Tushar Mehta
Solicitor General of India

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
TRANSFERRED CASE (CRL) NO. 4 OF 2018

IN THE MATTER OF:-

DIRECTORATE OF ENFORCEMENT ..... PETITIONER

VERSUS

RAJBHUSHAN DIXIT & ANR. ..... RESPONDENTS

WRITTEN SUBMISSIONS

BEHALF OF TUSHAR MEHTA, SOLICITOR GENERAL OF INDIA

INTERPRETATION OF SECTION 19 OF THE PMLA

The interpretation of section 19 and its validity

1. There are two grounds broadly raised by the petitioners based upon Section 19 of the PMLA.

(i) It is arbitrary and unconstitutional qua Article 14 of the Constitution of India; and

(ii) The power under Section 19 cannot be exercised at any stage prior to filing of a complaint.

Constitutional validity

2. The Parliament has made adequate provisions in the form of ***safeguards*** to make the provisions ***constitution compliant***. The Parliament has the entire scheme of the Act before it and has provided for a *different and distinct statutory mechanism* for investigation of special kind of offence namely money laundering and power of the authorities appointed thereunder to arrest an individual.

3. Section 19 will have to be understood in that context. There are following safeguards which are inbuilt in Section 19. It may be mentioned, at the outset, that so far as the power of arrest, an ordinary generic law namely CrPC is concerned, it can be exercised by any police officer which, reading section 2[o] with section 2[s], even includes a 'head constable'. Section 2[o] and Section 2[s] of the CrPC read as under:-

> *"(o) "officer in charge of a police station" includes, when the officer in charge of the police station is absent from the station-house or unable from illness or other cause to perform his duties, the police officer present at the station-house who is next in rank to such officer and is above the rank of constable or, when the State Government so directs, any other police officer so present;*
> *(s) "police station" means any post or place declared generally or specially by the State Government, to be a police station, and includes any local area specified by the State Government in this behalf;"*

4. As shown in the chart below, a police officer can arrest without a warrant even on a "reasonable suspicion" as mentioned in Section 41 of the CrPC. As against that, there are following safeguards inbuilt in Section 19 -

(a) The power of arrest under section 19 can be ***exercised only by a Director, Deputy Director, Assistant Director*** or any other police officer authorised in behalf by the

Central Government. It may be necessary to show that unlike police officers, the Director or any other officers are statutory authorities within the meaning of Section 48 of the Act which reads as under :-

> *"48. Authorities under Act.—There shall be the following classes of authorities for the purposes of this Act, namely:—*
>
> *(a) Director or Additional Director or Joint Director,*
>
> *(b) Deputy Director,*
>
> *(c) Assistant Director, and*
>
> *(d) such other class of officers as may be appointed for the purposes of this Act"*

The Director, who is heading the Enforcement Directorate, implements the PMLA and is appointed by way of a *separate neutral process* contemplated under Section 25 of the Central Vigilance Commission Act, 2003 which reads as under:-

> *"25. Appointments, etc., of officers of Directorate of Enforcement.—*
>
> *Notwithstanding anything contained in the Foreign Exchange Management Act, 1999 (42 of 1999) or any other law for the time being in force,—*
>
> *(a) the Central Government shall appoint a Director of Enforcement in the Directorate of Enforcement in the Ministry of Finance on the recommendation of the Committee consisting of—*
>
> *(i) the Central Vigilance Commissioner — Chairperson; (ii) Vigilance Commissioners — Members; (iii) Secretary to the Government of India in-charge of the Ministry of Home Affairs in the Central Government — Member; (iv) Secretary to the Government of India in-charge of the Ministry of Personnel in the Central Government — Member; (v) Secretary to the Government of India in-charge of the Department of Revenue, Ministry of Finance in the Central Government — Member;*
>
> *(b) while making a recommendation, the Committee shall take into consideration the integrity and experience of the officers eligible for appointment;*
>
> *(c) no person below the rank of Additional Secretary to the Government of India shall be eligible for appointment as a Director of Enforcement;*
>
> *(d) a Director of Enforcement shall continue to hold office for a period of not less than two years from the date on which he assumes office;*
>
> *Provided that the period for which the Director of Enforcement holds the office on his initial appointment may, in public interest, on the recommendation of the Committee under clause (a) and for the reasons to be recorded in writing, be extended up to one year at a time:*
>
> *Provided further that no such extension shall be granted after the completion of a period of five years in total including the period mentioned in the initial appointment;*
>
> *(e) a Director of Enforcement shall not be transferred except with the previous consent of the Committee referred to in clause (a);*

(f) the Committee referred to in clause (a) shall, in consultation with the Director of Enforcement, recommend officers for appointment to the posts above the level of the Deputy Director of Enforcement and also recommend the extension or curtailment of the tenure of such officers in the Directorate of Enforcement;
(g) on receipt of the recommendation under clause (f), the Central Government shall pass such orders as it thinks fit to give effect to the said recommendation."

The first safeguard and the inbuilt protection is, thus, ***conferring powers only on the statutory authorities of a particular rank***.

(b) The second inbuilt safeguard is existence of "*material in possession*" without which the power cannot be exercised.

This may be contrasted with the power of police officer who makes arrest without warrant, which can be done, under section 41 of the Cr.P.C., based upon "reasonable complaint, "credible information" or "reasonable suspicion".

(c) The third inbuilt safeguard is the "*reason to believe*" about the person being arrested, ***being guilty*** of an offence punishable under PMLA. The Cr.P.C., in contrast merely requires reasonable apprehension/suspicion of *commission of offence*.

(d) The fourth safeguard is a mandate contained in section 19 itself that such reasons to believe – based upon the material in his possession – shall have to be *reduced in writing*.

(e) The fifth inbuilt safeguard is the requirement of ***informing the person*** being arrested of the grounds of his arrest. This provision is in strict compliance with Article 22[1] of the Constitution of India.

(f) The sixth inbuilt safeguard is the duty cast upon the statutory authority effecting arrest to forward (i) a copy of the order of arrest and (ii) material in his possession- to the adjudicate authority in a sealed envelope.

With a view to ensure that the said mandate is fulfilled, the legislature has prescribed rules known as 'Prevention of Money Laundering [the Forms and Manner of Forwarding a Copy of Order of Arrest of a Person along with the Material to the Adjudicating Authority and its Period of Retention] Rules, 2005'.

It may be relevant to note that under the said Rules, the material so forwarded is required to be retained for a period of 10 years.

(g) The seventh safeguard which is inbuilt is ***production of the arrested person before the Special Court*** or the Magistrate within 24 hours. It is at this stage that the competent court looks at the material in possession of the Director, the reasons formed by him to believe that the person is guilty of the offence under PMLA and the reasons

recorded by him. The Court would also ascertain as to whether the grounds of arrest are known to the accused or not.

Since there is nothing contrary to Section 167 of the Code of Criminal Procedure in PMLA, the provisions of remand contained in section 167 CrPC would also apply [not because CrPC applies in general but because there is nothing contrary in PMLA].

Any further detention of the arrested person would, therefore, be only under a judicial order passed by the competent court.

5. In view of the above referred inbuilt precautions and safeguards envisaged by the legislature while providing for a different and distinct mechanism of arrest contrary to the power of arrest at a much lower threshold provided under CrPC, the provisions of section 19 can never be termed as either arbitrary or irrational or violative of Article 14 in any manner. The comparative chart is as under :

PMLA	CRPC
Section 19 : Power to arrest *(1) If the Director, Deputy Director, Assistant Director or any other officer authorised in this behalf by the Central Government by general or special order, has on the basis of material in his possession,* ***reason to believe (the reason for such belief to be recorded in writing)*** *that any person has been guilty of an offence punishable under this Act, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.* *(2) The Director, Deputy Director, Assistant Director or any other officer shall, immediately after arrest of such person under sub-section (1), forward a copy of the order along with the material in his possession, referred to in that sub-section, to the Adjudicating Authority in a sealed envelope, in the manner, as may be prescribed and such Adjudicating Authority shall keep such order and material for such period, as may be prescribed.* *(3) Every person arrested under sub-section (1) shall, within twenty-four hours, be taken to a Special Court or Judicial Magistrate or a Metropolitan Magistrate, as the case may be, having jurisdiction:* *Provided that the period of twenty-four hours shall exclude the time necessary for the journey from the place of arrest to the Special Court or Magistrate's Court.*	*41. When police may arrest without warrant. (1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person- (a) who has been concerned in any cognizable offence, or against whom a* ***reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists****, of his having been so concerned; or* *...*

Response to submissions of Petitioners

NOTE – IV

6. It is submitted that further, the submission of the Petitioners that persons under suspicious are not aware and ***are not even informed of the case against them*** during the arrest procedure ***is contrary to plain language of the act***. It is submitted that as soon as any inroad in the liberty is effectuated by the investigating agency in the form of arrest of the person, it is mandated by law to provide for the ground of arrest, which are relatable to the officer having *reason to believe* that the persons under suspicion to be *guilty of the offence*. It is submitted that the said information is far more detailed that any information provided to accused persons in ordinary procedural criminal law and in practice, provides detailed grounds and information to the person arrested as to the involvement of the said person.

7. It is submitted that further, the ***higher standard*** of the officer having *reason to believe* that the persons under suspicion to be *guilty of the offence* also affects the judicial decision making of the Ld. Special Judge before whom the remand proceedings take place. It is submitted that therefore, the assertion of the Petitioners that the said provision is contrary to Article 21 is misconceived.

