IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.5378 of 2021

Arising Out of PS. Case No.-1 Year-2017 Thana- GOVERNMENT OFFICIAL COMP. District- Patna

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RAJ KUMAR GOENKA, S/O LATE PASHUPATI NATH GOENKA, R/O VILLAGE-KACHI SARAI ROAD, PITAMBAR BABU LANE, RAMNA, MUZAFFARPUR, P.S-MITHANPURA, DISTRICT-MUZAFFARPUR.

... ... Petitioner/s

Versus

1. The State of Bihar
2. THE UNION OF INDIA THROUGH THE DIRECTOR, DIRECTORATE OF ENFORCEMENT, GOVT. OF INDIA, NEW DELHI.
3. THE ASSISTANT DIRECTOR, DIRECTORATE OF ENFORCEMENT, GOVT. OF INDIA, IST FLOOR, CHANDPURA PLACE, BANK ROAD WEST GANDHI MAIDAN, PATNA, BIHAR.

... ... Opposite Party/s

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Appearance :

For the Petitioner/s	:	Mr. Y.V. Giri, Sr. Adv.
	:	Mr.Ravindra Kumar Singh, Adv.
For the Union of India	:	Mr.Dr. K.N. Singh, ASG
	:	Mr.Manoj Kr. Singh, CGC
For the State	:	Mr.Shyam Kr. Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ANJANI KUMAR SHARAN

C.A.V. ORDER

7 31-05-2021 Heard Mr. Y.V. Giri, learned Sr. Advocate appearing for the petitioner assisted by Mr. Ravindra Kumar Singh, learned Advocate, learned counsel appearing for the Union of India Mr. Dr. K.N. Singh, Additional Solicitor General of India assisted by Mr. Manoj Kumar Singh, learned Central Government Counsel.

2. The petitioner seeks bail in Spl. Trial (PMLA) Case No. 7 of 2020 arising out of ECIR/PTZO/01/2017 dated 14.02.2017 for the offence under Section 3 of the Prevention of

Money Laundering Act, 2002 (PMLA) punishable under Section 4 of the said Act in connection with Mithanpura P.S. Case No. 298/2016 for offence under Sections 120(B), 420, 467 & 471 of the Indian Penal Code.

3. Prosecution case according to the informant, namely, Kunal Kumar is that the petitioner and his brother namely Ashok Kumar Goenka dishonestly and fraudulently got opened his bank accounts in Kotak Mahindra Bank and three accounts in ICICI Bank at Muzaffarpur by misusing his photographs and other documents without his knowledge and consent and again without his knowledge effected transactions worth Rs. Thirteen (13) crores from these bank accounts and he has got no manner of concern with these transactions at all. In substance, the allegation is about the misuse of his account without his knowledge. On the basis of said FIR, the Enforcement Directorate (ED) has recorded an ECIR No. PTZO/01/2017 dated 14.02.2017 and initiated its investigation. Though ECIR was recorded in Feb'17 and investigation was initiated, however, the copy of such ECIR was served to the petitioner in Jan'20.

4. Learned senior counsel for the petitioner submits that Raj Kumar Goenka (petitioner) was doing business of

Biscuit “BRISCKO” which is manufactured by Pankaj Agrawal (co-accused) of Kolkata, who also happens to be cousin of petitioner. In 2012-13, Pankaj Agrawal was selling biscuit in whole of Bihar in cash to other dealers as well and was facing issues in cash collection. So requested the petitioner to collect cash from his employees and transfer it to his companies by RTGS/NEFT. For this activity, he will pay commission @ 0.25%, which is equivalent to DD commission rate. Unaware of Income Tax implications, the petitioner agreed to this and opened bank accounts in his name, his wife’s name, his daughter’s name and also in name of his employees, namely, Kunal Kumar (Informant) of Mithanpura P.S. Case No. 298/2016 and Sri Neeraj Kumar, so that they can also be deposited Pankaj Agrawal’s cash in their bank accounts and transfer it to Sri Pankaj Agrawal. Sri Pankaj Agrawal’s employees, sometimes including Gaurav Maheshwari, used to deliver 5-10 lakhs rupees daily to Raj Kumar Goenka in Muzaffarpur. The petitioner used to deposit such amount in self/employee’ bank accounts and do RTGS to companies owned by Pankaj Agrawal. Commission @0.25% of transaction value was given by Pankaj Agrawal to Raj Kumar Goenka for such activity.

5. Learned senior counsel for the petitioner submits that around end of 2015, petitioner became aware of the Income Tax implications of such transactions, so immediately stopped all such transaction. In May 2016, Income Declaration Scheme (IDS) was launched by IT Department, as contained in Annexure-5 of the bail petition, where petitioner went ahead to declare all such transaction in his name, wife's name, daughter's name and also the transaction of accounts which were in the name of his employees, namely, Kunal Kumar (informant in Mithanpura P.S. Case No. 298/2016) and Neeraj Kumar and paid tax on such income @ 30% and penalty @50% of tax. This declaration was made on 30.09.2016, which is prior to institution of any investigation by any authority.

