

Gujarat High Court

Hemanshu Rajnikant Shah vs Assistant Director, Directorate ... on 28 March, 2022

Bench: Ilesh J. Vora

R/SCR.A/9001/2021

JUDGMENT DATED: 28/03/2022

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CRIMINAL APPLICATION NO. 9001 of 2021

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE ILESH J. VORA

Sd/-

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| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ? | Yes |
| 2 | To be referred to the Reporter or not ? | Yes |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ? | No |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ? | No |

HEMANSHU RAJNIKANT SHAH

Versus

ASSISTANT DIRECTOR, DIRECTORATE OF ENFORCEMENT

Appearance:

JIGER K MEHTA(7548) for the Applicant(s) No. 1,2
KRUNAL S MEHTA(9227) for the Applicant(s) No. 1,2
DS AFF.NOT FILED (N) for the Respondent(s) No. 3,4
MR DEVANG VYAS(2794) for the Respondent(s) No. 1,2
MS KRINA CALLA, APP for the Respondent(s) No. 5

CORAM:HONOURABLE MR. JUSTICE ILESH J. VORA

Date : 28/03/2022

ORAL JUDGMENT

1. The present writ petition is preferred under Articles 226 & 227 of the Constitution of India, for quashing of the provisional attachment order No.5/2020 dated 17.12.2020 issued in ECIR/01/STSZO/2017, by Deputy Director of Enforcement, Surat, Sub-Zonal Office, Surat, and consequential proceedings, under the provision of the Prevention of Money Laundering Act, 2002 ("PML Act, 2002" for short).

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2. Facts and circumstances giving rise to file present petition are as under:

(i) The respondent No.2, in exercise of its power under Section 5(1) of the Act, 2002, passed provisional attachment order No.5/2020, dated 17.12.2020, provisionally attaching properties of the petitioners, for a period of 180 days.

(ii) The respondent No.2 thereafter in exercise of its power under Section 5 (5) of the PML Act, 2002 filed a complaint being OC No.1382/2021 before the adjudicating authority on 24.12.2020.

(iii) The respondent No.3 - Adjudicating Authority after hearing the affected parties, confirmed the order of provisional attachment and held that the properties provisionally attached by the respondent No.2 are "proceeds of crime" in terms of Section 2(1)(u) of the PML Act, 2002.

(iv) Necessary facts giving rise to initiation of the proceedings under the PML Act, 2002, are as under:

(a) The petitioner No.1 Hemanshu Shah was the partner of M/s. Shah Maganlal Gulabchand Choksi. The partnership firm working as a bullion traders. Income Tax Department, Gandhidham, received information with regard to high value deposits of old currency notes in the bank accounts of M/s. S.N.Traders and M/s.Nirav & Co. The information transmitted to the Surat Income Tax Office and accordingly, during the course of search proceedings in the premises of petitioners and their related firms, it was noticed that Rs.36.17 crore during the period from 10.11.2016 to 05.12.2016 was credited in the account of M/s. Nirav & Co. and the same was transferred in the partnership firm of the petitioner No.1 and R/SCR.A/9001/2021 JUDGMENT DATED: 28/03/2022 other related entities. The Income Tax office, Surat, filed two complaints with CBI, Gandhinagar, under section 120(b), 467, 468, 471 of Indian Penal Code and Section 13(2), 13(1)(d) of the Prevention of Corruption Act, against the bank officials and present petitioner No.1 and others.

(b) The investigation under PML Act, 2002, was initiated on 11.01.2017 under ECIR/01/STSZO/2017 against the petitioner No.1 and others.

(c) During the course of investigation, it was revealed that, the bank account in the name of M/s. Nirav & Co. maintained with Surat People's Coop. Bank, was handled and operated by petitioner No.1. He had with the aid of one Maharshi Chokas, deposited Rs.36.17 crore during post demonetization period, so as to enable him to convert unaccounted black money into banking system, for which he had misused photo identity and other supporting documents of Nirav Shah. The amount so deposited was transferred to the bank account of M/s. Maganlal Gulabchand Shah, wherein, the petitioner No.1 Hemanshu Shah was one of the partners.

(d) During the course of investigation, the authority had called for properties details from the Revenue Department and Sub-Registrar, Surat. The department submitted certified copy of sale deed dated 27.05.2010, pertaining to one residential property being Flat No.16, Building No.3,

Gyandeeep Coop. Hous. Society, Surat, admeasuring 97.85 sq.mtrs., valued at Rs.20 lacs. The residential flat property purchased by the petitioners and later on, the petitioner No.1 sold his share to his wife.

(e) The authority further noticed during the investigation that, the commercial property, admeasuring 1800 sq.ft., situated at R/SCR.A/9001/2021 JUDGMENT DATED: 28/03/2022 parsi Sheri, Navapura, Surat, was purchased by M/s. Maganlal Gulabchand Choksi on 16.03.1998 by registered sale deed.

