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

% Reserved on: 27th April, 2018
Decided on: 10th May, 2018

\+ **BAIL APPLN. 350/2018**

RAJ KUMAR GOEL ..... Petitioner
Represented by: Mr.Manoj Ohri, Sr.Advocate with Mr.Vaibhav Tomar, Mr.Abhimanyu Singh and Mr.Rajeev Ranjan, Advocates

versus

DIRECTORATE OF ENFORCEMENT ..... Respondent
Represented by: Mr. Sandeep Sethi, Additional Solicitor General, Mr.Amit Mahajan, CGSC, Mr.Nitesh Rana, SPP, Ms.Mallika Hiremath, Mr.Madhav Chitale and Mr. A.R.Aditya, Advocates with Rahul Verma, Investigating Officer.

\+ **BAIL APPLN. 437/2018**

ROHIT TANDON ..... Petitioner
Represented by: Mr.Arvind Nigam and Mr.Sudhir Nandrajog, Sr.Advocates with Mr.Manu Sharma, Mr. Mehtaab Singh Sandhu, Mr. Mikhil Sharma, and Mr.Abhir Datt, Advocates

versus

DIRECTORATE OF ENFORCEMENT ..... Respondent
Represented by: Mr. Sandeep Sethi, Additional Solicitor General, Mr.Amit Mahajan, CGSC, Mr.Nitesh Rana, SPP, Ms.Mallika Hiremath, Mr.Madhav Chitale and Mr.A.R.Aditya,

Advocates with Rahul Verma,
Investigating Officer.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

1. By way of the present bail applications, petitioners Rohit Tandon and Raj Kumar Goel, seek regular bail in ECIR No.18/DLZO-II/2016 dated 26th December, 2016 recorded by Enforcement Directorate, Delhi Zone under Sections 3 and 4 of the Prevention of Money Laundering Act, 2002 (in short 'PMLA').

2. The above-noted ECIR No.18/DLZO-II/2016 was recorded on 26th December, 2016 pursuant to FIR No. 205/2016 registered for the offences punishable under Sections 406/409/420/468/471/188/120B IPC at PS Crime Branch on 25th December, 2016.

3. Brief conspectus of facts as recorded in the ECIR against Ashish Kumar, Manager, Kotak Mahindra Bank, Raj Kumar Goel and certain other unknown persons are that during the course of investigation in FIR No.242/2016 under Sections 420/467/468/471/120B IPC registered at PS CR Park, it was revealed that Raj Kumar Goel along with his associates was engaged in earning profits by routing money into various accounts by using forged documents and thereby receiving commission from the prospective clients. Raj Kumar Goel and few of his associates had opened multiple accounts in Kotak Mahindra Bank and ICICI Bank at Naya Bazar, Chandni Chowk, Delhi. On 8th November, 2016, when Government of India announced demonetization of one thousand and five hundred rupee currency notes, Raj Kumar Goel conspired with Ashish Kumar and one Chartered Accountant, whose name was not known at the time of recording of ECIR, to convert black money in the form of old currency notes into new currency

notes and earn huge profits. Aforesaid chartered accountant arranged for prospective clients and offered 2% commission to other accused persons for such transactions. After opening many accounts on the basis of forged and fabricated documents, approximately ₹25 crores was deposited after demonetization. Thus, it was alleged that Ashish Kumar, Raj Kumar Goel and certain other unknown persons had illegal earnings arising out of the said criminal conspiracy.

4. Rohit Tandon was arrested on 28th December, 2016 and Raj Kumar Goel on 9th January, 2017 in connection with the aforesaid ECIR.

5. On 23rd February, 2017, Directorate of Enforcement filed a complaint being Complaint Case No.400/2017 against Rohit Tandon, Ashish Kumar, Raj Kumar Goel, Dinesh Bhola and Kamal Jain. It was alleged that from 15th November, 2016 to 19th November, 2016, there were huge cash deposits to the tune of ₹31.75 crores by Raj Kumar Goel and his associated and there was incoming RTGS to the tune of ₹6.86 crores. Further, demand drafts amounting to ₹38 crores were issued in fictitious names. Qua Rohit Tandon it was alleged that he in conspiracy with the co-accused persons devised a plan for conversion of demonetized currency into monetized currency by depositing cash into the accounts of various companies in Kotak Mahindra Bank where cash in hand was available in the books of accounts and in furtherance of the conspiracy, demand drafts were issued in the names of fictitious persons from the said accounts. Those demand drafts were to be credited back into the accounts and the same would have been withdrawn/transferred in the form of monetized currency. It was also alleged that the funds actually pertaining to Rohit Tandon were carefully distanced away from him through calibrated planning and were deposited not into his

own or his firms' accounts but in the bank accounts that were not at all related to him against payments of commission.

