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 THE INTERPRETATION AND CONSTITUTIONALITY OF S. 50, PMLA

1. The Prevention of Money Laundering Act, 2002 (***"PMLA"***) insofar as it allows for an officer of the ED to summon any person to record his statement during the course of an investigation [***S. 50(2), PMLA***], require the said person to tell the truth in such statement [***S. 50(3), PMLA***] and to sign the said statement [***S. 63(2)(b), PMLA***], under the threat of penalty [***S. 63(2), PMLA***] or arrest [***S. 19, PMLA***] is violative of Article 20(3) and 21 of the Constitution.

2. To appreciate the draconian nature and unconstitutionality of the provisions u/s 50 r/w s. 63(2) PMLA, it is important to contrast the same with the safeguards for recording of statements by the Police under the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872 which is the procedure established by law, consistent with the constitutional guarantee against self-incrimination and right to silence under Article 20(3) and right to fair trial under Article 21.

3. Under the Cr.P.C., a person may be summoned to appear before a police officer during an investigation in two circumstances. In case the person is being summoned as a witness, the summons will be issued u/s 160, Cr.P.C. However, in case the person is being summoned in his position as an accused or a suspect under any offence, he will be summoned u/s 41A, Cr.P.C. The Cr.P.C. thus recognizes the constitutional importance of informing a person of the position in which she is being summoned.

S. 160, Cr.P.C	***S. 41A, Cr.P.C.***
160. Police officer's power to require attendance of witnesses.—	**41A. Notice of appearance before police officer.—**
(*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**	(*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,**

information given or otherwise, appears to be acquainted with the facts and circumstances of the case; and such person shall attend as so required. Provided that no male person under the age of fifteen years or above the age of sixty-five years or a woman or a mentally or physically disabled person shall be required to attend at any place other than the place in which such male person or woman resides. (*2*) The State Government may, by rules made in this behalf, provide for the payment by the police officer of the reasonable expenses of every person, attending under sub-section (*1*) at any place other than his residence.	**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**. (*2*) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice. (*3*) **Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested**. (*4*) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent

4. In either case, the statement of an accused or a witness will be recorded by the police u/s 161, Cr.P.C. This position was clarified by this Hon'ble Court in the decision of ***Nandini Satpathy v. P.L. Dani, (1978) 2 SCC 424, ¶¶35-36 [Vol. 6, Pg. 149; Relevant at Pg. 168-169]***

> *"35. We will now answer the questions suggested at the beginning and advert to the decisions of our Court which set the tone and temper of the 'silence' clause and bind us willy-nilly**. We have earlier explained why we regard Section 161(2) as a sort of parliamentary commentary on Article 20(3).** So, the first point to decide is whether the police have power under Sections 160 and 161 of the Cr. P. C. to question a person who, then was or, in the future may incarnate as, an accused person. **The Privy Council and this Court have held that the scope of Section 161 does include actual accused and suspects and we deferentially agree without repeating the detailed reasons urged before us by Counsel.***

36. The Privy Council, in Pakala Narayana Swami's case reasoned :

If one had to guess at the intention of the Legislature in framing a section in the words used, one would suppose that they had in mind to encourage the free disclosure of information or to protect the person making the statement from a supposed unreliability of police testimony as to alleged statements or both. In any case the reasons would apply as might be thought a fortiori to an alleged statement made by a person ultimately accused. But in truth when the meaning of words is plain it is not the duty of the Courts to busy themselves with supposed intentions.

[.....] ***They reached the conclusion that 'any person' in Section 161 Cr. P. C., would include persons then or ultimately accused****. The view was approved in Mahabir Mandal's case. We hold that 'any person supposed to be acquainted with the facts and circumstances of the case' includes an accused person who fills that role because the police suppose him to have committed the crime and must, therefore, be familiar with the facts. The supposition may later prove a fiction but that does not repel the section. Nor does the marginal note 'examination of witnesses by police' clinch the matter. A marginal note clears ambiguity but does not control meaning. Moreover, the suppositious accused figures functionally as a witness. 'To be a witness', from a functional angle, is to impart knowledge in respect of a relevant fact, and that is precisely the purpose of questioning the accused under Section 161, Cr. P. C.* ***The dichotomy between 'witnesses' and 'accused' used as terms of art, does not hold good here. The amendment, by Act XV of 1941, of Section 162(2) of the Cr. P. C. is a legislative acceptance of the Pakala Narayana Swami reasoning and guards against a possible repercussion of that ruling. The appellant squarely fell within the interrogational ring. To hold otherwise is to hold up investigative exercise, since questioning suspects is desirable for detection of crime and even protection of the accused***."

5. Even when an accused is summoned under s. 160, Cr.P.C and her statement is recorded under s. 161, Cr.P.C. a further protection has been afforded to in the form of s. 161(2), Cr.P.C., which reads as follows,

> *"(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, **other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture**."*

6. Notably, being mindful of the circumstances in which statements u/s 161, Cr.P.C. will be recorded, in particular, the threat of coercion and influence by the investigating officer, no statement recorded u/s 161, Cr.P.C. is admissible as evidence in the trial of any offence.

7. Such an exclusion is made explicit under s. 162, Cr.P.C. which reads as follows,

> ***162. Statements to police not to be signed : Use of statements in evidence**.—(1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, **be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made**:*
> *Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, **by the prosecution, to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination**.*

8. A statement made to a police officer can, therefore, only be used for the purposes of contradiction in accordance with the stipulations of s. 145, Indian Evidence Act, 1872. The said section reads as follows,

> "*145. Cross-examination as to previous statements in writing.—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved**; but, if it is intended to contradict him by the writing**, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him*."

