

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

Reserved on: September 10, 2020
Pronounced on: November 23, 2020

+ CRL.M.A. 10885/2020 & Crl.M.A. 12520/2020
in CRL.L.P. 184/2018

THE JOINT DIRECTOR,
DIRECTORATE OF ENFORCEMENT Petitioner
Through: Mr. Sanjay Jain, ASG with
Ms.Sonia Mathur &
Mr.Naveen Matta, Special
Public Prosecutors with
Mr.Amit Mahajan, CGSC,
Mr. Padmesh Mishra, Mr.
Arkaj Kumar, Ms. Noor
Rampal & Ms. Mallika
Hiremath, Advocates with
Mr. Sudhir Kumar, AD ED
Versus

A.RAJA & ORS. Respondents
Through: Mr. Manu Sharma, Advocate
for respondent No.1.
Mr. Vijay Aggarwal, Mr.
Mudit Jain, Mr.Ashul
Aggarwal, Mr. Shailesh
Pandey, Ms. Barkha Rastogi,
Mr. Hardik Sharma,
Advocates for respondents
No. 2, 4, 5, 12, 15, 18 &19.
Mr.Varun Sharma, Advocate
for respondent No. 11.
Mr.Mahesh Agarwal, Ms.
Neha Nagpal & Mr.
Vishvendra Tomar, Advocates

for respondents No. 3, 4 16
&17.

CORAM:
HON'BLE MR. JUSTICE BRIJESH SETHI

% **ORDER**

**CRL.M.A. 10885/2020 & CrI.M.A. 12520/2020 (both u/s 482
Cr.P.C.)**

1. The application CrI.M.A. 10885/2020 is filed by respondent No.17- M/s Conwood Construction & Developers (P) Ltd. and CrI.M.A. 12520/2020 is filed by respondent No.15- M/s Dynamix Realty. The applicants are seeking modification of the *ex parte ad interim* order dated 21st March, 2018, vide which *status quo* in respect of the attached properties was directed to be maintained, which were directed to be released upon acquittal of the present applicants vide order dated 21st December, 2017 passed by the learned Special Judge, CBI, New Delhi.

2. The pleas raised in these applications are almost similar and therefore, these applications are being disposed of by this common order.

3. At the hearing, while addressing his submissions in CrI.M.A. 10885/2020, Mr. Vijay Aggarwal, learned counsel appearing for the

applicants submitted, that in FIR bearing No. RC DAI 2009 A 0045, registered on 21st October, 2009, by the Central Bureau of Investigation for the offences under Sections 120-B of IPC and Section 13(2) r/w Section 13(1)(d) of the Prevention of Corruption Act, 1988 ("PC Act"), the present applicants i.e. respondent No.17- M/s Conwood Construction & Developers (P) Ltd. and respondent No.15/ M/s Dynamix Realty were not named. However, based on the allegations of CBI, the Enforcement Directorate (henceforth referred to as the "ED") registered a case No. ECIR/31/DZ/2010 under the provisions of Prevention of Money Laundering Act, 2002 (PMLA) and it was alleged that the present applicants with other accused were intentionally aiding and facilitating the payment of alleged quid pro-quo of Rs.200 crores as a reward for alleged undue favours shown to company- M/s Swan Telecom Pvt. Limited. After registration of ECIR, the ED by way of a provisional attachment order No. 01/2011, dated 30th August, 2011 attached the properties worth Rs.223.55 crores under the provisions of PMLA and the said attachment was confirmed by the adjudicating authority on 10th January, 2012 alleging that the monies returned to M/s Dynamix

Realty constitute "proceeds of crime" and hence, come under the purview of the PMLA.

4. Learned counsel further submitted that the learned Special Court vide order of 31st October, 2014 framed charges on the accused persons, including the present applicants for commission of offence under Section 4 of PMLA and vide order dated 21st December, 2017 all the accused persons, including the present applicants, were acquitted of the charges framed against them.

5. Learned counsel for the applicants next submitted that in the instant 'leave to appeal' under Section 378(4) Cr.P.C filed by the ED, Crl.M.A. 9402/2018 has already been filed for modification of order of 21st March, 2018 for exclusion of assets/ properties of the applicant from "*status quo*". Learned counsel further submitted that the said application is pending for long and is resulting in grave injustice due to "*ex-parte status quo*" order dated 21st March, 2018, thereby depriving the innocent and acquitted applicants from use and enjoyment of their property. Learned counsel submitted that it stands admitted during evidence that the assets and properties of applicants, which were attached during trial, were not acquired out of the

alleged 'proceeds of crime' and no part of alleged 'proceeds of crime' has either reached applicant or Eversmile Construction Co. Private Limited. Learned counsel submitted that the present applicant was neither arraigned as accused in the FIR nor in the chargesheet and during recording of evidence, the Investigating Officer had specifically stated that the applicant/company had no role in the transactions. It was submitted that during the cross-examination, it emerged that no money flew to or from the applicant/company with respect to the transaction in dispute and applicants were arrayed only on the basis of civil liability and a bare perusal of the complaint under Section 45 PMLA confirms that no money originated from Eversmile Construction Co. Pvt. Ltd and Conwood Construction & Developers (P) Ltd. during the flow of funds of Rs.200 crore from Dynamix Realty to Kusegaon Fruits and Vegetables (P) Limited.

