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

*Judgment delivered on: 17.09.2024*

\+ BAIL APPLN. 3056/2023

ADNAN NISAR ..... Petitioner

Through: Mr. Tanveer Ahmed Mir, Mr. Kartik Venu, Mr. Shashwat Sarin and Mr. Ariana D. Ahluwalia Advs.

versus

DIRECTORATE OF ENFORCEMENT ..... Respondent

Through: Mr. Zoheb Hossain, Special Counsel for ED with Mr. Vivek Gurnani Mr. Kartik Sabharwal and Mr. Abhipriya Rai, Advs.

\+ BAIL APPLN. 3168/2023

SHIVANG MALKOTI ..... Petitioner

Through: Mr. Tanveer Ahmed Mir, Mr. Kartik Venu, Mr. Shashwat Sarin and Mr. Ariana D. Ahluwalia Advs.

versus

DIRECTORATE OF ENFORCEMENT & ANR. ..... Respondent

Through: Mr. Zoheb Hossain, Special Counsel for ED with Mr. Vivek Gurnani Mr. Kartik Sabharwal and Mr. Abhipriya Rai, Advs.

\+ BAIL APPLN. 3529/2023, CRL.M.(BAIL) 1468/2023, 7861/2024

VISHAL MORAL ..... Petitioner

Through: Mr. Amit Shukla, Mr. B.S. Pundir, Mr. Deva Shukla, Mr. Atul Mishra, Ms. Neha Shukla, Ms. Kumudini

Shukla, Mr. Rahul Ranjan and Mr. Amit Kumar, Advs.

versus

DIRECTORATE OF ENFORCEMENT, GOVERNMENT OF INDIA THROUGH ASSISTANT DIRECTOR & ANR. ..... Respondents

Through: Mr. Zoheb Hossain, Special Counsel for ED with Mr. Vivek Gurnani Mr. Kartik Sabharwal and Mr. Abhipriya Rai, Advs.

**CORAM:**
**HON'BLE MR. JUSTICE VIKAS MAHAJAN**

**JUDGMENT**

**VIKAS MAHAJAN, J.**

1. The present petitions have been filed under Section 439 of the Code of Criminal Procedure, 1973 (hereinafter 'CrPC') read with Section 45 of the Prevention of Money Laundering Act, 2002 (hereinafter 'the Act' or 'PMLA') seeking grant of regular bail arising out of ECIR No. DLZO-II/15/2023 dated 07.02.2023 registered under Sections 3 & 4 of PMLA at P.S. E.D. Delhi Zone-II, pending before learned Special Court, PMLA, Central District, Tis Hazari Court, Delhi.

2. Since the present petitions have been filed by co-accused persons and the factual background, as well as the questions of law before this Court are on the same lines having arisen from the same complaint, all three bail petitions are being decided *vide* this common judgment.

3. The relevant facts giving rise to the present petitions are as follows:

a. The Enforcement Directorate had received a letter dated 23.12.2022 forwarding therewith a Mutual Legal Assistance Request (hereinafter 'MLA') No. CRM-182-85785 dated 04.12.2022 from the U.S. Department of Justice, Washington wherein request for legal assistance was sought. In the said MLA, it is alleged that one Mr. Vishal Moral (petitioner/accused), an Indian National, has committed an offence under Title 18, US Code, Section 1343 (Wire Fraud), Title 18, US Code, Section 1029 (Access Device Fraud), Title 18, US Code, Section 1030 (Computer Fraud) and Title 18, US Code, Section 1956 (Money Laundering).

b. As per MLA, a person (victim) living in Leawood, Kansas, U.S.A. reported to the U.S. authorities that between August 14, 2022 and August 15, 2022, crypto currencies worth approximately US$ 527,615.45 had been fraudulently transferred from the virtual currency addresses of the victim's Ledger Hardware Wallet.

c. On 13.08.2022, the victim downloaded and installed the Ledger Live software, a companion software for managing crypto wallets like the Ledger Hardware Wallet maintained by the victim, from the internet onto a laptop. The victim, thereafter, connected the Ledger Hardware Wallet to the laptop and made certain cryptocurrency transactions through the said software. After completing the aforesaid transfers, the victim promptly disconnected the Hardware Wallet from laptop.

d. On or about 14.08.2022, while the Hardware Wallet of the victim was disconnected, 0.995275351 Ethereum (hereinafter 'ETH') valued at US$ 1,926.87, was fraudulently transferred from the wallet of the victim to the address

0xC992AE8D0994468e7CC45d0CE0E85ad4eade0cEb (hereinafter '0xC99…0cEb'). Thereafter, on the same day, 0.48349150649972 ETH valued at US$ 959.39 was transferred from '0xC99…0cEb' to the address 0x0380d5c5c23551a109f5d3aaf76ced9e65d96a24 (hereinafter '0x038…6a24') which is associated with India-based cryptocurrency exchange and trading platform WazirX.

e. On 15.08.2022 as well, Ledger Hardware Wallet of the victim remained disconnected when 21.63831975 Bitcoins (hereinafter 'BTC') valued at US$ 526,656.06 were again fraudulently transferred to the address bc1qlqmlw0e7cyljum6w8fn5c4he5462f2ckjtzl72 (hereinafter 'bc1ql…zl72') which is also associated with WazirX.

f. The aforesaid transfers were confirmed by the investigators via blockchain analysis, and a request was made by them to WazirX to furnish the records pertaining to the account associated with "0x038…6a24" and "bc1ql…zl72". As per the information received from WazirX, it was found that both the said addresses were linked to an account belonging to petitioner/accused Vishal Moral bearing User ID 11093186, registered on 27.11.2021 with the email address moralvishal@gmail.com. WazirX also provided information regarding the IP addresses from where the said account was accessed at the time of the fraudulent transfers which were later found out to be hosted by Reliance Jio Infocomm Limited and Bharti Airtel Limited.

g. Upon inspection of the laptop, onto which the victim had downloaded and installed the Ledger Live software on 13.08.2022, the U.S. Investigators identified a compressed folder with legitimate Ledger Live installer, a file containing installation instructions and a

file having a SHA1 hash that matched a known malware capable of obtaining credentials and other information such as private keys or seed phrases, from an infected computer.

h. It is alleged that the said malware is known to be distributed to victims through websites that are designed to closely resemble the legitimate Ledger Live website. It is said that the U.S. Investigators have confirmed the victim had downloaded the malware from a website closely resembling the legitimate website of Ledger Live.

i. After receipt of the MLA, ED was satisfied that the offences being investigated by the U.S. Department of Justice under their relevant laws correspond to Section 75 of the Information Technology Act, 2000 and Sections 420 & 424 IPC in India, which fall under the Schedule of the Act and therefore, recorded ECIR DLZO-II/15/2023 dated 07.02.2023 for further investigation, search, seizure, attachment and confiscation of proceeds of crime under the Act.

j. During investigation, ED received documents related to User ID 11093186 from WazirX *vide* letter dated 30.01.2023 which revealed that the said account, in fact, belonged to petitioner/accused Vishal Moral residing in Bangali Colony, Sant Nagar, Delhi-110084.

k. Search was conducted under Section 17 PMLA at the residence of Vishal Moral. A mobile phone, laptop and Ledger Hardware Wallet along with cash amount of Rs.25,60,000 were seized from the premises of Vishal Moral.

l. From the evidence collected by ED, including the chats recovered from the seized phone, it was revealed that the accused had been committing the said offences along with many individuals, Indian

and foreign nationals, including the co-accused/petitioners, Shivang Malkoti and Adnan Nisar who had been assisting Vishal Moral. During investigation, ED also found that the accused persons were converting the stolen cryptocurrency into cash and utilizing the same for various purposes including creation of immoveable assets.

m. Summons were issued by the ED to the accused Vishal Moral under Section 50 of PMLA and his statements were recorded. Thereafter, Vishal Moral was placed under arrest on 26.04.2023 under Section 19 of PMLA. Likewise, summons were issued to Shivang Malkoti and Adnan Nisar as well. Subsequently, they were also arrested on 09.05.2023.

n. Information regarding the aforesaid offences was shared with the Delhi Police which resulted in the registration of FIR No. 124/2023 dated 10.05.2024 under Section 420 IPC and Section 66C of the Information Technology Act, 2000 at PS Special Cell, Delhi.

o. Complaint Case No. 02/2023 under Sections 44 and 45 of PMLA was filed *inter alia* against the petitioners/accused Vishal Moral, Shivang Malkoti and Adnan Nisar, before the learned Special Court, Tis Hazari District Court, on 23.06.2023.

p. *Vide* order dated 01.08.2023, the learned Additional Sessions Judge-03, Central District, Tis Hazari Courts, Delhi took cognizance of the complaint filed by the Directorate of Enforcement and summoned the accused persons.

q. Thereafter, on 16.08.2023, Adnan Nisar filed an application before the learned Special Court seeking retraction of his statements made under Section 50 PMLA. A similar application along with the

statement of retraction was filed by Shivang Malkoti which was taken on record by the Ld. ASJ *vide* order dated 16.09.2023.

4. The case of the prosecution as borne out from the complaint is that during investigation, stolen cryptocurrencies as mentioned in the MLA i.e. 0.48349150649972 ETH and 21.63831975 BTC were confirmed to have been received on 14.08.2022 and 15.08.2022 in the account bearing User ID 11093186 belonging to the accused/Vishal Moral. Further, it is their case that Vishal Moral has given inconsistent statements under Section 50 PMLA and has been unable to provide a legitimate source for the said amount.

5. As per complaint, Vishal Moral was associated with one Jack Let and a Turkish national who ran a scamming syndicate wherein there were four teams assigned to do specific tasks. First team used to develop malicious software; the second team used to do fake clicks on competitor's ads and websites (DDOS attack); the third team used to run and promote their own ads on websites and search engines (digital marketing); and the fourth team used to drain the wallets of the victims. Jack Let used to supervise the developer and fake clicks team while doing the draining himself. Vishal Moral was responsible for digital marketing. It is also the case of the prosecution that Shivang Malkoti and Jack Let used to supply Bing Ad accounts to Vishal Moral. One Mr. Murat @ Moorad from Turkey was head of the developer team and one Mr. Ghenry from Ukraine was heading the fake clicks team. After developing the malicious software, the second team used to execute "DDOS attacks" on the legitimate ads and websites of the competitors to suppress them. Thereafter, the third team used to promote their own ads to reach maximum audience. Finally, the fourth team used to

drain the wallets and distribute shares from the proceeds to all the other teams.

6. It is stated in the complaint that co-accused/Shivang Malkoti, knowing fully well the intentions of Vishal Moral, assisted him by providing Bing Ad accounts for running crypto ads from September 2022 to March 2023. Further, co-accused/Adnan Nisar is said to be assisting Vishal Moral in conversion of cryptocurrencies into cash between September 2022 to March 2023.

