

CrI.O.P.No.6205 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Reserved on : 21.03.2022

Pronounced on : 28.03.2022

Coram::

THE HONOURABLE Dr. JUSTICE G.JAYACHANDRAN

Criminal Original Petition No.6205 of 2022

Shri. Ahmed A.R.Buhari,
S/o.Shri.Abdul Rahman Buhary Seyed,
No.8, New No.14,
Subbarao Avenue,
3rd Street, Nungambakkam,
Chennai – 600 006.
Presently detained at Central Prison,
Puzhal, Chennai.

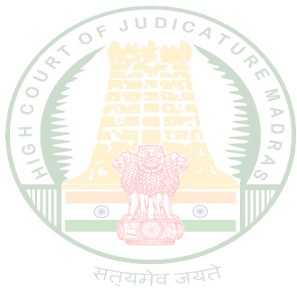
... Petitioner/Accused

/versus/

The Assistant Director,
Directorate of Enforcement,
Government of India,
Chennai Zonal Office-I,
2nd & 3rd Floor, 84,
Murugesu Naicker Complex, Greaves Road,
Chennai – 600 006.

... Respondent/Complainant

Prayer: This Criminal Original Petition is filed under Section 439 of Cr.P.C.,
pleaded to enlarge the petitioner on bail in F.No.ECIR/CEZO/I/01/2018 dated
31.01.2018 on the file of the respondent and such terms and conditions as this
Hon'ble Court may deem fit and proper in the facts and circumstances of the case.



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For Petitioner : Mr.P.Chidambaram, Senior Counsel, for
Mr.Sandeep Kapoor

For Respondent : Mr.R.Sankaranarayanan, Senior Counsel,
Additional Solicitor General, Asst. by,
Mr.N.Ramesh, Special Public Prosecutor

ORDER

The petitioner, was arrested on 04.03.2022 for the alleged offence under Section 3 of Prevention of Money Laundering Act, 2002 as amended under Section 4 of the Prevention of Money Laundering Act 2002, (hereinafter referred as to “PMLA”) in F.No.ECIR/CEZO/I/01/2018, on the file of the respondent police.

2. This petition under Section 439 of Criminal Original Petition filed to enlarge the petitioner on bail.

3. The case of the petitioner is that:-

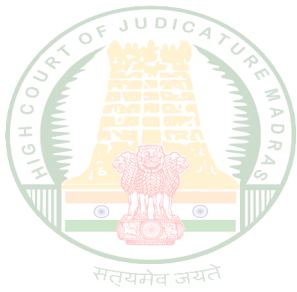
The petitioner herein is a native of Chennai. He is residing at Singapore with his family and presently he is a non-resident Indian, holding Indian passport. The petitioner is a promoter and Director of M/s.Coastal Energen



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Private Limited (hereinafter referred as “CEPL”), Chennai. He has established a power plant under the name and style M/s.Mutiara Thermal Power Plant, Tuticorin with 1200 MW capacity based on conversion of coal into thermal energy. The energy generated from the plant is sold to TANGEDCO. For operation of the power plant, the entity (CEPL) imports coal from overseas especially from South East Asian countries like Indonesia etc. During the period 2011-2015, (CEPL) imported coal from Indonesia under several consignments. The said goods were duly assessed by respective customs authorities and cleared for home consumption after due examination/scrutiny of import documents including test certificate, certificate of origin, invoice, contracts etc.

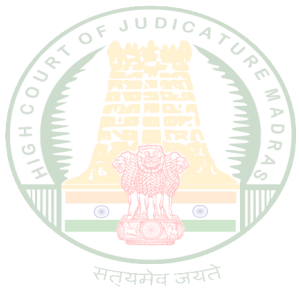
4. While so, the Directorate of Revenue Intelligence, Mumbai Zonal Unit, commenced investigations into the imports of coal with artificial inflation of values by certain Indian traders and actual users. It was suspected that the traders supply such coal to public sector coal based thermal generation companies at artificially inflated import price and the inflated price is remitted from India to the intermediary firms abroad which in turn remit only the actual price to the suppliers of the Indonesian coal and the balance is allegedly syphoned off.



5. After conducting extensive investigations, the petitioner Company

was suspected of inflated price to inferior quality coal and involved in money laundering, the Directorate of Revenue Intelligence issued a Show Cause Notice dated 14.2.2017 under the provisions of the Customs Act, 1962 in F.No.DRI/MZU/F/INT.160/2014. The Show Cause Notice issued by the office of the Directorate of Revenue Intelligence was duly responded by this petitioner and thereafter same has not been adjudicated till date and has been kept pending.

6. On the basis of the aforesaid Show Cause Notice and other inputs obtained from the petitioner the Central Bureau of Investigation, Economic Offences Wing, New Delhi - III commenced investigations into the supply of imported coal to various public sector entities like NTPC/APCL etc. The allegation against M/s.Coastal Energy Pvt. Ltd., (CEPL) Chennai and others was that they entered into criminal conspiracy amongst themselves and in connivance with unknown officers of NTPC/MMTC, APCL to cheat the Government of India in the matter relating to import of coal of Indonesian origin by fraudulently showing inferior quality of coal as that of superior quality.



