

(2011) 08 BOM CK 0103

In the Bombay High Court

Case No : Criminal Bail Application No. 994 of 2011

Hasan Ali Khan

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 12-08-2011

Acts Referred:

Antiquities and Art Treasures Act, 1972 — Section 25
Constitution of India, 1950 — Article 20
Criminal Procedure Code, 1973 (CrPC) — Section 167, 167(2)
Foreign Exchange Management Act, 1999 — Section 3A, 4
Penal Code, 1860 (IPC) — Section 120B, 379, 406, 411, 420
Prevention of Money-Laundering Act, 2002 — Section 2, 2(1), 24, 3, 4

Citation : (2012) BomCR(Cri) 807

Hon'ble Judges : A.M. Thipsay, J

Bench : Single Bench

Advocate : I.A. Bagaria, Uma Bagaria, Vikrant Sabne, Vipul Jain and Sandeep Batuvia, for the Appellant; D.J. Khambata, ASG, Revati Mohite-Dere and S.D. Shinde, APP, for the Respondent

Judgement

A.M. Thipsay, J.—The Applicant is the Accused No. 1 in Special Case No. 1 of 2011. There is one more Accused in the said case, i.e. Kashinath Tapuriah, mentioned as the Accused No. 2 therein. The allegation against the Applicant and the other Dixit Accused is that they have committed the offence punishable u/s 4 of the Prevention of Money-Laundering Act, 2002, (hereinafter referred to as "the PML Act"). The said case arises on the basis of a complaint filed by the Deputy Director, Directorate of Enforcement, Ministry of Finance, Department of Revenue, Government of India.

2. The Applicant was arrested in the said case on 7th March, 2011. He was produced before the Special Court on 8th March, 2011 for obtaining his remand in the custody of Directorate of Enforcement. It appears that, initially, the Special Court remanded the Applicant in custody, but by an order dated 11th March, 2011, rejected the prayer of the Directorate of Enforcement for remand of the

Applicant in custody. The Special Court released the Applicant on bail. As in connection with a Public Interest Litigation pending in the Supreme Court of India, the Directorate of Enforcement was required to file status report in respect of the investigations carried out in this case, the matter was brought to the notice of the Supreme Court of India. Their Lordships of the Supreme Court of India ordered stay of the operation of the bail order and authorized the detention of the Applicant in custody for a period of four days, initially. On 29th March, 2011, the Supreme Court of India disposed of the Appeal as well as the Dixit S.L.P., giving liberty to the Applicant to seek bail and to the Directorate of Enforcement to seek further remand in custody, by making appropriate applications before the Special Court. The Applicant was, thereafter, remanded into custody from time to time. The complaint came to be filed on 6th May, 2011. The application for bail made by the Applicant before the Special Court was rejected by the learned Judge. The Applicant has now approached this Court for bail.

3. I have heard Mr. Bagaria, the learned Advocate for the Applicant, at length. I have also heard Mr. Khambata, the learned Additional Solicitor General, for Respondent No. 1, and Mrs. Shinde, the learned APP for Respondent No. 2.

4. A number of contentions on facts and also on law have been raised by Mr. Bagaria, the learned Advocate for the Applicant, and also by Mr. Khambata, the learned Additional Solicitor General for the Union of India. I have been taken through the Bail Application and four affidavits-in-reply filed by the Union of India opposing the Bail Application. Apart from the oral submissions, several submissions in writing - on facts and also on law - have Dixit been made by Mr. Bagaria, the learned Advocate for the Applicant, and Mr. Khambata, the learned Additional Solicitor General for the Union of India, and reliance has been placed on a number of pronouncements of the High Courts and also of the Apex Court, in support of their respective contentions.