6. Qua Raj Kumar Goel it was alleged that Ashish Kumar, the Bank Manager got in touch with Raj Kumar Goel who had different accounts in his firms' names. Raj Kumar Goel agreed to the proposal of Ashish Kumar for getting the demonetized currency converted into monetized currency at a commission fixed @35% of net converted amount. Cash deposits were facilitated by Ashish Kumar in connivance with Raj Kumar Goel and accused persons.

7. On 23rd February, 2017 the first supplementary complaint was filed implicating Yogesh Mittal as the 6th accused and on 2nd August, 2017, second supplementary complaint was filed by the Directorate of Enforcement implicating Ramesh Chandra Sharma as an accused.

8. Learned counsels for the petitioners contend that against petitioner Rohit Tandon two FIRs were registered by PS C.R. Park and PS Crime Branch, that is, FIR No.197/2016 and 205/2016 resulting in recording of corresponding ECIR No.14/DZO-II/2016 and ECIR No.18/DLZO-II/2016. FIR No. 197/2016 related to the recovery of demonetized currency and the new currency whereas FIR No.205/2016 related to deposit of demonetized currency in various accounts of Yogesh Mittal and Raj Kumar Goel which was further transmitted to other accounts or bank drafts were made thereof in the first names of his employees to be encashed later on. In FIR No.205/2016 petitioner Rohit Tandon was not arrested by the Crime Branch and on filing of the charge sheet, he was granted regular bail however, the petitioner has been arrested in the consequential ECIR being ECIR No.18/DLZO-II/2016 recorded by the Enforcement Directorate. As per the

notification issued by the Government of India on 8th November, 2016 deposit of demonetized currency in one's own account was not an offence much less a scheduled offence. Further the second allegation that the petitioner Rohit Tandon got deposited money in the accounts of different persons who were given 35% commission and for the remaining, bank drafts were prepared, that is, accommodation entries were given. The same is also not an offence under IPC. The allegation of the prosecution that money was deposited in fictitious accounts and drafts were made in fictitious name is belied by its own charge sheet for the reason as per the statement of the witnesses itself money was deposited in the accounts which were pre-existing and transactions therein were taking place even prior to demonetization. Further demand drafts were not prepared in the fictitious names and they have all been traced by the Investigating Agency to be in the first names of the employees of the petitioner Rohit Tandon. Thus, no scheduled offence having taken place, there could be no laundering of the money thereof. It is further contended that in terms of Section 19 of PMLA the authorized officers before arresting has to record reasons in writing to believe that the person is guilty of offence defined under Section 3 of PMLA and punishable under Section 4 of PMLA. As the three necessary ingredients for offence defined under Section 3 PMLA i.e. firstly, the material with the investigating agency investigating the scheduled offence, secondly the proceeds of the crime and thirdly laundering of the proceeds of the crime, were not available with the authorized officer of the respondent, thus no satisfaction that the petitioners were guilty of offence punishable under Section 4 PMLA should be arrived at. .

9. Learned counsels for the petitioner Rohit Tandon further contend that FIR No.205/2016 was registered by the Crime Branch on 25th December, 2016 and a consequential ECIR was recorded on 26th December, 2016 and Rohit Tandon was arrested on 28th December, 2016. Thus, the respondent proceeded to arrest the petitioner without arriving at a satisfaction in terms of Section 19 of PMLA. Learned counsels relying upon the decision of the Division Bench of this Court reported as 246 (2018) DLT 610 *J.Sekar & Ors. vs. Union of India & Ors.* contend that reasons to believe cannot be a rubber stamping of an opinion already formed by someone else and the officer who is supposed to write down his reasons to believe has to independently apply his mind. Further and more importantly, it cannot be mechanical reproduction of words in the statute. A bare reading of Section 19 of PMLA sets the standard very high for the authorized officers to form an opinion that the accused is guilty of offence punishable under Section 4 PMLA before any arrest is made out. However, as noted in ECIR itself in para-9 the satisfaction recorded is that the proceeds of the crime might have undergone process of laundering and thereby an offence defined under Section 3 PMLA and punishable under Section 4 PMLA is made out.