9. This Court has on multiple occasions clarified that the use of a statement u/s 161, Cr.P.C. can only be for the purposes of proving a contradiction between the testimony in Court and the earlier statement given by the witness to the police. Notably, proof of the contradiction is materially different from and will not amount to the proof of the matter asserted [***Tahsildar Singh & Anr. v. State of Uttar Pradesh, AIR 1959 SC 1012, ¶¶16-17, 42, Vol. 10 Pg. 1, Relevant at Pg. 9,10,20; V.K. Mishra v. State of Uttarakhand, (2015) 9 SCC 588, ¶¶15-20, Vol. 10, Pg. 26, Relevant at Pg. 36-38***]. In other words, the portion of the S. 161 statement, brought on record as a contradiction, itself does not become evidence and cannot be read against the accused. The effect of the proof of the contradiction shall be only to cast doubt or discredit the testimony of the witness who is testifying before Court. This position is supported by a recent judgment of this Hon'ble Court in ***Somasundaram v. State, (2020) 7 SCC 722, ¶24, Vol. 10, Pg. 47, Relevant at Pg. 73]***, where it was observed,

> "*24. The learned counsel for A-3 relied upon the following decisions. In Baldev Singh v. State of Punjab [Baldev Singh v. State of Punjab, (1990) 4 SCC 692 : 1991 SCC (Cri) 61] , this Court noted that the High Court had fallen into error in relying upon the statement of the witness under Section 161 CrPC as well as on the FIR regarding identification of the accused in a case where, in his cross-examination in the court, he deposed that he could not, due to darkness, identify the culprits.* ***The Court emphasised that the statement under Section 161 CrPC is not to be used for any purpose except to contradict the witness in the manner provided in Section 162 CrPC****. Obviously, this judgment is invoked against the Court relying upon the evidence of PW 19."*

10. The legislative intent behind the bar under s. 162, Cr.P.C. has been explained by this Hon'ble Court in ***Tahsildar Singh (supra)*** in the following words,

[Vol. 10, Page. 9] "16. *The object of the main section as the history of its legislation shows and the decided cases indicate is to impose a general bar against the use of statement made before the police and the enacting clause in clear terms says that no statement made by any person to a police officer or any record thereof, or any part of such statement or record, be used for any purpose. The words are clear and unambiguous. The proviso engrafts an exception on the general prohibition and that is, the said statement in writing may be used to contradict a witness in the manner provided by Section 145 of the Evidence Act.* ***We have already noticed from the history of the section that the enacting clause was mainly intended to protect the interests of accused. At the state of investigation, statements of witnesses are taken in a haphazard manner. The police officer in the course of his investigation finds himself more often in the midst of an excited crowd and babel of voices raised all round****. In such an atmosphere, unlike that in a court of law, he is expected to hear the statements of witnesses and record separately the statement of each one of them. Generally he records only a summary of the laments which appear to him to be relevant. These statements are, therefore only a summary of what a witness says and very often perfunctory.* ***Indeed, in view of the aforesaid facts, there is a statutory prohibition against police officers taking the signature of the person making the statement, indicating thereby that the statement is not intended to be binding on the witness or an assurance by him that it is a correct statement****."*

[Vol. 10, Pg. 10] "17. ***At the same time, it being the earliest record of the statement of a witness soon after the incident, any contradiction found therein would be of immense help to an accused to discredit the testimony of a witness making the statement****. The section was, therefore, conceived in an attempt to find a happy via media, namely, while it enacts an absolute bar against the statement made before a police officer being used for any purpose whatsoever,* ***it enables the accused to rely upon it for a limited purpose of contradicting a witness in the manner provided by Section 145 of the Evidence***

Act by drawing his attention to parts of the statement intended for contradiction. *It cannot be used for corroboration of a prosecution or a defence witness or even a court witness. Nor can it be used for contradicting a defence or a court witness.* ***Shortly stated, there is a general bar against its use subject to a limited exception in the interest of the accused, and the exception cannot obviously be used to cross the bar****."*

[Vol. 10, Pg. 20] *"**44.** The legislature has, however, put restrictions upon the use of such statements at the inquiry or trial of the offence. The first restriction is that no statement made by any person to a police officer, if reduced into writing, be signed by the person making it.* ***The intention behind the provision is easy to understand. The legislature probably thought that the making of statements by witnesses might be thwarted, if the witnesses were led to believe that because they had signed the statements they were bound by them, and that whether the statements were true or not, they must continue to stand by them. The legislature next provides that a statement, however recorded, or any part of it shall not be used for any purpose (save as provided in the section) at the inquiry or trial in respect of any offence under investigation at the time such statement is made. The object here is not easily discernible, but perhaps is to discourage overzealous police officers who might otherwise exert themselves to improve the statements made before them****. The Privy Council considered the intention to be:*

"If one had to guess at the intention of the legislature in framing a section in the words used, one would suppose that they had in mind to encourage the free disclosure of the information or to protect the person making the statement from a supposed unreliability of police testimony as to alleged statements or both."

It is possible that the legislature had also in mind that the use of statements made under the influence of the investigating agency might, unless restricted to a use for the benefit of the accused, result in considerable prejudice to him. But whatever the intention which led to the imposition of the restrictions, it is manifest that the statements, however recorded, cannot be

***used except to the extent allowed by the section. The prohibition contained in the words "any purpose" is otherwise absolute**."*

11. It follows from the above position that under the Cr.P.C., no statement made by any person (accused, witness or suspect) to a police officer can be used as evidence in the trial against the accused as to the truth of the matter stated therein. Further, no person shall be required to answer questions which would tend to expose her to criminal charge or a penalty or forfeiture.

12. This position is significantly departed from under the PMLA, where any person may be summoned under s. 50, PMLA and compelled to state the truth, or such version of the truth as may be desired by the Investigating Officer and sign such statement under threat of legal sanction and even arrest. Such a situation also allows for the possibility to allow for Officers to implicate an accused person by procuring signed statements taken from witnesses under the threat of legal penalty.

13. Apart from the above scheme of the Cr.P.C, further protections have been envisaged by the legislature in the Indian Evidence Act. S. 25 of the Indian Evidence Act, 1872 reads as under,

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

This protective provision existed even prior to the protections under s. 161(2), Cr.P.C. being introduced in 1941.

