

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

% Judgment delivered on : 09.01.2019

+ **W.P.(C) 3531/2018 & CM Nos. 13961/2018, 19484/2018,  
39904/2018 & 51202/2018**

ABDULLAH ALI BALSHARAF & ANR ..... Petitioners

versus

DIRECTORATE OF ENFORCEMENT & ORS ..... Respondents

**Advocates who appeared in this case:**

For the Petitioners : Mr Biswajit Bhattacharya, Senior Advocate with Gurpreet Singh, Advocate.

For the Respondents : Mr D. P. Singh, SPP with Mr Amit Mahajan, CGSC and Mr Manu Mishra, Advocates for R-1 alongwith Mr Naresh Malik, Asst. Dir., PMLA with Mr Karun Bansal, AEO. Ms Surekha Raman, Mr Dileep Poolakkot and Mr Anuj Sharma, Advocates for R-2/BSE Ltd.

**CORAM**

**HON'BLE MR JUSTICE VIBHU BAKHRU**

**JUDGMENT**

**VIBHU BAKHRU, J**

1. The petitioners are citizens of Saudi Arabia and have filed the present petition, *inter alia*, impugning the directions issued by officers of the respondent no. 1 (Enforcement Directorate) resulting in withholding of the proceeds of equity shares sold by the petitioners on the platform of respondent no.2 (Bombay Stock Exchange – hereafter ‘BSE’). The petitioners also impugn the order dated 22.03.2018 passed

by the Enforcement Directorate prohibiting any debit transaction in the Demat Accounts (Account Nos. 1201910103642803 and 1201910103642797) maintained by the petitioners with respondent no.3 (hereafter 'SMC'). The aforementioned Demat Accounts are maintained in the name of petitioner nos. 1 and 2 respectively and they hold 78,38,330 equity shares of M/s Khushi Ram Behari Lal Ltd. (hereafter 'KRBL Ltd.') in those Demat Accounts. Whilst the impugned order dated 22.03.2018 – a copy of which was handed over by learned counsel of the Enforcement Directorate during the course of hearing – indicates that 35,88,330 equity shares are held by petitioner no.1 and 42,50,000 equity shares are held in the Demat Account in the name of petitioner no.2; the petitioners state that 42,50,000 equity shares are held by petitioner no.1 and 35,88,330 equity shares are held by petitioner no.2.

2. In addition to the 78,38,330 equity shares of KRBL Ltd. held by the petitioners in the aforementioned Demat Accounts (Account Nos. 1201910103642803 and 1201910103642797 maintained with SMC), the petitioners also held certain further shares in KRBL Ltd., which were sold in January and February 2018. These included 65,00,000 equity shares of KRBL Ltd. that were sold by the petitioners (32,50,000 equity shares of KRBL Ltd. each) through BSE on 12.02.2018. The said transactions were effected around 1:55 PM to 2:07 PM on the said date. The said shares were removed from the Demat Accounts of the petitioners and were delivered to the BSE (the clearing system of BSE). The counter parties (purchasers of shares)

had also remitted the sale consideration to the BSE to effect the settlement through its clearing system. However, on 13.02.2018 at 05:37 p.m., the Deputy Director of the Enforcement Directorate sent an email, *inter alia*, restraining any transaction in respect of the sale of 65,00,000 shares sold by the petitioners. The said email also enclosed therewith a letter dated 13.02.2018 restraining and stopping the transactions pertaining to the transfer of equity shares of KRBL Ltd. owned by the petitioners under the provisions of Section 102 Cr.P.C. read with Section 65 and Section 2 (1)(na) of the Prevention of Money Laundering Act, 2002 (hereafter 'PMLA'). The BSE was directed not to transfer the shares in question without permission of the Enforcement Directorate or the competent authority.

3. Thereafter, the officers of the Enforcement Directorate issued a series of instructions, which in effect reversed the sale transaction entered into by the petitioners in respect of 64,94,891 equity shares of KRBL Ltd. However, the concerned officer permitted the sale transaction pertaining to a small fraction of the shares of KRBL Ltd. (5109 in number) sold by the petitioners, to go through. The sale consideration for the said shares amounting to ₹30,35,006.90 was released by the BSE to the account of SMC (the petitioners' broker) and was thereafter frozen by the orders passed by the Enforcement Directorate.

4. Mr. Bhattacharya, learned Senior Counsel appearing for the petitioners limited the challenge in this petition to, essentially, two fronts. First of all, he assailed the communications issued by officers

of the Enforcement Directorate to the BSE as illegal and without authority of law. He further contended that the officers of the Enforcement Directorate do not have any recourse of Section 102 of Cr.P.C. for seizing any assets under the provisions of the PMLA.

5. Second, he assailed the order dated 22.03.2018 passed under Section 17 of the PMLA attaching 78,38,330 equity shares of KRBL Ltd. held by the petitioners in their Demat Accounts with SMC. He submitted that the said shares were purchased in the year 2003, which was prior to the PMLA coming into force and, therefore, the provisions of the PMLA are inapplicable to the said shares. He submitted that, therefore, the action of attaching/seizing the said shares is without jurisdiction. Mr. Bhattacharya also clarified that the petitioners had already filed appeals under Section 26 of the PMLA in respect of orders passed regarding freezing of the said shares. He had, accordingly, limited the challenge to the attachment of the said shares only on the aforesaid grounds relating to the jurisdiction of the Enforcement Directorate to pass the orders and issue instructions impugned in this petition.

### ***Factual Context***

6. The petitioners are foreign nationals and reside overseas. They claim to be engaged in the business of trading goods including rice. They state that they have been importing rice from India for more than three decades. It is further claimed that during the said period, the imports of rice from India were of a value exceeding US \$ 2 Billion.

7. The petitioners claim that due to their business interest in import of rice, they decided to make an investment in equity shares of M/s KRBL Ltd., a company engaged in the business of producing and exporting rice.

8. In the year 2003, the petitioners applied for allotment of 15,00,000 equity shares of KRBL Ltd. (7,50,000 shares by each of the petitioners) on preferential basis. In order to subscribe to the said shares, the petitioners remitted an aggregate sum of US \$ 29,51,364.81 on 17.11.2003 and 24.11.2003. The said remittances were made through banking channels and at the material time were equivalent to ₹13,50,00,000/- in Indian currency. In consideration for the said amount, KRBL Ltd. allotted 15,00,000 equity shares (7,50,000 equity shares to each of the petitioners) of the face value of ₹10/- at a premium of ₹80/- per equity share (at an aggregate price of ₹90 per equity share). It appears that the said allotment was a part of 30,00,000 shares allotted by KRBL Ltd. to foreign nationals/entities.

9. It is not disputed that the petitioners had complied with all regulatory laws for subscribing to the said shares. At the relevant time, KRBL Ltd. had made an application under the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 and the Reserve Bank of India had permitted the aforesaid investment by its letter dated 13.01.2004.

10. On 12.10.2004, BSE listed 30,00,000 equity shares of KRBL Ltd., which were allotted to Foreign Nationals/entities on preferential

basis. The shares allotted to the petitioners are also a part of the shares so listed. These shares were not transferable till 17.12.2004, however, were freely transferable thereafter.

11. It is not disputed that the allotment of the said shares was for valuable consideration and the petitioners have held the said shares uninterruptedly since the allotment.

12. On 12.02.2010, each share of KRBL Ltd. of a face value of ₹10/- was split into 10 equity shares of a face value of ₹1/-. Thus, the petitioners came to hold 75,00,000 equity shares each (an aggregate of 1,50,00,000 equity shares). These shares were maintained in a fungible form with SMC.

13. During the month of January 2018, the petitioner sold 6,61,670 equity shares of KRBL Ltd. through SMC. The sale was transacted through the BSE and the proceeds thereof were received by the petitioners. The petitioners have produced the contract notes for the shares sold in January 2018 and there is no controversy with regard to the said sale.

14. On 12.02.2018, each of the petitioners sold further 32,50,000 equity shares of KRBL Ltd. The bulk of the shares were sold at a gross rate of ₹594 per share; 84 shares held by petitioner no.1 and 25 shares held by petitioner no.2 were sold at a gross rate of ₹594.10 per share; and 5000 shares held by petitioner no.1 were sold at a gross rate of ₹594.05/-. The contract notes annexed to the present petition indicates that the gross amount of ₹1,93,05,00,258.40/- was payable to petitioner

no.1 and ₹1,93,05,00,002.5 was payable to petitioner no.2 as sale consideration for the said shares. After deducting the brokerage, transaction charges, stamp duty and taxes, a net amount of ₹1,92,72,34,289.08 was payable to petitioner no.1 and ₹1,92,72,34,033.37 was payable to petitioner no.2.

15. Admittedly, pursuant to the said transaction, SMC debited the Demat account of the petitioners by issuing the quantity of shares sold by the petitioners. The said shares were delivered to BSE for clearing. Similarly, the purchasers of the said shares (counter parties) also remitted the purchase consideration to BSE. In all, a pay out of ₹3,86,10,00,261/- was required to be made by the BSE to SMC on account of the said sale.

