

Uday S. Jagtap

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1569 OF 2021

WITH

INTERIM APPLICATION (L) NO. 16884 OF 2021

IN

WRIT PETITION NO. 1569 OF 2021

- | | |
|---|-----------------|
| 1. Sunlight Housing Development Pvt. Ltd. |] |
| A Company incorporated under the |] |
| Companies Act, 1956, having its registered |] |
| office Unit No. 302, 3 rd Floor, HQ Bldg., |] |
| Nr. Ambedkar Nagar Bandra (East), Shastri |] |
| Nagar Rahiwasi SRA CHS, Mumbai – 400 051 |] |
| 2. Mukesh Doshi |] |
| Indian Inhabitant, Aged 67 years, having his |] |
| address at 1101, Sai Vaibhav, Viikrant Circle, |] |
| Ghatkopar East, Mumbai – 400 077 |] |
| 3. Kaushal Doshi |] |
| Indian Inhabitant, Aged 36 years, having his |] |
| address at 1101, Sai Vaibhav, Vikrant Circle, |] |
| Ghatkopar East, Mumbai – 400 077 |] |
| |].. Petitioners |

Vs.

- | | |
|--|------------------|
| 1. Directorate of Enforcement |] |
| Through its Deputy Director, having their |] |
| address at Kaiser-e-hind building, Ballard |] |
| Estate, Fort, Mumbai – 400 001 |] |
| 2. Mack Star Marketing Pvt. Ltd. |] |
| A Company incorporated under Companies |] |
| Act, 1956 having its registered office at |] |
| 1102, 11 th Floor, Tower “B”, Peninsula |] |
| Business Park, S.B. Road, Lower Parel |] |
| Mumbai – 400 013. |] |
| |] .. Respondents |

**ALONG WITH
WRIT PETITION NO. 1636 OF 2021**

Mack Star Marketing Pvt. Ltd.	]
A company incorporated under the	]
Companies Act, 1956 having its	]
registered office at 1102, 11 th Floor,	]
Peninsula Business Park,	]
Lower Parel, Mumbai – 400 013	] .. Petitioner

Vs.

Directorate of Enforcement	]
Through its Deputy Director, having their	]
address at Kaiser-e-hind building, Ballard	]
Estate, Fort, Mumbai – 400 001	] .. Respondent

.....

Mr. Aabad Ponda, Senior Counsel a/w Mr. Devansh Bheda, Ms. Jheel Mheta i/b M/s. Purnanand & Co. for the petitioner in WP 1569/21

Mr. Sharan Jagtiani, Senior Counsel a/w Ms. Apurva Manwani, Mr. Vividh Tandon, Mr. Prakshal Jain i/b Trilegal for the petitioner in WP 1636/21 and for applicant in IA(L) No. 16884/21

Mr. H.S. Venegaonkar, Counsel for respondent – E.D.

**CORAM : K.K. TATED &
PRITHVIRAJ K. CHAVAN, J.J.**

DATED : 23rd AUGUST, 2021

JUDGEMENT : (Per Prithivraj K. Chavan, J.)

1. Rule.
2. Rule is taken up for hearing forthwith by consent of learned Counsel.

3. The petitioners herein have invoked writ jurisdiction of this Court seeking writ of certiorari challenging provisional attachment order dated 9th April, 2021 passed by the respondent, *inter alia*, provisional attachment of immovable properties under Section 5(1) of the Prevention of Money Laundering Act, 2002 (for short “PML Act”). In view of intertwinement of facts, both petitions are taken up together.
4. The litigation has chequered history. However, brief necessary facts to decide the dispute may be noted, which are as follows:-
5. Pursuant to a reliable information, the Central Bureau of Investigation (CBI), Anti Corruption Bureau (ACB), Mumbai registered an FIR No. RC0262020A0012 dated 23rd September, 2020 wherein it has been alleged viz :-

“1. That M/s. Mack Star Marketing Pvt. Ltd. (Mack Star) is a joint venture company of M/s. Ocean Deity Investment Holdings Ltd. (A company incorporated under laws of Mauritius, having its registered office in Mauritius) and certain privately held Indian companies owned and controlled by Shri Sarang Wadhawan and Shri Rakesh Wadhawan, Promoters, M/s. Housing Development & Infrastructure Ltd. (HDIL).

2. That M/s. Ocean Deity Investment Holdings Ltd. (ODIL) holds 78.09% share capitals of M/s. Mack Star Marketing Pvt. Ltd. and the Housing Development and Infrastructure Ltd (HDIL) and Mr. Waryam Singh, Former Chairman of PMC Bank held remaining 21.91% of shares.

3. That M/s. Mack Star Marketing Pvt. Ltd. developed

an office building called “Kaledonia” in Andheri East, Mumbai using a sum of Rs.1,000/- Crores in February, 2008. Rs. 900 crore was invested in purchasing of a plot of land and Rs.100 crore was invested in construction of building. This Rs.1,000/- crore was mostly invested by HDIL. Shri Sarang Wadhawan, Shri Rakesh Wadhawan, HDIL Promoters, Shri Weryam Singh, Former Chairman of PMC, Shri Amanpreet Singh, Director of HDIL Group of Companies, Shri Vebkatavarthan N. Iyenger, SR. Vice President and Director of HDIL Group of Companies and Shri Lakhminder Dyal Singh, Director of HDIL group of companies were appointed members of Board of Directors in M/s. Mack Star Marketing Pvt. Ltd. Since the Wadhawans had significant experience in developing and managing commercial real estate projects in Mumbai, the Wadhawans and certain directors appointed by them, unofficially called the “Wadhawan Directors”, exercised full control over day-to-day management and operations of Mack Star from 2008 until January 2019. The Wadhawans and the Wadhawan Directors also operated the bank accounts of Mack Star. Such arrangement is common in joint ventures between foreign investors and domestic entities.

4. That in order to safeguard the interest of Investor i.e. ODIL, which played a passive role in Mack Star’s Management the Article of Association of M/s. Mack Star Marketing Pvt. Ltd. has been embedded with some prohibitions like Article 14.1.2 of the Association Memorandum, which provides the right to appoint two directors (the “Investor Directors”) to Board of Directors meetings of Mack Star. Similarly, Article 14.4.2 of the Association Memorandum prohibits Mack Star (and its shareholders and directors) from (a) selling assets; (b) taking loans; (c) creating mortgages and (d) entering into contracts, whose value exceeds INR 20 lakhs, without the Investor’s consent i.e. HDIL.

5. That the HDIL group and the wadhawans have been in severe financial stress and been struggling to discharge liabilities / repay loans owed by them to several

persons/entities. The Wadhawans and Wadhawans Directors, who were in operational control of Mack Star and its bank accounts until the beginning of 2019, took advantage of their controlling position and took 6 loans of Rs.200.3 crores from Yes Bank Ltd. during the period from 2011 to 2016 in the name of Mack Star Marketing Pvt. Ltd. without approval or the knowledge of Investors.

6. That most of this loan amount was used in order to discharge liabilities owed by the HDIL group and the Wadhawan to the Yes Bank Ltd., and thereby prevented them from being NPA.

7. That although M/s. Mack Star Marketing Pvt. Ltd. was sanctioned a loan of Rs.200.3 Crore, but only a sum of Rs.138 Crore was credited in the current accounts of M/s. Mack Star Marketing Pvt. Ltd. and the remaining 64 Crores was directly transferred for the settlement of liabilities owned by HDIL Group to Yes bank through bank accounts of HDIL. Further, Rs.135 Crores was also transferred from the Yes Bank Accounts of M/s. Mack Star Marketing Pvt. Ltd. to the bank accounts of M/s. Housing Development and Infrastructure Ltd., M/s. Privillage Power and Infrastructure Private Limited and M/s. Sapphire Land Development Private Limited all HDIL Group Companies, on the same dates of loan disbursement. The Companies used more than Rs.96 Crore of the money to pay their liabilities with the Yes Bank Ltd.

8. That these transactions were orchestrated without the knowledge of the Investor or the Investor's Directors. The Investor was not able to discover any of these fraudulent transactions from Mack Star's audited financial statements because the statutory auditor of Mack Star, M/s. Ashok Jayesh & Associates (the Audit Firm) was acting in collusion with the Wadhawans and HDIL. The senior partner of the Audit Firm, Mr. Jayesh Sanghani, is closely associated with the Wadhawans. Further, even the other senior partner of the Audit Firm, the Audit Firm, Mr. Ashok Kumar Gupta: (a) was a director of HDIL till

November 2016 and is a very close business associate of the Wadhawans, and (b) has himself participated in these fraudulent transactions and misappropriated two office units owned by Mack Star.

9. Further, in January 2016, the investors realized that the Wadhawans had taken fraudulent loans from the Yes Bank in the name of M/s. Mack Star Marketing Pvt. Ltd. They informed Yes Bank Ltd. Even after this Yes Bank Ltd. disbursed 3 installments of loan amounting to Rs.19.60 crore to Mack Star's account on 23.03.2016, 26.04.2016 & 25.05.2016.

10. That three of such loans of Rs.140 crore were sanctioned to the Mack Star for the purpose of Expenditure for modification, renovation & refurbishment of 'Kaledonia Property and other Capex in Company. The purpose assigned for these loans was fictitious because Kaledonia was a newly constructed building and that total cost of construction was only Rs.100 crore. Therefore, the actual purpose for sanctioning and disbursement of loans was to siphon off the amounts and transfer the misappropriated funds to struggling HDIL group companies, so that the cash strapped HDIL Group Companies could repay loans and discharge liabilities owned in the same Yes Bank. Yes Bank disbursed these loans to Mack Star without the satisfaction of a key condition of Yes Bank's sanction letter that required Yes Bank to obtain Non-Disposal Undertakings (NDUs) from the Investor prior to disbursement. Yes Bank obtained NDUs from each of Wardhan - owned minority shareholder and never approached the major investors to hide the transaction from them.