7. It is further stated that a portion of the proceeds of crime have been utilized by Vishal Moral in acquiring and setting up a liquor shop which is registered in the name of his brother, Lalit Moral. Lalit Moral has been unable to explain any legitimate source for the funds that were used to purchase the said shop.

**SUBMISSIONS**

8. Mr. Amit Shukla, learned Counsel for the petitioner/accused Vishal Moral submits that the proceedings under Sections 3 & 4 of the Act initiated by the Respondent against the accused persons are contrary to law inasmuch as the learned Special Court, while taking cognizance of the complaint filed by ED and issuing summons to the accused persons, was not even aware of the identity of the victim, nor the MLA request sent by the U.S. authorities was filed by ED before the learned Court. He further submits that the learned Court was not even apprised of the contents of either the MLA request or the alleged complaint filed by the unknown victim in the United States, or the subsequent communications between the Government of India and the Respondent. He submits that the prosecution is also not aware of the contents of the alleged complaint in U.S. According to Mr. Shukla, the

learned Special Court mechanically took cognizance of the present case and issued summoning order without considering giving a *prima facie* finding as to what the complaint in the United States is about or its contents thereof.

9. Mr. Shukla submits that although MLA request sent by the U.S. Department of Justice has not been made available to accused persons, but as per the complaint of ED itself, assistance sought in the MLA request is limited to seizure and freezing of the WazirX accounts mentioned therein. However, ED has gone beyond the specific request in MLA by lodging the ECIR and initiating a separate investigation in India based on an offence committed abroad.

10. Relying upon the judgment of the Hon'ble Supreme Court in ***Vijay Madanlal Choudhary & Ors. vs. Union of India & Ors., 2022 SCC OnLine SC 929***, he submits that it is settled law that prosecution under the Act cannot be initiated on notional basis and upon an assumption that a scheduled offence has been committed. He submits that in the present case, there is nothing on record before the learned Special Court to establish existence of a scheduled offence. He further relies on the judgment of ***P. Chidambaram vs. Directorate of Enforcement, (2019) 9 SCC 24*** to contend that registration of a scheduled offence is a *sine qua non* for an offence under the Act.

11. Referring to Section 2(1)(y) of the Act, Mr. Shukla submits that scheduled offences are only those that are listed in the Schedule of PMLA. He submits that as per the case of prosecution, predicate offence is being investigated by the U.S. Attorney's office for the District of Kansas in the United States of America and relying upon the same as the scheduled offence under Part C of the Schedule, ED has initiated its own proceedings

in India. He submits that for an offence to be read into Part C of the Schedule, two conditions need to be satisfied. *Firstly*, the offence must be of cross border implications as defined under Section 2(1)(ra) of PMLA. *Secondly*, it should be mentioned in Part A of the Schedule or under Chapter XVII of IPC. He submits that even if it is accepted that the alleged offence has been committed abroad and the proceeds of the crime have been transferred to India, bringing the offence under the definition of cross border implications, the second condition under Part C of the Schedule is still not satisfied as the alleged predicate offence under the U.S. statute is neither specified under Part A nor under Chapter XVII of IPC.

12. He submits that ED has relied upon Section 2(1)(ia) of PMLA which recognizes the laws of foreign countries that correspond to the provisions of the Act and scheduled offences. He submits that it is the case of the prosecution that the predicate offences in U.S. correspond to the offences mentioned in Part A of the Schedule. However, he points out that the phrase 'corresponding law' has only been used 11 times in the PMLA, and the legislature has been quite specific as to where the said phrase is to be used. Elaborating further, he submits that the phrase has exclusively been mentioned in provisions which are in relation to attachment and not in those relating to penal action under Sections 3 & 4. He, therefore, contends that the legislative intent behind limiting the use of 'corresponding law' in the Act to the provisions for attachment is to enable the relevant authority in India to seize and protect the proceeds of crime of an offence committed abroad till the investigation and trial in the foreign country is concluded. He contends that contingent upon the agreements between the two countries, the contracting state may request Indian authorities to confiscate the proceeds,

and the provisions of the Act would merely allow the Indian authority to recognize the foreign law and exercise the limited power of safeguarding the proceeds of crime that have travelled to Indian territory.

13. Without prejudice to above contention, he submits that if corresponding laws in foreign countries are construed to be included under Part C of the Schedule, then ED will have to prove the said law as a matter of fact and to further establish that provisions invoked in U.S., correspond to Indian enactments/provisions mentioned in the Schedule. He submits that in complaint, the ED has not even quoted the alleged corresponding law. Merely certain sections of a Code in the U.S. have been mentioned and it is stated that they correspond to Sections 420 and 424 of IPC as well as Section 75 of the Information Technology Act, 2000 in India.

14. He further submits that if corresponding law is interpreted to be within the ambit of the Schedule, as mooted by the prosecution, then provisions like Section 44(1)(c) would be rendered otiose. Relying upon the decision in ***Rana Ayyub vs. Directorate of Enforcement, (2023) 4 SCC 357***, he submits that under the said section, if the scheduled or predicate offence is being tried by a Court other than the Special Court which has taken cognizance of the offence under PMLA, then upon application, the scheduled offence may be transferred and tried alongside the offence under PMLA by the same Special Court. He submits that in the present case, since the trial of the predicate offence is being held in the Court at Kansas, U.S.A. and cannot be transferred to the Special Court in India, therefore, the provisions of Section 44(1)(c) would become redundant in such a situation, which cannot be the intent of the legislature.

15. Mr. Shukla invites the attention of this Court to Chapter IX of PMLA. He submits that the Chapter is entitled "*Reciprocal Arrangement for Assistance in Certain Matter and Procedure for Attachment and Confiscation of Property*". As per Section 56 of the said Chapter, the Central Government may enter into an agreement with a foreign country for enforcement of the provisions of the Act and for exchange of information with regard to the offences under the Act or corresponding laws or investigation relating to the laws under the Act. Under Section 58, the contracting foreign country may send a letter of request to the Central Government seeking assistance in accordance with the provisions of the Act. After receipt of a letter of request from a contracting state, the Central Government is bound by Section 61 of PMLA to forward the said request to the concerned Court in India. He submits that in breach of the entire Chapter, no part of the request was sent to the Court, rather the MLA request was directly forwarded to ED. He submits that assuming *arguendo* that an offence of cross border implications has been committed, in such a situation sanction of the Central Government was required under Section 188 of CrPC, which has not been obtained.

16. He refers to paragraph 3.2 of the complaint filed before the learned Special Court. He submits that it is the case of the prosecution that on 14th of August 2022, approximately 0.9952 ETH which is valued at around US$ 1,926 was transferred from the account of the victim to an address admittedly not associated with Vishal Moral. He submits that as per the complaint, out of the said amount approximately 0.48 ETH valued at around US$ 959 was transferred to the account of Vishal Moral. He further submits that according to the complaint, another transaction on 15th of August 2022

took place wherein approximately 21.63 BTC were transferred from the account of the victim to the account of Vishal Moral. He points out that it is the case of the prosecution itself that the second transaction relating to Bitcoin was an act of theft. He submits that the first transaction relating to Ethereum is the only transfer that can be considered as the laundered amount, if any, whereby the total amount was first transferred to an account abroad and then a small portion came to the account of Vishal Moral. Therefore, he presses that as per the prosecution's own case, the alleged amount of US$ 959 which converts to approximately Rs.80,000/- is the only amount which can be considered proceeds of crime, if any.

17. He submits that the second transaction, which pertains to the transfer of Bitcoins valued at approximately Rs.4,00,00,000/- cannot, by any imagination, fall under Section 3 of PMLA. He contends that an offence under Section 3 of the PMLA consists of three steps, i.e. placement, layering and integration. He argues that any amount obtained through commission of theft or robbery cannot be termed as money laundering as the same would entail that every financial offence will attract the rigors of PMLA, which cannot be the intent of the legislature.

18. He contends that the said crypto currencies have not even come to the hands of Vishal Moral as he did not have access to the account after the commission of the alleged offence. Adverting to the email exchanges from 19.08.2022 onwards between Vishal Moral and WazirX, he submits that the WazirX account in which the crypto currencies were allegedly received has subsequently been frozen.

19. Furthermore, he submits although ED has mentioned the value of Ethereum and Bitcoins that are the subject matter of the complaint, however,

they have not provided the basis of such calculation. No data in this regard has been produced before this Court nor before the learned Special Court. ED has merely relied upon the MLA request and the calculations made by the U.S. authorities without any application of mind. He submits that in the context of United States of America, crypto currencies are valid currencies, however, in India, crypto currencies are not recognized as valid legal tender, they merely have notional value. He submits that determining the actual value of the alleged proceeds of crime is pertinent in view of the provisions of PMLA. He submits that the twin conditions envisaged under Section 45 for grant of bail are only applicable in cases where the laundered amount is Rs.1 crore or more. It is his contention that given the alleged laundered amount is only to the extent of Rs.80,000/-, the twin conditions are not applicable in the present case.

20. Mr. Tanveer Ahmed Mir, learned counsel for the petitioners/co-accused Adnan Nisar and Shivang Malkoti, invites the attention of this Court to the FIR bearing No.124/2023 dated 10.05.2023. He submits that the predicate offence has been lodged after the arrest of the petitioners on 09.05.2023 by the ED. Relying upon the judgment in ***Vijay Madanlal Choudhary*** (*supra*) he contends that scheduled offence must already be registered with the jurisdictional police or pending enquiry by way of a complaint before the competent forum pursuant to which the ED can proceed to investigate an offence under Sections 3 & 4 of PMLA. He further relies upon ***Prakash Industries Limited vs. Union of India & Anr., 2023 SCC OnLine Del 336***.

21. He submits that ED has not been able to establish commission of the predicate offence *qua* Shivang Malkoti and Adnan Nisar. He submits that the

prosecution has purported in the FIR that the predicate offence has been committed under Section 66C of the IT Act. The ingredients of Section 66C include fraudulent or dishonest use of electronic signature, password or any other unique identification feature of any other person and admittedly, no such acts have been committed by the petitioners.

22. He further submits that it is the admitted position of the prosecution, as well as the U.S. Authorities, that the petitioners at no point of time have ever interacted with the victim based out of USA or had made any representations in any manner to him to cause any kind of deceit or fraud by any means, therefore, there cannot be a question of the petitioners having cheated the victim. He submits that admittedly, the petitioners were not involved in either development of the malicious software, or fake clicks on competitor's ad website, or running advertisements on the websites/search engines, or draining the wallets/accounts of victims.

23. He submits that the allegation of the prosecution that Shivang Malkoti was responsible for running crypto ads on Bing search engine has no merit inasmuch as Bing does not permit advertisements relating to cryptocurrencies and cryptocurrency related products including, but not limited to initial coin offerings, cryptocurrency exchanges and cryptocurrency wallets. He points out that till date no advertisement accounts have been recovered by the prosecution.

