

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

NOTE on WHY ED OFFICERS ARE POLICE OFFICERS

1. The determination whether an officer under a special statute is a police officer or not will depend on - **(i)** the object/ purpose of such special statute; and **(ii)** the nature of powers exercised by such officer.
2. That is to say, if the purpose/ object of the special statute is the prevention and detection of a crime, and in order to achieve such object, an officer under such special statute is vested with coercive powers (such as arrest, taking remand in custody of the arrested person, search of property and person and seizure, etc.) which would facilitate the obtaining of a confession from a suspect, then such officer will be a police officer for the purposes of Section 25 and 26 of the Indian Evidence Act, 1872 and any confession made to such officer will be inadmissible in evidence. Section 25 of the Evidence Act deals with confessions made to police officer (with or without custody), and Section 26 deals with confessions made to any person while in custody of a police officer. In other words, even an extra-judicial confession made while in police custody cannot be read against an accused in terms of Section 26 of the Evidence Act .

Section 25, Evidence Act

***"25. Confession to police officer not to be proved.- No confession made to a police officer, shall be proved against a person accused of any offence."***

Section 26, Evidence Act

***"26. Confession by accused while in custody of police not to be proved against him.- No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved against such person."***

I. Purpose/ Object of Statute Test

3. The test which has been developed by way of judicial precedents over the years is that while determining whether an officer who has coercive powers under the

relevant special statute is to look at the purpose/ object of the said statute and to determine whether it is a penal statute that is dealing with prevention, detection and punishment of crime or a regulatory/ taxation statute which deals with levy of tax/ duty/ penalty.

4. In *State of Punjab vs. Barkat Ram*, reported in AIR 1962 SC 276 (3 Judges) [[@ Pg.1, Vol.V](#)] [[referred to in Tofan Singh vs. State of Tamil Nadu](#), reported in 2020 SCC OnLine SC 882 [@ Para 88 @ Pg.218, Vol.II](#)], while adjudicating the issue [[@ Para 1 @ Pg.1, Vol.V](#)] as to whether a Customs Officer under the Land Customs Act, 1924 or Sea Customs Act, 1878 is a police officer within the meaning of Section 25, Evidence Act, the Supreme Court examined the object and purpose of the aforesaid Acts to determine whether a Customs Officer would be a police officer or not.

(i) The Court refers to the Police Act, 1861 and notes that the main object and purpose of having the police is for the prevention and detection of crime. [[@ Para 8 @ Pg.2, Vol.V](#)]

*“8. The Police Act, 1861 (Act 5 of 1861), is described as an Act for the regulation of police, and is thus an Act for the regulation of that group of officers who come within the word “police” whatever meaning be given to that word. The preamble of the Act further says: “whereas it is expedient to re-organise the police and to make it a more efficient instrument for the prevention and detection of crime, it is enacted as follows”. **This indicates that the police is the instrument for the prevention and detection of crime which can be said to be the main object and purpose of having the police.** Sections 23 and 25 lay down the duties of the police officers and Section 20 deals with the authority they can exercise. They can exercise such authority as is provided for a police officer under the Police Act and any Act for regulating criminal procedure. The authority given to police officers must naturally be to enable them to discharge their duties efficiently. Of the various duties mentioned in Section 23, the more important duties are to collect and communicate intelligence affecting the public peace, to prevent the commission of offences and public nuisances and to detect and bring offenders to justice and to apprehend all persons whom the police officer is legally authorized to apprehend. It is clear, therefore, in view of the nature of the duties imposed on the police officers, the nature of the authority conferred and the purpose of the Police Act, that the powers which the police officers enjoy are powers for the effective prevention and detection of crime in order to maintain law and order.”*

(ii) The Court then refers to the Preamble and various provisions of the Sea Customs Act and the Land Customs Act and comes to the conclusion that the powers vested in a Customs Officer are not for prevention and detection of a

crime, but instead for checking the smuggling of goods and the due realisation of customs duties and to determine the action to be taken in the interests of the revenues of the country by way of confiscation of goods on which no duty had been paid and by imposing penalties and fines. [[@ Paras 9-11 @ Pg.3, Vol.V](#)]

**“9. The powers of Customs Officers are really not for such purpose. Their powers are for the purpose of checking the smuggling of goods and the due realisation of customs duties and to determine the action to be taken in the interests of the revenues of the country by way of confiscation of goods on which no duty had been paid and by imposing penalties and fines.**

**10.** Reference to Section 9(1) of the Land Customs Act may be usefully made at this stage. It is according to the provisions of this sub-section that the provisions of the Sea Customs Act and the orders, Rules etc. prescribed thereunder, apply for the purpose of levy of duties of land customs under the Land Customs Act in like manner as they apply for the purpose of levy of duties of customs on goods imported or exported by sea. This makes it clear that the provisions conferring various powers on the Sea Customs Officers are for the purpose of levying and realisation of duties of customs on goods and that those powers are conferred on the Land Customs Officers also for the same purpose. Apart from such an expression in Section 9(1) of the Land Customs Act, there are good reasons in support of the view that the powers conferred on the Customs Officers are different in character from those of the police officers for the detection and prevention of crime and that the powers conferred on them are merely for the purpose of ensuring that dutiable goods do not enter the country without payment of duty and that articles whose entry is prohibited are not brought in. It is with respect to the detecting and preventing of the smuggling of goods and preventing loss to the Central Revenues that Customs Officers have been given the power to search the property and person and to detain them and to summon persons to give evidence in an enquiry with respect to the smuggling of goods.