6. Learned counsel submitted that the present case is contradictory to the complaint filed by the ED under Section 5 (5) of the PMLA before the learned adjudicating authority, wherein the applicant/Company has been arrayed as respondent only on the

concept of civil liability, being partners of Dynamix Realty and the fact that the companies were roped in on the concept of civil liability was known to the complainant, however, the complainant arrayed the applicant/company in the present case on the allegation that the applicant/company had knowledge of the alleged transactions.

7. Learned counsel for the applicants submitted that the ED had taken actual physical possession of the properties since September, 2014, which are various shops/offices and were "stock in trade" and situated in Building Shagun Arcade & Shagun Towers. They are Co-operative Housing Society formed by Purchasers of Premises in Building Shagun Arcade & Shagun Towers, which is entitled to recover "maintenance and other charges/funds" for the various shops and offices and that Municipal Corporation of Greater Mumbai is entitled to claim "Property Taxes" for the various Shops/Offices including those belonging to applicant, which are attached and under the possession of ED and are not being released due to "status quo" order.

8. Learned counsel for the petitioner submitted that with respect to the applicant-M/S Conwood Constructions and Developers Pvt. Ltd., the following immovable properties have been attached:-

S.No.	Land /Property	Name & Address	Appx.Value in Rs.
1.	Unsold Units at Shagun Mall	Gen. A.K. Vaidya Marg, Goregaon (E), Mumbai	224594892.00
2.	Shop No. 105 at Shagun Mall	Gen. A.K. Vaidya Marg, Goregaon (E), Mumbai	848000.00
		Total value	225633928.00

9. It was submitted by learned counsel that though the applicant's properties have been attached and the ED has taken the possession, but has failed to bear and pay the maintenance and other charges/funds/ property tax for these attached shops/offices which has resulted in grave harm and prejudice to the applicants and led to situation where "ownership rights" of applicant are being put to jeopardy.

10. It was also submitted that the applicants have been forced to reach this Court seeking urgent hearing of the issue in hand because the applicants have received a Notice dated 7th August, 2020 from the Assistant Assessor / Collector, Brihanmumbai, vide which the

applicant/ company has been asked to pay the outstanding tax to the tune of Rs. 1,66,21,857/- within 48 hours or else action would be taken against the property. The Municipal Corporation of Greater Mumbai has issued Statutory Notice for taking recourse under Mumbai Municipal Corporation Act and auction the attached shops/offices for recovery of outstanding property tax without there being any fault on the part of the present applicant.

11. Learned counsel submitted that similarly Shagun Arcade Premises Co-Operative Society Ltd. has initiated proceedings under Section 101 of Maharashtra Co-Operative Societies Act for order of auction for recovery of outstanding maintenance and other charges/funds, to the tune of Rs.53,89,762/-. The attached property could be subjected to auction without there being any fault on the part of the present applicant.

12. It was submitted by learned counsel that the properties have been attached by the ED as a “bailee”, who is bound to take all the necessary steps and actions to ensure that the value of the property attached is not reduced. Learned counsel strenuously submitted that

the present situation is also affecting the rights of the applicant/company, as the assets/properties of the applicant cannot be developed and put to use for business and also that applicant/company is apprehensive of any coercive action under the Insolvency and Bankruptcy Code, 2016 and applicant's properties will become subject of auction causing irreparable damage and loss, despite the fact that the present applicant has been acquitted of all the charges by the learned Special Court.

13. Learned counsel for the applicant/ company submitted that the ED has to *prima facie* establish that the applicant had committed the offences and they had a nexus or a link in relation to criminal activities which constituted proceeds of crime and the property constituting the value of any such property. The attached property has to have a link or nexus with the actual property derived from criminal activity and it cannot merely be a property equivalent in value, attachment of which is only permissible if the proceeds of crime is taken or held outside India. Such evidence/averments/conditions are conspicuously missing in the instant case.

14. It was further submitted that as per Section 35 of PMLA, the order of an Appellate Tribunal is akin to a decree passed by a Civil Court, which makes it clear that the proceedings of attachment are civil in nature and the attachment under Section 5 of PMLA only serves one purpose i.e. 'confiscation of properties' till the time final order is passed by a Special Court. If a valid case is made by the ED, the proceeds of crime must be preserved so that after final order, it should be confiscated for the benefit of the State. However, in the present case the applicant has already been acquitted by the learned Special Court and the properties attached were directed to be released. However, by virtue of the order dated 21st March, 2018, *status quo* has been directed to be maintained by this Court.

