IN THE HON'BLE SUPREME COURT OF INDIA
T.C. (CRL.) NO. 4/2018

IN THE MATTER OF:
KARTI P. CHIDAMBARAM **... PETITIONER**

VERSUS

DIRECTORATE OF ENFORCEMENT **... RESPONDENT**

OPENING NOTE ON BEHALF OF MR. KAPIL SIBAL, SR. ADV.

I. THE PROCEDURE (OR LACK THEREOF) FOLLOWED BY THE ED IN REGISTERING AN ECIR IS OPAQUE, ARBITRARY AND VIOLATIVE OF THE CONSTITUTIONAL RIGHTS OF AN ACCUSED.

1. Any process involving a criminal investigation must be open, transparent, and in accordance with the established procedures of law. This involves informing an accused of the nature of the investigation, the statutes, and offences for which the accused is being investigated, and the allegations on which the investigation has commenced.

2. The procedure followed by the Directorate of Enforcement, while investigating offences under the Prevention of Money Laundering Act, 2002 ("**PMLA**"), by recording an internal document called the Enforcement Case Information Report ("**ECIR**"), without informing a proposed accused of the contents of the ECIR, and the acts for which he is being investigated, is a procedure unknown to law. This is *per se* arbitrary, and violative of the constitutional rights of an accused.

3. This aspect of transparency and fairness has been acknowledged even by the Supreme Court in cases of First Information Reports ("**FIRs**") under the Cr.P.C. The Supreme Court has held that an accused is entitled to get a copy of the FIR at an earlier stage than the stage prescribed under Section 207 Cr.P.C. [***Youth Bar Association vs. Union of India***, reported in (2016) 9 SCC 473 @ Para 11.1; *also see* ***Court on its own motion vs. State***, reported in (2010) SCC OnLine Del 4309 @ Paras 39 & 54**]** Further, the Supreme Court has moved to a fully transparent approach in which the FIR against an accused is uploaded on the websites maintained by the investigating authorities or is made available to an accused upon asking for the same [***Youth Bar Association (supra)* @ Para 11.4**]. This is so that the accused has full knowledge of the nature of the allegations against her. This Court has also acknowledged that the right to know the allegations against an accused person are an inherent part of Article 21 and the right to life and liberty.

(i) ***Youth Bar Association vs. Union of India***, reported in (2016) 9 SCC 473: [*Pg.1, Vol.VIII | Relevant @ Pg.4-5, Vol.VIII*]

> *"**11.** Having heard the learned counsel for the parties, we think it appropriate to record the requisite conclusions and, thereafter, proceed to issue the directions:*
>
> ***11.1.*** *An accused is entitled to get a copy of the first information report at an earlier stage than as prescribed under Section 207 CrPC.*
>
> ***11.2.*** *An accused who has reasons to suspect that he has been roped in a criminal case and his name may be finding place in a first information report can submit an application through his representative/agent/parokar for grant of a certified copy before the police officer concerned or to the Superintendent of Police on payment of such fee which is payable for obtaining such a copy from the court. On such application being made, the copy shall be supplied within twenty-four hours.*
>
> ***11.3.*** *Once the first information report is forwarded by the police station to the Magistrate concerned or any Special Judge, on an application being filed for certified copy on behalf of the accused, the same shall be given by the court concerned within two working days. The aforesaid direction has nothing to do with the statutory mandate inhered under Section 207 CrPC.*
>
> ***11.4.*** *The copies of the FIRs, unless the offence is sensitive in nature, like sexual offences, offences pertaining to insurgency, terrorism and of that category, offences under the Pocso Act and such other offences, should be uploaded on the police website, and if there is no such website, on the official website of the State Government, within twenty-four hours of the registration of the first information report so that the accused or any person connected with the same can download the FIR and file appropriate application before the court as per law for redressal of his grievances. It may be clarified here that in case there is connectivity problems due to geographical location or there is some other unavoidable difficulty, the time can be extended up to forty-eight hours. The said 48 hours can be extended maximum up to 72 hours and it is only relatable to connectivity problems due to geographical location.*
>
> *[…]*
>
> ***11.8.*** *In case a copy of the FIR is not provided on the ground of sensitive nature of the case, a person grieved by the said action, after disclosing his identity, can submit a representation to the Superintendent of Police or any person holding the equivalent post in the State. The Superintendent of Police shall constitute a committee of three officers which shall deal with the said grievance. As far as the metropolitan cities are concerned, where Commissioner is there, if a representation is submitted to the Commissioner of Police, he shall constitute a committee of three officers. The committee so constituted shall deal with the grievance within three days from the date of receipt of the representation and communicate it to the grieved person.*
>
> *[…]*

> ***11.10.*** *In cases wherein decisions have been taken not to give copies of the FIR, regard being had to the sensitive nature of the case, it will be open to the accused/his authorised representative/parokar to file an application for grant of certified copy before the Court to which the FIR has been sent and the same shall be provided in quite promptitude by the court concerned not beyond three days of the submission of the application.*
>
> *[…]"*