16. On 12.02.2018, M/s Pabrai Investment Fund (an investment fund based in Irvine, California, USA) purchased 64,94,891 shares of KRBL Ltd. on the platform of the BSE. The said shares were to be delivered by the BSE out of the 65,00,000 shares sold by the petitioners. The said fund, registered with SEBI as a Foreign Portfolio Investor, is also registered with the US Securities and Exchange Commission as an Investment Advisor. Three other persons purchased an aggregate of 5109 equity shares of KRBL Ltd. on 12.02.2018 on the BSE platform: 25 shares were purchased by an individual, Jetal Pravinchandra Parekh; 5000 shares were purchased by an individual Subhash Agarwal; and 84 shares were purchased by M/s G.K.N. Securities.

17. Thereafter, the officers of the Enforcement Directorate sent a series of letters, which effectively interdicted the transactions entered into by the petitioner. The petitioners impugn the said series of communications. The said communications are also relevant to understand the manner in which Enforcement Directorate has proceeded and are discussed hereafter.

18. On 13.02.2018 at 5:37 p.m., the Deputy Director of the Enforcement Directorate sent an email to BSE restraining it to proceed with the transaction relating to the sale of 65,00,000 equity shares of KRBL Ltd. The said email also included a letter dated 13.02.2018 to the aforesaid effect purportedly issued under section 102 Cr. P.C read with section 65 of the PMLA.

19. In view of the aforesaid instructions, on 15.02.2018, BSE sent emails to all brokers through whom the sale and purchase transactions for the sale of the said shares had been entered into. Accordingly, the purchasing brokers were informed that the pay out of the securities (shares of KRBL Ltd.) had been ordered to be withheld by BSE. Similarly, SMC was also informed that the pay out of the consideration was withheld pursuant to instructions received from the Enforcement Directorate.

20. It so transpired that three persons who had purchased 5109 equity shares of KRBL Ltd. had further sold the said shares to a different set of persons. In this view, the BSE sent a letter to the

Enforcement Directorate informing it regarding the same and further seeking instructions in the matter.

21. In response to the aforesaid request, the Enforcement Directorate, by an email dated 15.02.2018, advised the BSE that in respect of three counter parties who had purchased an aggregate 5109 equity shares of KRBL Ltd. and had further sold the same, no action was required to be taken against them.

22. On 15.02.2018, BSE sent an email informing Enforcement Directorate that it had withheld funds to the extent of ₹3,86,10,00,261.00 payable to the petitioners and 64,94,891 equity shares of KRBL Ltd., which were to be delivered to “The Pabrai Investment Fund II LP”.

23. On 23.02.2018, M/s Pabrai Investment Fund sent a letter confirming that it had purchased shares of KRBL Ltd. on the floor of the exchange through their broker M/s Kotak Securities. The said entity lodged its protest for not receiving the shares purchased by it and also being deprived access to its assets. M/s Pabrai Investment Fund had pointed out that it was registered as Foreign Portfolio Investor and the funds invested by it belonged to over three hundred and fifty individuals/institutions across the globe.

24. Almost a month thereafter, that is, on 23.03.2018, the Assistant Director of the Enforcement Directorate sent a letter to the BSE instructing it to release funds deposited by M/s Pabrai Investment Fund and to continue to withhold the shares of KRBL Ltd. Accordingly, the

BSE released the purchase consideration paid by M/s Pabrai Investment Fund after withholding it for over a month. It is relevant to note that with the said instructions, the Assistant Director of the Enforcement Directorate effectively cancelled the sale transaction entered into by the petitioners in respect of 64,94,891 shares of KRBL Ltd.

25. At the instance of officers of the Enforcement Directorate, the BSE continued to withhold 64,94,891 shares of KRBL Ltd. (out of 65,00,000 equity shares) delivered by SMC to the BSE. The BSE also continued to withhold a sum of ₹30,35,006.90 being the consideration of the balance 5109 shares that were released to the purchasers.

26. On 21.05.2018, the Assistant Director of the Enforcement Directorate sent a letter instructing the BSE to release the equity shares of KRBL Ltd. of the petitioners to SMC.

27. Thereafter, on 12.06.2018, the Assistant Director instructed the BSE to release the amount of ₹30,35,006.90 to the seller, SMC.

28. In the meanwhile, the officers of the Enforcement Directorate conducted a search in the premises of SMC and on 22.03.2018 passed an order under Section 17 (1A) of the PMLA freezing 78,38,330 shares of KRBL Ltd. held by the petitioners (42,50,000 shares held by petitioner no.2 and 35,88,330 shares held by petitioner no.1) in the Demat accounts maintained with SMC. Thereafter, on 20.04.2018, the Enforcement Directorate filed an application with the Adjudicating

Authority under Section 17(4) of the PMLA for extending the order passed under Section 17(1A) of the PMLA.

29. The officers of Enforcement Directorate conducted yet another search at the premises of SMC on 14.06.2018 and passed a freezing order under Section 17(1A) of the PMLA in respect of 64,94,891 equity shares of KRBL Ltd. that were returned by BSE.

30. Similarly, an order has also been passed under Section 17(1A) of the PMLA restraining ICICI Bank from releasing the funds that were remitted by BSE in respect of the 5109 shares of KRBL Ltd. that were sold by the petitioners.

***Enforcement Directorate's stand***

31. It is the Enforcement Directorate's case that the said actions were taken pursuant to the investigations that were being conducted in respect of the money laundering relating to the kickbacks alleged to have been received by certain parties in connection with the purchase of VVIP Helicopters by the Indian Air Force (IAF) from M/s AgustaWestland, UK (AgustaWestland).

32. In the Counter Affidavit filed by the Enforcement Directorate, it is stated that CBI has registered a case for commission of offences punishable under Section 120B read with Section 420 of the Indian Penal Code, 1860 (IPC) and certain provisions of the Prevention of Corruption Act, 1988 against Sh. S.P. Tyagi, Former Air Chief

Marshall in respect of a transaction relating to procurement of twelve Helicopters for VVIPs.

33. It is stated that Sh. S.P. Tyagi had joined as the Chief of Air Staff on 01.01.2005 and remained in office till his retirement on 31.03.2007. It is stated that during his tenure as Chief of Air Staff, IAF had considered reducing the Service Ceiling for the VVIP Helicopters to 4500. It is further alleged that cousins of Sh. S.P. Tyagi (the Tyagi Brothers) had connived with one Mr Guido Haschke and Mr Carlo Gerosa and they had received huge payments from AgustaWestland, which were camouflaged as consultancy fee. It is also alleged that Sh. S.P. Tyagi had received some amount of cash from Mr Guido Haschke and Mr Carlo Gerosa. It is alleged that Mr Guido Haschke and Mr Carlo Gerosa, in collusion with Tyagi Brothers had managed to make inroads in the IAF through S.P. Tyagi and had influenced and subverted the consistent stand of IAF regarding mandatory Service Ceiling for the helicopters in question.

34. It is not necessary to enumerate the extensive allegations made in this regard; suffice it to state that it is alleged that certain bribes had been paid by AgustaWestland through various entities and one Mr Gautam Khaitan had provided the corporate structure through which such payments were made.

35. It is alleged that funds paid by AgustaWestland were paid either directly or routed through various entities to one M/s Rawasi Al Khaleej General Trading LLC (hereafter 'RAKGT') – an entity having

its principal office in Dubai. It is stated that RAKGT was promoted by the directors of KRBL DMCC, Dubai which is a subsidiary of KRBL Ltd.

36. It is further stated in the Counter Affidavit filed on behalf of the Enforcement Directorate that a search was conducted by the Income Tax Department on the premises of M/s KRBL Ltd. During the course of the search, it was revealed that in the books of RAKGT, two ledger accounts were maintained: one in the name of Omar Ali Balsharaf-DO and the other in the name of Omar Ali Balsharaf-GK. As per the said ledger account maintained in the name of Omar Ali Balsharaf-GK, RAKGT had received money directly from M/s Interstellar Technologies Limited and other companies, which in turn had received proceeds of crime directly or indirectly from Interstellar Technologies Limited. It is affirmed on behalf of the Enforcement Directorate that *“the proceeds of crime are suspected to be parked in the accounts of M/s Rawasi Al Khaleej General Trading, LLC Dubai under the ledger entries of M/s Omar Ali Balsharaf –GK who is a major shareholder of M/s KRBL Limited.”*

37. The said allegations gave little indication as to the real property, which was alleged to be proceeds of crime and only mentioned entries in ledger account. In view of the aforesaid allegation, this Court had, by an order dated 27.09.2018, directed the Enforcement Directorate to file a statement indicating the money trail, which the Enforcement Directorate alleged to be the proceeds of crime and which are alleged to be under control of the petitioners outside India.

38. In compliance with the aforesaid order, the Enforcement Directorate filed an additional affidavit indicating money trail of the alleged proceeds of crime received overseas. It is affirmed in the said affidavit that AgustaWestland transferred Euro 24.37 million to M/s IDS Tunisia during the years 2008 to 2013. M/s IDS Tunisia in turn transferred Euro 12.4 million to the accounts of Interstellar Technologies Limited, Mauritius between the years 2009 to 2012 and Interstellar Technologies Limited transferred USD 2,749,948 to RAKGT between 11.10.08 to 27.01.2010.