15. Learned counsel for applicants further submitted that the properties of the applicant attached, admittedly were not acquired out of the alleged proceeds of crime and the same are not connected with proceeds of crime and it is not the case of petitioner/ED that the property is derived or obtained from the scheduled offence and it is acquired as a result of any criminal activity relatable to the schedule

offence. It is an admitted fact that the properties have no nexus with the 'proceeds of crime'.

16. Reliance was placed by learned counsel for applicant/respondent upon a decision of this Court in ***State vs. Rajbir Singh & Ors. 2002 CrL.L.J 3882***, wherein it has been observed that the High Court should not interfere in the judgment of acquittal passed by the trial court. The Court has observed as under:-

"19. We know from the decision of the Supreme Court almost five decades ago in the case of Prandas v. The State that High Court indeed has the power to set aside a judgment of acquittal. The leading case of Sbeo.Swarup.v.Emperor was looked with approval, which provided the following guidelines:

Section 417, 418 and 423 of the Code, give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless It be found expressly stated in the Code. Put in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the

accused to the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognised in the administration of justice."

20. *In other words, it was held that the High Court would be slow to interfere because it is the trial court which had the advantage of seeking the demur of seeing the presumption of innocence verified by the judgment of acquittal."*

17. Reliance was also placed by learned counsel upon a decision of the Division Bench of this Court in **State Vs. Sanjay Kashyap @ Omi & Ors.** CrI. L.P. 861/2018 to submit that the Court should not grant leave to appeal unless it is established that the view taken by the trial court was one of the possible views and the High Court should interfere only when it finds that the findings of the trial court are "perverse". It has been observed as under:-

"22. It is a settled law that while deciding a leave to appeal petition filed by the State, in case two views are possible, the High Court must not grant leave, if the trial court has taken one of the plausible views, in contrast there to in an appeal filed against acquittal. Upon re- appraisal of evidence and relevant material placed on record, in case, the High Court reaches a conclusion that another view

can reasonably be taken, then the view, which favour's the accused, should be adopted unless the High Court arrives at a definite conclusion that the findings recorded by the trial court are perverse, the High Court would not substitute its own views on a totally different perspective”.

18. It was submitted by learned counsel for the applicant/company that in plethora of cases, the attached properties have been released on furnishing of indemnity bond in cases where investigation was in progress, whereas in the present case, the case of applicant/company is on a better footing, as the innocence of the applicant is fortified by order of acquittal passed by the learned Special Court. Reliance is placed upon decisions of the learned Appellate Tribunal dated 29th August, 2019 in ***Omar All Obaid Balsharaf Vs. The Deputy Director***, ED FPA-PMLA-2617/DLI/2018; dated 26th July, 2019 in FPA-PMLA-751/DLI/2014, ***M/s. Alpha Avenue Pvt. Ltd. Vs. The Deputy Director, Directorate of Enforcement, Delhi***; order dated 17th September, 2019 in 1735/MUM/2017, ***63 Moons Technologies Ltd. Vs. The Deputy Director, Director of Enforcement, Mumbai FPAPIV1LA***; order dated 26th July, 2019 in FPA-PMLA-503/DLI/20, titles as ***Jagat Publications Pvt. Ltd. Vs. The Joint Director, Director of Enforcement***.

19. Learned counsel Mr. Vijay Aggarwal on behalf of applicant-M/s Dynamic Realty submitted that ED had attached the sundry debtors of the applicant and one of the debtors -M/s Graceworks Realty and Leisure Pvt. Ltd., had deposited a sum of Rs.34,51,20,750/- on 1st October, 2014 with the department and on vide communication of 12th May, 2015, it had requested the ED to invest the said amount into “Fixed Deposit Receipts”. However, no reply to the said communication was received by the applicant from the ED. Learned counsel submitted that the following accounts of applicant- M/s Dynamic Realty have been attached:-

S.No.	Account Number / Description of the Sundry Debtors	Name & Address of the bank / Sundry Debtors	Balance as on 24.08.2011/ Amount with the Sundry Debtors as on 22.08.2011 in Rupees
1.	05211011000957	OBC, Rajnigandha Shopping Centre, Gokuldham, Goregaon, Mukund Link Road, Film City Road, Goregaon(E), Mumbai	Rs.429368.71/-
2.	05211131000530	do	Rs.424252.00/-
3.	0062002900000018	PNB, PNB House, Sir PM Road Fort, Mumbai-01	Rs.380257.07/
4.	006200PS00006526	do	Rs.20,00,000/
5.	02122320001852	HDFC Bank Ltd., Conwood House Yashodham, Gen A.K. Vaidya Marg, Goregaon (East), Mumbai-400063	Rs.366046.63
6.	M/s Grace Works Realty & Leisure Pvt. Ltd.	462, Senapati Bapat Marg, Lower Parel, Mumbai-400013	Rs.690241500.00
7.	M/s Mystical Advisory Services Pvt. Ltd.. (Dr.)	2-5, Ramnagar, Opp. Patkar College Goregaon (W) Mumbai-400060	Rs.621100000.00