5. The facts of the present case, as appearing from the complaint may, briefly, be stated as under:

6. The case against the Applicant (and the other Accused) was registered by the Directorate of Enforcement as back as on 8th January, 2007 vide Enforcement Case Information Report No. 02/MZO/2007. It was on the basis of certain information and documents received from the Income Tax Department. The Income Tax Department had carried out some searches in the premises owned / possessed by the Applicant and had found documents indicating that the Applicant Hasan Ali Khan was dealing in foreign exchange. The Income Tax Department, by a letter dated 8th January, 2007, reported to the Directorate of Enforcement that during the search at the residence of the Applicant at Peddar Road, Mumbai, cash of Rs. 88,05,000/-was seized. A number of imported watches and some jewelery were also found during the said search. It was also found that the Applicant had purchased an expensive car worth about Rs. 60 lacs from one Anil Shankar of Bangalore through one Sheshadri, also from Bangalore,

and that the Applicant had paid, till then, an amount of Rs. 46 lacs towards the purchase of the said car. Certain documents, which were found by the Income Tax Department, during the course of the search, were forwarded to the Directorate of Enforcement.

The documents received from the Income Tax Department contained several transfer instructions issued by the Applicant to transfer various amounts to different persons from the Bank Accounts held by him outside India. The amounts involved in the instructions were running into billions of dollars. The Income Tax Department assessed the total income of the Applicant for the Assessment Years from 2001-2002, 2002 to 2007 and 2007 to 2008 as Rs. 110,412,68,85,303/-.

During the course of investigation, the Directorate of Enforcement obtained a notarized document signed by the Applicant on 29th June, 2003 at London. It was notarized by one Mr. Nicolas Ronald Rathbone Smith, Notary Public of London, on 30th June, 2003.

On the investigations conducted under the Foreign Exchange Management Act, 1999, (hereinafter referred to as "the FEMA"), show cause notices were issued to the Applicant for violation of Sections 3A and 4 of the FEMA for dealing in for acquiring and holding foreign exchange to the extent of US \$ 8000453000, equivalent to Indian currency of Rs. 36,000 crores approximately, in his account with Union Bank of Switzerland, AG, Zurich, Switzerland.

Inquiries also revealed that the Applicant Shri Hasan Ali Khan had obtained at-least three passports by submitting false documents, by making false statements and by suppressing the fact of already having a passport.

The analysis of documents forwarded by the Income Tax Department and the evidence collected by the Directorate of Enforcement revealed that the Applicant had kept a large number of Foreign Bank Accounts. For ascertaining the details of these Accounts and documents pertaining to transactions in those Accounts, Letters Rogatory to the Competent Authority in U.S.A., U.K. U.A.E., Singapore, Hong Kong and Switzerland were issued. Reply in respect of the Letters Rogatory issued to the Competent Authority in U.S.A. was received on 29th March, 2010, wherein it was stated that, as per the instructions of the Applicant, Sarasin Bank, Basel, Switzerland had transferred US \$ 700,000 by debiting US \$ Account maintained with Citi Bank, New York, and that the said amount was credited to the account of Barclays Bank, New York, who, in turn, had remitted the said amount of US \$ 700,000 into equivalent amount in Sterling Pounds to Barclays Bank Head Office, London. Finally, the amount of Sterling Pounds 369081.51, equivalent to US \$ 700,000, to Barclays Bank was further credited to the account of M/s. S.K. Financial Services. It was revealed that the Applicant had given instructions to Sarasin Bank for transfer of the said amount to M/s. S.K. Financial Services in their Account maintained with Barclays Bank, London.

In the course of investigation, statements of the Applicant were recorded u/s

50(3) of the PML Act, the details whereof have been given in the complaint. Statements of several persons, including that of the co-accused Kashinath Tapuriah, the wife of the Applicant, were recorded under the same provisions.

The investigation also revealed that the Applicant had sold a Diamond belonging to Nijam and routed the sale proceeds through his Account in Sarasin Bank to Barclays Bank.

7. The conclusions of the complainant are recorded in para 3 of the complaint, which are to the effect "that the Applicant and the other Accused had derived and obtained various properties directly or indirectly as a result of criminal activities relating to scheduled offences, which they were projecting as untainted property". It is asserted that "the properties acquired by the Accused persons are nothing but proceeds of crime" and it is further emphasized that "the evidence collected did not, even remotely, indicate that the properties were acquired by lawful means."

8. The contention of Mr. Bagaria, the learned Advocate for the Applicant, is basically that there is no material with the Directorate of Enforcement to justify the allegation that has been levelled against the Applicant. He submitted that the whole case is based on certain documents and the so called admissions made by the Applicant, which, according to him, have no evidentiary value. He also submitted that, even otherwise, there is no material to show that the property, which the Applicant allegedly had, was proceeds of crime within the meaning of Clause (u) of Section 2(1) of the PML Act. Additionally, a number of contentions on the legal aspects have been advanced by Mr. Bagaria, the learned Advocate for the Applicant.