11. That unknown officials of Yes Bank dishonestly ignored the terms of Mack Star's Articles that expressly prohibited Mack Star from availing any loans without the approval of its majority shareholder (i.e. the Investor). The said unknown officials of Yes Bank Ltd. deliberately avoided alerting the Investor about these fraudulent loans and disbursed these loans to Mack Star without the satisfaction of a key condition of Yes Bank's sanction

letter. It is also revealed that they did not verify the end-use of these loans. The entire circulation of funds was happening within the Yes Bank System (i.e. loans disbursed by Yes Bank into Mack Star's Yes Bank account were immediately diverted to Yes Bank accounts of HDIL group companies, which used these funds on the same day to discharge liabilities owed by these HDIL group companies to Yes Bank)."

6. An offence came to be registered under Sections 120B, 409, 420 of Indian Penal Code, 1960 and Section 13(2) r/w section 13(1) (d) of the Prevention of Corruption Act, 1988 against Mr. Sarang Wadhawan, Mr. Rakesh Wadhawan and others (for short "Wadhawans"). It is alleged that Wadhawans have committed the aforesaid offences, which are scheduled offences under para 'A' of the schedule to the PML Act (as amended). On the basis of the aforesaid information and documents, the respondent found that a *prima facie* case for the offence of money laundering under Section 3 of the PML Act for the offence punishable under Section 4 of the PML Act appeared to have been made out.

7. During the course of investigation, it is revealed that Wadhawans of Housing Development and Infrastructure Ltd. (for short "HDIL") connived with Mr. Rana Kapoor of Yes Bank had fraudulently sanctioned loan of more than Rs. 200 Cores to Mack Star (a joint venture between Wadhawans and DE Shaw Group) for the purpose of the newly constructed building developed by Mack Star at Andheri. Wadhawans had siphoned off entire amount of loan through their HDIL group of companies without using the same for its declared purpose. Wadhawans had fraudulently committed the act without the consent of majority of

the shareholders of Mack Star i.e. DE Shaw Group. It is further alleged that Wadhawans, pursuant to a criminal conspiracy, had illegally and fraudulently transferred the properties of Mack Star situated in Kaledonia building viz. 7 office units bearing No. 101 to 104, 202B, 501-A and 504-A situated at Andheri (E), Mumbai to the petitioner – M/s. Sunlight Housing Development Pvt. Ltd. (for short “M/s. Sunlight Housing”) a company beneficially owned by Mr. Mukesh Doshi, Mr. Kaushal Doshi and controlled by Mr. Mukesh Doshi and Ankit Doshi.

8. The respondent further noticed during investigation that Doshis of M/s. Sunlight Housing connived with Wadhawans of HDIL had illegally and fraudulently transferred the aforesaid 7 office units to Mack Star in Kaledonia building without paying any actual consideration to Mack Star, meaning thereby, value of the property for its acquisition had never been paid by Doshis of M/s. Sunlight Housing to Mack Star. Thus, the aforesaid properties in Kaledonia building, Andheri (W), Mumbai have been illegally acquired and beneficially owned by Doshis through their beneficially owned / controlled entity namely, M/s. Sunlight Housing, which are proceeds of crime in terms of Section 2(1)(u) of PML Act r/w Section 2(1)(v) of the said Act and were liable for attachment under the said Act.
9. Investigation further revealed that in the year 2019-20, Doshis had sold two office units of M/s. Sunlight Housing namely; Office No.101 and 102 to one M/s. Acropolish and the same were not available for attachment. Therefore, the other properties

beneficially owned by Mr. Kaushal Doshi were identified in Atlantis building at Andheri (W), Mumbai. Since the proceeds of crime have been illegally and fraudulently obtained by Doshis through their beneficially owned company M/s. Sunlight Housing, were not available for attachment, as the two properties sold by M/s. Sunlight Housing, being Flat No.1001 and 1002, 10th floor, Atlantis building, Oshiwara, Andheri (W), Mumbai 400 012 were directly owned by Kaushal Doshi, which represents the value of proceeds of crime in terms of definition of Section 2(1)(u) of PML Act, was liable for attachment. It is the contention of the respondent that remaining 5 properties in Kaledonia building namely; office unit Nos.103, 104, 202-B, 501-A and 504-A were still in possession of M/s. Sunlight Housing and the same were liable for attachment in terms of Section 2(1)(u) of the PML Act.

10. Cash amount of Rs.1.40 Crore was recovered from the residential premises of Mr. Mukesh Doshi as proceeds of crime in terms of Section 2(1)(u) of the PML Act and the same was attached vide the instant provisional attachment order in value thereof to prevent it from being transferred / concealed or otherwise which might have resulted into frustrating the proceedings in the present case.
11. Flat No. 1001 and 1002, 10th floor, Atlantis building, Oshiwara, Andheri (W), Mumbai were directly owned by Mr. Kaushal Doshi, the proceeds of crime as defined under Section 2(1)(u) of the PML Act representing the equivalent value of proceeds of crime, are not available for attachment.

12. These properties are the subject matter of the writ petition, which have already been provisionally attached by way of a provisional attachment order No.6 of 2021 dated 9th April, 2021.
13. We heard Mr. Ponda, learned Senior Counsel appearing for the petitioner – M/s. Sunlight Housing, Mr. Jagtiani, learned Senior Counsel for the petitioner in Mack Star as well as Mr. Venegaonkar, learned Counsel for the respondent – E.D. at length.
14. At the outset, Mr. Ponda, challenged the impugned provisional attachment order on two grounds namely; the preconditions of Section 5 of the PLM Act are not fulfilled and, therefore, the provisional attachment order dated 9th April, 2021 passed by the respondent no.1 is bad in law and secondly, the order of provisional attachment has been passed ignoring a binding precedent and the consent decree passed by this Court. Mr. Ponda would argue that the immovable properties in question namely; Flat Nos. 1001 and 1002 in Atlantis building (subject flats) have been acquired in the year 2010 as can be discern from the petitioners' averments in the petition, which has also been fortified on the basis of record of Index No.II of the Deed of Conveyance registered in the name of M/s. Crystal Pride Developers, Ms. Dhvani Doshi and Petitioner no.3 in June, 2010, which is prior to the scheduled offence. As such, according to Mr. Ponda, the subject flats are, therefore, untainted and clean property, which cannot be termed as proceeds of crime and are

not liable to be attached. Mr. Ponda, reiterates that there is a difference in 'value of such property' and 'property equivalent' and the difference, according to him, has been succinctly noted in case of *Seema Garg Vs. Deputy Director, Directorate of Enforcement, 2020 SCC Online, P & H 738* as well as in the case of *Kumar Pappu Singh Vs. Union of India & Ors. 2021 SCC Online AP 983*. The subject flats can never be attached, even provisionally and, therefore, there is no question of going through the motion of adjudication. Admittedly, the petitioners have filed a reply before the adjudicating authority.

15. The second limb of his argument is that in view of a consent decree passed by this Court on 16th March, 2021 in Commercial Suit (L) NO. 370 of 2020 which has already been communicated to the respondent no.1, the respondent no.1 chose to ignore the same. In view of the said consent decree, the officials of the respondent no.1 are not empowered to provisionally attach the subject flats in defiance of the said consent decree.
16. In order to invoke Section 5 of the PML Act for attachment of property in the form of provisional attachment order, the requirement of law is that there should be reason to believe and the same should be recorded in writing of such belief that any person is in possession of any proceeds of crime and 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 Chapter III of the PML Act.

17. Mr Ponda would argue that except by invoking writ jurisdiction of this Court, there is no provision in PML Act to challenge an order of provisional attachment as there is no statutory appeal or any other provisions in PML Act or in the Civil Procedure Code. He took us through Sections 5 and 8 of the PML Act. He candidly admits that the petitioners have not challenged the show-cause notice in this proceeding and only seeking to challenge the provisional attachment order. The present challenge has been filed before this Court on 28th April, 2021, which was much prior to show-cause notice dated 17th June, 2021 and thus, the same is still alive inspite of the show-cause notice.
18. Mr. Jagtiani, the learned Senior Counsel for the petitioners in Mack Star, vehemently urged that the petitioners being victim of crime, who have been defrauded by M/s. Sunlight Housing, there is absolutely no question of they being arraigned as accused and being prosecuted by the respondent in terms of the provisional order dated 9th April, 2021. Mr. Jagtiani would argue that even the impugned provisional attachment order dated 9th April, 2021 does not, in so many words, accuses the petitioners as co-conspirators, rather it can be seen that the petitioners suffered a wrongful loss.
19. *Per contra*, Mr. Venegaonkar, in his brief submissions emphasized and brought to our notice as to how the whole facade of money laundering was conspired by Wadhawans and Doshis in a meticulous way wherein, without actual payment of a single

rupees, seven properties worth Rs.100 crores were acquired; preferential shares allegedly worth Rs.76.87 crores were acquired in connivance with one another and the said amount of Rs.5 crores was rotated 223 times, which totally amounts to Rs.994.28 crores amongst Wadhawans group of companies and Doshis group of companies, so as to project a payment of Rs.76.87 crores by M/s. Sunlight Housing to Mack Star Pvt. Ltd. in so called projects of 7 office units in Kaledonia building.