10. Learned counsels for the petitioners also contend that the money which was deposited in the bank and converted into the demand drafts is still lying with the bank as the demand drafts have not been encashed. There being no withdrawal of money the ingredients of Section 420 IPC are not satisfied. At best it can be said that there was preparation to commit an offence which is not punishable under the IPC or PMLA. There is no averment in the entire charge-sheet or the complaint that amount of ₹38 crores deposited was the proceeds of the crime. Learned counsels further

contend that since accounts were not fictitious and were pre-existing accounts wherein business was being conducted, the allegations of forgery are not made out for the reason no forged or false document was created. Reliance is placed on the decision of the Hon'ble Supreme Court reported as 2008 (8) SCC 751 *Mohammed Ibrahim & Ors. vs. State of Bihar & Anr.* It is contended that even if one deposits money in the account of another person it is not creation of false document and thus no offence of forgery is made out. In FIR No.205/2016 relating to the scheduled offence there is no allegation of forgery. Though, in the charge-sheet pursuant to FIR No.205/2016 the allegation is of abetment however, in the complaint under the ECIR allegations are of criminal conspiracy.

11. Learned counsel for petitioner Raj Kumar Goel further contends that the petitioner is not involved in FIR No.197/2016 and the consequential ECIR No.14/DZO-II/2016. The only allegation in the present case is that demonetized currency was deposited in the bank accounts of the petitioner from where demand drafts in the first name of the employees of Rohit Tandon were prepared. In the first complaint five accused were named namely Rohit Tandon, Ashish Kumar, Raj Kumar Goel, Dinesh Bhola and Kamal Jain. Dinesh Bhola and Kamal Jain, Personal Assistant and Chartered Accountant respectively of Rohit Tandon who had a far more serious role were not even arrested and the charge-sheet was filed qua them without arrest. Further first supplementary complaint was filed against Yogesh Mittal who has since been granted bail though on technical reasons and in the second supplementary complaint Ramesh Chandra Sharma was implicated as an accused who was also not arrested and complaint was filed without arrest. It is further submitted that the demand drafts from the money

deposited in the account have already been recovered and only demand drafts for a sum of ₹2.65 crores have not been recovered and the complaint is categorical that the same could not be recovered due to non-cooperation of Ashish Kumar, the Bank Manager.

12. Learned Additional Solicitor General for Directorate of Enforcement at the outset fairly submits that as per notification dated 8th November, 2016 of the Ministry of Finance there was no limit on the quantity or value of the specified bank notes to be credited in the accounts maintained with a bank by a person provided the account was KYC compliant. Thus as long as the demonetized currency was deposited in one's own account, it was not an offence much less a scheduled offence. Learned Additional Solicitor General further contends that when valueless currency was deposited in the account of other persons to create value it amounted to cheating and forgery. Further after deposit of the money in the accounts of Raj Kumar Goel and various accounts of Yogesh Mittal, demand drafts were prepared in the name of fictitious persons who did not exist. Thus, ingredients of offence of forgery are made out. Moreover the offence punishable under Section 120B IPC is a standalone offence. The petitioners were preparing demand drafts with the object to get the demand drafts cancelled later on and get the new currency. After FIR No.205/2016 was registered by the Crime Branch, on 25th December, 2016 ECIR was recorded by respondent on 26th December, 2016. On 27th December, 2016 the authorized officers recorded statements of Kamal Jain and Dinesh Bhola, CA and employee of Rohit Tandon, Ashish Kumar, the Bank Manager and Rohit Tandon himself. Corroborative material in the form of deposit details from the eight accounts of Kotak Mahindra Bank were received and 72 demand drafts were recovered from

Kamal Jain, whereafter Rohit Tandon was arrested on 28th December, 2016 after arriving at a satisfaction of the guilt of Rohit Tandon. Further the bail applications filed by the petitioner Rohit Tandon have been dismissed up till the Supreme Court and in view of the decision of the Supreme Court in the decision reported as 2004 (7) SCC 528 *Kalyan Chandra Sarkar vs. Rajesh Ranjan @ Pappu Yadav & Anr.* the Court is required to record reasons which persuade the Court to grant bail despite earlier rejections of the bail order. Learned Additional Solicitor General thus contends that it is incumbent on the petitioners to show change of circumstances and the plea now being taken having been decided and concluded in the earlier round of bail applications, the same cannot be reconsidered now. Reliance is placed on the decision of the Sessions Court, this Court and the Hon'ble Supreme Court rejecting the bail applications of Rohit Tandon.