9. Mr. Khambata, the learned Additional Solicitor General, on the other hand, submitted that there was overwhelming evidence available with the Enforcement Directorate to show the prima-facie involvement of the Applicant in the alleged offences. He referred to various provisions under the PML Act and highlighted, in particular, the provisions of Sections 24 and 45 of the said Act.

10. The complaint is running into 43 pages and the annexures thereto are running into 768 pages. With the assistance of the learned Counsel for the parties, I have glanced through the relevant record.

11. A number of contentions have been raised by Mr. Bagaria, the learned Advocate for the Applicant, dealing with the allegation that the Applicant was holding various Accounts in Foreign Banks, and that these Accounts had huge amounts in their credit. He submitted that there is no material or communication from the said Banks giving the details of such Accounts and indicating that, indeed, such Accounts had been opened and maintained by the Applicant. According to him, only on the basis of the statements made by the Applicant that he had a number of Accounts in Foreign Banks, and that he had huge amounts into the credit of those Accounts, this aspect cannot be established. He suggested that a person may make a false claim of his possessing certain

properties for various reasons and merely because a person has made such a claim, that claim cannot be accepted as a fact. It is true that much of the material available with the Directorate of Enforcement consists only in the form of statements of the Applicant, of the co-accused and some other persons, recorded u/s 50(3) of the PML Act. The Directorate of Enforcement has, so far, not been able to obtain any record or details of the relevant transactions from the concerned Banks, in spite of the fact that the case was registered more than four years back, and that the Applicant has been in custody since 7th March, 2011. Undoubtedly, the value to be attached to the statements of the Applicant, recorded u/s 50(3) of the PML Act, in the trial for the offence punishable u/s 4 of the PML Act, would need consideration during the trial. Similarly, the statements made by the co accused, which exonerate himself, but implicate the Applicant, how far can be used against the Applicant, -not in the adjudication proceedings, but during his trial, -would also need serious consideration. The voluntariness of the confessional statements made by the Applicant, if any, would also need to be assessed, keeping in mind that the statements have been recorded while he was in custody and the prolonged period of custody would also have a bearing on this issue. However, in the view that I am taking, I do not feel it necessary to enter into a deeper discussion on this aspect, atleast at this stage, and what needs to be observed is that, prima facie, indeed, it appears that the Applicant had several Accounts in Foreign Banks, and that huge amounts were in the credit of atleast some of these Accounts.

12. At this stage, the relevant provisions in the PML Act may be noticed.

13. The offence punishable u/s 4 of the said Act has been defined in Section 3 thereof. Section 3 of the PML Act reads as under:

3. Offence of money-laundering -Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime and projecting it as untainted property shall be guilty of offence of money-laundering.

14. The term "proceeds of crime" has been defined in Clause (u) of Section 2(1) of the said Act, which reads as under:

2(1)(u). "proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property

15. "Scheduled Offence" has been defined in Clause (y) of Section 2 of the said Act, which reads as under:

2(1)(y). Scheduled Offence means-

(i) the offences specified under Part A of the Schedule; or

(ii) the offences specified under Part B of the Schedule if the total value involved in such offences is thirty lakh rupees or more; or

(iii) the offences specified under Part C of the Schedule.

16. Clause (x) of Section 2(1) of the said Act clarifies that "Schedule" means the Schedule to the said Act.

17. Thus, the ingredients of the offence of money-laundering punishable u/s 4 of the said Act are as follows:

(i). Commission of a scheduled offence or an attempt to commit the same;

(ii). Property or the value of any property is derived or obtained by any person as a result of criminal activity relating to such scheduled offence;

(iii). Such property or the value of such property is projected as "untainted property."