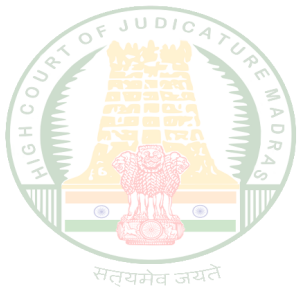
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7. Based on these inputs Central Bureau Investigation registered the

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F.I.R in R.C.No.221/2018/E003 dated 22.01.2018 under the provisions of Sections 120-B r/w Section 420 I.P.C and Section 13(2) r/w Section 13(1)(d) of Prevention and Corruption Act, 1988. The First Information Report registered by CBI is also pending and no final report has been filed by the investigation agency namely the CBI, EOW, New Delhi.

8. While after two Central Government Law Enforcing Agencies namely Directorate of Revenue Intelligence (DRI) and Central Bureau of Investigation (CBI), thirdly the Directorate of Enforcement which is the respondent herein. On the basis of the investigations undertaken by the CBI, EOW-III, New Delhi under Section 120-B r/w Section 420 and the provisions of Section 13(2) and 13(1)(d) the Prevention of Corruption Act, 1988, treating it as scheduled offences under Section 2(1)(y) of PMLA, 2002 as amended commenced investigations under the provisions of PMLA, 2002. The registered ECIR in No.CEZO/I/01/2018 dated 31.1.2018.



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9. The petitioner has been arrayed as an accused and the allegation against him is that, he and other named persons appear to be in possession of an amount of Rs.487 crores being suspected proceeds of crime requiring investigation for alleged offences under Section 3 of PMLA, 2002 punishable under Section 4 of the said Act.

10. The petitioner was summoned by the respondent on 23.10.2019, 24.10.2019, 25.10.2019, 07.11.2019, 06.1.2020, 10.2.2020 and 11.2.2020. The statements of the petitioners were recorded in terms of Section 50 of PMLA, 2002. Further, the petitioner has also produced the documents which have been sought for by the investigation at the time of recording of the statement.

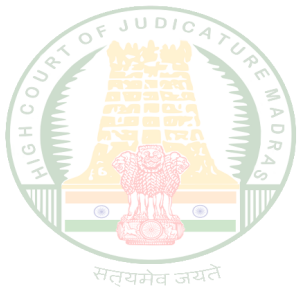
11. After initiating investigations and identifying the alleged proceeds of crime as also the properties said to have been acquired from the alleged proceeds of crime they passed a provisional attachment order No.01/2020 in F.No.ECIR/CEZO/I/01/2018 dated 28.2.2020 and under the provisional attachment order for the alleged possession of proceeds of crime as movable and immovable properties to the extent of Rs.557.25 crores properties quantified at



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Rs.6,730.68 crores being the plant, machinery, buildings, land of the power plant

at Mutiara Thermal Power Plant, Tuticorin have been attached. A complaint in O.C.No.1286/2020 dated 19.03.2020 before the office of the Adjudicating Authority is pending. However, no confirmation of the said attachment order passed in terms of Section 5(3) of PMLA, 2002 even after the expiry of 180 days from the date of attachment. Thus, the provisional attachment order has lapsed and the office of the adjudicating authority has becomes functus officio to deal with the complaint. Projecting the same, Writ Petition W.P(C).No.1999 and 2001 of 2021 have been moved before the Hon'ble High Court of Delhi and vide order dated 15.2.2021, the Hon'ble Delhi High Court has ordered status quo in respect of the movable and immovable properties which are subject matter of attachment under the provisional attachment order dated 28.2.2020. Further, all proceedings before the adjudicating authority has also been stayed. Pursuant to the aforesaid proceedings, he has been cooperating with the office of the respondent in the ongoing investigation of the case by appearing before the Investigation Officer as and when called upon and furnishing all the documents available with him.

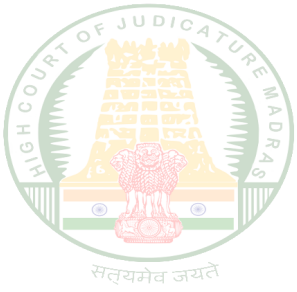


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12. While fact being so, suddenly an LOC had issued by the office of

the respondent preventing him from undertaking such travel abroad. In such circumstances, the petitioner moved W.P.No.3949 of 2020 before this Hon'ble High Court for issue of a writ of mandamus to lift the LOC in F.No.ECIR/CEZO/I/01/2018 to allow him to travel to Singapore, Korea, United Kingdom, Europe, Bangladesh, Malaysia, Indonesia, Japan and China from February 2020, till 31.5.2020 and permitted the Petitioner to travel abroad from 10.2.2020 to 31.5.2020 on certain terms and conditions.