6. Learned senior counsel for the petitioner submits that in December, 2016, survey was conducted at Muzaffarpur in the premises of petitioner by Income Tax Department on 22.12.2016, when the petitioner was in Kolkata for his medical treatment and Income Tax Department could get only sundry amount of Rs.68,000/- Income Tax Department enquired from Sri Kunal Kumar (who is one of the employees in whose name bank account was opened) to explain the transaction which has happened from his bank account. Kunal Kumar became scared

on questioning from Income Tax Department and was pressurized to file an FIR by the Income Tax Authority against the petitioner stating that the bank accounts have been opened without his knowledge and consent. As such FIR No. 298/2016 in Mithanpura P.S. was registered. On the basis of FIR No. 298/2016 of Mithanpura P.S. as schedule offence the opposite parties (ED) have initiated the present ECIR case against the petitioner and others.

7. Learned senior counsel for the petitioner submits that the petitioner preferred Anticipatory Bail Application in Mithanpura P.S. Case No. 298/2016 before this Court in which he has mentioned the issuance of summons by the Enforcement Directorate (ED) as well as recording of his statement u/s 50 of Prevention of Money Laundering Act (PMLA). The said fact of summon was mentioned in Para 10 of the Anticipatory Bail Petition filed vide Cr. Misc. No. 7790/2018 which is attached as an annexure to the 2nd Supplementary Bail Petition filed in the present case. On consideration of every aspect of the matter this Court has been pleased to grant Anticipatory Bail to the petitioner (Raj Kumar Goenka) vide Cr. Misc. No. 7790/2018 on 23.03.2018 in the said FIR 298/2016. It is also pertinent to note that no information of registration of ECIR was given to

the petitioner before 28.01.2020.

8. Learned senior counsel for the petitioner submits that in FIR, the informant Kunal Kumar has claimed that the accounts have been opened without his knowledge and consent and again without his knowledge effected transactions worth Rupees 13 crores. In his statement given to ED dated 20.07.2017 Kunal Kumar has precisely stated that he himself used to go to the bank to deposit the amount in his account in between the period 2012-12 to 2016 and then used to transfer these amounts through bank to other places. In reply to Question no.7 of the ED, Kunal Kumar has accepted that Sanjay Mahto, Vikash Gathani and Ratan Goenka used to go alongwith him to deposit the amounts in the banks. In reply to Question no. 9 of the ED, Kunal Kumar has accepted that he used to get Rs.500/- extra as consideration amount against operation of his accounts apart from the monthly salary. In reply to Question no.10 of the ED, Sri Kunal Kumar has further specifically admitted that the bank accounts were being operated by him on the direction of Ashok Goenka. Statement of Kunal Kumar recorded by ED shows that there is no merit in the FIR being recorded by him, as he himself has opened the bank account and has done transactions from such accounts on direction received from

Ashok Goenka. FIR only includes bank accounts of Kunal Kumar, however, Enforcement Directorate claims that bank of account of Neeraj Kumar, who happens to be a brother of Kunal Kumar, has also been opened without his knowledge and consent. The Enforcement Directorate has not brought on record that if his account has also been opened fraudulently then why Neeraj Kumar has not went ahead to register an FIR separately or included his name in his brother's FIR.

9. Learned senior counsel for the petitioner submits that in the statement recorded by Enforcement Directorate dated 05.03.2020 of Gaurav Maheshwari, who happened to be an employee of Pankaj Agrawal (co-accused)-, in reply to Question no. 12, he has specifically said that before the ED that he used to hand over the cash amounts to the petitioner on the direction of Pankaj Agrawal (co-accused) which was thereafter transferred back by the petitioner through various banks to the accounts of the companies/firms/persons on the direction of Sri Pankaj Agrawal (co-accused). In statement recorded by Enforcement Directorate dated 02.10.2020 of Pankaj Agrawal (co-accused), in reply to Question no. 30, Pankaj Agrawal (co-accused) has said that he used to get the sale consideration into the bank accounts held in the name of sheel companies

controlled by him for the unaccounted sales of biscuits and he has further stated that the petitioner was his main distributor for his biscuit (BRISCKO) in Bihar and the petitioner used to transfer money to his shell companies against the unaccounted sale of biscuits. Further, in statement recorded by ED dated 21.09.2020 of Pankaj Agrawal (co-accused), in reply to Question no.5, has accepted that the petitioner used to deposit cash into the bank accounts of Kunal Kumar and Neeraj Kumar and, subsequently, transferred the same to the bank accounts of companies/firms controlled by him through the mode of RTGS/NEFT and he has further accepted that he used to provide an accommodation entry to his clients and used to get cash of the equivalent amount. During this process he used to get 0.20 to 0.25% commission from his clients he used to get he gave 0.10 to 0.15% commission to the petitioner and his brothers for facilitating deposit of cash. It is apparent from the statement of both Pankaj Agrawal and Gaurav Maheshwari that the whole business of transferring money through banks to different accounts were done by the petitioner on the direction of Pankaj Agrawal (co-accused) and further these amounts belongs to Pankaj Agrawal and thus the role of the petitioner was just of a commission agent, who has declared all income of such commission income to Income Tax Authorities and has paid all due taxes alongwith penalty. The Income Tax Authority has accepted the defense of the petitioner and has dropped all further proceedings. Even upon completion of the entire investigation by ED, there is no allegation that the money deposited in the account of Kunal Kumar was acquired by commission of any scheduled offence. Thus, in absence of constitution of any crime, no offence of money laundering is made out, as PMLA has no legs to stand in absence of existence of a foundational structure of Scheduled Offence. In the present case, there has been no wrongful loss and no wrongful gain to any person. No loss has been claimed by either the informant, Bank or Income Tax Authority. In absence of no wrongful loss to any of the parties, Sections 420, 467, 468 and 471 of the IPC cannot be said to be constituted.

