IN THE HON'BLE SUPREME COURT OF INDIA

TRANSFERRED CASE (CRL.) NO. 3/2018; CRL. A. 391-392 / 2018 and Others

BRIEF SUBMISSIONS ON BEHALF OF VIKRAM CHAUDHRI, SR. ADV.

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PLACE: NEW DELHI

DATE: 09.02.2022

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A. AFTER THE JUDGMENT IN ***NIKESH TARACHAND SHAH'S CASE (2018) 11 SCC 1*** DELIVERED ON 23.11.2017, THE ISSUE IS AS TO WHETHER AFTER THE AMENDMENT VIDE FINANCE ACT, 2018 W.E.F. 19.04.2018, THE TWIN CONDITIONS EVEN EXIST, AND NOT AS TO WHETHER THEY APPLY OR OF THEIR CONSTITUTIONAL VALIDITY.

A1. In ***Nikesh Tarachand Shah's case***, this Hon'ble Court held as under:-

> *"54. Regard being had to the above, we declare Section 45(1) of the Prevention of Money Laundering Act, 2002, insofar as it imposes two further conditions for release on bail, to be unconstitutional as it violates Articles 14 and 21 of the Constitution of India…"*

The effect of the aforementioned declaration by this Hon'ble Court is that the twin conditions as encapsulated in Section 45(1)(ii) are struck down.

A2. In ***'State of Manipur & Ors. vs. Surjakumar Okram & Ors. 2022 SCC OnLine SC 130***', this Hon'ble Court was pleased to observe in Para 29 that the ***"very declaration*** *by a Court that a statute is unconstitutional obliterates the statute entirely as though it had never been passed*". Two of the principles laid down by this Hon'ble in Para 28 of the said judgment read as under:-

> *"I. A statute which is made by a competent legislature is valid till it is declared unconstitutional by a court of law.*
>
> ***II. After declaration of a statute as unconstitutional by a court of law, it is non est for all purposes…"***

A3. Accordingly, the relevant comparison of the Section 45(1) PMLA soon after Nikesh Tarachand Shah's case would comparatively read as under:-

PRE-NIKESH TARACHAND SHAH	POST-NIKESH TARACHAND SHAH
(1) [Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),	(1)[Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of

PRE-NIKESH TARACHAND SHAH	POST-NIKESH TARACHAND SHAH
no person accused of an offence punishable for a term of imprisonment of more than three years under Part-A of the Schedule shall be released on bail or on his own bond unless—] (i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and (ii) where the Public Prosecutor opposes the application, **the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:** Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs: Provided further that the Special Court shall not take cognizance of any offence punishable under Section 4 except upon a complaint in writing made by— (i) the Director; or (ii) any officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government by a general or special order made in this behalf by that Government.	1974), no person accused of an offence punishable for a term of imprisonment of more than three years under Part-A of the Schedule shall be released on bail or on his own bond unless—] (i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and (ii) **(STRUCK DOWN)** Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs: Provided further that the Special Court shall not take cognizance of any offence punishable under Section 4 except upon a complaint in writing made by— (i) the Director; or (ii) any officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government by a general or special order made in this behalf by that Government.

A4. Despite the above position where Section 45(1)(ii) PMLA had ceased to exist in view of ***Nikesh's*** judgment, all publishers of Bare Acts kept on printing Section 45(1) along with the twin conditions. Such reproduction of Section 45(1) of PMLA as it existed prior to ***Nikesh's case*** is therefore, an 'editorial error' in reporting. (Refer

Para 23 of ***Sundeep Kumar Bafna (2014) 16 SCC 623***);

A5. A further example of such editorial or publishing error can be seen from the Bare Acts relating to Information Technology Act, 2000 where, despite Section 66-A thereof having been struck down in ***Shreya Singhal's case***, the entire Section is still reproduced, *albeit* with a footnote "***Held unconstitutional and struck down by Shreya Singhal v. Union of India, (2015) 5 SCC 1***". A Photocopy of the relevant page of the Bare Act as published by the Universals (Lexis Nexis) is being annexed for a kind perusal;

A6. S. 208(e)(ii) of Finance Act, 2018 (No. 13 of 2018) w.e.f. 19-4-2018 incorporates the amendment to Section 45(1) as follows:-

"(e) in section 45, in sub-section (1), —

(i) for the words "punishable for a term of imprisonment of more than three years under Part A of the Schedule", the words "under this Act" shall be substituted;

(ii) in the proviso, after the words "sick and infirm,", the words "or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees" shall be inserted;"

A7. Post the aforementioned amendment of 2018, the comparative chart of Section 45(1) may be seen as under:

POST-NIKESH TARACHAND SHAH	**POST - FINANCE ACT, 2018**
(1) [Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence punishable for a term of imprisonment of more than three years under Part-A of the Schedule shall be released on bail or on his own bond unless—](i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and (ii) **(STRUCK DOWN)** Provided that a person, who, is under the	(1) [Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence [**under this Act**] shall be released on bail or on his own bond unless— (i) the Public Prosecutor has been given an opportunity to oppose the application for such release; (ii) **(STRUCK DOWN)** Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, **[or is accused either on his own or**

POST-NIKESH TARACHAND SHAH	**POST - FINANCE ACT, 2018**
age of sixteen years, or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs: Provided further that the Special Court shall not take cognizance of any offence punishable under Section 4 except upon a complaint in writing made by— (i) the Director; or (ii) any officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government by a general or special order made in this behalf by that Government	**along with other co-accused of money-laundering a sum of less than one crore rupees]** may be released on bail, if the Special Court so directs: Provided further that the Special Court shall not take cognizance of any offence punishable under Section 4 except upon a complaint in writing made by— (i) the Director; or (ii) any officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government by a general or special order made in this behalf by that Government.

Thus, the real issue would not be whether the twin conditions under Section 45(1) apply or not OR of their constitutional validity but would be as to whether they exist or not.