(ii) ***Court on its own motion vs. State***, reported in (2010) SCC OnLine Del 4309: [***Pg.6, Vol.VIII | Relevant @ Pg.18-19, Vol.VIII***]

> "***39.*** *From the aforesaid enunciation of law, it is graphically vivid that fair and impartial investigation is a facet of Article 21 of the Constitution of India and presumption as regards the innocence of an accused is a human right. Therefore, a person who is booked under criminal law has a right to know the nature of allegations so that he can take necessary steps to safeguard his liberty. It is imperative in a country governed by Rule of Law as crusaders of liberty have pronounced 'Give me liberty, or give me death'. Not for nothing it has been said that when a dent is created in the spine of liberty, it leads to a rainbow of chaos."*

4. In addition, the Supreme Court now requires the investigating agencies to provide a list all documents and material seized (even though not relied upon) to the accused, consistent with principles of openness and transparency.

(i) ***Criminal Trials Guidelines Regarding Inadequacies and Deficiencies, In re***, reported in (2021) 10 SCC 598 @ Para 11. [***Pg.26, Vol.VIII | Relevant @ Pg.30, Vol.VIII***]

> "***11.*** *The Amici Curiae pointed out that at the commencement of trial, accused are only furnished with list of documents and statements which the prosecution relies on and are kept in the dark about other material, which the police or the prosecution may have in their possession, which may be exculpatory in nature, or absolve or help the accused. This Court is of the opinion that while furnishing the list of statements, documents and material objects under Sections 207/208 CrPC, the Magistrate should also ensure that a list of other materials, (such as statements, or objects/documents seized, but not relied on) should be furnished to the accused. This is to ensure that in case the accused is of the view that such materials are necessary to be produced for a proper and just trial, she or he may seek appropriate orders, under CrPC for their production during the trial, in the interests of justice. It is directed accordingly; the Draft Rules have been accordingly modified. [Rule 4(i)]"*

(ii) ***Nitya Dharmananda v. Gopal Sheelum Reddy***, reported in (2018) 2 SCC 93 @ Para 8. [*Pg.42, Vol.VIII | Relevant @ Pg.45, Vol.VIII*]

> "***8.*** *Thus, it is clear that while ordinarily the Court has to proceed on the basis of material produced with the charge-sheet for dealing with the issue of charge but if the court is satisfied that there is material of sterling quality which has been withheld by the investigator/prosecutor, the court is not debarred from summoning or relying upon the same even if such document is not a part of the charge-sheet. It does not mean that the defence has a right to invoke Section 91 CrPC dehors the satisfaction of the court, at the stage of charge.*"

5. The Cr.P.C. also mandates [u/S 157, Cr.P.C.] that every FIR registered by an officer u/S 154, Cr.P.C. is to be forwarded to the jurisdictional magistrate, ensuring a greater level of judicial oversight in each case. However, there is no such requirement in the case of an ECIR.

6. The ED, despite registering the ECIR, refuses to provide a copy of the ECIR to the accused person and since the ED refuses to comply with Section 157 Cr.P.C. and forward a copy of the ECIR to the concerned jurisdictional Magistrate, the same cannot be obtained even by applying to the concerned jurisdictional Magistrate. As such, the procedure prescribed under law in the Cr.P.C. and the law laid down by the Supreme Court in ***Youth Bar Association (supra)*** in respect of supply of FIRs to an accused is completely given a go-by in the case of an ECIR registered by the ED.

7. Despite the ED refusing to provide the ECIR in most cases, it voluntarily provides the ECIR in some cases during adjudication proceedings under S. 5 & 8, PMLA. In some cases, the ED has also agreed to hand over a copy of the ECIR to the accused persons. Even in the instant case, the ED refused to provide a copy of the ECIR despite specific requests, until the same was provided during adjudicating proceedings under S. 5 & 8, PMLA. For instance, in the following cases, upon petitions being filed by the accused in this regard, the ED conceded and agreed to supply a copy of the ECIR:

S. No.	Date of Order	Particulars of the Case
1.	07.01.2016 [*@ Pg.46, Vol.VIII*]	***Virbhadra Singh v. Directorate of Enforcement*** [W.P. (Crl.) No. 3107/2015]
2.	21.06.2021 r/w 05.07.2021 [*@ Pg.49 & 55,*	***PPK Newsclick Studio Pvt. Ltd. v. Union of India*** [W.P. (Crl.) No. 1129/2021]

S. No.	Date of Order	Particulars of the Case
	Vol.VIII]	
3.	08.07.2021 r/w 19.07.2021 [*@ Pg.58 & 60, Vol.VIII*]	***Asst. Director, Directorate of Enforcement v. Kewal Krishna Kumar*** [Crl. M. C. No. 1455/2021]

8. The offence of money laundering defined under Section 3 of the PMLA makes an accused culpable for all acts – either direct or indirect in any process or activity connected with proceeds of crime, as defined, and projecting or claiming such proceeds of crime as untainted property.