8.	M/s UBS Dream Constructions ,Pvt. Ltd.(Drs)	27S-A. JBB Marg, Belasi Road, Mumbai-400009.	Rs.23933364.00 is attached out of the total of Rs. 27500000.00
		Total	Rs.1338877171.00

20. It was submitted by the learned counsel that the applicant would suffer huge financial loss of interest in case the said amount was not deposited in the fixed deposit receipt by the petitioner/ED. It was submitted that a sum of Rs.34,51,20,750/- has already been deposited by M/s Graceworks Realty and Leisure Pvt. Ltd. and further a sum of Rs.35,99,924.41/- is attached by ED, which is lying in various bank accounts, so, the amount of Rs.34,51,20,750/- received from M/s Graceworks Realty and Leisure Pvt. Ltd. (along with interest accrued thereupon) be released to M/s Dynamic Realty subject to furnishing of indemnity bonds to enable the applicants to run and manage its affairs in a smooth manner.

21. On behalf of applicant-M/s Conwood Construction & Developers (P) Ltd., learned counsel submitted that the applicant be permitted to execute an 'indemnity bond' by way of an undertaking to the tune of Rs.22,56,33,928.00 as a surety and if the appeal filed by ED is allowed in its favour and if the impugned order acquitting

the applicant is set aside by this Court, the applicant shall deposit the said amount with the ED as equivalent to value thereof.

22. Lastly, it was submitted by learned counsel for the applicants that the instant applications have been filed without prejudice to all the rights and contentions raised in CrI.M.A. 9402 of 2018 as well as "Stay Application" and "Leave to Appeal" in the instant case, and so, in the interest of justice, impugned order of 21st March, 2018 be set aside and the attached properties/accounts/amounts of applicants be released on furnishing of indemnity equivalent to the value thereof.

23. On the other hand, learned Additional Solicitor General (ASG) appearing for petitioner-Directorate of Enforcement (ED) at the outset sought dismissal of these applications and submitted that though in this case leave to appeal has not yet been granted, yet while passing *ex parte ad interim* order dated 21st March, 2018, this Court had applied its mind to *prima facie* inference that the matter requires consideration and therefore, until the present appeal under Section 378 Cr.P.C. is heard and decided, these applications be not decided, as it would be abuse of the process of law.

24. Learned ASG pointed out that another application Crl.M.A. 9402/2018 seeking similar relief has already been filed by the applicants- respondent No.16 & 17 and reply dated 10th August, 2018 to the said application has already been filed and, therefore, the instant applications are not maintainable.

25. Learned ASG submitted that the learned Special Judge while passing the impugned order failed to appreciate the fact that the offence of money laundering is a standalone offence and on the basis of acquittal of applicants/respondents in the scheduled offence, investigated & prosecuted by the CBI, acquitted the respondents from the offence of money laundering also. Learned ASG further submitted that the facts of the present matter are intrinsically connected to that of CRL. L.P.No. 185/2018 (CBI vs. A Raja & Ors), as both matters arise out of a common judgment. The acquittal and release of attached properties in this case was merely followed by the acquittal of applicants in the CBI matter and accordingly, the arguments in the present matter would flow from the arguments in the CBI matter.

26. Learned ASG submitted that the offence of money laundering as defined under Section 3 of PMLA has been committed by the firm, M/s Dynamix Realty (in which M/s Conwood Construction & Developers (P) Ltd. is a partner) and certain accused individuals who were controlling the affairs of the present applicant as well as of M/s Dynamix Realty, in which proceeds of the crime were parked and hence, the applicants are jointly and severally liable for the illegal acts and actions of their firms. Learned ASG submitted that the prime accused persons in the scheduled offence, who were investigated by the CBI, were controlling the day to day affairs of the present applicants/companies and therefore, these applicants were liable under Section 70 of the PMLA and accordingly, the value equivalent to proceeds of crime in terms of Section 2(l)(u) of the PMLA to the tune of Rs. 22.56 crore, was attached from the present applicants.

27. Learned ASG submitted that in view of Section 8(5) and (6) of the PMLA, it is essential to secure the proceeds of crime in the case of offence of money laundering and the issues relating to the possession of properties are pending adjudication before the

Appellate Tribunal and that there is no contradiction between the complaint filed by the appellant under Section 5(5) of PMLA before the adjudicating authority and the present leave to appeal.