24. Mr. Mir submits that with respect to the allegation of converting cryptocurrency to cash by Adnan Nisar, the prosecution has not divulged any incriminating material indicating that he assisted Vishal Moral or anyone else in conversion of stolen cryptocurrencies to cash, besides certain WhatsApp/Telegram chats which the prosecution claims to be between the

petitioner and Vishal Moral. That apart, the prosecution also relies on statements of the co-accused persons, which thereafter stand retracted.

25. He submits that the WhatsApp/Telegram chats placed on record by the prosecution do not establish the identity of the persons involved in the chat and whether it is, in fact, Adnan Nisar in conversation with Vishal Moral. Without prejudice, even if it is assumed that Adnan Nisar is the person in the chat, he submits that the chats merely reveal that it was Vishal Moral who asked the petitioner to get in touch with some unknown person and collect their cryptocurrency IDs. He submits that there is no evidence to indicate that the petitioner/Adnan Nisar at any point knew the identity of the aforementioned traders, their locations, their business operations, or any of their agents/associates. He submits that the petitioner had no knowledge of the length and breadth of the business operation of the main accused/Vishal Moral. He further submits that WhatsApp/Telegram chats are virtually verbal communications which are a matter of evidence with regard to their meaning and its contents are to be proved during trial. In this regard, he places reliance in the judgment of ***Ambalal Sarabhai Enterprise Limited vs. KS Infraspace LLP Limited &Anr., (2020) 5 SCC 410***.

26. Mr. Mir submits that it cannot be said that any act of money laundering under Sections 3 & 4 of PMLA have been committed by the petitioners from the point of view of criminal *mens rea*, broad probabilities as well as there being any reasonable material on record. He submits that the allegation against Shivang Malkoti is to the effect that he was working with Vishal Moral for the purpose of promotion of ads. He submits that Shivang Malkoti was at best, working on a limited professional basis with the main accused for promotion of ads. There is no evidence on record to indicate that

Shivang Malkoti had any knowledge of Vishal Moral's other activities, and the prosecution has not recovered any formal account statements or digital wallet ledgers, let alone any proceeds to show that he is a beneficiary to the alleged offence. He submits that the entire investigation rests upon the WhatsApp chats. He places reliance on the judgments in ***Pooja Singh vs. Directorate of Enforcement, 2023 SCC OnLine Del 5285*** and ***Pinky Irani vs. State (NCT of Delhi), 2023 SCC OnLine Del 6722*** to contend that this Hon'ble Court, at the stage of bail, is only required to examine whether the accused/petitioners were possessed of the requisite *mens rea*.

27. He submits that with respect to the hawala activities alleged to have been performed by Adnan Nisar, it would only amount to commercial activities as the case of the prosecution is that he merely received crypto currency IDs sent by traders to Vishal Moral. Without prejudice, he submits that even if it is assumed as per the allegations of prosecution, that Adnan Nisar has received proceeds of crime to the tune of Rs.1,70,000/-, since there are no allegations of money laundering against him apart from receipt of the said financial benefit, it would be a perversity of justice to continue his pre-trial incarceration. Reliance is placed on the judgment in ***Hartej Singh vs. State of Punjab & Anr., 2023 SCC OnLine P & H 6651.***

28. Mr. Mir argues that the registration of ECIR has not been done in compliance with Section 58 of PMLA and Section 188 of CrPC. The mandate of Section 58 requires that the letter of request received by the Central Government from a contracting state must be forwarded to the Special Court or any authority under the Act for execution of such request.

29. He further submits that the prosecution has relied on the statements of the accused persons under Section 50 of PMLA to establish the involvement

of the petitioners. He submits that in the case of ***Preeti Chandra vs. Enforcement Directorate, 2023 SCC OnLine Del 3622***, this Court has held that the statements recorded under Section 50 can only be analyzed once the parties have entered the witness box. Further, in ***Manish Sisodia vs. Directorate of Enforcement, 2023 SCC OnLine Del 3770***, this Court held that although the statements recorded under Section 50 of PMLA are admissible in evidence, however, their evidentiary value has to be weighed at the time of trial. He submits that at this stage, evidence cannot be appreciated meticulously, and the statements cannot be taken as gospel truth, only broad probabilities have to be considered. Learned counsel for the petitioners also brings attention of this Court to the judgment in ***Sanjay Jain vs. Directorate of Enforcement, 2024 SCC OnLine Del 1656,*** wherein it was held by this Court that statement of co-accused under Section 50 of PMLA is not a substantive piece of evidence and can only be used for the purpose of corroboration in support of other evidence to lend assurance to the Court in arriving at a conclusion of guilt. He submits that even otherwise, the statements under Section 50 have subsequently been retracted and are not reliable to form a basis of the guilt of the petitioners for the offences as alleged. Moreover, it is his submission that any statements made under Section 50 post arrest would be in the teeth of Article 20(3) of Constitution of India, rendering the said statements inadmissible in evidence.

30. Lastly, he submits that merely because of the gravity of offence, bail cannot be denied. He submits that the petitioners are not at risk to tamper with any evidence or influence any witnesses. He submits that no useful purpose would be served by further incarceration of the petitioners. He

submits that the constitutional right to a speedy trial must be protected in view of the fact that trial is likely to take a long time.

31. *Per contra*, Mr. Zoheb Hossain, learned Special Counsel for the respondent opposes the contention of the learned counsel for the petitioners that there is no scheduled offence in the present case. During the course of arguments, he handed over a copy of the MLA Request in a sealed cover. Taking the Court through the contents of the MLA, Mr. Hossain submits that the said document mentions at several places that the U.S. Attorney's Office for the District of Kansas is investigating Vishal Moral for the offences enumerated therein. Moreover, in the first paragraph of the MLA itself, it is stated that the assistance requested is "*to obtain evidence for use in a criminal investigation and any related proceedings.*" He submits that investigation, across the world, is a corollary to registration of a complaint and requisite provisions having been triggered.

32. He submits that a seizure warrant has also been issued by the United States District Court for the District of Kansas in respect of the entire contents of the WazirX account bearing user ID 11093186 held in the name of Vishal Moral. He submits that a copy of the said warrant has been sent along with the MLA. Therefore, he submits, the counsel for the petitioners cannot presume that there is no corresponding scheduled offence in the US as the information collected by the U.S. Authorities regarding details of Vishal Moral have been corroborated by ED and the said information could not have been obtained without investigation into the offences.

33. He further invites the attention of this Court to the '*Treaty Between The Government of The Republic of India and The Government of The United States of America On Mutual Legal Assistance in Criminal Matters*'

(hereinafter 'Treaty'). He submits that the preamble of the Treaty expressly provides the intent of the said Treaty which is to extend assistance to each other with investigation, prosecution, prevention and suppression of crimes relating to *inter alia* economic crimes. He further relies on Article I of the Treaty wherein it is contemplated that the contracting states shall provide the widest measure of mutual assistance to each other in connection with the investigation, prosecution, prevention and suppression of offences. He submits that once the Government of India has received a request for legal assistance under the Treaty and decides to act upon it, exercise of such discretion by the government and its powers under the Treaty cannot be questioned by the petitioners.

34. He submits that as held in ***Vijay Madanlal*** (*supra*), PMLA is a *sui generis* legislation, and it is directly traceable to Entry 13 & 14 of List I in the Seventh Schedule of the Constitution. He brings the attention of this Court to the preamble of the Act which states that the enactment of the legislation is in furtherance of the global efforts to fight the menace of money laundering. He submits that therefore, the intent of the legislation can solely be interpreted as being so that the entire regime of PMLA would get triggered upon receipt of information that an offence has been committed in the jurisdiction of a contracting state and the proceeds of such offence have reached India. He elaborates that by virtue of the proceeds having travelled in Indian jurisdiction, the standalone offence of money laundering would be deemed to be committed in India as well.

35. In support of the above contention, he further invites the attention of the Court to Section 2(1)(ra) of PMLA which provides for two separate scenarios in respect of offences of cross border implications. *First*, when the

offence has been committed outside India and the proceeds therefrom have been transferred to India and *second*, when the offence has been committed in India and the proceeds have travelled outside India.

36. Mr. Hossain controverts the argument of the petitioners that the phrase "corresponding law" has been used in the PMLA only under those sections that relate to attachment and not Sections 3 & 4. In addition to the above, he submits that the request of the U.S. Authorities in the MLA is to obtain evidence and when such a request is received, the ED is empowered to do everything required to gather all evidence that may be available. He submits that arrest is an inherent part of investigation for the purpose of collection of evidence and in support places reliance in the judgements of ***H.N. Rishbud vs. State (Delhi Admn.), (1954) 2 SCC 934*** and ***P. Chidambaram*** (*supra*).

37. Without prejudice to the aforestated contentions, he submits that once a scheduled offence is brought to the attention of the ED, the exclusive jurisdiction over investigation of money laundering in respect of the said scheduled offence has been given to ED under the PMLA. Mr. Hossain refers to Section 2(2) of PMLA which provides that "*any reference, in this Act or the Schedule, to any enactment or any provision thereof shall, in relation to an area in which such enactment or such provision is not in force, be construed as a reference to the corresponding law or the relevant provisions of the corresponding law, if any, in force in that area*." He submits that in the present case, since the Indian Penal Code, 1860 is not in force in the U.S., but offences akin to cheating under Section 420 of IPC have been committed in US jurisdiction, then it must be construed that a scheduled offence under a corresponding law has been committed in the U.S. In this regard, he places reliance on the judgment of the Hon'ble High

Court of Jammu & Kashmir in ***Ahsan Ahmad Mirza & Ors. vs. Enforcement Directorate & Anr., 2019 SCC OnLine J&K 1026.*** He submits that the ambit of Section 2(2) is wide enough to read foreign laws within the meaning of corresponding law. He therefore submits that upon receipt of the information regarding the same by ED through the MLA request, the entire provisions of PMLA would get triggered.

38. It is his submission that only the offence of money laundering is being investigated by the ED in India and not the predicate offence. Since the proceeds of crime have travelled to the jurisdiction of ED, as a result the offence of money laundering has also occurred in its jurisdiction.

39. He submits that the arguments raised by the petitioners with respect to the veracity of the statements under Section 50 of the Act, are all liable to be rejected as it is well settled that such statements are admissible and can be relied upon at the stage of remand or even to reject bail. In this regard, he places reliance on the judgments in ***Vijay Madanlal*** (*supra*), ***Tarun Kumar vs. Directorate of Enforcement, 2023 SCC OnLine Del 4173, Tarun Kumar vs. Directorate of Enforcement, 2023 SCC OnLine Del 1486***, ***Rohit Tandon vs. Directorate of Enforcement, (2018) 11 SCC 46***, ***Amanatullah Khan vs. Directorate of*** **Enforcement,** ***2024 SCC OnLine Del 1658, Satyendar Kumar Jain vs. Directorate of Enforcement, 2023 SCC OnLine Del 1953,*** and ***Satyendar Kumar Jain vs. Directorate of Enforcement, (2024) 6 SCC 715.*** He submits that merely by way of filing belated applications for retraction, the said statements cannot be resiled from and such a retraction is a matter of trial. At this stage, a mini trial cannot be conducted.