**11.** The preamble of the Sea Customs Act says: “Whereas it is expedient to consolidate and amend the law relating to the levy of Sea Customs-duties”. Practically, all the provisions of the Act are enacted to achieve this object. Section 167 gives a long list of offences, but it is to be noticed that with the exception of certain offences, all the others are to be dealt with by the Customs Officers in view of Section 182. The Customs Officers are given the power to confiscate, to fix the duty and to impose penalties which can, in certain cases, be of enormous amounts. The offences mentioned in Section 167, which are to be dealt with by a Magistrate, are mostly of the type in which the Customs Officers have nothing to investigate. Offences at Items 23 to 28 are with respect to certain acts committed by a pilot or a master of a vessel. The Customs staff has merely to report the conduct for

trial before a Magistrate. They have nothing to investigate about it. Similarly, the offence at Item 72 relates to a person's making a false declaration. Offences at Items 74, 75 and 76 are with respect to the conduct of the Customs Officers themselves. Items 76-A, 76-B and 78 deal with the obstruction by smugglers to the performance of duty by the Customs Officer. The offence at Item 77 relates to an offence where a police officer neglects to do his duty. Item 81 creates an offence with respect to a person doing certain things to defraud the Government. **The Customs Officer, therefore, is not primarily concerned with the detection and punishment of crime committed by a person, but is mainly interested in the detection and prevention of smuggling of goods and safeguarding the recovery of customs duties. He is more concerned with the goods and customs duty, than with the offender.**

- (iii) The Court then holds that the words 'police officer' are not to be construed in a narrow way but have to be construed in a wide and popular sense. [[@ Para 16 @ Pg.4, Vol.V](#)] The Court further notes that Sections 17 and 18 of the Police Act specifically provide for the appointment of special police officers who are not enrolled under the Act but are appointed for special occasions and have the same powers, privileges and protection and are liable to perform the same duties as the ordinary officers of the police. [[@ Para 14 @ Pg.4, Vol.V](#)] Therefore, it is clear that any officer who (though not enrolled under the Police Act) but is invested with the same powers as that of a police officer i.e. the powers for prevention and detection of a crime, will be a police officer as per Sections 17 and 18 of the Police Act.
- (iv) However, on the basis of the above distinction between the object and purpose of the Sea Customs Act and the Land Customs Act and the powers exercised thereunder by a Customs Officer (as against the object of prevention and detection of a crime by a police officer), the Supreme Court (by a 2:1 majority) concludes and holds that a Customs Officer under the aforesaid Acts is not a police officer for the purposes of Section 25, Evidence Act. [[@ Para 27 @ Pg.6, Vol.V](#)]
- (v) In the dissenting opinion of J. Subba Rao, he identifies the following categories of a police officer: [[@ Para 33 @ Pg.8, Vol.V](#)]

**“33. [...] It may mean any one of the following categories of officers: (i) a police officer who is a member of the police force constituted under the Police Act; (ii) though not a member of the police force constituted under the Police Act, an officer who by statutory fiction is deemed to be a police officer in charge of a police station under the Code of Criminal Procedure; and (iii) an officer on whom a statute confers powers and imposes duties of**

a police officer under the Code of Criminal Procedure, without describing him as a police officer or equating him by fiction to such an officer. [...]

- (vi) He then refers to the high purpose of Section 25 of the Evidence Act and observes as under: [[@ Para 33 @ Pg.9, Vol.V](#)]

“33. [...] It is, therefore, clear that Section 25 of the Evidence Act was enacted to subserve a high purpose and that is to prevent the police from obtaining confessions by force, torture or inducement. The salutary principle underlying the section would apply equally to other officers, by whatever designation they may be known, who have the power and duty to detect and investigate into crimes and is for that purpose in a position to extract confessions from the accused.”

- (vii) He then goes on to conclude as under: [[@ Para 40 @ Pg.13, Vol.V](#)]

“40. [...] The said sections, therefore, create offences, and, for the purpose of prevention and detection of such offences, confer specific powers on the Customs Officers to search persons or places, to arrest persons suspected of such offences and to make necessary investigation in respect thereof. **The Customs Officers under the Act have the powers, and they also discharge the functions, of police officers and, therefore, they are police officers for the purpose of the Evidence Act insofar as they exercise or discharge such powers and functions. I, therefore, hold that a Customs Officer is a police officer qua his police functions. If so, it follows that a confession made to him cannot be proved against a person accused of an offence.**”

5. The PMLA is a purely penal statute, unlike statutes such as the Customs Act, 1962; Sea Customs Act, 1878; Central Excise Act, 1944 or GST Act, 2017, which are fiscal statutes dealing with levy and collection/ recovery of taxes/ duties. [[see Comparative Table of the Preamble of various Acts @ APPENDIX-1 hereto](#)]
6. As stated previously, the PMLA was enacted in response to India's global commitment (including the Vienna Drugs Convention, 1988 and the 40 FATF Recommendations) to combat the menace of money laundering and to thus, adopt a comprehensive national money laundering legislation declaring the laundering of monies a criminal offence.
- (i) The Statements of Objects and Reasons of the PML Bill, 1999 [[@ Pg.2, Vol.II](#)] make it evident that the PMLA is a comprehensive penal statute to counter the threat of money laundering through its effective prevention, detection, and punishment.