14. To appreciate the constitutional concerns behind the insertion of s. 25, IEA, it is necessary to examine the legislative history as well as the judicial treatment of the said section;

a. The earliest protections against confessions made to police officers were introduced in the Criminal Procedure Code, 1861 pursuant to the first report of the Indian Law Commission. This Report based its decision on the evidence placed before the ***Parliamentary Committee on Indian Affairs (1852 & 1853)*** which showed gross abuse of power by police officers in India (Bengal), particularly for the purposes of extracting confessions [***185th Law Commission Report on the Indian Evidence Act, 1872 (2003), Vol. 10, Pg. 196, Relevant at Pg. 210-211].***

b. The 185th Law Commission Report, 2003 which was tasked with carrying out a comprehensive review of the Indian Evidence Act, 1872, dealt extensively with the legislative history of s. 25, observing in this regard [***Vol. 10, Pg. 210***], as follows,

> "*We may now go back and refer to the First Report of the Indian Law Commission given over 150 years ago.* ***The Report said that the evidence of the Parliamentary Committee on Indian Affairs showed gross abuse of powers by the police officers in India leading to oppression or extortions***. *They also said:*
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> > *"A police officer, on receiving intimation of the occurrence of a dacoity or other offence of a serious character, failing to discover the perpetrators of the offence, often endeavours to secure himself against any charge of supineness or neglect by getting up a case against parties whose circumstances or characters are such as are likely to obtain credit for an accusation of the kind against them. This is not infrequently done by extorting or fabricating false confession; and, when this step is once taken, there is of course impunity for real offenders, and a great encouragement to crime… We are persuaded that any provision to correct the exercise of this power by the police will be futile; and we accordingly propose to remedy the evil…"*
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> *The question is whether this comment which was the basis for introducing sections 25 and 26 in the Evidence Act in 1872 is no longer relevant now in the year 2003.*" (emphasis supplied)

c. This protection was later transplanted to the Indian Evidence Act, 1872, again keeping in mind that the purpose for the same was to protect persons from the apprehension that a police officer who has large powers over the accused persons may unwillingly extort false confessions.

d. Therefore, the prohibition under Section 25, IEA is to prevent the police from coercing confession from accused persons or using any of the circumstances under Section 24, IEA to extract such confessions. [***State of Punjab v. Barkat Ram, (1962) 3 SCR 338, ¶33, Vol. 5, Pg. 1, Relevant at Pg. 8-9***]. This Court observed,

> *"33. That section was taken out of the Criminal Procedure Code, 1861 (Act 25 of 1861) and inserted in the Evidence Act of 1872 as Section 25.* ***Stephen in his Introduction to the Evidence Act states at p. 171 thus: "I may observe, upon the provisions relating to them, that Sections 25, 26 and 27 were transferred to the Evidence Act verbatim from the Code of Criminal Procedure, Act 25 of 1861. They differ widely from the law of England, and were inserted in the Act of 1861 in order to prevent the practice of torture by the police for the purpose of extracting confessions from persons in their custody.****"*
> *So too, Mahmood, J., in Queen Empress v. Babulal gave the following reasons for the enactment of Section 25 of the Evidence Act at p. 523: "...* ***the legislature had in view the malpractices of police officers in extorting confessions from accused persons in order to gain credit by securing convictions, and that those malpractices went to the length of positive torture****; nor do I doubt that the legislature, in laying down such stringent Rules, regarded the evidence of police officers as untrustworthy, and the object of the Rules was to put a stop to the extortion of confession, by taking away from the police officers the advantage of proving such extorted confessions during the trial of accused persons."*
> ***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****."*

e. There is therefore a presumption that a confession made to a police officer has been obtained through force or coercion. In ***Balkishan A. Devidayal v. State of Maharashtra, (1980) 4 SCC 600 ¶14 [Vol. 5, Pg. 72, Relevant at Pg. 78], this Hon'ble Court observed,***

"14. As explained by this Court in Ariel v. State, ***the policy behind Sections 25 and 26, Evidence Act is to make a substantive rule of law that confessions whenever and wherever made to the police shall be presumed to have been obtained under the circumstances mentioned in Section 24*** *and, therefore, inadmissible except so far as is provided in Section 27, of that Act."*

f. Courts as well as the Law Commission have repeatedly recognised that the circumstances which led to the enactment of the protection under Section 25, IEA continue to persist insofar as custodial torture and police abuse are still common across the Country. In ***Nandini Satpathy (Supra) ¶¶26-27, Vol. 6, Pg. 149, Relevant at Pg. 161-162,*** this Court observed**,**

> ***"****26.* ***Two important considerations must be placed at the forefront before sizing up the importance and impregnability of the anti-self-incrimination guarantee. The first is that we cannot afford to write off the fear of police torture leading to forced self-incrimination as a thing of the past. Recent Indian history does not permit it, contemporary world history does not condone it****. A recent article entitled 'Minds Behind Bars', published in the December, 1977 issue of the Listener, tells an awesome story:*
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> *The technology of torture all over the world is growing ever more sophisticated - new devices can destroy a prisoner's will in a matter of hours – but leave no visible marks or signs of brutality. And government-inflicted terror has evolved its own dark sub-culture. All over the world, torturers seem to feel a desire to appear respectable to their victims . . . . There is an endlessly inventive list of new methods of inflicting pain and suffering on fellow human beings that quickly cross continents and ideological barriers through some kind of international secret-police network*
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> *. . .What is encouraging in all this dark picture is that we feel that public opinion in several countries is much more aware of our general line than before. And that is positive. I think, in the long run, governments can't ignore that. We are also encouraged by the fact that, today, human rights are discussed between governments - they are now on the international political agenda.*

> *But, in the end, what matters is the pain and suffering the individual endures in police station or cell*
> ***27. Many police officers, Indian and foreign, may be perfect gentlemen, many police stations, here and elsewhere, may be wholesome. Even so, the law is made for the generality and Gresham's Law does not spare the police force****."*

g. Similarly, after a detailed discussion on the state of custodial torture in the country, the Law Commission [***at Vol. 10, Pg. 216***] concludes as follows,

> *"We have referred to the above judgment in extenso for the purpose of highlighting that what the First Report of the Law Commission stated more than 150 years ago holds good today and, in fact, the situation has vastly deteriorated."*

h. In fact, the recommendations given by 3 Law Commission Reports [***14th, 48th and 69th Report***] to amend this position inter alia by inserting a new Section 26A into the Indian Evidence Act, 1872 to allow for confessions made to police officers to be admissible in certain cases were soundly rejected by the 185th Law Commission Report which specifically highlighted that the circumstances leading to the insertion of Section 25 and 26 were still prevalent in the Country [***Vol. 10, Pg. 196, Relevant at Pg. 216***]. The relevant discussion in this regard, reads as follows,