9. The investigation under the PMLA therefore can only proceed if such proceeds of crime are projected or claimed as untainted property. Those facts must first be collected before launching an investigation under PMLA, that is there must be definitive determination as to whether any proceeds of crime have emanated from the scheduled offence, and further, whether such proceeds have been projected as untainted. The extent of proceeds of crime projected or claimed to be untainted property must at least be *prima facie* quantified to ensure that the thresholds prescribed under the PMLA are met.

10. None of these requirements are adhered to in the ECIRs which are in the nature of internal documents.

11. Further, in the case of other offences under the IPC and other statutes governed by the Cr.P.C., the receipt of information of a cognizable offence inescapably must lead to the registration of an FIR, which is then made available to the accused and also filed with the jurisdictional magistrate u/S 157, Cr.P.C. [***Lalita Kumari v. Government of Uttar Pradesh and Ors., reported in (2014) 2 SCC 1 @ Para 120.1***]. The FIR is available in the public domain, such as in the State of NCT of Delhi and a certified copy of the same can also be obtained by applying to the jurisdictional magistrate to whom it has been submitted u/s 157, Cr.P.C. The relevant extracts of ***Lalita Kumari (supra)*** are as under: [*Pg.61, Vol.VIII | Relevant @ Pg.121, Vol.VIII*]

> "***120.1.*** *The registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.*"

12. However, the ED treats itself as an exception to these principles and practices and chooses to register an ECIR on its own whims and fancies on its own file. The ED claims this to be an internal document and does not make it available to the persons named in the ECIR through any procedure. Pursuant to the registration of the ECIR, the ED begins to summon accused persons and seeks details of all financial transactions of the accused and their family members. The accused is called upon to make statements under S. 50, PMLA which are treated as admissible in evidence. Throughout this procedure, the accused does not even know the allegation against him, as the only document which contains the allegation is the ECIR, which is not supplied to the accused persons.

13. Under the Cr.P.C., separate provisions exist for summoning an accused [*S. 41-A, Cr.P.C.*] and witness [*S. 160, Cr.P.C.*]. However, the PMLA makes no such distinction and the ED summons the accused and witnesses under the same provision i.e. Section 50, PMLA. Therefore, the procedure under the law makes a distinction between the accused and a witness and the person ought to be informed whether he is being summoned as an accused or a witness to enable him to exercise his constitutional and legal rights (such as the right to remain silent under Article 20(3) of the Constitution). This procedure, which is the procedure established by law, is absent in the PMLA.

Section 41-A, Cr.P.C.

> "***41-A. Notice of appearance before police officer.—***
> *(1) The police officer shall, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of Section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.*
> *[…]*"

Section 160, Cr.P.C.

> "***160. Police officer's power to require attendance of witnesses.—***
> *(1) Any police officer making an investigation under this Chapter may, by order in writing, require the attendance before himself of any person being within the limits of his own or any adjoining station who, from the information given or otherwise, appears to be acquainted with the facts and circumstances of the case; and such person shall attend as so required:*
> *[…]*"

Section 50, PMLA

> "***50. Powers of authorities regarding summons, production of documents and to give evidence, etc.—***

[…]

(2) *The Director, Additional Director, Joint Director, Deputy Director or Assistant Director shall have power to summon any person whose attendance he considers necessary whether to give evidence or to produce any records during the course of any investigation or proceeding under this Act.*

(3) *All the persons so summoned shall be bound to attend in person or through authorised agents, as such officer may direct, and shall be bound to state the truth upon any subject respecting which they are examined or make statements, and produce such documents as may be required.*

(4) *Every proceeding under sub-sections (2) and (3) shall be deemed to be a judicial proceeding within the meaning of Section 193 and Section 228 of the Indian Penal Code (45 of 1860).*"

14. The ED, without following any procedure, decides to register an ECIR in certain cases as opposed to others, even in case of the same schedule offence. In light of the position of the ED, that Chapter XII of the Cr.P.C. does not apply to proceedings under the PMLA, it is unclear what principles would govern the registration or otherwise of an ECIR. In other words, there is no legal criteria/guiding principle set out in the statute/ PMLA which mandates when the ED ought to investigate an offence and when it ought not to. Certainly, it is not the case of the ED that an ECIR corresponding to every single FIR under S. 420, IPC has been registered by it. However, it is unclear on what principles (if any) the ED decides that a certain case of cheating u/s 420, IPC is fit to initiate an investigation under the PMLA, and another case of a similar offence is not.

15. The initiation of an investigation by the ED has consequences which have the potential of curtailing the liberty of an individual. Such an executive action, striking at the very liberty of an individual and taken in the absence of any guiding principles suffers from the vice of arbitrariness under Article 14 of the Constitution of India.