(f) During the investigation, it is found that one residential property No.538/2, situated at Ketankunj Building Nanpura, Surat was purchased in the name of petitioner No.1 and his two brothers by way of registered sale deed dated 08.03.2013 and the same was mortgaged with the Surat People's Coop. Bank as a collateral security against cash credit and later on, in the year 2017, the petitioner No.1 Hemanshu Shah gifted his one-third share to his two brothers and the same was sold by way of registered sale deed dated 04.11.2020. The respondent authority directed the Surat People's Coop. Bank not to release the proportionate amount related to Hemanshu Shah and accordingly, bank vide their letter dated 16.12.2020 informed that, the amount of Rs.18 lacs being one-third sale proceeds recovered against the mortgaged and being the share of Hemanshu Shah being invested in the FDR in the name of M/s. Maganlal Gulabchand Choksi.

(g) In the aforesaid facts, on the basis of material placed before respondent No.2, the authority came to a conclusion that, the petitioner No.1 with criminal intent, connived with others utilized the bank account for depositing demonetized SBNs to the extent of Rs.36.17 crore and channelized the unaccounted black money to the banking system, which is nothing, but proceeds of crime as Rs.34.82 crore has been transferred to the bank account of M/s. Shah Maganlal G. Choksi and therefore, there is reasonable ground to believe that, properties mentioned in the Schedule are liable for provisional attachment under Section 5 of the PML Act being value of the property derived or obtained, directly or indirectly, by petitioner No.1 Hemanshu Shah and the said properties are further likely to be transferred or dealt with in R/SCR.A/9001/2021 JUDGMENT DATED: 28/03/2022 such a manner, which may result in frustrating further proceedings and accordingly, the provisional attachment order No.5/2019, dated 17.12.2020 came to be passed by Deputy Director, E.D, in ECIR /01/STSZO/2017 attaching the properties mentioned in the Schedule for a period of 180 days.

(h) The complaint as provided under Section 5 (5) of the PML Act came to be filed on 24.12.2020 before the Adjudicating Authority, as OC-382/2021.

(i) The Adjudicating Authority - respondent No.3 after perusal of the contents of the complaint, submissions of the petitioners in response to Notice issued under Section 8 (1) of the PML Act and hearing the parties confirmed the order of provisional attachment order vide 24.07.2021. The respondent No.3 while confirming the order, held that, the petitioners herein failed to discharge the burden as required under Section 24 of the PML Act and finally came to a conclusion that, the properties attached are proceeds of crime in terms of Section 2(i)(u) of the PML Act and therefore, the involvement in money laundering has been established.

(j) The petitioners herein approached the Appellate Tribunal as provided under Section 26 of the PML Act, to challenge the impugned order passed by respondent No.3. However, due to non-availability of the Adjudicating Authority, the present writ petition is preferred under Articles 226 of the Constitution of India as the petitioners having no any other efficacious alternative remedy.

(k) The respondent No.2, served a notice dated 01.09.2021 directing the petitioners to vacate and handover the peaceful possession of the attached properties within 10 (ten) days. Pursuant to the notice and pending the proceedings, the R/SCR.A/9001/2021 JUDGMENT DATED: 28/03/2022 respondents have taken possession of the attached properties, in terms of Section 8(5) of the PML Act.

3. In the aforesaid facts, the petitioners herein are before this Court, by preferring present writ petition under Article 226 of the Constitution of India, seeking writ of certiorari or any other writ, order or direction, to quash the provisional attachment order and the impugned notice and subsequent action of the respondents in taking possession of the attached properties.

4. This Court has heard Mr. Jigar K. Mehta, learned counsel for the petitioners and Mr. Devang Vyas, learned Additional Solicitor General of India for the respondents.

5. Learned counsel for the petitioners submitted that;

(i) The properties in question were acquired much prior to the alleged act of offences under the PML Act, 2002 and therefore, they do not come within the definition of "proceed of crime".

In this context, he urged that, the residential flat and shop admittedly purchased prior to the enactment of the PML Act, 2002. Thus, therefore, it is evident that, the properties were not purchased from the criminal activity, which can be established from the details of the purchase of properties collected during the investigation. In that view of the matter, the entire exercise of the respondent authorities suffer from arbitrariness, against the mandate of law and as such is violative of legal right of the petitioners and therefore, the authority erred in holding the value of any proceeds of crime is covered under the definition of proceed of crime and wrongly held that, the properties in question are value of properties derived or obtained by criminal activity. The impugned order passed under Section 5(1) of the PML Act, 2002, is without application of mind and as such, there is no R/SCR.A/9001/2021 JUDGMENT DATED: 28/03/2022 material before the authority to justify to hold that, the properties are obtained or derived from proceeds of crime.