(ii) The Statements of Objects and Reasons of the PML Bill, 1999 [[@ Pg.2, Vol.II](#)] *inter alia* also refers to the FATF Recommendations [[@ Para \(c\)\(i\) @ Pg.2, Vol.II](#)] and notes that one of important recommendations was “*declaration of laundering of monies carried through serious crimes a criminal offence*”.

7. The PMLA, thus, defines and creates a new offence i.e. the offence of money-laundering (as defined under [Section 3, PMLA](#)) and provides for punishment under [Section 4, PMLA](#). The PMLA also vests powers of search and seizure ([Sections 17 and 18](#)), arrest ([Section 19](#)), issuance of Letters Rogatory ([Section 57](#)), etc. on the officers under the Act for carrying out investigation (which is defined in [Section 2\(na\)](#)). For the trial of offence of money laundering, the PMLA provides for constitution of new Special Courts ([Sections 43-45](#)) and provides that the procedure to be followed shall be the procedure prescribed under the Cr.P.C. ([Section 46](#)). By virtue of [Section 65](#), all provisions of Cr.P.C., except in so far as they are inconsistent with the provisions under the PMLA, are made applicable to the PMLA.
  
8. Unlike fiscal/ taxation statutes, there is no provision for imposition of any levy/ penalty under the PMLA since the purpose/ object of the PMLA is not imposition or collection of any tax or levy but instead is the prevention and detection of the newly created crime of money laundering. There are proceedings for provisional attachment under [Section 5, PMLA](#), but even these proceedings are in aid of punishing the person accused of committing the offence of money laundering by depriving him/ her of the fruits of the scheduled offence i.e. the proceeds of crime. Even after completion of adjudication of the attachment proceedings, the actual deprivation of property by way of ‘confiscation’ to the Central Govt. remains subject to the final outcome of the trial of the offence of money laundering. [[see Sections 8\(5\) and 8\(6\), PMLA](#)] Further, the Special Court has also been vested with the power to restore a confiscated property to a claimant having a legitimate interest in such property. [[see Sections 8\(8\), PMLA](#)] Thus, it is clear that the attachment proceedings are in aid of the prosecution for the offence of money laundering.
  
9. Table setting out the provisions dealing with attachment/ confiscation proceedings, settlement proceedings and offences and prosecutions under the fiscal/ taxation statutes are as under:

S. No.	Statute	Confiscation of Goods and Conveyances and Imposition of Penalties	Settlement of Cases	Offences and Prosecutions
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S. No.	Statute	Confiscation of Goods and Conveyances and Imposition of Penalties	Settlement of Cases	Offences and Prosecutions
1.	Customs Act, 1962	Chapter XIV	Chapter XIVA	Chapter XVI
2.	Income Tax Act, 1961	Chapter XIV	Chapter XIXA	Chapter XXII
3.	Central Excise Act, 1944	Chapter VI	Chapter V	Sections 9, 9A, 9B
4.	Central GST Act, 2017	Chapter XV	-	Chapter XIX
5.	PMLA, 2002	-	-	Chapter II and Chapter VII

## II. Nature of Powers Exercised Test

10. This test provides that the Court must look at the nature of the powers exercised by the officer to determine whether such officer is a police officer or not. That is to say, if the officer possess powers as would facilitate the obtaining of a confession by him from a suspect, then such officer would be a police officer.
11. In *Raja Ram Jaiswal vs. State of Bihar*, reported in AIR 1964 SC 828 (3 Judges) [[@ Pg.15, Vol.V](#)] [[referred to in Tofan Singh @ Para 98 @ Pg.222, Vol.II](#)], the question that had arisen for consideration of the Supreme Court was whether a confession recorded by an Excise Inspector under Section 78(3) of the Bihar and Orissa Excise Act, 1915 is hit by the bar under Section 25, Evidence Act. [[@ Para 1 @ Pg.15, Vol.V](#)] The Supreme Court held that another test for determination of who is a police officer would be to see whether the powers which are given to officers are such as would facilitate the obtaining of a confession from a suspect. If they do, the other tests may become irrelevant. [[@ Para 10 @ Pg.19, Vol.V](#)]

*“10. [...] The test for determining whether such a person is a “police officer” for the purpose of Section 25 of the Evidence Act would, in our judgment, be whether the powers of a police officer which are conferred on him or which are exercisable by him because he is deemed to be an officer in charge of police station establish a direct or substantial relationship with the prohibition enacted by Section 25, that is, the recording of a confession. In other words, the test would be whether the powers are such as would to facilitate the obtaining by him of a confession from a suspect or delinquent. If they do, then it is unnecessary to consider the dominant purpose for which he is appointed or the question as to what other powers he enjoys. These questions may perhaps be relevant for consideration where the powers of the police officer conferred upon him are of a*

very limited character and are not by themselves sufficient to facilitate the obtaining by him of a confession.”