13. As per the order of the High Court, he was allowed to travel abroad. When the world was struck by the COVID-19 pandemic, various countries including India has suspended International travel and restricted movement. Hence, the petitioner was constrained to file several miscellaneous petitions in the aforesaid writ petition seeking extension of time to stay abroad or for travelling abroad and for continued suspension of the LOC. Vide order dated 28.5.2020 and 8.12.2020, the Hon'ble High Court was pleased to extend the stay of the Petitioner and suspended the LOC up till 28.2.2021.



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14. After his return to India, the Petitioner, intimated about his arrival to the respondent. Due to further necessity to travel abroad especially to Singapore, Malaysia and UK moved the petitioner filed a writ petition bearing No. W.P.No.7302 of 2021 before this Hon'ble High Court seeking permission to travel abroad and for lifting LOC from 24.3.2021 till 30.6.2021. On the strength of the earlier orders passed by this Hon'ble High Court, is writ petition was disposed of by suspending the LOC till 30.6.2021 on certain conditions which were also complied.

15. However, due to the raging pandemic in the second wave and closure of international borders. On petition extension of time of suspension of LOC till 30.9.2021 was ordered. The respondent had no serious objections and same was recorded in the order. The petitioner having returned to India, filed further writ petition in W.P.No.27972 of 2021 to lift the LOC from 7.2.2022 till 7.9.2022 to travel abroad. The High Court disposed of the writ petition with a direction that the petitioner would be entitled to travel abroad between the period 20.01.2022 till 07.09.2022 subject to certain conditions. One of the conditions imposed in the said writ petition was that he should appear before the respondent



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as and when directed by the investigation agency. In the said circumstances, the respondent issued summons dated 03.02.2022 to appear on 04.02.2022. On the request of the petitioner, the same was deferred and the petitioner directed to appear on 5.2.2022. Due to certain pressing engagements, he could not appear on 05.02.2022 and duly requested the Respondent for further deferment of the proceedings.

16. Accepting the same, the respondent issued summons dated 17.2.2022 directing the petitioner to join the investigation and appear before him on 03.03.2022. The petitioner caused a communication to the respondent dated 28.2.2022 by mail and also by hand, confirming that the Petitioner shall join investigation on 03.03.2022.

17. On 03.03.2022, the petitioner rigorously appeared before the Respondent. To the best of his ability responded to the questions and stated that he is not in possession of any documents related to the overseas entities referred to by the respondent during investigation, as they are all under of liquidation, hence, he has no access to the said documents. In spite of his full co-operation to

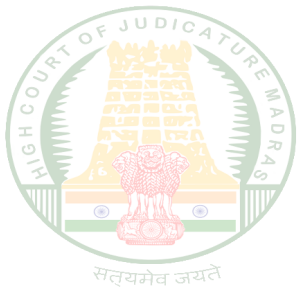


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investigative at 7.45 p.m., on the same day, the petitioner was served with a memo of arrest in the presence of a witness.

18. The petitioner has given his unstinted cooperation to the investigation at all times by appearing before the respondent and submitting the requisite documents and recording of statements on several occasions. All relevant documents pertaining to the investigation undertaken by the respondent under the provisions of PMLA have been submitted and are in possession of the respondent as can be seen from the copy of the complaint filed by the respondent before the adjudicating authority pursuant to the provisional attachment order dated 28.2.2020. There is no question of concealing, layering of the proceeds of crime. The petitioner has not committed any offence much less an offence of money laundering as contemplated under Section 3 of PMLA, 2002 as amended.

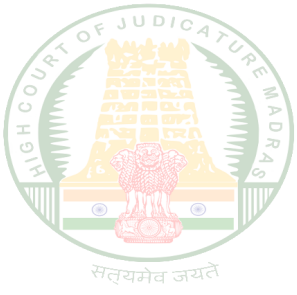
19. Despite the cooperation extended in the investigation of the case registered by the respondent, the investigation agency i.e. the respondent seems to think that the petitioner has more evidences in his possession which is deliberately being withheld and not divulged. This is far from truth.



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20. In defence of their action of arrest and listing out the reasons to

keep the petitioner in judicial custody. The respondent has filed counter opposing grant of bail in which it is stated that based on the case registered by Central Bureau of Investigation (CBI), New Delhi against the petitioner as promoter of the Indian Company M/s.Coastal Energy Private Limited (CEPL) and others investigation under the provisions of Prevention of Money Laundering Act, 2002 was taken up by the respondent. An Enforcement Case Information Report No.ECIR/CEZO-I/01/2018 dated 31.01.2018 was registered and so far, from the investigation conducted under PMLA 2002, it is revealed that there was an over-valuation of consignments of coal supplied to PSUs imported from Indonesia to India by CNO Group entities. The CNO Group entities comprise the Indian Company CEPL, viz., Coastal Energy Private Limited, Chennai which is engaged in trade of imported coal, Coastal Energy Private Limited, Chennai which is having a Coal Fired Power Plant in the name of Mutiara Thermal Power Plant, Coal & Oil Group Company DMCC, Dubai (CNO DMCC) and Coal & Oil Group Company LLC, Dubai (CNO LLC). All these companies are controlled and run by its promoter, shareholder/owner Mr.Ahmed A.R. Buhari who is the petitioner herein.