28. Learned ASG drew the attention of this Court to the provisions of sub Sections (4) and (5) of Section 5 of The Prevention Of Money-Laundering (Taking Possession Of Attached Or Frozen Properties Confirmed By The Adjudicating Authority) Rules, 2013, which reads as under:-

5. Manner of taking possession of immovable property.-

(4) Where the immovable property confirmed by the Adjudicating Authority is in the form of a land, building, house, flat, etc., and is given on lease or rent to any third party where the registration is optional in accordance with the provision of section 18 of the Registration Act, 1908, the authorized officer shall proceed to get the premises vacated and the possession shall be taken by seeking the assistance of local Authorities in terms of section 54 of the Act;

(5) Where the immovable property confirmed by the Adjudicating Authority is in the form of a land, building, house, flat, etc., and is under joint ownership, the authorized officer may accept the equivalent value of fixed deposit to the extent of the value of the share of the concerned person in the property estimated by the authorized officer, to be involved in money laundering; and”

29. Learned ASG contended that it is only after examining the material on record, this Court had passed the order dated 21st March, 2018 directing *status quo* with respect to the attached properties. It is next submitted by learned ASG that no prejudice is caused to the applicants, whose properties have been attached after following the due process of law, as they continue to be the owner of the attached property and are therefore liable to fulfil the liability arising out of the same. Learned ASG submitted that the prayer of applicants to release the attached properties/amounts on furnishing of indemnity bond and reliance placed upon various decisions in support thereof, is of no avail to the case of applicants as the said decisions were passed in the peculiar facts and circumstances of those cases.

30. Learned ASG submitted that the impugned order of 21st December, 2017 passed by the learned Special Court, vide which applicants were acquitted, is subjudice before this Court in the instant leave to appeal and, therefore, the present applications seeking vacation of interim order of 21st March, 2018 is untenable and requires no interference by this Court.

31. Lastly, learned ASG appearing for the petitioner submitted that this Court is not bound by the decision taken by the PMLA or any Coordinate Bench and since this case involves larger issues for consideration, which can be gone into only when the case is heard in its entirety, this application cannot be decided.

32. In rebuttal, learned counsel appearing for the applicants submitted that the applicants have already disclosed before this Court about pendency of Crl.M.A. 9402/2018 and the instant applications have been filed while reserving the rights and contentions to deal with the Crl.M.A. 9402/2018. Learned counsel for the applicants submitted that M/s Conwood has moved the instant application as it has received a Notice dated 7th August, 2020 from the Assistant Assessor / Collector, Brihan, Mumbai to pay the outstanding tax of Rs.1,66,21,857/- within 48 hours or action under the Mumbai Municipal Corporation Act and auction of the attached properties shall be conducted for the recovery of outstanding amount. Learned counsel submitted that applicant- M/s Dynamix Realty has been forced to approach this Court owing to COVID-19 pandemic, as the applicant is facing acute financial distress and

difficulty in managing day to day expenses of the firm and due to reduction of cash flows, the situation has become worse and so, the applicant had to lay off some employees being unable to pay their salaries and expenses.

33. Learned counsel for the applicants submitted that the properties attached are under the control of ED, who is liable to maintain them but it has failed to reply as to what steps have been taken to prevent the depletion in the value of the attached properties on account of non maintenance.

34. Learned counsel for the applicants further submitted that stand of petitioner-ED that the facts of the present matter are intrinsically connected to that of CRL. L.P.No. 185/2018 (CBI vs. A Raja & Ors), as both matters arise out of a common judgment, is grossly misplaced as two separate orders have been passed by the learned Special Court and the said separate orders are assailed separately by the ED and the CBI respectively. Learned counsel submitted that the allegations of petitioner/ED that the individuals involved in the scheduled offence had complete control over the affairs of the

present applicant companies, is without any basis as there is no evidence to show that the present applicant was involved in the day to day affairs of the firm M/s Dynamix Realty. Further it is submitted by learned counsel that no money either in the forward trail or in the reverse trail has reached the present applicants.

35. Learned counsel for the applicants have drawn attention of this Court to sub Rule (5) and (6) of Section 8 of PMLA which reads as under:-

“(5) Where on conclusion of a trial for any scheduled offence, the person concerned is acquitted, the attachment of the property or retention of the seized property or record under sub-section (3) and net income, if any, shall cease to have effect.

(6) Where the attachment of any property or retention of the seized property or record becomes final under clause (b) of sub-section (3), the Adjudicating Authority shall, after giving an opportunity of being heard to the person concerned, make an order confiscating such property.”

36. Learned counsel for the applicants submitted that grant of *ex parte ad interim order* in favour of the petitioner does not imply that the petitioner has a good case on merits. He submitted that ‘leave to appeal’ has not yet been granted in this case because the Court has to be convinced that the findings of acquittal returned by the learned

Special Court are perverse and the submission of petitioner's counsel that interim order has to continue till the leave of the court is granted, is frivolous. It is submitted by learned counsel for the applicants that hearing on the point of 'leave to appeal' is time consuming, and therefore, the interim order dated 21st March, 2018 be set aside and the applicants be permitted to execute indemnity bond equivalent to the value of the properties/amounts as surety and that applicants are ready to furnish the undertaking that in case the leave to appeal is allowed in favour of ED, the applicants shall deposit the said amount with the ED.