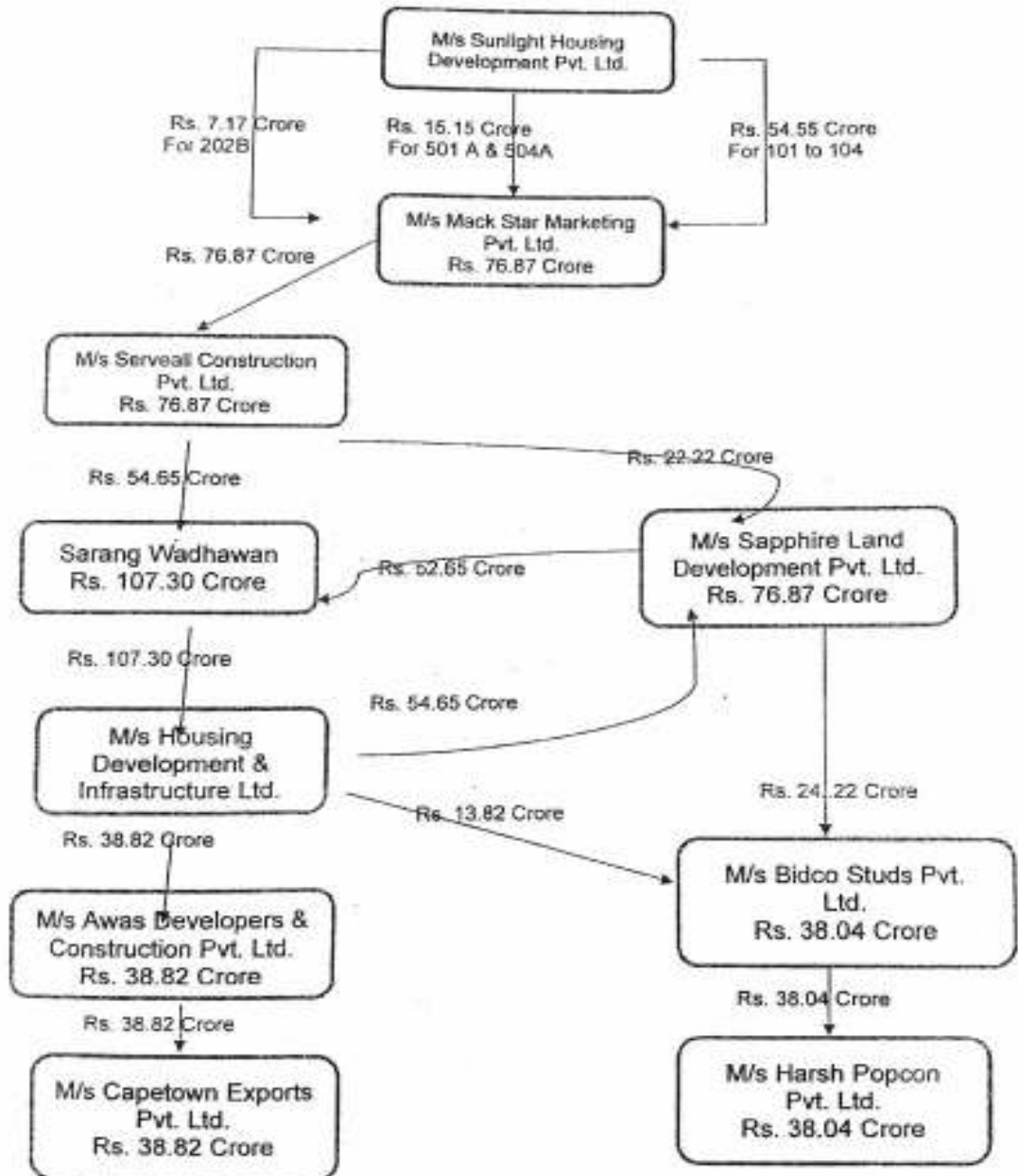
20. Mr. Venegaonkar has drawn our attention to pages 62 and 67 of the provisional attachment order depicting a chart indicating how the funds were rotated between Wadhawans and Doshis under the garb of purchase of 7 office units in Kaledonia building.
21. Mr. Venegaonkar has also brought to our notice that petition needs to be dismissed in *limine* solely on the basis of the fact that the petitioners have approached this Court *mala fide* with unclean hands, in the sense, they have suppressed the decision of this Court passed in Writ Petition (L) No.10807 of 2021 dated 17th June, 2021 (Coram : S.C. Gupte & M.S.Karnik, JJ.) wherein the petitioners – M/s. Sunlight Housing have already approached this Court seeking similar relief *qua* the same provisional attachment order dated 9th April, 2021. He would argue that since the petitioners have not challenged the show-cause notice under Section 8 of the PML Act, there is no question of now challenging the impugned provisional attachment order in respect of the subject flats. Mr. Venegaonkar has also drawn our attention to the facts that the subject flats were not at all in existence in the

year 2010 and the said property came into the hands of the petitioners in 2020, which totally falsifies the contention of the petitioners that they have acquired the subject flats in the year 2010.

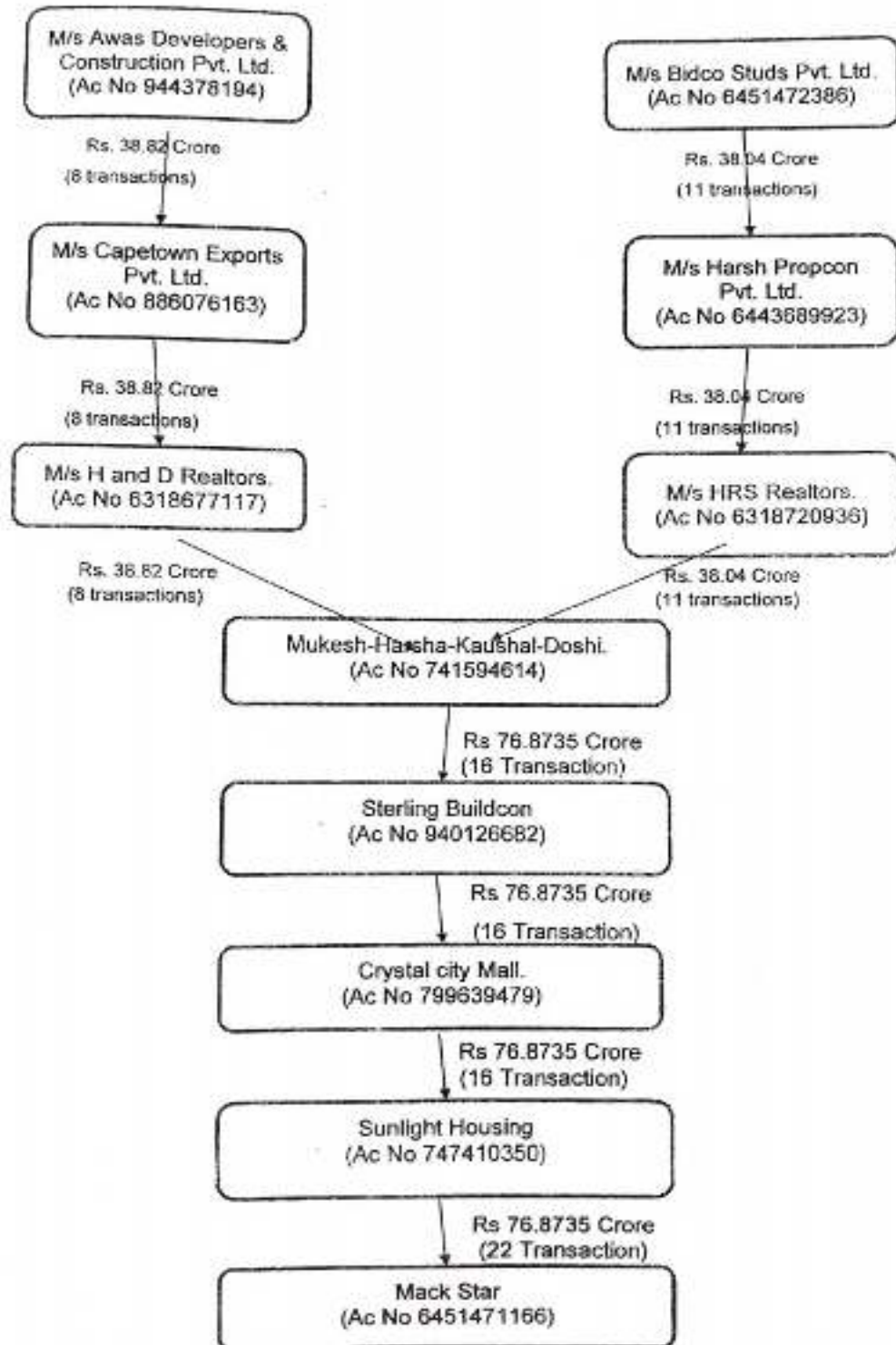
22. At the first blush, the arguments of the learned Senior Counsel for the petitioners may appear attractive, nevertheless, a deeper scrutiny would reveal its hollowness in view of the complexity of the matter.

23. At the outset, the provisional attachment order No. 6 of 2021 dated 9th April, 2021 itself is so comprehensive, which augment the documentary evidence in the form of extracts of bank accounts of the petitioners and details of transactions which took place from time to time as well as documents at **Exhibit-A** to **Exhibit-J** (page nos. 130 to 153 of the petition) that it hardly needs to delve into the other aspects, for, being a writ court, we cannot venture into several disputed questions of facts. A pictorial chart indicating rotation of funds between Mukesh Doshis group of companies and Rakesh Wadhawans controlled HDIL group of companies in the garb of purchase of 7 office units in Kaledonia building as depicted on page nos.171, 179, 180, 182 and 183 will give, at a glance the enormity and deep rooted conspiracy entered into by the petitioners which can *prima facie* be said to be an offence of money laundering as contemplated in Section 3 of the PML Act.