8. It is submitted that further, by implication of the ousting of Section 41 and 41A of Cr.P.C., the judgment in ***Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273 [SGI Compilation – Volume X – pg. 4346-4355]** would not apply to arrest under PMLA as the principles in ***Arnesh Kumar*** **[SGI Compilation – Volume X – pg. 4346-4355]** have been developed keeping in mind the lower threshold in Cr.P.C. in order to avoid misuse due to the high possibility of arrest in all cases. It is submitted that as opposed to the same, considering the higher threshold in PMLA, the possibility of arbitrary arrests is negated and therefore, ***Arnesh Kumar*** **supra [SGI Compilation – Volume X – pg. 4346-4355]** has no application. Further, it may be noted that considering the nature of the offences in IPC, and the gravity thereof, the benchmark of 7 years is under in Section 41/41A in order segregate offences. It is submitted that considering the special regime in the PMLA and the fact that a need for a special enactment was felt by the Legislature, the division of 7 years cannot be lifted and applied to PMLA. Further, considering the nature of the offence, serving of notice to a person would often result in making the investigation infructuous.

9. It is submitted that the apprehension of misuse of power is even otherwise unfounded and incorrect. The Enforcement officers empowered by PMLA to make investigation into the offences under the said law are not to be equated with police officers. The law confers upon them requisite powers to carry out investigation and collect evidence. The said power includes the power to issue summons to "any person" whose attendance is considered "necessary" and compelling his attendance, whether to "give evidence" or to "produce any records" and to examine him "on oath", in terms of Section 50(2) and (3), or to put any person under arrest (without warrant) upon satisfaction as to his complicity. These powers necessary for investigation do not render the authorities under PMLA same as police. The general guidelines governing the arrest procedure, as envisaged in the Code of Criminal Procedure or in terms of judicial dicta, control the exercise of such power by them. The fundamental rights relating to criminal prosecutions are not denied here. Similarly, the rights guaranteed to an arrestee including for authorization for continued detention as per the general criminal law continue to regulate and, for this purpose, Section 167 Cr.P.C. continues to apply. There are safeguards

available under this special law (PMLA) which correspond in equal measure to the safeguards under the general law. Some of the safeguards under PMLA may be highlighted as under:

(i) No action affecting the rights of any person to property may be initiated on unfounded suspicion. The Director (or Deputy Director) must have "material in his possession" and must record reasons "in writing" for forming belief about a person having in his possession proceeds of crime or about their possible use or retention before he can lawfully proceed to have such property attached for adjudication or confiscation.

(ii) The officer directing provisional attachment of a property is obliged by the law to report the fact to a superior independent statutory authority (Adjudicating Authority) by making over to it, in confidence, copy of the material, the recorded reasons and connected proceedings, such authority, in turn, being obliged by law to retain the said record in its safe custody, the procedure and period prescribed by the Rules being such as to ensure transparency and accountability.

10. It is submitted that further, other provisions of ***Chapter V of the Cr.P.C. like 41B, Section 46 and Section 50A would apply to arrests made under the PMLA also***.

The contention that power under section 19 can be invoked only after a complaint is filed

11. The said submission has no factual or legal foundation as stated hereunder-

- The plain language of section 19 itself indicate such an interpretation permitting arrest only after complaint is filed.
- It may be mentioned that in a complaint case, a complaint is akin to the police report under Section 173 of the CrPC. Section 19 necessarily and inevitably being a ***part of investigation*** would always be prior to filing of the complaint under section 44[2] or further complaint stipulated in Explanation II of Section 44[2]

12. The proviso to Section 44[1][b] makes it absolutely clear that the complaint is to be filed only after conclusion of investigation. Section 44[1][b] reads as under:-

> *"44. Offences triable by Special Courts.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—*
>
> *xxx*
>
> *xxx*
>
> *(b) a Special Court may, upon a complaint made by an authority authorised in this behalf under this Act take cognizance of offence under section 3, without the accused being committed to it for trial;*
>
> *Provided that after conclusion of investigation, if no offence of money-laundering is made out requiring filing of such complaint, the said authority shall submit a closure report before the Special Court; or"*

13. Once it is clear on a plain reading of a statute that a complaint is culmination of investigation and the arrest is inevitably a part of investigation, there can be no legal justification for a proposition that an arrest can be made only after conclusion of investigation.

14. It is submitted that considering the nature of the offence, it may not be possible to file a conclusive complaint against all accused with all evidence since many of them may be absconding or have become fugitives. It is for this reason that Explanation II is added to remove

any doubts and confer power of conducting further investigation even after filing of a complaint under section 44[1][b].

15. It is submitted that further, Section 19 of PMLA is ***pari materia*** to Section 35 of Foreign Exchange Regulation Act, 1973 and Section 103 of the Customs Act, 1963. The said provisions are reproduced as under:

SECTION 19 OF PMLA	SECTION 35 OF FERA	SECTION 104 OF THE CUSTOMS ACT 1
19. Power to arrest.— *(1) If the Director, Deputy Director, Assistant Director, or any other officer authorised in this behalf by the Central Government by general or special order, has* ***on the basis of material in his possession reason to believe*** *(the reason for such belief to be recorded in writing)* ***that any person has been guilty of an offence punishable under this Act****, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.* *(2) The Director, Deputy Director, Assistant Director or any other officer shall, immediately after arrest of such person under sub-section (1), forward a copy of the order, along with the material in his possession, referred to in that sub-section, to the Adjudicating Authority, in a sealed envelope, in the manner, as may be prescribed and such Adjudicating Authority shall keep such order and material for such period, as may be prescribed.* *(3) Every person arrested under sub-section (1) shall within twenty-four hours, be taken to a Judicial Magistrate or a Metropolitan Magistrate, as the case may be, having jurisdiction:*	*"35. (1) If any officer of Enforcement authorised in this behalf by the Central Government, by general or special order,* ***has reason to believe that*** *any person in India or within the Indian customs waters* ***has been guilty of an offence punishable under this Act****, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.* *(2) Every person arrested under sub-section (1) shall, without unnecessary delay, be taken to a Magistrate.* *(3) Where any officer of Enforcement has arrested any person under sub-section (1), he shall, for the purpose of releasing such person on bail or otherwise, have the same powers and be subject to the same provisions as the officer-in-charge of a police station has, and is subject to, under the Code of Criminal Procedure, 1898 (5 of 1898)."*	*"104. (1) If any officer of Customs empowered in this behalf by general or special order of the Collector of Customs* ***has reason to believe that*** *any person in India or within the Indian customs waters* ***has been guilty of an offence punishable under Section 135****, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.* *(2) Every person arrested under sub-section (1) shall, without unnecessary delay, be taken to a Magistrate.* *(3) Where an officer of Customs has arrested any person under sub-section (1), he shall, for the purpose of releasing such person on bail or otherwise, have the same powers and be subject to the same provisions as the officer-in-charge of a police station has and is subject to under the Code of Criminal Procedure, 1898 (5 of 1898).* *(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), an offence under this Act shall not be cognizable.*

[1] Before the amendment in 2006.

SECTION 19 OF PMLA	SECTION 35 OF FERA	SECTION 104 OF THE CUSTOMS ACT 1
Provided that the period of twenty-four hours shall exclude the time necessary for the journey from the place of arrest to the Magistrate's Court.		

16. It is submitted that the following case law would clearly demonstrate the validity of the language contained in Section 19 of the PMLA. It is submitted that similar *pari materia* provisions have been tested by this Hon'ble Court and been upheld. It is further stated that this Hon'ble Court, has further held that ***the filing of complaint before the magistrate under the relevant provision of the Special Acts after the culmination of the investigation is not a necessary perquisite before effecting the arrest of a person***. The Hon'ble Court has further stated that there are enough safeguards in the language of the provisions. A similar argument of "formal accusation" prior to arrest was made before a Constitution Bench of this Hon'ble Court while interpreting a similar provision under the Sea Customs Act in ***Ramesh Chandra Mehta v. State of W.B.*, (1969) 2 SCR 461 [SGI Compilation – Volume VIII – pg. 3852-3863]**. It was held as under:

> *"**23.** The scheme of the Customs Act, 1962, relating to searches, seizure and arrest, and confiscation of goods and conveyances and imposition of penalties may be briefly examined. Under Sections 100 and 101 a Customs Officer has power to search any person to whom these sections apply if the officer has reason to believe that such person has secreted about his person, any goods liable to confiscation or any documents relating thereto. **Section 104 confers upon the Customs Officer power to arrest if he has reason to believe that any person in India or within the Indian Customs waters has been guilty of an offence punishable under Section 135**. Every person so arrested must be informed of the grounds for such arrest. Section 105 authorises any Assistant Collector of Customs to search any premises if he has reason to believe that goods liable to confiscation, or any documents or things which in his opinion will be useful for or relevant to any proceeding under the Act, are secreted in any place, he may authorise any officer customs to search or may himself search for such goods, documents or things. Under Section 104(3) where an officer of customs has arrested any person under sub-section (1) he shall, for the purpose of leasing such person on bail or otherwise, have the same powers and be subject to the same provisions as the officer-in-charge of a police station has and is subject to under the Code of Criminal Procedure, 1898. By Section 107 any officer of customs empowered in that behalf by general or special order of the Collector of Customs may, during the course of any enquiry in connection with the smuggling of any goods — (a) require any person to produce or deliver any document or thing relevant to the enquiry; and (b) examine any person acquainted with the facts and circumstances of the case Section 108 confers upon a gazetted officer of customs the power to summon any person whose attendance he considers necessary to give evidence or to produce a document or any other thing in an enquiry which such officer is making in connection with the smuggling of goods. The person so summoned is bound to attend and to state the truth upon any subject respecting which he is examined or make statements and*

produce such documents and other things as may be required, and every such enquiry shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code. Section 110 authorises the proper officer to seize such goods as he has reason to believe are liable to confiscation under the Act. Sections 111 to 127 deal with confiscation of goods and conveyances and with imposition of penalties. An appeal lies to the appropriate authority at the instance of a person aggrieved by any decision or order passed under the Act within the time specified under Section 128. Under Section 130 the Central Board of Revenue may exercise revisional powers in respect of orders passed by the Subordinate Customs Authorities and Section 131 authorises the Central Government on the application of any person aggrieved by certain orders specified therein to exercise the power to annul or modify such orders.