13. Learned Additional Solicitor General further contends that the words used in Section 3 PMLA "criminal activity connected with the proceeds of the crime including its concealment, possession, acquisition, use and breach and claiming it as untainted property" are of wide ambit and would include the offence committed by the petitioners. Raj Kumar Goel was arrested on 19th January, 2017 in the above ECIR and only thereafter he informed about the involvement of Yogesh Mittal whereafter investigation was carried out and first supplementary complaint was filed against Yogesh Mittal and second supplementary complaint against Ramesh Chandra Sharma.

14. Learned Additional Solicitor General refers to the statements of Rohit Tandon, Dinesh Bhola and Ashish Kumar recorded under Section 50 of PMLA and corroborative evidence in the form of CCTV footages and the mobile phone records. Learned Additional Solicitor General fairly submits

that by the notification dated 8th November, 2016 no new offence was created however, the acts of the petitioners and their co-accused amounted to offences punishable under Sections 420/467/471/120B/109/34 IPC which are all scheduled offences. Referring to the decision of the Hon'ble Supreme Court reported as 2006 (9) SCC 425 *Anil Kumar Tulsiyani vs. State of U.P. & Anr.* it is contended that Rohit Tandon is an advocate and thus in a position to command and his release on bail is likely to influence the witnesses. Further Raj Kumar Goel is also a party to conspiracy as huge amount was deposited in his accounts. Statements of various parties were recorded which showed demand drafts were prepared and handed over to Kamal Jain, CA of Rohit Tandon and the commission was duly assured, hence no case for grant of bail is made out.

15. Rebutting the contention of learned Additional Solicitor General learned counsels for the petitioners contend that when the bail of Rohit Tandon was rejected by the Hon'ble Supreme Court, the twin conditions as required under Section 45 of PMLA had not been set aside as unconstitutional and applicability of the two conditions was the major reason for rejection of bail. In any case the Hon'ble Supreme Court rejecting the bail referred to recovery of huge amounts of demonetized and monetized currency which is neither the scope of FIR in question nor the consequential ECIR No.18/DLZO-II/2016 wherein the petitioners are in custody, for which separate FIR No.197/2016 was registered and ECIR No.14/DZO-II/2016 was recorded in which ECIR Rohit Tandon was never arrested and on filing of the complaint and appearing before the Court he has been granted bail. Further Raj Kumar Goel is not an accused in FIR No.197/2016 or ECIR No.14/DZO-II/2016.

16. Money belonging to Rohit Tandon was deposited in various accounts and was no public money, hence, it cannot be held that public has been cheated. Admittedly, cash was deposited in pre-existing accounts, that is, accounts which were not opened on 8th November, 2016 or thereafter and were in operation previously. Further the bank accounts were in the names of persons identified hence they cannot be said to be fictitious accounts. Even if as per the statements of the witnesses though the bank accounts were in the name of different individuals however, business operations were being controlled by Yogesh Mittal, the same would not render the bank account in fictitious names, nor that offences under IPC were committed. Further even the demand drafts made have been identified to be in the names of the persons who are employees of Rohit Tandon though they have been prepared in their first names. The demand drafts have still not been encashed and the money is therefore, still lying with the banks.

17. It is further contended that the apprehension that Rohit Tandon is a man of influence and would thus tamper with the evidence is wholly unfounded for the reason, the entire evidence is documentary in nature and in any case in FIR No.205/2016 registered at PS Crime Branch, Rohit Tandon was not arrested and charge-sheet was filed without arresting him. When Rohit Tandon appeared in Court he was granted bail and the learned Trial Court has already noted its satisfaction that there is no possibility of tampering with the evidence. It is also stated that the reliance of learned Additional Solicitor General on the decision of Hon'ble Supreme Court in the appeal filed by Rohit Tandon against rejection of his bail application is also misconceived, for the reason the Supreme Court clarified that the observations made in the decision were limited for considering the prayer of

grant of bail. It is lastly contended that there being major change in circumstances; firstly that the twin conditions under Section 45 PMLA, which was the main reason for rejection of the bail till the Supreme Court, has been set aside; and secondly, despite directions of the Hon'ble Supreme Court dated 10th November, 2017 that since the offence punishable under Section 4 of PMLA provides for imprisonment for a terms which may extend to seven years but not less than three years, the learned Trial Court is well advised to proceed with trial on day-to-day basis expeditiously, till date arguments on charge have not begun thus, the petitioners are entitled to bail.