40. With respect to the admissibility of the WhatsApp/Telegram chats, he submits that the said chats have been retrieved from the mobile phone of Vishal Moral during search at his residence and extraction from the said mobile phone was carried out by the cyber lab of ED. *Panchnama* was duly drawn and the same have now been sent for forensic analysis. He further submits that it is well settled law that at the stage of bail, this Court does not have to go into the credibility or reliability of the evidence. He submits that at this stage, this Court need only consider whether based on the material available on record, there are reasonable grounds for believing that the person may not be guilty of the offence. He places reliance in the judgment of ***Gurcharan Singh & Ors., vs. State (Delhi Administration), (1978) 1 SCC 118, Mohan Singh vs. Union Territory, (1978) 2 SCC 366***, ***Satish Jaggi vs. State of Chhattisgarh, (2007) 11 SCC 195***, ***Vijay Madanlal*** (*supra*), ***CBI vs. V. Vijay Sai Reddy, (2013) 7 SCC 452***.

41. Mr. Hossain, in response to the contention of the learned counsel for the petitioners that foreign law relied upon by the prosecution as the scheduled offence will have to be proved during trial, submits that public documents of foreign countries are to be proved in accordance with Section 78(6) of the Evidence Act, 1872.

42. Lastly, Mr. Hosssain submits that the apprehension of the petitioners that the trial is likely to take a long time is not well founded. In light of the judgment of the Hon'ble Supreme Court in ***Tarun Kumar*** (*supra*), he submits that the nature of offence in the present case, which is a sophisticated cryptocurrency fraud, committed by only a few clicks of a button, it cannot be said that the petitioners are not likely to commit any

offence while on bail. He submits that Section 436A of CrPC is a sufficient safeguard available to the petitioners.

43. Mr. Vivek Gurnani, learned counsel appearing on behalf of the ED brought to the notice of the Court the incriminating material contained in the relied upon documents.

44. While reserving the present judgment, inadvertently judgment was also reserved in connected petitions i.e. Crl.M.C. 6730/2023 and W.P.(Crl.) 2789/2023, which were continuously being listed with the captioned bail applications, despite no arguments having been addressed by the parties on the said petitions. Accordingly, the matters including aforesaid Crl.M.C. and Writ Petitions were listed for clarification on 06.09.2023. The learned counsel for parties were *ad idem* that they had confined their submissions only to the bail applications and no arguments were addressed *qua* Crl.M.C. and Writ Petitions. The said two petitions were thus, released and directed to be listed before the Roster Bench.

45. Mr. Mir on 06.09.2023 also sought to place before this Court the recent judgments of the Hon'ble Supreme Court in ***(i) Ramkripal Meena vs. Directorate of Enforcement, 2024 SCC OnLine 2276; (ii) Manish Sisodia vs. Directorate of Enforcement, 2024 SCC OnLine SC 1920;*** and ***(iii) Prem Prakash vs. Union of India through the Directorate of Enforcement, 2024 SCC OnLine SC 2270***. Accordingly, all the parties were allowed to make their further submissions confined only to the said decisions.

46. I have heard the learned counsel for the petitioners, as well as the learned Special Counsel for the ED and have perused the material on record.

47. The point wise analysis of the rival contentions of the learned counsel for the parties is as under:

**OFFENCE UNDER FOREIGN LAW AS SCHEDULED OFFENCE**

48. The registration of a scheduled offence with the jurisdictional police and/or pending investigation or trial, including by way of criminal complaint before the competent forum, is a *sine qua non* for prosecution of any person under the PMLA. The authorities under the PMLA cannot prosecute any person on notional basis or on the assumption that a scheduled offence has been committed[1].

49. It is the case of the respondent/ED that scheduled offence in the present case has been committed in the United States of America and the ED had received a Mutual Legal Assistance (MLA) request from the U.S. Department of Justice, Washington, stating that the petitioner/accused Vishal Moral, an Indian national has committed an offence under the U.S. statutes mentioned therein, which according to the ED, correspond to Section 75 of IT Act, 2000 and Sections 420 and 424 of IPC.

50. It is also the case of the ED that the victim of the offence was navigated to a malicious website closely resembling that of 'Ledger Live', containing a malware, with the aid of which Ethereum and Bitcoins were transferred from the address of victim's Ledger Hardware Wallet to the petitioner/accused Vishal Moral's account maintained with WazirX in India, in violation of U.S. laws. It is thus, the case of the ED that the offence committed in U.S. has cross border implications.

51. The expression ***"offence of cross border implications"*** has been defined under Section 2(1)(ra) of the PMLA to mean –

> *"(i)* ***any conduct by a person at a place outside India which constitutes an offence at that place*** *and which would have constituted an offence specified in Part A, Part B or Part C of the*

[1] Vijay Madanlal Choudhary (supra)

*Schedule, had it been committed in India and* ***if such person transfers in any manner the proceeds of such conduct or part thereof to India; or***

*(ii) any offence specified in Part A, Part B or Part C of the Schedule which has been committed in India and the proceeds of crime, or part thereof have been transferred to a place outside India or any attempt has been made to transfer the proceeds of crime, or part thereof from India to a place outside India."*

(emphasis supplied)

52. Clearly, offences having cross border implications contemplated under the above quoted provision are of two categories. *First*, when any offence has been committed at a place outside India which would have constituted an offence specified in Part A, Part B or Part C of the Schedule had it been committed in India, and the proceeds have been transferred to India; and *second* when the Scheduled offence has occurred in India and the proceeds have travelled to a place outside India. For the purpose of present case, first category defined in sub-clause (i) of Section 2(1)(ra) is of relevance, since the case of ED is that proceeds of crime have been transferred from the account of victim in U.S. to the account of petitioner/accused Vishal Moral in India.

53. Section 2(1)(y) of PMLA defines scheduled offence to mean offences specified under the Schedule of PMLA. The Schedule has been trifurcated into Part A, Part B and Part C. The ED's case is that offences committed under U.S. laws are being investigated by the U.S. Attorney's Office for the District of Kansas in the United States of America and treating the same as a predicate offence under Part C of the Schedule, it has registered a case under Sections 3 and 4 of the PMLA in India and initiated proceedings thereunder.

54. At this juncture, apposite would it be to refer to Part C of the Schedule, the relevant extract of which reads thus:

> *"PART C*
>
> *An offence which is the offence of cross border implications and is specified in,—*
>
> *(1) Part A; or*
>
> * * * * *
>
> *(3) the offences against property under Chapter XVII of the Indian Penal Code (45 of 1860).*
>
> *(4) The offence of wilful attempt to evade any tax, penalty or interest referred to in section 51 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (22 of 2015)."*

55. A bare reading of Part C of the Schedule shows that it encompasses offences specified under Part A, if the said offences have cross border implications. Further, all the offences against property under Chapter XVII of IPC having cross border implications also become scheduled offences under the Act. In other words, some of the offences included under Chapter XVII, which are though not included in Part A like theft, will become scheduled offences by virtue of Part C, if they have cross border implications.[2]

56. In the *second category* described under sub-clause (ii) of Section 2(1)(ra) there is no confusion as the predicate offence occurs inside the territory of India, therefore, the laws mentioned in the Schedule would directly be applicable. However, the conundrum needs to be resolved in case of *first category* specified under sub-clause (i) of Section 2(1)(ra) as neither the offences enumerated under Part A, nor the IPC are globally enacted provisions, rather each foreign country has its own laws inside its

[2] Pavna Dibbur (supra)

territory, *albeit* they may have similarities with the laws in other jurisdictions. To reconcile this situation reference may be had to Section 2(1)(ia) which defines the expression "corresponding law" as well as sub-section (2) of Section 2 of PMLA which provides as to when any reference to the Scheduled offence under the Act can be construed as reference to the "corresponding law". The said provisions read thus:

> *"2(1)(ia)"corresponding law" means any law of any foreign country corresponding to any of the provisions of this Act or dealing with offences in that country corresponding to any of the scheduled offences.*
>
> *XXXX XXXX XXXX*
>
> *2(2) Any reference, in this Act or the Schedule, to any enactment or any provision thereof shall, in relation to an area in which such enactment or such provision is not in force, be construed as a reference to the corresponding law or the relevant provisions of the corresponding law, if any, in force in that area."*

57. Expression 'area' in Section 2(2) has not been defined under the Act. However, the definition of 'corresponding law' has been inserted by an amendment of 2013 which clarifies the position that corresponding law would mean any law of any foreign country dealing with the offences of that country which correspond to the scheduled offences. Therefore, by virtue of the definition of 'corresponding law' it is clear that expression 'area' in sub-section (2) of Section 2 of PMLA would also mean 'any foreign country'. The effect of the said sub-section is that it creates a deeming fiction wherein the corresponding law of any foreign country dealing with the offences in that country will have to be read into the schedule of PMLA.

58. Further, a conjoint reading of Section 2(2); Section 2(1)(ia); Section 2(1)(ra) and Part C of the Schedule, makes it plain that if an offence has been committed in a foreign country under the laws of that country, the same

can be treated as a predicate offence provided such offence corresponds to any of the offences specified under Part C of the PMLA and it has cross border implications in the sense that the proceeds of such crime has travelled to India.

59. Therefore, there is no substance in the submission of Mr. Amit Shukla, the learned counsel for the petitioner/accused Vishal Moral that expression 'corresponding law' has been used only in relation to the provisions providing for attachment to enable the relevant authority in India to seize and protect the proceeds of crime of an offence committed abroad till the investigation and trial in the foreign country is concluded, and the same is not to be read in the context of initiating penal action in India under Sections 3 and 4 of the PMLA.

60. This Court also does not find merit in the contention of Mr. Shukla that since the trial of the alleged predicate offence is being held in the Court at Kansas, U.S.A. and the same cannot be transferred to the Special Court in India, therefore, the provisions of Section 44(1)(c) would become redundant in such a situation, which cannot be the intent of legislature. The Hon'ble Supreme Court in ***Vijay Madanlal Choudhary*** (*supra*) has held that the provision of Section 44(1)(c) of the Act only bestow enabling power on the Special Court to examine the request of the Authority authorised for transfer of trial to predicate offence to itself and such request will be examined on case-to-case basis. Thus, the provision is not mandatory. In the context of a predicate offence under the corresponding law of a foreign country, the same can only be tried as per the procedure in force in that foreign country and Section 44(1)(c) of the Act will have no application in such a situation.

**MLA REQUEST & POWERS OF THE AUTHORITY UNDER THE ACT**

61. Next, it was argued by Mr. Shukla that the MLA request received from the U.S. Authorities, as per the complaint of ED, seeks limited assistance to the extent that WazirX accounts mentioned therein may be seized and frozen, but the ED has gone beyond the mandate of specific request in the MLA and lodged the present ECIR to initiate a separate investigation in India based on an offence committed abroad, which was impermissible.