.....

26. *It was strenuously urged that under Section 104 of the Customs Act, 1962, the Customs Officer may arrest a person only if he has reason to believe that any person in India or within the Indian Customs waters has been guilty of an offence punishable under Section 135 and not otherwise and he is bound to inform such person of the grounds of his arrest.* ***Arrest of the person who is guilty of the offence punishable under Section 135 and information to be given to him amount, it was contended, to a formal accusation of an offence and in any case the person who has been arrested and who has been informed of the nature of the infraction committed by him stands in the character of an accused person. We are unable to agree with that contention****. Section 104(1) only prescribes the conditions in which the power of arrest may be exercised. The officer must have reason to believe that a person has been guilty of an offence punishable under Section 135, otherwise he cannot arrest such person. But by informing such person of the grounds of his arrest the Customs Officer does not formally accuse him with the commission of an offence. Arrest and detention are only for the purpose of holding effectively an inquiry under Sections 107 and 108 of the Act with a view to adjudging confiscation of dutiable or prohibited goods and imposing penalties. At that stage there is no question of the offender against the Customs Act being charged before a Magistrate. Ordinarily after adjudging penalty and confiscation of goods or without doing so, if the Customs Officer forms an opinion that the offender should be prosecuted he may prefer a complaint in the manner provided under Section 137 with the sanction of the Collector of Customs and until a complaint is so filed the person against whom an inquiry is commenced under the Customs Act does not stand in the character of a person accused of an offence under Section 135.*

27. *Section 167 of the Sea Customs Act, 1878, contained a large number of clauses which described different kinds of infractions and different penalties or punishments liable to be imposed in respect of those infractions. Under the Customs Act of 1962 the Customs Officer is authorised to confiscate goods improperly imported into India and to impose penalties in cases contemplated by Sections 112 and 113. But on that account the basic scheme of the Sea Customs Act, 1878, is not altered. The Customs Officer even under the Act of 1962 continues to remain a revenue officer primarily concerned with the detection of smuggling and enforcement and levy of proper duties and prevention of entry into India of dutiable goods without payment of duty and of goods of which the entry is prohibited. He does not on that account become either a police officer, nor does the information conveyed by him, when the person guilty of an infraction of the law is arrested,*

amount to making of an accusation of an offence against the person so guilty of infraction. Even under the Act of 1962 formal accusation can only be deemed to be made when a complaint is made before a Magistrate competent to try the person guilty of the infraction under Sections 132, 133, 134 and 135 of the Act. Any statement made under Sections 107 and 108 of the Customs Act by a person against whom an enquiry is made by a Customs Officer is not a statement made by a person accused of an offence."

17. It is submitted that Section 104 of the Customs Act, 1962 underwent a slight change in language in 2006. This Hon'ble Court, again examined the power of arrest under the said Act in ***Union of India v. Padam Narain Aggarwal*, (2008) 13 SCC 305 [SGI Compilation – Volume X – pg. 4356-4374]**, in the context of blanket anticipatory bail order granted by the High Court. This Hon'ble Court held as under:

*"**Application for anticipatory bail***

***8.** The accused came to know about the filing of complaints. They, therefore, made applications for anticipatory bail before the District and Sessions Court, Jaipur. The learned Judge, however, dismissed the applications by an order dated 22-11-2006. The accused approached the High Court of Rajasthan (Jaipur Bench) and as stated above, the applications were disposed of by the High Court directing the Customs Authorities not to arrest the respondents for any non-bailable offence without ten days' prior notice to them. The High Court stated:*

"Having considered the rival submissions, since the petitioner-accused have only been summoned under Section 108 of the Customs Act, 1962 to give their evidence in the inquiry, these anticipatory bail applications are premature and are disposed of with the direction that they shall appear before the Customs Authorities concerned on 4-12-2006 at 11 a.m. in response to the summons issued to them and in case the Customs Authorities found any non-bailable offence against the petitioner-accused, they shall not be arrested without ten days' prior notice to them."

(emphasis supplied)

The said order is challenged by the Union of India in this Court.

xxx

Power to arrest

19. Having noticed the relevant provisions of the Act, let us now consider ambit and scope of power of arrest.

20. The term "arrest" has neither been defined in the Code of Criminal Procedure, 1973 nor in the Penal Code, 1860 nor in any other enactment dealing with offences. The word "arrest" is derived from the French word "arrater" meaning "to stop or stay". It signifies a restraint of a person. "Arrest" is thus a restraint of a man's person, obliging him to be obedient to law. "Arrest" then may be defined as "the execution of the command of a court of law or of a duly authorised officer".

***21.** Sections 41-44 and 46 of the Code of Criminal Procedure, 1973 deal with arrest of a person. Section 41 empowers a police officer to arrest any person without warrant. Section 42 deals with the power of a police officer to arrest any person who in the presence of such police officer has committed or has been accused of committing a non-cognizable offence and refuses to give his name and residence or gives a name or residence which such officer has reason to believe to be false. Section 43 enables a private person to arrest any person who in his presence*

commits a non-cognizable offence, or is a proclaimed offender. Section 44 deals with cases of arrest by a Magistrate. Section 46 lays down the manner of arrest.

22. *So far as the Customs Act, 1962 is concerned, the power to arrest is contained in Section 104 thereof. It reads thus:*

.....

Section 104 thus empowers a Customs Officer to arrest a person if he has "reason to believe" that such person has committed any offence mentioned therein. It also enjoins the officer to take the arrested person to a Magistrate "without unnecessary delay". The section also provides for release of such person on bail.

Anticipatory bail

23. *Section 438 of the Code makes special provision for granting "anticipatory bail" which was introduced in the present Code of 1973. The expression "anticipatory bail" has not been defined in the Code. But as observed in Balchand Jain v. State of M.P. [(1976) 4 SCC 572 : 1976 SCC (Cri) 689] , anticipatory bail means a bail in anticipation of arrest. The expression "anticipatory bail" is a misnomer inasmuch as it is not as if bail presently granted is in anticipation of arrest. Where a competent court grants "anticipatory bail", it makes an order that in the event of arrest, a person shall be released on bail. There is no question of release on bail unless a person is arrested and, therefore, it is only on arrest that the order granting anticipatory bail becomes operative.*

24. *It was also observed that the power of granting "anticipatory bail" is extraordinary in character and only in exceptional cases where it appears that a person is falsely implicated or a frivolous case is launched against him or "there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail" that such power may be exercised. Thus, the power is "unusual in nature" and is entrusted only to the higher echelons of judicial service i.e. a Court of Session and a High Court.*

27. *Keeping in view the Reports of the Law Commission, Section 438 was inserted in the present Code. Sub-section (1) of Section 438 enacts that when any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or to the Court of Session for a direction that in the event of his arrest he shall be released on bail, and the Court may, if it thinks fit, direct that in the event of such arrest he shall be released on bail. Sub-section (2) empowers the High Court or the Court of Session to impose conditions enumerated therein. Sub-section (3) states that if such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, he shall be released on bail.*

30. *We may also refer to at this stage "Malimath Committee on Reforms of Criminal Justice System". Considering the exercise of power by courts under Section 438 and grant of anticipatory bail in favour of the applicants, the Committee observed that the provision as to anticipatory bail has often been "misused by rich and influential people". The Committee, however, opined to retain the provision subject to two conditions:*

(i) The Public Prosecutor should be heard by the court before granting an application for anticipatory bail; and

(ii) The petition for anticipatory bail should be heard only by the court of competent jurisdiction.

33. *The Court proceeded to state that the* ***High Court or the Court of Session must apply its own mind to the question and decide whether a case has been***

made out for grant of such relief. If condition precedent laid down in sub-section (1) of Section 438 is not satisfied and there is no reason to believe that the applicant is likely to be arrested for commission of a non-bailable offence, the Court has no power to grant anticipatory bail. *This Court, however, held that the High Court was wholly right so far as Proposition (2) was concerned. The High Court in Proposition (2) said: (Gurbaksh Singh case [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] , SCC p. 576, para 11)*

> *"(2) Neither Section 438 nor any other provision of the Code authorises the grant of blanket anticipatory bail for offences not yet committed or with regard to accusations not so far levelled."*

Agreeing with the said proposition, this Court stated: ***(Gurbaksh Singh case [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] , SCC p. 590, para 40)***

> ***"40. ... We agree that a 'blanket order' of anticipatory bail should not generally be passed. This flows from the very language of the section which, as discussed above, requires the applicant to show that he has 'reason to believe' that he may be arrested. A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine. That is why, normally, a direction should not issue under Section 438(1) to the effect that the applicant shall be released on bail 'whenever arrested for whichever offence whatsoever'. That is what is meant by a 'blanket order' of anticipatory bail, an order which serves as a blanket to cover or protect any and every kind of allegedly unlawful activity, in fact any eventuality, likely or unlikely regarding which, no concrete information can possibly be had. The rationale of a direction under Section 438(1) is the belief of the applicant founded on reasonable grounds that he may be arrested for a non-bailable offence. It is unrealistic to expect the applicant to draw up his application with the meticulousness of a pleading in a civil case and such is not requirement of the section. But specific events; and facts must be disclosed by the applicant in order to enable the court to judge of the reasonableness of his belief, the existence of which is the sine qua non of the exercise of power conferred by the section."***

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Safeguards against abuse of power

36. From the above discussion, it is amply clear that power to arrest a person by a Customs Officer is statutory in character and cannot be interfered with. Such power of arrest can be exercised only in those cases where the Customs Officer has "reason to believe" that a person has been guilty of an offence punishable under Sections 132, 133, 135, 135-A or 136 of the Act. Thus, the power must be exercised on objective facts of commission of an offence enumerated and the Customs Officer has reason to believe that a person sought to be arrested has been guilty of commission of such offence. The power to arrest thus is circumscribed by objective considerations and cannot be exercised on whims, caprice or fancy of the officer.