> [***Vol. 10, Pg. 207***] "***In paras 11.17 and 11.18, the 69th Report suggested that under a new section 26A all confessions made to senior police officers should be made admissible subject to certain conditions.*** *We shall presently be referring to the said conditions. Question is whether this recommendation for a new sec. 26A should be accepted in the light of what is happening in police stations today*"
> [***Vol. 10, Pg. 209***] "***The recommendation in the 69th Report made for insertion of sec. 26A is intended to make confessions to senior police officers, subject to some conditions, admissible, in all cases. (see paras 11.16 to 11.18 of the Report). The Commission there referred to the 48th Report of the Law Commission relating to Criminal Procedure Code, 1898 (pages 6-7, paras 21-22) where the Commission had made a similar recommendation. They were accepted in***

the 69th Report. Reference was made to the safeguards imposed in the 48th Report and it was stated that if those safeguards are followed, the confession should be admissible and that the prohibition against admissibility in sections 25 and 26 should not apply."

[***Vol. 10, Pg. 211***] "***The question is whether this comment which was the basis for introducing sections 25 and 26 in the Evidence Act in 1872 is no longer relevant now in the year 2003***.

In the last three decades,- as revealed from the media and innumerable law reports of the Supreme Court and High Courts, police conduct appears to have deteriorated rather than improving from what it was years ago. ***The Law Commission in its 113th Report had in fact suggested incorporation of sec. 114B in the Evidence Act raising a presumption against police officers in case of custodial deaths of prisoners. The judgments of the Supreme Court on police violence are in good number, at least forty to fifty in the last three decades****. We shall, however, refer to the most important of these judgments."*

[***Vol. 10, Pg. 216***] ***We have referred to the above judgment in extenso for the purpose of highlighting that what the First Report of the Law Commission stated more than 150 years ago holds good today and, in fact, the situation has vastly deteriorated***.

Today the Supreme Court has also developed a jurisprudence to award compensation against the State for the offensive acts of the police officers. In some cases, criminal complaints were directed to be filed against senior police officers as well.

The experience of the Law Commission in seminars held in relation to the 'Law of Arrest' during the year 2000 showed that several senior police officers suggested that the suspicion and stigma against arrest by police or in regard to police investigation while in custody is no longer warranted. The plea was that arrest should be allowed to be made on mere suspicion and that confessions to police must be made admissible. ***These suggestions, in our view, do not take into consideration the ground realities today as disclosed by the press and Court judgments as to what is happening inside a police station and***

these suggestions overlook the importance of clause (3) of Art. 20 and Art. 21."

i. The Law Commission observed that if confessions to police are made admissible in all offences, it will in fact be a violation of Articles 20 and 21 [***185th Report of the Law Commission, Pg. 132-133, Vol. 10, Pg. 196, Relevant at Pg. 220-221***]. It was noted as follows,

> "***But, the effect of sec. 26A as proposed in the 69th Report, would be to bring in drastic provisions which make confessions to senior police officers admissible, in every case, and even if the case does not relate to terrorism falling under TADA***. *If, according to the Supreme Court, the case of terrorists stands on a separate footing where confessions made before senior officers could be made admissible, that principle, as already stated, if extended to all criminal cases, would, in our view, violate Art. 14 as well and will amount to a serious encroachment into Art. 21 of the Constitution of India.* ***Once this part of the law is now settled by judgments of the Supreme Court, namely, that such confessions to senior police officers could be made admissible only in case of grave offences like those committed by terrorists, a provision like the one proposed in sec. 26A, if made applicable to all offences – would, in our view, be violative of both Art. 14 and Art. 21 of the Constitution of India, as to a fair trial***."

j. From the above, it is evident that the rule embodied by Section 25, as correctly identified in ***Raja Ram Jaiswal v. State of Bihar, (1964) 2 SCR 752 ¶10*** [***Vol. 5, Pg. 15, Relevant at Pg. 19***] is that any person who is given the powers that would raise a substantial link with the rationale underlying the prohibition of Section 25, IEA would be a police officer and any confession made to any such person ought not to be admissible. The Court observed,

> "*10. [....] In our judgment what is pertinent to bear in mind for the purpose of determining as to who can be regarded a "police officer" for the purpose of this provision is not the totality of the powers which an officer enjoys but the kind of powers which the law enables him to exercise. 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***."

15. Under the current scheme of the PMLA, an officer of the ED can legally require the accused to sign a confessional statement, failing which he may be prosecuted under s. 63(2)(a)-(b). It is important to note that statements under s. 50, PMLA are also regularly recorded by officers of the Enforcement Directorate when persons are in custody of the Enforcement Directorate or in judicial custody. Such a scheme also fails to recognise the threat and coercion that are bound to exist when a person is either interrogated by or in the custody of the ED, the said situation, being nothing more than an interrogation by or in the custody of a police official.

16. The above statutory safeguards in the Cr.P.C. and the Indian Evidence Act, which constitute the procedure established by law are also in line with the fundamental right under Article 20(3) which is interlinked intrinsically with the right to a fair trial under Article 21. This interlinking has been recognised by this Hon'ble Court in the case of ***Selvi v. State of Karnataka, (2010) 7 SCC 263 ¶¶ 87-89 Vol. 6, Pg. 28, Relevant at Pg. 80***, where the Court observed,

*"87. **The interrelationship between the "right against self-incrimination" and the "right to fair trial" has been recognised in most jurisdictions as well as international human rights instruments**. For example, the US Constitution incorporates the "privilege against self-incrimination" in the text of its Fifth Amendment. The meaning and scope of this privilege has been judicially moulded by*

recognising its interrelationship with other constitutional rights such as the protection against "unreasonable search and seizure" (Fourth Amendment) and the guarantee of "due process of law" (Fourteenth Amendment). In the International Covenant on Civil and Political Rights, 1966, Article 14(3)(g) enumerates the minimum guarantees that are to be accorded during a trial and states that everyone has a right not to be compelled to testify against himself or to confess guilt. In the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, Article 6(1) states that every person charged with an offence has a right to a fair trial and Article 6(2) provides that "everybody charged with a criminal offence shall be presumed innocent until proved guilty according to law". The guarantee of "presumption of innocence" bears a direct link to the "right against self-incrimination" since compelling the accused person to testify would place the burden of proving innocence on the accused instead of requiring the prosecution to prove guilt.