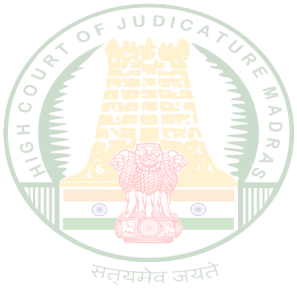


21. The modus operandi of the crime adopted by the petitioner is

explained as below:-

The petitioner herein through his Indian Company CEPL used to bid for supply of coal to the various Public Sector Undertakings (PSUs) like NTPC, APGENCO, MAHAGENCO, APCPL, TNPL. On getting the bids successfully allotted to his company, he will entered into the agreement for supply of coal to the PSU which invariably mention the specific requirement of coal to be supplied particularly its specification in terms of Total Moisture Content in percentage terms and Gross Calorific Value of Coal which is measured in Kcal/ Kg among other parameters.

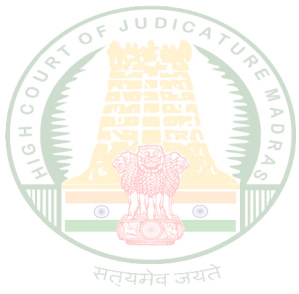
22. In case the petitioner fail to succeed in the bid and MMTC Limited, a Government of India Undertaking, get the bid successfully, he will enter into agreement with MMTC to supply the imported coal which was required to be of particular technical specification in terms of Total Moisture Content & Gross Calorific Value of Coal among other parameters



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23. In both the instances whether the petitioner Mr.Ahmed A.R.Buhari successfully bid for the tender or he enter into the agreement for supply of coal to Public Sector Undertakings through MMTC Limited, the requirement of coal particulars was specifically mentioned. However, he supplied coal of lower quality at the bid price of higher quality of coal.

24. For effecting the said modus he used his offshore entities viz., CNO DMCC Dubai and CNO LLC Dubai. Tripartite as well as back to back agreements were executed by CNO DMCC/CNO LLC with the miners of Indonesia and the same proves that the intent of the accused was never to supply the coal of specific requirement but to cheat the Public Sector Undertakings by way of supplying lower quality of coal. It is further revealed that a total of 169 consignments, where the value of coal imported artificially inflated and supplied to PSU's. Totally 77 consignments were supplied by CEPL through MMTC, 5 consignments supplied directly by CNO DMCC Dubai and remaining 87 consignments supplied directly by CEPL to PSU's. The overall inflation amounts for the 169 consignments that were supplied to PSU's is arrived at Rs.564.48 crores which is proceeds of crime as defined under PMLA, 2002.

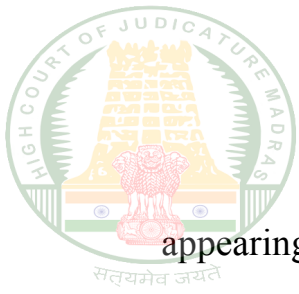


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25. The petitioner had diverted the Proceeds of Crime to the tune of

Rs.557.25 crore through CEPL and CNO Group entities, UAE through Precious Energy Holdings Ltd, BVI and Mutiara Energy Holdings Ltd, Mauritius to invest in Coastal Energen, India. The petitioner is the beneficial owner of Precious Energy Holdings Ltd, BVI and Mutiara Energy Holdings Ltd, Mauritius. The Proceeds of Crime to the extent of Rs.557.25 Crores in the possession of M/s.Coastal Energen Pvt. Ltd has been provisionally attached vide PAO No.01/2020 in OC No.1286 of 2020 pending before the Hon'ble Adjudicating Authority (PMLA) New Delhi.

26. As far as the cause for the arrest on 03.03.2022, the respondent has stated that the Petitioner/Accused vide letter dated 01.02.2022 intimated his intent to go out of India next week implying after 07.02.2022. As his examination was required to move further in the investigation he was summoned vide summon dated 03.02.2022 for his appearance on 04.02.2022. However, he informed vide his letter and email dated 04.02.2022 that he would not be in a position to appear in view of short duration of time and his prior engagement. However, he chose not to appear even on the adjourned date for appearance i.e. 05.02.2022 Instead of