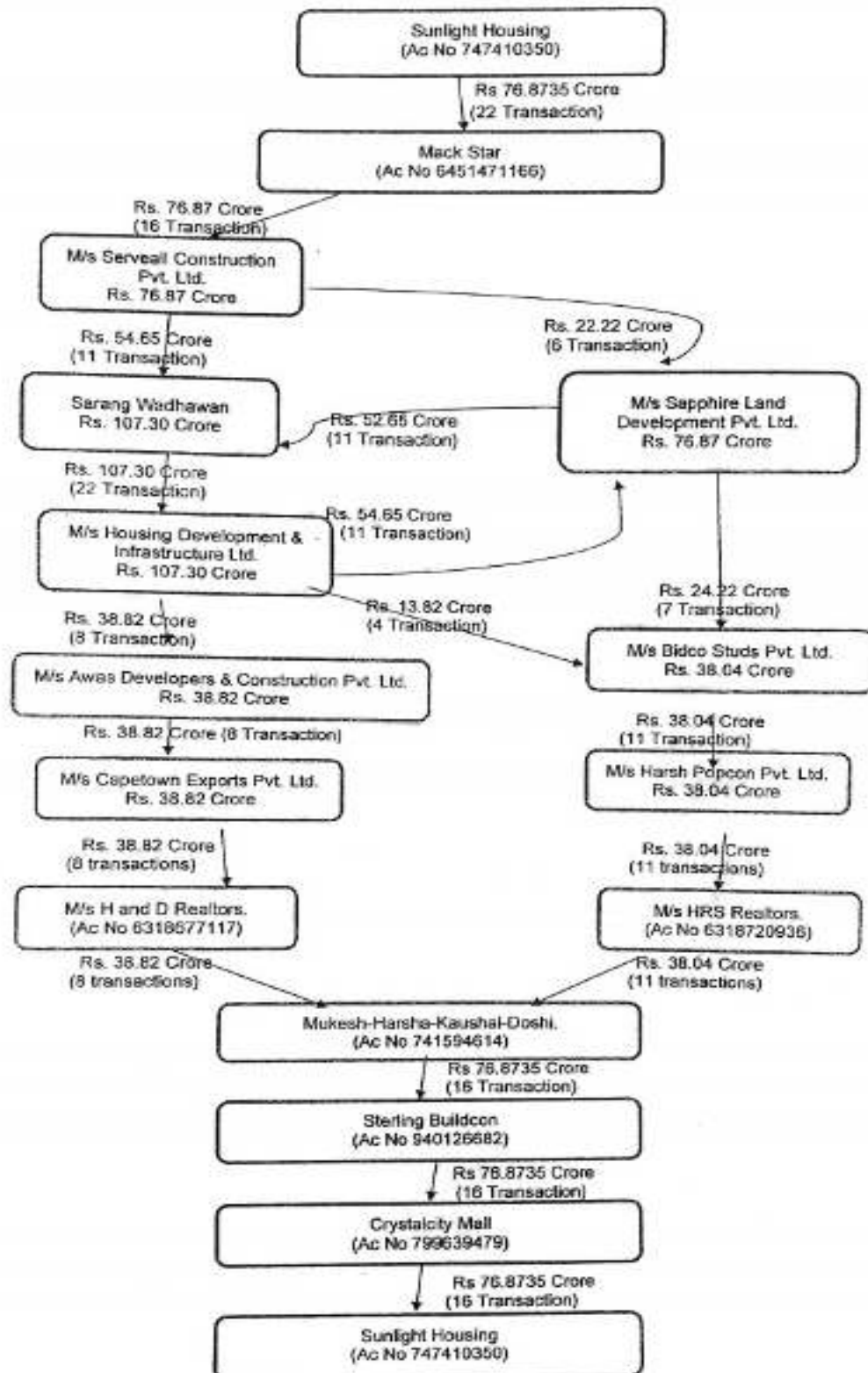
24. The pictorial chart of rotation of funds between Mukesh Doshi's group companies and Rakesh Wadhawan controlled HDIL group companies under the garb of purchase of 7 office units in Kaledonia building is as under :-



25. Flow Chart of further rotation of funds ahead of M/s. Capetown Exports Pvt. Ltd. and M/s. Harsh Propcon Pvt. Ltd. is as under :-



26. On clubbing both the charts as aforesaid, the complete circular rotation of the funds is shown in the chart below :-



27. The aforesaid charts opened pandora's box and uncovered a well hatched conspiracy of the petitioners' and their coterie indicating as to how every attempt has been made to conceal the proceeds of crime by obfuscating the facts. Be that as it may. The main contention of the learned Counsel for the petitioners while invoking extraordinary writ jurisdiction of this Court is that the preconditions of Section 5 of the PML Act are not fulfilled and, therefore, the impugned provisional attachment order dated 9th April, 2021 is bad in law, which came to be passed in ignorance of the binding precedent and a decree passed by this Court in Commercial Suit (L) No. 370 of 2020, dated 16th March, 2021 (*Coram : B.P. Colabawalla, J*). The petitioners are not so innocuous who feigned innocence as if they were unaware of the action initiated by the respondent – E.D. against the companies. Having taken into account the magnitude and *modus operandi* of the petitioners in filing the suit and getting a consent decree itself speaks volumes. We are not inclined to enter into that arena as the ultimate truth would come out at the appropriate time.
28. The learned Senior Counsel would argue that the subject flats are clean and untainted properties legitimately obtained through barter system. If that being so, why the petitioners did not produce any material or documentary evidence to substantiate their contentions despite opportunities given by the respondent – E.D. A bare look at the charts depicted hereinabove, *prima facie*, revealed an illegal and fraudulent activities amongst Wadhawans

and Doshis, who transferred the subject flats in Kaledonia building to Mukesh Doshi's M/s. Sunlight Housing. It is the contention of the respondent – E.D. that during the course of investigation it has been revealed that M/s. Sunlight Housing has not paid any consideration against purchase of either of the 7 office units in Kaledonia building. Though it has been claimed by the beneficially owners of M/s. Sunlight Housing namely; Mukesh Doshi and Kaushal Doshi as well as its Director Ankit Doshi that approximately Rs.76.87 crores had been paid by M/s. Sunlight Housing to Mack Star for purchase of said 7 office units in Kaledonia building, however, in fact after having scanned the relevant bank transactions, it is revealed that the entire amount paid by M/s. Sunlight Housing to Mack Star was routed back to the beneficially owned companies of Mr. Mukesh Doshi on the same day. Thus, it is crystal clear that no actual payments were made by M/s. Sunlight Housing to Mack Star for the purchase of 7 properties of Mack Star for purchase of 7 office units in Kaledonia building.

29. The investigation further revealed that in fact Rs.76.87 crore was never existed in any of the companies / entities of the petitioners at any point of time. The fund flow of Rs.76.87 crores as depicted in the chart hereinabove were made to appear by the Wadhawans and Doshis so as to illegally transfer / acquire the 7 properties in Kaledonia building. According to the respondent – E.D., the whole facade of cheating conspiracy and money laundering by way of rotation was done with mere amount of Rs. 5 crore. This single amount of Rs.5 crore was circulated to

approximately 16 times in between 15 below mentioned companies of Wadhawans and Doshis on a single day i.e. 2nd September, 2016 in such a way that it gives impression of circulation of Rs.77.65 crores approximately.

30. The companies of the petitioners for the sake of understanding have been clubbed group-wise which are as under :-

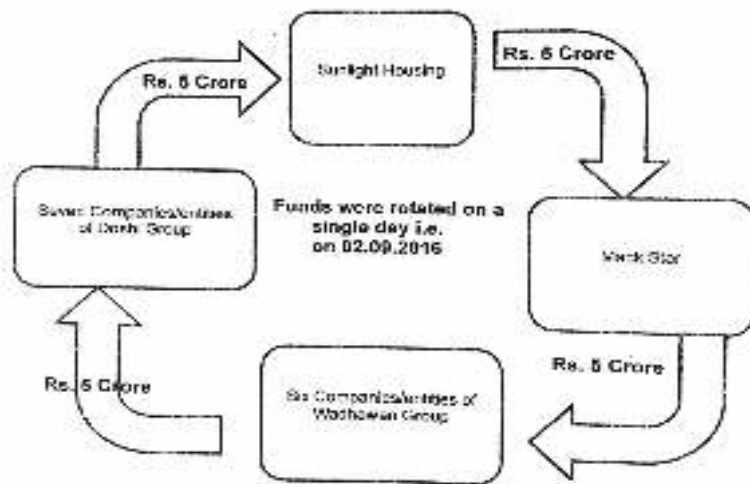
*“A. **M/s. Sunlight Housing Development Pvt. Ltd.** (it’s a Doshi’s owned company; but here represented as a separate entity to demonstrate rotation of fund)*

*B. **M/s. Mack Star Marketing Pvt. Ltd.** (at the material time it was controlled by Wadhawan; but here represented as a separate entity to demonstrate rotation of fund)*