88. ***In the Indian context, Article 20(3) should be construed with due regard for the interrelationship between rights, since this approach was recognised in Maneka Gandhi case. Hence, we must examine the "right against self-incrimination" in respect of its relationship with the multiple dimensions of "personal liberty" under Article 21, which include guarantees such as the "right to fair trial" and "substantive due process****".*

17. The right to a fair trial being a facet of the Right to Life and Liberty under Article 21 can only be violated by procedure established by law, which procedure must be just, fair, and reasonable.

18. It is in this vein and keeping in mind the scheme of the Constitution under Article 20(3) and Article 21, that the safeguards against self-incrimination exist under Section 161, 162, 313 and 315 and other provisions of the Cr.P.C. Similar safeguards also exist under Section 25 and 26, Indian Evidence Act, 1872, wherein confessions made to Police Officers cannot be proved against their makers. In ***Selvi (supra) ¶141 [Vol. 6, Pg. 28, Relevant at Pg. 102]***, this Hon'ble Court observed,

> *"141. At this juncture, it must be reiterated that Indian law incorporates the "rule against adverse inferences from silence" which is operative at the trial stage.* ***As mentioned earlier, this position is embodied in a conjunctive reading of Article 20(3) of the Constitution and Sections 161(2), 313(3) and proviso (b) of Section 315(1) CrPC.*** *The gist of this position is that even though an accused is a competent witness in his/her own trial, he/she cannot be compelled to answer questions that could expose him/her to incrimination and the trial Judge cannot draw adverse inferences from the refusal to do so. This position is cemented by prohibiting any of the parties from commenting on the failure of the accused to give evidence."*

This reading was also supported by the ***180th Law Commission Report (Vol. 10, Pg. 149, Relevant at Pg. 189)*** which noted as follows,

> ***"In other words, sec. 161, 313 and 315 raise a presumption against guilt and in favour of innocence, grant a right to silence both at the stage of investigation and at the trial and also preclude any party or the court from commenting upon the silence.*** *This is quite contrary to what the Australian law permits. Under the Australian law the Court can make a comment on the silence but the prosecution cannot make any comment. Now the New South Wales Law Commission has, as stated earlier, recommended amendment of the law, to permit even the prosecution to comment on the silence of the accused.*
>
> ***Our law in the Code of Criminal Procedure, 1973 is consistent with clause (3) of Art. 20 of the Constitution and Art. 21****."*

19. The extent of the safeguard under Article 20(3) and Article 21 is evident from the fact that under Section 313, Cr.P.C., even the Special Court cannot compel the Accused to answer its questions under threat of sanction or under oath. These safeguards will also be available to an accused in cases under the PMLA in terms of Section 313, Cr.P.C. r/w Section 65 of the PMLA. S. 313, Cr.P.C. reads as follows,

> *313. Power to examine the accused.—*
> *(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court—*

(a) may at any stage, without previously warning the accused put such questions to him as the Court considers necessary;
(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case: Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).
(2) No oath shall be administered to the accused when he is examined under sub-section (1).
(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.
(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.
(5) The Court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section.

20. The right against self-incrimination and the right to silence is also extended under s. 315, Cr.P.C. which provides that the failure of an accused to give evidence shall not be read against him. S. 315, Cr.P.C. reads as follows,

315. Accused person to be competent witness.—
(1) Any person accused of an offence before a Criminal Court shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial:
Provided that—
(a) he shall not be called as a witness except on his own request in writing;
(b) his failure to give evidence shall not be made the subject of any comment by any of the parties or the Court or give rise to any presumption against himself or any person charged together with him that the same trial*.*
(2) Any person against whom proceedings are instituted in any Criminal Court under section 98, or section 107 or section 108, or section 109, or section 110, or under Chapter IX or under

Part B, Part C or Part D of Chapter X, may offer himself as a witness in such proceedings:
Provided that in proceedings under ***section 108, section 109, or section 110, the failure of such person to give evidence shall not be made the subject of any comment by any of the parties or the Court or give rise to any presumption against him or any other person proceeded against together with him at the same inquiry****.*

21. The above safeguards, in protecting the right of the Accused person under Article 20(3) and Article 21, constitute the procedure established by law as far testimonial compulsion of an accused person is concerned.

22. Before examining the provisions of the PMLA on the touchstone of the fundamental rights guaranteed under Article 20(3) and 21, read with s. 161, 162, 313, 315 Cr.P.C. and s. 25, IEA, it is necessary to set out the pre-conditions to take benefit of the protection of Article 20(3). It is no longer res integra that to seek the protection of Article 20(3) of the Constitution, the following pre-conditions have to be fulfilled,

a. *Accused of an offence*

i. The term "***accused of an offence***" has been interpreted to mean that the person must stand in the character of an accused. In the ***State of Bombay v. Kathi Kalu Oghad (supra) ¶¶16 Vol. 6, Pg. 12, Relevant at Pg. 21***, this Court observed,

> "*(7) To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made.*"

ii. This term must be given a wide connotation, given that the protection under Article 20(3) is inextricably linked with the right to a fair trial under Article 21 [***Selvi (supra) ¶¶87-90 Vol. 6, Pg. 28, Relevant at Pg. 80]***

iii. A formal accusation, such as inclusion as an accused in the FIR/ECIR/Chargesheet/Complaint is not necessary, and this protection can be availed even by suspects at the time of interrogation. The position of law in this regard is clear from the judgment of this Court in ***Nandini Satpathy (supra), ¶¶37 [Vol. 6, Pg. 149, Relevant at Pg. 170]*** where the Court observed**,**