12. In fact, this is an additional test to the purpose/ object test, since it interprets the section from the point of view of the accused.
13. In *Tofan Singh* [[@ Para 100 @ Pg.224, Vol.II](#)], the Supreme Court relied upon a significant sentence in *Raja Ram Jaiswal* - “it is the power of investigation which establishes a direct relationship with the prohibition enacted in Section 25 Evidence Act”. The Supreme Court concluded that if a person is invested with all powers of investigation can be said to be police officers, as when they prevent and detect crime, they are in a position to extort confessions, and thus are able to achieve their object through a shortcut method of extracting involuntary confessions. [[@ Para 128 @ Pg.234, Vol.II](#)]

*“129. The golden thread running through all these decisions – some of these being decisions of five-Judge Benches which are binding upon us – beginning with Barkat Ram, is that where limited powers of investigation are given to officers primarily or predominantly for some purpose other than the prevention and detection of crime, such persons cannot be said to be police officers under Section 25 of the Evidence Act. What must be remembered is the discussion in Barkat Ram that a “police officer” does not have to be a police officer in the narrow sense of being a person who is a police officer so designated attached to a police station. The broad view has been accepted, and never dissented from, in all the aforesaid judgments, namely, that where a person who is not a police officer properly so-called is invested with all powers of investigation, which culminates in the filing of a police report, such officers can be said to be police officers within the meaning of Section 25 of the Evidence Act, as when they prevent and detect crime, they are in a position to extort confessions, and thus are able to achieve their object through a shortcut method of extracting involuntary confessions.”*

14. In the case of PMLA, the coercive powers which are provided, including the power of arrest under Section 19 without a warrant on a mere subjective satisfaction of the officer concerned, in fact facilitate obtaining of a confession.
15. Further, the power of recording of statements under Section 50(2) and (3) PMLA is for the purposes of ‘investigation’, which as noted in [Para 100 of Tofan Singh](#), establishes a direct relationship with the prohibition in Section 25 of the Evidence Act.
16. The use of the term ‘investigation’ is crucial since most other statutes where officers have been held not to be police officers use the term *enquiry/ inquiry* in the

equivalent provision to Section 50, PMLA [[Appendix 1 @ Pg. 326, Vol. VI](#)]. Therefore, the reasoning that when statements are taken under those statutes, the officer is not ‘investigating’ an offence, cannot be sustained for the PMLA. Pertinently, under the PMLA, the term ‘*investigation*’ has been defined as follows in Section 2(na), which is identical to the definition of ‘investigation’ under Section 2(h) of the Cr.P.C.

Definition of ‘investigation’ under PMLA [ <a href="#">Section 2(na)</a> ]	Definition of ‘investigation’ under Cr.P.C. [ <a href="#">Section 2(h)</a> ]
“investigation” includes all the proceedings under this Act conducted by the Director or by an authority authorised by the Central Government under this Act <u>for the collection of evidence</u> ;	“investigation” includes all the proceedings under this Code <u>for the collection of evidence</u> conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf;

### III. Chargesheet Test

17. The other test that has been laid down to determine whether officers under Special Acts are police officers or not is to examine the nature of powers granted to such officers under the relevant Special Act, and particularly the power to file a charge sheet/ final report under Section 173 Cr.P.C.

- (i) This test was first considered in *Raja Ram Jaiswal* [[@ Pg.15, Vol.V](#)], and noted in *Tofan Singh* [[@ Para 99 @ Pg.222-224, Vol.II](#)].
- (ii) This test was further considered in *Badaku Joti Savant vs. State of Mysore*, reported in AIR 1966 SC 1746 [5 Judges] [[@ Pg.39, Vol.V](#)], and noted in *Tofan Singh* [[@ Paras 109-110 @ Pg.227-228, Vol.II](#)].
- (iii) This test was also considered and approved in *Ramesh Chandra Mehta vs. State of West Bengal*, reported in AIR 1970 SC 940 [5 Judges] [[@ Pg.44, Vol.V](#)], and noted in *Tofan Singh* [[@ Paras 112-113 @ Pg.228-229, Vol.II](#)].
- (iv) It has since been followed in subsequent decisions of the Supreme Court, as noted in [Paras 114 \(@ Pg.229, Vol.II\)](#), [117 \(@ Pg.230, Vol.II\)](#), and [120 \(@ Pg.230-231, Vol.II\)](#) of *Tofan Singh*.
- (v) Finally, in [Para 134 \(@ Pg.236-237, Vol.II\)](#) of *Tofan Singh*, the Supreme Court relies on Section 53 of the NDPS Act, which gives powers to an officer under

the NDPS to file a chargesheet, to hold, amongst other reasons, that the officers under the NDPS Act are police officers.

18. It may be contended by the ED that since under Section 44(1)(b) of the PMLA, the Special Court can take cognizance only on a 'complaint' made by an authority authorized under the PMLA, therefore, this test is not satisfied under the PMLA and hence, the officers under the PMLA are not police officers.
19. However, even if this test is applied to the PMLA, the following submissions will show that the ED officers are police officers.
20. Firstly, when the Act was enacted in 2002 and received the President's assent on 20.01.2003, Section 44(1)(b) of the PMLA read as under: [[original PMLA 2002 @ Pg.1, Vol.I | Relevant @ Pg.17, Vol.I](#)]

Section 44(1)(b) [ <i>as it stood originally</i> ]	Section 44(1)(b) [ <i>post-amendment of 2005</i> ]
(b) a Special Court may, <u>upon perusal of police report</u> of the facts which constitute an offence under this Act <b>or</b> <u>upon a complaint</u> made by an authority authorised in this behalf under this Act take cognizance of the offence for which the accused is committed to it for trial.	(b) a Special Court may, <u>upon a complaint</u> made by an authority authorised in this behalf under this Act take cognizance of the offence for which the accused is committed to it for trial.