10. Learned senior counsel for the petitioner submits that the Income Tax proceedings against the petitioner is that the petitioner had made a voluntary and bonafide disclosure of the all transactions carried out by him from 2012 to 2016, standing in different persons names under Income Disclosure Scheme (IDS), 2016. Such disclosure was made on 30.09.2016 i.e. before initiation of any kind of investigation against him. All

due taxes along with the additional penalty (@50% of tax) was paid by the petitioner on all incomes arising out of such transactions. All accounts standing in both Kunal Kumar as well as Neeraj Kumar's name have been declared to Income Tax Department under IDS, 2016 scheme and all due taxes arising on income earned from such transactions has been paid in full along with penalties before recording of such FIR.

11. Learned senior counsel for the petitioner further submits that the petitioner has accepted all reported transactions since assessment year 2011-12 to 2016-17 in the banking account which stands in the name of different persons, since the petitioner assessee's acceptance-existence and identity of such persons automatically ceased to exist and the person concern automatically got the immunity from levy of any tax. As at date, all Income Tax proceedings in relation to all these transactions have been completely dropped by Income Tax Authorities. Around 4.5 years have elapsed from the date of recording of such FIR and around 3 years have elapsed from the date of grant of such Anticipatory Bail, no charge sheet has been submitted yet by the investigating agency in the said FIR 298/2016.

12. Learned senior counsel for the petitioner submits that the ED has not established the fact that the intention of the

petitioner behind the effect of transactions from Kunal Kumar's Account was to cheat anyone. If the intention is to cheat, then why such transaction were effected from the petitioner' own bank accounts, his wife bank accounts and his daughter's bank accounts. The quantum of transactions done from self accounts are higher than the quantum of transactions done from Kunal Kumar's bank accounts. Also nowhere it has been denied by the petitioner that he does not own the transactions done from Kunal Kumar's Bank accounts. This clearly shows that there was no intention to cheat anyone.

13. Learned senior counsel for the petitioner submits that the pre-condition for attracting the offence under PMLA is that there must be proceeds of crime in existence by commission of scheduled offence, and violation of Income Tax Act, 1961 is not a scheduled offence as specified under PMLA. Merely by depositing unaccounted money in bank accounts does not amount to an offence of money laundering. Section 5 of PMLA requires that a report under Section 173 of the Cr.P.C. has to be forwarded to a Magistrate before proceeding for attachment of property. No such report has been sent by ED and the ED has also arbitrarily went ahead to attach properties of the petitioner. As per claims made by ED. The petitioner has deposited money

in Kunal Kumar's bank accounts and then transferred it to companies controlled by Pankaj Agrawal (co-accused). Thus, no alleged proceeds of crime are left in possession of the petitioner.

14. Learned senior counsel for the petitioner submits that ED's investigation has begun in Feb'17 and the petitioner was summoned 8 times before being arrested on 22.09.2020. The petitioner has appeared on every single summon and has answered all questions asked by ED. Despite being so medically unfit, he has fully cooperated in the entire investigation till date. Even after his arrest on 22.09.2020, he was available for further interrogation in last six months, however, ED has not asked for his remand after interrogating him one for seven days and then for four days. Since 05.10.2020, ED has not taken him on remand. This shows that they do not require the custody of the petitioner and their investigation is completed. In the charge-sheet, neither any allegation has been made nor has any evidence been brought on record with reference to the term Hawala, which has no meaning in law. Maximum imprisonment, if held guilty under offence of PMLA is 07 (seven years) and the petitioner has remained in custody for about more than seven months now, without having committed any crime much less an offence under PMLA Act.

15. Learned senior counsel for the petitioner submits that twin condition for grant of bail under Section 45 (1) of the PMLA.

a) Public prosecutor given an opportunity to oppose.

b) Court is satisfied that there are reasonable ground for believing that the person is not guilty of such offence.