(ii) Placing reliance on the decision of the Division Bench of Punjab & Haryana High Court, in the case of Seema Garg Vs. Deputy Director [(2020) SCC Online P & H 738], to submit that, the properties purchased prior to the commission of the offence would not fall within the meaning of proceeds of crime and therefore, in the facts of present case, pre- conditions of Section 5 of the PML Act, 2002, are not satisfied.

(iii) It was submitted that, the petitioners herein invoked the appellate jurisdiction as provided under Section 26 of the PML Act to challenge the impugned order. However, the authorities to adjudicate the appeals were not available and no any new appointment was ordered by the Government and therefore, the petitioners had no any efficacious remedy available, except to approach this Court by preferring present writ petition under Article 226 of the Constitution of India. In this context, it was further submitted that, even otherwise, the respondent authority have acted contrary to the provisions of the Act in question, as they had wrongly exercised the jurisdiction to attach the properties, which are not of proceeds of crime.

In the aforesaid contentions raised by learned counsel for the petitioners Mr. Mehta, it was submitted that, the impugned provisional attachment order and consequential proceedings are illegal, unjust and contrary to the law and the same deserve to be quashed and set aside.

6. Learned Additional Solicitor General of India appearing for the respondent authorities reiterating the facts of the affidavit in reply filed by Deputy Director, Directorate of Enforcement, R/SCR.A/9001/2021 JUDGMENT DATED: 28/03/2022 Surat, submitted that;

(i) The properties in question are covered under the definition of "proceeds of crime" as contemplated under Section 2(1)(u) of the PML Act, 2002.

(ii) Referring to Section 5 of the PML Act, 2002, it was submitted that, in order to invoke Section 5 for attachment of the property in the form of provisional attachment, requirement of law is that, there should be "reason to believe" and same should be recorded in writing of such belief that, any person is in possession of any proceed of crime and such proceeds of crime are likely to be concealed, transferred or dealt with in any manner, which may result in frustrating proceedings relating to confiscation of such proceeds of crime. In this context, it was submitted that, the respondent No.2 while passing the order had considered the nature of properties, conduct of the petitioners and object of the legislature. Drawing the attention to pages 23 to 34 and 37 to 39 of the provisional attachment order, it was contended that, the respondent No.2 had considered material collected during the course of investigation come to the conclusion that, the properties are likely to be transferred or dealt with in such a manner, which may result in frustrating further proceedings of confiscation. It was further submitted that the share of petitioner No.1 in residential property has been sold to petitioner No.2 after registration of the offence. Petitioner No.1 has sold his one-third share of one another residential property to his two brothers and later on, both the brothers have sold the property, which was placed under the collateral security with Surat People's Coop. Bank.

(iii) It was submitted that, the properties are liable to attach though they were purchased prior to the commission of the R/SCR.A/9001/2021 JUDGMENT DATED: 28/03/2022 offence or the act came into force. Reference was placed on the judgment of the Delhi High Court in Deputy Director, Directorate of Enforcement Vs. Axis Bank & Ors. [2019 SCC Online Delhi 7854], to contend that even the untainted properties, which are acquired with legitimate source of money are liable to be attached as "value equivalent".

(iv) Referring to the impugned order of provisional attachment, it was submitted that, the respondent No.2 passed provisional attachment order dated 17.12.2020 on the basis of material with him and the same was confirmed by the Adjudicating Authority vide order dated 24.08.2021 and therefore, the authority has passed the impugned order after considering weighing the entire evidence available on record and passed well reasoned order. In this context, it was submitted that, the satisfaction of adjudicating authority at the stage of confirmation of provisional attachment is limited one, so as to inquire as to whether the properties in question are ascribable to money laundering or not. Therefore, at the stage of passing the order under Section 5 of the PML Act, it is not necessary to assess or weigh the full evidence as is required at the stage of final decision. Referring to Section 24 of the PML Act, it was submitted that, there is a presumption with respect to proceeds of crime involved in money laundering. The burden is on the petitioners to establish that, the properties are not derived or obtained from the proceeds of crime. Therefore, at this stage, the Adjudicating Authority rightly held that, the petitioners failed to discharge their burden as required under the PML Act and raising the presumption under Section 24 of the PML Act, it is held that, the properties fall under Section 2(i)(u) of the PML Act, 2002. Thus, therefore, it was submitted that, no case is made out or there exists no ground to invoke the extraordinary jurisdiction R/SCR.A/9001/2021 JUDGMENT DATED: 28/03/2022 of this Court.