62. To appreciate this argument, reference to the preamble of PMLA is imperative, which makes it plain that legislation has been enacted to implement the resolution and declaration adopted by United Nations General Assembly (UNGA) in the year 1990 and 1998, respectively in furtherance of global efforts, to control and prevent money laundering.

63. Chapter IX has been incorporated in PMLA specifically providing for reciprocal arrangement for assistance in certain matters and procedure of attachment and confiscation of property. Section 56 under Chapter IX envisages that the Central Government may enter into an agreement with the Government of any country outside India for – (a) enforcing the provisions of PMLA; (b) exchange of information for the prevention of any offence under PMLA or under the corresponding law in force in that country or investigation of cases relating to any offence under PMLA, and may, by notification in the official gazette, make such provisions as may be necessary for implementing the agreement.

64. It appears that pursuant to the provisions of Section 56 of the Act, the Government of India and the Government of United States of America,

desiring to improve the effectiveness of law enforcement authorities in both the States in the investigation, prosecution, economic crimes, through cooperation and mutual legal assistance in criminal matters, agreed on various aspects by way of a treaty entitled *"On Mutual Legal Assistance in Criminal Matters"* (hereinafter 'Treaty'). The preamble of Treaty reads as under:

> *"The Government of the Republic of India and the Government of the United States of America, hereinafter referred to as the Contracting Parties, desiring to improve the effectiveness of the law enforcement authorities of both states in the investigation, prosecution, prevention and suppression of crimes, including those relating to terrorism, narcotics trafficking, economic crimes, and organized crime, through cooperation and mutual legal assistance in criminal matters,*
> *Have agreed as follows:"*

65. Article I of the Treaty which deals with the scope of assistance that is to be provided by the contracting parties, reads as under:

> *"Article 1*
> *Scope of Assistance*
> *1. The Contracting Parties shall provide the widest measure of mutual assistance to each other, in accordance with the provisions of this Treaty, in connection with the investigation, prosecution, prevention and suppression of offenses, and in proceedings related to criminal matters.*
>
> *2. Assistance shall include:*
> ***a) taking the testimony or statements of persons**;*
> ***b) providing documents, records, and items of evidence**;*
> *c) locating or identifying persons .or items;*
> *d) serving documents;*
> *e) transferring persons in custody for testimony or other purposes;*
> ***f) executing requests for searches and seizures;***
> ***g) assisting in proceedings related to seizure and forfeiture of assets, restitution, collection of fines; and***

***h) any other form of assistance not prohibited by the laws of the Requested State.***

*3. Assistance shall be provided without regard to whether the conduct that is the subject of the investigation, prosecution, or proceeding in the Requesting State would constitute an offense under the laws of the Requested State.*

*4. This Treaty is intended solely for mutual legal assistance between the Contracting Parties. The provisions of this Treaty shall not give rise to a right on the part of any private person to obtain, suppress, or exclude any evidence, or to impede the execution of a request."*

(emphasis supplied)

66. As noted above the ED had received a letter dated 23.12.2022 forwarding therewith a Mutual Legal Assistance Request ('MLA') from the U.S. Department of Justice, Washington wherein legal assistance was sought. A copy of MLA request was handed over across the Bar during course of the arguments with a *caveat* that the same is confidential. Admittedly, said MLA request does not form part of the record either before this Court or before the learned Special Court, nor a copy of the same has been supplied to the accused persons, though reference of contents of said MLA request has been made in the complaint in abridged form.

67. A perusal of MLA request reveals that the Central Authority of the Republic of India has been requested with reference to the aforementioned Treaty, *to obtain evidence for use in a criminal investigation and any related proceedings*. Elaborating further, the MLA request also furnishes the details of the information obtained by the U.S. Attorney's Office for the District of Kansas ('the Prosecutor'), while investigating the alleged commission of fraud and money laundering offences by petitioner/accused Vishal Moral.

The request also points out that the above noted Prosecutor has obtained a U.S. Seizure warrant authorizing the restraint of entire contents of the relevant WazirX account, held in the name of Vishal Moral (Target Account) and accordingly a request has, *inter alia*, been made to restraint or to seize the entire contents of the said account with WazirX.

68. At this stage, it would also be relevant to refer to Section 60 of the PMLA, which provides for attachment, seizure and confiscation of property in contracting State of India. The provision reads as under:

> *"60. Attachment, seizure and confiscation, etc., of property in a contracting State or India.—*
>
> *(1) XXXX XXXX XXXX*
>
> *(2)* ***Where a letter of request is received by the Central Government from a court or an authority in a contracting State requesting attachment, seizure, freezing or confiscation of the property in India****, derived or obtained, directly or indirectly, by any person from the commission of an offence under a corresponding law committed in that contracting State,* ***the Central Government may forward such letter of request to the Director, as it thinks fit, for execution in accordance with the provisions of this Act.***
>
> *(2A) XXXX XXXX XXXX*
>
> *(3)* ***The Director shall****, on receipt of a letter of request under section 58 or section 59,* ***direct any authority under this Act to take all steps necessary for tracing and identifying such property.***
>
> ***(4) The steps referred to in sub-section (3) may include any inquiry, investigation or survey in respect of any person, place, property, assets, documents, books of account in any bank or public financial institutions or any other relevant matters.***

> ***(5) Any inquiry, investigation or survey referred to in sub-section (4) shall be carried out by an authority mentioned in sub-section (3) in accordance with such directions issued in accordance with the provisions of this Act.***
>
> (emphasis supplied)

69. From the wholesome reading of Section 60, it is abundantly clear that though a request from the contracting state may be confined to attachment, seizure, freezing or confiscation of the property in India, but the steps to be taken for executing the said request may include conducting of an inquiry, investigation or survey.

70. Investigation has been defined under Section 2(na) of the Act as follows:

> *"Investigation" includes all the proceedings under this Act conducted by the Director or by an authority authorized by the Central Government under this Act for the collection of evidence."*

71. The meaning assigned to investigation under section 2(h)[3] of the Code of Criminal Procedure is similar. The Hon'ble Supreme Court in ***H.N. Rishbud*** (*supra*) observed that under the Code investigation consists generally of the following steps:

> *"(1) Proceeding to the spot,*
> *(2) Ascertainment of the facts and circumstances of the case,*
> *(3)* ***Discovery and arrest of the suspected offender,***
> *(4) Collection of evidence relating to the commission of the offence which may consist of*

[3] Section 2(h) –"investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf;

*(a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit,*

*(b) the search of places of seizure of things considered necessary for the investigation and to be produced at the trial, and*

*(5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so, taking the necessary steps for the same by the filing of a charge-sheet under Section 173."*

(emphasis supplied)

72. Similarly, the Apex Court in ***P. Chidambaram*** (*supra*) observed that ordinarily, arrest is a part of procedure of investigation to secure not only the presence of the accused but several other purposes. In good number of criminal cases, for collecting of evidence custodial interrogation becomes imperative. Incidentally, there cannot be arrest without registration of a case under the ordinary criminal law, except where arrest is under preventive detention laws.

73. In the backdrop of this legal position, there appears to be substance in the submission of Mr. Hossain that the request of the U.S. Authorities in the MLA is to obtain evidence and when such a request is received, the ED is empowered to do everything required including arrest of accused post lodging of a case under section 3 and 4 of the PMLA, to gather all evidence that may be available.

74. Even otherwise, once ED, on the basis of MLA request and other material collected, was satisfied that the offences being investigated by the U.S. Department of Justice under the relevant U.S. laws correspond to offences falling under Schedule of the PMLA and the proceeds of crime have found its way to India, it was well within its power to register an

offence under Sections 3 and 4 of the PMLA, irrespective of the nature of request in the MLA. This view finds support from the decision of the Hon'ble Supreme Court in ***Vijay Madanlal Choudhary*** (*supra*) wherein it has been held that the offence of money laundering under Section 3 of the Act is an independent offence regarding the process or activity connected with the proceeds of crime which had been derived or obtained as a result of criminal activity relating to or in relation to a scheduled offence.

75. In light of the above discussion there is no merit in the submission of Mr. Shukla that the MLA request received from the U.S. Authorities, as per the complaint of ED, seeks limited assistance to the extent that WazirX accounts mentioned therein may be seized and frozen and the same does not warrant registration of an offence under the PMLA.

## NON-COMPLIANCE OF PROCEDURAL REQUIREMEMTS

76. Insofar as contention of Mr. Shukla and Mr. Mir that after receipt of a letter of request from a contracting state, the Central Government is bound by Section 61 of PMLA to forward the said request to the concerned Court in India, is concerned, it may be observed that a conjoint reading of Section 58[4], Section 60(2) and Section 61[5] of the Act, leaves no manner of doubt that the Central Government upon receipt of a letter of request from a contracting State has a discretion to forward the said request to any authority

[4] Section 58 –Assistance to a contracting State in certain cases.—Where a letter of request is received by the Central Government from a court or authority in a contracting State requesting for investigation into an offence or proceedings under this Act and forwarding to such court or authority any evidence connected therewith, the Central Government **may forward such letter of request to the Special Court** or **to any authority under the Act as it thinks fit for execution of such request in accordance with the provisions of this Act** or, as the case may be, any other law for the time being in force.

[5] Section 61 – Procedure in respect of letter of request.—Every letter of request, summons or warrant, received by the Central Government from, and every letter of request, summons or warrant, to be transmitted to a contracting State under this Chapter shall be transmitted to a contracting State or, as the case may be, sent to the concerned Court in India and in such form and in such manner as the Central Government may, by notification, specify in this behalf.

under the Act or to the Special Court as it thinks fit for the execution of such request. Therefore, the Central Government was well within its power to forward the MLA request in the present case directly to the ED. There is thus, no breach of the provisions of Chapter IX of the Act, as contended by the counsel for the petitioners/accused.

77. It was also argued both by Mr. Shukla and Mr. Mir that since it is the case of the ED that an offence of cross border implications has been committed, therefore, sanction of the Central Government was required under Section 188 CrPC. To appreciate this submission, apposite would it be to refer to Section 188 CrPC, which reads as under:

> *"188. Offence committed outside India.—**When an offence is committed outside India**—*
>
> *(a) by a citizen of India, whether on the high seas or elsewhere; or*
> *(b) by a person, not being such citizen, on any ship or aircraft registered in India,*
> *he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found:*
> *Provided that, notwithstanding anything in any of the preceding sections of this Chapter, no such offence shall be inquired into or tried in India except with the previous sanction of the Central Government."*
>
> (emphasis supplied)

78. In terms of proviso to Section 188 CrPC, the section gets attracted when the entirety of the offence is committed outside India; and it is the grant of sanction that would enable such offence to be enquired into or tried in India.[6]

[6] Sartaj Khan vs. State of Uttarakhand, (2022) 13 SCC 136.