Hon’ble Supreme Court in the case of Nikesh Tarachand Shah Vs. Union of India & Another (2018 (I) PLJR page 46 (SC) dated 23.11.2017 has already struck down Section 45 (1) on the ground that the same is violation of Articles 14 and 21 of the Constitution of India. Hon’ble Supreme Court also directed the Courts to decide the Bail applications without Application of conditions contained in Section 45 (1) as they are ultra vires. Second proviso to Section 45 of PMLA says if a person is a woman or is sick or infirm, may be released on Bail, if the Court so directs- Raj Kumar Goenka (petitioner) is patient of Acute Depression, Diabetes (since 15 years), Hypertension, High Cholesterol and was tested COVID-19 positive in July 2020. He has also been operated with spine injury due to this the doctors have strictly advised him not to sit for 3 hours at a stretch. Triple test for consideration of bail as laid down by the Apex Court

a. Flight Risk- The petitioner has got his family and properties in Muzaffarpur, hence no flight risk.

b. Tampering with evidence-The entire case set up by ED is based on documentary evidence and all the documentary evidences are in the custody of ED which has been filed with the charge-sheet in the Court.

c. Risk of Witness getting influenced- ED has recorded statement of all accused persons on record, hence risk of witness getting influenced does not arise.

16. Learned senior counsel for the petitioner submits that Hon’ble Supreme Court in case of Regular Bail of Sri P. Chidambaram Vs. Directorate of Enforcement, while granting bail, has again laid down in para 21 as basic jurisprudence relating to Bail matters remains the same inasmuch as grant of Bail is the rule and refusal is the exception so as to ensure that the accused has the opportunity of securing fair trial. Patna High Court in case of Ahilya Devi vs State of Bihar dated 28 May, 2020, while granting Anticipatory Bail, has said in para 24 that “I have no hesitation in reaching to a definite conclusion that the amendment in sub Section (1) of Section 45 of the Act

introduced after Supreme Court's decision in case of Nikesh Tarachand Shah (supra) does not have the effect of reviving the twin conditions for grant of bail, which have been declared ultra vires Articles 14 and 21 of the Constitution of India." Delhi High Court in case of Raj Kumar Goel vs Directorate of Enforcement has held in para 25 that "because all evidence are documentary in nature and statement of accused has already been recorded and because trial of PMLA &Scheduled Offence are required to be held together, which is likely to take some time, the Court deems it fit to grant Bail". The Hon'ble Supreme Court in case of Sanjay Chandra vs CBI, (2012) I SCC 40 in determining the grant or otherwise of bail, the seriousness of the charge and severity of the punishment should be taken into consideration.

17. Learned senior counsel for the petitioner submits that in Sanjay Chandra Vs. CBI, 2012 (1) SCC 40. Para 36.

'this court has taken the view that when there is a delay in the trial, bail should be granted to the accused. **(Babba Vs. State of Maharashtra, (2005) 11 SCC 569, Vivek Kumar Vs. State of U.P. (2000) 9 SCC 443 and Mahesh Kumar Bhawsinghka Vs. State of Delhi (2000) 9 SCC 383**. In para 44 of the supra, the Apex Court held in the **State of Kerala Vs.**

Raneef reported in (2011) SCC 784 of para 15.'

'In deciding bail application an important factor which should certainly be taken into consideration by the court is the delay in concluding the trial. Often this takes several years, and if the accused is denied bail but is ultimately acquitted, who will restore so many years of his life spent in custody? Is Article 21 of the Constitution, which is the most basic of all the fundamental rights in our Constitution, not violated in such a case? Of course, this is not the only factor, but it is certainly one of the important factors in deciding whether to grant bail. In the present case, the petitioner has already spent more than six months in custody.

18. Learned senior counsel for the petitioner relied upon the judgment in "Arnesh Kumar Vs. State of Bihar (2014) 8 SCC 273" which makes it mandatory that in any case where the offence is punishable with imprisonment for a term which may extend to 7 years, the accused may not be automatically arrested and the Magistrate may not authorize the detention casually and mechanically.

19. Learned counsel for the Opposite Party Union of India represented by Additional Solicitor General Dr. K.N. Singh submits that the scrutiny of statement of above bank

accounts reveled that the above cash deposits were transferred to some other bank accounts. Therefore, the bank was enquired regarding the beneficiary accounts where these deposits have been transferred. The reply from the bank revealed that the deposited cash was transferred to the bank accounts of multiple companies/firms/entities. FIR bearing No. 298/2016 dated 22.12.2016 was registered in Mithanpura P.S. Muzaffarpur for commission of offences punishable under Sections 420, 467, 468, 469, 471 and 120B of the Indian Penal Code on information lodged by Kunal Kumar a peon, that an account in the ICICI, Muzaffarpur was fraudulently opened in his name by his empoyer Raj Kumar Goenka (petitioner) and his brother Ashok Kumar Goenka without his knowledge and consent which was done by cheating and inducing him to deliver his photographs and documents on pretext of job requirement which was fraudulently used by accused for opening several bank accounts in his name and that of Neeraj Kumar without their knowledge. The two accused Goenka brothers admittedly deposited huge cash to the tune of Rs.20,97,01,912/- and Rs.12,78,94,516/- into these accounts. Subsequently Kunal Kumar came to know of the opening of accounts in their names and huge deposits made into them during the survey operation under the Income Tax Act when it was emerged that the petitioner by using else and other accounts fraudulently opened in names of his employees placed huge cash for layering through several bank accounts which in itself constitutes a Scheduled Offence under as per Schedule I of the PMLA, 2002 or PMLA. Neeraj Kumar has further stated and alleged that his signatures were forged on cheques.