37. It was once again submitted that the applicants have rightly relied upon various decisions as referred to above to seek release of the attached properties/amounts against indemnity bonds, as the case of applicants is on higher pedestal because they have already been acquitted by the learned Special Court, whereas in those cases investigation was in progress.

38. Learned counsel for the applicants further submitted that after applicant/respondent No.17- M/s Cornwood moved the instant

application, the petitioner with the *mala fide* intention to avoid answering the relief claimed by the applicants, have filed Crl.M.A. 11890/2020 seeking early hearing of this case as well as other cases [Crl.L.P.185/2018 and 257/2018] but has not informed this Court that such similar application Crl.M.A. 12246/2020, filed by the petitioner in Crl.L.P.185/2018, was rejected by a Coordinate Bench of this Court and, therefore, in the garb of seeking early hearing of the main case itself, the instant application cannot be ignored and has to be decided. No other submission was made on behalf of the applicants.

39. I have heard the learned counsels for the parties and given my thought to the matter.

40. The stand taken by the prosecution in reply to the applications filed is that M/s Conwood Constructions & Developers Pvt. Ltd. is a DB Group i.e. company under the control of Mr. Shahid Usman Balwa, respondent No. 2 and Mr. Vinod K. Goenka, respondent No. 3 respectively and that the applicant/respondent No. 17 is a partner in the firm- M/s Dynamix Reality, respondent No. 15 in this petition.

It stated that respondent No. 17 and the present applicant namely, M/s Conwood Constructions & Developers Pvt. Ltd. is also a DB Group company under the control of Sh. Shahid Usman Balwa, respondent No. 2 and Vinod K. Goenka, respondent No. 3 respectively.

41. The case of the prosecution is that M/s Dynamix Realty was a partnership firm and a partnership was entered into by M/s D.B. Realty Ltd., M/s Eversmile Construction Company Pvt. Ltd. and M/s Conwood Construction Developers Pvt. Ltd. specifically in order to develop a Slum Rehabilitation Project at Mumbai. The partnership deed did not provide for any other related project or a project relating to farm and agriculture business or cinematography work. None of the companies, firms involved in the entire transactions, purportedly claimed as loan of an amount of Rs. 200 crores, had the main objective of lending money. The companies could lend money only for the purposes incidental to the main objects and lending money could not be the main object of the company. The amount of interest purportedly earned out of these monies is a large proportion of the entire revenue of M/s Kalaigarnar TV Pvt. Ltd., and M/s

Cineyug Films Pvt. Ltd. As regards M/s Kusegaon Fruits & Vegetables Pvt. Ltd., the almost entire earnings of the company are out of these transactions only. Furthermore, none of these companies was holding status of non-banking finance company.

42. It is the case of the prosecution that M/s Dynamix Realty and M/s DB Realty Ltd. had taken credit facilities from M/s IL&FS Finance Services during 2007 to 2011 for amounts of Rs. 140 crore and Rs. 102 crores respectively. These loans were secured by M/s IL&FS Finance Services by way of collateral securities/ mortgages of big chunks of land held by the entities, shares of the promoters of the companies concerned and rate of interest charged was 13.5% & 16% respectively. The transactions by which M/s Dynamix Realty paid the amount of Rs. 200 crores to M/s Kalaighar TV Pvt. Ltd. through M/s Kusegaon Fruits & Vegetables Pvt. Ltd. & M/s Cineyug Films Pvt. Ltd. during 2008-2011 at rates of interest of 7.5% to 10%, while M/s Dynamix Realty itself and its promoters had taken loans of similar amounts at much higher rate of interest, cannot be said to be a genuine business transaction.

43. It is also the case of the prosecution that none of the transactions among these four companies/firms were secured by way of any collateral/guarantee/ mortgage when these transactions were made and if the plea of applicants is taken into consideration that the payment of funds was in the nature of loan, there exists incontrovertible material to establish the fact of inadequate consideration by the applicants/ respondents in as much as these so-called loans were obtained by M/s Kalaingar TV Pvt. Ltd. at 10% per annum, whereas those giving the so-called loans themselves took loans from IL&FS at the rate of 13.5% to 16% per annum. M/s Kalaingar TV Pvt. Ltd. itself took credit limit from Indian Bank at the rate of 13.25% to 14.5% per annum.