39. It is affirmed that Interstellar Technologies Limited also transferred Euro 1 million and USD 1 million to M/s. Windsor Group Holding Limited during the years 2009 to 2012. Out of the aforesaid amount, USD 830,000 were transferred to RAKGT during the period 03.02.2010 to 13.02.2010. Similarly, Interstellar Technologies Limited transferred USD 10,000 to the accounts of one M/s. Carisma Investment Limited in the year 2010 and that company transferred USD 419,980 to RAKGT between 18.04.2009 to 27.02.2010. Further, Interstellar Technologies Limited also transferred USD 200,000 to the accounts of Capital Infrastructure Limited in the year 2009 out of which USD 114,972 were transferred to RAKGT on 18.04.2009.

40. It is further affirmed that the books of account of RAKGT reveal that money was received by RAKGT from the Petitioner no.2 and the same was shown as credited in its ledger account maintained in the name of OAB-GK. According to the Enforcement Directorate 'OAB-GK' stands for Omar Ali Balsharaf -Gautam Khaitan.

### ***Discussion and Reasons***

41. As noticed in the outset, the petitioners' challenge to the action of the Enforcement Directorate is on two fronts. The first relates to the series of instructions given by officers of the Enforcement Directorate, which in effect have reversed the transaction relating to sale of 64,94,891 equity shares of KRBL Ltd. sold by the petitioners. The second relates to the applicability of the PMLA to the shares of KRBL Ltd., which were, indisputably, acquired by the petitioners in the year 2003. Thus, essentially, two questions fall for consideration of this court: (i) whether the instructions issued by the Officers of the Enforcement Directorate pertaining to the transaction of 65,00,000 (64,94,891 plus 5109) equity shares of KRBL Ltd. are without authority of law; and (ii) whether the provisions of the PMLA apply to the shares of KRBL Ltd. acquired by the petitioners in the year 2003.

### ***Whether the ED's instructions to BSE are sustainable in law***

42. Mr Singh contended on behalf of the Enforcement Directorate that instructions issued by its officers to the BSE were in exercise of powers conferred under Section 102 of the Code of Criminal Procedure, 1973. He further submitted that the powers to freeze assets and transactions were inherent in powers of investigation of any offence under the PMLA and, therefore, it was implicit that the officers of the Enforcement Directorate could issue such directions. He relied on the decision of the Gujarat High Court in ***Paresha G. Shah v. State of Gujarat and Ors.: Special Criminal Application (Quashing)***

**No. 150 of 2015** and the decision of the Supreme Court in **V.T. Khanzode and Ors. v. Reserve Bank of India and Anr.: (1982) 2 SCC 7** in support of his contention.

43. Thus, the first and foremost issue that is required to be addressed is whether Section 102 of the Cr.P.C is applicable to proceedings under the PMLA. If the said issue is answered in the affirmative, the next question to be addressed would be whether officers of the Enforcement Directorate have acted in conformity of the said provisions.

44. According to the Enforcement Directorate, the provisions of Cr.P.C. are incorporated in the PMLA by virtue of Section 65 of the PMLA. Thus, the provisions of Section 102 of Cr.P.C, that empower any police officer to seize a property, which is suspected to have been stolen or which creates suspicion of commission of any offence, is also available to officers of the Enforcement Directorate.

45. The PMLA is a Special Act, which is enacted for prevention of money laundering and other connected activities. The statement of objects and reasons indicates that the Prevention of Money-Laundering Bill, 1998 was introduced “*in the view of an urgent need for the enactment of a comprehensive legislation inter alia, for preventing money laundering and connected activities, confiscation of proceeds of crime, setting up of agencies and mechanisms for co-ordinating measures for combating money-laundering etc.*”.

46. Chapter III of the PMLA contains extensive provisions with regard to attachment and seizure of property perceived as proceeds of crime. Section 5(1) of the PMLA empowers a Director of the Enforcement Directorate or any other officer not below the rank of Deputy Director authorized by the Director to provisionally attach any property for a period not exceeding one hundred and eighty days.

47. Section 16 of the PMLA enables an authority to enter any place within the limits of the area assigned to the said authority or in respect of which he is so authorized. This is subject to the condition that the authority has reason to believe on the basis of the material in his possession that an offence under Section 3 of the PMLA (offence of money laundering) has been committed.

48. Section 17 of the PMLA empowers the Director, or any other officer not below the rank of Deputy Director authorized by him to authorize any officer subordinate to him to enter and search any building, etc. and/or seize records of property found as a result of such search. Sub-section (1A) of Section 17 expressly enables an officer to make an order freezing such property, which is not practicable to be seized.

49. Section 5 and Section 17 of the PMLA are relevant for the purposes of this discussion and are set out below:-

“5. Attachment of property involved in money-Laundering.- (1) Where the Director or any other officer not below the rank of Deputy Director authorized by the Director for the purposes of this section, has reason to

believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that-

(a) any person is in possession of any proceeds of crime; and

(b) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under this Chapter, he may, by order in writing, provisionally attach such property for a period not exceeding one hundred and eighty days from the date of the order, in such manner as may be prescribed:

Provided that no such order of attachment shall be made unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, 1973 (2 of 1974), or a complaint has been filed by a person authorised to investigate the offence mentioned in that Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or a similar report or complaint has been made or filed under the corresponding law of any other country:

Provided further that, notwithstanding anything contained in first proviso, any property of any person may be attached under this section if the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section has reason to believe (the reasons for such belief to be recorded in writing), on the basis of material in his possession, that if such property involved in money-laundering is not attached immediately under this Chapter, the non-attachment of the property is likely to frustrate any proceeding under this Act:

[Provided also that for the purposes of computing the period of one hundred and eighty days, the period during which the proceedings under this section is stayed by the High Court, shall be excluded and a further period not exceeding thirty days from the date of order of vacation of such stay order shall be counted]

(2) The Director, or any other officer not below the rank of Deputy Director, shall, immediately after attachment under sub-section (1), forward a copy of the order, along with the material in his possession, referred to in that sub-section, to the Adjudicating Authority, in a sealed envelope, in the manner as may be prescribed and such Adjudicating Authority shall keep such order and material for such period as may be prescribed.

(3) Every order of attachment made under sub-section (1) shall cease to have effect after the expiry of the period specified in that sub-section or on the date of an order made under sub-section (3) of section 8, whichever is earlier.

(4) Nothing in this section shall prevent the “person interested,” in the enjoyment of the immovable property attached under sub-section (1) from such enjoyment.

*Explanation.- For the purposes of this sub-section, “person interested”, in relation to any immovable property, includes all persons claiming or entitled to claim any interest in the property.*

(5) The Director or any other officer who provisionally attaches any property under sub-section (1), shall, within a period of thirty days from such attachment, file a complaint stating the facts of such attachment before the Adjudicating Authority.

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17. Search and seizure.- (1) Where the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section, on the basis of information in his possession, has reason to believe (the reason for such belief to be recorded in writing) that any person-

(i) has committed any act which constitutes money-laundering, or

(ii) is in possession of any proceeds of crime involved in money-laundering, or

(iii) is in possession of any records relating to money-laundering, or

(iv) is in possession of any property related to crime then, subject to the rules made in this behalf, he may authorise any officer subordinate to him to-

(a) enter and search any building, place, vessel, vehicle or aircraft where he has reason to suspect that such records or proceeds of crime are kept;

(b) break open the lock of any door, box, locker, safe, almirah or other receptacle for exercising the powers conferred by clause (a) where the keys thereof are not available;

(c) seize any record or property found as a result of such search;

(d) place marks of identification on such record or property, if required or make or cause to be made extracts or copies therefrom;

(e) make a note or an inventory of such record or property;

(f) examine on oath any person, who is found to be in possession or control of any record or property,

in respect of all matters relevant for the purposes of any investigation under this Act:

Provided that no search shall be conducted unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under section 157 of the Code of Criminal Procedure, 1973, (2 of 1974) or a complaint has been filed by a person, authorised to investigate the offence mentioned in the Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or in cases where such report is not required to be forwarded, a similar report of information received or otherwise has been submitted by an officer authorised to investigate a scheduled offence to an officer not below the rank of Additional Secretary to the Government of India or equivalent being head of the office or Ministry or Department or Unit, as the case may be, or any other officer who may be authorised by the Central Government, by notification, for this purpose.

(1A) Where it is not practicable to seize such record or property, the officer authorised under sub-section (1), may make an order to freeze such property whereupon the property shall not be transferred or otherwise dealt with, except with the prior permission of the officer making such order, and a copy of such order shall be served on the person concerned:

Provided that if, at any time before its confiscation under sub-section (5) or sub-section (7) of section 8 or section 58B or sub-section (2A) of section 60, it becomes practical to seize a frozen property, the officer authorised under sub-section (1) may seize such property.

(2) The authority, who has been authorised under sub-section (1) shall, immediately after search and seizure or upon issuance of a freezing order forward a copy of the reasons so recorded along with material in his possession, referred to in that sub-section, to the

Adjudicating Authority in a sealed envelope, in the manner, as may be prescribed and such Adjudicating Authority shall keep such reasons and material for such period, as may be prescribed.