(v) On the issue of maintainability of present writ petition, it was submitted that, the petition is not maintainable as there is specific statutory remedy available under Section 26 of the PML Act, 2002, providing remedy of an appeal against the impugned orders and therefore, the petitioners herein have not exhausted statutory remedy of appeal. In this context, learned ASG Mr. Vyas vehemently argued that, the petitioners herein have not brought on record the relevant material to show that the Appellate Authorities to adjudicate the matter were not available. The petitioners could have produced the memo of appeal or acknowledgment of the office of the Appellate Tribunal to show that, they had genuinely preferred appeal before the Appellate Tribunal. Therefore, merely raising the contentions in the petition is not suffice to hold that, at the relevant point of time, the posts were vacant. Learned ASG Mr. Vyas raised the technical issue that, the writ petition in the present form is not maintainable as the attachment proceedings is civil in nature and therefore, the writ petition invoking criminal jurisdiction, seeking writ of certiorari is not maintainable and therefore, on this count only, the petition deserves to be dismissed.

In view of the aforesaid contentions, learned ASG submitted that the authorities have followed the mandatory provisions of the PML Act, 2002 and rules thereunder and therefore, the petitioners failed to make out a case for exercising extraordinary power and the petition devoid of any merits, deserves to be dismissed.

7. Before dealing with the question involved, it would be appropriate to notice to the applicable legal provision.

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8. The provision of PML Act, 2002 was brought in for preventing money laundering. Section 3 of the PML Act, 2002, which defines the offence of "money laundering" reads as under:-

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

9. "Proceeds of crime" has been defined under Section 2(u) of the PML Act, 2002, which reads as under:-

"Section 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.

10. Section 5 of the PML Act, 2002, provides for attachment of property. Section 5(1)(a) of the PML Act, which is relevant to the case, reads as under:-

"Section 5(1)- Where the Director, or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section, has reason to believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that

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

(b) such person has been charged of having committed a scheduled offence; and;

(c) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under this Chapter, he may, by order in writing, provisionally attach such property for a period not exceeding 9 [one hundred and fifty days] from the date of the order, in the manner provided in the Second Schedule to the Income-tax Act, 1961 (43 of 1961) and the Director or the other officer so authorised by him, as the case may be, shall be deemed to be an officer under sub-rule (e) of rule 1 of that Schedule."

11. In view of the statutory provisions, it can be sum up that, the PML Act, 2002 gives wide powers to the authorities to attach properties suspected to be involved in money laundering. Section 5 of the PML Act authorizes to attach property and the same is to be exercised if the authority has reason to believe, R/SCR.A/9001/2021 JUDGMENT DATED: 28/03/2022 on the basis of material in their possession that, any person is in possession of any proceeds of crime and such proceed 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. If the conditions as laid down are satisfied, the authority may by order in writing provisionally attach property. It is settled law that, the authority may proceed with the provisional attachment even their being no prosecution qua schedule offence against the persons. It is statutory duty on the part of the authority to file a complaint, stating the facts of attachment before the adjudicating authority after provisional

attachment. Section 24 of the PML Act, 2002, casts the burden of proving that, the alleged proceeds of crime are not involved in money laundering on the accused.

12. In the case of Satyam Computer Services Ltd. Vs. Director of Enforcement & Ors., vide judgment dated 31.12.2018, (Manu/HY/0428/2018), Hyderabad High Court held that, in a case when the proceeds of crime are untraceable, or have been disposed of in a manner where tracing them would be impossible, in that case, the untainted or clean properties cannot be attached.

13. Before delve into the issue, it is profitable to refer the relevant decisions of the various High Courts.

14. In the case of Abdulla Ali Balsharaf & Anr. Vs. Director of Enforcement, vide its judgment dated 09.02.2019, Delhi high court (MANU/DEL/51/2090), the issue was that, whether the property which was acquired prior to the PML Act, 2002, coming into force, could be attached or not as "value equivalent". The Delhi High Court answered the reference in R/SCR.A/9001/2021 JUDGMENT DATED: 28/03/2022 the affirmative and held that, according to the amended section 2(1)(u), if the proceeds of crime are held abroad, then any property of the accused held by in India can be attached to the extent of value of proceeds of crime, held abroad and in that circumstances, even the untainted property can be attached which may have been acquired, prior to the commission of the offence, or to the act coming into force itself.

15. In the case of Deputy Director of Enforcement, Delhi & Ors, Vs. Axis Bank, vide its judgment dated 02.04.2019, (Manu/DE/1120/2019), wherein, definition of "proceeds of crime" deconstructed into three parts namely (i) property derived or obtained (directly or indirectly) as a result of criminal activity relating to schedule offence; or (ii) value of any such property as above; or (iii) if the property of the nature first above mentioned as has been "taken or held" abroad, any other property, "equivalent in value" whether held in India or in abroad. After deconstructing the definition in three parts, the Court observed that so far in the case (1), there is no controversy since the properties referred in this case are "tainted", which are acquired through commission of a schedule offence, liable for attachment. The court further held that in cases under falling category 2 and 3, even property, acquired through legitimate sources by the accused, but since the actual proceeds of crime are not traceable, then even these properties can be attached.