A8. The Bill introduced on 1st February, 2018 for amending Section 45 of PMLA specifies its object under sub-clause (v) to Clause 204 and 205 of the Bill. The relevant clause (v) of the Bill reads as below :-

> *"Clauses 204 and 205 of the Bill seeks to amend certain provisions of the Prevention of Money laundering Act, 2002, which include the following, namely:-*
>
> -x-x-x-x-
>
> *(v) to amend section 45 of the Act relating to offences to be cognizable and non-bailable and to amend sub-section (1) of section 45 to substitute the words "punishable for a term of imprisonment of more than three years under Part A of the Schedule" by words "under this Act"* ***so as to take a step further towards delinking the Scheduled offence and money laundering offence****. Further, it seeks to amend the proviso in subsection (1) by inserting the words "or is accused either on his own or along with other co-accused of*

money laundering a sum of less than Rupees one crore", after the words "sick or infirm" ***to allow the Court to apply lenient bail provisions*** *in case of money laundering offence is not grave in nature."*

A9. Thus, it is axiomatic that the stated object of 2018 Amendment was not to cure any anomaly or defect in the light of pronouncement in ***Nikesh's case*** but was only to "*delinking the Scheduled offence and money laundering offence"* for the purpose of bail;

A10. In the *Proviso* to Sub-Section(1) of Section 45, an insertion of the *words "or is accused either on his own or along with other co-accused of money laundering a sum of less than Rupees one crore"* was made after the words *"sick or infirm"* vide the same 2018 Amendment wherein for consideration of a person falling in this category i.e. involvement in money laundering for a sum of less than one crore, even the requirement of giving of an opportunity to the public prosecutor to oppose the application for bail has been dispensed with;

A11. There is no legislative intent in bringing in the amendment to Section 45 for either curing the defect on the basis of which twin conditions were struck down in ***Nikesh's case*** or resurrecting the twin conditions for bail. Not a remote reference in this regard has been made in the aforementioned amendment. The interpretation to this amendment as is being sought to be accorded by the State is therefore completely misfounded and untenable.

B. SOME ADDITIONAL SUBMISSIONS RE. PROCEDURE UNDER CHAPTER XII CR.P.C. TO BE FOLLOWED FOR INVESTIGATIONS UNDER PMLA

B1. In ***Ashok Munilal Jain vs. Directorate of Enforcement (2018) 16 SCC 158***, an objection was taken on behalf of the ED that Section 167 Cr.P.C. does not apply to the proceedings under PMLA and therefore, the benefit of default bail cannot be granted. This Hon'ble Court while applying Section 4(2) Cr.P.C. r/w Section 65 PMLA held as under:-

> ***"3. …We may record that as per the provisions of Section 4(2) of the Cr.P.C., the procedure contained therein applies in respect of special statutes as well unless the applicability of the provisions is expressly barred."***

B2. In ***Ashok Munilal Jain's*** case, a reference was also made to the ratio laid down in ***Deepak Mahajan's case [(1994) 3 SCC 440]*** wherein, it was held:-

> *"**106.** In our considered opinion, the view taken in O.P. Gupta and **M.K.S. Abu Bucker** and also of the **Kerala High Court** and Gujarat High Court is the logical and correct view and we approve the same for the reasons we have given in the preceding part of this judgment……*

B3. In ***M.K. Ayoob v. Superintendent, CIU, Cochin, 1984 Crl.L.J. 949*** to which reference has been made in Para 106 of *Deepak Mahajan (supra)*, the Kerala HC held as under:-

> *"**11.** ……. In relation to matters of investigation, inquiry, trial or other matter not covered by the provisions of the Act, the parallel provisions of the code must necessarily be applied. That is the clear affect of the operation of S. 4(2) of the code. Such operation cannot be negatived merely because a section in the Code uses expression which are compatible with an offence under Penal Code or with investigation being conducted by a police officer. **In relation to a person arrested under the Act, the provisions of S. 167 of the Code must be read suitably, that is, reference to "officer in charge of a Police Station" must be read as "customs Officer"…."***

B4. Similarly in ***S.I.O. DRI, Madras v. M.K.S. Abu Bucker, 1990 Cri.L.J 704*** to which approval was accorded in *Deepak Mahajan's case*, the Madras HC held as under:-

> *"21……it is in the context of Section 4(2)Cr.P.C the applicability of the provisions of Section 167(2) Cr.P.C. to the person arrested under the Customs Act and produced before a Magistrate, will have to be considered. A reading of Section 4(2) Cr.P.C. renders the provisions of the Code applicable in the field not covered by the provisions of the Customs Act. The Code of Criminal Procedure primarily deals with the offences under the Penal Code, 1860 and the investigation by Police Officers or Officers-in-charge of police station. This cannot straightway lead to the conclusion that the provision of Section 167 Cr.P.C. cannot be applied to cases under the Customs Act. Obviously, in relation to matters of investigation, inquiry, trial or dealing otherwise, not covered by the provisions of the Customs Act, the parallel provisions of the Code of Criminal Procedure necessarily will have to be applied and that is the observation of the Supreme Court extracted earlier in Antulay's*

case (1984 Cri LJ 647). ***Such operation of Section 4 of the Code, cannot be just rejected merely because the Code uses expressions which are compatiable with offences under the Penal Code, 1860 and investigation being conducted by a police officer****……"*

"23. *The Supreme Court, while considering the position and character of a person arrested under the Sea Customs Act or Customs Act vis-a-vis Article 20(3) of the Constitution and the questions whether a Customs Officer was a police officer for the purpose of Section 25 of the Indian Evidence Act and whether any person making a statement to a Customs Officer under Sections 107 and 108 of Customs Act can be said to be a person "accused of any offence" within the meaning of the said article, held that a person so arrested was not an accused within the meaning of Article 20(3) of the constitution and the Customs Officer acting under the Customs Act was not a police officer for the purpose of Section 25 of the Indian Evidence Act, vide lllias v. The Collector of Customs, Madras AIR 1970 SC 1065: (1970 Cri LJ 998) and Ramesh Chandra Mehta v. State of West Bengal AIR 1970 SC 940: (1970 Cri LJ 863).* ***In both the cases, it is nowhere mentioned that the provisions of Chapter XII of the Code and the provision of Section 167(2) thereof, would not be available when the person is detained under the Customs Act and produced before the Magistrate by the Officer appointed under the said Act."***