*37. **It is idle to-day to ply the query whether a person formally brought into the police diary as an accused person is eligible for the prophylactic benefits of Article 20(3).** He is, and the learned Advocate General fairly stated, remembering the American cases and the rule of liberal construction, that suspects, **not yet formally charged but embryonically are accused on record, also may swim into the harbour of Article 20(3).** We note this position but do not have to pronounce upon it because certain observations in Oghad's case conclude the issue."*

This view was also approved by this Hon'ble Court in ***Selvi (supra) ¶¶122 [Vol. 6, Pg. 28, Relevant at Pg. 94***], in the following terms,

*"122. Therefore the "right against self-incrimination" protects persons who have been formally accused as well as those who are examined as suspects in criminal cases. **It also extends to cover witnesses who apprehend that their answers could expose them to criminal charges in the ongoing investigation or even in cases other than the one being investigated**."*

iv. The protection of Article 20(3) would even extend to answers which would incriminate the person in other offences or where they would furnish a link in the chain of evidence required to prosecute the person. Relevant extracts from judicial pronouncements of this Court in this regard are as under,

- ***Nandini Satpathy (supra), ¶50 [Vol. 6, Pg. 149, Relevant at Pg. 176]***

  ***"50**. We, however, underscore the importance of the specific setting of a given case for judging the tendency towards guilt. Equally emphatically, we stress the need for regard to the impact of the plurality of other investigations in the offing or prosecutions pending on the amplitude of the immunity. **'To be witness against oneself' is not confined to particular offence regarding which the questioning is made but extends to other offences about which the accused has reasonable apprehension of implication from his answer**. This conclusion also flows from 'tendency to be exposed to a criminal charge'. 'A criminal charge' covers any criminal charge then under investigation or trial or which imminently threatens the accused."*

- ***Selvi (supra), ¶ 145 [Vol. 6, Pg. 28, Relevant at Pg. 104***]

  ***"**145. The next issue is whether the results gathered from the impugned tests amount to "testimonial*

compulsion" thereby attracting the prohibition of Article 20(3). For this purpose, it is necessary to survey the precedents which deal with what constitutes "testimonial compulsion" and how testimonial acts are distinguished from the collection of physical evidence. Apart from the apparent distinction between evidence of a testimonial and physical nature, some forms of testimonial acts lie outside the scope of Article 20(3). For instance, even though acts such as compulsorily obtaining specimen signatures and handwriting samples are testimonial in nature, they are not incriminating by themselves if they are used for the purpose of identification or corroboration with facts or materials that the investigators are already acquainted with. ***The relevant consideration for extending the protection of Article 20(3) is whether the materials are likely to lead to incrimination by themselves or "furnish a link in the chain of evidence" which could lead to the same result. Hence, reliance on the contents of compelled testimony comes within the prohibition of Article 20(3) but its use for the purpose of identification or corroboration with facts already known to the investigators is not barred***."

b. *Shall be Compelled*

i. The term "***shall be compelled***" does not include voluntary statements made by Accused persons on interrogation by the relevant authorities.

ii. The compulsion in Article 20(3) is not restricted to the physical compulsion but would also include situations whereby the mental state of mind of the person has been affected. This proposition was explained by the Court in ***Kathi Kalu Oghad (supra) ¶15 [Vol. 6, Pg. 12, Relevant at Pg. 20***] in the following terms,

"***15. In order to bring the evidence within the inhibitions of clause (3) of Article 20 it must be shown not only that the person making the statement was an accused at the time he made it and that it had a material bearing on the criminality of the maker of the statement, but also that he was compelled to make that statement****.*

[.....]

The compulsion in this sense is a physical objective act and not the state of mind of the person making the statement, ***except where the mind has been so conditioned by some extraneous process as to render the making of the statement involuntary and, therefore extorted.*** *Hence, the mere asking by a police officer investigating a crime against a certain individual to do a certain thing is not compulsion*

within the meaning of Article 20(3). ***Hence, the mere fact that the accused person, when he made the statement in question was in police custody would not, by itself, be the foundation for an inference of law that the accused was compelled to make the statement. Of course, it is open to an accused person to show that while he was in police custody at the relevant time, he was subjected to treatment which, in the circumstances of the case, would lend itself to the inference that compulsion was in fact exercised.*** *In other words, it will be a question of fact in each case to be determined by the court on weighing the facts and circumstances disclosed in the evidence before it*."

iii. Nevertheless, keeping in mind the principles underlying the protection of Article 20(3), a broad reading must be given to the circumstances in which a person may be said to have been "*compelled*", especially where the compulsion is from the circumstances in which the statement is recorded. This Court in ***Nandini Satpathy (supra) ¶¶ 53, 57-58 [Vol. 6, Pg. 129, Relevant at Pg. 178-179***] observed,

"***53.*** *The policy of the law is that each individual, accused included, by virtue of his guaranteed dignity, has a right to a private enclave where he may lead a free life without overbearing investigatory invasion or even cryptocoercion.* ***The protean forms gendarme duress assumes, the environmental pressures of police presence, compounded by incommunicado confinement and psychic exhaustion, torturesome interrogation and physical menaces and other ingenious, sophisticated procedures - the condition, mental, physical, cultural and social, of the accused, the length of the interrogation and the manner of its conduct and a variety of like circumstances, will go into the pathology of coerced para-confessional answers. The benefit of doubt, where reasonable doubt exists, must go in favour of the accused****.*

57. [....] We are disposed to read •compelled testimony' as evidence procured not merely by physical threats or violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like - not legal penalty for violation. So, the legal perils following upon refusal to answer, or answer truthfully, cannot be regarded as compulsion within the meaning of Article 20(3). The prospect of prosecution may lead to legal tension in the exercise of a constitutional right, but then, a stance of silence is running a calculated risk. ***On the other hand, if there***

is any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by the policeman for obtaining information from an accused strongly suggestive of guilt, it becomes ·compelled testimony', violative of Article 20(3).