37. *The section [**Ed.**: Section 104 of the Customs Act, 1962.] also obliges the Customs Officer to inform the person arrested of the grounds of arrest as soon as*

may be. ***The law requires such person to be produced before a Magistrate without unnecessary delay.***

38. The law thus, on the one hand, allows a Customs Officer to exercise power to arrest a person who has committed certain offences, and on the other hand, takes due care to ensure individual freedom and liberty by laying down norms and providing safeguards so that the power of arrest is not abused or misused by the authorities. It is keeping in view these considerations that we have to decide correctness or otherwise of the directions issued by a Single Judge of the High Court. "Blanket" order of bail may amount to or result in an invitation to commit an offence or a passport to carry on criminal activities or to afford a shield against any and all types of illegal operations, which, in our judgment, can never be allowed in a society governed by the rule of law."

18. In light of the above, it is submitted that apart from having adequate provision ensuring compliance with Article 14 and Article 21, the language of provisions which are pari materia the language Section 19 of the PMLA, have been interpreted by this Hon'ble Court whereby the interpretation sought to be canvassed by the Petitioners has been rejected.

Reason to believe & recording in writing prevent arbitrariness and makes the provision Article 14 compliant

19. It is submitted that the standard of reasons to believe to be record in writing with regard to the guilt of the person sough to be arrested under Section 19 is not a novel or an arbitrary standard which can be abused by the authorities. It is submitted that *reason to believe* has a specific meaning in law and has been interpreted by the Courts to itself be a sufficient safeguard against arbitrary exercise of power vested under a statute. It is submitted that a ***grand total of 313 arrests in 17 years of operation of the Act is itself illustrative of reasonability and the higher standard of protection that Section 19 of the PMLA represents***.

20. It is submitted that on the said issue, first a judgment Canada is illustrative. In ***Gifford v. Kelson*** **(1943) 51 Man. R 120** at 124(9) **[SGI Compilation – Volume X – pg. 4375-4383]** it was observed by Dysart J as under:

"A suspicion or belief may be entertained, but suspicion and belief cannot exist together. Suspicion is much less than belief; belief includes or absorbs suspicion.

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When, we speak of "reason to believe" we mean a conclusion arrived at as to the existence of a fact. Of course "reason to believe" does not amount to positive knowledge nor does it mean absolute certainty but it does convey conviction of the mind founded on evidence regarding the existence of a fact or the doing of an act. ***Suspicion, on the other hand rings uncertainty. It lives in imagination. It is inkling. It is mistrust It is chalk. 'Reason to believe' is not. It is cheese****."*

21. It is submitted that another safeguard present in section 19 is the record of reasons. It is submitted that this Hon'ble Court has held that the recording of reasons also necessarily serves as a check on any arbitrary exercise of power and in essence provides for a safeguard to the person against whom such power is being exercised. In ***Premium Granites & Anr. v. State of***

***Tamil Nadu & Ors.*, (1994) 2 SC 691 [SGI Compilation – Volume X – pg. 4384-4411]**, this Hon'ble Court held as under :

> *"49. The power of relaxation under Rule 39 of Mineral Concession Rules is to be exercised for "mineral development" and "in public interest" after recording reasons for such exercise of power. In our view, it has been rightly contended by the learned counsel in support of the validity of Rule 39, that the exercise of power under the said Rule 39 cannot be made arbitrarily, capriciously and on subjective satisfaction of the authority concerned but the same is to be exercised within the parameters of "mineral development" and "in public interest" which as aforesaid, are not vague and indefinite concepts. Such exercise of power must satisfy the reasonableness of State action before a court of law if any challenge of improper action in exercise of the said power under Rule 39 in a given case is made. It has been held by the Constitution Bench of this Court in Meenakshi Mill case that if a speaking order is required to be passed on objective consideration, such provision is not vitiated on the ground of absence of a provision for appeal or review because the remedy available by way of judicial review is by itself an adequate safeguard against improper and arbitrary exercise of power**. **It has also been held by this Court in the said decision that requirement of giving reasons for exercise of the power by itself excludes chances of arbitrariness**."*

Safeguard of high-ranking officer exercising the power

22. It is submitted that that further, it is a high-ranking officer alone who can exercise power under Section 19 thereby creating another layer of protection against arbitrary exercise. It is submitted that in ***Sukhwinder Pal Bipan Kumar v. State of Punjab*, (1982) 1 SCC 31 [SGI Compilation – Volume X – pg. 4412-4420]**, this Hon'ble Court held as under:

> *"Thirdly, as a check upon possible injustice that might result from an improper exercise of the power of suspension of a licence by the licensing authority under the second proviso, there is an additional safeguard to a dealer by way of an appeal to the Director, Food and Supplies, under cl. 13 of the Order*. ***This Court has repeatedly laid down that where the discretion to apply the provisions of a particular statute is left with the Government or one of the highest officers, it will be presumed that the discretion vested in such highest authority will not be abused.*** *It would, therefore, appear that the second proviso to sub-cl. (1) of cl. 11 of the Order furnishes sufficient guidelines for the exercise of the power of suspension of a licence during the pendency of or in contemplation of the proceedings for cancellation thereof,* ***and it does not suffer from the vice of arbitrariness and is, therefore, not violative of Art. 14 of the Constitution. On the contrary, as already indicated, it affords reasonable safeguards***."

23. It is submitted that lastly, the standard of "reason to believe" for the "reasons to be recorded in writing" with regard to "guilt" is ample and adequate safeguard for an individual. It is submitted that in ***A.S. Krishnan v. State of Kerala*, (2004) 11 SCC 576 [SGI Compilation – Volume X – pg. 4421-4429]**, this Hon'ble Court has held as under :

> *"10. In substance, what it means is that a person must have reason to believe if the circumstances are such that a reasonable man would, by probable reasoning, conclude or infer regarding the nature of the thing concerned. Such*

circumstances need not necessarily be capable of absolute conviction or inference; but it is sufficient if the circumstances are such as creating a cause to believe by chain of probable reasoning leading to the conclusion or inference about the nature of the thing. These two requirements i.e. "knowledge" and "reason to believe" have to be deduced from various circumstances in the case. (See Joti Parshad v. State of Haryana [1993 Supp (2) SCC 497 : 1993 SCC (Cri) 691 : AIR 1993 SC 1167] .)"

24. It is submitted that therefore, the Legislature has designedly adopted a higher standard in Section 19 in order to ensure a departure for the Cr.P.C. and further, in order to ensure that power under Section 19 is exercise in pursuance of investigation under the PMLA with adequate safeguards to individuals.

Possibility of abuse is not a ground – Robust protection over and above Cr.P.C.

25. It is submitted that the argument of the possibility of any misuse and arbitrary use of the power by an empowered officer can be a ground to challenge such action however, will not render the provision itself unconstitutional. It is submitted that considering the higher threshold inbuilt in the language of Section 19, ***the legislature has taken adequate care to reduce the possibility of any misuse or arbitrary exercise of power***. It is submitted that this Hon'ble Court in ***Ahmed Noor Mohd. Bhatt v. State of Gujarat***, **(2005) 3 SCC 647 [SGI Compilation – Volume X – pg. 4430-4436]** has already held in the context of power to arrest that in light of the inbuilt guidelines and safeguard in the provisions, *a mere assertion that such power may lead to a possibility of abuse cannot be a ground for declaration of unconstitutionality*. It may also be relevant to quote the relevant portions of the said judgment as under:

"10. Counsel for the petitioner submitted that such requirements must be laid down in the case of an arrest under Section 151 of the Code of Criminal Procedure. Counsel for the respondents conceded that the requirements laid down in Joginder Kumar [(1994) 4 SCC 260 : 1994 SCC (Cri) 1172] and D.K. Basu [(1997) 1 SCC 416 : 1997 SCC (Cri) 92] apply also to an arrest made under Section 151 of the Code of Criminal Procedure. As we have noticed earlier, Section 151 of the Code of Criminal Procedure itself makes provision for the circumstances in which an arrest can be made under that section and also places a limitation on the period for which a person so arrested may be detained. The guidelines are inbuilt in the provision itself. Those statutory guidelines read with the requirements laid down by this Court in Joginder Kumar [(1994) 4 SCC 260 : 1994 SCC (Cri) 1172] and D.K. Basu [(1997) 1 SCC 416 : 1997 SCC (Cri) 92] provide an assurance that the power shall not be abused and in case of abuse, the authority concerned shall be adequately punished. ***A provision cannot be held to be unreasonable or arbitrary and, therefore, unconstitutional, merely because the authority vested with the power may abuse his authority****. Since several cases of abuse of authority in matters of arrest and detention have come to the notice of this Court, this Court has laid down the requirements which have to be followed in all cases of arrest and detention."*