B5. In ***Deepak Mahajan's case***, it was categorically concluded as under:-

*"**128.** To sum up, Section 4 is comprehensive and that Section 5 is not in derogation of Section 4(2) and it only relates to the extent of application of the Code in the matter of territorial and other jurisdiction but does not nullify the effect of Section 4(2). In short, the provisions of this Code would be applicable to the extent* ***in the absence of any contrary provision in the Special Act or any special provision excluding the jurisdiction or applicability of the Code****. In fact, the second limb of Section 4(2) itself limits the application of the provisions of the Code reading, "... but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."*

B6. While placing reliance upon a series of judgements which dealt with admissibility of

statements made to a Customs Officer etc. for the purpose of Section 25 of the Indian Evidence Act, it was concluded in ***Deepak Mahajan's case*** as under:

> ***"91.*** *Though this Bench is bound by the decisions of all the above Constitution Benches yet these decisions are distinguishable since none of the above decisions relates to the interpretation of Section 167 of the Code explaining the meaning of the word 'accused' or 'accused person' limited to the purpose of Section 167. On the other hand,* ***all those decisions are rendered only on the question of admissibility or otherwise of the statement of a person arrested under the provisions of the general Act or special Acts concerned and recorded while in the custody of the arrester."***

B7. Reference was made to several special enactments including Prevention of Corruption Act etc. and reliance was placed upon the Constitution Bench judgment in ***A.R. Antulay vs. Ramdas Sriniwas Nayak (1984) 2 SCC 500*** to arrive at the aforementioned conclusion;

B8. A three-judge bench in ***Om Parkash*** **v.** ***Union of India,*** **(2011) 14 SCC 1,** while dealing with the issue as to whether the offences under Customs Act, 1962 and Central Excise Act, 1944 are bailable, *inter alia* framed the following issue as well:-

*"****11. Since the question of arrest is in issue in these sets of cases****……"*

B9. After extensively referring to the provisions of both the special statutes i.e., the Customs Act, 1962 and Central Excise Act, 1944, which contemplated offences to be non-cognizable at the time, it was held in ***Om Prakash's case*** as under:-

> *"16. As has been indicated hereinbefore in this judgment……..However, in the case of the 1944 Act, in view of Section 9-A****, all offences under the Act have been made non-cognizable and having regard to the provisions of Section 155, neither could any investigation be commenced in such cases, nor could a person be arrested in respect of such offence, without a warrant for such arrest****."*

B10. In ***Om Prakash's case***, the following contentions of Union of India were recorded:

> ***"26.*** *Mr. Parasaran pointed out that the Preamble to the 1944 Act states that it is expedient to consolidate and amend the law relating to Central Excise duty on goods manufactured or produced in certain parts of India……"*
>
> ***27.*** *It was also urged that the officers under the said Act are not police officers and that the said question is no longer res integra. Consequently, in Ramesh Chandra Mehta v. State of W.B., a Constitution Bench of this Court held that*

since a Customs Officer is not a police officer, as would also be the case in respect of an officer under the Excise Act, submissions made before him would not be covered under Section 25 of the Evidence Act.

28. *Mr. Parsaran submitted that the High Court had also made a distinction on the basis that while Section 13 of the 1944 Act refers to a "person" and not to an "accused" or "accused person", the power under the Central Excise Act is for arrest of any person who is suspected of having committed an offence and is not an accused, but is a person who would become an accused after the filing of a complaint or lodging of an FIR, as was held by this Court in Directorate of Enforcement v. Deepak Mahajan.*

30. *Mr. Parasaran also urged that the power to arrest must necessarily be vested in the officer concerned under the 1944 Act for the efficient discharge of his functions and duties, inter alia, in order to prevent and tackle the menace of black money and money-laundering. Mr. Parasaran submitted that in Union of India v. Padam Narain Aggarwal, this Court has held that even though personal liberty is taken away, there are norms and guidelines providing safeguards, so that such a power is not abused, but is exercised on objective facts with regard to commission of any offence.*

31. ***Reference was also made to the decision of the Punjab and Haryana High Court in Sunil Gupta v. Union of India and Bhavin Impex (P) Ltd. v. State of Gujarat, in which the issue, which is exactly in issue in the present case, was considered and, as submitted by the learned ASG, it has been held that the FIR or complaint or warrant is not a necessary precondition for an officer under the Act to exercise powers of arrest……"***

B11. After considering the aforementioned issues i.e., question of arrest and the question as to the compliance of Section 155 Cr.P.C. falling in Chapter XII thereof for investigations under the aforementioned special statutes***, Om Prakash's case*** arrived at the following conclusion:

*"**41.** In our view, the definition of "non-cognizable offence" in Section 2(I) of the Code makes it clear that non-cognizable offence is an offence for which a **police officer** has no authority to arrest without warrant. As we have also noticed hereinbefore, the expression "cognizable offence" in Section 2(c) of the Code means an offence for which a **police officer** may, in accordance with*

the First Schedule or under any other law for the time being in force, arrest without warrant. ***In other words, on a construction of the definitions of the different expressions used in the Code and also in connected enactments in respect of a non-cognizable offence, a police officer, and, in the instant case an Excise Officer, will have no authority to make an arrest without obtaining a warrant for the said purpose……..”***

B12. After the judgement in ***Om Prakash’s case*** (*supra*) various petitions were filed under Article 32 seeking a declaration as to vitiation of the investigations under the Customs Act, 1962 for non-compliance with the provisions of Section 155 Cr.P.C. falling in chapter XII thereof in the wake of the ratio decidendi laid down in the said judgement. This Hon’ble Court, while relegating the respective petitioners to approach the High Court, clarified that in *Om Prakash’s case*, the provisions Section of 155 Cr.P.C. have been considered in detail;

B13. A Review Petition (Crl.) Nos. 97-98 of 2013 was filed by the Union of India in ***Om Prakash’s case*** (*supra*) wherein it was contended as under:

a. Central Excise / Customs Act are Special Acts giving special powers to the officers named and authorised under the Special Act to investigate, interrogate and arrest, if necessary;

b. Power to arrest was statutory and not derived from the Code;

c. Non-cognizability of offence under the CrPC had no relevance to the investigation under these special acts containing provisions for arrest, search, seizure, examination etc;

d. The reason for making the offence non-cognizable was firstly to restrain the police officer from making investigations and arresting without warrant in offences under these special Acts, and secondly to ensure that complaint can only be filed by the officer under the Special Act.