18. Before adverting to the facts of the case it would be appropriate to note the relevant extracts of Notification No. S.O. 3407(E) dated 8th November, 2016 of Ministry of Finance as under:

> *S.O. 3407(E).— Whereas, the Central Board of Directors of the Reserve Bank of India (hereinafter referred to as the Board) has recommended that bank notes of denominations of the existing series of the value of five hundred rupees and one thousand rupees (hereinafter referred to as specified bank notes) shall be ceased to be legal tender;*
>
> *And whereas, it has been found that fake currency notes of the specified bank notes have been largely in circulation and it has been found to be difficult to easily identify genuine bank notes from the fake ones and that the use of fake currency notes is causing adverse effect to the economy of the country;*
>
> *And whereas, it has been found that high denomination bank notes are used for storage of unaccounted wealth as has been evident from the large cash recoveries made by law enforcement agencies;*
>
> *And whereas, it has also been found that fake currency is being used for financing subversive activities such as drug*

trafficking and terrorism, causing damage to the economy and security of the country and the Central Government after due consideration has decided to implement the recommendations of the Board;

Now, therefore, in exercise of the powers conferred by sub-section (2) of section 26 of the Reserve Bank of India Act, 1934 (2 of 1934) (hereinafter referred to as the said Act), the Central Government hereby declares that the specified bank notes shall cease to be legal tender with effect from the 9th November, 2016 to the extent specified below, namely:—

1. ……

2. The specified bank notes held by a person other than a banking company referred to in sub-paragraph (1) of paragraph 1 or Government Treasury may be exchanged at any Issue Office of the Reserve Bank or any branch of public sector banks, private sector banks, foreign banks, Regional Rural Banks, Urban Cooperative Banks and State Cooperative Banks for a period up to and including the 30th December, 2016, subject to the following conditions, namely:—

(i) …….

(ii) …..

(iii) <u>there shall not be any limit on the quantity or value of the specified bank notes to be credited to the account maintained with the bank by a person, where the specified bank notes are tendered;</u> however, where compliance with extant Know Your Customer (KYC) norms is not complete in an account, the maximum value of specified bank notes as may be deposited shall be ₹50,000/-;"

(Emphasis supplied)

19. Relevant extracts of provisions of the Specified Bank Notes (Cessation of Liabilities) Act, 2017 are as under:

"3. ***Specified bank notes to cease to be liability of Reserve Bank or Central Government.****- On and from the*

appointed day, notwithstanding anything contained in the Reserve Bank of India Act, 1934 or any other law for the time being in force, the specified bank notes which have ceased to be legal tender, in view of the notification of the Government of India in the Ministry of Finance, number S.O. 3407(E), dated the 8th November, 2016, issued under sub-section (2) of section 26 of the Reserve Bank of India Act, 1934, shall cease to be liabilities of the Reserve Bank under section 34 and shall cease to have the guarantee of the Central Government under sub-section (1) of section 26 of the said Act.

4. .....

5. ***Prohibition on holding, transferring or receiving specified bank notes.-*** *On and from the appointed day, no person shall, knowingly or voluntarily, hold, transfer or receive any specified bank note:*

Provided that nothing contained in this section shall prohibit the holding of specified bank notes—

(a) by any person—

(i) up to the expiry of the grace period; or

(ii) after the expiry of the grace period,—

(A) not more than ten notes in total, irrespective of the denomination; or

(B) not more than twenty-five notes for the purposes of study, research or numismatics;

(b) by the Reserve Bank or its agencies, or any other person authorised by the Reserve Bank;

(c) by any person on the direction of a court in relation to any case pending in the court.