26. Further, this Hon'ble court in ***Manzoor Ali Khan v. Union of India*****, (2015) 2 SCC 33 [SGI Compilation – Volume X – pg. 4437-4449]**, held as under :

"8. The issue raised in this petition is no longer res integra. Requirement of sanction has salutary object of protecting an innocent public servant against unwarranted

and mala fide prosecution. Undoubtedly, there can be no tolerance to corruption which undermines core constitutional values of justice, equality, liberty and fraternity. At the same time, need to prosecute and punish the corrupt is no ground to deny protection to the honest. ***Mere possibility of abuse cannot be a ground to declare a provision, otherwise valid, to be unconstitutional****. The exercise of power has to be regulated to effectuate the purpose of law. The matter has already been dealt with in various decisions of this Court."*

27. It is submitted that therefore, no ground challenging the validity of Section 19 can be sustained.

VALIDITY OF TWIN CONDITIONS UNDER SECTION 45

28. At the outset, it is submitted that:

a. The quantum of punishment is a legislative function and whether a certain amount of punishment will act as a deterrent for a particular kind of offence is a subject matter of legislative wisdom.

b. The legislature has a choice to use several statutory mechanisms to bring about this deterrent effect, which would act as a deterrent against commission of offence.

c. The quantum of punishment prescribed is only one such mechanism of deterrence.

d. It is the submission of the Respondent that a stringent condition of bail is relatable to this object of creating a deterrent effect on persons who may commit the offence of Money Laundering.

e. The legislature has several choices to bring about deterrence from commission of an offence.

f. The title of the Act makes it clear that the law is not solely for the punishment of the offence of Money Laundering but mainly for its prevention.

g. The entire scheme of the Act is such that right from ensuring that the anti-money laundering standards as laid down by FATF and other international treaties are given effect to and therefore the offence of money laundering is not only prevented but also to create sufficient deterrence in the nature of attachments of properties, stringent bail conditions etc, and in the occasion when it is committed, then its deleterious impact is stymied with immediate effect.

h. The Legislature has, by providing for safeguards in section 19 and providing for the same threshold for bail, has balanced the rights of the accused and protected the interest of the investigation itself.

Section 45 reflects Legislative recognition of jurisprudence of Apex Court regarding severity of economic offences in general and that of a global menace in particular

29. As stated above, the Legislature has recognized money laundering as an extremely serious offence and thought it appropriate to provide for a stringent condition for bail. It is submitted that the mere submission that the policy of the Legislature in criminalizing money laundering and providing for twin condition for bail would not be *appropriate* as the same is an *economic offence* cannot be a subject matter of judicial review. It is submitted that the

legislative policy of the country has consistently treated money-laundering as a serious threat to the macro-economic strength of the country and thereby sought to provide stringent regime for dealing with the same.

30. The following are the cases relevant to the present circumstances:

1. ***Y.S. Jagan Mohan Reddy v. CBI,*** **(2013) 7 SCC 439 – Para 34, 35 [SGI Compilation – Volume X – pg. 4632-4643]**
2. ***State of Gujarat* v. *Mohanlal Jitamalji Porwal*, (1987) 2 SCC 364 – Para 5 [SGI Compilation – Volume X – pg. 4644-4651]**
3. ***State of Bihar v. Amit Kumar*, (2017) 13 SCC 751 – Para 9-14 [SGI Compilation – Volume X – pg. 4652-4656]**
4. ***Nimmagadda Prasad v. CBI*, (2013) 7 SCC 466 – Para 22-25 [SGI Compilation – Volume X – pg. 4657-4666]**
5. ***Central Bureau of Investigation versus Ramendu Chattopadhyay,*** **Criminal Appeal No. 1711 Of 2019 – Para 8-9 [SGI Compilation – Volume X – pg. 4667-4671]**

31. It is submitted that therefore, the incorporation of twin condition for bail under Section 45, is in fact, the ***legislative recognition of seriousness of economic offences*** which has already been highlighted by jurisprudence of this Hon'ble Court. It is submitted that further, this legislative recognition is also in consonance with the developing international opinion with regard to the serious of the offence of money-laundering and the need to incorporate strong deterrence measures in order to curtail it.

32. It is submitted that such objective has been a consistent part of the legislative policy of the country for the past almost 2 decades. It is submitted that further, the stringent conditions for bail have a direct and proximate relationship with the object of the Act, which is subsumed within the protected spheres of State power for identifying and declaring activities as "*criminal*". It is submitted that the even from standpoint of the accused and the rights under Article 21, the said conditions are reasonable and provide for a necessary and discernible classification on the basis of objective criterion and intelligible differentia. It is submitted that impugned amendments are directly relatable to activities/programmes detrimental to the macro-economic health of the country impacts crores of lives in a profound and unseen manner.

33. It may not be lost sight of that Section 45 does not apply to an ordinary offence either under IPC or any other special law. The offence is not against an individual or individuals but against the economy of nations, welfare of its citizens and future generations. This is taken note of by the international community.

34. There are only some issues / subjects on which the international community is building consensus and is trying to work harmoniously with each other. They are –

(i) Terrorism;
(ii) Drug related offences; and
(iii) Organised crime;
(iv) Money laundering;

Considering the wide-ranging impact of the offences, the world community has repeatedly required all nations to formulate special legislations for money laundering which must have a deterrent effect.

NOTE – IV

35. Considering the very seriousness and impact of the offence, all the above stated category of offences referred above are legislatively considered separately by the Parliament and in all the three categories of laws, the twin condition is stipulated by the legislature. The concern expressed by the global community is reflected from the following parts of the international conventions:

A. UNITED NATIONS CONVENTION AGAINST ILICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES

The Parties to this Convention,

Deeply concerned by the magnitude of and rising trend in the illicit production of, demand for and traffic in narcotic drugs and psychotropic substances, which pose a serious threat to the health and welfare of human beings and adversely affect the economic, cultural and political foundations of society,

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Recognizing the links between illicit traffic and other related organized criminal activities which undermine the legitimate economies and threaten the stability, security and sovereignty of States,

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Aware that illicit traffic generates ***large financial profits and wealth enabling transnational criminal organizations to penetrate, contaminate and corrupt the structures of government, legitimate commercial and financial business, and society at all its levels,***

Determined to deprive persons engaged in illicit traffic of the proceeds of their criminal activities and ***thereby eliminate their main incentive for so doing****,*

B. UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

With the signing of the United Nations Convention against Transnational Organized Crime in Palermo, Italy, in December 2000, the international community demonstrated the political will to answer a global challenge with a global response. If crime crosses borders, so must law enforcement. If the rule of law is undermined not only in one country, but in many, then those who defend it cannot limit themselves to purely national means. ***If the enemies of progress and human rights seek to exploit the openness and opportunities of globalization for their purposes, then we must exploit those very same factors to defend human rights and defeat the forces of crime, corruption and trafficking in human beings.***

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Arrayed against these constructive forces, however, in ever greater numbers and with ever stronger weapons, are the forces of what I call "uncivil society". They are terrorists, criminals, drug dealers, traffickers in people and others who undo the good works of civil society. They take advantage of the open borders, free markets and technological advances that bring so many benefits to the world's people. They thrive in countries with weak institutions, and they show no scruple about resorting to intimidation or violence. Their ruthlessness is the very antithesis of all we regard as civil. ***They are powerful, representing entrenched interests and the clout of a global enterprise worth billions of dollars, but they are not invincible.***

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Criminal groups have wasted no time in embracing today's globalized economy and the sophisticated technology that goes with it. But our efforts to combat them have remained up to now very fragmented and our weapons almost obsolete. The Convention gives us a new tool to address the scourge of crime as a global problem. With enhanced international cooperation, we can have a real impact on the ability of international criminals to operate successfully and can help citizens everywhere in their often bitter struggle for safety and dignity in their homes and communities.

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Article 11. Prosecution, adjudication and sanctions

1. Each State Party shall make the commission of an offence established in accordance with articles 5, 6, 8 and 23 of this Convention liable to sanctions ***that take into account the gravity of that offence****.*

2. ***Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences covered by this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.***

3. In the case of offences established in accordance with articles 5, 6, 8 and 23 of this Convention, each State Party ***shall take appropriate measures,*** *in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.*

C. UNITED NATIONS CONVENTION AGAINST CORRUPTION, 2003

Article 14. Measures to prevent money-laundering

1. Each State Party shall:

(a) Institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions, including natural or legal persons that provide formal or informal services for the transmission of money or value and, where appropriate, other bodies particularly susceptible to moneylaundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer and, where appropriate, beneficial owner identification, record-keeping and the reporting of suspicious transactions;

D. FATF RECOMMENDATIONS

35. SANCTIONS

Sanctions Countries should ensure that there is a range of effective, proportionate and dissuasive sanctions, whether criminal, civil or administrative, available to deal with natural or legal persons covered by Recommendations 6, and 8 to 23, that fail to comply with AML/CFT requirements. Sanctions should be applicable not only to financial institutions and DNFBPs, but also to their directors and senior management.