B14. Vide Order dated 13.08.2013, a Three-Judge Bench of this Hon’ble Court dismissed the review petition with the following observations:-

“We have gone through the Review Petitions and the connected papers. We see no reason to interfere with the order impugned. The Review Petitions are, accordingly, dismissed.”

B15. In the absence of any procedure to the contrary under PMLA that displaces Cr.P.C., irrespective of whether the offence is cognizable or non-cognizable, the

investigations cannot commence without:-

(a) Recording any information relating to the Commission of a cognizable offence (u/s 154 of the Code of Criminal Procedure);

(b) Forwarding any report / FIR of the cognizable offence to competent Magistrate (u/s 157 of the CrPC);

(c) Recording any Information as prescribed of the Commission of a non-cognizable offence and referring the informant to the competent Magistrate (u/s 155(1) of the CrPC);

(d) Obtaining any order from a competent Magistrate for investigating any non-cognizable offence (u/s 155(2) of the CrPC);

(e) Obtaining any warrant from competent Magistrate to arrest the Petitioner in a non-cognizable offence (u/s 155(3) of the CrPC);

(f) Maintaining any case diary in a duly paginated volume, entering therein day-to-day proceedings in the investigation and other material particulars (u/s 172 of the CrPC); and

(g) Producing such case diary before the Magistrate when the Petitioner was arrested and produced before the Magistrate (u/s 167 of the CrPC);

B16. As an illustration, the Railway Property (Unlawful Possession) Act, 1996 was enacted investing the powers of investigation and prosecution of offences relating to Railway property in the Railway Protection Force in the same manner as in the Excise and Customs. Although Section 5 made the offence under the said Act a 'non-cognizable' offence, yet while enacting the said Act, there was a specific departure in Section 6 to exclude application of Section 155(2) and 155(3), in the following manner:-

> ***"6. Power to arrest without warrant.—Any*** *superior officer or member of the Force may, without an order from a Magistrate and* ***without a warrant****, arrest any person who has been concerned in an offence punishable under this Act or against whom a reasonable suspicion exists of his having been so concerned."*
>
> (emphasis supplied)

Since, specific provisions of section 6 of the said Special Act are inconsistent with Section 155 of the general provisions of the CrPC, in view of Section 4(2) read with Section 5 of the CrPC, these special provisions override the general provisions of

section 155 of the CrPC in that Act. As a sequitur, since no such provision excluding the application of Section 155(2) and 155(3) of the CrPC exists in PML Act, and thus the same shall apply in the investigations under PML Act, if the offence thereunder is non-cognizable. If the offence under PMLA is construed to be cognizable, the other provisions falling in Chapter XII Cr.P.C. including Section(s) 154, 157, 167 & 172 Cr.P.C. would come into play;

B17. In ***"Union of India Vs Thamisharasi, (1995) 4 SCC 190"***, this Hon'ble Court, after considering the provisions of Section 4(2) of Cr.P.C., rejected the Criminal Appeal filed by the Union of India wherein no merit was found in the contention that in view of the conditions precedent vide Section 37 of NDPS Act imposing limitations on grant of bail, the proviso to sub-section (2) of Section 167 of Cr.P.C. was not applicable for release on bail even upon expiry of the total period specified therein. This Hon'ble Court was pleased to observe that:-

> ***"14.*** *In our opinion, in order to exclude the application of the proviso to sub-section (2) of Section 167 CrPC in such cases, an express provision indicating the contrary intention was required or at least some provision from which such a conclusion emerged by necessary implication. As shown by us, there is no such provision in the NDPS Act and the scheme of the Act indicates that the total period of custody of the accused permissible during investigation is to be found in Section 167 CrPC which is expressly applied. The absence of any provision inconsistent therewith in this Act is significant."*

B18. The following comparative chart would be apt to be seen:-

THE CODE OF CRIMINAL PROCEDURE, 1973		PREVENTION OF MONEY LAUNDERING ACT, 2002	
Section	CHAPTER XII: INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE	Section	CHAPTER V SEARCHES, SEIZURE, ARREST ETC. (INCLUDING POWER TO ARREST UNDER SECTION 19)
154	Information in cognizable cases		Not displaced
155	Information as to non-cognizable cases and investigation of such cases		Not displaced

156	Police officer's power to investigate cognizable case.		Not displaced
157	Procedure for investigation.		Not displaced
158	Report how submitted.		Not displaced
159	Power to hold investigation or preliminary inquiry (Under direction of Magistrate or by Magistrate)		Not displaced

160	Police officer's power to require attendance of witnesses.	50 R/W Rule 5 and 11 of GSR 445(E) dated 1.7.2005	Powers of authorities regarding summons, production of documents and to give evidence etc. (Proviso to sub-section 1 of Section 160 Cr.P.C re. exemption to a male person under the age of 15 years or above 65 years; a woman; mentally or physical disabled persons from attending at any place other than their residence is not displaced) (Similarly, sub Section (1) of Section 162 of the Code which prohibits the obtaining of signatures of any person on the statement made by him in course of investigation, also does not stand displaced in any manner)
161 162	Examination of witnesses by police. Statements to police not to be signed - Use of Statements in evidence.		
163	No inducement to be offered.		Not displaced
164	Recording of confessions and		Not displaced

	statements.		
164A	Medical examination of the victim of rape		Not applicable
165 r/w 100	Search by police officer. Persons in charge of closed place to allow search	16	Power of Survey
		17	Search and Seizure
		18	Search of persons
166	When officer in charge of police station may require another to issue search warrant.	20	Retention of property
		21	Retention of records
166A	Letter of request to competent authority for investigation in a country or place outside India.	Chapter IX Reciprocal arrangement for assistance in certain matters and procedure for attachment and confiscation of property	
		57	Letter of request to a contracting State in certain cases.
166B	Letter of request from a country or place outside India to a Court or an authority for investigation in India.	58	Assistance to a contracting State in certain cases.
		58-B	Letter of Request of a Contracting State or Authority for confiscation or release the