18. It has already been observed that from the averments made in the complaint and the material produced in support thereof, it does appear that the Applicant had several Accounts in Foreign Banks, and that huge amounts were in credit of at-least some of these Accounts. It, therefore, prima facie, appears that the Applicant has violated the provisions of the Income Tax Act and the provisions of FEMA. The crucial question, however, is whether there exists a prima facie case against the Applicant with respect to the offence of money-laundering punishable u/s 4 of the PML Act. In this regard, the crucial aspect would be whether the amounts, which are said to be in the various Accounts allegedly held by the Applicant, were proceeds of crime. The scheme of the provisions of the PML Act makes it clear that there has to be some scheduled offence or scheduled offences which would generate the money that is being laundered. A crime is committed. Money is earned illegally by committing the said crime, but the criminal cannot put the money earned by the crime into any use immediately, as this would immediately arouse suspicion and would provide evidence of the crime itself. It is, therefore, that it becomes necessary for a criminal to make the proceeds of crime appear to be generated in some other way, i.e. by some other lawful source, and it is for this purpose that money is laundered. Therefore, the existence of a scheduled offence is a sine-qua-non for the offence of money-laundering.

19. Since the emphasis of Mr. Khambata, the learned Additional Solicitor General, was more on the aspect of the Applicant's having possessed huge amounts in various Bank Accounts held by him in Foreign Banks, which would, undoubtedly, invite action for the violation of the provisions of Income Tax Act and FEMA, but not necessarily point out an offence punishable u/s 4 of the PML Act, Mr. Khambata, the learned Additional Solicitor General, was specifically asked to address on the issue as to whether there is material to show, though prima facie, that the amounts held by the Applicant were proceeds of crime. It was specifically asked as to which scheduled offence the prosecution alleges as having been committed by the Applicant - or by anybody else. The Scheduled Offences allegedly involved in this case are said to be -

- (i) the offences punishable under the Passports Act and;
- (ii) the offence relating to the theft of a Diamond from the Jewellery belonging to Nijam.

20. The first contention advanced by Mr. Bagaria, the learned Advocate for the Applicant, with respect to the offences punishable under the Passports Act is that the offences under the Passports Act were included in the Schedule only on 1st June, 2009. He contended that the offence under the Passports Act was registered in Mumbai in the year 2007-2008, when it was not a scheduled offence. His contention is that the PML Act cannot be given a retrospective effect. In other words, according to him, the proceeds of a crime, which was not a scheduled offence at the time when it was committed, would not attract the applicability of the PML Act. This contention advanced by Mr. Bagaria does not seem to be sound. It is clear that the essence of the offence of the money-laundering is "projecting of the proceeds of crime as untainted property". It is this "projecting" that attracts the applicability of the penal provisions of PML Act. Now, where such sale proceeds, or the property derived from a crime, which, at that time, was not a scheduled offence, but was a scheduled offence when such sale proceeds or such property was projected as untainted, there would be no bar to the applicability of the PML Act. If the provisions of Section 3 of the PML Act are interpreted in this manner, it would not amount to giving retrospective effect to the said Legislation. If the proceeds of a crime, which has been declared as a "scheduled offence" on the day on which the "projection of such proceeds" as "untainted" is attempted or undertaken, the provisions of the PML Act would apply. Such a course, cannot be said to be violative of Article 20 of the Constitution. Since in the view that I am taking not much turns on this aspect, I refrain from discussing this aspect any further.

21. What, however, needs to be observed is that where even the projection of the proceeds of crime as "untainted" has taken place before the commencement of the provisions of the PML Act, then the charge of an offence punishable under the PML Act cannot be levelled with respect to such transactions. In other words, the crucial date would be the date on which the projection of the proceeds of crime as "untainted" takes place, and, if this has taken place before the commencement of the PML Act, then it cannot be suggested that a person can be prosecuted for the offence punishable u/s 4 thereof. In the instant case, most of the transactions, which are the subject matter of the case against the Applicant, have taken place before coming into force of the PML Act. They cannot be the subject matter of prosecution for the offence punishable under the PML Act. It was faintly suggested, to over come this difficulty, that the offence of money-laundering is a continuing offence. This Dixit contention, -if it is intended thereby to suggest that even the cases where the money-laundering had already been done before the commencement of the PML Act, would give rise to the prosecution under the provisions of the PML Act, -has to be rejected forthwith. Since, ultimately, however, not much turns on this aspect so far as the present

Bail Application is concerned, I do not wish to discuss this aspect any further.