79. Clearly, the predicate offence has been committed in U.S. and the same is being tried there though it has cross border implications. It is only the offence under PMLA that is being tried in India. Since the proceeds of crime related to the predicate offence have travelled to India, the offence under PMLA being a standalone offence, has been committed in India in its entirety, therefore, no sanction as mandated under proviso to Section 188 CrPC is required for the said offence.

**JUDICIAL NOTICE OF CORRESPONDING LAW**

80. In the MLA request it is alleged that the petitioner/accused Vishal Moral, an Indian national has committed an offence under the U.S. statutes mentioned therein viz., (i) Title 18, United States Code, Section 1343 (Wire Fraud); (ii) Title 18, United States Code, Section 1029 (Access Device Fraud); (iii) Title 18, United States Code, Section 1030 (Computer Fraud) and; (iv) Title 18, United States Code, Section 1956 (Money Laundering).

81. The provisions of U.S. statutes under which offences are alleged to have been committed, have not been quoted in *extenso* in complaint filed by the ED nor there is any reference made to the ingredients of such offences. Even Title 18, United States Code has not been filed along with the complaint, let alone filing of an opinion of an expert on the subject.

82. Under Section 57[7] of the Indian Evidence Act, 1872 the Courts in India are obliged to take judicial notice of all laws in force in the territory of India and other facts enumerated in the provision, however, foreign laws are

[7] Section 57 –Facts of which Court must take judicial notice.—The Court shall take judicial notice of the following facts: —

(1) All laws in force in the territory of India;
(2) xxxxx
...
(13) xxxxx
...

not stated therein. The United States Code, being a foreign law, cannot be taken judicial notice of by Indian Courts and the same has to be pleaded like any other fact. Reference in this regard may be had to the decision of the Hon'ble Supreme Court in ***Hari Shanker Jain vs. Sonia Gandhi, (2001) 8 SCC 233***. In the said case dispute regarding the validity of certificate of citizenship of the respondent therein arose and the issue before the Apex Court was that whether the respondent could have renounced her Italian citizenship and become a citizen of India, for which the appellants therein had failed to provide any reference to the statutory enactment or other provision on the issue, having force of law in Italy. The Hon'ble Supreme Court in this context observed that the Courts in India cannot take judicial notice of foreign law, therefore, it should be pleaded like any other fact. The relevant part observations of the Court read as under:

> *"27.* ***Italian law is a foreign law so far as the courts in India are concerned. Under Section 57(1) of the Indian Evidence Act, 1872, the court shall take judicial notice of, inter alia, all laws in force in the territory of India. Foreign laws are not included therein. Sections 45 and 84 of the Evidence Act permit proof being tendered and opinion of experts being adduced in evidence in proof of a point of foreign law.*** *Under Order 6 Rule 2 of the Code of Civil Procedure, 1908, every pleading shall contain a statement in concise form of the material facts relied on by a party but not the evidence nor the law of which a court may take judicial notice. But the rule against pleading law is restricted to that law only of which a court is bound to take judicial notice.* ***As the court does not take judicial notice of foreign law, it should be pleaded like any other fact, if a party wants to rely on the same*** *(see Mogha's Law of Pleadings, 13th Edn., p. 22). In Guaranty Trust Co. of New York v. Hannay & Co. it was held that: "Foreign law is a question of fact to an English court ... the opinion of an expert on the fact, to be treated with respect, but not necessarily conclusive."* ***In Beatty v. Beatty it was held that the American law in English***

***courts must be proved by the evidence of experts in that law***. *In Lazard Bros. and Co. v. Midland Bank, Ltd. Their Lordships of the Privy Council observed that what the Russian Soviet law is, is a question of fact, of which the English court cannot take judicial cognizance, even though the foreign law has already been proved before it in another case. The court must act upon the evidence before it in that actual case.* ***The statement of law by Halsbury in Laws of England (3rd Edn., Vol. 15, para 610 at p. 335) is that the English courts cannot take judicial notice of foreign law and foreign laws are usually matters of evidence requiring proof as questions of fact****."*

(emphasis supplied)

83. Likewise, this Court in the case of ***Mundipharma AG vs. Wockhardt Ltd., 1990 SCC OnLine Del 269*** had also articulated the above legal position. The question in this case was with regard to the enforceability of a particular clause under the Swiss law. This Court held Swiss Law being foreign law is a question of fact and opinion of an expert must be filed before the Court if reliance is placed on such foreign law. Relevant part of the judgment reads thus:

*"18.* ***The petitioner submitted that clause 27 of the agreement containing prohibition during the subsistence of the agreement and three years thereafter was enforceable under the Swiss law.*** *This submission was with reference to clause 34 which says that the terms of the agreement were to be government by the laws of Switzerland. I am of the view that for the purpose of deciding the validity of clause 27 of the agreement I have to see if it passes the test under section 27 of the Contract Act which makes every agreement by which one is restrained from exercising a lawful profession, trade or business of any kind to be void to that extent. No one before me disputes that clause 27 is within the category of agreements in restraint of trade. Law is against restrain of trade and the courts have not locked upon such agreements with favour. Such agreements sometimes are, however, required to be tested on the ground of reasonableness. This court has to see if clause 27 is valid as per laws of this country when the clause is*

*under challenge in the proceedings before this Court. This is particularly so when the agreement is to be performed in this country. Whether the arbitrators are bound to apply the substantive laws of switzerland relating to the contract is question when the matter goes for arbitration in terms of arbitration agreement between the parties is a different question altogether. Even in that case the award which would be a foreign award, if made would have to be tested on the touchstone of public policy of this country, if that foreign award is sought to be enforced in this country. (See clause (b) of Article V(2) of the Schedule and section 7(1)(b)(ii) of the Foreign Awards Act).* ***Assuming, however, that it would be laws of Switzerland that will govern the validity of clause 21, the question then arises what is that law? The petitioner has filed an affidavit of a lawyer practising in Switzerland. This is sought to be introduced as opinion of an expert being relevant under section 45 of the Indian Evidence Act, 1972. Foreign law is no doubt a question of fact. The opinion of an expert on the subject has to be tested by cross-examination. When at an interim stage only an affidavit is to be relied upon this affidavit has to be complete in all respects. The affidavit must show the qualification and experience of the expert. It must state if the law on the subject is codified and must also refer to judicial precedents in support of his views. It may perhaps be said that if the law is codified, opinion is not necessary on the subject. But sometimes in such cases also court would like to have the opinion of an expert as to what interpretation has been put on the law in the courts in the foreign country concerned. The opinion of the expert must be clear and cogent. I find the opinion of Ms. Werner on the question of foreign law quite obscure. It is more like a certificate. I will not, therefore, take any notice of this affidavit. Thus, there is nothing on record to show as to what is the swiss law on the subject of restraint of trade****."*

(emphasis supplied)

84. It is in the backdrop of above legal position that Mr. Hossain's submission that the MLA request received by the ED is a certified copy,

therefore, the same may only be required to be proved in terms of Section 78(6) of the Evidence Act, 1872 is to be appreciated.

85. The aforesaid submission is noted to be rejected. Even assuming that the MLA request is a certified copy as required under Section 78(6) of the Evidence Act, 1872, the same is not a substitute for the statute or provision of a corresponding law (*United States Code*) enacted in the United States of America, which will have to be proved as a question of fact during the course of trial by examining experts on the subject. At this stage no judicial notice can be taken of corresponding law of U.S., therefore, in the absence of material on record in the form of a relevant statute supported by the opinion of experts, there is nothing to establish even *prima facie* that the alleged predicate offence corresponds to the offences mentioned in the Schedule of the PMLA. Incidentally, in the absence of commission of scheduled offence, there cannot be any proceeds of crime.

86. At this juncture, it will also be relevant to note that the initial burden is on the prosecution to establish *prima facie* the three basic or fundamental facts as delineated in ***Vijay Madanlal Choudhary*** (*supra*). *Firstly*, that the criminal activity relating to a scheduled offence has been committed. *Secondly*, that the property in question has been derived or obtained, directly or indirectly, by any person as a result of that criminal activity. *Thirdly*, the person concerned is directly or indirectly involved in any process or activity connected with the said property being proceeds of crime. On establishing the fact that there existed proceeds of crime and the person concerned was involved in any process or activity connected therewith, itself, constitutes an offence of money laundering.

87. It is only after three foundational facts are *prima facie* established in a given case that the accused will assume the burden in terms of Section 24(a)[8] of the Act to convince the Court within the parameters of the inquiry under Section 45 that for the reasons adduced by him there are reasonable grounds to believe that he is not guilty of such offence.[9]

88. In the present case, the foundational facts that the alleged crime committed in U.S. is a scheduled offence and consequently the amount which has come to the account of petitioner/accused Vishal Moral is proceeds of crime have not been established even *prima facie*, therefore, the burden will not shift on petitioners/accused to convince the Court in terms of Section 45 that they are not guilty of an offence of money-laundering under the Act.

**NON-SPEAKING ORDER OF COGNIZANCE**

89. A submission has also been made by Mr. Shukla, the learned counsel appearing on behalf of petitioner/accused Vishal Moral, that the order taking cognizance does not reflect any application of mind. The order dated 01.08.2023 *vide* which cognizance was taken by the learned Special Court reads thus:

> "*The Court has heard SSP (ED). The Court has also perused the file. The Court is taking cognizance of offence under Section 3 read with Section 4 of PML Act. The accused persons be summoned for 16.08.2023.*"

[8] Section 24 - Burden of proof.-In any proceeding relating to proceeds of crime under this Act,-
(a) in the case of a person charged with the offence of money-laundering under section 3, the Authority or Court shall, unless the contrary is proved, presume that such proceeds of crime are involved in money-laundering;
(b) in the case of any other person the Authority or Court, may presume that such proceeds of crime are involved in money-laundering.

[9] Prem Prakash (supra)

90. Elaborating on his submission Mr. Shulka contends that the ED in the complaint has not disclosed or placed on record - (i) the identity of the victim; (ii) the complete contents of MLA; (iii) a complaint of the predicate offence in the US; (iv) communications between the US Central Authority and the Indian Central Authority; and (v) the communication between the Central Government and the ED. Therefore, there was no material before the learned Special Court with regard to commission of predicate offence in the U.S. and MLA request having been made by the U.S. Authorities to the Government of India.

91. In the present bail petitions, there is no challenge to the order *vide* which cognizance was taken by the learned Special Court, therefore, this Court need not delve deep into this submission, but certainly the absence of material to establish commission of scheduled offence in the United States of America, as noted in the foregoing part of the judgment, will enure to the benefit of the petitioners in the scheme of broad probabilities.

## BENEFIT OF FIRST PROVISO TO SECTION 45(1) OF PMLA

92. The first proviso[10] to sub-section (1) of Section 45 of the Act, *inter alia*, provides that a person who is accused either on his own or alongwith other co-accused of money-laundering may be released on bail, if the sum of laundered amount is less than one crore rupees.