36. It is submitted that the legislative policy of the country has consistently treated money-laundering as a serious threat to the macro-economic strength of the country and thereby sought to provide stringent regime for dealing with the same. See ***Lochner v. New York,* 198 U.S. 45, 56–58, 25 S.Ct. 539, 49 L.Ed. 937; *New State Ice Co. v. Liebmann,* 285 U.S. 262, 52 S.Ct. 371, 76 L.Ed. 747 (1932); *West Coast Hotel v. Parrish,* 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937); *United States v. Carolene Products Co.,* 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234 (1938); *Am. Fed'n of Labor, Ariz State Fed'n of Labor v. Am. Sash & Door Co*, 335 U.S. 538, 553–57, 69 S. Ct. 260, 265–67, 93 L. Ed. 222 (1949); *Ferguson v. Skrupa*, 372 U.S. 726, 728–33, 83 S. Ct. 1028, 1030–32, 10 L. Ed. 2d 93 (1963); *Union of India v. Indian Radiological & Imaging Assn.*, (2018) 5 SCC 773; *State of H.P. v. Satpal Saini*, (2017) 11 SCC 42; *Ravindra Ramchandra Waghmare v. Indore Municipal Corpn.*, (2017) 1 SCC 667; *State of H.P. v. H.P. Nizi Vyavsayik Prishikshan Kendra Sangh*, (2011) 6 SCC 597; *Dr. Ashwani Kumar v. Union of India and Anr.*, 2019 SCC OnLine SC 1144; *Rustom Cavasjee Cooper* v. *Union of India* [(1970) 1 SCC 248]; *R.K. Garg* [(1981) 4 SCC 675]; *Premium Granites* v. *State of T.N.* [(1994) 2 SCC 691]; *Delhi Science Forum* v. *Union of India* [(1996) 2 SCC 405]; *BALCO Employees' Union* v. *Union of India* [(2002) 2 SCC 333]; *Peerless General Finance and Investment Co. Ltd.* v. *RBI* [(1992) 2 SCC 343]; *State of M.P.* v. *Narmada Bachao Andolan* [(2011) 7 SCC 639]**

Stringent bail conditions as a deterrence – Legitimate State interest

37. It is submitted that it must not be lost sight of that the twin conditions for bail are also a legislative demarcation of the *deterrence effect* that the Legislature sought to put to the offence of money laundering. It is submitted that the nature of the offence, the severity of the offence, the impact that it has on the society and/or the economy of the nation, together point towards the special character of the offence of money laundering and thereby the Legislature, being cognizant of the same, sought to provide for stringent twin conditions for bail.

38. It is submitted that such twin conditions have a serious deterrent effect on its own and are intrinsically linked with the object of the PMLA and the implementation process of the same. It is submitted that as stated hereinbefore, the implementation of the PMLA is monitored internationally and therefore, the conditions for bail and the deterrence effect that the laws seeks to provide, is linked to the India's obligations internationally. It is submitted that therefore, the twin conditions for bail being a facet of the *deterrent effect* of PMLA, in itself constitute a *legitimate state interest*. It is submitted that it is settled that a law which provides for a *legitimate state interest* would not fall foul of Article 21.

39. It is submitted that therefore, the twin conditions, as a departure from ordinary criminal law and procedure, keeping in mind the special nature of PMLA as a whole, and the specific international context, can validly be termed as a provision in furtherance of a *legitimate state interest*.

40. It is submitted that in ***A.K. Roy v. Union of India*, (1982) 1 SCC 271**, it has been held that:

> *"**33.** There can be no doubt that personal liberty is a precious right. So did the founding fathers believe at any rate because, while their first object was to give unto the people a Constitution whereby a Government was established, their second object, equally important, was to protect the people against the Government. That is why, while conferring extensive powers on the Government like the power to declare an emergency, the power to suspend the enforcement of fundamental rights and the power to issue ordinances, they assured to the people a Bill of Rights by Part III of the Constitution, protecting against executive and legislative despotism those human rights which they regarded as fundamental. The imperative necessity to protect those rights is a lesson taught by all history and all human experience. Our Constitution-makers had lived through bitter years and seen an alien Government trample upon human rights which the country had fought hard to preserve. They believed like Jefferson that "an elective despotism was not the Government we fought for". And therefore, while arming the Government with large powers to prevent anarchy from within and conquest from without, they took care to ensure that those powers were not abused to mutilate the liberties of the people.*
>
> ***34. But, the liberty of the individual has to be subordinated, within reasonable bounds, to the good of the people."***

41. From the above, it is clear that twin conditions, as envisaged under Section 45, are not a novel or draconian condition, and is rather present in numerous special enactments dealing with special offences. It is submitted that that further it is open for the legislature to enact laws in the field which has deterrent effect. It is submitted that apart from the maximum punishment that an offence carries, the intention of the legislature to provide for a serious deterrent effect is also to be ascertained from the provisions enacted by the legislature with regard to bail. It is submitted that the applicability of twin conditions for bail in PMLA is a representation of the legislature intent not only to tackle the offence of money-laundering after it has been committed but also to provide for a preventive deterrent effect. The wisdom of the legislature with regard to enactment of twin conditions even though the maximum of merely 7 years in case of money-laundering cannot be a matter of judicial review under Article 13 as the same is a matter of legislative policy. It is further submitted that the said issue was not taken note of by this Hon'ble Court in the judgment in ***Nikesh Tarachand Shah v. Union of India*, (2018) 11 SCC 1 [KS Compilation – Volume III – pg. 210 – 252].**

Severity of offence - Length of punishment not the only indicator

42. At this juncture, it is necessary to respond to some of the assertions put forth by the Petitioners. The Petitioners have submitted that the inclusion of twin conditions in a provision concerning bail made by the legislature with regard to crime which carries a punishment of only 7 years is erroneous and arbitrary. The Petitioners have premised their argument in this regard on the presumption that the length of the punishment is the sole determinative factor of ascertaining the gravity of the offence, which in turn, is the sole factor on which a provision concerning bail should be decided. It is submitted that a similar exposition is noted by this Hon'ble Court in the judgment in ***Nikesh* supra [KS Compilation – Volume III – pg. 210 – 252]**, however, when the assistance with regard to the gravity of the offence of money

laundering in the context of its international development. In the said context, it is submitted that maximum punishment that an offence carries is in the sole determinative factor in ascertaining the gravity of the offence rather it is merely an indicator in certain circumstances. It is submitted that the gravity of these offence is to be adjudged on a totality of a factor and specifically keeping in mind the background in which the offence came to be recognized by the legislature. In the case of the offence of money-laundering, the legislature recognizes the same in the specific international context elaborated hereinbefore and further deliberately and consistently noted the seriousness of the offence. The legislature further recognizes that the difficulties in dealing with the offence in the nature of money-laundering and thereby sought to provide for an adequate statutory framework to deal with the peculiar nature of the offence. It is submitted that twin conditions regarding this are manifestation of the legislative intent regarding the seriousness of the offence and the separate machinery require to deal with the offence. The international community and the legislature in India have both recognized money-laundering as an extremely serious and grave offence which has disastrous consequences for the economy and country as a whole. The PMLA and the legislature architecture of the entire Act represents the seriousness with which the legislature sought classifying the offence of money-laundering and the gravity which would be attached to such offence. It is submitted that that the maximum punishment of 7 years and, therefore, not be the only factor on which seriousness or gravity of offence of money-laundering can be established.

43. This Hon'ble Court has highlighted that the length of punishment is not the sole factor to ascertain severity of the offence in the specific context of economic offences. The following principles emerge :

A. That economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. ***[Nimmagadda Prasad v. CBI, (2013) 7 SCC 466 and Y.S. Jagan Mohan Reddy vs. CBI (2013) 7 SCC 439]*** **[SGI Compilation – Volume X – pg. 4657-4666 (Nimmagadda Prasad) and [SGI Compilation – Volume X – pg. 4632-4643 (Jagan)]**

B. Usually economic offences have deep rooted conspiracies affecting the moral fibre of the society and causing irreparable harm and hence needs to be considered seriously. ***[State of Bihar v. Amit Kumar, (2017) 13 SCC 751]*** **[SGI Compilation – Volume X – pg. 4652-4656]**

C. This Hon'ble Court has taken judicial notice of the fact that the country has seen an alarming rise in white collar crimes, which has affected the fibre of the Country's economic structure and that incontrovertibly, economic offences have serious repercussions on the development of the nation as a whole. ***[Nimmagadda Prasad v. CBI, (2013) 7 SCC 466, Para 23]*** **[SGI Compilation – Volume X – pg. 4657-4666]**

D. This Hon'ble Court has further held while distinguishing the nature of economic offences with traditional offences and held that the entire community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the community. A disregard for the

interest of the community can be manifested only at the cost of forfeiting the trust and faith of the community in the system to administer justice in an even-handed manner without fear of criticism from the quarters which view white-collar crimes with a permissive eye unmindful of the damage done to the national economy and national interest. ***[State of Gujarat v. Mohanlal Jitamalji Porwal (1987) 2 SCC 364]*** **[SGI Compilation – Volume X – pg. 4644-4651]**

E. In the specific context of the offence of Money Laundering, this Hon'ble Court has held that Money Laundering is a serious threat to the National economy and the National interest, committed in a calculative manner with a deliberative design and motive of personal gain, regardless of the consequence to the members of the society. [***Gautam Kundu v. Directorate of Enforcement (Prevention of Money-Laundering Act), (2015) 16 SCC 1]*** **[SGI Compilation – Volume VIII – pg. 3424-3441]**

44. It is further submitted that once it is established that even though the maximum punishment in PMLA is for 7 years, the legislature has recognized money-laundering as an extremely serious offence, it would be clear that the twin conditions of bail, as amended after the judgment in ***Nikesh (supra)*** **[KS Compilation – Volume III – pg. 210 – 252]**, cannot be held to be unconstitutional.