			property
167	Procedure when investigation cannot be completed in twenty-four hours		Not displaced
168	Report of investigation by subordinate police officer.		Not applicable
169	Release of accused when evidence deficient.		Not displaced
170	Cases to be sent to Magistrate when evidence is sufficient.	Chapter VII Special Courts 45	(Second Proviso to sub-section (1) of section 45 envisages cognizance to be taken by a Special Court upon a complaint in writing by certain authorities under the Act, if the evidence is sufficient) Displaced only to this limited extent
171	Complainant and witnesses not to be required to accompany police officer and not to be subject to restraint.		Not displaced
172	Diary of proceedings in investigation.		Not displaced
173	Report of police officer on completion of investigation.	45	(Second Proviso to sub-section (1) of section 45 envisages cognizance to be taken by a Special Court upon a complaint in writing by

			certain authorities under the Act, if the evidence is sufficient. Per contra, in case the evidence is deficient, section 169 of the Code may also come into play for the release of the accused if he is under arrest and a closure / cancellation report would also have to be filed in terms of section 173(2) of the Code) Similarly, the only provision by virtue of which Investigating Authorities can conduct further investigation or bring further evidence on record is Section 173(8) where also the words used officer in charge of a Police Station are displaced and re substituted by the Officer Authorised under PMLA Displaced only to this limited extent
174 175 176	Police to enquire and report on suicide, etc. Power to summon persons. Inquiry by Magistrate into cause of death.		Not Applicable

OTHER PROVISIONS

THE CODE OF CRIMINAL PROCEDURE, 1973		PREVENTION OF MONEY LAUNDERING ACT, 2002	
41 to 60	CHAPTER V ARREST OF PERSONS	19 r/w GSR 446(E) and GSR 441(E) dated 1.7.2005	Power to arrest (displaced only to the extent mentioned in section 19 read with Rules notified vide GSR 446(E) and GSR 440(E) vis-a-vis 441(E), all dated 1.7.2005)
50	Person arrested to be informed of grounds of arrest and of right to bail		Form of the Arrest Order as provided under Rule 6. The same read with Rule 2(c), 2(g) and 2(h), in light of Notes on clauses for clause 18 of PMLA Bill, 1999 indicating provision for furnishing Grounds of Arrest, shall displace the corresponding provisions of the Code to that extent. Consequently, the officer authorised for exercising powers under section 19 by a general or special order of the Central Government has to record reasons for arrest in writing and has to furnish the Grounds of arrest in writing alongwith and as part of the arrest order, especially in light of Constitution Bench

			judgments of the Hon'ble Supreme Court in ***CB Gautam*'s** case reported in ***(1993) 1 SCC 78.***
   61 to 69 70 TO 81 82 TO 86 87 TO 90	CHAPTER VI PROCESS TO COMPEL APPEARANCE A. – SUMMONS B. – WARRANT OF ARREST C. – PROCLAMATION AND ATTACHMENT D. – OTHER RULES REGARDING PROCESSES		Not displaced
    91 TO 92 93 TO 98 99 TO 105	CHAPTER VII PROCESSES TO COMPEL THE PRODUCTION OF THINGS A. – SUMMONS TO PROODUCE B. – SEARCH WARRANTS C. – GENERAL PROVISIONS RELATING TO SEARCHES	17 20 21	Search and Seizure Retention of Property Retention of Records (displaced to the extent of these provisions)

B19. If these mandatory procedural safeguards provided in the CrPC are complied with:-

i. The jurisdictional Magistrate is kept in the picture at all stages of the investigation;

ii. Court would be aware about the commencement of investigations, and closure of the same qua any of the accused;

iii. Court would have the advantage of Case Diary as and when required;

iv. Person who is shown as suspect / accused of offence by complying with section 154/155 (1) and 157/155 (2) of the CrPC, would be able to-

a. seek a certified copy of the Information report from Court on payment of fee,

b. file application for seeking anticipatory bail under section 438 of the Code by

relying upon –

i. the contents of the FIR for the cognizable offence, or

ii. the Complaint for Non-cognizable offence, as the case may be;

c. "appear" before the Court with reference to the FIR of cognizable case or the Order to investigate the non-cognizable case, and thus effectively seek regular bail as per provisions of section 437 /439 of the CrPC as the case may be;

d. effectively invoke inherent jurisdiction of Hon'ble High Court under section 482 of Code / Article 226 for seeking quashing of the FIR / the complaint of non-cognizable offence at the inception;

e. seek effective protection from threatened violation of fundamental rights under Article 32 of the Constitution by annexing therewith the concerned FIR of cognizable case or the complaint with order to investigate the non-cognizable case;

f. place on record of investigating agency such material which would, demolish the allegations in the FIR /the complaint, and / or satisfy the officer concerned that the role alleged against him is not true and correct;

g. take appropriate steps in accordance with law, if the information recorded is wrong, malicious, distorted and to wreck vengeance only to spitefully set criminal law into motion, and

h. seek redress against fishing and roving inquiry.