16. In the case of Seema Garg (supra), Punjab & Haryana High Court vide its judgment dated 06.03.2020, interpreted the provision "proceeds of crime". Before the Division Bench, the issue raised whether the property acquired prior to enactment of PML Act i.e. 01.07.2005 can be provisionally attached or not R/SCR.A/9001/2021 JUDGMENT DATED: 28/03/2022 and whether the fresh "value of any such property" occurring in the definition of "proceeds of crime" includes any property of any person irrespective of source of the property. The Division Bench, after considering the judgments of Satyam Computer (supra) and Abdul Ali Balsharaf (supra) 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 of Section 2(1)(u) of the PML Act, 2002 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 and

(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. The Division Bench further held that the property purchased or acquired before the commission of the offence, would not fall within the first limb of definition of proceeds of crime, however, in cases where the proceeds of crime are held abroad, any property of the accused irrespective of its date of acquisition, can be attached.

Findings :-

17. In the facts of the present case, the investigation under the PML Act, 2002, was initiated on 11.01.2017 under ECIR/01/STSZO/2017. The alleged deposition of high value amount, was credited from 16.11.2016 to 30.11.2016 in the account referred in the proceedings. During the course of investigation, the authority collected copies of sale deeds with respect to two residential properties and one commercial shop property. It is not in dispute that, the residential property as mentioned in the Schedule was purchased by the petitioners vide sale deed dated 27.05.2010 paying consideration of Rs.20 lacs. The shop property mentioned in the Schedule was R/SCR.A/9001/2021 JUDGMENT DATED: 28/03/2022 purchased by M/s. Maganlal Gulabchand Choksi by way of registered sale deed dated 16.03.1998. The another residential property, which is not attached herein, but referred by the authority, situated at Chetankunj Building, Nanpura, was purchased by the petitioner No.1 and his three brothers jointly on 08.03.2013 by way of registered sale deed.

18. In the aforesaid backdrop, this Court is of considered view that, the attached properties purchased or acquired before the commission of the offence as well as the Act came into force. It is not in dispute that, the authority was not able to trace the "tainted property". If we read the Affidavit in Reply filed by the Deputy Director, Directorate of Enforcement, wherein, it has been admitted by the agency that, despite having exhausted all options of finding the properties purchased out of proceeds of crime, they could not find direct trail of proceeds of crime.

19. The definition "proceeds of crime" came up for interpretation before the Division Bench of the High Court of Punjab & Haryana in the case of Seema Garg (supra). Before the Division Bench, the petitioner Seema Garg challenged the attachment order, wherein, the property was purchased prior to the commission of schedule of offence. The issue before the Division Bench was that, whether property purchased prior to the commission of the offence could be fall within the definition of Section 2(i)(u) of the PML Act or not. The Division Bench after considering the cases of Satyam Computer (supra) and Abdulla Ali Balsharaf & Anr. (supra) held that any property purchased or acquired before the commission of offence would not fall within the first limb of the definition of "proceeds of crime".

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20. Paragraphs 31 to 35 of the judgment of Division Bench of Punjab & Haryana High Court, in the case Seema Garg (supra) are relevant to refer, which reads as under:-

"31. Property purchased prior to commission of scheduled offence leaving aside date of enactment of PMLA, does not fall within ambit of first limb of definition of

'proceeds of crime', however it certainly falls within purview and ambit of third limb of the definition. Counsel for both sides have cited judgment of Delhi High Court in the case of Abdullah Ali 22 of 38 PMLA No.1 of 2019(O&M) #23# Balsharaf & Another Vs Directorate of Enforcement and Others 2019 (3) RCR (Criminal) 798 to support their contention. As per said judgment, if property derived or obtained from scheduled offence is taken or held outside India, the property of equivalent value held in India or abroad may be attached irrespective of date of purchase. We fully subscribe to the opinion expressed by Delhi High Court. We find that third limb of definition 'proceeds of crime' covers property equivalent to property held or taken outside India, thus date of purchase of property which is equivalent to property held outside India, is irrelevant. Any property irrespective of date of purchase may be attached if property derived or obtained from scheduled offence is held or taken outside India.