(3) Where an authority, upon information obtained during survey under section 16, is satisfied that any evidence shall be or is likely to be concealed or tampered with, he may, for reasons to be recorded in writing, enter and search the building or place where such evidence is located and seize that evidence:

Provided that no authorisation referred to in sub-section (1) shall be required for search under this sub-section.

(4) The authority seizing any record or property under sub-section (1) or freezing any record or property under sub-section (1A) shall, within a period of thirty days from such seizure or freezing, as the case may be, file an application, requesting for retention of such record or property seized under sub-section (1) or for continuation of the order of freezing served under sub-section (1A), before the Adjudicating Authority.”

50. It is apparent from the above that although the Director of the Enforcement Directorate (or any other officer not below the rank of Deputy Director so authorized by him) has the powers to provisionally attach any property or seize such property; the orders for such provisional attachment or seizure can be passed only subject to certain safeguards that are expressly inbuilt in the said provisions. An order of provisional attachment or seizure can be passed only if the concerned officer has, on the basis of information in his possession, reasons to believe that a person is in possession of proceeds of crime

and such proceeds of crime are likely to be concealed or tampered with or dealt with in any manner, which may result in frustrating any proceedings relating to confiscation of such proceeds of crime.

51. Similarly, an officer can seize any property or pass an order for freezing such property provided that he has, on the basis of information in his possession, reason to believe that any person has committed an act of money laundering; or is in possession of the proceeds of crime involved in money laundering; or is in possession of any records related to money laundering; or is in possession of property related to crime. It is material to note that the reasons to so believe are to be recorded in writing.

52. It is also relevant to note that in either case – the order of provisional attachment of any property under section 5(1) of the PMLA or an order of seizure of any property – has a limited life. The order of provisional attachment cannot extend beyond the period of one hundred and eighty days. Further, in terms of Section 5(5) of the PMLA, a Director or any officer who provisionally attaches a property is required to make a complaint to the Adjudicating Authority within a period of thirty days from such attachment. Similarly, where an order of seizure of property or freezing any property has been passed under Section 17(1) or Section 17(1A) of the PMLA, the concerned officer is required to make an application in terms of Section 17(4) of the PMLA, before the Adjudicating Authority for extending the time for retention of the property so seized.

53. Section 8 of the PMLA provides for procedure for adjudication by the Adjudicating Authority. The relevant extract of Section 8 of the PMLA is set out below:-

“8. Adjudication.- (1) On receipt of a complaint under sub-section (5) of section 5, or applications made under sub-section (4) of section 17 or under sub-section (10) of Section 18, if the Adjudicating Authority has reason to believe that any person has committed an offence under Section 3 or is in possession of proceeds of crime, it may serve a notice of not less than thirty days on such person calling upon him to indicate the sources of his income, earning or assets, out of which or by means of which he has acquired the property attached under sub-section (1) of Section 5, or, seized or frozen under Section 17 or Section 18, the evidence on which he relies and other relevant information and particulars, and to show cause why all or any of such properties should not be declared to be the properties involved in money-laundering and confiscated by the Central Government:

Provided that where a notice under this sub-section specifies any property as being held by a person on behalf of any other person, a copy of such notice shall also be served upon such other person:

Provided further that where such property is held jointly by more than one person, such notice shall be served to all persons holding such property.

(2) The Adjudicating Authority shall, after-

(a) considering the reply, if any, to the notice issued under sub-section (1);

(b) hearing the aggrieved person and the Director or any other officer authorised by him in this behalf; and

(c) taking into account all relevant materials placed on record before him, by an order, record a finding whether all or any of the properties referred to in the notice issued under sub-section (1) are involved in money-laundering:

Provided that if the property is claimed by a person, other than a person to whom the notice had been issued, such person shall also be given an opportunity of being heard to prove that the property is not involved in money-laundering.

(3) Where the Adjudicating Authority decides under sub-section (2) that any property is involved in money-laundering, he shall, by an order in writing, confirm the attachment of the property made under sub-section (1) of Section 5 or retention of property or record seized or frozen under Section 17 or Section 18 and record a finding to that effect, whereupon such attachment or retention or freezing of the seized or frozen property or record shall-

(a) continue during investigation for a period not exceeding ninety days or the pendency of the proceedings relating to any offence under this Act before a court or under the corresponding law of any other country, before the competent court of criminal jurisdiction outside India, as the case may be; and

(b) become final after an order of confiscation is passed under sub-section (5) or sub-section (7) of Section 8 or Section 58-B or sub-section (2-A) of section 60 by the Special Court.

(4) Where the provisional order of attachment made under sub-section (1) of section 5 has been confirmed under sub-section (3), the Director or any other officer authorised by him in this behalf shall forthwith take the possession of the property attached under Section 5 or frozen under sub-section (1A) of Section 17, in such manner as may be prescribed:

Provided that if it is not practicable to take possession of a property frozen under sub-section (1A) of section 17, the order of confiscation shall have the same effect as if the property had been taken possession of.

(5) Where on conclusion of a trial of an offence under this Act, the Special Court finds that the offence of money-laundering has been committed, it shall order that such property involved in the money-laundering or which has been used for commission of the offence of money-laundering shall stand confiscated to the Central Government.

(6) Where on conclusion of a trial under this Act, the Special Court finds that the offence of money-laundering has not taken place or the property is not involved in money-laundering, it shall order release of such property to the person entitled to receive it.

(7) Where the trial under this Act cannot be conducted by reason of the death of the accused or the accused being declared a proclaimed offender or for any other reason or having commenced but could not be concluded, the Special Court shall, on an application moved by the Director or a person claiming to be entitled to possession of a property in respect of which an order has been passed under sub-section (3) of Section 8, pass appropriate orders regarding confiscation or release of the property, as the case may be, involved in the offences of money-laundering after having regard to the material before it.

(8) where a property stands confiscated to the Central Government under sub-section 5, the Special Court, in such manner as may be prescribed, may also direct the Central Government to restore such confiscated property or part thereof of a claimant with a legitimate interest in the property, who may have suffered a quantifiable loss as a result of the offence of money-laundering:

Provided that the Special Court shall not consider such claim unless it is satisfied that the claimant has acted in good faith and has suffered the loss despite having taken all reasonable precautions and is not involved in the offence of money laundering:

Provided further that the Special Court may, if it thinks fit, consider the claim of the claimant for the purposes of restoration of such properties during the trial of the case in such manner as may be prescribed.

54. In terms of Section 8(1) of the PMLA, the Adjudicating Authority is required to examine the complaint filed under Section 5(5) of the PMLA or an application made under Section 17(4) of the PMLA. If on receipt of such complaint or application, the adjudicating authority has reason to believe that a person has committed an offence of money laundering or is in possession of the proceeds of crime, he is required to serve a notice of not less than thirty days on such person calling upon him to indicate the sources of his income, earning or assets or the means with which he has acquired the property which is provisionally attached under Section 5(1) of the Act or seized or frozen under Section 17 of the PMLA.

55. In either case, the Adjudicating Authority is required to pass an order within a period of one hundred and eighty days from the date of the order of provisional attachment under Section 5(1) or from the date of order of seizure/freezing passed under Section 17 of the PMLA. This is explicitly clear by the plain language of Section 5(1) of the PMLA. In terms of Section 20 of the PMLA, any property seized under Section 17 or frozen under Section 17(1A) of PMLA can be

retained or if frozen, continue to remain frozen for a period not exceeding one hundred and eighty days. Section 20 of the PMLA is relevant and is set out below:-

“20. Retention of property-(1) Where any property has been seized under section 17 or section 18 or frozen under sub-section (1A) of section 17 and the officer authorised by the Director in this behalf has, on the basis of material in his possession, reason to believe (the reason for such belief to be recorded by him in writing) that such property is required to be retained for the purposes of adjudication under section 8, such property may, if seized, be retained or if frozen, may continue to remain frozen, for a period not exceeding one hundred and eighty days from the day on which such property was seized or frozen, as the case maybe.

(2) The officer authorised by the Director shall, immediately after he has passed an order for retention or continuation of freezing of the property for purposes of adjudication under section 8, forward a copy of the order along with the material in his possession, referred to in sub-section (1), to the Adjudicating Authority, in a sealed envelope, in the manner as may be prescribed and such Adjudicating Authority shall keep such order and material for such period as may be prescribed.

(3) On the expiry of the period specified in sub-section (1), the property shall be returned to the person from whom such property was seized or whose property was ordered to be frozen unless the Adjudicating Authority permits retention or continuation of freezing of such property beyond the said period.

(4) The Adjudicating Authority, before authorising the retention or continuation of freezing of such property beyond the period specified in sub-section (1), shall satisfy himself that the property is prima facie involved in

money-laundering and the property is required for the purposes of adjudication under section 8.

(5) After passing the order of confiscation under sub-section (5) or sub-section (7) of section 8, the Special Court or the Adjudicating Authority, as the case maybe, shall direct the release of all property other than the property involved in money-laundering to the person from whom such property was seized or the persons entitled to receive it.