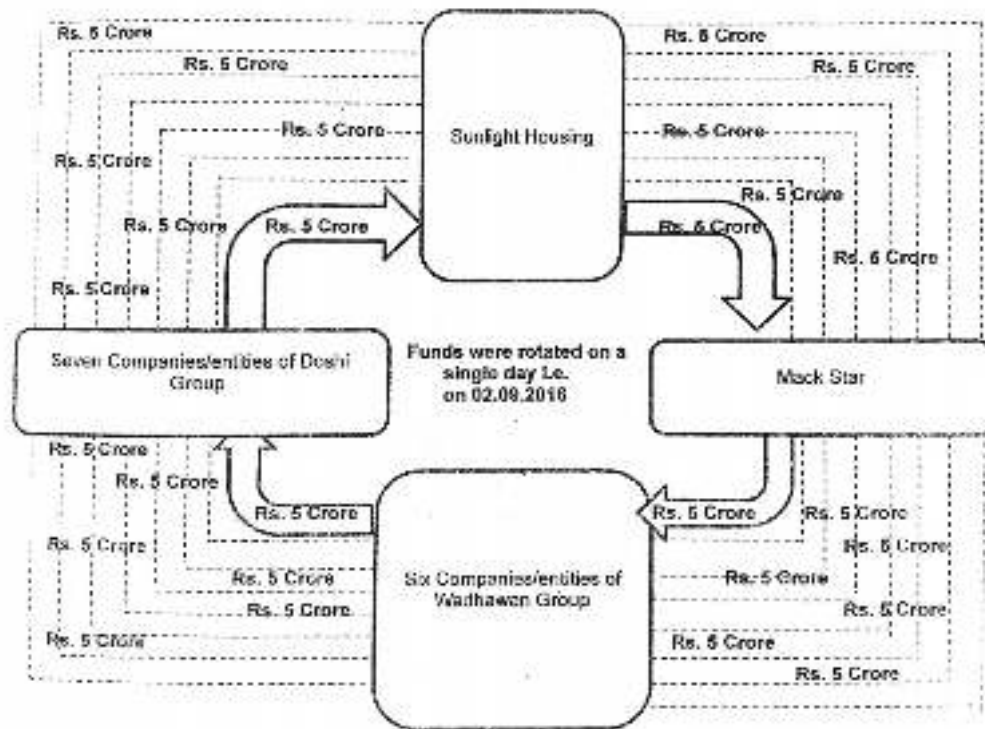
*C. **Wadhawan Group Companies / entities** : (1) M/s. Serveall Constructions Pvt. Ltd., (2) Sarang Rakesh Wadhawan, (3) M/s. Sapphire Land Development Pvt. Ltd. (4) M/s. Housing Development & Infrastructure Ltd. (HDIL), (5) M/s. Bidco Studs Pvt. Ltd., (6) M/s. Awas Developers,*

*D. **Doshi’s Group Companies entities** : (1) M/s. Capetown Exports Pvt. Ltd. (2) M/s. Harsh Propcon Pvt. Ltd. (3) M/s. H and D Realtors and Developers LLP, (4) M/s. HRS Realators LLP, (5) a Joint account of Mr. Mukesh Doshi with Mrs. Harsha Doshi & Mr. Kaushal Doshi, (6) M/s. Sterling Buildcon Pvt. Ltd. and (7) M/s. Crystallcity Mall Pvt. Ltd.*

For instance, say initially M/s. Sunlight Housing transferred Rs.5 Crore to M/s. Mack Star on 02.09.2016. Through M/s. Mack Star this amount of Rs.5 Crore was transferred to six different Wadhawan group companies / entities one by one on the same day i.e. on 02.09.2016 and reached to M/s. Capetown Exports and M/s. Harsh Propcon. Through seven different Doshi’s group companies / entities including M/s. Capetown Exports and M/s. Harsh Propcon, this amount of Rs.5 Crore reached back to M/s. Sunlight Housing (another Doshi Group Company) :-



When the amount of Rs.5 Crore reached back to M/s. Sunlight Housing after circulating through 15 companies / entities, this same amount was again transferred by M/s. Sunlight to M/s. Mack Star on the very same day i.e. on 02.09.2016; and from M/s. Mack Star to six companies / entities of Wadhawan Group again on 02.09.2016; and from Wadhawan Group to seven companies / entities of Doshi's Group (other than M/s. Sunlight) again on 02.09.2016; and finally from Doshi's Group to M/s. Sunlight Housing on the very same day i.e. on 02.09.2016. In this way, this one amount of Rs.5 Crore was rotated / circulated approximately 16 times (most of the time as a single amount of Rs.5 Crore and sometimes in broken form i.e. Rs.1.87 Crore, Rs.2.65 Crore etc.) between M/s. Sunlight Housing, M/s. Mack Star, Wadhawan Group and Doshi's Group companies. The Wadhawans and Doshi's conspired together and formulated these rotation of funds in such a coordinated manner that this whole facade of Money Laundering by way of rotations was done in a single day i.e. on 02.09.2016. The pictorial representation of rotation of funds is as under :-



31. It would also be apposite to extract what has been stated by the respondent – E.D. in its reply affidavit in paragraph nos. 11 and 12, which reads thus :-

“11. During the course of investigation, it is also revealed that the said amount of Rs. 5 Crore (most of the time as a single amount of Rs.5 Crore and sometimes in broken form i.e Rs.187 Crore, Rs.2.65 Crore etc.) was transferred 16 times from M/s Sunlight Housing to M/s Mack Star; then from M/s Mack Star this amount was transacted 16 times to M/s Serveall Constructions; then from M/s Serveall Constructions this amount was transacted 11 times to Mr. Sarang Wadhawan and 6 times to M/s Sapphire land; thereafter this amount of Rs 5 Crore was rotated between M/s Sapphire, Mr. Sarang & HDIL wherein this same amount was transacted Mr Sarang to HDIL 22 times then from HDIL to M/s Sapphire 11 times then from M/s Sapphire to Sarang 11 times; thereafter this amount was transacted by HDIL to M/s Awas Developers 8 times and to M/s Bidco Studs 4 times; then from M/s Sapphire to M/s Bidco Studs 7 times; further from M/s Bidco Studs this amount was transacted 11 times to M/s Harsh

Propcon; then from M/s Harsh Propcon to M/s HRS Realtors 11 times; then from M/s HRS Realtors to a Joint account of Mr. Mukesh Doshi, Harsha Doshi & Kaushal Doshi 11 times; also from M/s Awas Developers this amount was transacted to M/s Capetown Exports 8 times; then from M/s Capetown Exports to M/s H And D Realtors 8 times; then from M/s H and D Realtors to the Joint account of Mr. Mukesh Doshi, Harsha Doshi & Kaushal Doshi 8 times; further this amount of Rs.5 Crore was transacted 16 times from the Joint account of Mr. Mukesh Doshi, Harsha Doshi & Kaushal Doshi to M/s Sterling Buildcon; then from M/s Sterling Buildcon to M/s Crystallcity Mall 16 times; and finally this amount of Rs. 5 Crore reached to M/s Sunlight Housing from M/s Crystallcity Mall by transacting it to 16 times. All of the above said transaction were concluded in a single day i.e on 02.09.2016.

On clubbing the above transactions, it shows that this single amount of Rs.5 Crore was rotated among 15 companies/entities which resulted in amount of Rs.994.28 Crore vide 223 no. of transactions in a single day i.e on 02.09.2016.

12. *Investigation has revealed that this whole facade of Money Laundering was conspired by two group companies i.e Wadhawan Group and Doshi's Group. Wadhwan Group includes Mr. Rakesh Kumar Wadhawan & Mr. Sarang Wadhwan whereas Doshi's Group includes Mr. Mukesh Doshi, Mr. Kaushal Doshi & Mr. Ankit Doshi. To justify the movement of funds from Wadhawan Group of companies viz. M/s Awas Developers & M/s Bidco Studs to Doshi's Group of Companies viz. M/s Capetown Exports & M/s Harsh Propcon, the Wadhawan and Doshis entered into another conspiracy under which M/s Awas Developers & M/s Bidco Studs allegedly acquired preferential shares in M/s Capetown Exports & M/s Harsh Propcon respectively. For acquiring these preferential shares M/s Awas Developers & M/s Bidco Studs transferred approx. Rs. 38.82 Crore & Rs. 38.04 Crore respt. to M/s Capetown Exports & M/s Harsh Propcon respectively. Here kind attention is invited towards the fact that these amounts of Rs.38.82 Crore & Rs. 38.04 Crore given a total of Rs. 76.87 Crore approx. which is the same amount projected as*

transferred from M/s Sunlight Housing to M/s Mack Star to acquire the 7 properties in Kaledonia building; and this is the same amount received by M/s Sunlight Housing from M/s Crystalcity Mall. Thus, these transactions of acquiring preferential shares by Wadhawan Group Companies in Doshi's Group Company are only a front/tool to rotate the money through their companies. Further investigation in this regard is in progress.