21. Therefore, Section 44(1)(b) of the PMLA, as originally enacted, provided for both – filing of a police report as well as a complaint by the authorities under the PMLA.
22. This was since under the Act (as it stood then), both a police officer and an authority under Section 48, PMLA could investigate offences under the PMLA. Therefore, when the police officer investigated, he would have filed a police report and when a Section 48 authority investigated, they would file a complaint. This is substantiated from the following Speech of the then Finance Minister on the Prevention of Money-Laundering (Amendment) Bill, 2005 in the Lok Sabha on 06.05.2005. [[Speech @ Pg.10, Vol.II | Relevant @ Pg.14-15, Vol.II](#)]

*“Sir, the Money-Laundering Act was passed by this House in the year 2002, and number of steps have to be taken to implement it. Sir, two kinds of steps were required. One was to appoint an authority who will gather intelligence and information, and the other was an authority to investigate and prosecute. This Act was made to implement the political declaration adopted by the Special Session of the UN General Assembly in 1999. Section 1 (3) of the Act stipulates that the Act*

*will come into force on such date as the Central Government may by notification appoint. While we were examining the question of notifying the Act, I found that there was certain lacunae in the Act. I regret to say that not enough homework had been done in the definitions, and in the division of responsibility and authority. So, in consultation with the Ministry of Law, we came to the conclusion that these lacunae had to be removed. Broadly, the reasons for the amendment are the following.*

*Under the existing provisions in Section 45 of the Act, every offence is cognizable. If an offence is cognizable, then any police officer in India can arrest an offender without warrant. At the same time, under Section 19 of the Act, only a Director or a Deputy Director or an Assistant Director or any other officer authorised, may arrest an offender. Clearly, there was a conflict between these two provisions. Under Section 45(1)(b) of the Act, the Special Court shall not take cognizance of any offence punishable under Section 4 except upon a complaint made in writing by the Director or any other officer authorised by the Central Government. So, what would happen to an arrest made by any police officer in the case of a cognizable offence? Which is the court that will try the offence? Clearly, there were inconsistencies in these provisions.*

*They have now been removed. We have now enabled only the Director or an officer authorised by him to investigate offences. Of course, we would, by rule, set up a threshold; and, below that threshold, we would allow State police officers also to take action.*

*The second anomaly that we found was that the expression "investigation officer" and the word "investigation" occur in a number of sections but they were not defined in the Act. Consequently, one has to go to the definition in the Criminal Procedure Code and that Code provides only "investigation by a police officer or by an officer authorised by a magistrate". So, clearly, there was a lacuna in not enabling the Director or the Assistant Director under this Act to investigate offences. That has been cured now.*

*[...]*

*What we are doing is, we are inserting a new Section, 2 (n) (a) defining the term, 'investigation'; making an amendment to Sections 28, 29 and 30, dealing with tribunals; amending Sections 44 and 45 of the Act to make the offence non-cognisable so that only the Director could take action; and also making consequential changes in Section 73. I request hon. Members to kindly approve of these amendments so that the Act could be amended quickly and we could bring it into force."*

23. The Speech clearly shows that prior to the 2005 Amendment, a police officer could investigate the offence and file a police report. Post amendment, police officers could not investigate the offence of money laundering under the PMLA, except

unless specifically authorized by the Central Government, in terms of Section 45(1A), PMLA.

24. Accordingly, the following amendments were made in 2005 to the PMLA:
- (i) Amendment of Section 44(1)(b), PMLA - the words “upon perusal of police report of the facts which constitute an offence under this Act or” were omitted from Section 44(1)(b) of the PMLA. [[PMLA 2005 Amendment @ Pg.30, Vol.I | Relevant @ Section 6 @ Pg.31, Vol.I](#)]
  - (ii) Insertion of Section 45(1A) and Section 73(ua), PMLA - By these amendments, the right of police officers to investigate the offence of money laundering under Section 3 PMLA was restricted by insertion of Section 45(1A) and Section 73(ua) in the PMLA. Now, a police officer could not investigate, unless he was authorized by the Central Government by way of a general or special authorization. [[PMLA 2005 Amendment @ Pg.30, Vol.I | Relevant @ Sections 7\(b\) and 8 @ Pg.31, Vol.I](#)]
  - (iii) Deletion of Section 45(1)(a), PMLA which read as follows - “(a) every offence punishable under this Act shall be cognizable;” thereby making the offence of money-laundering under the PMLA a non-cognizable offence. [[PMLA 2005 Amendment @ Pg.30, Vol.I | Relevant @ Section 7\(a\) @ Pg.31, Vol.I](#)]
25. The obvious reason for the amendment in Section 44(1)(b) PMLA appears to be that by the same Amendment Act, the offence under the PMLA was made non-cognizable, as stated above. The reason being that as per the Explanation to Section 2(d) Cr.P.C., when a police officer files a report, after investigation, which discloses the commission of a non-cognizable offence, it shall be deemed to be a complaint and the police officer by whom by such complaint is made shall be deemed to be a complainant.
26. Therefore, once the offence under the PMLA was made non-cognizable, the ED officers or a police officer, could not have filed a final report and could have only filed a complaint, as is evident from the Explanation to Section 2(d) Cr.P.C. Thus, the above amendment to Section 44(1)(b) appears to have been necessitated as a consequence of making the offence under the PMLA non-cognizable.
27. Thus, it is clear that even post 2005, police officers could continue to investigate offences under the PMLA, subject to a general or special order passed by the Central Government.