20. Learned ASG submits that scrutiny of statement of above bank accounts revealed that the above cash deposits were transferred to some other bank accounts. Therefore, the bank was enquired regarding the beneficiary accounts where these deposits in the accounts of Kunal and Neeraj to the tune of Rs.33.76 crores have been transferred. The reply from the bank revealed that the deposited cash was transferred to the bank accounts of multiple companies/firms/entities. The names of some such companies/firms are as follows:

a) Trimurti Vanijya, 266, Rabindra Sarani 1st Floor Kolkata WB 700007 (Canara Bank Account No. 0397201001935)

b) M/s Yashoda Marketing Pvt. Ltd., 1, British Indian Street 7th Floor Kolkata, Kolkata WB 700069 (Kotak Mahindra Bank A/c No.504011053267)

c) SLA commodity, 159, Rabindra Sarani 4th Floor, FL-4/L Kolkata

d) Star Enterprises, Kolkata (Kotak Mahindra Bank A/c No. 9011502268)

e) M/s HRK Adventure World Pvt. UGF-06, Omaze Park Plaza, Shaktikhand-II, Indrapuramiabad Ghaziabad UP 201014 (Axis Bank A/c No. 914020016470457)

f) Nextgen Retail Pvt. Ltd. 266, Rabindra Sarani 1st Floor Kolkata WB 700007 (Canara Bank Account No. 0397201001934)

g) Allmost Tradelink Pvt. Ltd. 7/1A, Grant Lane 1st Floor Kolkata Kolkata WB 700012 (Canara Bank Account No. 0397201001994)

h) Cheroot Vanijya Ptv. Ltd., 4, NS Road, 1st Floor Kolkata Kolkata WB 700001 (ICICI Bank A/c No. 127605000278)

i) A One Enterprises, 2 N C Dutta Saranisagar Estate 4th Floor Koklata WB 700001

j) Best Enterprises, Kolkata

k) Join Overseas, Kolkata (ICICI Bank A/c No.015405500489)

l) Vevo Logistics, Kolkata etc. (ICICI Bank A/c No.

015405500439)

m) Star Commodities, Kolkata (Federal Bank A/c no. 11570200071248)

Enquiry has revealed that more than 50 such Companies were registered at one single address at 1st Floor, 266 Rabindra Sarani, Kolkata-70007

21. Learned ASG submits that it has now emerged that apart from the above more than Rs.225 crores has admittedly been deposited by the petitioner which he claims is also to be knowledge of the Income Tax Authorities and that he has paid tax related to such deposits and list whereof is given in tabular form and this is to be investigated.

Total Cash Admittedly Deposited In Accounts by Raj Kumar Goenka

Year	INCOME RETURNED	UNDISCLOSED INCOME PER IDS at w.p. page 48	TAX PAID PER IDS DISCLOSURE	CASH DEPOSITS PER I.T. Assessment of u/s 143 (3), 147 IT	Income Assessed @ 0.25% on Deposits	Writ Petition
2011-12	1,66,090/-	3,99,763/-		2,02,88,615/-		P.51
2012-13	1,90,490/-	2,25,835/-		3,04,19,315/-		P.55
2013-14	2,05,190/-	2,76,295/-		1,81,70,723/-		P.59
2014-15	2,19,570/-	2,28,490/-		2,55,15,382/-		P.65
2015-16	2,91,060/-	8,77,666/-		1,33,52,54,200/-		P.71-72
2016-17	6,16,720/-			82,90,35,810/-		P.79
Total	10,72,400/-	22,08,049/-	9,93,624/- Tax+SC+ Penalty at IDS Rates	2,25,86,84,045/-		

22. Learned ASG submits that it would be clear from the above that although an honest and complete declaration of

all concealed income is the sine qua non of the Income Declaration Scheme he did not do so and later when the IT caught the huge deposits he concocted the story of commission for laundering. However, the scope of proceedings under the IT Act and the PMLA are entirely different and independent of such other.

23. Learned ASG submits that the further investigation revealed that all these private limited companies have a very negligible paid up capital and were shell having dummy directors and most of them were not found at the given address. Inquiries revealed that many of these Companies, more than 50 of some 200 such Companies had a single common address at 1st Floor, 266 Rabindra Sarani, Kolkata-700007. These are the shell companies where the cash deposits were transferred from the bank accounts of Kunal Kumar and Neeraj Kumar and other such dummy accounts. Deepak Agrawal, an employee of the Pankaj Agrawal (co-accused) who managed his e-filing and was in know of affairs has also stated that Pankaj Agrawal (co-accused) and Raj Kumar Goenka (petitioner) are cousins and both are involved in hawala transactions and such accounts operated by them have been utilized for Hawala. On 01.04.2017 Deepak Agrawal unequivocally stated that Pankaj

and Pankaj's brother Aashish laundered money of Raj Kumar Goenka (petitioner) and as such the yarn of money from biscuit sales is falsified. Aashish Agrawal has also corroborated the fact of the petitioner being the kingpin. Pankaj says even Deepak Agrawal is his first cousin but he does not know his address, Pankaj Agrawal (co-accused) on 21.09.2020 and 01.10.2020 has also unambiguously stated that the money deposited into accounts of Kunal Kumar and his brother Neeraj Kumar belonged to the petitioner himself.