44. It is also the case of prosecution that in furtherance of the investigation, proceeds of crime to the tune of Rs. 13.76 crore approx. have been attached under Section 5 (1) of PMLA from the respondent No. 16 being the partner of respondent No. 15 and proceeds of crime to the tune of Rs. 52.16 crore approx. have been attached under Section 5 (1) of PMLA from the respondent no. 17,

being the partner of respondent No. 15. It is stated that the attachment of the proceeds of crime from the respondent No. 17 was done considering the above explained arrangements amongst the said companies and that the said attachment was done duly following the procedure provided under the provisions of the PMLA. The stand of prosecution is that the assets from the said applicants were attached on the basis of the fact that the firm- respondent No. 15 had received proceeds of crime and the active role of the respondent No. 16 and 17 can be deciphered from the fact that respondent No. 16 and 17 along with respondent No. 18 were partners in M/s Dynamix i.e. respondent No. 15 and accordingly, the applicant / respondent No. 17 as a partner is liable for receiving proceeds of crime as well as for the commission of offence of money laundering as defined under Section 3 of the PMLA. It is stated that as a matter of fact the individuals involved in the scheduled offence had complete control over the present applicant.

45. This Court has carefully gone through the record.

46. These applications were listed before this Court on 17th August, 2020, at the time when the functioning of the Court was limited to listing and hearing of matters of urgency through video conferencing. This Court had heard extensive arguments through video conference and reserved orders on these applications on 10th September, 2020. On the same day, i.e. on 10th September, 2020, petitioner/ED had filed application for early hearing [Crl.M.A.11718/2020] of the instant leave to appeal as well as connected petitions [Crl.M.A.11888/2020 in Crl.L.P.185/2018 and Crl.M.A. 11890/2020 in Crl.L.P.257/2018].

47. The plea of petitioner/ED raised in these applications for early hearing was that since this Court is to demit the office on 30th November, 2020 and arguments on behalf of petitioner in Crl.L.P. 185/2020 stand concluded and part arguments on behalf of respondents have already been advanced, the leave petitions should, therefore, be heard expeditiously and in case, the arguments remain inconclusive, the petitioners will have to address all the arguments afresh. The said applications for early hearing were strongly opposed by learned counsel for the applicants and other respondents on

various grounds i.e. the Courts are hearing only urgent matters through video conferencing as per the Roster and non-urgent matters shall be taken up by the Roster Benches on resumption of regular hearings. It was also argued as to why these petitions be given preference in hearing over the appeals in which accused persons are in jails. It was further submitted that the other matters [Crl.Rev.P.381/2017; Crl.Rev. P.370/2017 and Crl.Rev.P.57/ 2017] arising out of “2 G Spectrum case” are pending before different Benches of this Court and why only these petitions should be heard on priority. It was next submitted that amendment in Section 13 of The Prevention of Corruption Act, 1988 is directly relevant for the adjudication of the present leave to appeal and since this Court has to demit office on 30th November, 2020, respondents will not get ample time to argue their case, especially when record is voluminous in nature.

48. Vide detailed order of 29th September, 2020, this Court allowed the applications for early hearing while observing as under:-

“45. This Court is of the opinion that with the assistance and cooperation of learned counsels, all endeavours should be made to hear the matter as early as possible. Though this Court has limited time, yet no one should carry an impression that he will not get a fair opportunity of hearing. This Court assures that everyone will be given an effective hearing. However, at the same time it goes without saying that irrelevant and repetitive arguments need to be avoided.

46. In the end, this Court has only one thing to say that no doubt there may be delay in filing the applications for early hearing; no doubt the documents are voluminous in nature; no doubt the evidence runs into thousands of pages; no doubt one of the judgment also runs into 1552 pages, but that does not mean that this should deter this court in hearing the criminal leave petitions. The judicial discipline demands that the Judge should do his duty and must not succumb to pessimism and it is not expected from him to sit leisurely with his pen down and to say that he will not hear the cases because the record is voluminous and the time at his disposal is limited. It will be a folly not to make an attempt and to sit idle abdicating one's duty. It is advisable to perform one's duty irrespective of the fact whatever conclusion the petitions reach. This Court, therefore, will not fail in its duty and expects all the learned counsels to cooperate and assist this Court in deciding the matters expeditiously.

47. In view of the above discussion, the applications moved for early hearing of the leave petitions are allowed. Let the petitions be listed on 5th October, 2020 at 02:30 P.M.

for hearing on day to day basis till further orders.”

49. Accordingly, the leave petition [Crl.L.P.185/2020] was set down for day to day hearing from 5th October, 2020, while the orders in these applications stood reserved. It goes without saying that Coordinate Bench of this Court after preliminary hearing and being satisfied, had passed *ex parte ad interim* order dated 21st March, 2018 directing the parties to maintain *status quo* in respect of the attached properties. Perusal of instant applications and replies reveals that disputed and complicated issues have been raised which require analysis of evidence and judgment of learned trial court which is voluminous in nature and is, no doubt, subject matter of leave to appeal also which this Court intended to decide at the earliest and had even directed listing of the same for hearing on day to day basis from 5th October, 2020 onwards.