28. Therefore, post 2005, if an investigation is made by a police officer under the PMLA, in terms of Section 45(1A), he will still file a complaint and not a police report for the purposes of cognizance under Section 44(1)(b) PMLA. Therefore, in view of the special provisions of the PMLA, the aforesaid test is irrelevant and inapplicable.
29. Further, this issue was dealt with in *Para 140 (@ Pg.239-240, Vol.II)* of *Tofan Singh* which considered the similar provisions of the NDPS Act, which reads as under:

*“140. What is clear, therefore, is that the designated officer under Section 53, invested with the powers of an officer in charge of a police station, is to forward a police report stating the particulars that are mentioned in Section 173(2) CrPC. Because of the special provision contained in Section 36-A(1) of the NDPS Act, this police report is not forwarded to a Magistrate, but only to a Special Court under Section 36-A(1)(d). Raj Kumar Karwal, when it states that the designated officer cannot submit a police report under Section 36-A(1)(d), but would have to submit a “complaint” under Section 190 CrPC misses the importance of the non obstante clause contained in Section 36-A(1), which makes it clear that the drill of Section 36-A is to be followed notwithstanding anything contained in Section 2(d) CrPC. It is obvious that Section 36-A(1)(d) is inconsistent with Section 2(d) and Section 190 CrPC and therefore, any complaint that has to be made can only be made under Section 36-A(1)(d) to a Special Court, and not to a Magistrate under Section 190. Shri Lekhi’s argument, that the procedure under Section 190 has been replaced only in part, the police report and complaint procedure under Section 190 not being displaced by Section 36-A(1)(d), cannot be accepted. Section 36-A(1)(d) specifies a scheme which is completely different from that contained in the CrPC. Whereas under Section 190 CrPC it is the Magistrate who takes cognizance of an offence, under Section 36-A(1)(d) it is only a Special Court that takes cognizance of an offence under the NDPS Act. Secondly, the “complaint” referred to in Section 36-A(1)(d) is not a private complaint that is referred to in Section 190(1)(a) CrPC, but can only be by an authorised officer. Thirdly, Section 190(1)(c) CrPC is conspicuous by its absence in Section 36-A(1)(d) of the NDPS Act – the Special Court cannot, upon information received from any person other than a police officer, or upon its own knowledge, take cognizance of an offence under the NDPS Act. Further, a Special Court under Section 36-A is deemed to be a Court of Session, for the applicability of the CrPC, under Section 36-C of the NDPS Act. A Court of Session under Section 193 CrPC cannot take cognizance as a court of original jurisdiction unless the case has been committed to it by a Magistrate. However, under Section 36-A(1)(d) of the NDPS Act, a Special Court may take cognizance of an offence under the NDPS Act without the accused being committed to it for trial. It is obvious, therefore, that in view of Section 36-A(1)(d), nothing contained in Section 190 CrPC can be said to apply to a Special Court taking cognizance of an offence under the NDPS Act.”*

30. The above reasoning of *Para 140* of *Tofan Singh* is also squarely applicable to Section 44 of the PMLA.

Section 36A, NDPS Act	Section 44, PMLA
<p><b>36-A. Offences triable by Special Courts.—</b>(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973—</p> <p>(a) all offences under this Act which are punishable with imprisonment for a term of more than three years shall be triable only by the Special Court constituted for the area in which the offence has been committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the Government;</p> <p>(b) where a person accused of or suspected of the commission of an offence under this Act is forwarded to a Magistrate under sub-section (2) or sub-section (2-A) of Section 167 of the Code of Criminal Procedure, 1973, such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate:</p> <p>Provided that in cases which are triable by the Special Court where such Magistrate considers—</p> <p>(i) when such person is forwarded to him as aforesaid; or</p> <p>(ii) upon or at any time before the expiry of the period of detention authorised by him;</p> <p>that the detention of such person is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;</p> <p>(c) the Special Court may exercise, in relation to the person forwarded to it under clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise under Section 167 of the Code of Criminal Procedure, 1973, in relation to an accused person in such case who has been forwarded to him under that section;</p> <p>(d) a Special Court may, upon perusal of police report of the facts constituting an offence under this Act or upon complaint made by an officer of the Central Government or a State</p>	<p><b>44. Offences triable by Special Courts.—</b>(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—</p> <p>(a) an offence punishable under Section 4 and any scheduled offence connected to the offence under that section shall be triable by the Special Court constituted for the area in which the offence has been committed :</p> <p>Provided that the Special Court, trying a scheduled offence before the commencement of this Act, shall continue to try such scheduled offence; or]</p> <p>(b) a Special Court may, upon a complaint made by an authority authorised in this behalf under this Act take cognizance of offence under Section 3, without the accused being committed to it for trial] :</p> <p>Provided that after conclusion of investigation, if no offence of moneylaundering is made out requiring filing of such complaint, the said authority shall submit a closure report before the Special Court; or]</p> <p>(c) if the court which has taken cognizance of the scheduled offence is other than the Special Court which has taken cognizance of the complaint of the offence of money-laundering under sub-clause (b), it shall, on an application by the authority authorised to file a complaint under this Act, commit the case relating to the scheduled offence to the Special Court and the Special Court shall, on receipt of such case proceed to deal with it from the stage at which it is committed.</p> <p>(d) a Special Court while trying the scheduled offence or the offence of money-laundering shall hold trial in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of</p>