B20. This Hon'ble Court while dealing with a '***Criminal Appeal No. 737 of 2016 titled as Gorav Kathuria vs. Union of India***' arising out of the Certificate to Appeal granted in terms of Article 134-A of the Constitution held as under:-

> *"Though the High Court has granted certificate to appeal, we have heard the learned counsel for some time* ***and are of the opinion that the impugned judgment of the High Court is correct****.*
>
> *This appeal is, accordingly, dismissed."*

B21. In view of settled law as enunciated in ***V.M. Salgaocar (2000) 5 SCC 373*** that the doctrine of merger applies "*When an appeal is dismissed the order of the High Court is merged with that of the Supreme Court",* it is apt to reproduce the critical findings of the Division Bench of the Punjab & Haryana High Court in ***Gorav Kathuria vs. Union of India, 2016 SCC OnLine P&H 3428***:-

> *"**33.** Guided by the aforesaid principles laid down by the Hon'ble Supreme Court*

regarding statutory interpretation and the duty of the Court to secure the ends of justice, we have no hesitation in holding that in 2013, Part B of the Schedule was omitted and the Scheduled Offences falling thereunder were incorporated in Part A with the sole object to overcome the monetary threshold limit of Rs. 30 lakhs for invocation of PMLA in respect of the laundering of proceeds of crime involved in those offences. No substantive amendment was proposed with express intention to apply limitations on grant of bail as contained in Section 45(1) in respect of persons accused of such offences which were earlier listed in Part B. Therefore, twin limitations in grant of bail contained in Section 45(1) as it stands today, are not applicable qua a person accused of such offences which were earlier listed in Part B.

37. *We, therefore, in light of the "Statement of Objects and Reasons" as incorporated in the Prevention of Money-Laundering (Amendment) Bill, 2011 and the above discussion and findings, have no hesitation in holding that the reference to the offences under Part A of the Schedule in the context of Section 45(1) has to be necessarily read down to apply only to those persons who are arrested under Section 19 of PMLA on accusation of money laundering, who are accused of commission of scheduled offences which were listed under the Part A of the Schedule existing prior to 2013 amendment. In other words, the limitations in grant of bail under Section 45(1) of PMLA are not applicable to those persons who are arrested under PMLA on accusation of commission of such scheduled offences which were earlier listed under Part B of the Schedule (prior to amendment in Schedule carried out in 2013).*

58. ***By application of Section 4(2) of the Code and in view of the aforesaid binding precedents, the words 'police officer' appearing in these definitions would be read as 'officer authorized under the Customs Act, 1962'. Thus, in a 'cognizable offence' under Customs Act, 1962 the Customs Officer would have power to arrest under Section 104(1) without a warrant. He would comply with provisions of Sections 154 to 157 by recording the information and sending forthwith a copy of the Report under Section 157 to the jurisdictional Magistrate. But in a 'non-cognizable offence' under the Act, he would have to obtain from jurisdictional Magistrate permission to investigate and a warrant of arrest under Section 104(1) of the Act, as***

<u>already held by the Hon'ble Supreme Court in Om Parkash (supra).</u>

71. *To the extent any of these Rules or any provision of PMLA is inconsistent with the provisions of the Code it will have overriding effect, and would have to be complied with. All other provisions of the Code, for which there is no inconsistent provision in PMLA or Rules made thereunder, however, would necessarily apply with full force. For example-In the matter of arrest under Section 19 of PMLA, the Rules notified by Central Government vide G.S.R. 446(E) dated 01.07.2005 would have overriding effect on the provisions of the Code of Criminal Procedure, 1973 to the extent anything inconsistent contained therein. Subject to any such inconsistent overriding procedure under PMLA, by application of Section 4(2) of the Code read with Section 65 of PMLA, the provisions contained in the Code relating to arrest would necessarily apply in the matter of any arrest under Section 19 of PMLA.*

72. *Accordingly, subject to the overriding provisions of PMLA and Rules made thereunder, the provisions of Code of Criminal Procedure would necessarily apply to arrest, search and seizure, attachment, confiscation, investigation, prosecution and all other proceedings under PMLA. This is also in consonance with Section 4(2) read with Section 5 of the Code.*

73. *It is therefore evident from the above observations of the Hon'ble Supreme Court that the provisions of the Code of Criminal Procedure would apply, but if there is any inconsistent provision under PMLA or Rules made thereunder, the same will have overriding effect on the provisions of the Code in view of Section 4(2) and 5 of the Code read with Section 65 and 71 of PMLA.*"

B22. The judgment of Division Bench of the Punjab & Haryana HC in ***Gorav Kathuria's case*** has been accorded *imprimatur* in ***Nikesh Tarachand Shah's*** case while observing as under:-

*"**51**. Shri Rohatgi's alternate argument, namely, that if Section 45 were not to be struck down, the 2012 Amendment Act should be read down in the manner indicated in Gorav Kathuria v. Union of India and Ors., 2017 (348) ELT 24 (P & H) and having been expressly approved by this Court, must apply to the facts of these cases.*

52. *In Gorav Kathuria (supra), the 2012 Amendment Act was read down having regard to the object sought to be achieved by the amendment, namely, that*

Part B of the Schedule is being made Part A of the Schedule, so that the provision of a monetary threshold limit does not apply to the offences contained therein…

53. *The matter came to this Court by a certificate of fitness granted by the High Court. Sikri, J and Ramana, J., by their order dated 12th August, 2016, stated:*

> *"Though the High Court has granted certificate to appeal, we have heard the learned counsel for some time and are of the opinion that the impugned judgment of the High Court is correct.*
>
> *This appeal is, accordingly, dismissed."*

The complaint of the learned Attorney General is that this was done at the very threshold without hearing the Union of India. Be that as it may, we are of the opinion that, ***even though the Punjab High Court judgment appears to be correct, it is unnecessary for us to go into this aspect any further, in view of the fact that we have struck down Section 45 of the 2002 Act as a whole****."*

B23. In ***D.K. Basu vs. State of West Bengal (1997) 1 SCC 416*** it was *inter alia* held as under:-

*"**30.** Apart from the police, there are several other governmental authorities also like Directorate of Revenue Intelligence, Directorate of Enforcement, Costal Guard, Central Reserve Police Force (CRPF), Border Security Force (BSF), the Central Industrial Security Force (CISF), the State Armed Police, Intelligence Agencies like the Intelligence Bureau, R.A.W, Central Bureau of Investigation (CBI) , CID, Tariff Police, Mounted Police and ITBP which have the power to detain a person and to interrogated him in connection with the investigation of economic offences, offences under the Essential Commodities Act, Excise and Customs Act. Foreign Exchange Regulation Act etc.* ***There are instances of torture and death in custody of these authorities as well****, In re Death of Sawinder Singh Grover [1995 Supp (4) SCC, 450], (to which Kuldip Singh, j. was a party) this Court took suo moto notice of the death of Sawinder Singh Grover* ***during his custody with the Directorate of Enforcement****. After getting an enquiry conducted by the additional District Judge, which disclosed a prima facie case for investigation and prosecution, this Court directed the CBI to lodge a FIR and initiate criminal proceeding*

against all persons named in the report of the Additional District Judge and proceed against them. The Union of India/Directorate of Enforcement was also directed to pay sum of Rs. 2 lacs to the widow of the deceased by was of the relevant provisions of law to protect the interest of arrested persons in such cases too is a genuine need.