93. The contention of Mr. Shukla, as noted above, is that as per the complaint, out of the total Ethereum amount, approximately 0.48 ETH valued at around US$ 959 was transferred to the account of petitioner/accused Vishal Moral which converts to approximately

[10] Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees may be released on bail, if the Special Court so directs.

Rs.80,000/-. According to Mr. Shukla it is the said amount which can be considered proceeds of crime, whereas another transaction on 15.08.2022 wherein approximately 21.63 BTC valued at approximately Rs.4,00,00,000/- were transferred from the account of the victim directly to the account of Vishal Moral was an act of theft and cannot, by any imagination, fall under Section 3 of PMLA.

94. At this stage, without going into the question as to whether the proceeds from the second transaction have been obtained by way of fraud or theft or by commission of any other offence, suffice it to state that all the offences against the property under Chapter XVII of the IPC, which includes theft as well, are scheduled offences under Part C, if the same have cross border implications. Therefore, *prima facie* there is no force in Mr. Shukla's submission that twin conditions envisaged under Section 45 for grant of bail will not be applicable as the laundered amount is only to the extent of Rs.80,000/-.

95. Insofar as the contention that in the complaint the ED has not provided the basis of calculating the value of the subject matter, it may be observed that basis of calculation is a matter of trial and the same cannot be gone into while deciding the bail plea of the petitioners.

## INCRIMINATING MATERIAL

### (i) Petitioner/accused -Vishal Moral

96. The incriminating material pressed into service by the ED against petitioner/Vishal Moral is in the form of – (i) statements of petitioner/Vishal Moral recorded under Section 50 of the PMLA; (ii) the WhatsApp/Telegram Chats; and (iii) seizure of cryptocurrency from Vishal Moral's account on the basis of MLA request.

97. In the present case, the ED has recorded as many as 12 statements of petitioner/accused Vishal Moral under Section 50 of the PMLA on various dates viz., 29.03.2023, 26.04.2023, 28.04.2023, 29.04.2023, 30.04.2023, 01.05.2023, 02.05.2023, 03.05.2023, 04.05.2023, 05.05.2023 06.05.2023 and 07.05.2023.

98. It is the case of ED itself that the petitioner/Vishal Moral was arrested on 26.04.2023. Clearly, except two statements of Vishal Moral recorded on 29.03.2023 and 26.04.2023, all remaining 10 statements have been recorded post his arrest.

99. The crux of the statement of petitioner/Vishal Moral recorded on 29.03.2023 has been stated in the complaint filed by the ED and the same reads thus:

> *"On being asked, Vishal Moral stated that he started working as freelancer digital marketer and from the savings of his earnings, he started a company called 'Infosys Live' in the year 2019 which provided services like Search Engine Optimization, Search Ads Marketing and Banner Design worldwide. In 2020, after closing the office of 'Infosys Live', he had joined M/s Addon Trip Private Limited (Travel Agency) as Director and Digital Marketing Strategist in mid of year 2020. There, he used to promote the website of M/s Addon Trip Private Limited on google search platform. Further, he also registered a company in USA named 'Infosys Live LLC' to provide services of digital marketing in USA, (Statement dated 29.03.2023)."*

100. Likewise, the essence of statement of petitioner/Vishal Moral recorded on 26.04.2023 as set out in the complaint reads as under:

> *"On being asked, he stated further that he received approximately 22 Bitcoin by mistake without providing any services and that he hadn't informed any authority. He stated that he had claimed these cryptocurrencies belonged to him and that in order to claim the stolen cryptocurrencies, he sent a fake*

*and self-created screenshot to WazirX Crypto Exchange as proof. However, WazirX Crypto Exchange blocked his account because he couldn't provide a source of such funds. (Statement dated 26.04.2023)."*

101. A reading of above two statements goes to show that the statement dated 29.03.2023 refers only to his professional credentials whereas the statement dated 26.04.2023 contains admission of petitioner Vishal Moral that he received certain Bitcoins by mistake and he claimed the same as belonging to him and sent a fake and self-created screenshot to WazirX Crypto Exchange as proof. There is nothing incriminating to establish Vishal Moral's involvement in commission of alleged fraud or in any kind of scam or money laundering.

102. The other statements of petitioner/Vishal Moral have undisputedly, been recorded post his arrest on 26.04.2023, therefore, such statements, which according to the ED contains incriminating material, will be hit by Section 25 of the Evidence Act and rendered inadmissible, as the same were recorded whilst the petitioner/Vishal Moral was in custody. Reference in this regard may be had to the decision of the Hon'ble Supreme Court in ***Prem Prakash*** (*supra*). In the said case, the incriminating statements of the appellant therein had been recorded by the ED under Section 50 of the PMLA whilst the appellant therein was in custody in another case ECIR. Thus, the argument put forth by the ED was that the appellant was not in custody in the concerned case when his statement under Section 50 of the PMLA was recorded. In this factual backdrop, the Hon'ble Supreme Court formulated the following question and then referring to its various earlier decisions observed as under:

> *"22. The question that arises is when a person is in judicial custody/custody in another case investigated by the same Investigating Agency, whether the statements recorded (in this case the statements dated 03.08.2023, 04.08.2023, 11.08.2023) for a new case in which his arrest is not yet shown, and which are claimed to contain incriminating material against the maker, would be admissible under Section 50?*
>
> *XXXX XXXX XXXX*
>
> *27.* ***In the facts of the present case, we hold that the statement of the appellant if to be considered as incriminating against the maker, will be hit by Section 25 of the Evidence Act since he has given the statement whilst in judicial custody, pursuant to another proceeding instituted by the same Investigating Agency.*** *Taken as he was from the judicial custody to record the statement, it will be a travesty of justice to render the statement admissible against the appellant."*
>
> (emphasis supplied)

103. In so far as the WhatsApp/Telegram Chats between the petitioner and co-accused Adnan Nisar and Shivang Malkoti are concerned, case of the ED is that the said chats are with pseudo or dummy names. Even assuming that the said chats are between the petitioner/accused and other co-accused, at this stage suffice it to say that such chats cannot establish a live link between the petitioner/Vishal Moral and other co-accused in the absence of scientific reports. Reference in this regard may be had to the judgment of Hon'ble Supreme Court in ***Bharat Chaudhary vs. Union of India, (2021) 20 SCC 50,*** the relevant part of which reads as under:-

> *"13. ...Reliance on printouts of WhatsApp messages downloaded from the mobile phone and devices seized from the office premises of A-4 cannot be treated at this stage as sufficient material to establish a live link between him and A-1 to A-3, when even as per the prosecution, scientific reports in respect of the said devices is still awaited."*

104. The Hon'ble Supreme Court in ***Ambalal Sarabhai*** (*supra*) also observed that *the WhatsApp messages which are virtual verbal communications are matters of evidence with regard to their meaning and its contents to be proved during trial by evidence-in-chief and cross-examination.*

105. On behalf of the ED, it was also argued that incriminating material in the form of MLA request has been corroborated from the seizure of exact amount from Vishal Moral's account maintained with WazirX. However, in view of the *prima facie* opinion of this Court that there is a missing link to establish that the seized amount from WazirX account of petitioner/Vishal Moral are proceeds of crime from an offence committed in U.S. which corresponds to the scheduled offence(s), merely seizure of amount pursuant an MLA request is not sufficient for the petitioner/accused Vishal Moral to assume the burden to convince the Court in terms of Section 45 of the Act that there are reasonable grounds to believe that he is not guilty of an offence under the Act.

**ii) <u>Petitioner/accused – Adnan Nisar and Shivang Malkoti</u>**

106. Insofar as the other two petitioners namely Adnan Nisar and Shivang Malkoti are concerned, the incriminating material available against them is in the form of statements under Section 50 of PMLA, which were subsequently retracted by the said accused persons, as well as, the same WhatsApp/Telegram chats which have been pressed into service by the ED against co-accused/Vishal Moral.

107. Notably, petitioner/accused Adnan Nisar retracted his statement under Section 50 of PMLA by filing an application on 16.08.2023. Though petitioner/accused Shivang Malkoti in his statement under Section 50 of

PMLA has stated that he was maintaining temporary Telegram account with pseudo name of Raman Kohli and WhatsApp number in the name of Raman Sharma but this statement has been subsequently retracted by the petitioner/Shivang by filing an application that was taken on record by the learned Special Court *vide* order dated 16.09.2023.

108. The proceedings under Section 50 of the PMLA may be judicial proceedings for the limited purpose mentioned therein but a confession made by an accused in his statement under Section 50 of the PMLA is not a judicial confession.[11] Even with regard to the retraction of judicial confession, the Hon'ble Supreme Court in ***Bhagwan Singh & Ors. vs. State of M.P., (2003) 3 SCC 21*** has observed that when such a confession is found to be not voluntary and more so when it is retracted, the conviction cannot be based on such retracted judicial confession, in the absence of other reliable evidence. Relevant para of the said judgment is as under:

> *"30. It has been held that there was custody of the accused Pooran Singh with the police immediately preceding the making of the confession and it is sufficient to stamp the confession as involuntary and hence unreliable. A judicial confession not given voluntarily is unreliable, more so when such a confession is retracted. It is not safe to rely on such judicial confession or even treat it as a corroborative piece of evidence in the case. When a judicial confession is found to be not voluntary and more so when it is retracted, in the absence of other reliable evidence, the conviction cannot be based on such retracted judicial confession."*

109. Likewise, in ***Puran vs. State of Punjab, (1952) 2 SCC 454***, it was observed that it is settled rule of evidence that unless a retracted confession

[11] Judicial confessions are those which are made before Magistrate or Court in course of judicial proceedings [Ramanand @ Nandlal Bharti vs. State of Uttar Pradesh, AIR 2022 SC 5273]

is corroborated in material particulars, it is not prudent to base a conviction in a criminal case on its strength alone.