24. Learned ASG submits that with regard to the offences against the petitioner it is submitted that predicate offence has not been booked under Income Tax Act. Rather, FIR no.298/2016 dated 22.12.2016 was registered with P.S. Mithanpura, Muzaffarpur, Bihar for commission of offence punishable under Sections 420, 467, 468, 469, 471 and 120B of the Indian Penal Code. As, these offences are covered as 'Scheduled offences' under Para 1, in Part 'A' of the Schedule to the Prevention of Money Laundering Act, 2002 (as amended), an ECIR No. PTZO/01/2017 has been registered by ED Patna Zonal Office on 14.02.2017 and investigation under PMLA, 2002 has been initiated in the present case. It may here be stated that one a case of predicate offence comes to be registered

(Mithanpura P.S. Case No. 298/2016 on 22.12.2016) and thereafter an ECIR under the PMLA is registered, then on, the two case would stand alone and the former will be investigated by the police in this case and the latter by the ED. The PMLA investigation and subsequent filing of the Complaint and trial will be on the basis of money trail and evidence found and will stand on its own legs independently of the predicate offence; during investigation under PMLA if the money trail leads to a person who is not accused in predicate offence i.e. has not committed that crime, nevertheless he will be prosecuted for offence under PMLA if the money has come to him (he has possessed it or dealt with it in any manner) and hence emphasis of petitioner of not being charge sheeted in Case no. 298/2016 is of no avail. This has been clarified and held by High Court of Kerala in A.K. Samsuddin Vs Union of India in WP (C) No. 15378 of 2016 (V) and the High Court of Judicature at Bombay in the case of Babulal Verma & Anr Vs ED & Anr. In Cr. Appl. No.201 of 2021 with Cr. Bail Appl. No. 974 of 2021 dated 16.03.2021.

25. Learned ASG submits that in course of investigation, it was found that bank accounts of certain innocent persons have been misutilized by Goenka Brothers and

huge illegal cash (approx 33.76 Crores) has been deposited and subsequently transferred through these accounts. Hence, FIR No.298/2016 has been filed by the account holders with P.S. Mithanpura, Muzaffarpur and Bihar for commission of scheduled offences under Sections 420, 467, 468, 471 and 120B of the Indian Penal Code. The cash, so deposited into and from, became proceeds of crime and its transfer to other accounts clearly represents the process of integration of the proceeds of crime with the mainstream economy. It was further found that proceeds of crime to the tune of Rs.33.76 Crores originating from the bank accounts of complainant and his brother had been illegally transferred into the bank account of shell companies/factious firms controlled by the petitioner and his Mausera Bhai co conspirators. Therefore, in view of presumption under Section 23 of the PMLA, this entire series of transactions originating from bank accounts complainant and his brother and other accounts controlled by them are involved in money laundering.

26. Learned ASG submits that the provisions of the Income Tax Act, 1961 mandate that any income, even from illegitimate business sources or business of crime, unless exempt under that Act will be taxed. The tax man is not

concerned about the nature of income so long as it is income he will tax it at the specified rates as he is only concerned about his tax and not to punish the criminal for any crime or illegality that may have been committed in generation of that income as he has been done in this case, which also admits deposits of more than Rs.225 crores by the petitioner. Even in all illegitimate business such as smuggling the profits will be taxed viz Receipts-expenses of the business (which would also include seizures by customs auth)= taxable income/loss. The case is best illustrated by the case of Commr. Of Income Tax, Patiala Vs. Piara Singh AIR 1980 SC 1271 applying the ratio of CIT Gujrat Vs. S.C. Kothari [1971] 82 ITR 794 Guj) wherein Piara Singh, a gold smuggler, was allowed to claim the value of goods seized by Customs as business expenses. Similarly, although gold smuggling is illegitimate and punishable the profits would be taxable and the punishable for crime would be in another proceeding under the appropriate (Customs) Act. In S.C. Kothari the Hon'ble Court has, illustrating the above proposition succinctly quoted vide para 21 Lord Morison who also held that an illegal trade is a trade for the purpose of the income tax law and " the burglar and swindler, who carry on trade or business for profit, are as liable to tax as an honest business man, and in addition, they get their deserts elsewhere". Finlay J. also took the same view in Southern (H.M. Inspector of Taxes) v. A.B. Ltd. He also regarded the question as one of construction He said :