32. The aforesaid facts and charts if juxtaposed, demonstrates that the Authority has every reason to believe from the material on record to arrive at its objective as well as subjective satisfaction to construe that the subject flats which have been provisionally attached, have been involved in money laundering and if it is not attached it would result in frustrating the further proceedings under the PML Act.
33. Mr. Ponda, learned Senior Counsel would argue that the subject flats are untainted and clean property as it has been acquired in the year 2010 and, therefore, it cannot be attached by branding it as 'proceeds of crime'. To substantiate his point, reliance is placed upon a decision of Punjab & Haryana High Court in the case of *Seema Garg* (supra) and *Kumar Pappu Singh* (supra) that "value of property" and "property equivalent" are different terms to be understood in different sphere. We accept the argument of Mr. Ponda albeit with a pinch of salt on the aspect that the subject flats are untainted and clean property. We shall discuss the case law shortly afterwards.
34. To counter his arguments Mr. Venegaonkar, learned Counsel appearing for the respondent – E.D. drew

our attention to a vital peace of document in the form of a Memorandum of Understanding, dated 1st December, 2020. This MOU is between Crystal Pride Developers referred as the first owner, and Kaushal Mukesh Doshi, second owner and Dhvani Mukesh Doshi, third owner *qua* the subject flats. The relevant clauses of the said MOU are extracted as under :-

“C) As per the Understanding arrived at between the Promoters, they have decided to develop the said Larger Property under the provision of regulation 33(14)D of DCR 1991, contribute costs of the development and also distribute the constructed area proportionately;

D) The Promoters through their Architect submitted a proposal for development of the CTS Nos. 1/A/283 to 1/A/286 to Slum Rehabilitation Authority (‘SRA’) which was duly approved and SRA has issued LOI bearing No. SRA/DDTP/0164/KW/PL/LOI dated 16th May, 2011 read with revised LOI bearing No. SRA/DDTP/244/L/PL/LOI dated 8th June, 2017;

E) Architect has submitted a proposal in SRA for scheme on the said Property and said other Property. Thereafter building plans were passed and amended from time-to-time for construction of the building to be known as “Atlantis” consisting of Basement + Ground (pt.) and Stilt (pt.) + A3 to A9 + 10th to 12th + 14th to 21st + Fire Check Floor + 22nd to 27th + 28th (pt.) upper floors on the said Property which has been duly sanctioned by SRA, who have granted approvals as and by way of Intimation of Approval, as well as the various Commencement Certificates (hereinafter referred to as ‘the said Building’);”

The Executive Engineer-I of S.R.A. by its communication dated 9th June, 2020 to M/s. Crystal Pride Developers granted occupation certificate for Atlantis building of the petitioners.

35. It is manifest that the building Completion Certificate was granted on 28th May, 2020, meaning thereby, the subject flats came in the hands of the petitioners for the first time in the year 2020, which clearly falsifies the contention of the petitioners that they are in possession of the subject flats right from the year 2010. Annexure “C” appended to the MOU dated 1st December, 2020 depicts the second owner’s entitlement, which reads thus :-

ANNEXURE ‘C’
Second Owner’s entitlement
(Kaushal Mukesh Doshi)

Unit	Floor	Area (in sq.mtrs.)
1001	10 th	368.69
1002	10 th	361.43
1101	11 th	368.69
1102	11 th	361.43
1201	12 th	368.69
1202	12 th	361.43
1401	14 th	368.69

36. This gives a very vital blow to the petitioners’ contention. The petitioners have, therefore, can be said to have approached this Court with unclean hands while seeking an equitable and discretionary relief under Article 226 of the Constitution of India. This also amounts to suppression of material facts and misleading the Court. Not only the property is unclean and tainted but the hands of the petitioners too. *Prima facie*, the unholy nexus amongst the petitioners is apparent.

37. Mr. Ponda has placed reliance on a decision of the Andhra Pradesh High Court in the case of ***Kumar Pappu Singh Vs. Union of India, Ministry of Finance, Rep. by its Secretary and Ors. 2021 SCC Online AP 983***. The relevant paragraph of the said judgment is extracted below :-

“20. The jurisdictional fact whereby these provisions can be invoked is that the properties sought to be attached and confiscated must be proceeds of crime. The expression "proceeds of the Crime" is defined in Section 2 (1)(u) of the Act as follows:

2(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 [(3) or where such property is taken or held outside the country, then the property equivalent in value held within the country] [(4) or abroad];

[(5) Explanation.- for the removal of doubts, it is hereby clarified that "proceeds of crime" including property not only derived or obtained from the scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence;]

(3) Inserted by the Finance Act, 2015 (20 of 2015), Section 145(i) (w.e.f. 14-05- 2015);

(4) Inserted by Act 13 of 2018, Section 208(a) (w.e.f. 19-04-2018), vide G.S.R.

383 (E) dated 19.04.2018) (5) Inserted by the Finance (No.2) Act, 2019, section 192(iii) (w.e.f. 01.08.2019)

21.

22.

23. *The same provision came up for interpretation before a Division Bench of the High Court of Punjab and Haryana in the case of **Seema Garg v. The Deputy Director, Directorate of Enforcement** decided on **06.03.2020** in PMLA No.1, 2 & 3 of 2019 (O&M). These are appeals filed against the order of attachment, which had been affirmed by the Appellate Tribunal. In these cases, the property had been purchased prior to the commission of the scheduled offence. The question that arose before the Court was whether such property could be brought within the definition of Section 2 (1)(u) and could be attached under Section 5 of the Act. The Division Bench, after considering the judgment of the erstwhile High Court for the State of Telangana and the State of Andhra Pradesh at Hyderabad in the case of **Satyam Computers** and the judgment of the Delhi High Court in **Abdullah Ali Balsharaf v. Directorate of Enforcement**, had held that the properties purchased prior to the commission of the offence would not fall within the meaning of "proceeds of crime". The Division Bench also held that there are three limbs to Section 2(1) (u) viz.,*

i) Any property derived or obtained directly or indirectly as a result of criminal activity relating to scheduled offence;

ii) Value of property derived or obtained from criminal activity;

iii) Property equivalent in value held in India or outside where property obtained or derived from criminal activity is taken or held outside the country.

24. *The Division Bench held that the property derived from the offence would be proceeds of the crime and as such any property purchased or acquired before the commission of the offence would not fall within the first*

limb of the definition of "proceeds of crime". It also held that if such property is moved abroad, any property of the accused available within India, irrespective of the date of acquisition, can be attached as proceeds of crime, as the same would fall within the third limb of the definition. However, the Division Bench held, on the ambit of "value of such property", that this term is not the same as the term "property equivalent in value held within the Country or abroad", which appears in the third limb, and the same meaning cannot be given to both terms. While explaining the scope of the term "value of such property", the division bench took the view that if some properties are obtained by committing an offence and are sold prior to the registration of the F.I.R or ESIR, the money generated from sale or transfer of such property in the form of cash or any other form of property, which is available for attachment would answer the description "value of such property". I am in respectful agreement with the view taken by the Division bench of the Hon'ble High Court of Punjab and Haryana.

25.

26.

27. *At the inception, the legislative intent was to bring within the fold of the definition, such property, whose source of acquisition can be traced, directly or indirectly, to the benefits obtained from the commission of the scheduled offences. At that stage, the question of the proceeds of the crime not being available for being attached/confiscated, either on account of their dissipation in the hands of the person holding the property or on account of the property being moved out of India and the reach of the authority under the Act, does not appear to have been contemplated. This issue was addressed by Act 20/2015, whereby the words "or where such property is taken or held outside the country, then the property equivalent in value held within the country" were added. This amendment contemplates only one situation, namely the proceeds of the crime being moved out of India. In such a situation, the*

amended definition permitted the attachment of property, in India, equivalent to the value of the proceeds of the crime, which were moved out of India. Later, by Act 13 of 2018 the words "or abroad" were added. By virtue of this amendment the property, which was moved abroad, could also be attached and confiscated. This amendment did not envisage a situation of dissipation of the property in the hands of the person holding the property.

28. *Viewed from this perspective, the amendments would be unnecessary if the term "or the value of such property" was understood to authorize the attachment of any property, when the actual proceeds of the crime are not available.*

29. *The explanation to this provision which was brought in by Act No.2 of 2019 also speaks only of properties derived or obtained from the proceeds of a crime and expands the scope of the definition to include properties obtained not only from the scheduled offences but also criminal activity relatable to the scheduled offence. The explanation did not expand the definition to include any other property of equivalent value where the proceeds of the crime are lost even by the offender.*

30. *In that view of the matter, the properties purchased before the commission of the offence, cannot fall within the definition of "proceeds of crime" and cannot be attached or confiscated under the Act. Consequently, the attachment and subsequent proceedings before the Adjudicating authority for confiscation of the properties in Table-I of the impugned order would be without jurisdiction and would have to be struck down."*

(emphasis supplied)

38. In the case of *Seema Garg* (supra), the appeals were filed against the order of attachment which has been affirmed by the Appellate

Tribunal. In those cases, property had been purchased prior to the commission of the scheduled offence. The question that arose before the Court was whether such property can be brought within the definition of Section 2(1)(u) of the PML Act and would be liable to be attached under Section 5 of the said Act. The Division Bench after considering the judgment of the erstwhile High Courts of the State of Telangana and Andhra Pradesh in the case of *Satyam Computers Services Ltd. Vs. Directorate of Enforcement, 2018 SCC Online Hyd. 787* and in view of the judgment of the Delhi High Court in the case of *Abdullah Ali Balsharaf V. Directorate of Enforcement* held that properties purchased prior to the commission of the offence would not fall within the meaning of “proceeds of crime”. The Division Bench held that there are three limbs of Section 2(1)(u) of the PML Act viz. (i) any property derived or obtained, directly or indirectly, by any person; as a result of criminal activity relating to a scheduled offence, or (ii) the value of any such property, or (iii) where such property is taken or held outside the country, then the property equivalent in value held within the country.

39. The Division Bench held that ambit of “value of any such property”, that this term is not the same as the term of “property equivalent in value” held within the country or abroad, which appears in the 3rd limb and the same meaning cannot be given to both the terms. The Andhra Pradesh High Court is in agreement with the view taken by the Division Bench of the High Court of Punjab & Haryana in *Seema Garg* (supra). The Andhra Pradesh High Court, apart from concurring with the view expressed by

Punjab & Haryana High Court also supplement its reason by the rule of Heydon's as explained by the Hon'ble Supreme Court in ***Bengal Immunity Co. Vs. State of Bihar AIR 1955 SC 661***. As such, in the case at hand, the subject flats were in the hands of the petitioners in 2020 and, therefore, squarely fall within the definition of proceeds of crime and can very well be attached or confiscated under the Act.