(i) ***EP Royappa v. State of Tamil Nadu***, reported in (1974) 4 SCC 3. [*Pg.122, Vol.VIII | Relevant @ Pg.157, Vol.VIII*]

> "***85.*** *[……] The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose. J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach.* ***We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within***

traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. *Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it effects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment.* ***They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16****. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16.*"

(ii) ***S.G. Jaisinghani v. Union of India and Ors***, reported in (1967) 2 SCR 703. [***Pg.163, Vol.VIII | Relevant @ Pg.172, Vol.VIII***]

"14. In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should now where he is*. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the Rule of law. (See Dicey – Law of the Constitution – 10th Edn., Introduction ex). "Law has reached its finest moments," stated Douglas, J. in United States v. Wunderuck [342 US 98] , "when it has freed man from the unlimited discretion of some ruler…. Where discretion, is absolute, man has always suffered****". It is in this sense that the rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield slated it in classic terms in the case of John Wilkes [(1770) 4 Burr 2528 at 2539] , "means sound discretion guided by law. It must be governed by Rule, not by humour: it must not be arbitrary, vague, and fanciful"***

(iii) ***Nikesh Tarachand Shah v. Union of India***, reported in (2018) 11 SCC 1 @ Para 21-23. [*@Pg.210, Vol.III | Relevant @ Pg.233-236, Vol.III*]

II. THE ED MUST NECESSARILY SATISFY ITSELF THAT PROCEEDS OF CRIME HAVE BEEN PROJECTED AS UNTAINTED PROPERTY BEFORE REGISTERING AN ECIR.

16. The offence of money laundering requires '*proceeds of crime*' (which are generated from the commission of the predicate offence), ***and*** for a person to '*project or claim*' such proceeds of crime as '*untainted property*'. Therefore, the cause of action to commence an investigation under the PMLA can arise ***only if*** the commission of the alleged predicate offence has resulted in generation of '*proceeds of crime*', and such proceeds of crime are projected or claimed as untainted property. However, the procedure invariably followed by the ED is to register an ECIR (an 'internal document') immediately upon an FIR (being the predicate offence) being registered.

17. That cause of action being entirely different from the generation of proceeds of crime through alleged commission of the predicate offence, requires *prima facie*, for the ED to establish the act of money laundering i.e. the act of projecting or claiming the alleged proceeds of crime as untainted property, and thereafter start proceedings, and not simultaneous with the lodging of an FIR. Otherwise, there will be no difference between the predicate offence and the offence of money laundering.

18. The importance of the ingredient of '*projection*' or '*claiming*' it as '*untainted property*' for constituting an offence of money laundering is borne out from the following:

(i) In 20.12.1988 at Vienna, various member countries (including India) of the United Nations adopted and signed the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("**Vienna Convention**") ***[****@ Pg. 1, Vol. VII*]. This was the first major international convention to call upon the member states to criminalize the offence of money laundering. In Article 3 (Offences and Sanctions) ***[****@ Pg. 5-6, Vol. VII*] of the said Convention, it was provided as under:

> "***1.*** *Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:*
> *[…]*
> ***(b) (i)*** *The* ***conversion or transfer of property****, knowing that such property is derived from any offence or offences established in accordance with subparagraph (a) of this paragraph, or from an act of participation in such offence or offences,* ***for the purpose of*** *concealing or disguising the illicit origin*

of the property ***or*** *of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;*"

(ii) From the above, it is clear that what was sought to be criminalized as the offence of money laundering was not the mere acquisition, use or possession of proceeds of crime but its '*conversion*' or '*transfer*' for the purpose of either '*concealing or disguising the illicit origin of the property*' or of assisting any person who has been involved in the commission of the predicate offence to "*evade the legal consequences of his action*".

(iii) As is evident from the Preamble to the PMLA, the Act was enacted in response to India's global commitment (including the Vienna Convention) to combat the menace of money laundering and to thus, adopt a comprehensive national money laundering legislation and programme.

(iv) As the Prevention of Money Laundering Bill of 1999 originally stood, the offence of money laundering was defined as under: [***Pg.174, Vol.VIII | Relevant @ Pg.176, Vol.VIII***]

"***3.*** *Whoever –*
(a) acquires, owns, possesses or transfers any proceeds of crime; or
(b) knowingly enters into any transaction which is related to proceeds of crime either directly or indirectly; or
(c) conceals or aids in the concealment of the proceeds of crime,
commits the offence of money-laundering."

(v) As per the above definition of money laundering under the original PML Bill, 1999, mere acquisition, ownership, possession or transfer of any proceeds of crime would have constituted the offence of money laundering, without the further requirement of 'projecting' it as untainted property.