45. It is submitted that the seriousness of an offence and its impact on society is a subject matter of legislative wisdom and this Hon'ble Court has held in several decisions that the legislature knows the needs of the society. It is submitted that in ***Mohd. Hanif Quareshi v. State of Bihar***, **AIR 1958 SC 731** @ Para 15 **[SGI Compilation – Volume X – pg. 4866-4894]**, this Hon'ble Court noted as under :

> *"15. The meaning, scope and effect of Article 14, which is the equal protection clause in our Constitution, has been explained by this Court in a series of decisions in cases beginning with Chiranjitlal Chowdhury v. The Union of India [1(1950) SCR 869] and ending with the recent case of Ramakrishna Dalmia v. Union of India [CAs Nos. 455-457 and 657-658 of 1957, decided on March 28, 1958] . It is now well established that while Article 14 forbids class legislation it does not forbid reasonable classification for the purposes of legislation and that in order to pass the test of permissible classification two conditions must be fulfilled, namely, (i) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) such differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification, it has been held, may be founded on different bases, namely, geographical, or according to objects or occupations or the like and what is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. The pronouncements of this Court further establish, amongst other things, that there is always a presumption in favour of the constitutionality of an enactment and that the burden is upon him, who attacks it, to show that there has been a clear violation of the constitutional principles.* ***The courts, it is accepted, must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. It must be borne in mind that the legislature is free to recognise degrees of harm and may***

confine its restrictions to those cases where the need is deemed to be the clearest and finally that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation. *We, therefore, proceed to examine the impugned Acts in the light of the principles thus enunciated by this Court."*

Peculiar nature of this trans-border offence needs specific bail conditions

46. Unlike all other IPC offences, persons involved in money laundering offences would be influential, intelligent and resourceful. The crime is committed with full pre-meditation ensuring-

(i) It is not detected;
(ii) If a part of its detected, the investigation agency cannot find the trail.
(iii) It remains continuing and expanding in its scope;
(iv) It is a highly sophisticated offence often utilising advanced technologies which enable concealing and transacting without being detected.

47. It is this reason which justifies the stringent condition. When the authorities are unable to arrest an accused merely based upon "reasonable complaint", "credible information" or "reasonable suspicion" [like police authorities], it is reasonable that the grant of bail is statutorily made dependent upon the very same threshold.

48. The stringent conditions under section 19 and conditions imposed for grant of bail under section 45 respectively takes care of the interest of the accused as well as prosecution respectively.

49. In this regard, it may be noted that the Hon'ble Supreme Court in ***Talab Haji Hussain v. Madhukar Purshottam Mondkar*, 1958 SCR 1226**, has held as under :

*"**6.** Now it is obvious that the primary object of criminal procedure is to ensure a fair trial of accused persons. Every criminal trial begins with the presumption of innocence in favour of the accused; and provisions of the Code are so framed that a criminal trial should begin with and be throughout governed by this essential presumption;* ***but a fair trial has naturally two objects in view; it must be fair to the accused and must also be fair to the prosecution. The test of fairness in a criminal trial must be judged from this dual point of view****. It is therefore of the utmost importance that, in a criminal trial, witnesses should be able to give evidence without any inducement or threat either from the prosecution or the defence. A criminal trial must never be so conducted by the prosecution as would lead to the conviction of an innocent person****; similarly the progress of a criminal trial must not be obstructed by the accused so as to lead to the acquittal of a really guilty offender. The acquittal of the innocent and the conviction of the guilty are the objects of a criminal trial and so there can be no possible doubt that, if any conduct on the part of an accused person is likely to obstruct a fair trial, there is occasion for the exercise of the inherent power of the High Courts to secure the ends of justice****. There can be no more important requirement of the ends of justice than the uninterrupted progress of a fair trial; and it is for the continuance of such a fair trial that the inherent powers of the*

High Courts are sought to be invoked by the prosecution in cases where it is alleged that accused persons, either by suborning or intimidating witnesses, are obstructing the smooth progress of a fair trial. Similarly, if an accused person who is released on bail jumps bail and attempts to run to a foreign country to escape the trial, that again would be a case where the exercise of the inherent power would be justified in order to compel the accused to submit to a fair trial and not to escape its consequences by taking advantage of the fact that he has been released on bail and by absconding to another country. In other words, if the conduct of the accused person subsequent to his release on bail puts in jeopardy the progress of a fair trial itself and if there is no other remedy which can be effectively used against the accused person, in such a case the inherent power of the High Court can be legitimately invoked. In regard to non-bailable offences there is no need to invoke such power because Section 497(5) specifically deals with such cases. The question which we have to decide in this case is whether exercise of inherent power under Section 561-A against persons accused of bailable offences, who have been released on bail, is contrary to or inconsistent with the provisions of Section 496 of the Code of Criminal Procedure."

50. In the present day global economy, trans-border nature of the money laundering offence, influence the accused persons wield within and beyond India, mere routine conditions ensuring either presence of the accused during trial or ensuring protection of evidence will never be enough. The experience reflected in the legislative intent is indicative of the fact that even deposit of passport may not deter an accused from fleeing and only in some minimum time, the accused can remove evidence/s or influence / eliminate witness/es. It may be relevant to note that removal of money trail, under the present technology, is permitted anonymously and the prosecution will never be able to accused the offender connecting him with destruction of evidence.

51. It is submitted that it is trite law that **gravity of the offence** and **the role played by the accused** is **not an alien concept** in matter concerning bail. It is submitted that it is settled law that economic offences constituting a class apart and need to be visited with a different approach in the matter of bail. The **classification of economic offences in a different class itself is a clear jurisprudential recognition of gravity of the offence being judicially recognised as an extremely relevant factor** while considering matters regarding bail. The categorisation of any offence as an "economic offence" is an exercise which depicts the gravity of such offence. It is submitted that **the gravity of such offences is further accentuated** by the fact that economic offences having **deep-rooted conspiracies** and involving huge loss of public funds need to be viewed seriously and considered as **grave offences** affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country. Further, it is submitted that it is trite law that the Hon'ble Court while granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations.

NOTE – IV

Discretion of Court

52. As a proposition of law, granting or refusal of bail is always circumscribed by the requirements of the offence, specific needs of investigation, peculiar nature of the offence involved, the status of the accused and such other factors. Though right to bail is right to be free, it is always open for the legislature to prescribe a separate offence specific procedure for grant of bail resulting into release of an accused. The broad arguments made that bail is a right under all circumstances and it is always an unfettered discretion will not reflect correct legal position. The legislature is competent to enact conditions within the framework of which the court of competent jurisdiction would consider grant or refusal of bail. The discretion to grant or refuse bail is definitely that of the Court. However, the legislature can provide for a statutory mechanism subject to which such discretion would be exercised. Formulation of such statutory mechanism would be the legislative domain and is a permissible legislative device to achieve the object of the particular special penal enactment.

53. It is submitted that requirement of the court being satisfied that "the accused is not guilty of an offence" is not a novel legislative device being adopted for the first time. Though IPC offence and money laundering offences are different and distinct, the same exercise is required to be undertaken by competent courts while releasing an accused of serious offences as contained in section 437 which reads as under:

> *"437. When bail may be taken in case of non- bailable offence.*
> *(1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but-*
> *(i) such person shall not be so released if there appear reasonable grounds for believing that* ***he has been guilty of an offence*** *punishable with death or imprisonment for life;"*

54. At the cost of repetition, it is submitted that the length of punishment is not the sole criteria to judge the severity and gravity of the offence. The legislature thought 7 to 10 years imprisonment should be serious enough to require the condition for release on bail keeping the nature of money laundering in mind. The same would not be violative on the touchstone of Article 14 and 21 of the Constitution of India.

55. It is therefore submitted that the "twin conditions" are not an anathema to the criminal jurisprudence in the country and do not result in unreasonable consequences as have been suggested by the Petitioner.

56. Further, it is submitted that a different standard for bail, in the nature of twin conditions have been provided for by the Parliament in numerous enactments. The said enactments and their maximum punishments are appended to the note as **Annexure A**.

Classification for a separate procedure and separate bail provision

57. It is submitted that it is settled law that the Legislature is free to make classification of 'offences' and 'offenders' in the application of a statute. It is submitted that the distinction made in PMLA, in the context of specific economic impact it has on the nation as a whole and the

global movement against the same, classifying *money laundering* as a separate class of offence from ordinary criminals under the normal laws. It is submitted that the classification of the offences under PMLA as *separate and serious* form of crimes is clearly distinguishable from the ordinary crimes. In order to consider the question as to the reasonableness of the distinction and classification, it is necessary to take into account the objective for such distinction and classification which of course need not be made with *mathematical precision*. In order to ascertain the question of classification, it is necessary to recall the previous notes submitted to this Hon'ble Court, which conclusively establish as under :

a. the PMLA was framed in a specific international context;
b. PMLA has a separate and special architecture for investigation and other aspects of penal law;
c. PMLA creates a new offence of money laundering;
d. The high threshold of arrest [as reflected in section 19] itself justifies high threshold for grant of bail. Unlike other offences, the pre-condition for arrest is very stringent and, therefore, the legislature has, in its wisdom, provided for the very same threshold for grant of bail.
e. The nature of Money Laundering is peculiar and the difficulties faced in investigation and unearthing the actual perpetrator of crime are far more difficult than ordinary penal offences;
f. Money laundering is a global phenomenon of gigantic proportions which requires a suitably modulated approach in Indian context different from ordinary penal offences;
g. The conscious legislative intent in PMLA that the procedure applied to ordinary penal offences would not apply to the PMLA;
h. The PMLA is a complete Code and create separate machinery to tackle a special crime;
i. The PMLA has adequate safeguards, sometime even over and above, the safeguards in ordinary penal offences.