22. There is also another aspect of the matter. The essence of the offence defined in Section 3 of the PML Act is projecting proceeds of crime as "untainted property". One would think that it is only when a legitimate source of the earning with respect to the tainted property, i.e. proceeds of crime, is suggested or attempted to be suggested that the offence punishable u/s 4 of the PML Act would be said to be committed. In other words, it requires consideration whether where a person having proceeds of crime in his possession puts them in a Bank Account and then transfers the same to another Account, he can be said to have projected that money as "untainted property". The proceeds of crime would remain the proceeds of crime, irrespective of whether they are kept in the house, or deposited in a Bank Account, or kept with somebody else. Projecting them as "untainted property", which is the essence of the offence punishable u/s 4 of the PML Act, would involve offering of some explanation with respect to the acquisition of the said property and showing it to be having a lawful source of earning. My prima facie view in this regard is that it is only when an attempt is made to show the source of that money as something legitimate, it would amount to projecting the proceeds as "untainted property". When this aspect was discussed in the course of oral arguments, Mr. Khambata, the learned Additional Solicitor General, submitted that an amount which is repeatedly transferred to various different Bank Accounts, it would be impossible to trace it to the scheduled offence from which it has been derived, and that, therefore, merely transferring from one Account to another and keeping on doing so would amount to projecting the property as "untainted property". It is true that if the number of transfers are very high, it would be difficult to trace or detect the taint attached to such money and, if the transfers are made with that object, it may be said that the person resorting to such transfers has projected the property as "untainted". For the present, I proceed on the basis that even this requirement - of projecting - has been fulfilled.

23. However, the next contention of Mr. Bagaria, the learned Advocate for the Applicant, namely, that by committing the offences under the Passports Act, the Applicant did not receive or obtain any property, needs to be considered seriously. Obviously, by committing the offences under the Passports Act, the said property has not been "derived or obtained". This was pointed out to Mr. Khambata, the learned Additional Solicitor General, who advanced an argument, which is quite interesting. He submitted that the definition of "proceeds of crime" is very wide, and that it involves "deriving or obtaining of property directly or indirectly by any person as a "result" of criminal activity relating to scheduled offence". Thus, he emphasized the word "result" and the phrases "directly or indirectly" and "criminal activity relating to a scheduled offence". According to him, it need not be the direct result of commission of a scheduled offence. His argument runs thus:-"by committing the offence under the Passports Act, the Applicant could go out of India and open a Bank Account abroad. The Applicant could not have gone out of India without committing the offence under the

Passports Act, as his previous Passport had been seized. Thus, it is by committing the offence under the Passports Act, i.e. a scheduled offence, that the Applicant could go out of India; and that, because he could go out of India, he could open an Account in a Foreign Bank. Therefore, the money, that was credited into that Account, would be "property derived or obtained", as a result of criminal activity relating to a Scheduled Offence. This argument is far-fetched and shows a feeble attempt to wriggle out of the position that though the offence was registered more than four years back; and though the Applicant and the co-accused have been in custody since March, 2011, and have been sufficiently interrogated, by committing which offences such huge amount was generated is still not clear to the Investigating Agency itself. The properties or the monies in question were obviously not earned by committing the offences under the Passports Act. Even if these far-fetched arguments are accepted, they can lead to the proposition that the opening of an Account in a Foreign Bank was a "result" of the criminal activity relating to the offence under the Passports Act, but cannot be carried further to claim that opening of the Bank Account resulted in deriving or obtaining the property or money in question. Opening of a Bank Account can never amount to obtaining or deriving property, nor can the obtaining or deriving of property be a "result" of opening the Account. This contention, therefore, is required to be rejected forthwith.