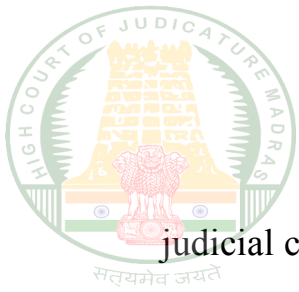


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appearing in compliance of summons under Section 50 of PMLA, 2002 petitioner

preponed his departure and went out of India on 05.02.2022 itself (*emphasis added*) and intimated the respondent that he would appear in response to summons after his return to India. When he submitted his itinerary about his travel dated 05.02.2022 vide email he was immediately allowed to travel by the office of Respondent for departure to Singapore in compliance of the order of this Hon'ble Court. Subsequently he came back to India on 15.02.2022 and departed to Singapore on 16.02.2022. However, he chose not to appear in response to Summons dated 03.02.2022 despite informing that he would appear on return to India. Afterwards, he was summoned afresh on 17.02.2022 for his appearance on 03.03.2022. During his statement recorded on 03.03.2022 he straight away denied providing the documents being requested by the department (*Emphasis added*).

Hence, under reasonable belief that in the event of not arresting the accused, there would be a chance that he may tamper with evidences which will certainly derail the ongoing investigation, the accused was arrested. Further, it is believed that the accused is in possession of more evidences in this case and deliberately withholding and not divulging the same, thus jeopardizing the investigation under PMLA, 2002. Hence, the accused was arrested on 03.03.2022 and remanded to



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judicial custody on 04.03.2022.

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27. Further, in the counter, the respondent has expressed its apprehension that the petitioner is an NRI. He was born abroad and residing along with his family members in Singapore. His family members are not Indian Citizen. The accused is a “Flight risk” and there is possibility of his abscondence from the investigation and trial.

28. The Learned Senior Counsel Mr.P.Chidambaram arguing for the petitioner/accused, made three-fold submissions as below:-

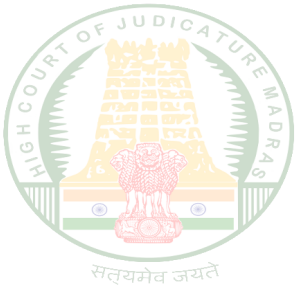
a). To proceed under PMLA, first, there must be a scheduled offence. From out of the scheduled offence, the person accused of the said crime ought to have obtained proceeds of crime and that proceeds of crime ought to have concealed, layered or undergone any of the process leading to laundering. To satisfy the definition of offence of money laundering as found in Section 3 of the PMLA Act and to punish under Section 4 of PMLA Act, first there must be some proceedings or adjudication which has held that the petitioner has concealed or



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possessed or acquired or used the proceeds of crime projecting it as untainted money or claiming as untainted money. In the absence of such finding prosecution under PMLA is without base.

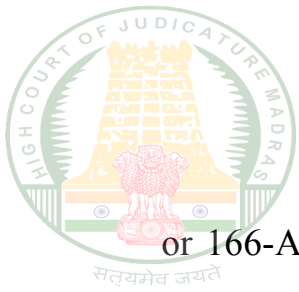
b). The import of coal from Indonesia through Dubai and the allegation of over valuation first came under scanner of DRI. A show cause notice dated 14/02/2017 under the provisions of Customs Act, 1962 in F.No.DRI/MZU/F/Int.160/2014 was issued and it was proposed to re-determine the import value of the coal in terms of section 14 of the Customs Act, to confiscate the coal in terms of Section 112 (iii) of the Customs Act and to impose penalty in terms of Section 112(a) and (b) r/w 112 (iii) of the said Act. After reply to this show cause notice, DRI has not proceeded with the adjudication and it is still pending. After DRI thought fit not to proceed further, CBI registered FIR in R.C.221/2018/E0003 on 22/01/2018 under Sections 120B r/w 420 I.P.C and Sections 13(2) r/w Section 13(1)(d) of Prevention of Corruption Act 1988. In this case also the petitioner appeared before CBI and gave all the documents sought during investigation by CBI. Till date CBI has not filed final report.



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While so, when the First Information Report registered by CBI for the predicate offence not culminated in final report, the Directorate of Enforcement for the very same transaction has registered ECIR in No.CEZO-1/01/2018 dated 31/01/2018 and even after due cooperation for investigation all these years, the petitioner is confined to prison for the reason he is withholding evidence in his possession. At the outset, this reason is contrary to the Department's own statement before the Court in the writ petition filed for extension of time of suspension of LOC, wherein, the Learned Counsel for the Department conceded that the petitioner is co-operating with investigation and no objection for him to travel abroad. Besides, having appeared before the respondent for more than 8 times on various dates and cooperated with investigation arresting the petitioner on the ground that he is withholding evidence is baseless.

Person accused of crime has right of silence under Article 20(3) of the Constitution which envisages protection from self incrimination. No person shall be compelled to give self incriminating statement. If at all, the respondent needs any document for its investigation and believes that the petitioner is withholding it, the legal recourse for the investigating agency is under Section 57 of the PMLA



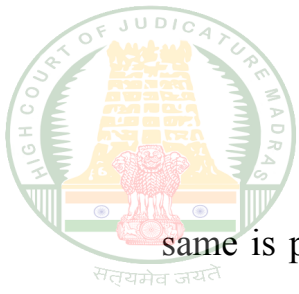
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or 166-A of the Code of Criminal Procedure. Confining a person for exercising

his constitutional right is against the spirit of the constitution.