(vi) When the PML Bill, 1999 was referred to a Select Committee of the Rajya Sabha, the said Select Committee observed as under in relation to the above definition of the offence of money laundering: [***Pg.216, Vol.VIII | Relevant @ Pg.221, Vol.VIII***]

"*The Committee finds that sub-clauses (a) and (c) viewed in the context of the provisions contained in clause 23 of the Bill may lead to harassment of innocent persons who bona fide and unknowingly deal with the persons who have committed the offence of money laundering and enter into transactions with them. Such persons purchasing property born out of proceeds of crime*

without having any inkling whatsoever about that are liable to be prosecuted if the sub-Clauses (a) & (c) remain in the Bill in the existing form.

The fact of the matter is that these sub-clauses do not provide any protection or defence to this category of persons."

(vii) Accordingly, the Select Committee proposed the following amended definition of money laundering: [***Pg.216, Vol.VIII | Relevant @ Pg.221, Vol.VIII***]

"*The Committee, therefore, recommends that Clause 3 of the Bill be substituted by the following:-*
"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.*"

(viii) The above definition was accepted by the Legislature and incorporated in the PMLA when it was finally passed by both Houses of Parliament in 2002.

(ix) The use of the word "*and*" before the term "*projecting as untainted property*" makes the intent of Legislature clear that mere '*use*' or '*possession*' will not suffice.

(x) Reliance is also placed on ***Nikesh Tarachand Shah v. Union of India***, reported in (2018) 11 SCC 1 @ Para 11 [***@Pg.210, Vol.III | Relevant @ Pg.228, Vol.III***] wherein it has been held as under:

"***11.*** *Having heard the learned counsel for both sides, it is important to first understand what constitutes the offence of money laundering. […] Thus, whosever is involved as aforesaid, in a process or activity connected with "proceeds of crime" as defined, which would include concealing, possessing, acquiring or using such property, would be guilty of the offence,* ***provided*** *such persons* ***also*** *project or claim such property as untainted property. Section 3, therefore, contains all the aforesaid ingredients, and before somebody can be adjudged as guilty under the said provision, the said person must not only be involved in any process or activity connected with proceeds of crime,* ***but must also project or claim it as being untainted property.***"

19. Statutorily therefore, the ED is required to record that the offence of money laundering stands *prima facie* committed for which the accused is liable to be prosecuted. The ECIR therefore must disclose the '*proceeds of crime*' as well as the act of projecting or claiming such proceeds of crime as untainted property. In the absence thereof, the accused person will not be able to avail his remedies in law. For instance, an ECIR would be liable to be

quashed if the contents thereof, even if taken to be true, do not make out the ingredients of the offence of money laundering.

20. Registration of an offence against a person and investigating him has serious and adverse consequences on the person, especially on his liberty, livelihood and reputation. Hence, registration and investigation of the offence of money laundering should be commenced only after the predicate offence investigating agency has concluded *prima facie* that the predicate offence has been committed by filing a Chargesheet u/S 173 Cr.P.C. in as much as only if there exists 'proceeds of crime' which will be determined in the chargesheet u/S 173 Cr.P.C., there can be the offence of money laundering by projecting such proceeds of crime as untainted property. If a Chargesheet is not filed or a closure report is filed or the Court rejects the Chargesheet, meaning thereby that there are no proceeds of crime and no predicate offence, there can be no offence of money laundering. Hence, the authorities under PMLA must await, *at least* the filing of a Chargesheet in the predicate offence before they register and investigate a case of money laundering.

21. The PMLA, as it was enacted originally in 2002 and brought into force in 2005, contained the safeguard of filing of a chargesheet u/S 173 Cr.P.C. before any investigation could be carried out under the PMLA. For instance, the power of provisional attachment of property u/S 5 PMLA [*see* ***Proviso to Section 5 in the original PMLA 2002 @ Pg.4, Vol.1***] and the power of search and seizure u/S 17 PMLA [*see* ***Proviso to Section 17 in the original PMLA 2002 @ Pg.10, Vol.1***] could be exercised only after a chargesheet u/S 173 Cr.P.C. had been filed in relation to the alleged scheduled offence.

22. The above safeguards, however, have been diluted over time by way of amendments to the PMLA. For instance:

    (i) In 2009, a second proviso to Section 5 PMLA was added [***Pg.34, Vol.1***] in order to dilute the safeguard under the First Proviso. Similarly, under Section 17 PMLA, the threshold for invocation of the power of search and seizure was diluted by amending the Proviso and making the exercise of power contingent on the mere forwarding of an FIR u/S 157 Cr.P.C. instead of filing of chargesheet u/S 173 Cr.P.C. [***Pg.35, Vol.1***]

    (ii) In 2019, the safeguard u/S 17 PMLA was completely done away with by deletion of the Proviso to Section 17(1) PMLA. [***Pg.85, Vol.1***]

23. The power of arrest u/S 19 PMLA can be exercised only after recording of reasons to believe in writing that '*any person has been guilty of an offence punishable under this Act*'.