"The question always is, I think, a short question of construction: is there trade …... carried on within the meaning of Case I ?" and held that one you find a trade, profession, employment or vocation and find profits derived from that, then, at once, the tax is leviable and it would be irrelevant to the taxing statute whether the trade is lawful or unlawful. Viscount Haldane, delivering the opinion of the Privy Council, also to the same effect while construing the Canadian income tax law in Canadian Minister of Finance v. Smith, where the question was whether profit made from a business of illicit traffic in liquor carried on by the tax-payer in Ontario contrary to the provisions of the Ontario Temperance Act were taxable under the Canadian income tax laws : " Construing the Dominion Act literally, the profits in question, although by the law of the particular province they are illicit, come within the words employed... There is nothing in the Act which points to any intention to curtail the statutory definition of income, and it does not appear appropriate under the circumstances to import any assumed moral or ethical standard as controlling in a case such as this the literal interpretation of the language employed...”

27. Learned ASG submits that as regards the Hon’ble Court’s query about disclosure of existence of ECIR No. PTZO/01/2017 dated 14.02.2017 case in Cr. Misc. No.7970 of 2018 which was allowed on 23.03.2018 the petitioner has claimed that he had made a statement vide para 10 of the bail application that he had received summons from ED. He states that he had no knowledge of ECIR No.PTZO/01/2017 since it was not known to him. However, the statement at para 10 of the Cr. Misc. No.7970/2018 appears to be misleading concealing the real fact as the top left hand corner of the summons itself bears the No.PTZO/01/2017. The petitioner cleverly, with help of misleading statements and half truths contrived that facts of PMLA case were not brought to notice of the Hon’ble Court. ED had no notice of the matter.

28. Learned ASG submits that being an influential and wealthy individual involved in money laundering, there is every likelihood that the petitioner may tamper with the evidence and he will escape to any other country and will not be available for trial and petitioner assertions to contrary are not reliable as even Nirav Modi and V.Mallaya had family and

property but they evaded the law and so may petitioner. It cannot be lost sight of that petitioner being the king pin has control and influence over many witnesses who were/are employees of accused and obliged to him. He accepts that he has fraudulently opened bank accounts in name of other and transferred money from those accounts for illegitimate purposes and realizing his mistake he filed under Income Disclosure Scheme but in that also he played truant and failed to make trur and correct disclosure because of which I.T. authorities started proceedings u/s 147 of the I.T. Act. Nowhere has it been said that if custodial interrogation is not required for the present and accused is remanded to judicial custody it amounts to the prosecution having no objection to bail being granted to the petitioner as was sought to be fallaciously made out on his behalf. Investigation in the case is still going on.

29. Learned ASG submits that it is relevant here to refer to the amended Section 45 of the PMLA, which says that the offences are cognizable and non-bailable. Section 45 of the Act (as amended vide Finance Act 2018) reads as under:-

"Offence to be cognizable and non-bailable (1) [Notwithstanding anything contained in the code of criminal procedure, 1973, no person accused of an offence (under this act) shall be released on bail or on his own bond unless]

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

ii. Where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and he is not likely to commit any offence while on bail."

30. Learned ASG submits that the Hon'ble Supreme Court of India has upheld these provisions in Rohit Tandon vs. The Enforcement Directorate (2018) 11 SCC 46. The relevant observations are reproduced as follows:

" 18. the consistent view taken by this Court is that economic offence having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country. Further, when attempt is made to project the proceeds of crime as untainted money and also that the allegations may not ultimately be established, but having been made, the burden of proof that the monies were not the proceeds of crime and were not, therefore, tainted shifts on the accused persons under Section 24 of the Act of 2002."

31. Learned ASG submits that moreover, while granting bail, the ingredients under Section 45 (1) of the PMLA should be complied. The same was upheld by the Hon'ble Supreme Court of India in the case of **Gautam Kundu Vs. Manoj Kumar, AD, ED (2015) 16 SCC 1** and by the Bombay High Court in the case of **Chhhagan Chandrakant Bhujbal & Others Vs. Union of India (2017 140 SCL 40** (Bom.). The Apex Court has, in the case of **Y.S. Jagan Mohan Reddy Vs. Central Bureau of Investigation (2013) 4 SCC 439** held:-

"34. Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offence having deep rooted conspiracies and involving huge loss of public funds needs to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.

35. While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused reasonable apprehension of the witnesses being tampered with the larger interests of the public/State and

other similar consideration."

-AK Samsuddin Vs. Union of India WP (C) No. 15378 of 2016 (V).

-Motilal@ Moti Lal Patwa Vs Union of India Cr. Misc. No.73052/2019 Patna High Court as affirmed by the Apex Court.

-Vidyut Kr. Sarkar Vs. State of Bihar & Ors. Cr. Misc. 73325/2019 dated 18.06.2020 Patna High Court.

-State of Bihar Vs. Amit Kumr (2017) 13 SCC 751.

-Union of India Vs. Hassan Ali (2011) 10 SCC 235.-

Shivendra Mohan Singh Vs. DE 2020 SCC Online Del 766.