58. *A police officer is clearly a person in authority. Insistence on answering is a form of pressure especially m the atmosphere of the police station unless certain safeguards erasing duress are adhered to.* ***Frequent threats of prosecution if there is failure to answer may take on the complexion of undue pressure violating Article 20(3). Legal penalty may by itself not amount to duress but the manner of mentioning it to the victim of interrogation may introduce an element of tension and tone of command perilously hovering near compulsion.***"

c. *To be a witness against himself*

i. The terms '*to be a witness*' is much broader than the term '*to appear as a witness*'.

ii. Therefore, the protection of Article 20(3) extends outside the Court room even to investigations conducted by the authorities (in this case, the Enforcement Directorate). In this regard, please see

- ***M.P. Sharma and 4 Ors. v. Satish Chandra, Distt. Magistrate, Delhi and 4 Ors., AIR 1954 SC 300, ¶10 [Vol. 6, Pg. 1 Relevant at Pg. 5-6***]

"*10. [….] Indeed, every positive volitional act, which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part.* ***Nor is there any reason to think that the protection in respect of the evidence so procured is confined to what transpires at the trial in the court room. The phrase used in Article 20 (3) is "to be a witness" and not to "appear as a witness****". It follows that the protection afforded to an accused in so far as it is related, to the phrase "to be a witness" is not merely in respect of testimonial compulsion in the court room but may well extend to compelled testimony previously obtained from him****. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution****. Whether it is available to other persons in other situations does not call for decision in this case.*"

- ***Nandini Satpathy (supra) ¶43-44 [Vol. 6, Pg. 149, Relevant at Pg. 173-174***].

  "43. The text of the clause contains no such clue, its intendment is stultified by such a judicial 'amendment' and an expansive construction has the merit of natural meaning, self-fulfilment of the 'silence zone' and the advancement of human rights. ***We overrule the plea for narrowing down the play of the sub-article to the forensic phase of trial. It works where the mischief is, in the womb, i.e. the police process****. […..]*
  Considered in this light, the guarantee under Article 20(3) would be available in the present cases to these petitioners against whom a First Information Report has been recorded as accused therein. It would extend to any compulsory process for production of evidentiary documents which are reasonably likely to support a prosecution against them*.*
  44. We have to apply this rule of construction, an off-shoot of the Heydon's case doctrine, while demarcating the suspect and the sensitive area of selfcrimination and the protected sphere of defensive silence. ***If the police can interrogate to the point of self-accusation, the subsequent exclusion of that evidence at the trial hardly helps because the harm has been already done. The police will prove through other evidence what they have procured through forced confession. So it is that the foresight of the framers has pre-empted self-incrimination at the incipient stages by not expressly restricting it to the trial stage in court.*** *True, compelled testimony previously obtained is excluded. But the preventive blow falls also or pre-court testimonial compulsion. The condition, as the decisions now go, is that the person compelled must be an accused. Both precedent procurement and subsequent exhibition of self-criminating testimony are obviated by intelligent constitutional anticipation.*"

iii. Further, the protection under Article 20(3) also extends beyond statements that are confessions. The said protection would also extend to incriminatory statements, which are not complete confessions, but which would furnish a link in the chain of evidence against the person [***Nandini Satpathy (supra) ¶¶46-47 Vol. 6, Pg. 149, Relevant at Pg. 175***]

23. Therefore, in an examination of the constitutional validity of S. 50, PMLA, this Hon'ble Court ought to examine the provisions of s. 50, PMLA against the

constitutional safeguards under Article 20(3) and Article 21, as operationalized by the legislature under various statutory provisions including s. 161, 162, 313, 315 Cr.P.C and s. 25, 26 Indian Evidence Act. The test that the Court should consider while determining the vires of Section 50, PMLA is that whether by exercising the powers under Section 50, PMLA, the officer is in a position to compel a person to render a confession, give incriminating statements against himself, under threat of legal sanction/imprisonment and arrest by the ED

24. Such an examination would reveal that the provisions of s. 50, PMLA, being draconian in nature ought to be struck down as unconstitutional, being violative of Article 20(3) and 21 of the Constitution of India.

25. Section 50 not only enables a confession or incriminating statement made in custody or otherwise, to be proved against its maker but in fact extends to legally mandating that such a confession or incriminating statement be made under the threat of legal sanction/penalty/imprisonment under Section 63(2) and 63(4), PMLA. It is to be noted that the ED is in the practice of recording statements under s. 50, PMLA even when the accused persons are in custody.

26. There is no rationale or reason given for this departure from the procedure established by law under the Cr.P.C and IEA, into which safeguards are inbuilt to protect the rights of the Accused under Article 20 and 21.

27. Under the statutory scheme of the PMLA, a person is not informed on whether the person is being summoned in the capacity of an accused person, suspect or witness.

28. This is in contradistinction to the scheme under the Cr.P.C. where specific provisions have been made for summons to an Accused Person [***Section 41A r/w Section 161, Cr.P.C.***]

29. The ED further claims that it is not bound by Chapter XII of the Cr.P.C. and therefore, does not register an FIR. The ED also claims that the ECIR registered by it is an internal document and is not to be shared with the Accused. This procedure is completely opaque, and an Accused can never know whether he is formally accused of an offence, unlike an offence under the IPC, for which an FIR is registered.

30. Therefore, at the time a person is summoned under Section 50(2), PMLA, it is impossible for him to meaningfully exercise his right under Article 20(3). This is especially because the non-provision of the ECIR provides an excuse for the ED to conduct wide-ranging, fishing, and roving enquiries into the affairs of the person summoned under Section 50(2), PMLA.

31. Further, under Section 50(2), PMLA, the following circumstances would render every questioning by an ED Officer as testimonial compulsion, subject to the protection of Article 20(3).

a. The person summoned is required to attend the offices of the ED as opposed to answer written questions from a list provided.

b. The person summoned is not informed of the contents of the ECIR and is neither informed whether he has been summoned in the character of an accused/suspect/witness. The summon also does not contain the allegation against the person summoned.

c. In fact, the form of summons issued by the ED under s. 50 stipulated under the ***PMLA (Forms, Search and Seizure or Freezing and the Manner of Forwarding the Reasons and Material to the Adjudicating Authority, Impounding and Custody of Records and the Period of Retention) Rules, 2005***, also notes that failure to comply with the summons u/s 50, PMLA will lead to penal proceedings under the PMLA.

d. He is also not informed whether the questioning by the ED pertains to only money allegedly laundered from the schedule offence or to other transactions having no connection to the Schedule Offence.
Note: Practically, the ED's questioning is not restricted to the offence of money laundering but also invades the commission of the schedule offence.