110. In regard to the reliability of retracted statements, a Coordinate Bench of this Court in ***Raman Bhuraria vs. Directorate of Enforcement, 2023 SCC OnLine Del 657***, referring to the decision of the Division Bench of this Court has observed that such retracted statements are though admissible, but the reliability of such statements is questionable. This Court took a view that the retracted statements cannot form basis for the guilt of the applicant in the offence as alleged and the question as to why such statements have been retracted are questions of trial. The relevant part of the said decision reads thus:

> *"58.* ***The reliability of the retracted statements has been discussed by the Division Bench of this Court CCE v. Vishnu & Co. (P) Ltd.****:*
>
> > *"40. In fact Ms. Sharma too insisted upon reading from such retracted statements in order to persuade the court to hold that the impugned order of the Cestat is perverse. According to her the retraction made more than 20 months after the making of the initial statements 'would have no effect in the eye of the law'. She too submitted that the responsibility of ensuring the presence of such persons for cross-examination was of the noticees themselves.*
> >
> > *41.* ***What the above submission overlooks is the 'reliability' of such statements. Once it is shown that the maker of such statement has in fact resiled from it, even if it is after a period of time, then it is no longer safe to rely upon it as a substantive piece of evidence. The question is not so much as to admissibility of such statement as much as it is about its 'reliability'. It is the latter requirement that warrants a judicial authority to seek, as a rule of prudence, some corroboration of such retracted statement by some other reliable independent material.*** *This is the approach adopted by the Cestat and*

*the court finds it to be in consonance with the settled legal position in this regard."*

*59.* ***In the present case as well, the question is not regarding the admissibility but the reliability. The statements had concretely named the applicant. However, in their subsequent retraction the reliability of the statements themselves become doubtful.*** *Statements of employees of SBFL, accommodation entry operators (Devki Nandan Garg and Ashok Kumar Goel) are a cut copy paste job with even the punctation marks of commas, full stops not differing.*

***60. Prima facie in view of the retraction, the reliability of these statements is questionable. The retracted statements cannot form the basis of the guilt of the applicant of the offences as alleged. Prima facie, I find it difficult to place the guilt of the offence under PMLA on the applicant, based on these statements. Further, the questions as to why the statements were retracted are questions of trial.****"*

(emphasis supplied)

111. Having regard to the above legal position, the reliability of the retracted statements of the co-accused Adnan Nisar and Shivang Malkoti is questionable and conviction cannot be based solely on the basis of such statements without corroborative evidence that would lend credence to such retracted statements.

112. For the reasons already stated above while dealing with the incriminating material against accused/Vishal Moral, the WhatsApp/Telegram Chats cannot be pressed into service against accused Adnan Nisar and Shivang Malkoti as well.

113. That apart, it is not the case of ED that any recovery has been made from accused Adnan Nisar and Shivang Malkoti, or they were engaged in development of any malicious software, fake clicks of competitors, ad

website, running advertisements on the websites/search engines, or trading the wallet or accounts of victims. It is also not the case of the ED any advertisement accounts have been recovered from Shivang Malkoti.

114. Further, since the statements of accused/Vishal Moral post his arrest are inadmissible, therefore, the same cannot be relied upon against the co-accused Adnan Nisar and Shivang Malkoti. The confessional statement of a co-accused under Section 50 of the PMLA is otherwise, not a substantive piece of evidence and can be used only for the purpose of corroboration in support of other evidence to lend assurance to the Court in arriving at a conclusion of guilt.[12]

115. Furthermore, even assuming that petitioner/Adnan Nisar is the person who was chatting with accused/Vishal Moral, the said chats merely reveal that it was the main accused Vishal Moral who asked the petitioner Adnan Nisar to get in touch with some unknown persons and collect their crypto currency IDs. No evidence has been brought to the notice of this Court that petitioner/Adnan Nisar at any point of time knew of the identity of the unknown persons/traders or their location, their business operations or any agent/association of the traders. Thus, there is merit in the contention of Mr. Mir that Adnan Nisar had no knowledge, whatsoever, about the length and breadth of the business operations of accused/Vishal Moral. Likewise, no evidence has been brought to the notice of Court to show that co-accused Shivang Malkoti was having any knowledge as to the nature of activities which accused/Vishal Moral was indulging into at the relevant time. The WhatsApp/Telegram Chats on the basis of which knowledge of Vishal Moral's activities could be ascribed to co-accused/Shivang Malkoti are

[12] Sanjay Jain (supra)

under pseudo/dummy names. As already observed, such chats are to be proved during trial and at this stage co-accused/Shivang Malkoti cannot be tied to such chats. Besides, the first statement of Shivang Malkoti dated 05.05.2023 under Section 50 of the Act in which he was confronted with the chats has already been retracted. Thus, *prima facie* it cannot be said that the petitioner/Adnan Nisar or Shivang Malkoti were possessed of requisite *mens rea.*

116. In any case, the role ascribed to co-accused Adnan Nisar and Shivang Malkoti is subsidiary to that of main accused/Vishal Moral, therefore, all the factors discussed in favour Vishal Moral in the scheme of broad probabilities shall enure to their benefit as well.

**DELAY IN TRIAL**

117. Section 45 of the PMLA provides that no bail in relation to offence of money-laundering is to be granted unless twin conditions are fulfilled, namely, (i) there are reasonable grounds for believing that accused is not guilty of offence of money-laundering and (ii) he is not likely to commit any offence while on bail. In recent pronouncements, the Hon'ble Supreme Court has laid down in no uncertain terms that even under PMLA the governing principle is that *"bail is the rule and jail is the exception".* Reference in this regard may be had to the decision in ***Manish Sisodia*** (*supra*) and ***Prem Prakash*** (*supra*). The relevant extract from ***Prem Prakash*** (*supra*) can beneficially be referred to at this stage, which reads thus:

> *"11. ….*
>
> *In Vijay Madanlal Choudhary v. Union of India, 2022 SCC OnLine SC 929, this Court categorically held that while Section 45 of PMLA restricts the right of the accused to grant of bail, it could not be said that the conditions provided under*

*Section 45 impose absolute restraint on the grant of bail. Para 131 is extracted hereinbelow:—*

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

***These observations are significant and if read in the context of the recent pronouncement of this Court dated 09.08.2024 in Criminal Appeal No. 3295 of 2024 [Manish Sisodia (II) v. Directorate of Enforcement], it will be amply clear that even under PMLA the governing principle is that "Bail is the Rule and Jail is the Exception"****. In para 53 of [Manish Sisodia (II), this Court observed as under:—*

> *"53…..From our experience, we can say that it appears that the trial courts and the High Courts attempt to play safe in matters of grant of bail. The principle that bail is a rule and refusal is an exception is, at times, followed in breach. On account of non-grant of bail even in straight forward open and shut cases, this Court is flooded with huge number of bail petitions thereby adding to the huge pendency. It is high time that the trial courts and the High Courts should recognize the principle that "bail is rule and jail is exception."*

*All that Section 45 of PMLA mentions is that certain conditions are to be satisfied.* ***The principle that, "bail is the rule and jail is the exception" is only a paraphrasing of Article 21 of the Constitution of India, which states that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Liberty of the individual is always a Rule and deprivation is the exception****. Deprivation can only be by the procedure established by law, which has to be a valid and reasonable procedure.* ***Section 45 of PMLA by imposing twin conditions does not re-write this***

> ***principle to mean that deprivation is the norm and liberty is the exception.*** *As set out earlier, all that is required is that in cases where bail is subject to the satisfaction of twin conditions, those conditions must be satisfied."*
>
> (emphasis supplied)

118. It was observed by the Hon'ble Supreme Court in ***Prem Prakash*** (*supra*) that Article 21 being a higher constitutional right, statutory provisions must align themselves to the said higher constitutional edict.

119. Incidentally, in ***Manish Sisodia*** (*supra*), the Hon'ble Supreme Court considering the custody period of 17 months of the appellant therein and the likely delay to be expected in conclusion of trial and regard being had to the voluminous documents and number of witnesses, observed that the appellant therein cannot be kept behind bars for an unlimited time in the hope of completion of speedy trial which would deprive the fundamental right to liberty under Article 21 of the Constitution.

120. Reference may also be had to yet another decision of Hon'ble Supreme Court in ***Ramkripal Meena*** (*supra*)**,** wherein considering the custody period of the petitioner being more than one year and there being no likelihood of conclusion of trial within a short span, it was observed that rigours of Section 45 of the Act can suitably be relaxed to afford conditional liberty to the petitioner.

121. Coming back to the facts of the present case, it is an admitted position that the petitioner/Vishal Moral is in custody since 26.04.2023, therefore, he has been incarcerated for more than 16 months, whereas co-accused/petitioners namely Adnan Nisar and Shivang Malkoti are in custody since 09.05.2023 and have likewise spent more than 16 months in custody, whereas the maximum sentence which can be awarded for the offence under

the PMLA is 07 years in the event the petitioners are found guilty. The documents to be proved in the present case also runs into 2500 pages and there are various witnesses to be examined by the ED. However, the present status of the proceedings is that the trial has not commenced, inasmuch as, the charges have not yet been framed. On behalf of the petitioners, it is submitted that further investigations are pending which position was not disputed by the learned Special Counsel for the ED.

**CONCLUSION**

122. The upshot of the above discussion is that this Court is satisfied that there are reasonable grounds for believing that the petitioners are not guilty of the offence. Further, on a conspectus of the custody period, the delay in commencement of trial and no likelihood of conclusion of trial anytime in near future, the rigors of Section 45 of the Act deserve to be relaxed. Ordered accordingly.

123. Further, all relevant documents and devices including laptops, mobile phones, Ledger, Hardware Wallet, etc., have already been recovered and seized. The alleged proceeds of crime held in the accounts maintained with WazirX have also been frozen. Thus, all material documents are already in possession of the investigating agencies and no further recovery is to be made from the petitioners. It is also not the case of the ED that the petitioners have a criminal record or any criminal case is pending against them. Therefore, petitioners/accused are not likely to commit any offence while on bail.

124. Thus, the petitioners have made out a case for grant of regular bail. Accordingly, the petitioners are enlarged on bail subject to the following conditions :

a. Petitioner/Vishal Moral will furnish a Personal Bond in the sum of Rs.2,00,000/- and one surety of the like amount to the satisfaction of the learned Special Court/learned Trial Court/CMM/Duty Magistrate;

b. Petitioner/Adnan Nisar will furnish a Personal Bond in the sum of Rs.50,000/- and one surety of the like amount to the satisfaction of the learned Special Court/learned Trial Court/CMM/Duty Magistrate;

c. Petitioner/Shivang Malkoti will furnish a Personal Bond in the sum of Rs.50,000/- and one surety of the like amount to the satisfaction of the learned Special Court/learned Trial Court/CMM/Duty Magistrate;

d. Petitioners shall not leave the country during the bail period without prior permission of this Court.

e. Petitioners shall appear before the Court as and when the matter is taken up for hearing.

f. Petitioners shall provide a mobile number to the I.O. concerned which shall be kept in working condition at all times and they shall not change the mobile number without prior intimation to the Investigating Officer concerned.

g. Petitioners shall join the investigation as and when directed and shall report once in a month to the I.O. concerned.

h. Petitioners shall not dispose of any property without the specific permission of the Special Court.

i. Petitioners shall not indulge in any criminal activity and shall not communicate with or come in contact with, or influence any

of the prosecution witnesses or tamper with the evidence of the case.

j. In case the petitioners change their addresses, they will inform the I.O. concerned and the Special Court also.

125. The petitions stand disposed of alongwith all pending applications.

126. It is clarified that the observations made hereinabove are only for the limited purpose of deciding the present bail applications and the same shall not be construed as an expression of opinion on the merits of the case.

127. Copy of the order be forwarded to the concerned Jail Superintendent for necessary compliance and information.

128. Order *dasti* under signatures of the Court Master.

129. Order be uploaded on the website of this Court.

**VIKAS MAHAJAN, J.**

**SEPTEMBER 17, 2024**
**dss/MK**