50. However, on 5th October, 2020 itself, an application Crl.M.A. 13703/2020 was filed on behalf of respondent No.13- *Asif Yusuf Balwa* and Mr. Vijay Aggarwal, learned counsel appearing on his behalf, had sought issuance of directions to petitioner/CBI to furnish

copy of mandatory approval obtained under Section 378(2) Cr.P.C. with concerned note sheets, reports, drafts, letters and correspondence to file the present leave to appeal. Proceedings and hearing qua this application continued from 5th October, 2020 till 12th October, 2020. On 12th October, 2020, another application [Crl.M.A.14091/2020] was filed by respondent No.13 and was listed before this Court and Mr. Vijay Aggarwal, learned counsel appearing for the respondent No.13 conceded that almost similar relief is sought in this application and, therefore, on the said date i.e. 12th October, 2020, orders in Crl.M.A.13703/2020 and Crl.M.A.14091/2020 were reserved after hearing arguments.

51. Thereafter, on 12th October, 2020, learned counsel appearing for applicants and other respondents insisted that this Court should first hear the question of applicability of Prevention of Corruption (Amendment) Act, 2018 to the case in hand and pressed for hearing of Crl.M.As.1731/2020, 1820/2020 and 13784/2020 [in Crl.L.P.185/2020] pending before this Court. Arguments on the said applications were heard in part on behalf of respondents by this Court. However, hearing of the petition was deferred because of

lock down due to Covid-19. This Court had, thereafter started hearing arguments in these applications. During the hearing of these three applications [Crl.M.A.1731/2020, 1820/2020 and 13784/2020 in Crl.L.P.185/2020], another application [Crl.M.A. 14230/2020] seeking the same relief was filed by respondent No.5 on 14th October, 2020 and arguments were heard on the said application as well.

52. Thereafter, on 20th October, 2020, two writ petitions [W.P.(C) No. 7978/2020 and W.P.(C) No.8071/2020] were filed before this Court. The relief sought in these writ petitions was more or less same as sought in the applications [Crl.M.A.1731/2020, 1820/2020, 13784/2020 and Crl.M.A.14230/2020 in Crl.L.P.185/2020], which were already in the process of being heard. This Court had then started hearing arguments in W.P.(C) No. 7978/2020 on behalf of Mr.Vijay Aggarwal, learned counsel for the petitioner.

53. On 3rd November, 2020, two more writ petitions [W.P.(C) No. 8617/2020 and W.P.(C) No.8620/2020] for the same relief were filed by respondent No.3 and respondent No.16 before this Court. This

Court heard arguments in these writ petitions as well, not only on behalf of the petitioners, but also by other respondents who had not even filed any formal application or petition but claimed similar relief. The arguments were heard in detail in the applications and writ petitions and these were reserved for order on 6th November, 2020.

54. Vide order of even date, this Court has pronounced separate detailed order in Crl.M.A.1731/2020, 1820/2020, 13784/2020 and Crl.M.A.14230/2020 in Crl.L.P.185/2020 deciding the issue whether any mandatory approval is required to file appeal under Section 378(2) Cr.P.C. Order has also been pronounced in Crl.M.A.1731/2020 & Crl.M.A.1820/2020 & Crl.M.A.13784/2020 & Crl.M.A.14230/202 in Crl.L.P.185/2020 adjudicating the issue regarding applicability of the Prevention of Corruption (Amendment) Act, 2018 as well as in four writ petitions [W.P.(C) 7978/2020; W.P.(C) 8021/2020; W.P.(C) 8617/2020 and W.P.(C) 8620/2020] vide which note-sheets, correspondence, drafts and file containing approval/sanction to file the leave to appeal were sought from Central Government.

55. Since the subject matter of present applications required thorough examination of the impugned judgment, this Court had, therefore, made an earnest effort to hear and decide the leave to appeal as expeditiously as possible. However, this Court has to say with a heavy heart that limited time available at its disposal was consumed in hearing and disposal of miscellaneous applications and writ petitions filed one after another on behalf of the respondents, which have been dismissed vide detailed orders/judgments on merits. Had the leave to appeal been heard on merits, a clear picture would have emerged and this Court could have arrived at a conclusion whether the properties at all are required by the prosecution or these should be released to the applicants. In the absence of any arguments on merits, this Court is of the opinion that the order dated 21st March, 2018 vide which *status quo* in respect of attached properties was directed to be maintained, need not be interfered with at this stage.

56. In view of the above discussion, this Court is of the opinion that it will be in the interest of justice if these applications are decided only after hearing arguments in criminal leave to appeal.

However, if there is inordinate delay in disposal of leave to appeal, the applicants/respondents are at liberty to approach this Court by filing fresh application for release of attached properties, which will then be considered in accordance with law.

57. With aforesaid observations, these applications stand disposed of accordingly.

58. The order be uploaded on the website of this Court forthwith.

BRIJESH SETHI, J

NOVEMBER 23, 2020

r/ak/ap