(6) Where an order releasing the property has been made by the Special Court under sub-section (6) of section 8 or by the Adjudicating Authority under section 58B or sub-section (2A) of section 60, the Director or any officer authorised by him in this behalf may withhold the release of any such property for a period of ninety days from the date of receipt of such order, if he is of the opinion that such property is relevant for the appeal proceedings under this Act.”

56. It is clear from the aforesaid scheme of the PMLA that any property can be provisionally attached under Section 5 or be seized under Section 17 or be frozen under Section 17(1A) of the PMLA. However, any such order can be passed only if the necessary checks and balances are complied with; namely, that the seizure or attachment is preceded by the concerned authority having reason to believe that such properties are proceeds of crime or are otherwise related to crime. Further, such reasons to believe must be formed on the basis of material in possession of the concerned officer and must be recorded in writing. In addition, such orders cannot be extended beyond the period of one hundred and eighty days, within which the Adjudicating Authority has to examine the matter and pass an order after issuing

notice to the concerned persons and after affording the concerned person full opportunity to be heard. Any person aggrieved by any such order of the Adjudicating Authority is entitled to prefer an appeal to the appellate tribunal constituted under Section 25 of the Act.

57. It is axiomatic that no order of freezing can be passed except in accordance with the provisions of Section 17(1A) of the PMLA.

58. In terms of Section 73 of the PMLA, the Central Government is empowered to make rules for carrying out the provisions of the PMLA. In exercise of such powers, the Central Government has notified the Prevention of Money-Laundering (Forms, Search and Seizure or Freezing and the Manner of Forwarding the Reasons and Material to the Adjudicating Authority, Impounding and Custody of Records and the Period of Retention) Rules, 2005. Rule 4 of the said Rules also provides for the procedure related to freezing of any property found as a result of search of any building, place, vessel, vehicle or aircraft.

59. It is relevant to note that an order of provisional attachment or an order of seizure is not an end in itself and does not stand in isolation. The said orders are passed in aid of the provisions to confiscate properties, which are found to be proceeds of crime.

60. The scheme of seizure made under Section 102 of the Cr.P.C. is materially different. Section 102 of Cr.P.C. is set out below:-

“102. Power of police officer to seize certain property.

(1) Any police officer, may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence.

(2) Such police officer, if subordinate to the officer in charge of a police station, shall forthwith report the seizure to that officer.

(3) Every police officer acting under sub- section (1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized is such that it cannot be conveniently transported to the Court, he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same.”

61. It is clear from the plain reading of Section 102 Cr.P.C. that any police officer may seize the property, which may be alleged or suspected to have been stolen or which is found in circumstances which create suspicion of the commission of any offence. However, the said order of seizure is only a temporary order and in terms of sub-section (3) of Section 102 of Cr.P.C., the police officer seizing any property on the grounds of suspicion of an offence is required to forthwith report the seizure to the Magistrate having jurisdiction.

62. The said property seized is required to be produced before a Court and/or reported to a Magistrate. In such cases, the court would have the power to pass necessary orders with regard to the said property. In terms of Section 457 of the Cr.P.C., whenever a property is seized by any police officer and is reported to the Magistrate, the Magistrate is empowered to make such orders as he thinks fit in

respect of disposal of the property or the delivery of such property to the person entitled to the possession thereof. In cases where such person cannot be ascertained, the Magistrate can pass orders in respect of the custody and production of such property.

63. It is at once clear that scheme of seizure, including the checks and balances in exercise of such power, as contemplated under the Cr.P.C. is wholly inconsistent with the scheme of the provisions under the PMLA.

64. Powers of seizure of properties is a draconian power. Grant of such authoritarian and drastic powers, without commensurate checks and balances, would militate against the principle of rule of law engrafted in the constitution of India. A police officer does not possess unfettered rights to freeze any asset without the same being reported immediately to a Magistrate. The party aggrieved, thus, has immediate recourse in respect of the said action of freezing the property. As observed above, the scheme of provisional attachment or seizure of a property, as contemplated under the provisions of the PMLA is materially different. The PMLA has separate checks and balances to ensure that such powers are exercised in aid of the object of confiscating or vesting such proceeds of crime with the Government. The power to provisionally attach or seize or freeze a property can be exercised only (a) if the specified officer has material in his possession, which provides him reason to believe that the property sought to be attached or seized is proceeds of crime or related to a crime; and (b) after recording the reasons in writing.

65. In the aforesaid view, the reliance placed on provisions of Section 65 of the PMLA is misplaced. By virtue of Section 65, the provisions of Cr.P.C. apply only insofar as they are not inconsistent with the provisions of the PMLA. There can be little doubt that scheme of seizure under Section 102, Cr.P.C. is inconsistent with the provisions relating to attachment and seizure of property under the PMLA.

66. What is sought to be canvassed on behalf of the Enforcement Directorate is a devised scheme under which the Enforcement Directorate refers to the provisions of Section 102(1) of Cr.P.C. for drawing the power to issue orders for immediately seizing the property on mere suspicion but at the same time ignores the provisions of Section 102(3) of Cr.P.C. which requires such seizure to be reported to a Magistrate. There is clearly no principle of law that would permit such interpretation, where officers can draw the power under a statute and yet not be accountable for the checks and balances enacted therein.

67. Mr Singh had contended on behalf of the Enforcement Directorate that the PMLA does not contain any provision regarding seizure on mere suspicion, therefore the power to make such seizure can be drawn from Section 102 of Cr.P.C. He contended that the provisions of Section 102(1) of Cr.P.C. are, therefore, not inconsistent with the provisions of the PMLA with regard to seizure of property. The said contention is unmerited. The question whether an enactment is repugnant to another is not determined on whether two provisions can be simultaneously obeyed but is determined in the context of the

scheme of the legislative enactment. The question to be asked is whether the schemes of the two enactments can subsist and be implemented simultaneously. It is apparent that the scheme of effecting provisional attachment and seizure of property under the PMLA is wholly inconsistent with the one as enacted under the Cr.P.C.

68. In *Innovative Industries Ltd. v. ICICI Bank and Anr.*: (2018) 1 SCC 407, the Supreme Court had examined the question of repugnancy between two enactments, namely, the Maharashtra Relief Undertakings (Special Provisions Act), 1958 and the Insolvency and Bankruptcy Code, 2016 in the perspective of the Constitution of India. The Supreme Court had referred to various decisions and culled out the principles with regard to repugnancy between two enactments. Although the decision was rendered in an altogether different context – whether the provisions of the central legislation would override a state enactment – the principles of inconsistency between two enactments as noticed by the Supreme Court would be equally applicable to determine whether the provisions of Section 102 Cr.P.C. are inconsistent with the provisions of the PMLA. In that case, the Supreme Court has referred to various decisions to set out the principles on the anvil of which the question whether two enactments are inconsistent are to be tested. In the aforesaid context, the Supreme Court had, *inter alia*, observed as under:-

“51.7. Though there may be no direct conflict, a State law may be inoperative because the Parliamentary law is intended to be a complete, exhaustive or exclusive code. In such a case, the State law is inconsistent and

repugnant, even though obedience to both laws is possible, because so long as the State law is referable to the same subject-matter as the Parliamentary law to any extent, it must give way. One test of seeing whether the subject-matter of the Parliamentary law is encroached upon is to find out whether the Parliamentary statute has adopted a plan or scheme which will be hindered and/or obstructed by giving effect to the State law. It can then be said that the State law trenches upon the Parliamentary statute. Negatively put, where Parliamentary legislation does not purport to be exhaustive or unqualified, but itself permits or recognises other laws restricting or qualifying the general provisions made in it, there can be said to be no repugnancy.”

69. As is clear from the above, one of the tests for determining whether there is repugnancy between two statutes is to find out where one of the statutes has adopted a plan or a scheme, which will be hindered or obstructed by giving effect to the other statute. This principle to determine whether there is repugnancy between two enactments is of universal application. If one applies the aforesaid test, it is at once clear that the PMLA has set out a separate scheme with a separate set of safeguards for ensuring that properties of parties are not attached or seized without the authorities effecting such actions having reason to believe that such properties are proceeds of crime or are related to a crime.

70. If the contention as advanced on behalf of the Enforcement Directorate is accepted, it would mean that whereas the property cannot be provisionally attached under Section 5(1) of the PMLA and/or seized or frozen under Section 17 of the PMLA without (a) the

Director having a reason to believe, on the basis of material available with him, that the properties are proceeds of crime and (b) recording such reasons in writing; the same officer can on mere suspicion pass orders for freezing the properties without recording reasons. Further, there are strict timelines provided under the PMLA. The orders of provisional attachment and/or seizure and/or freezing cannot extend beyond the period of 180 days. The Director of the Enforcement Directorate (or the officer authorized by him) is required to file a complaint by seeking extension of the period of retention from the adjudicating authority within a period of thirty days from passing such order. However, this safeguard would also be rendered meaningless if the Enforcement Directorate's contention is to be accepted; the Directorate could – as has been done in this case – freeze the assets without recording reasons and without making any application or complaint to the Adjudicating Authority. This Court is unable to accept that even in cases where the Director of the Enforcement Directorate has reasons to believe that the property is proceeds of crime, he can provisionally attach the same only for a period of one hundred and eighty days, but in cases where he has mere suspicion that the property in question is proceeds of crime, he can without recording any reasons, without issuance of any notice and without any obligation to make a complaint/ application in this regard to the Adjudicating Authority, pass an order freezing the property for an indeterminate period. This interpretation would militate against the scheme of the PMLA as enacted by the Parliament.