This determination of guilt can never be done without first carrying out an investigation, including carrying out search and seizure (which are in aid of investigation). Therefore, the safeguard under Section 17 PMLA of filing of chargesheet in respect of the predicate offence was impliedly built-in Section 19 PMLA.

24. In so far as Section 50 PMLA is concerned, though there is no threshold to issue summons under Section 50 PMLA, as there existed under Section 5/ 17/ 19 PMLA, however, such a threshold must be read into Section 50 PMLA i.e. a person can be summoned under Section 50 PMLA only after registration of ECIR and supply of its copy, which in turn can only be done after chargesheet or complaint has been filed in respect of the predicate offence, as stated above.

25. Thus, as the PMLA originally stood, the exercise of powers under the PMLA were contingent on the filing of a chargesheet u/S 173 Cr.P.C. in relation to the alleged scheduled offence and it is only by way of subsequent amendments that these safeguards have either been diluted or completely done away with.

26. Therefore, any attempt to commence proceedings under the PMLA without *prima facie* recording the commission of the offence of money laundering would be a procedure inconsistent with the PMLA itself, and therefore violative of Articles 14 and 21 of the Constitution.

III. DERIVATE ACT CANNOT BE MORE ONEROUS THAN THE ORIGINAL.

27. As highlighted above, no offence under the PMLA can exist if there is no generation of proceeds of crime. The nature/ scope of the laundering under the PMLA is also linked inextricably to the proceeds of crime so generated. It is therefore submitted that the consequence that would befall an accused for laundering proceeds of crime cannot be more severe than the consequence suffered by them for generating the proceeds of crime itself.

28. Such protection and parity would also necessarily extend to procedural protections such as the grant of bail, compounding of offences and rights accorded to the accused person at the time of investigation such as the right to receive a notice u/s 41A, Cr.P.C.

29. Procedural protections granted by the Cr.P.C. in respect of a predicate offence, if inconsistent with the procedure faced by an accused while being prosecuted under the PMLA, would be inconsistent with basic principles of criminal law.

30. For example, if a person A is to obtain Rs. 100 by cheating person B and then projects that Rs. 100 as untainted property, it is fully within the bounds of law for the person to compound the offence u/s 420 in terms of the procedure u/s 320, Cr.P.C. This protection must necessarily extend to the PMLA investigation with reference to the laundering of the same Rs. 100 as well. [*see* ***Table of Scheduled Offences indicating the punishment, classification of offences as bailable/ non-bailable, cognizable/ non-cognizable, compoundable etc. @ Pg.270, Vol.VIII***]

31. The failure to treat the schedule offence and subsequent offence under the PMLA on similar planes insofar as provisions/ protections of the Cr.P.C. are concerned would amount to a disproportionate application of the criminal law and subject to be struck down under Article 21 of the Constitution.

IV. WHOLE SCHEDULE IS OVER-BROAD AND IS INCONSISTENT WITH THE PMLA IN THE CONTEXT OF A PREDICATE OFFENCE

32. The Statements of Objects and Reasons of the PMLA Bill, 1999 [***@ Pg.1, Vol. I***] make it evident that the PMLA is a comprehensive penal statute to counter the threat of money laundering, specifically stemming from trade in narcotics. This is evident from the references to international conventions and instruments dealing primarily with money laundering related to drug and narcotics related crimes. The instruments/conventions relevant in this regard are as under:

(a) United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 ("**Vienna Convention**") ***[@ Pg. 1, Vol. VII***]
(b) Basle Statement of Principles, 1989
(c) Forty Recommendations of the Financial Action Task Force on Money Laundering, 1990 **[*@ Pg. 39, Vol. VII***]
(d) Political Declaration and Global Program of Action adopted by the United Nations General Assembly on 23.02.1990 ***[@ Pg. 46, Vol. VII***]
(e) Resolution passed at the UN Special Session on countering World Drug Problem Together – 8th to 10th June 1998 ***[@ Pg. 53, Vol. VII***]

33. Purpose behind money laundering as a concept is that the objective of the predicate offence would envisage the commission of laundering, through an organized process, including through syndicates etc. The object of the activity must be to launder, and the predicate offence must be committed also with the objective of laundering the proceeds thereof. An isolated act, by itself, however heinous, cannot relate to PMLA.

34. Currently, the offences in the schedule are extremely overbroad, in several cases, having absolutely no relation to either narcotics or organized crime. For instance, an offence of cheating committed by a private individual against another private individual would also be subject to the provisions of the PMLA. This becomes more egregious, since, as highlighted above, the consequences of laundering of proceeds of crime often times may be more stringent and severe than the consequences of the generation of the proceeds of crime itself.

35. The inclusion of offences in the schedule without the same having any rational nexus with the objects and reasons of the PMLA is violative of Article 14 and 21 of the Constitution of India being unreasonable and arbitrary.