35. *We, therefore, consider it appropriate to issue the following requirements to be followed in all cases of arrest or detention* ***till legal provisions are made is that behalf*** *as preventive measures:*

(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lockup, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or

is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State or Union Territory concerned. Director, Health Services should prepare such a panel for all Tehsils and Districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Illaqa Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.

36. ***Failure to comply with the requirements hereinabove mentioned shall apart from rendering the official concerned liable for departmental action, also render him liable to be punished for contempt of Court*** *and the proceedings for contempt of Court may be instituted in any High Court of the country, having territorial jurisdiction over the matter.*

37. ***The requirements, referred to above flow from Articles 21 and 22(1) of the Constitution and need to be strictly followed. These would apply with equal force to the other Governmental agencies also to which a reference has been made earlier.***

38. *These requirements are in addition to the constitutional and statutory safeguards and do not detract from various other directions given by the Courts from time to time in connection with the safeguarding of the rights and dignity of the arrestee.*"

It was clearly indicated in the said judgment that the directives contained in Para 35 of the said judgment were to be followed "***till legal provisions are made is that behalf****";*

B24. It is a matter of record that subsequently, Section 41-B, 41-C, 41-D have been enacted in the Cr.P.C. in the light of the said directives of this Hon'ble Court in ***D.K. Basu***. All the aforementioned provisions in Cr.P.C. refer to the expression "*Police Officer*", *'Police Control Room'* etc. Thus, it cannot be countenanced that though statutory provisions have been made, provisions of Cr.P.C would not apply to other governmental agencies merely because expression 'Police Officer' is used;

B25. In a recent pronouncement in ***Union of India vs. Ashok Kumar Sharma 2020 SCC OnLine SC 683***, this Hon'ble Court was dealing with the interplay between the provisions of Cr.P.C. and Drugs & Cosmetics Act, 1940 as also the issue as to whether an FIR can be registered by Police for an offence under the D&C Act, *inter alia* held as under:-

> *"**159.** It has been brought to our notice that FIRs have been filed in regard to offences under Chapter IV of the Act.* ***In the view we have taken, no further investigation can be done by the Police Officer. However, it is in the interest of justice that the FIRs are made over by the Police Officers to the concerned Drugs Inspector at the earliest...***
>
> *162. Thus, we may cull out our conclusions/directions as follows:*
>
> > *I. In regard to cognizable offences under Chapter IV of the Act, in view of Section 32 of the Act and also the scheme of the CrPC, the Police Officer cannot prosecute offenders in regard to such offences. Only the persons mentioned in Section 32 are entitled to do the same.*
> >
> > *-x-x-x-*
> >
> > *V. It would appear that on the understanding that the Police Officer can register a FIR, there are many cases where FIRs have been registered in regard to cognizable offences falling under Chapter IV of the Act. We find substance in the stand taken by learned Amicus*

Curiae and direct that they should be made over to the Drugs Inspectors, if not already made over, and it is for the Drugs Inspector to take action on the same in accordance with the law. We must record that we are resorting to our power under Article 142 of the Constitution of India in this regard"

B26. Thus, even Drugs Inspectors have been directed to investigate the FIRs in offences relating to the special enactment i.e., Drugs & Cosmetics Act, 1940, with respect to cognizable offences provided thereunder;

B27. The above view is in consonance with the scheme as contemplated in Section 4(2) Cr.P.C. that unless expressly barred, unless Special Act provides for specific procedure displacing procedure under Cr.P.C., the procedure for investigations under such Special Act would be governed by Cr.P.C. alone.

C. UMBILICAL CORD CONNECTION BETWEEN THE SCHEDULED/PREDICATE OFFENCE AND THE OFFENCE OF MONEY LAUNDERING - FINDINGS RECORDED IN THE TRIAL OF THE SCHEDULED OFFENCE REGARDING PROCEEDS OF CRIME WOULD HAVE BEARING IN THE CASE UNDER THE PML ACT – SCOPE OF EXPLANATION (I) TO SECTION 44 REQUIRES CLARIFICATION.

C1. In ***Nikesh Tarachand Shah vs. Union of India (2018) 11 SCC 1***, it has been held as under:-

*"**11**. .... **An important ingredient of the offence is that these persons must be knowingly or actually involved in any process or activity connected with proceeds of crime and "proceeds of crime" is defined under the Act, by Section 2(1)(u) thereof, to mean any property derived or obtained directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence (which is referred to in our judgment as the predicate offence)**…."*

C2. A bare glance at Section 2(1)(u) of PMLA would show that the *'proceeds of crime'* is the property etc. derived from a criminal activity relatable to the particular schedule/predicate offence. The article ***'the'*** occurring in the *explanation* inserted to Section 2(1)(u) would leave no manner of doubt that the same has a definite

connotation and pins down the proceeds of crime to a particular and specific scheduled offence/predicate offence and not ***'any'*** offence which may be a part of the schedule. In ***Canon India Private Limited v. Commissioner of Customs 2021 SCC OnLine SC 200*** the Hon'ble Supreme Court has held as under:-

"11. ***There are only two articles 'a (or an)' and 'the'. 'A (or an)' is known as the Indefinite Article because it does not specifically refer to a particular person or thing. On the other hand, 'the' is called the Definite Article because it points out and refers to a particular person or thing. There is no doubt that, if Parliament intended that any proper officer could have exercised power under Section 28(4), it could have used the word 'any'."***

C3. Relating to the aspect of the scheduled/predicate offence and the offence of money laundering to be tried together, ***Nikesh Tarachand Shah (****supra****)*** lays to rest the interpretation to Section 44 in the following paragraphs:

"13. *.....* ***Section 44 is very important in that the section provides for the trial of a scheduled offence and the offence of money laundering together by the same Special Court, which is to try such offences under the Code of Criminal Procedure as if it were a Court of Session…***

14. *....* ***Now, both the offence of money laundering and the predicate offence were to be tried by the Special Court…***

31. *.....* ***Section 44 of the 2002 Act makes it clear that an offence punishable under Section 4 of the said Act must be tried with the connected scheduled offence from which money laundering has taken place….***

32. ***The second illustration would be of Mr X being charged with an offence under the 2002 Act together with a predicate offence contained in Part B of the Schedule. Both these offences would be tried together……In a third illustration, Mr X can be charged under the 2002 Act together with a predicate offence****.....*

33. *.....* ***In the fourth illustration, Section 45 would apply in a joint trial of offences under the Act and under Part A of the Schedule****....*

34. *..... Despite the fact that Mr X is not involved in the money laundering offence, but only in the scheduled offence,* ***by virtue of the fact that the two sets of offences are being tried together, Mr X would be denied bail because the money laundering offence is being tried along with the scheduled***

offence, for which Mr Y alone is being prosecuted.

39. *....Inasmuch as these sections attract the twin conditions under the NDPS Act in any case, it was wholly unnecessary to include them again in Para 2 of Part A of the Schedule**, for when a person is prosecuted for an offence under Sections 19, 24, 27-A or 29 of the NDPS Act, together with an offence under Section 4 of the 2002 Act**,*

42. *……**Thus, anticipatory bail may be granted to a person who is prosecuted for the offence of money laundering together with an offence under Part A of the Schedule, which may last throughout the trial.***

43. *... **According to him, Section 45, when read with Sections 3 and 4, would necessarily lead to the conclusion that the source of the proceeds of crime, being the scheduled offence, and the money laundering offence, would have to be tried together, and the nexus that is provided is because the source of money laundering being as important as money laundering itself, conditions under Section 45 would have to be applied…...*"

C4. Under the peculiar scheme of the Act, the following conclusions are therefore inevitable:-

a. It is pre-requisite, incumbent and mandatory that before the ED embarks upon the investigations into an offence under PMLA, the occurrence of a scheduled/predicate offence and consequential registration of case as well as commencement of investigation into the same must pre-exist;

b. There is an umbilical cord connection between the scheduled/predicate offence and the offence of money laundering *inasmuch as* the proceeds of crime is the property etc. derived from a criminal activity relatable to ***the*** particular schedule/predicate offence, and therefore both the trials are mandatory to be tried together by the same Special Court under PMLA in terms of Section 44 PMLA;

c. In the event of the proceedings under the investigation/trial into the scheduled/predicate offence result in recording of a finding that neither is the person concerned involved in any criminal activity relating thereto, nor have any proceeds of crime been derived or obtained therefrom, no proceedings/trial under PMLA can continue;

d. In the wake of trial into the schedule/predicate offence having concluded and

no attempt having been made by the ED to comply with the mandatory provisions of Section 44(1)(c) of PMLA for having the trial of schedule/predicate offence committed to the Special Court under PMLA, the proceedings under PMLA would stand vitiated;

C5. The scope of money laundering & proceedings would be confined to projecting and claiming as untainted, the property derived from a criminal activity relating to a scheduled offence in whatever form available. Any other property tainted or untainted, disclosed or undisclosed, accounted for or unaccounted, if having no nexus with the *'proceeds of crime'* derived from scheduled offence, shall not be a subject matter under Section 3. Only those properties which are derived from a criminal activity relating to a scheduled offence and projected or claimed as untainted would contravene Section 3 & other properties cannot be brought under the fold of money laundering;

C6. In a Constitution Bench judgment of this Hon'ble Court in '***Attorney General for India vs. Amratlal Prajivandas, (1994) 5 SCC 54'*** while dealing with the validity of the provisions relating to forfeiture of properties under SAFEMA, it was held as under:-

> *"**44. …..The idea is not to forfeit the independent properties of such relatives or associates which they may have acquired illegally but only to reach the properties of the convict/detenu or properties traceable to him, wherever they are, ignoring all the transactions with respect to those properties…***
>
> ***…It would thus be clear that the connecting link or the nexus, as it may be called, is the holding of property or assets of the convict/detenu or traceable to such detenu/convict**"*

C7. Thus, it can be safely concluded that projection of '*proceeds of crime*' as untainted is a stand-alone offence indeed. However, the foundation for prosecution for an offence of money laundering rests upon the projection or claiming of '*proceeds of crime'* as untainted & to that extent, it is a stand-alone offence. If the '*proceeds of crime*' are found to be non-existent in the investigation / trial of Scheduled Offence or are not projected or claimed as untainted, the offence under Section 3 of PMLA cannot stand;

C8. As an illustration, in CRL. A. 391-392 / 2018 titled ***Adjudicating Authority (PMLA)***

And Ors. v. Ajay Kumar Gupta and Ors. (Item No. 1.9), the schedule/predicate offence related to acquisition/possession of disproportionate assets during the check period 01.05.1997 to 30.06.2005. FIR to that effect was recorded on 29.06.2005 i.e., prior to the coming into force of PML Act on 01.07.2005. While the trial was on the verge of conclusion, an ECIR for offences under the PML Act was registered on 20.02.2015 i.e., after 10 years. The trial in the scheduled offence concluded on 29.12.2017 with a clear finding that there was no disproportionate asset and that all the assets were purchased/acquired from legitimate source of income. The Prosecution Complaint for offence under PMLA was filed after such acquittal ion 28.6.2018 without referring to the same. In such circumstances, it can never be countenanced that the findings recorded in the trial of the scheduled offence would have no bearing in the case under the PML Act by mis-construing Explanation (i) to Section 44.

DRAWN BY:-

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RISHI SEHGAL,
KESHAVAM CHAUDHRI,
RIA KHANNA.
ADVOCATE FOR THE PETITIONERS

FILED BY
NIKHIL JAIN
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PLACE: NEW DELHI
DATE: 09.02.2022