71. With much respect to the view of the Hon'ble Gujarat High Court, this Court is unable to agree with the view as expressed in *Paresha G. Shah v. State of Gujarat and Ors.* (*supra*). An order of freezing under Section 102 of Cr.P.C. cannot be considered to be in aid of order of provisional attachment passed under Section 5(1) of the PMLA or an order of seizure and/or freezing of property under Section 17(1A) of the PMLA. Both the orders under Section 5(1) and under Section 17 of the PMLA are orders of interim nature and are operative for a limited period till pending adjudication under Section 8 of the Act and further confiscation of the property. Orders of freezing of property passed under section 17(1A) of the PMLA or provisional attachment are by their nature provisional orders that require confirmation. Such powers are exercised in emergent situations warranting passing such orders. The contention that an order of provisional freezing is in aid of provisional attachment is plainly unpersuasive.

72. It is possible that prior to acquiring any material providing the Enforcement Directorate any reason to believe that any property is a proceed of crime, the concerned officers may entertain a suspicion that property in question represents proceeds of crime; but that does not entitle them to freeze the property, interdict transactions and perhaps bring a person's business to a standstill. The nature of the power of seizure contemplated under the provisions of Cr.P.C. is drastic and exercise of such powers is likely to have severe adverse effects on the person concerned; thus, the parliament in its wisdom did not confer

upon the Enforcement Directorate, any powers to attach or freeze assets on a mere suspicion.

73. The learned counsel appearing for the Enforcement Directorate has also referred to the decision of the Supreme Court in ***V.T. Khanzode and Ors. v. Reserve Bank of India and Anr.:* (1982) 2 SCC 7**. The said decision has no application in the facts of the present case. In that case, the petitioners had challenged the circular issued by the Reserve Bank of India whereby it had decided to combine the seniority of all officers. The petitioners had contended that such conditions of service could not be framed by administrative circulars but necessitated framing Regulations under Section 58 of the Reserve Bank of India Act, 1934. The Supreme Court repelled the said contention and held that under Section 7(2) of the Act, the Central Board had the power to provide for service conditions of the bank staff by issuing administrative circulars as long as they did not impinge upon the Regulations made under Section 58 of the said Act. The power of an employer to fix service conditions cannot be equated to police powers.

74. In view of the above, the contention that officers of the Enforcement Directorate could issue orders of freezing under Section 102 of Cr.P.C. is rejected and the communications issued by the Enforcement Directorate to BSE are, plainly, without authority of law.

75. In view of the above, it is not necessary to examine whether the series of communications sent by the officers of Enforcement

Directorate for interdicting the transaction relating to sale of 64,94,891 equity shares of KRBL Ltd. are otherwise sustainable in law. However, for the sake of completeness, this Court considers it apposite to also examine the question whether such communications could be issued under the provisions of Section 102 Cr.P.C.

76. As noticed above, the petitioners had sold 65,00,000 shares of KRBL Ltd. on the floor of BSE on 12.02.2018. SMC had issued a contract note in the form as prescribed by BSE confirming the said transaction. It is relevant to note that the said transactions were executed between 1:15 pm and 2:07 pm. The shares had been tendered by the broker (SMC) and the same had been removed from the Demat accounts of the Petitioners. Similarly the purchasers (counter parties) had also remitted the purchase consideration to BSE. It is at this stage that on 13.02.2018 at 5:37 pm, the Deputy Director of the Enforcement Directorate sent a communication stopping the transaction pertaining to the sale of the said shares. The said letter is relevant and is set out below:

“F.No. ECIR/15/DLZO-1/2014                      Dated 13.02.2018

To,

Sh. Poonam Chand  
BSE Ltd. (Stock Exchange)  
101 , 1st Floor, Aggarwal Corporate Tower  
Plot No. 23, District Center,  
Rajendra Place,  
New Delhi - 110 008

Sub:    Seizure/freezing of Shares of M/s KRBL Limited u/s  
         102 Cr.P.C. r/w section 65 r/w Sec. 2(na) of PMLA.

Sir,

This Directorate is conducting investigation against M/s KRBL Limited in AgustaWestland Helicopter Scam and Embraer case under the Prevention of Money Laundering Act.

Investigation reveals that M/s Rawasi Al Khaleej General Trading, UAE which is controlled by promoters of M/s KRBL Limited, received Agusta kickbacks through M/s Abdulla Ali Obeid Balsharaf & Omar Ali Obeid Balasharaf. These payments were routed through shell companies. Investigation reveals that the above mentioned kickbacks (proceeds of crime) were further layered through M/s KRBL DMCC and finally reached M/s KRBL Limited.

The investigation also reveals that through this laundering of money M/s Abdulla Ali Obeid Balasharaf & M/s Omar Ali Obeid Balsharaf acquired 3.19% shares each of M/s KRBL Limited.

Further, it is reported that M/s Abdulla Ali Obeid Balsharaf & M/s Omar Ali Obeid Balsharaf had entered into the transaction to sell the shares of M/s. KRBL Ltd, which may frustrate the purpose of investigation and further proceedings under PMLA. Since, the matter is under investigation for the offences of money laundering and its operation is required to be seized necessarily.

Thus, the operation of the transaction pertaining to the transfer of shares of M/s. KRBL Ltd owned by M/s Abdulla Ali Obeid Balsharaf & M/s Omar Ali Obeid Balsharaf ought to be restrained/stopped under the provisions of Sec. 102 Cr.P.C. r/w sec. 65 r/w Sec. 2 (na) of The Prevention of Money Laundering Act 2002 during the pendency of investigation. The same may not be transferred without permission of this Directorate or competent authority.

Yours sincerely,

S/d

Vikas Singh, IRS  
(Deputy Director)”

77. It is apparent from the above that the allegation against the petitioners was that AgustaWestland had paid kickbacks which had been received by KRBL Ltd. through the petitioners and in the process of laundering, the petitioners had acquired 3.19% shares each of M/s KRBL Ltd. This is *ex facie* erroneous. Even a perfunctory investigation would have revealed that the petitioners had acquired the shares of KRBL Ltd. in the year 2003, which was prior to allegation of any scheduled crime or any alleged kickbacks paid by AgustaWestland. Thus, the assumption/allegation that the said shares were acquired in the process of money laundering is perverse and without application of mind. It is material to note that the contention now advanced is materially different. It is now contended that proceeds of crime have been received by the petitioners overseas therefore the orders freezing property in India, which are equivalent to the proceeds of crime received overseas, have been passed. It is now no longer asserted that the shares have been subscribed by the proceeds derived from any crime.

78. Be that as it may, the said communication dated 13.02.2018 effectively restrained BSE from completing the transaction of sale and purchase of the shares of KRBL Ltd. It is relevant to note that by the said order, Deputy Director, BSE, not only froze the shares, which were required to be delivered to the purchasers but also froze the consideration paid by them.

79. On 15.02.2018, BSE sent an email informing the Enforcement Directorate that it had withheld funds to the extent of ₹3,86,10,00,261.00 payable to the petitioners and 64,94,891 equity shares of KRBL Ltd. which were to be delivered to “The Pabrai Investment Fund II LP” securities. The said email is relevant and is set out below:-

“Dear Sir,

As per your telecom, we would like to inform you that, Exchange have withheld the funds and securities of the following entities for their trades executed in the scrip KRBL Ltd. (530813) on trade date 12/02/2018.

| Buyer Client                     | Securities to be withheld | Seller Client                                      | Funds to be withheld |
|----------------------------------|---------------------------|----------------------------------------------------|----------------------|
| The Pabrai Investment Fund II LP | 64,94,891 shares          | Abdullah Ali Balsharaf<br>Omar Ali Obaid Balsharaf | Rs.3,86,10,00,261.00 |

”

80. It is apparent from the aforesaid email that securities due to M/s Pabrai Investment Fund and the amount due to the petitioners had been withheld. This also clearly indicates that as far as the said entities are concerned, the said transaction of sale and purchase is complete.

81. Any doubt that remained as to the import of the order dated 13.02.2018 passed by the Enforcement Directorate was put to rest by BSE by the abovementioned email dated 15.02.2018, whereby they confirmed that they were holding the securities to be delivered to M/s

Pabrai Investment Fund and withholding of ₹3,86,10,00,261.00 payable to the petitioners.

82. Clearly, the Deputy Director of the Enforcement Directorate had no authority whatsoever to freeze the shares, which were to be delivered in settlement to the purchaser. There was no allegation or any iota of suspicion against the purchaser who had purchased the shares from the floor of the exchange. If at all, any order for freezing any property was required to be passed under Section 102, Cr.P.C. (assuming it is accepted that Section 102, Cr.P.C. is at all applicable, which this Court has not accepted), at best, the officers of the Enforcement Directorate could have frozen the money (approximately Rs.386 crores) which were to be paid out by the BSE to the petitioners.