24. The other scheduled offence involved in this case, is said to be relating to the theft of a Diamond from the jewellery belonging to Nijam. It is submitted that, in this regard, the Hyderabad Police have registered a F.I.R. bearing No. 136 of 2011 dated 1st May, 2011, which is in respect of offences punishable under Sections 406 IPC, 420 IPC, 379 IPC, 411 IPC read with Section 120-B of the IPC read with Section 25 of the Antiquity and Art Treasurers Act, 1972. It is submitted that Sections 420 IPC, 411 IPC, 120-B of the IPC and Section 25 of the Antiquity and Art Treasurers Act, 1972, scheduled offences specified in Part B of the Schedule to the PML Act. It is submitted that invocation of Section 25 of the Antiquities and Art Treasurers Act makes the offence committed an "offence of cross border implication", as defined in Part "C" of the Schedule to the PML Act. In my opinion, there is no satisfactory material to indicate the commission of the said offences and further to show that the amount obtained by committing the said offences had been credited into the Accounts held by the Applicant. Much emphasis has been placed on the amount of US \$ 700,000 transferred from Bank Sarasin, Basel, Switzerland into the Account of Barclays Bank, New York, and the amount of Sterling Pounds 369081.51 equivalent to US \$ 700,000 having been remitted to Barclays Bank for further credit into the Accounts of M/s. S.K. Financial Services. However, the Applicant has never admitted that the amount of US \$

Dixit 7,00,000 was the proceeds of the said offences. All that he has admitted in his statement, -on which much emphasis is placed ,-(found in Page No. 394 - Volume III of the annexures to the complaint) is that "he had brokered purchase of one Diamond value of US \$ 700,000 for Mr. Styler through Shri Mohammed

Hussain of Diamoor Jewellery, Dubai, and that he received a commission of US \$ 30,000 for the same from Shri Mohammed Hussain, which was spent by him in shopping at Dubai and Zurich". It may be recalled that the F.I.R. in respect of the said offences has been registered recently, i.e. on 1st May, 2011, and there is nothing to show that the amount of Rs. 7,00,000 dollars in any way relates to the commission of the said offences. What are the facts mentioned in the said F.I.R. has not been disclosed. The complaint mentions that the F.I.R. has been lodged on a reference made by the Directorate of Enforcement to the Commissioner of Police, Hyderabad. Even if the possibility of the F.I.R. having been deliberately lodged to show the commission of a scheduled offence is ignored, the fact remains that there does not appear to be satisfactory material to indicate the said amounts to be the proceeds of crimes in question.

25. What needs to be highlighted is that the basic case against the Applicant was of violation of the provisions of the Income Tax Act and the FEMA. Now the FEMA does not create any offence and, at any rate, the violation of the provisions of the FEMA cannot be termed as a "scheduled offence", as defined in Section 2(y) of the PML Act. The Schedule does not incorporate either the violation of FEMA or contravention of the provisions of the Income Tax Act including the offences punishable under the Income Tax Act as "scheduled offences". In this context, what was the original case of the Investigating Agency with regard to commission of "Scheduled Offences" is worth noting. The E.C.I.R. registered on 8th January, 2007, (which has to be treated on par with the First Information Report in several respects) mentions the scheduled offences involved as "offences related to Prevention of Corruption Act, 1988, Gun-running, Terrorism & Forgery. Interestingly, the column number 7 of the E.C.I.R., which is meant for recording "material relating to commission of offence and reason to believe that an offence of money-laundering has been committed and assessment thereof", has been kept blank. The conclusion drawn by the Investigating Agency, at that stage, was that there were indications of corruption money involved in mega transactional deals representing commissions received on sale of Boeing Aircrafts held by Air India (see Exhibit "B" to the Bail Application) (Page No. 56). Indeed, such illegal activities can generate such high amount of money. What was the investigation done in that direction, and why the claim of those scheduled offences having been involved in this case has been given up, and why the scheduled offences involved are stated to be under the Passports Act, and the offences relating to the theft of a Diamond, has not been clarified at all. It was expected of the Investigating Agency to find out, in the course of investigation, the activities which generated such huge amount, which must necessarily be believed to be illegal and try to attach the said money or properties. Instead of uncovering the activities, which generated such large volume of money, reference is made to the offences under the Passports Act to sustain the accusation of money-laundering, without referring to the scheduled offences, which have or could have generated such huge amount. It has already been observed that the allegation regarding theft of a Diamond of the jewellery of

Nijam has not at all been supported by any material.