That apart, the petitioner after issuance of Look Out Circular (LOC), with the leave of the Court, had gone out to Foreign Countries on several occasions and returned back to India. He is man of means running a 1200MW of M/s.Thermal Power Generation Plant in this State and holding high status in the Society. While so, he is branded as 'travel risk' in the counter to put the petitioner in bad light only for the sake of opposing the bail petition, when the grounds of arrest does not whisper about travel risk.

c). In *Nilkesh Tarachand Shah -vs- Union of India reported in 2018 (11) SCC 1*, the Hon'ble Supreme Court has declared Section 45 of the PMLA, 2002. To validate the provision, the Union Government brought out as a Money Bill through Department of Finance and has amended Section 45 of the Act. Instead of re-enacting the provision to validate the Act, the amendment brought as money bill is unconstitutional and therefore the constitutional validity of the said amendment to PMLA, is under challenge before the Supreme Court and



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same is pending. Therefore, for grant of bail the rigor of Section 45 as amended

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need not be applied only the triple test laid in section 437 of Cr.P.C to be applied.

29. In this contest, the Learned Senior Counsel for the petitioner also read out Section 19 of PMLA 2002, which confers power to arrest and Section 45 which speaks about granting bail to the person arrested and submitted that, for arrest under PMLA, the person authorised to arrest must *prima facie* satisfy himself that the accused is guilty of offence under PMLA. Whereas to grant bail, the Court must satisfy itself that the accused is not guilty of offence under PMLA. When the predicate offence itself not made out and no final report filed so far, the *prima facie* satisfaction of guilt to arrest does not arise. Unlike, Section 41 of Cr.P.C., “*when police may arrest without warrant*”, the threshold to arrest under PMLA 2002, is high and in this case, the respondent has failed to ensure the mandate laid in Section 19 of the PMLA 2002.

30. Per contra, the Learned Additional Solicitor General Mr.R.Sankarnarayanan for the respondent submitted that, to proceed under PMLA, the authorities need not wait for the conclusion of the proceedings initiated under the predicate offence. Even the outcome of the proceedings is immaterial. It is



sufficient if proceedings initiated under schedule offence. Therefore, there is no bar to simultaneously initiate action under PMLA, 2002 and sustain it independent of the orders passed in respect of the schedule offence.

31. The legal position on this issue is clear from the explanation to Section 44(1) (d) of PMLA 2002, which reads as below:-

44. Offences triable by Special Courts.

(1). Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

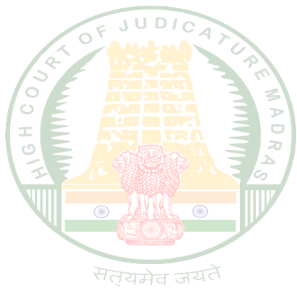
(a).....

(b).....

(c).....

(d) a Special Court while trying the scheduled offence or the offence of money-laundering shall hold trial in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), as it applies to a trial before a Court of Session.

Explanation.—For the removal of doubts, it is clarified that,



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(i) the jurisdiction of the Special Court while dealing with the offence under this Act, during investigation, enquiry or trial under this Act, shall not be dependent upon any orders passed in respect of the scheduled offence, and the trial of both sets of offences by the same court shall not be construed as joint trial;

(ii) the complaint shall be deemed to include any subsequent complaint in respect of further investigation that may be conducted to bring any further evidence, oral or documentary, against any accused person involved in respect of the offence, for which complaint has already been filed, whether named in the original complaint or not.

32. As far as the alleged co-operation for investigation claimed by the petitioner, it was only partial and selective. He, when asked to produce documents connected to the Companies at Dubai which has supplied the Indonesian Coal, he in unequivocal term refused to provide it. Now, as a defence, he claims right of silence. No doubt, constitution protects any person from self incrimination, however, it is subject to adverse inference. Particularly, when Section 63 of PMLA penalise any person who with-holds known information or who furnish false information. Therefore, the fundamental right of silence guaranteed under



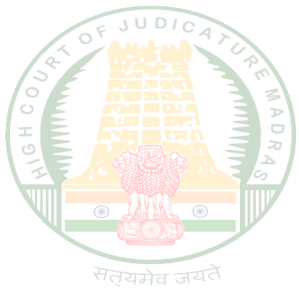
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the constitution always carry a tag, which is 'adverse inference'.