40. Even otherwise, it is a provisional attachment and the matter is pending adjudication before the adjudicating authority. We are afraid, we can not buy the argument of the learned Counsel for the petitioners that the subject flats are clean and untainted property and, therefore, not liable to be attached, given the aforesaid facts.
41. Mr. Venegaonkar, on the other hand, placed useful reliance on a decision of the Delhi High Court in the case of ***J. Sekar Vs. Union of India & Ors. 2018 SCC Online Del. 6523***. It would be advantageous to refer paragraph 26 to 32 of the judgment by which a judicial review of the provisional attachment has been made, which read thus :-

“26. To complete the scheme of the PMLA, after the provisional attachment order is passed under Section 5(1) PMLA, the officer making such order will immediately forward a copy thereof to the AA in a sealed envelope, as stipulated under Section 5(2) PMLA.

27. Section 5 (3) PMLA states that the provisional attachment order shall cease to have effect on the expiry of the period specified in Section 5 (1) or on the date

when the AA makes an order under Section 8 (2) PMLA, whichever is earlier. As already noted, under Section 5 (5) PMLA, the officer making such order must file a complaint before the AA within 30 days of the order of provisional attachment being made.

28. *As far as the AA is concerned, under Section 8(1), once such a complaint is received and if the AA “has a reason to believe that any person has committed an offence under section 3 or is in possession of the proceeds of crime”, the AA may serve a notice (SCN) of not less than 30 days on such person calling upon him to indicate the sources of his income, earning or assets or by means of which he has acquired the property attached under Section 5(1) PMLA or seized or frozen under Sections 17 or 18 PMLA.*

29. *The above SCN would require the noticee to produce evidence on which he relies and other relevant information and particulars to show cause why all or any of the property “should not be declared to be the properties involved in money-laundering and confiscated by the Central Government”.*

30. *Section 8 (2) requires the AA to consider the reply to the SCN issued under Section 8(1) PMLA; to hear the aggrieved person as well as the officer issuing the order of provisional attachment and also taken to account “all relevant materials placed on record before the AA”. After following the above procedure, the AA will record its finding whether all the properties referred to in the SCN are involved in money-laundering.*

31. *If the AA is satisfied that any such property is in fact involved in money- laundering the AA will confirm the attachment of such property and record a finding to that effect. Thereupon, the attachment of such property will continue during the pendency of the criminal proceedings. It will become final after an order of confiscation is passed either under Section 8(5) or 8(7) PMLA, or Section 58B PMLA or Section 60(2A) PMLA by the special court constituted for trial of the offences under the PMLA.*

Under Section 8 (4) PMLA, upon confirmation of the order of provisional attachment, the Director or other officer authorized by him shall “forthwith take the possession of property attached”.

32. Section 8 (5) PMLA states that upon conclusion of the trial where the special court finds that the offence of money-laundering has been committed, it shall order that the property involved in money-laundering shall stand confiscated to the Central Government. If it finds to the contrary, then under Section 8 (6) it shall order the release of the property to the person entitled to receive it.”

42. The Delhi High Court has explained the scheme of PML Act and it has rightly been observed that the over all scheme has to be borne in mind before proceeding to examine the specific submissions in the matter. It would be apposite to extract paras 44 to 50 of the judgment in the case of **J. Sekhar** (supra), which read thus :-

44. In this context, the submissions of the learned counsel for the Union of India are as under:

(i) The mere possibility of abuse of power is not a ground to strike down the provision on the basis that it is ultra vires or unconstitutional. In such case, the decisions in individual cases can be the subject matter of judicial review. Reliance is placed on the decisions in Sushil Kumar Sharma v. Union of India (2005) 6 SCC 281, Collector of Customs v. Nathella Sampathu Chetty (1961) 3 SCR 786 and State of Rajasthan v. Union of India (1978) 1 SCR 1.

(ii) There are sufficient safeguards in the second proviso to Section 5(1) PMLA which in no way obliterates the first proviso thereto. The second proviso kicks in only where there is urgency and the officer believes that the property

involved in money-laundering should be immediately attached and the failure to attach it “is likely to frustrate any proceedings under the Act”. Since the reasons for such belief has to be recorded in writing, “on the basis of material in his possession”, there are sufficient safeguards inasmuch as there cannot be any arbitrary and whimsical exercise of powers.

(iii) The second proviso has been inserted for a very specific purpose which is in consonance with the objects of the PMLA. The offence under the PMLA is a ‘conduct-based offence’ and the experience of the enforcement agencies is that the proceeds of such crime are “susceptible to stealth and clandestine movement” which, if not seized immediately upon detection, can vanish forever. It is added that in the world of internet and wire transfers, it is very difficult to have a trail of the money or property constituting the proceeds of crime or value of such property. It is submitted that the very definition of proceeds of crime under Section 2(1)(u) PMLA, which incidentally has not been challenged by the Petitioners, permits any property involved in money-laundering to be attached and not necessarily the proceeds of crime of the persons facing trial under Section 3 PMLA.

(iv) Recourse to the second proviso to Section 5(1) is for a limited period of 180 days. The entire proceedings are taken over by the AA after 30 days of the provisional attachment order. There is a second tier of safeguard since the AA will again have to apply its mind before issuing an SCN regarding such continued provisional attachment. The confirmation of the provisional attachment is preceded by a hearing and the application of mind by the AA to all the facts and circumstances.

(v) A third level of safeguard is that the order of the AA is further subject to review by the AT and then again by the High Court. With there being so many levels of judicial review, there can be very little scope for arbitrary or whimsical decision-making in the matter. The second proviso does not render otiose the first proviso nor does it provide for exercise of unbridled or arbitrary powers by t

he authorities under the PMLA. Reliance is placed on the decisions in B. Ramaraju v. Union of India (2011) 164 Company Cases 149 (AP), Dr. V.M. Ganeshan v. Joint Director (2015) 1 MLJ 870, Usha Aggarwal v. Union of India (2017) SCC-Online (Sikkim) 146, Radhey Mohan Lakhotia v. Deputy Director 2010 (5) BomCR 625, Gautam Khaitan v. Union of India 218 (2015) DLT 183.

Decision on constitutional validity of the second proviso to Section 5(1)

45. *The Court first would like dwell on the definition of 'proceeds of crime' under Section (1) (u) of the PMLA. It is defined to mean:*

- a) any property derived or obtained, directly or indirectly, by any person; as a result of criminal activity relating to a scheduled offence, or*
- b) the value of any such property, or*
- c) where such property is taken or held outside the country, then the property equivalent in value held within the country.*

46. *It was sought to be contended by the Petitioners that the latter portion of (c) viz., that it could also be a property equivalent in value held within the country should also apply to the situation in (b). In other words, for (b) to be the subject matter of 'proceeds of crime', the property which is the proceeds of crime should be taken out of or held outside the country and not be available in the country.*

47. *The above submissions ignore the important disjunctive 'or' occurring between the expression 'the value of any such property' in (b) above and the expression in (c) "where such a property is taken or held outside the country". On the contrary, the qualifying word 'such' in (b) refers to the earlier portion in (a) viz., property derived or obtained, directly or indirectly, by 'any person' as a result of criminal activity relating to a scheduled offence.*

48. *The above definition is to be read with Section 2(1)*

(b) which defines 'property' to mean any property or assets "of every description, whether corporeal or incorporeal, moveable or immoveable, tangible or intangible" including title to or interest in such a property and their assets, wherever located. The Explanation to Section 2(1)(b) defines property to mean property of any kind used in the commission of an offence under the PMLA itself or of any scheduled offence. Therefore, the expression 'value of any such property' would be a value equivalent to the value of a property derived or obtained directly or indirectly by any person as a result of criminal activity. The property itself may no longer be available but the equivalent value of such a property, whether held in cash, etc., would be available for attachment.

49. The wide definition of the phrase 'proceeds of crime' has to be borne in mind while examining the scope of the power of attachment of such proceeds of crime.

50. What attracts Section 5(1) PMLA is the person being in possession of any proceeds of crime. That person who is in possession of proceeds of crime need not be the person who is being tried for the scheduled offences or even PMLA offences. Or he may be a person accused of a PMLA offence as described under Section 3 PMLA. That is because, under Section 3 PMLA, any person who attempts to indulge or knowingly assists or knowingly is a part of or actually involved in concealment, possession, acquisition or use and projecting a claim the property constituting a proceeds of crime as an untainted property "shall be guilty of the offence of money-laundering". While the element of mens rea is not dispensed with, it is possible that a person who commits the offence under Section 3 PMLA is not himself or herself facing trial for any scheduled offence."

43. Thus, viewed from the perspective of the ratio laid down by the Delhi High Court, the respondent herein and the competent Authority has rightly passed the provisional attachment order and

is following the procedure as contemplated in the PML Act. The Authority has yet to reach its final conclusion. The *ratio decidendi* of the judgment of the Delhi High Court, therefore succinctly applies to the present set of facts.