*6. **Penalty for contravention of section 4.-** Whoever knowingly and willfully makes any declaration or statement specified under sub-section (1) of section 4, which is false in material particulars, or omits to make a material statement, or makes a statement which he does not believe to be true, shall be punishable with fine which may extend to fifty thousand rupees or five times the amount of the face value of the specified bank notes tendered, whichever is higher.*

*7. **Penalty for contravention of section 5.-** Whoever contravenes the provisions of section 5 shall be punishable with fine which may extend to ten thousand rupees or five times the amount of the face value of the specified bank notes involved in the contravention, whichever is higher.*

*8. **Offences by companies.-** (1) Where a person committing a contravention or default referred to in section 6 or section 7 is a company, every person who, at the time the contravention or default was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contravention or default and shall be liable to be proceeded against and punished accordingly:*

Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention or default was committed without his knowledge or that he had exercised all due diligence to prevent the contravention or default.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the same was committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary, or other officer or employee of the company, such director, manager, secretary, other officer or employee shall also be deemed to be

guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purpose of this section,—

(a) "a company" means anybody corporate and includes a firm, a trust, a cooperative society and other association of individuals;

(b) "director", in relation to a firm or trust, means a partner in the firm or a beneficiary in the trust.

20. As noted above the two FIRs, that is, FIR No.197/2016 and FIR No.205/2016 registered against Rohit Tandon and others thus resulted in the recording of the consequential ECIRs, that is, ECIR No.14/DZO-II/2016 and ECIR No.18/DLZO-II/2016. FIR No.197/2016 and ECIR No.14/DZO-II/2016 related to recovery of currency notes amounting to ₹2.62 crores in new currency and ₹11.02 crores in old currency. Further, neither in FIR No. 197/2016 nor in ECIR No.14/DZO-II/2016 Rohit Tandon was arrested and Raj Kumar Goel is not involved in the said FIR and the ECIR. Thus the facts required to be considered by this Court only relate to ECIR No.18/DLZO-II/2016 after registration of FIR No.205/2016 for the scheduled offences relating to deposit of demonetized currency in various accounts and thereafter transfer to other accounts and preparation of demand drafts.

21. FIR No.205/2016 was registered by the Crime Branch on 25th December, 2016 for offence punishable under Sections 420/109/406/467/ 468/471/188/120B IPC. The scheduled offence therein being punishable under Sections 420/471/120B IPC. In this FIR both the petitioners are on bail and charge-sheet was filed without arrest. The allegations in the present

ECIR in nutshell are that the petitioners with other accused persons illegally converted the demonetized currency into monetized currency by depositing cash into the accounts of various firms, persons and subsequent issuance of demand drafts and also paying of commission to the conspirators who also deposited the money in various accounts and transferred it to satisfy their own liability. Based on the statements of the accused recorded under Section 50 of PMLA it is the case of the prosecution that a conspiracy was hatched on the asking of Rohit Tandon between his CA, Kamal Jain and Ashish Kumar against a commission of 35% of converting currency in further collusion with Raj Kumar Goel, an entry operator working from Naya Bazar, through Yogesh Mittal, a businessman having various shell firms/companies with different bank accounts in different banks operated by young people of poor strata of society against monetary inducement. For execution of the criminal conspiracy Ashish Kumar, Raj Kumar Goel and others visited the locations in and around the Chhattarpur farmhouse of Rohit Tandon and also his office at R-89, Greater Kailash-I, Delhi to collect the demonetized currency plus the commission amount @35% totaling approximately to ₹51 crores during the period of 15th November, 2016 till 19th November, 2016 from Dinesh Bhola, an employee of Rohit Tandon. Out of this amount of ₹51crores, ₹41.65 crores of money was converted in the form of demand drafts from Kotak Mahindra Bank, Bank of Baroda, ICICI Bank of which physical copies to the tune of ₹38 crores worth demand drafts have been recovered from Kamal Jain, however, demand drafts pertaining to commission of amount of ₹3.65 crores of Ashish Kumar's commission, physical copies could not be recovered as it is the case of the prosecution that Ashish Kumar had already destroyed the same.

22. As noted above vide notification dated 8th November, 2016 neither the possession nor deposit of demonetized currency in one's own account was an offence much less a scheduled offence. Further even as per the provisions of Specified Bank Notes (Cessation of Liabilities) Act, 2017 only provides for penalty for possession/transferring of demonetized currency notes after the appointed date. Further the claim of the prosecution that the money was deposited in fictitious accounts is also not fortified as the accounts were in operation earlier and had not been opened on 8th November, 2016 or thereafter and were in the name of persons or firms which existed. At this stage this Court would refrain from making any observation as to whether the deposit of demonetized currency in the accounts of other persons would amount to an offence of cheating or not lest it may prejudice the parties at the stage of arguments on charge. Further even as per the prosecution though the initial claim was that demand drafts were prepared in fictitious names however, it was on investigation revealed that they were prepared in the first names of the employees of Rohit Tandon. However, as held by the Supreme Court the manner in which the money was routed amounted to criminal activity connected with the proceeds of the crime including its concealment, possession, acquisition, use and projecting/claiming it as untainted property.