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33. Regarding, application of Section 45 (1) of the PMLA, 2002 for considering the bail petition, the Learned Additional Solicitor General submitted that, when a similar plea was raised before the Hon'ble Division Bench of this Court in *N.Umashankar & others -vs- The Assistant Director, Directorate of Enforcement, Government of India, Chennai* reported in *MANU/TN/0007/2022*, questioning the constitutional validity of post amended Section 45 of PMLA, Division Bench of this Court has held that, as long as Section 45 of PML Act as amended is not struck down by the Constitutional Court, legislation duly passed by the Parliament is presumed to be valid and in force. Therefore, judicial propriety and discipline warrants the Bench of lesser strength to follow the dictum laid by the larger Bench of the same High Court. Any judgment of other Hon'ble High Courts contrary to the Division of Bench judgment of this Court may not have **even** persuasive value and certainly not binding.

34. Heard the arguments of the Learned Senior Counsels representing the petitioner and the respondent.



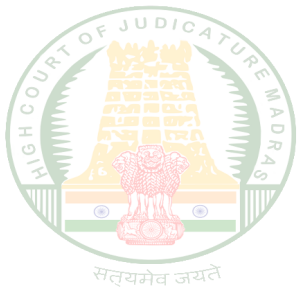
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35. As far as the case in hand is concern, this Court is now called

upon to decide whether the arrest of the petitioner under PMLA is uncalled. If not, whether it can exercise its discretion to set the petitioner at liberty on obtaining bail bond.

36. In *T.Subramanian and others -vs- The Assistant Director, Directorate of Enforcement reported in MANU/TN/8500/2021*, when a similar plea that initiating action under PMLA is premature, when there is no concluded proceedings in the predicate offence raised, this Court had the privilege of sharing Division Bench judgment considered in detail, the effect of the pending or non-pending of proceedings in predicate offence qua prosecution under PMLA and held that,

“14. Unless final report in the predicate offence is filed, proceedings under the PMLA cannot be initiated is the second fallacy in the petitioners' submission. After the insertion of Explanation to Section 44 and the second proviso to Section 5 (1) (b) of the PMLA, it is made clear in the statute that the proceedings under the PMLA not dependant to the predicate offence. Soon after registration of a schedule



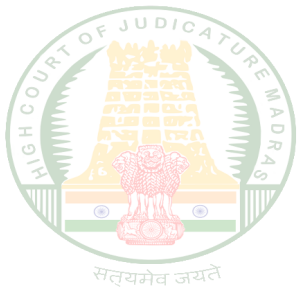
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offence case, the authorities under the PMLA can act upon and register case under the PMLA, for money-laundering and also provisionally attach the proceeds of crime. Under first proviso to this Section in ordinary circumstances, the authorities shall wait till the filing of final report under Section 173 Cr.P.C. in the predicate offence. In extraordinary circumstances if the authority has reasons to believe that non-attachment of the suspected proceeds of crime will frustrate the proceeding under the PMLA, the authority need not wait for the schedule offence agency to file their final report, but shall proceed even prior to filing of final report by virtue of second proviso.

15. Section 13 of the Prevention of Corruption Act is a schedule offence under the PMLA. 'Proceeds of crime' as defined under Section 2(u) of the PMLA, is any property derived or obtained directly or indirectly by any person as a result of criminal activity relation to a schedule offence. Section 3 of the PMLA defines the offence Money-Laundering as the process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property. The authorities of the Enforcement Directorate in view of the registration of the crime under Section 13 of the Prevention of Corruption Act, has thought fit to summon the persons involved in the scheduled offence to ensure whether there is



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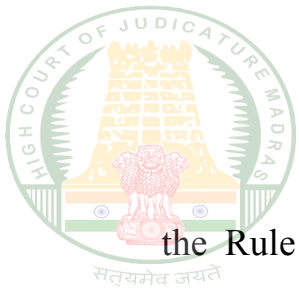
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any act of money-laundering involved. For the said purpose, the summons under Section 50 (2) and (3) of the PMLA has been issued. In such circumstances, the petitioners are expected to produce documents sought by the authorities and satisfy them that they are not involved in any act of money-laundering. Instead, under false pretext that the properties are likely to be provisionally attached before filing of final report in the predicate offence, the writ petitions are filed.”

37. The above logic squarely applies to the facts of the case in hand and this answers the first limb of the petitioners submission.

38. This Court has no second view on the Principle of Law on precedent, as put forth by the Learned Additional Solicitor General, Section 45(1) of PMLA as it stands today after amendment ought to be applied when bail petition is considered in case of offences involving “Proceeds of Crime” above Rs.1 crore. This section which impose additional condition for grant of bail apart from the condition contain in the Code of Criminal Procedure or any other law in force.

39. Adverting to the other limb of the petitioner's argument, “Bail is



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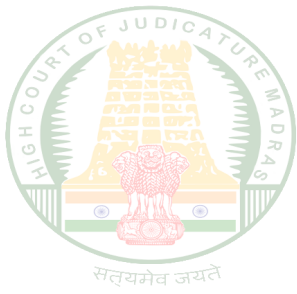
the Rule Jail is exception” is the philosophy generally followed in the Indian

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Criminal Jurisprudence. But, then there are certain legislations in India like NDPS Act and PMLA, which says, based on the gravity of offence alleged, “Jail is the rule and bail is exception”. Whether such classification is reasonable or not is the question primarily now subject matter pending before of the Apex Court. Till verdict is pronounced, as the Division Bench of this Court has observed in ***N.Umashankar & others -vs- The Assistant Director, Directorate of Enforcement, Government of India, Chennai*** reported in ***MANU/TN/0007/2022 order dated 03.01.2022***, the constitutional validity of Section 45(1) of PMLA, 2002 found in the statute has to be held valid.