e. Since the list of questions is not provided to the person, it is unclear whether the questions posed are being posed in relation to the ECIR under investigation, the Schedule Offence or any other unrelated transaction. It has been recognised that this knowledge is essential since the context of a question can completely change its meaning and the implications of its answer. This Court, in ***Nandini Satpathy (supra) ¶51 [Vol. 6, Pg. 149, Relevant at Pg. 177***] noted,

> *"51.* ***The setting of the case or cases is also of the utmost significance in pronouncing on the guilty tendency of the question and answer. What in one milieu may be colourless, may, in another be criminal****. 'Have you fifty rupees in your· pocket?' asks a police officer of a P. W. D. engineer. He may have. It spells no hint of crime. But if, after setting a trap, if the same policeman, on getting the signal, moves in and challenges the engineer, 'have you fifty rupees in your pocket?' The answer, if 'yes', virtually proves the guilt.*

> *'Were you in a particular house at a particular time?' is an innocent question; but in the setting of a murder at that time in that house, where none else was present, an affirmative answer may be an affirmation of guilt. While subjectivism of the accused may exaggeratedly apprehend a guilty inference lingering behind every non-committal question, objectivism reasonably screens nocent from innocent answers. Therefore, making a fair margin for the accused's credible apprehension of implication from his own mouth, the court will view the interrogation objectively to hold it criminatory or otherwise, without surrendering to the haunting subjectivism of the accused. The dynamics of constitutional 'silence' cover many interacting factors and repercussions from 'speech."*

f. Further, the person so summoned is required by law to state the truth upon any subject on which they are examined [***Section 50(3)***]

g. The failure to answer such a question truthfully will also render the person liable for penalty under Section 63(2), PMLA or prosecution and imprisonment under Section 174, IPC in terms of Section 63(4), PMLA.

h. The person attending is also under a legal obligation to sign his statement recorded under Section 50, PMLA under threat of sanction under Section 63(2)(b), PMLA and 63(4), PMLA.

i. Further, the ED also has the power of arrest under Section 19, PMLA and therefore, a person summoned with no knowledge of the context of his summons is also under constant threat of arrest.

32. Therefore, a person is summoned under threat of imprisonment, subjected to questioning without any indication of his role or the accusations against him or any other person and is legally bound to tell the truth in his statement, which he has to sign under fear of prosecution and arrest. These conditions, it is submitted are sufficient to invoke the protection of Article 20(3).

33. Therefore, by requiring the accused person to tell the truth under threat of sanction renders the safeguards under Section 161, 162, 313 and 315 Cr.P.C., Section 25 & 26 of the IEA, and consequently, the protections under Article 20(3), illusory.

34. In fact, it was exactly for this reason that the protection under Article 20(3) was extended prior to the Trial Stage [***Kathi Kalu Oghad (supra) ¶20 Vol. 6,***

Pg. 12, Relevant ***at Pg. 22; Nandini Satpathy (supra), ¶44 Vol. 6, Pg. 149, Relevant at Pg. 174***].

35. Finally, the rigours of Section 50 are much more severe than those of Section 67, NDPS. The PMLA was introduced to counter the menace of money laundering arising from the narcotics trade. The offences relating to the narcotics trade are governed by the NDPS Act, in India. However, the Supreme Court has in no uncertain terms held that the extraction of a confessional statement under the NDPS Act which can be used to convict a person would be a violation of Article 14, 20(3) and 21 [***Tofan Singh v. State of Tamil Nadu, 2020 SCC OnLine SC 882 ¶155, Vol. 2, Pg. 173, Relevant at Pg. 247***].

36. In light of the above, what cannot be done under the NDPS, which imposes much harsher punishments (up to death) than the PMLA (maximum punishment of 10 years), ought not to be allowed under the PMLA.

37. It is also important to note that the ED cannot escape these constitutional safeguards by claiming that the statement u/s 50, PMLA is recorded in the course of a judicial proceeding. S. 50(4), PMLA states,

> *"(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)."*

38. The words "*judicial proceeding*" are not defined in the PMLA. The only statutory definition of the same is in S. 2(i) of the Cr.P.C. which states that "*'judicial proceeding' includes any proceeding in the course of which evidence is or may be legally taken on oath.*" The closest statement of law in this regard can be found in ***Asstt. Collector of Central Excise v. Ramdev Tobacco Co.***, ***(1991) 2 SCC 119, ¶6 [Vol. 6, Pg. 187, Relevant at Pg. 192***] wherein it has been held that:

> "*'suit' or 'prosecution' are those judicial or legal proceedings which are lodged in a Court of law and not before any executive authority, even if a statutory one.*"

39. Section 50 of the PMLA sets out the powers of Enforcement authorities. Under Section 50(1), for the purposes of Section 13 of the Act, the Enforcement authority shall have the powers of a civil court including the power to examine any person on oath. However, this power is available only for the purposes of Section 13, PMLA.

40. Under Section 50(2) of the PMLA, the Enforcement authority may summon any person to give evidence in any investigation or proceeding. The two distinct words used are 'investigation' and 'proceeding'.

41. Moreover, unlike in some other Acts (e.g. Income Tax Act), Section 50(2) does not further say that the Enforcement authority shall be deemed to be a civil court.

42. Under Section 50(4) of the PMLA, every proceeding before an Enforcement authority shall be deemed to be a judicial proceeding within the meaning of S. 193 and S. 228 of the IPC. The word used is only 'proceeding' and the omission of the word 'investigation' is conspicuous and significant.

43. Hence, the conclusion is that an investigation done by an Enforcement authority will not be a judicial proceeding.

44. In any event, while an inquiry may be a judicial proceeding, an investigation can never be a judicial proceeding and any contrary opinion will clearly fall foul of Article 20 and 21 of the Constitution.

45. The statutory scheme of the PMLA as set out under s. 50, PMLA, therefore, in the absence of the safeguards provided under Article 20(3) and 21 of the Constitution of India as operationalized s. 161, 162, 313, 315 Cr.P.C. and s. 25, 26, Indian Evidence Act, 1872 is unconstitutional and ought to be set aside.

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