32. Learned ASG submits that in view of the aforesaid amended provisions contained in Section 45 of the Act, an accused can be granted bail only if the Hon'ble Court is of the view that the accused has not committed any offence under the Act. To the contrary, in the instant case there are sufficient materials as has been stated in the complaint petition which goes to prove the guilty of the petitioner. Moreover, it is also submitted that after being convinced from the material available on record, the learned Court was pleased to take the cognizance of the offence committed by the petitioner.

33. Learned ASG submits that having perused the judgments cited by the petitioner such as P. Chidambaram case (apart from the personality there was no allegation that he had received any money the allegation was that aided and complicity was yet to be proved in trial whereas in instant case Pankaj admits receiving the money), Dheeraj Jain case, Arvind Kumar case, Bimal Jain case, Rinku Singh case, Laloo Yadav, Karti Chidambaram case and Shivkumar case it is submitted that same are quite distinguishable from the present case. In the referred cases either the petitioner were in jail for much longer period than the present petitioner or they were not the main accused or the similarly situated accused were already on bail or they were ladies or seriously ill and in most cases there was no further scope of investigation but in the present case, the various illegal sources behind the cash transactions made by the petitioner is yet to be unraveled as only the tip of the iceberg has been revealed in this case and there being serious apprehension of tampering of the evidence and /or influencing witnesses. Moreover, in the present case the petitioner has a serious flight risk and cannot be released at such an initial stage of investigation despite charge-sheet which may be considered only a preliminary charge-sheet in the present case against the

petitioner.

34. I have perused the records including the counter affidavit, no allegation of any fraud with State Exchequer or affecting any Govt. policy like demonetization. Neither any allegation nor any material to suggest that money was acquired by cheating anyone, by defrauding anyone, being ransom for kidnapping, proceeds of any dacoity, obtained from any corrupt practice or embezzlement of Govt. fund-sets. The only allegation is that its source was not disclosed in income tax before the cash was deposited in Muzaffarpur. The money belonged to the clients for accommodation entry; petitioner has admitted this fact in the statement given under Section 50 of PML Act.

35. The ED has not stated that the money was arranged or collected by commission of any Scheduled offence to become proceeds of crime. In the charge-sheet filed by the ED, it is stated that "because all the unaccounted cash has been deposited / placed into normal banking channels by use of this criminal modus operandi through the bank accounts opened through fraudulent means, thus, the same became proceeds of crime". The ingredients of crime offence are based on fact and not an inference or interpretation. Raj Kumar Goenka

(petitioner) had made a voluntary and bonafide disclosure of all the transactions carried out by him from 2012 to 2016, standing in different persons' names under Income Disclosure Scheme (IDS) 2016. All due taxes alongwith additional penalty @ 50% of tax) was paid by the petitioner on all incomes arising out of such transactions. On that basis, Raj Kumar Goenka (petitioner) has been granted anticipatory bail by a co-ordinate Bench of this Court vide Cr. Misc. No. 7790/2018 in Mithanpura P.S. Case No. 298/2016 and till date no charge- sheet has been filed by the police in Mithanpura P.S. Case No. 298/2016, after more than four years.

36. I am conscious of the fact that accused is charged with economic offence of huge magnitude. I am also conscious of the fact that offences alleged, if proved, may jeopardize the economy of the country. At the same time, I could lose sight of the fact that the investigating agency has already completed the investigation agency has already completed investigation and the charge sheet has already been filed before the Special Judge, ED, Patna. Therefore, his presence in the custody may not be necessary for further investigation. I am of the view that the petitioner is entitled to the grant of bail pending trial on stringent condition in order to ally the apprehension expressed

by the ED.

37. In course of investigation, the petitioner appeared before the ED on 22.10.2020, the ED has filed the charge-sheet against the petitioner. When the under trial prisoners are detained in jail custody to an indefinite period, Article 21 of the constitution is violated. Every person, detained or arrested is entitled to speedy trial, the question is: whether the same is possible in the present case. ED has cited 32 witnesses for moving the case. Further defence witnesses will be required to be deposed. The petitioner is in jail custody since 22.10.2020 and has got no criminal antecedent mentioned in para 3 of the bail petition.

38. Let the petitioner, above named, be released on bail on furnishing bail bond of Rs. 10,00,000/- (Rupees Ten Lakhs) with two sureties of the like amount each in connection Mithanpura P.S. Case no. 298/2016 to the satisfaction of learned Court below where the case is pending, subject to the following conditions:

(i) He shall not leave the country without permission of court and surrender his passport, in any (if not already surrendered), and in case, he is not holders of the same, he will swear to an affidavit. If he has already surrendered before the learned trial court, that fact should also be supported by an affidavit.

(ii) He shall also make himself available for investigation, if required by the prosecuting agency.

(iii) He shall not influence the prosecution witnesses directly or remotely.

(iv)) The prosecuting agency will be at liberty to file an appropriate application for modification / recalling the order passed by this Court, for any reason or the petitioner violates any of the conditions imposed by this court.

39. Accordingly, this application is allowed.

(Anjani Kumar Sharan, J)

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