Section 36A, NDPS Act	Section 44, PMLA
<p>Government authorised in his behalf, take cognizance of that offence without the accused being committed to it for trial.</p> <p>(2) When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act with which the accused may, under the Code of Criminal Procedure, 1973, be charged at the same trial.</p> <p>(3) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under Section 439 of the Code of Criminal Procedure, 1973, and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to "Magistrate" in that section included also a reference to a "Special Court" constituted under Section 36.</p> <p>(4) In respect of persons accused of an offence punishable under Section 19 or Section 24 or Section 27-A or for offences involving commercial quantity the references in sub-section (2) of Section 167 of the Code of Criminal Procedure, 1973 thereof to "ninety days", where they occur, shall be construed as reference to "one hundred and eighty days":</p> <p>Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days.</p> <p>(5) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the offences punishable under this Act with imprisonment for a term of not more than three years may be tried summarily.</p>	<p>1974), as it applies to a trial before a Court of Session.]</p> <p><i>Explanation.</i>—For the removal of doubts, it is clarified that,—</p> <p>(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;</p> <p>(ii) the complaint shall be deemed to include any subsequent complaint in respect of further investigation that may be conducted to bring any further evidence, oral or documentary, against any accused person involved in respect of the offence, for which complaint has already been filed, whether named in the original complaint or not.]</p> <p>(2) Nothing contained in this section shall be deemed to affect the special powers of the High Court regard bail under Section 439 of the Code of Criminal Procedure, 1973 (2 of 1974) and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to "Magistrate" in that section includes also a reference to a "Special Court" designated under Section 43.</p>

- (i) As can be seen from the above Table, Section 44 PMLA also starts with a non-obstante clause (similar to Section 36A(1), NDPS Act). Consequently, the cognizance of the offence of money laundering is taken by a Special Judge and not by a Magistrate.
- (ii) The '*complaint*' referred to in Section 44(1)(b) is not a private complaint that is referred to in section 190(1)(a) of the Cr.P.C., but can only be by an authorised officer under Section 48 PMLA or a police officer under Section 45(1A) PMLA.

- (iii) Further, a Special Court under Section 44 is deemed to be a Court of Session, for the applicability of the Cr.P.C., under Section 44(1)(d) of the PMLA. A Court of Session under Section 193 of the Cr.P.C. cannot take cognizance as a Court of original jurisdiction unless the case has been committed to it by a Magistrate. However, under section 44(1)(b) of the PMLA, a Special Court may take cognizance of an offence under the PMLA without the accused being committed to it for trial.
31. Another argument which arises from Section 45(1A), PMLA is that, under the Act, both an Authority defined under Section 48, PMLA as well as a Police Officer can investigate offences under Section 3, PMLA. Prior to the amendments in 2005, as stated above, a Police Officer could investigate offences under the PMLA, without specific authorization by the Central Government but after insertion of Section 45(1A), a specific authorization was required.
32. If the Authority under Section 48 PMLA is not held to be a police officer or if the same protections are not held to be available in such investigations, there will be two different standards which will apply. That is, if the police officer investigates along with the Section 48 authority or on his own, the protection under Section 25 & 26, IEA will inure to the benefit of the Accused person, whereas, when a Section 48 authority investigates, such benefit will not be available.
33. Further, there is no rationale or basis provided under the Act, as to when investigation will be carried out by a police officer either singularly or along with the Section 48 Authority. This procedure (or lack thereof) clearly violates Article 14 of the Constitution. It could also lead to absurd situations such as:

**Illustration:** "A" is being investigated for an offence under the PMLA by a Section 48 Authority of the ED ["B"] and a Police Officer ["C"]. A is summoned for questioning by C and placed in a room, where A knows he is being monitored by C. Subsequently, B enters the room and directs A to record his confessional statement under Section 50, PMLA. In such a situation, it cannot be said that simply because it was B and not C sitting in the room at the time of the formal recording of the confession, such a confession can be admissible.