44. Thus, in the case at hand, the competent authority has just passed an order of provisional attachment and yet to reach a final conclusion.
45. On the aspect of availability of alternate efficacious remedy, the law is no more *res integra* right from a well known judgment of the Hon'ble Supreme Court in the case of ***Shalini Shyam Shetty and Anr. Vs. Rajendra Shankar Patil, (2010) 8 SCC 329*** up to the judgment in the case of ***Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai & Ors. (1998) 8 SCC 1***. It has been well settled by a catena of decisions that the power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection needs to be exercised when any of the aforesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred thereagainst and entertaining a petition invoking certiorari or supervisory jurisdiction of the High Court would obstruct the smooth flow

and/ or early disposal of the suit or proceedings. It is observed that the High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

46. In the case of ***Whirlpool Corporation Vs. Registrar of Trade Marks & Ors. (1998) 8 SCC 1*** while elaborating the scope of Article 226 of the Constitution of India, the Hon'ble Supreme Court has held that the alternative remedy would not operate as a bar in at least three contingencies namely; (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is violation of principles of natural justice; or (iii) where the order or the proceedings are wholly without jurisdiction or the vires of an Act is challenged.
47. We do not find any of the three contingencies arising in the instant writ petitions and, therefore, there is no question of invoking the writ jurisdiction of this Court. Rather, we have discussed as to how the petitioners have approached this Court *mala fide* by suppressing not only material facts but also by suppressing the earlier petition being Writ Petition (L) No.10807 of 2021 *qua* the same impugned provisional attachment order.
48. On the similar point of alternative efficacious remedy, Mr. Ponda has pressed into service following case laws :-

- (i) State of H.P. and Ors. Vs. Gujarat Ambuja Cement Ltd. and Anr. (2005) 6 SCC 499.
- (ii) Commissioner of Income Tax Vs. Chhabil Dass Agarwal (2014) 1 SCC 603.
- (iii) Maharashtra Chess Association Vs. Union of India & Ors. (2020) 13 SCC 285.

49. In case of *Gujarat Ambuja Cement Ltd.* (supra) it has been held in para 17, which reads thus :-

“17. We shall first deal with the plea regarding alternative remedy as raised by the appellant-State. Except for a period when Article 226 was amended by the Constitution (Forty-second Amendment) Act, 1976, the power relating to alternative remedy has been considered to be a rule of self imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction of discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. If somebody approaches the High Court without availing the alternative remedy provided the High Court should ensure that he has made out a strong case or that there exist good grounds to invoke the extraordinary jurisdiction.”

50. A bare look at the ratio laid down by the Hon’ble Supreme Court would indicate that the High Court should not interfere if there is an adequate efficacious remedy. If someone approaches the High Court without availing the alternate remedy provided, the High Court should ensure that he has made out a strong case or there exists a good ground to invoke extraordinary jurisdiction. As already demonstrated hereinabove, no good grounds or strong

case has been made out by the petitioners warranting interference of this Court in the impugned provisional attachment order passed by the respondent - ED.

51. The Hon'ble Supreme Court extracted sub-para (7) and (8) of para 38 from the judgment in the case of ***Surya Dev Rai Vs. Ram Chander Rai & Ors. (2003) 6 SCC 675*** which read thus :-

"(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not covert itself into a Court of Appeal and indulge in re-appreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character."

52. Similar is the view taken by the Hon'ble Supreme Court in the

case of ***Maharashtra Chess Association Vs. Union of India & Ors.*** (2020) 13 scc 285. We extract para 21 and 22 of the said judgment, which read thus :-

“21. The principle that the writ jurisdiction of a High Court can be exercised where no adequate alternative remedies exist can be traced even further back to the decision of the Constitution Bench of this Court in State of U.P. V. Mohd. Nooh, AIR 1958 SC 86 where Vivian Bose, J. observed : (AIR p.93, para 10)

“10. In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute. (Halsbury’s Laws of England, 3rd Edn., Vol.11, p.130 and the cases cited there). The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies.”

22. The mere existence of alternate forums where the aggrieved party may secure relief does not create a legal bar on a High Court to exercise its writ jurisdiction. It is a factor to be taken into consideration by the High Court amongst several factors. Thus, the mere fact that the High Court at Madras is capable of granting adequate relief to the appellant does not create a legal bar on the Bombay

High Court exercising its writ jurisdiction in the present matter.”

53. The Hon’ble Supreme Court has echoed similar view in the case of ***Commissioner of Income Tax & Ors. Vs. Chhabil Dass Agarwal, (2014) 1 SCC 603***. Paragraph 15 of the said judgment reads thus :-

“15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal V. Supt. Of Taxes, AIR 1964 SC 1419, Titaghur Paper Mills Co. Ltd. V State of Orissa, (1983) 2 SCC 433 : 1983 SCC (Tax) 131 and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.”

54. Indubitably, the petitioners have not challenged the show-cause notice and are only seeking to challenge the provisional attachment order. The reason assigned by the petitioners is that the present challenge was filed before this Court on 28th April, 2021 i.e. much prior to the show-cause notice dated 17th June, 2021 and thus, the same will remain alive in spite of the show-

cause notice.

55. We do not agree. The petitioners cannot thwart the due process of law and halt the investigation under the guise of raising insignificant things. We have already discussed the scheme of the PML Act. The petition has been filed on mere issuance of the provisional attachment order dated 9th April, 2021 under Section 5 of the PML Act. The respondent has filed original complaint on 7th May, 2021 in the present provisional attachment order. The said order is required to be confirmed by the adjudicating authority constituted under Section 6 of the Act. The authority has had after receipt of the complaint issued show-cause notice requiring the party to file their reply. The order which would be passed by the adjudicating authority is appealable one under Section 26 of the PML Act before the appellate Tribunal. The order passed by the appellate Tribunal, in turn, is further appealable before this Court under Section 42 of the PML Act. The Act is a complete code in itself. The petitioners, therefore, cannot be heard to say that only because the petition was filed on 28th April, 2021 i.e. much prior to the show-cause notice, the same is still alive. The petitioners are required to be relegated to the concerned authorities as *prima facie* it appears that the authorities are proceeding by following due process of law.
56. It is pertinent to note that the petitioners have not yet been dispossessed of the subject flats but have been prevented from dealing with the said property till the orders are passed by the appellate authority under Section 8(2) of the PML Act. Last but

not the least, the petitions needs to be dismissed also on the ground of suppression of dismissal of the earlier Writ Petition being Writ Petition (L) NO. 10807 of 2021 (*Mr. Mukesh Doshi & Anr. Vs. Directorate of Enforcement & Anr.*) by order dated 17th June, 2021 passed by this Court (Coram : S.C. Gupte and M.S. Karnik, JJ). This glaring aspect is brought to our notice by the learned Counsel for respondent – E.D. wherein the petitioners had challenged the said provisional attachment order dated 9th April, 2021 *qua* the cash to the tune of Rs.1.5 crores sought to be attached under section 5 of the PML Act. It would be apposite to extract paragraph 3, 4 and 5 of the said order, which read thus :-

“3. It is important to note that in the present case, the property was seized, after a search was carried out under Section 17 of the PML Act on 23 March, 2021, and on 9 April, 2021, that is to say, within about a fortnight of such seizure, the Director, who was of the view that there was a sufficient case to proceed under Section 5 of the PML Act, ordered its provisional attachment. There is no substance in the Petitioners’ contention that having seized the property under Section 17 of the PML Act, the State was bound to apply for continuation of seizure under sub-section (4) of that section, and not exercise powers under Section 5 of the PML Act. The initial search followed by seizure may well be under Section 17 of the PML Act, but if the Director had reason to believe that the seized property was proceeds of crime and was likely to be dealt with by the person from whose possession it was seized, the Director may still choose to act under Section 5 of the PML Act and order its provisional attachment. The two provisions, namely, Sections 5 and 17 are not mutually exclusive alternative powers; there is no reason why they cannot be simultaneously resorted to.

4. It would be too hyper-technical to suggest that on the

date when the order was passed under Section 5 of the PML Act, that is to say, on 9 April 2021, there had to be a reason to believe that the property was likely to be dealt with, and not anterior to that case, particularly when search was made under Section 17 or seizure was ordered under that Section. We are concerned here with one unitary transaction, namely, search of the Petitioners' premises and seizure of their property on 23 March 2021, followed by provisional attachment under Section 5 on 9 April 2021. This is one continuous transaction. The fact that on 23 March 2021, when the property was seized following search under Section 17, there was a likelihood of the property being transferred or dealt with by the person from whose possession it was seized, would offer a good ground for the Director to act under Section 5 of the PML Act.

5 Mr. Ponda, learned Senior Counsel appearing for the Petitioners, submits that the law on the point requires the formation of reason to believe the existence of the two pre-conditions under Section 5 on the basis of material in possession of the Director. Learned Counsel submits that on the date when the order was passed under Section 5, there was no such material. It is submitted that there was no material to indicate that the cash was likely to be transferred or dealt with by the Petitioners, considering particularly that it was under seizure at that time under Section 17 of the PML Act and placed in a designated bank account under the control of the Director. Insofar the argument of learned Counsel that likelihood of transfer or dealing with the property must exist on the very date of the order under Section 5 and not on any anterior date or on the date when order was passed under Section 17 of the PML Act, is concerned, that has already been dealt with by us above. The other leg of Counsel's submission that there was no material for arriving at the reason that the cash was, in any event, likely to be transferred or dealt with by the Petitioners, merely needs to be noted to be rejected on ex facie consideration. The fact that the property seized was hard cash, by itself and without anything more, did give rise to a reason to believe that it was likely to be transferred or dealt with by the person in whose possession it was found."

57. Corollary of the aforesaid discussion led us to hold that the petitions are devoid of merits and looking to the conduct of the petitioners, they are not entitled to seek any equitable relief under the writ jurisdiction of this Court.
58. Consequently, both the petitions are dismissed. However, there shall be no order as to costs.
59. In view of dismissal of Writ Petition No. 1569 of 2021, nothing survives in Interim Application (L) No. 16884 of 2021 and the same is disposed of accordingly.

(PRITHVIRAJ K. CHAVAN, J.)

(K.K. TATED, J.)