23. When the earlier bail application was filed by the petitioner Rohit Tandon, the same was dismissed by the learned Additional Sessions Judge followed by the dismissal by this Court which order was taken up in appeal before the Hon'ble Supreme Court which also dismissed the bail application on 10th November, 2017. The Hon'ble Supreme Court noting the decision reported as 2015 (16) SCC 1 *Gautam Kundu vs. Directorate of Enforcement*

(Prevention of Money-Laundering Act), Government of India held that the scope of Section 45 PMLA was no more res-integra and that the Court at the stage of considering the application for grant of bail, shall consider the question from the angle as to whether the accused was possessed with the requisite mens rea. Further the Court was not required to record a positive finding that the accused had not committed an offence under the Act. The Court ought to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. The duty of the Court at this stage is to not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. Thus keeping in mind the dictum in the decision as noted, the Hon'ble Supreme Court upheld the opinion recorded by the Sessions Court and the High Court.

24. After the rejection of the bail application of the petitioner Rohit Tandon on 10th November, 2017 Hon'ble Supreme Court in the decision reported as 2017 (13) Scale 609 *Nikesh Tarachand Shah vs. Union of India and Ors.* set aside the twin conditions imposed under Section 45 PMLA on 23rd November, 2017 and declared that Section 45 (1) PMLA in so far as it imposed two further conditions for release on bail to be unconstitutional and violative of Articles 14 and 21 of the Constitution of India. Rohit Tandon had also filed a writ petition before the Hon'ble Supreme Court challenging the constitutional validity of the twin conditions required for grant of bail under Section 45 of the PMLA. While disposing of the batch of writ petitions and appeals in the decision reported as *Nikesh Tarachand Shah* (supra) the Supreme Court noted that in all matters before it in which bail has been denied because of presence of twin conditions contained in Section

45 PMLA will now go back to respective Courts which denied bail and the respective Courts were directed to hear the applications on merits without application of the twin conditions contained in Section 45 PMLA.

25. Thus the major change which is required to be considered by this Court as per the decision of Supreme Court in *Kalyan Chandra Sarkar* (supra) referred to by Additional Solicitor General in the present case is the non-applicability of the twin conditions under Section 45 of PMLA which was the major reason for rejection of the earlier bail application of Rohit Tandon. Second major consideration is that the offence punishable under Section 4 PMLA provides for maximum sentence of imprisonment for seven years with a minimum sentence for imprisonment of three years. Petitioners have been in custody for a period of now more than one year four months and despite directions of the Hon'ble Supreme Court vide order dated 10th November, 2017 that day-to-day trial should continue, till date arguments on charge have not begun. As noted above in the predicate offence, that is, FIR No.205/2016 the Crime Branch did not even think it fit to arrest the petitioners and filed a charge-sheet without arrest. The evidence in the present case is primarily documentary in nature and statements of accused which are admissible in evidence have already been recorded under Section 50 of PMLA. Further corroborative evidence in the form of CCTV footage and call detail records is also documentary in nature. Moreover as per the requirement of Section 44 of PMLA trials in FIR No.205/2016 for the scheduled offence as well as Section 4 PMLA in ECIR No.18/DLZO-II/2016 are required to be held together. Hence the trial is likely to take some time. Thus, this Court deems it fit to grant bail to the petitioners.

26. It is, therefore, directed that the petitioners be released on bail on their furnishing a personal bond in the sum of ₹5 lakhs each with two sureties of the like amount each subject to the satisfaction of the learned Trial Court, further subject to the condition that the petitioners will not leave the country without prior permission of the Trial Court and in case of change of residential address the same will be intimated by way of an affidavit to the Court concerned.

27. Petitions are disposed of.

28. Order dasti.

(MUKTA GUPTA)
JUDGE

MAY 10, 2018
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HIGH COURT OF DELHI
सत्यमेव जयते