32. The moot question arises that whether property of equivalent value may be attached where property derived or obtained from scheduled offence is not held or taken outside India. If any property is permitted or held liable to be attached irrespective of its date of purchase, it would amount to declaring second and third limb of definition of 'proceeds of crime' one and same. As pointed out by counsel for Appellants, the third limb of definition clause was inserted by Act 20 of 2015. The aforesaid 3rd limb has been further amended w.e.f. 19.04.2018 enlarging the scope. The question arises that if phrases 'value of such property' and 'property equivalent in value held within the country or abroad' are of same connotation and carry same meaning, there was no need to insert third limb in the definition of 'proceeds of crime'. The amendment made by legislature cannot be meaningless or without reasons. Use of different words and insertion of third limb in the definition cannot be ignored or interpreted casually. Every word chosen by legislature deserves to be given full 23 of 38 PMLA No.1 of 2019(O&M) #24# meaning and effect. Accordingly, words 'value of such property' and 'property equivalent in value held within the country or abroad' cannot be given same meaning and effect. Had there been intention of legislature to include any property in the hands of any person within the ambit of proceeds of crime, there was no need to make three limbs of definition of proceeds of crime. It was very easy and convenient to declare that any property in the hands of a person who has directly or indirectly at any point of time had obtained or derived R/SCR.A/9001/2021 JUDGMENT DATED: 28/03/2022 property from scheduled offence. There was even no need to declare property derived or obtained from scheduled offence as proceeds of crime. The legislature w.e.f. 01.08.2019 has inserted explanation in Section 2(1)(u) of the PMLA. As per Mr. Mittal, counsel for the Respondents, the said explanation enlarges scope of first limb of definition 'proceeds of crime' and does not affect second limb of definition. We find some substance in the contention of Respondents, however it is trite law that entire scheme of the Act must be read as a whole/ in its entirety and every provision should be read in such a manner that it makes other provisions and scheme of Act coherent and meaningful. A provision cannot be read in isolation. The definition part does not create rights and liabilities, thus it should be examined in the light of other sections which create rights and liabilities. As per Section 8(1) of the PMLA, the Adjudicating Authority has to serve notice calling upon the person to indicate the source of his income, earning or assets out of which or by means of which he has acquired the property attached under Section 5 of the PMLA. Seeking explanation about source of property and furnishing explanation is meaningless

if property inspite of genuine and explained source may be attached. As per Section 24 of the PMLA, burden to prove 24 of 38 PMLA No.1 of 2019(O&M) #25# that property is not involved in money laundering is upon the person whose property is attached. There is no sense on the part of any person to discharge burden qua source of property if any property may be attached, irrespective of its source.

33. As per Section 8(6) of the PMLA, where the Special Court finds that offence of money laundering has not taken place or property is not involved in money laundering, it shall release such property. If contention of Respondent is upheld, there would be no need of recording findings by Special Court with respect to property attached being proceeds of crime, no sooner it is held that offence of money laundering has been committed, then the Special Court would be bound to confiscate every attached property because every property in the hand of a person, who had obtained or derived property from scheduled offence, would be proceeds of crime.

34. We deem it appropriate to examine contention of Respondents from another angle i.e. offence of money laundering as defined under Section 3 of the PMLA. As per Section 3 of the PMLA, any person who has directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is involved in concealment, possession, acquisition or use or projecting as untainted property or claiming as untainted property shall be guilty of an offence. If property purchased prior to commission of alleged offence or property not derived or obtained from commission of scheduled offence is declared as proceeds of crime, every person who is concerned with sale, purchase, possession or use of said R/SCR.A/9001/2021 JUDGMENT DATED: 28/03/2022 property would be guilty of offence of money laundering. A person who is not connected with commission of scheduled offence as well property derived from said offence but had dealt with any other property of a person, who had committed 25 of 38 PMLA No.1 of 2019(O&M) #26# scheduled offence, would fall within the ambit of Section 3 of the PMLA, which cannot be countenanced in law. There would be total chaos and uncertainty. The authorities would get unguided and unbridled powers and may implicate any person even though he has no direct or indirect connection with scheduled offence and property derived from thereon but has dealt with any other property (not involved in scheduled offence) of the person who has derived or obtained property from scheduled offence. It would amount to violation of Article 20 and 21 of Constitution of India.

35. In our considered opinion, to understand true meaning of second limb of definition of 'proceeds of crime', it must be read in conjunction with Section 3 and 8 of the PMLA. If all these sections are read together, phrase 'value of such property' does not mean and include any property which has no link direct or indirect with the property derived or obtained from commission of scheduled offence i.e. the alleged criminal activity. 'Value of such property' means property which has been converted into another property or has been obtained on the basis of property derived from commission of scheduled offence e.g. cash is received as bribe and invested in purchase of some house. House is value of property derived from scheduled offence. Cash in the hands of an accused of offence under Prevention of Corruption Act, 1988 is property directly derived from scheduled offence, however if some movable or immovable property is purchased against said cash, the movable or immovable property would be 'value of property' derived from commission of scheduled offence. If a person gets some land or building by committing cheating (Section 420 of IPC) which is a scheduled offence and

said building or land is sold prior to registration of FIR or ECIR, the property derived from scheduled offence 26 of 38 PMLA No.1 of 2019(O&M) #27# would not be available, however money generated from sale or transfer of said property in the form of cash or any other form of property may be available. The cash or any other form of property movable or immovable, tangible or intangible would be 'value of property' derived from commission of scheduled offence."