83. On 25.02.2018, M/s Pabrai Investment Fund sent a letter to the Enforcement Directorate confirming that they had purchased shares on the floor of BSE and paid consideration for the same. There was no allegation or suspicion against M/s Pabrai Investment Fund and therefore, there was now no justification in the Enforcement Directorate withholding the said securities.

84. Nonetheless, the officers of the Enforcement Directorate did not act immediately. Considering that it is argued that the orders under Section 102 Cr.P.C. are emergent orders necessary to freeze the properties which are likely to decapitate pending orders of seizure / attachment under the PMLA, it was incumbent upon the said officers

to immediately take a view and pass appropriate orders in accordance with the PMLA. However, the Enforcement Directorate took no such steps.

85. Almost a month thereafter, that is, on 23.03.2018, the Assistant Director, PMLA sent a letter to BSE instructing BSE to release the amount paid by M/s Pabrai Investment Fund to it but to continue to withhold the securities and shares of KRBL Ltd. The said letter is set out below:

“F.No.ECIR/15/DLZO-1/2014/ Dated: 23.03.2018

To,

BSE Limited  
Phiroze Jeejeebhoy Towers  
Dalai Street  
Mumbai- 400001

Sub: Seizure/freezing of shares traded on 12.02.2018 of  
M/s KRBL - reg.

Sir,

Please refer to your email dated 15.02.2018 on the above cited subject wherein it has been informed that the bulk trading dated 12.02.2018 by the seller M/s Omar Ali Balsharaf and buyer M/s. Pabrai Investment Fund pertaining to the shares of M/s. KRBL Limited; the funds and securities have been withheld by the exchange pursuant to the direction of this directorate.

In this regard, it is intimated that you may release the funds to the buyer M/s Pabrai Investment Funds and continue to withhold the securities at your end till further, instructions.

Yours sincerely,

S/d

NARESH MALIK  
Assistant Director(PMLA)”

86. This Court is at a loss to understand as to under which provision of law, such directions were given. Plainly, provisions of Section 102 Cr.P.C. do not empower any police officer to nullify a transaction. The sale of shares of KRBL Ltd. were complete and SMC had tendered the shares and M/s Pabrai Investment Fund had tendered the consideration and was entitled to the said securities. The petitioners were entitled to the consideration paid by M/s Pabrai Investment Fund. By directing BSE to release funds to M/s Pabrai Investment Fund, the Deputy Director of the Enforcement Directorate had proceeded further; he had interdicted the BSE from effecting the clearing and, by the letter dated 23.03.2018, the Assistant Director of the Enforcement Directorate had nullified the sale transaction that was complete. No authority for such actions can be found in section 102 Cr. PC. A police officer cannot set aside a transaction of sale and purchase of shares under the provisions of Section 102 Cr.PC. This Court pointedly asked Mr Singh, the learned counsel for the respondents as to under which authority did the Assistant Director, PMLA issue the communication dated 23.03.2018. Apart from contending that such action was *bonafide*, there was no explanation forthcoming as to under which provision of law, this direction had been issued.

87. Curiously, the said officer permitted BSE to let the transaction relating to 5109 equity shares go through. On 15.02.2018 the said officer sent an email to the BSE, which reads as under:

“Subject: RE: Seizure/freezing of shares traded on 12.02.2018 of M/s KRBL

Please refer to the trail mail. As discussed with you regarding the 3 counter parties mentioned below, as they have already sold their securities on the same day, no action is required to be taken against them.

| Sum of Qty | Sum of TRADE _VALUE | Buy CP_MEMBER | Buy CP_MEMBER_ NAME              | Buy CP_CLIEN TCODE | Buy CP- CLIENTNAM E        |
|------------|---------------------|---------------|----------------------------------|--------------------|----------------------------|
| 25         | 148.50              | 37            | BIPIN RATILAL VORA               | J005               | JETAL PRAVINCHANDRA PAREKH |
| 5000       | 2970250.00          | 3010          | SHRI PARASRAM HOLDINGS PVT. LTD. | OWN                | SUBHASH AGARWAL            |
| 84         | 49904.04            | 6507          | GKN SECURITIES                   | OWN                | GKN SECURITI ES            |

Regards

Vikas Singh, IRS”

88. Accordingly, 5109 shares of KRBL Ltd., which were sold by the petitioners, were released to the counter parties (purchasers). If the concerned officer was under a *bonafide* belief that the petitioners continued to hold the shares of KRBL Ltd. even after the same had been delivered by SMC to the BSE – as is contended on behalf of the Enforcement Directorate – and the said shares were to be attached and confiscated under the PMLA, the said officer would have no authority to permit the sale of any part of the said shares. His actions, plainly, indicate that the instructions to return the funds to M/s Pabrai Investment Fund were issued callously and in complete disregard of the provisions of the PMLA.

89. However, on instructions of the Enforcement Directorate, BSE continued to withhold 64,94,891 shares of KRBL Ltd. and ₹30,35,006.90 which were received as consideration for the sale of 5109 shares.

90. Thereafter, on 23.03.2018, the Assistant Director of the Enforcement Directorate informed BSE to release the securities (64,94,891 shares) to the petitioners. This Court was informed during the course of proceedings that the value of the shares had fallen significantly by the said date.

91. Thereafter, on 12.06.2018, the Assistant Director instructed BSE to release ₹30,35,006.90 to SMC.

92. This Court in no manner can doubt that the communications issued by the officers of the Enforcement Directorate interdicting the sale transaction for sale of equity shares of KRBL Ltd. and then subsequently, reversing the same is wholly illegal and without authority of law. This Court is informed that the value of the shares of KRBL Ltd. has fallen to half the value at which they were transacted. Thus, as of today, about 190 crores of the petitioners' value in the said shares stands eroded. Thus, even if it is accepted that the respondents are ultimately entitled to confiscate the value of the amount equal to the value of proceeds of crime which are alleged to have been received by the petitioners overseas, the officers of the Enforcement Directorate by their action have effectively reduced the assets which may have been available for such seizure.

93. It is seen that orders under Section 17 of the PMLA freezing the said shares and the amount released in the bank account of the petitioners has since been passed and, the petitioners have preferred an appeal before the Appellate Tribunal. Keeping this in view, no further orders are being passed and it would be open for the petitioners to seek appropriate remedy including compensation for any loss suffered by them on account of the illegal actions on the part of the respondents.

***Whether the provisions of the PMLA apply to the shares of KRBL Ltd. that were acquired prior its enactment.***

94. The next question to be examined is whether the provisions of the PMLA are applicable in respect of freezing orders passed under Section 17(1A) of the PMLA in respect of the shares of KRBL Ltd. As noticed above, these shares were acquired in the year 2003 and held uninterruptedly by the petitioners for approximately 15 years. Although, in the communication dated 13.02.2018 sent to BSE, it is alleged that the said shares were acquired in the process of money laundering, there is no material to substantiate such allegation. The alleged scheduled crime is stated to have been committed much after the acquisition of the aforesaid shares, therefore, these shares do not represent any proceeds which are derived from any crime.

95. Mr Singh had contended that the shares represented value of proceeds of crime that had been received by the petitioners outside India. In this regard it would be relevant to briefly examine the case set up by the Enforcement Directorate.

96. As noticed above, in the Counter Affidavit filed on behalf of the Enforcement Directorate, it is alleged that kickbacks have been paid by AgustaWestland in connection with procurement of helicopters of VVIPs. It is alleged that the said kickbacks were paid through various entities and found their way to an entity known as RAKGT (M/s Rawasi Al Khaleej General Trading LLC). The said company is stated to have been incorporated in the year 2007 by promoters and directors of KRBL DMCC, Dubai (100% subsidiary of M/s KRBL Pvt. Ltd. incorporated in UAE). It is further stated that promoters and directors of KRBL, DMCC had transferred shareholding in the name of the nephew of the promoters of KRBL Ltd.

97. As regards the issue with respect to the involvement of the petitioners as recipients of the proceeds of crime is concerned, it is affirmed in the Counter Affidavit that *“the proceeds of crime are suspected to be parked in the account of M/s Rawasi Al Khaleej General Trading, LLC Dubai under the ledger entries of M/s Omar Ali Balsharaf-GK, who is a major shareholder of M/s KRBL Limited”*.