*Complaint v/s Chargesheet - Merely a nomenclature and not determinative of whether an officer is a police officer or not.*

34. In any event, the 'complaint' that is filed by the ED officers is practically a final report under Section 173 Cr.P.C. in as much as:
- (i) the complaint is also filed after a full investigation by the ED officer or a Police Officer [if specifically authorized under Section 45(1A)] as is the case when a police officer investigates and files a final report under Section 173 Cr.P.C.;
  - (ii) the definition of 'investigation' under the Cr.P.C. is identical to the definition of 'investigation' under the PMLA, both of which are '*proceedings for collection of evidence*'; [refer **Section 2(h) Cr.P.C. and Section 2(na) PMLA**]. Therefore, the procedure and events antecedent to the filing of the Complaint are the same i.e. the same investigation as defined under the Cr.P.C. or the PMLA.
  - (iii) the complaint is accompanied by a list of witnesses, statements recorded and the documents relied upon by the complainant ED in support of its case. Same is the position in the case of a final report, which is also accompanied by a list of witnesses, statements recorded u/s 161 and 164 Cr.P.C. and relied upon documents.
  - (iv) the complaint filed by the ED is unlike a private complaint in as much as:
    - (a) the complainant ED and the witnesses cited in the complaint are exempt from examination under Section 200 Cr.P.C. in terms of sub-clause (a) of the First Proviso to Section 200 Cr.P.C. since the complainant is a public servant acting in the discharge of his official duties;
    - (b) the complaint is exempt from the rigours of a pre-summoning inquiry or investigation under Section 202 Cr.P.C. since the offence of money laundering is exclusively triable a Court of Sessions - *see* sub-clause (a) to the Proviso to Section 202 Cr.P.C. r/w Section 46(1) of the PMLA;
  - (v) Pursuant to issuance of process under section 204 Cr.P.C., the stage of supply of documents to the accused under Section 208 Cr.P.C. is the same as under Section 207 Cr.P.C. for a case instituted on a police report;
  - (vi) Thereafter, the procedure for conduct of the prosecution/ trial under Chapter XVIII of the Cr.P.C. (*Trial before a Court of Session*) is the same for a case instituted on a complaint as well as a police report.

- (vii) In both cases i.e. complaint filed by ED and police report filed by a police officer, the trial is conducted by a Public Prosecutor.
- (viii) In both cases, the Special Court will be empowered to examine the Accused under Section 313, Cr.P.C.
- (ix) the ED officers have also been vested with two additional powers unlike other special statutes *viz.* **(a)** to file closure reports [*Proviso to Section 44(1)(b) PMLA*], which is akin to the Cr.P.C. where a closure report is filed under the same provision as that for filing of a chargesheet i.e. Section 173(2) Cr.P.C.; and **(b)** to carry out further investigation [*Explanation (ii) to Section 44(1) PMLA*] which is also a power vested in police officers under Section 173(8) Cr.P.C.

35. Therefore, from the above, it is clear that there is no material difference in the 'complaint' filed by the ED officers *vis-à-vis* a final report under Section 173 Cr.P.C. and the procedure for prosecution/ trial upon filing of 'complaint' is the same as for a case instituted on a police report. Therefore, it is only a question of nomenclature given to the culmination of the investigation by the ED and therefore, the nomenclature can never be determinative of whether the ED officers are police officers or not.
36. Even otherwise, if the ED's argument is accepted, it would result in manifest arbitrariness being violative of Article 14 since if the investigation is carried out by a police officer under Section 45(1A) PMLA, the protections/ safeguards under Section 161(2) Cr.P.C., Section 162(1) Cr.P.C., Sections 25 and 26 of the Evidence Act would be available whereas if investigation is carried out by the authorized officers under the PMLA (who are contended to not be police officers), the very same safeguards would not be available to the accused.
37. Therefore, officers authorized under the PMLA are police officers.

**Drawn By:**

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**APPENDIX-1 - Comparative Table of Preamble of various Acts**

<i>PMLA, 2002</i>	<i>NDPS Act, 1985</i>	<i>Sea Customs Act, 1878</i> [*repealed]	<i>Land Customs Act, 1924</i> [*repealed]	<i>Bihar and Orrisa Excise Act, 1915</i>	<i>Central Excise Act, 1944</i>	<i>Customs Act, 1962</i>	<i>Railway Property (Unlawful Possession) Act, 1966</i>	<i>Income Tax Act, 1961</i>	<i>Central Goods and Service Tax Act, 2017</i>
An Act to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto. [...]	An Act to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances 1 [, to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Conventions on Narcotic Drugs and Psychotropic Substances] and for matters connected therewith;	An Act to consolidate and amend the law relating to the levy of Sea Customs-duties.  Whereas it is expedient to consolidate and amend the law relating to the levy of Sea Customs-duties;	An Act to consolidate, amend and extend the law relating to the levy of duties of customs on articles imported or exported by land from or to territory outside India.  Whereas it is expedient to consolidate, amend and extend the law relating to the levy of duties of customs on articles imported or exported by land from or to territory outside India;	An Act to amend and re-enact the Excise Law in the Province of Bihar and Orrisa. Whereas it is expedient to amend and re-enact the law in the Province of Bihar and Orrisa relating to the import, export, transport, manufacture, possession and sale of certain kinds of liquor and intoxicating drugs. And whereas the previous sanction of the Governor-General has been obtained, under Section 5 of the Indian Councils Act, 1892, to the passing of this Act;	An Act to consolidate and amend the law relating to central duties of excise. Whereas it is expedient to consolidate and amend the law relating to central duties of excise on goods manufactured or produced in certain parts of India;	An Act to consolidate and amend the law relating to customs.	An Act to consolidate and amend the law relating to unlawful possession of railway property.	An Act to consolidate and amend the law relating to Income Tax and Super Tax.	An Act to make a provision for levy and collection of tax on intra-State supply of goods or services or both by the Central Government and for matters connected therewith or incidental thereto.