21. This Court is of considered view that, so far interpretation of term "proceeds of crime" is concerned, the judgment of the Division Bench of the Punjab & Haryana High Court (Seema Garg), is guiding force and adopting the view taken by the Bench and applying to the facts of the present case, the R/SCR.A/9001/2021 JUDGMENT DATED: 28/03/2022 respondent authorities initiated attachment proceedings based on the registration of ECIR, without there being complaint in the first place. The issue to be examined is whether the necessary condition for passing the impugned order under Section 5(1) of the Act is satisfied or not. In the case on hand, the respondent authorities have passed order in mechanical manner, without assigning proper reasons thereof, as order itself reveals that, there is non-application of mind while come to a conclusion that, the properties were derived or obtained from proceeds of crime. At the relevant point of time, the sufficient material was with the authorities to arrive at a conclusion that, the properties were acquired before commission of offence. Even the very facts having been admitted by the authorities that, they could not find tainted properties. Therefore, there is no material that could suggest that the properties sought to be attached derived or acquired from criminal activity.

22. A plain reading of Section 5(1) of the PML Act, provides that, when officer has reason to believe (the reason for such belief to be recorded in writing) on the basis of material in his possession that any person is in possession of any proceed of crime, and such proceeds of crime are likely to be concealed or transferred in any manner, which result in frustrating any proceedings relating to confiscation of such proceed of crime, he may provisionally attach such property. Thus, the officer who passed the impugned order would require to have sufficient cause to believe that, the properties sought to be attached, would acquire or obtain from proceed of crime. The expression "reason to believe" is not defined in the PML Act. In the case of Income Tax Officer Vs. Lakhmani Mevaldas [(1976) 3 SCC 757], the Supreme Court held that, there R/SCR.A/9001/2021 JUDGMENT DATED: 28/03/2022 should be "live link or close nexus" between the material before the ITO and formation of his believed that income had escaped assessment. In the facts of the present case, while forming the belief, the officer had no sufficient material to determine whether the properties were obtained from criminal activity. The concerned officer had mechanically taking wordings of Section 5(1) of the Act, formed his belief and came to the conclusion that, the value of the properties derived or obtained by criminal activity. Even the Adjudicating Authority while confirming the provisional attachment order had not applied his mind with respect to the properties.

23. The learned ASG Mr. Vyas referring to Section 24 of the PML Act, submitted that, Section 24 provides to raise presumption with respect to proceeds of crime involved in money laundering and therefore, at the stage of passing the provisional attachment order or while confirming it by the authority, it is not necessary to assess or weigh the full evidence as required at the stage of final decision. This Court is disagree with the contention raised on behalf of the respondent authority. Section 24 of the Act cannot be read, as as to obviate the requirement for the respondent authority

to prove foundational facts. The presumption shall be raised when the properties would fall under Section 2(i)(u) of the Act. Therefore, primarily burden is upon the respondent authority to establish that the properties had been obtained or acquired prior to the commission of offence. Unless and until, the said burden is not discharged, the presumption as provided would not come into play.

24. In the aforesaid reasons, this Court is of considered view that, necessary condition for passing the impugned order under Section 5(1) of the Act is not satisfied. Hence, in the facts of the present case, properties purchased before commission of R/SCR.A/9001/2021 JUDGMENT DATED: 28/03/2022 offence cannot fall within the definition of "proceeds of crime" and thus, it could not have been attached the properties in exercise of powers under Section 5(1) of the Act.

25. Learned ASG Mr. Devang Vyas, on behalf of the respondent authorities, submitted that, considering the facts of the present case, the case of Seema Garg (supra) would not applicable. Reliance has been placed on the decision of High Court of Bombay rendered in Sunlight Housing Development Private Ltd. Vs. Directorate of Enforcement, to submit that, the Division Bench of the High Court of Bombay after referring the case of Seema Garg, dismissed the petition, holding that, the properties attached would fall under the definition of Section 2(1)(u) of the Act. After perusal of the facts of cited case, this Court is of considered view that, the authority concerned was able to find out the tainted property and there was sufficient material before the authority to come to a conclusion that the alleged transaction of money laundering would fall under section 2(1)(u) of the Act. Here, in the present case, admittedly from the inception of the proceedings, the authorities could not find the tainted properties and the properties attached here were derived, acquired or obtained from legitimate source of income and before the commission of crime, the properties were purchased by the petitioners herein.