40. For convenience, the relevant passages in ***N.Umashankar case*** cited *supra* is extracted below:-

“16. No doubt, the legislature has the power to cure



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the underlying defect pointed out by a Court, while striking down a provision of law and pass a suitable amendment. When such a law is passed, the legislature basically corrects the errors which have been pointed out in a judicial pronouncement. Resultantly, it amends the law, by removing the mistakes committed in the earlier legislation, the effect of which is to remove the basis and foundation of the judgment. Therefore, merely because the entire section is not re-enacted would be of no consequence, since the provision even after being declared unconstitutional, does not get repealed or wiped out from the statute book and it only becomes unenforceable. Therefore, once the Parliament steps in and cures the defect pointed out by a Constitutional Court, the defect appears to be cured and the presumption of constitutionality is to apply to such provision. Therefore, there is a presumption in favour of constitutionality since the amended section 45(1) of the PMLA has not been struck down.”

41. In this case, the prosecution claims that the accused failed to co-operate with the investigation and he is withholding information which are necessary to trace the trail of tainted money. The specific allegation against this



petitioner is that, he, by supplying inferior quality of coal of Indonesian Origin routed through his shell company at Dubai by obtaining two different manipulated certificates of sampling and analysis, had siphoned the over invoiced money to his offshore entities in UAE, British Virgin Islands (BVI) and Mauritius. The proceeds of crime so laundered was brought back to India as equity investment in one of his entity viz., M/s.Coastal Energen Pvt Ltd.

42. During the investigation, the respondent/complainant has asked the petitioner to furnish bank account statements of the offshore Companies involved in this transaction, original invoices raised by the Indonesian Coal Miners to his Dubai based entities, Books of Accounts of his foreign entities located in Mauritius and British Virgin Islands (BVI). The petitioner reluctant to part away those crucial documents and had given evasive reply. Having refused and reluctant to handover these documents which are essential to ascertain whether the money laundered the manner in which the investigation so far reveals, mere physical presence at Respondent Office will not tantamount to cooperation to investigation. Further, having declared to maintain silence, the investigating agency needs time to collect the documents required, by other means as the



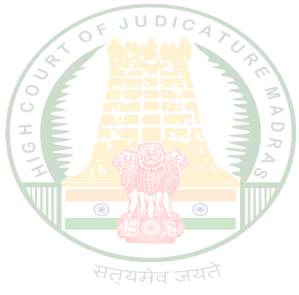
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petitioner himself have put it in his petition, (i.e.,) Letter of Request (LOR) under

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Section 57 of PMLA, 2002 or Section 166-A of Cr.P.C., may be resorted. It is the discretion and prerogative of the investigating agency, to choose the mode and they need no advice neither from the Court nor from the accused. To collect those documents, the confinement of the petitioner in prison is inevitable, else he may secret away the documents, taking advantage of his liberty.

43. In view of this Court, this petitioner who is a Non-Resident Indian widely connected with other parts of the World and not inclined to cooperative with the investigation in its true sense is not entitled for bail. The ramification of the alleged crime runs to several hundred crores. Several persons in and out side India are connected in the crime. The documents connected with the Shell Companies floated by him in other countries are to be collected. This petitioner has very fragile roots in this Country and strong connections abroad. His appearance before the Investigating Officer for investigation as and when it was convenient for him does not indicates that his presence can be secured, if he once decide to leave the Country for ever.



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44. For the reasons stated above, this Criminal Original Petition is

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28.03.2022

Index :Yes.

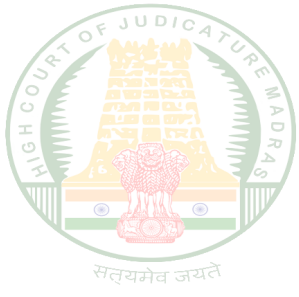
Internet :Yes.

Speaking order/Non Speaking order

bsm

To:-

1. The Principal Sessions Court, Chennai.
2. The Central Prison, Puzhal.
3. The Assistant Director, Directorate of Enforcement,
Government of India, Chennai Zonal Office-I,
2nd & 3rd Floor, No.84, Murugesu Naicker Complex, Greaves Road,
Chennai – 600 006.
4. The Section Officer, V.R.Section, High Court, Madras.



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Dr.G.JAYACHANDRAN,J.

bsm

Pre-delivery order made in
Crl.O.P.No.6205 of 2022

28.03.2022