98. As is apparent from the above that whilst it is clear that RAKGT is alleged to have received the alleged proceeds of crime, it is unclear on what basis it is alleged that the petitioners are recipients of proceeds of crime. Clearly, a ledger entry is not a property and cannot be the proceeds of crime. It appears from the reading of the counter affidavit that it is the Enforcement Directorate’s allegation that certain funds were received by RAKGT which were essentially kickbacks paid by AgustaWestland. The receipt of the said amounts are reflected

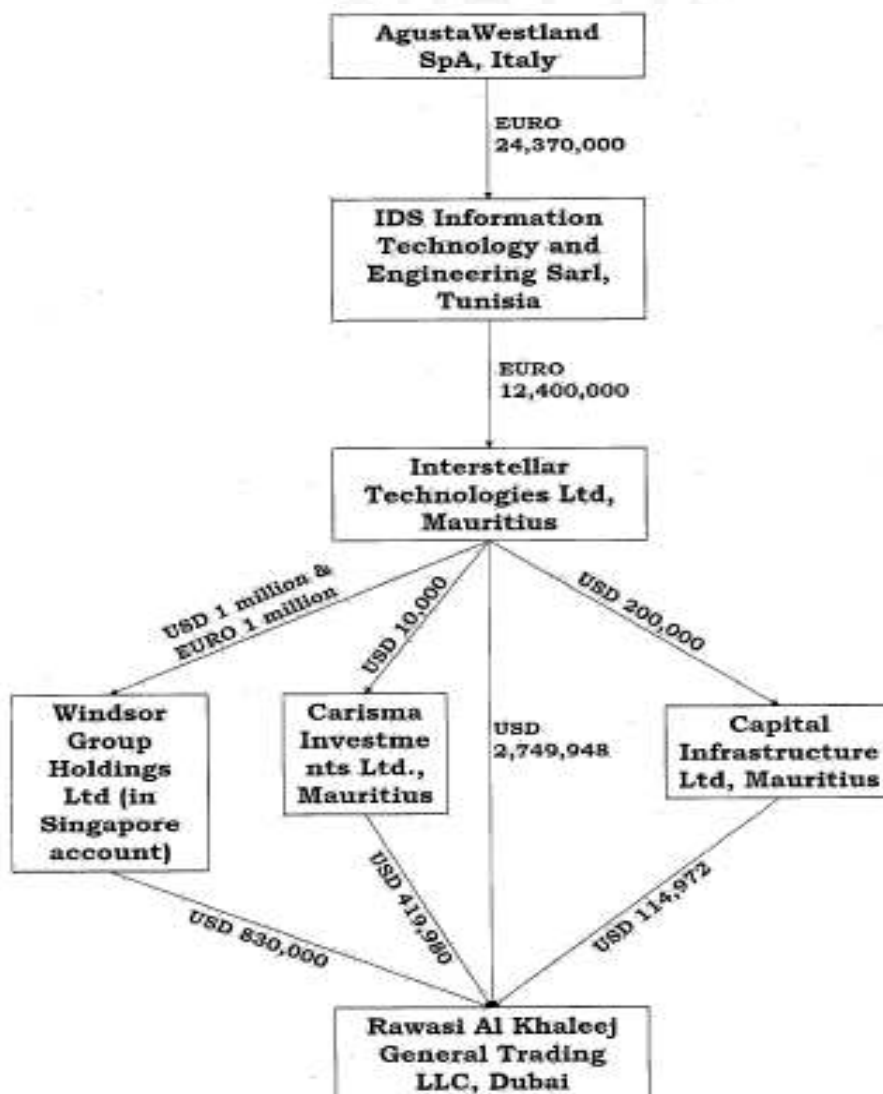
as credit entries against M/s Omar Ali Balsharaf-GK. In other words, books of RAKGT reflect that the said sums have been received from petitioner No.2.

99. In view of the above, this court in order to seek clarity, by order dated 27.09.2018 directed Enforcement Directorate to file the statement indicating money trail which the Enforcement Director alleges to be proceeds of crime. In compliance with the aforesaid order, the Enforcement Directorate had filed an affidavit affirming the following:

- “A. M/s. AgustaWestland transferred Euro 24.37 million to M/s. IDS Tunisia between 2008 to 2013.
- B. Further, M/s. IDS Tunisia transferred Euro 12.4 million to the accounts of M/s. Interstellar Technologies Limited, Mauritius between 2009 to 2012.
- C. M/s. Interstellar Technologies Limited transferred USD 2,749,948 to M/s. Rawasi Al Khaleej General Trading LLC (RAKGT) in its HSBC bank account between 11.10.08 to 27.01.2010.
- D. M/s. Interstellar Technologies Limited transferred Euro 1 million and USD 1 million to M/s. Windsor Group Holding Limited between 2009 to 2012. Out of which, USD 830,000 were transferred to M/s RAKGT between 03.02.2010 to 13.02.2010.
- E. M/s. Interstellar Technologies Limited transferred USD 10,000 to the accounts of M/s. Carisma Investment Limited in 2010. Whereas, USD 419,980 were transferred to M/s RAKGT between 18.04.2009 to 27.02.2010 by M/s. Carisma Investment Limited.

F. M/s. Interstellar Technologies Limited transferred USD 200,000 to the accounts of M/s. Capital Infrastructure Limited in 2009 out of which USD 114,972 were transferred to M/s RAKGT on 18.04.2009.”

100. The Enforcement Directorate has also annexed with the affidavit, a flow chart indicating the flow of money which is alleged to be proceeds of crime. The said flow chart is reproduced below:-



101. During the course of hearing, this Court had repeatedly called upon the learned counsel for the Enforcement Directorate to explain as to how the petitioners are connected with the funds remitted to RAKGT and the material available with the Enforcement Directorate, which would give reasons to believe that the petitioners are in possession of the proceeds of crime overseas.

102. In this regard, the learned counsel for the Enforcement Directorate referred to the affidavit filed on behalf of the Enforcement Directorate in compliance with the orders passed by this Court that the books of accounts of RAKGT had revealed that money was received by RAKGT from the petitioners and had credited in the ledger account maintained in the name of OAB-GK. Paragraphs 2 and 3 of the said affidavit are relevant and are set out below:-

- “2. That further, the books of account of M/s RAKGT revealed that the money was received by M/s. RAKGT from the Petitioner Omar Ali Balsharaf and the same has been shown as credited in its ledger account maintained in the name of OAB-GK. Basis the money trail, there are strong reasons to believe that the same are Proceeds of Crime parked in the said ledger account and investigation to ascertain the exact nature of the transaction is still ongoing.....
3. That therefore, approximately Rs 111 Crores were found credited in the ledger account of Petitioner Omar Ali Balsharaf from the above companies, which are directly or indirectly in receipt of proceeds of crime related to M/s. AgustaWestland....”

103. A credit entry in the books of RAKGT indicates receipt of money. According to the Enforcement Directorate, RAKGT had received funds, which are alleged to be proceeds of crime and the same are allegedly shown as credited to the account of the petitioners. However, this would only indicate that the petitioners had parted with the proceeds of crime in favour of RAKGT and consequently, the alleged proceeds of crime are with RAKGT and not the petitioners. *Prima facie*, there appears to be no material with the Enforcement Directorate to indicate that the petitioners are in possession of proceeds derived from any alleged crime or any property received as kickbacks from AgustaWestland. However, it is not necessary for this Court to delve into this issue any further as the petitioners have already challenged the orders passed by the Adjudicating Authority allowing the application filed under Section 17(4) of the PMLA and extending the orders passed under Section 17(1A) of the PMLA, before the Appellate Tribunal.

104. The limited question to be addressed at this stage is whether the provisions of the PMLA are applicable to the shares in question. Mr. Bhattacharya had contended that the PMLA was enacted after the shares were purchased, therefore, the PMLA would be inapplicable to those shares.

105. This Court is of the view that the question whether the provisions of the PMLA would apply would depend on the allegation made against the petitioners.

106. The expression “proceeds of crime” has been defined under Section 2(1) (u) of PMLA as under:

**“Section 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 [or where such property is taken or held outside the country, then the property equivalent in value held within the country] [or abroad];”**

107. A plain reading of the aforesaid definition indicates that the definition / expression of proceeds of crime is in two parts. The first part relates to proceeds of crime derived or obtained by crime and the second relates to property of an equivalent value. The expression ‘proceeds of crime’ means any property derived or obtained directly or indirectly as a result of criminal activity relating to a scheduled offence. Clearly the shares in question do not fall within this part of the definition. This is so because shares were subscribed by remittances paid through banking channels much prior to commission of any alleged crime and much prior to the PMLA coming into force.

108. The second part of the definition of the expression ‘proceeds of crime’ includes within its ambit, a property equivalent to the value of the property, which is derived from any criminal activity and is held outside the country. In other words, if any property that is derived or obtained from any criminal activity relating to a scheduled offence is held outside India, then a property of an equivalent value held in India, would also fall within the scope of expression of ‘proceeds of crime’.

Thus, if it is established that the petitioners hold any property overseas, which is derived or obtained by a scheduled offence, then the Enforcement Directorate would be well within its right to initiate proceedings against any property held by the petitioners in India to the extent of the value of the proceeds of crime held overseas. In such a case, it would be irrelevant whether the assets acquired in India were acquired prior to or after the PMLA came into force.

109. In the aforesaid view, the contention that assets acquired prior to enactment of the PMLA could never fall under the scope of the definition of the expression 'proceeds of crime' and consequently are immune from the provisions of the PMLA, is erroneous and is accordingly rejected.

110. The petition is, accordingly, disposed of in the aforesaid terms. It would be open for the petitioners to seek consequential and other reliefs in any court or forum. The pending applications are also disposed of.

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**VIBHU BAKHRU, J**

**JANUARY 09, 2019**  
**RK**