26. The learned ASG Mr. Devang Vyas raised the contention that the petition is not maintainable as there is an effective alternative remedy available to the petitioner. On the other hand, learned counsel Mr.Mehta for the petitioners submitted that, at the relevant point of time, the petitioners approached the Appellate Tribunal as provided under Section 26 of the PML Act, 2002, however, it was learnt that, the authorities to adjudicate the appeals were not available and no new R/SCR.A/9001/2021 JUDGMENT DATED: 28/03/2022 appointment was being given by the government and therefore, the petitioners have no efficacious remedy available except to file present petition under Section 226 of the Constitution of India. He also pointed out that, the writ jurisdiction of the High Court is not excluded by statute and more particularly when the respondent authorities have acted contrary to the mandatory provisions of the Act, present writ petition on technical ground of availability of alternative remedy cannot be dismissed.

27. By enacting Section 25 of the PML Act, 2002, the central government has established an Appellate Tribunal to hear appeal against the orders of the Appellate Authority and authorities under the Act, whereas, Section 26 says that, the authority or any person aggrieved by an order made by the Adjudicating Authority under the Act may prefer an appeal to the Appellate Tribunal.

28. It is settled by catena of decisions of the Apex Court that, jurisdiction of High Court is to issue a writ under Article 226 of the Constitution of Indian is plenary in nature and is not limited by any

other provisions of the Constitution. The High Court having regard to the facts of the case has discretion to entertain or not to entertain the writ petition. The Court has imposed upon self restriction in the exercise of this power and the same will not normally be exercised by the Court to the exclusion of other available remedies unless the action of the authority is arbitrary and unreasonable. Despite the existence of an alternative remedy, it is within the jurisdiction of the High Court to grant relief under Article 226 of the Constitution of India. If party 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 exists R/SCRA/9001/2021 JUDGMENT DATED: 28/03/2022 good grounds to invoke extraordinary jurisdiction. In the case of CIT Vs. Chhabildas Aggrawal [(2014) 1 SCC 603], the Apex Court has recognized 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 when order has been passed in total violation of principle of natural justice.

29. In light of the settled law and applying to the facts of the present case, the authorities while exercising their powers under Sections 5 and 8 of the Act, 2002 did not apply his mind properly and the impugned order passed against the mandate of Section 5 of the Act as there was no material before him to come to a conclusion that the properties are derived or acquired from the criminal activity and therefore, the action of the authority suffers from arbitrariness and the order impugned having been passed without authority of law. Therefore, the petition is maintainable on two counts i.e. (i) at the relevant point of time, the post of appellate authority was vacant and (ii) the respondent authorities have not acted in accordance with the provisions of the enactment in question. Thus, the plea of non-maintainability of petition on the ground of availability of alternative efficacious remedy is not acceptable.

30. Learned ASG Mr.Vyas raised the contention that, the nature of proceedings undertaken by the authority under Section 5 of the Act for provisional attachment of the properties is civil in nature and therefore, the present writ petition invoking the criminal jurisdiction of the Court, is not maintainable. In the reply of the said contention, learned counsel for the petitioners Mr. Mehta referring to Section 46 of the PML Act, 2002, submitted that, the provisions of Code of Criminal R/SCRA/9001/2021 JUDGMENT DATED: 28/03/2022 Procedure is applicable to the proceedings before the Special Court and therefore, petition in present form registered as Special Criminal Application is maintainable. It is to be noted that, Article 226 of the Constitution of India does not make any classification as to the nature of proceedings and if the condition for granting relief to a person is satisfied in a particular case, then the relief has to be granted irrespective of nature of the proceedings. It is true that, the proceedings of the provisional attachment is civil in nature. The Special Court has power to pass an order of confiscation of the property, as provided under sub-section (5) of Section 8 of the PML Act. It provides that, on conclusion of a trial of an offence, the Special Court finds that, the offence of money laundering has been committed, it shall order that such property involved in money laundering or used for commission of the offence of money laundering, shall stand confiscated to the Central Government. In the case on hand, respondent No.3 adjudicating authority while confirming the provisional attachment order under Section 5(1) of the PML Act ordered that, the attachment shall continue for a period not exceeding 365 days or pendency of proceedings relating to any offence under the Act before the Special Court and it

become final after an order of confiscation is passed under sub-section (5) or sub-section (7) of the PML Act.

31. In view of the statutory provisions, the present writ petition in the present form has been rightly registered as Special Criminal Application and therefore, the contention raised by the respondents that, the present writ petition in present form invoking the criminal jurisdiction, is devoid of any merits and not acceptable.

32. For the foregoing reasons, present writ petition is allowed. The impugned provisional attachment order No.5/2020 dated R/SCR.A/9001/2021 JUDGMENT DATED: 28/03/2022 17.12.2020 issued in ECIR/01/STSZO/2017, by Deputy Director of Enforcement, Surat, Sub-Zonal Office, Surat and impugned notice dated 01.09.2021 (Annexure-A) and subsequent proceedings arising therefrom are hereby quashed. The respondent authorities are hereby directed to release the properties in question including the FDRs and restore the actual possession of the petitioners forthwith. Direct service is permitted.

Sd/-

(ILESH J. VORA,J.) Suchit