26. The truth of the matter, at this stage, appears to be that the Applicant, indeed, held several Accounts in Foreign Banks, and that he had huge money transactions in those Accounts. Where did the money come from, what was the source of the money, whom did it belong, where did it go, or whether it is still there, is, however, not at all clear. Even in the statements of the Applicant, that have been recorded, the emphasis of the Questioning Officer does not seem to be on ascertaining the source of the money or towards ascertaining what was the activity which led to the generation of such huge amounts. The amounts involved in the matter are so huge that if these are proceeds of crime, obviously many serious crimes have been committed, but the details of which are not forthcoming. These offences could be the one originally suspected, as they would be capable of generating such huge amounts, but either no efforts have been made to ascertain the source of money, or the Investigating Agency has not been successful in spite of making efforts. The fact, however, remains that instead of accepting the fact that the source of, or the activity which generated this money is not traced till today, an attempt has been made to persist with the accusation by claiming the scheduled offences involved to be under the Passports Act.

27. I have considered the effect of the provisions of Section 24 of the PML Act. This Section casts the burden of proving that (alleged) proceeds of crime are untainted property on the Accused. It is obvious that this Section would not relieve the prosecution of its responsibility of making a specific allegation that the monies that are allegedly being laundered are earned by committing a particular scheduled offence or offences under the PML Act. This Section cannot be construed as laying down that the prosecution has only to allege that an Accused is indulging into money-laundering and then it would be for the Accused to prove that he had earned the monies in question lawfully. Moreover, this Section, in my view, provides for the burden of adducing evidence during the trials in respect of the PML Act and cannot be stretched to the extent of claiming that once the commission of an offence of money-laundering is alleged, the prosecution need not support the same by any material whatsoever.

28. There is also another aspect of the matter. In the course of arguments, when the issue of non-availability, or the lack of sufficient material on a given aspect of the matter was raised on behalf of the Applicant, it was mentioned by Mr. Khambata, the learned Additional Solicitor General, that the matter was still under investigation. In fact, it has been made very clear by the Directorate of Enforcement that the investigations are still going on and the replies to the Letters Rogatory are still awaited. In view of this, I had asked Mr. Khambata, the learned Additional Solicitor General, as to whether the prosecution is in a position to proceed with the trial of the case. The answer - given on instructions from the Investigating Agency - was that the prosecution would be in a position to start the trial within about three to six months. It was submitted that this was the period during which collection of further material was expected.

29. If the scheme of the PML Act is examined, it is clear that the Scheduled Offence and the offence of money-laundering, both, shall be tried by the Special Court constituted under the PML Act. Section 44 of the PML Act is clear on this. Similarly, the provisions of Section 45, which curtail the discretion of the Court in the matter of release of an accused person, interestingly, refer not to an offence punishable u/s 4 of the PML Act, but refer to a scheduled offence of a certain category. Sub-Section 1 thereof reads as under:

45. Offences to be cognizable and non-bailable.- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) - no person accused of an offence punishable for a term of imprisonment of more than three years under part A of the Schedule shall be released on bail or on his own bond unless -... (Emphasis supplied).

30. This leads to no other conclusion except that the commission of a Scheduled Offence must necessarily be alleged before the Special Court, and that such offence/s must also be tried by the Special Court in the trial in respect of the offence of Money-Laundering. Needless to say that there should be material before the Special Court in respect of the Scheduled Offences also, so as to enable it to frame a charge in respect of such offence and try it. In the present case, the complaint is only in respect of an offence punishable u/s 4 of the PML Act. As regards the Scheduled Offences, no charge-sheets have been filed as yet. Thus, from this point of view also, the trial cannot proceed. This is apart from the interesting question as to whether the trial of the Scheduled Offence, which has been registered at Hyderabad, can take place in the Special Court at Mumbai. Section 44 speaks of the trial by a Special Court constituted for the area in which the offence has been committed.

31. On one hand, the Applicant is deprived of the benefit of the proviso to Sub-section (2) of Section 167 of the Code of Criminal Procedure as a complaint has already been filed which signifies that the investigation is over. On the other hand, however, the prosecution admits that it is not in a position to proceed with the trial of the case; and, as discussed above, it does not appear to be legally possible till the investigations into the alleged Scheduled Offences are completed. It would be, indeed, unfair to deny the benefit of the proviso to Sub-section (2) of Section 167 of the Code of Criminal Procedure to the Applicant on the ground that investigation is over, as signified by the filing of a complaint, but to make a claim that investigation is still proceeding when lack of material to make out a prima facie case is pointed out by the accused. Certainly, the prosecution is not comfortable with the idea of proceeding with the trial with the available material and evidence, and feels that obtaining further "crucial" evidence would be necessary (which is expected to be obtained within three to six months). Under the circumstances, the principle on which the provision of mandatory release of an accused contained in the Proviso to Section 167(2) of the Code of Criminal Procedure is based, must be given full effect to.