V. PMLA CANNOT BE A STANDALONE STATUTE

36. The legislative intent of the PMLA is to stem the flow of money laundering from illicit trade, primarily in narcotics. This is apparent from the Statement of Objects and Reasons of the PMLA. Even the Speeches of the Ministers in Parliament while introducing the PMLA and the 2012 Amendment to the PMLA made it clear that the offence of money laundering pre-supposes the existence of a scheduled offence which generated the funds which were subsequently laundered by '*projecting or claiming it as untainted property*'.

(i) Speech of the then Finance Minister (Sh. Yashwant Sinha), who had introduced the Prevention of Money Laundering (Amendment) Bill, 1999 in the Lok Sabha and moved it for consideration in the Lok Sabha on 02.12.1999 [***@ Pg.8, Vol.II | Relevant @ Pg.9, Vol.II***], which is extracted below:

> "*The point I am making is that we have picked up certain offences which are heinous, as I said in the beginning, which are of very serious nature. We are bringing this legislation on money laundering so that receipts from those crimes and properties acquired as a result thereof, are dealt with under this Act. At the present moment, we have no legislation which will deal exclusively with this particular subject. So, we are bringing this Bill.*
> *[…]*
> *Therefore, it is important to relate the provisions of this Bill to the Schedule which we have mentioned.* ***If we delink it from the Schedule, then all and every offence can be brought within its ambit, but that is not the intention of this legislation.*** *The intention is to confine it to certain serious, heinous offences and that is why, we have decided to enumerate the offences under various Acts in this Schedule.*"

(ii) Speech of the then Finance Minister, who had introduced the Prevention of Money Laundering (Amendment) Bill, 2012 in the Rajya Sabha on 17.12.2012 [***@ Pg.19, Vol.II | Relevant @ Pg.21, Vol.II***], which is extracted below:

> "*Sir, firstly, we must remember that money-laundering is a very technically-defined offence. It is not the way we understand 'money laundering' in a colloquial sense. It is a technically-defined offence. It postulates that there must be a predicate offence and it is dealing with the proceeds of a crime. That is the offence of money-laundering. It is more than simply converting black-money into white or white money into black. That is an offence under the Income Tax Act. There must be a crime as defined in the Schedule. As a result of that crime, there must be certain proceeds – It could be cash; it could be property. And anyone who directly or indirectly indulges or assists or is involved in any process or activity connected with the proceeds of crime and projects it as untainted property is guilty of offence of money-laundering. So, it is a very technical offence. The predicate offences are all listed in the Schedule.* ***Unless there is a predicate offence, there cannot be an offence of money-laundering.***"

(iii) It is well settled in law that the Speech of the Minister introducing a legislation in the Parliament is a valid tool for interpretation of a statute.

(a) ***K.P. Varghese v. Income Tax Officer, Ernakulum***, reported in (1981) 4 SCC 173 @ **Para 8**. [***@ Pg.24, Vol.2 | Relevant @ Pg.35, Vol.2***]

> "*Now it is true that the speeches made by the Members of the Legislature on the floor of the House when a Bill for enacting a statutory provision is being debated are inadmissible for the purpose of interpreting the statutory provision* ***but the speech made by the Mover of the Bill explaining the reason for the introduction of the Bill can certainly be referred to for the purpose of ascertaining the mischief sought to be remedied by the legislation and the object and purpose for which the legislation is enacted.***"

(b) ***Union of India v. Martin Lotteries Agencies Limited***, reported in (2009) 12 SCC 209 @ **Para 38**. [***@ Pg.45, Vol.2 | Relevant @ Pg.62, Vol.2***]

37. In ***P. Chidambaram v. Directorate of Enforcement***, reported in (2019) 9 SCC 24 @ Para 25, it was held as under: [***Pg.231, Vol.VIII | Relevant @ Pg.248, Vol.VIII***]

> "**25.** *[…] "Scheduled offence" is a sine qua non for the offence of money-laundering which would generate the money that is being laundered. PMLA contains schedules which originally contained three parts, namely, Part A, Part B and Part C. Part A contains various paragraphs which enumerate offences under the Penal Code, 1860, Narcotic Drugs and Psychotropic Substances Act, 1985, offences under the Explosives*

Substances Act, 1908 and the offences under the Prevention of Corruption Act, 1988 (Para 8), etc. […]"

38. In fact, the PMLA, prior to 2013, also reflected this understanding in Section 8(5), which reads as under: [*see* ***original PMLA 2002 @ Pg.1, Vol.I | Relevant @ Pg.6, Vol.I***]

> "*(5)* ***Whereon 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*"

39. This provision was amended in 2013 [*see* ***PMLA Amendment 2013 @ Pg.44, Vol.I | Relevant @ Pg.46-47, Vol.I***], where in the words '*trial for any scheduled offence*' were replaced with the words '*trial of an offence under this Act*'. However, the Standing Committee in fact recommended this Amendment since problems were being faced in cases where persons who were not involved in the Scheduled Offence were involved in Money Laundering.

