and Signed on : 10.04.2023

| “CERTIFIED TO BE TRUE AND CORRECT COPY OF THE ORIGINAL SIGNED JUDGMENT/ORDER” | |
|---|---|
| 11.04.2023 at hours<br>UPLOAD DATE AND TIME | (KISHOR PRAKASH SHERWADE)<br>NAME OF STENOGRAPHER |

| Name of the Judge | HHJ M. G. DESHPANDE<br>(COURT ROOM NO.16) |
|---|---|
| Date of pronouncement of judgment/order | 01.04.2023 |
| Judgment/order signed by P.O. on | 10.04.2023 |
| Judgment/order uploaded on | 11.04.2023 |