32. The real seriousness of this case lies in the existence of huge amounts which

are unaccounted and which are lying in Foreign Banks. The amounts Dixit involved in the present case are so huge that the quantum itself indicates that they have been generated, in all probability, by carrying out some unlawful activities. The criminal activities, if any, which led to the generation of such money were required and expected to be detected in the course of investigation, but instead of doing so, reference has been made to the commission of offences under the Passports Act to somehow bring the case within the purview of the PML Act. To take aid of the offences under the Passports Act to justify the accusation of money-laundering without touching the aspect as to from where and by which activity such huge amounts were generated, indeed, reflects adversely on the success, -and perhaps the sincerity, -of the investigation. These failures cannot be overcome or covered up by claiming that the Applicant should not be released on bail. Detaining the Applicant further in custody without any prospects of commencement of the trial within a reasonable time cannot be the solution to the problem apart from being improper. In this case, no scheduled offence under Part "A" of the Schedule being involved, the discretionary powers of the Court in the matter of bail are not curtailed in any manner. Considering all the relevant aspects of the matter, in my opinion, it would be just and proper to release the Applicant on bail.

33. An apprehension was expressed by Mr. Khambata, the learned Additional Solicitor General, that if released on bail, the Applicant would abscond. It was pointed out that, in the past, he had managed to secure three different passports. In my opinion, appropriate conditions can be imposed to ensure that the Applicant would not be able to depart from the country. In this connection, what needs to be observed is that the case against the Applicant was registered as back as on 8th January, 2007. Still, he was placed under arrest only on 7th March, 2011 i.e. after a gap of more than four years. Most of the transactions, which are being referred to in the complaint, have taken place even much before 2007 and, as already observed, some of them have taken place even before the PML Act came in force. In these circumstances, it would not be proper to deny bail to the Applicant on the basis of the apprehension of absconding or tampering, as has been expressed by Mr. Khambata, the learned Additional Solicitor General.

34. As a result of the aforesaid discussion, it follows that the Applicant deserves to be released on bail.

35. The Bail Application is allowed.

36. The Applicant is ordered to be released on bail in the sum of Rs. 5,00,000/-, with one surety in like amount, or two sureties in the sum of Rs. 2,50,000/-each, on the following conditions:

(i). The Applicant shall not reside at any other place except at his residence in Brihanmumbai or Pune City.

(ii). The Applicant shall report to the Office of the Directorate of Enforcement,

Ministry of Finance, Department of Revenue, Government of India, everyday, between 11:00 a.m. to 12:00 noon, except on Saturdays, Sundays and other Holidays.

The Applicant shall, however, be permitted to leave Brihanmumbai or Pune, and may be exempted from reporting to the Office of the Directorate of Enforcement on the days on which his presence would be required before any Court or a Competent Authority in connection with any legal proceedings instituted by or against him, including the period necessary for the journey to be undertaken to such places, provided the Applicant gives previous intimation, in writing, to the Directorate of Enforcement in that regard, specifying the period during which such exemption would be needed.

37. Mr. Khambata, the learned Additional Solicitor General, at this stage, prays that the operation of this order be stayed keeping in mind the importance of the matter and that the matter is receiving the attention of the Supreme Court of India. I have considered this prayer. The Applicant has been ordered to be released on bail after taking into consideration all the relevant aspects of the matter. I do not think that there is any apprehension or danger of the Applicant absconding or tampering with the evidence, within the time that would be needed for approaching the Supreme Court of India. The Applicant would be available to the Investigating Agency in the event of the bail granted in his favour being cancelled. As such, I see no necessity of staying the operation of this order. The prayer is, therefore, rejected.

38. Mr. Bagaria, the learned Advocate for the Applicant, prays that the Applicant be allowed to deposit cash in lieu of surety. The prayer is rejected.