40. The offence of money laundering has been defined under Section 3, PMLA as,

> "*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*** *including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering.*"

41. Therefore, in order to be convicted of the offence of money laundering, it is essential that the accused person has dealt with the proceeds of crime in one of the ways illustrated under Section 3, PMLA.

42. The term "*proceeds of crime*" is defined under Section 2(u) as,

> "*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 or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad*"

43. Therefore, for property to qualify as proceeds of crime, the same must be connected in some way to an activity related to a schedule offence.

44. It follows from the above that if there is no schedule offence, there can be no property derived or obtained directly or indirectly from such an offence, and therefore, no person can deal with such property, meaning that the fundamental pre-requisites of the offence under Section 3, PMLA can never be fulfilled, and no person can ever be convicted of the offence of money laundering.

45. The ED has argued that the insertion of Explanation (i) to Section 44(1)(d), PMLA *vide* the Finance Act (No. 2) of 2019 has clarified the position that a trial under the PMLA may proceed irrespective of any orders including acquittals in the trial of the Schedule Offence. However, such a proposition is unacceptable for the following reasons:

(i) The plain words of the statute must be given their plain meaning, where they are unambiguous. Explanation (i) to Section 44(1)(d), PMLA reads as follows: [*see* ***PMLA Amendment vide Finance Act (No. 2) of 2019 @ Pg.82, Vol.I | Relevant @ Pg.85, Vol.I***]

> "Explanation*: For the removal of doubts, it is clarified that, –*
> (i) ***the jurisdiction of the Special Court*** *while dealing with the offence under this Act, during investigation, enquiry or trial under this Act,* ***shall not be dependent upon any orders passed in respect of the scheduled offence****, and the trial of both sets of offences by the same court shall not be construed as joint trial*"

(ii) Explanation (i) clearly refers only the jurisdiction of the Special Court and not to the effect of the Schedule Offence on the trial of the offence under the PMLA. As highlighted above, the relationship between the schedule offence and the offence under the PMLA is one of merits and not a technical objection of jurisdiction.

(iii) As highlighted above, in the absence of a schedule offence, the pre-requisites to convict a person of the offence of money laundering can never be fulfilled. Therefore, continuing with a trial under the PMLA, once a Court has held there is no commission of a schedule offence, the Special Court can never convict the person under the PMLA without returning a finding that a schedule offence has been committed.

(iv) Where the same Court is trying the Schedule Offence and the offence under the PMLA, such a situation would lead to an absurd outcome, where in one Trial the Court will give two contrary decisions.

VI. CR.P.C. IS THE PROCEDURE ESTABLISHED BY LAW AND THERE CANNOT BE AN INVESTIGATION OUTSIDE OF SECTIONS 154/155 CR.P.C.

46. Under Article 21 of the Constitution, the right to life and liberty cannot be abrogated save by procedure established by law, which procedure must be just, reasonable, and fair. Through the Cr.P.C., there are several safeguards/constraints which apply to the investigation and prosecution of offences.

47. Further, S. 65, PMLA makes the Cr.P.C. applicable to the PMLA, which applicability has also received the imprimatur of this Hon'ble Court in ***Ashok Munilal Jain v. Union of India, (2018) 16 SCC 158 @ Paras 3-5***. [*Pg.97, Vol.III | Relevant @ Pg.98-99, Vol.III*]

48. Several of the safeguards of the Cr.P.C., however, are nevertheless not complied with by the ED in any of its investigations. For instance:

(a) The ED does not register an FIR on the receipt of information relating to money laundering, and consequently, the entire investigation by the ED is conducted outside the purview and oversight of the jurisdictional magistrate.

(b) The ED also does not maintain a case diary noting the terms of its investigation.

(c) The ED does not provide a copy of the ECIR to the Accused persons, even at the time of arrest.

(d) The procedural safeguards under S. 161, Cr.P.C. and Article 20(3) of the Constitution are not available under s. 50, PMLA, which requires that every person state the truth and sign their statement under threat of criminal sanction.

(e) The safeguards under s. 41A, Cr.P.C. are not followed by the ED.

(f) Further, assuming that the offences under the ED are non-cognizable, the ED has failed to take magisterial permission under s. 155, Cr.P.C. to initiate investigation into the same.

49. The ED refuses to comply with most provisions of the Cr.P.C., despite the PMLA itself making the Cr.P.C. applicable to the said procedures. Therefore, if the provisions of the Cr.P.C. are excluded, there are in fact no statutory provisions governing the conduct of an investigation by the ED, other than those provisions explicitly included in the PMLA.

Such a situation would amount to uncanalized power in the hands of the ED to investigate and prosecute any person under the PMLA.

50. Such an investigation, not controlled or regulated by any statutory or judicial oversight will amount to a violation of Article 14 and 21, being arbitrary, unreasonable and unfair.

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