There is a reasonable basis for classifying a particular category of offences for being treated differently for the purpose of grant of bail

58. It is submitted that the Legislature has, on numerous occasions, made suitable departures from the ordinary penal laws and procedural laws in order to tackle specific problems. It is submitted that over the years, the said departures have been tested before this Hon'ble Court in a large number of cases.

In ***Kedar Nath Bajoria* v. *State of West Bengal*** **[AIR 1953 SC 404 : 1954 SCR 30] [SGI Compilation – Volume X – pg. 4450-4460]** the case of the appellants and two others was allotted by the State Government to the Special Court which was constituted by the Government under Section 3 of the West Bengal Criminal Law Amendment Act, 1949. The trial commenced on January 3, 1950 and nine prosecution witnesses were examined-in-chief before January 26, when the Constitution came into force. The order of conviction was recorded by the Special Court on August 29, 1950 under Sections 120-B and 420 of the Penal Code and

Section 5(2) of the Prevention of Corruption Act, 1947. The appellant's contention that Section 4 of the Act under which the State Government had allotted their case to the Special Court violated Article 14 was rejected by the majority on the ground that ***having regard to the underlying purpose and policy of the Act as disclosed by its title, preamble and its provisions, the classification of the offences for the trial of which the Special Court was set up and a special procedure was laid down could not be said to be unreasonable or arbitrary***. In coming to this conclusion, the Court relied on what was described as "well known" that during the post-war period, several undertakings which were established for distribution and control of essential supplies gave special opportunities to unscrupulous persons in public services, who were put in charge of such undertakings, to enrich themselves by corrupt practices. Viewed against that background, the Court considered that offences mentioned in the Schedule to the Act were common and widely prevalent during the particular period and it was in order to place an effective check upon those offences that the impugned legislation was thought necessary. Such a legislation, according to the majority, under which Special Courts were established to deal with special types of cases under a shortened and simplified procedure, ***was based on a perfectly intelligible principle of classification having a clear and reasonable relation to the object sought to be attained***.

59. In ***Kathi Raning Rawat* v. *State of Saurashtra*** **[AIR 1952 SC 123 : 1952 SCR 435] [SGI Compilation – Volume X – pg. 4461-4481]**, the Hon'ble Supreme Court was examining the Saurashtra State Public Safety Measures (Third Amendment) Ordinance, 1949. It referred to four district categories, namely, "offences", "classes of offences", "cases" and "classes of cases" and empowered the State Government to direct any one or more of these categories to be tried by the Special Court constituted under the Ordinance. It was held by the majority that the preamble to the Ordinance which referred to "the need to provide for public safety, maintenance of public order and the preservation of peace and tranquillity in the State of Saurashtra"' together with the affidavit filed by the State Government explaining the circumstances under which the impugned order was passed, afforded a basis for distinguishing and provided sufficient guidance for classifying offences, classes of offences or classes of cases for being tried by the special procedure. Therefore, according to the majority, Section 11 of the Ordinance insofar as it authorised the State Government to direct offences, classes of offences or classes of cases to be tried by the Special Court was not violative of Article 14 and the notification which was issued under that part of the Ordinance was not invalid or ultra vires.

60. It is submitted that therefore, the contention that the special enactment for a special offence violated the guarantee of equality conferred by Article 14 was raised specifically and was considered by this Hon'ble Court

61. In ***Special Courts Bill, 1978, In re*, (1979) 1 SCC 380 [SGI Compilation – Volume X – pg. 4482-4563]**, in a case concerning special procedure for trial of offenders during the Emergency era, the Hon'ble Supreme Court held as under :

> *"**72.** As long back as in 1960, it was said by this Court in Kangsari Haldar that the propositions applicable to cases arising under Article 14 "have been repeated so many times during the past few years that they now sound almost platitudinous". What was considered to be platitudinous some 18 years ago has, in the natural course of events, become even more platitudinous today, especially in view of the avalanche of cases which have flooded this Court. Many*

a learned Judge of this Court has said that it is not in the formulation of principles under Article 14 but in their application to concrete cases that difficulties generally arise. But, considering that we are sitting in a larger Bench than some which decided similar cases under Article 14, and in view of the peculiar importance of the questions arising in this reference, though the questions themselves are not without a precedent, we propose, though undoubtedly at the cost of some repetition, to state the propositions which emerge from the judgments of this Court insofar as they are relevant to the decision of the points which arise for our consideration.

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73. *By the application of these tests, the conclusion is irresistible that the classification provided for by the Special Courts Bill is valid and no objection can be taken against it. Since the Bill provides for trial before a Special Court of a class of offences and a class of offenders only, the primary question which arises for consideration is whether the Bill postulates a rational basis for classification or whether the classification envisaged by it is arbitrary and artificial. By clause 5 of the Bill, only those offences can be tried by the Special Courts in respect of which the Central Government has made a declaration under clause 4(1). That declaration can be made by the Central Government only if it is of the opinion that there is prima facie evidence of the commission of an offence, during the period mentioned in the preamble, by a person who held a high public or political office in India and that, in accordance with the guide-lines contained in the Preamble to the Bill, the said offence ought to be dealt with under the Act. The classification which Section 4(1) thus makes is both of offences and offenders, the former in relation to the period mentioned in the preamble that is to say, from February 27, 1975 until the expiry of the proclamation of emergency dated June 25, 1975 and in relation to the objective mentioned in the sixth para of the preamble that* ***it is imperative for the functioning of parliamentary democracy and the institutions created by or under the Constitution of India that the commission of such offences should be judicially determined with the utmost dispatch; and the latter in relation to their status, that is to say, in relation to the high public or political office held by them in India. It is only if both of these factors co-exist that the prosecution in respect of the offences committed by the particular offenders can be instituted in the Special Court****."*

62. It is submitted that similarly in the case of TADA, in ***Kartar Singh v. State of Punjab*****, (1994) 3 SCC 569 [SGI Compilation – Volume VI – pg. 2603-2801]**, the Hon'ble Supreme Court has held as under :

*"**220.** Coming to the distinction made in TADA Act grouping the terrorists and disruptionists as a separate class of offenders from ordinary criminals under the normal laws and the classification of the offences under TADA Act as aggravated form of crimes distinguishable from the ordinary crimes have to be tested and determined as to whether this distinction and classification are reasonable and valid within the term of Article 14 of the Constitution. In order to consider the question as to the reasonableness of the distinction and classification, it is necessary to take into account the objective for such distinction and classification which of course need not be made with*

mathematical precision. Suffice, if there is little or no difference between the persons and the things which have been grouped together and those left out of the groups, the classification cannot be said to be a reasonable one. In making the classification, various factors have to be taken into consideration and examined as to whether such a distinction or classification justifies the different treatment and whether they subserve the object sought to be achieved.

221. *There is a catena of outstanding judgments on the above principle of law and it is not necessary to refer to all those decisions except to make mention of a few, namely, (1) Chiranjit Lal Chowdhari v. Union of India [1950 SCR 869 : AIR 1951 SC 41] , (2) Ram Krishna Dalmia v. Justice S.R. Tendolkar [1959 SCR 279 : AIR 1958 SC 538] , and (3) Special Courts Bill, In re, 1978 [(1979) 1 SCC 380 : (1979) 2 SCR 476] .*

222. As pointed out supra, the persons who are to be tried for offences specified under the provisions of TADA Act are a distinct class of persons and the procedure prescribed for trying them for the aggravated and incensed nature of offences are under different classification distinguishable from the ordinary criminals and procedure. This distinction and classification of grouping of the accused and the offences to be tried under TADA are to achieve the meaningful purpose and object of the Act as reflected from the preamble as well as the 'Statement of Objects and Reasons' about which we have elaborately dealt with in the preceding part of this judgment.

225. *The learned Additional Solicitor General in continuation of his arguments stated that the procedure under the normal penal laws had become grossly inadequate and ineffective to try the distinct group of offenders, i.e., terrorists and disruptionists for the classified aggravated nature of offences and that his submission is fortified by the statistics with regard to the terrorist crimes in the State of Punjab from 1984 to 1992, annexed in the compilation of his written submission before the court and the debates and discussion made in the Parliament at the time of introduction of the Bill (TADA). He placed reliance on (1) N.B. Khare (Dr) v. State of Delhi [1950 SCR 519 : AIR 1950 SC 211 : 1951 Cri LJ 550] ; (2) Kathi Raning Rawat v. State of Saurashtra [1952 SCR 435 : AIR 1952 SC 123 : 1952 Cri LJ 805] (SCR at pp. 447-450); (3) Kedar Nath Bajoria v. State of W.B. [1954 SCR 30 : AIR 1953 SC 404 : 1953 Cri LJ 1621] (SCR at pp. 38-43); (4) State of Bombay v. R.M.D. Chamarbaugwala [1957 SCR 874 : AIR 1957 SC 699] (SCR at pp. 927) which decisions have held that stringency and harshness of provisions are not for courts to determine; (5) Pannalal Binjraj v. Union of India [1957 SCR 233 : AIR 1957 SC 397 : (1957) 31 ITR 565] wherein it has been said that mere possibility of abuse is not a valid ground to challenge the validity of a statute; (6) Talib Haji Hussain v. Madhukar P. Mondkar [1958 SCR 1226 : AIR 1958 SC 376 : 1958 Cri LJ 701] (SCR at p. 1232) wherein it has been ruled that fair trial has two objects in view, namely, it must be fair to the accused and also to the prosecution; (7) Kangsari Haldar v. State of W.B. [(1960) 2 SCR 646 : AIR 1960 SC 457 : 1960 Cri LJ 654] (SCR at pp. 651, 654, 656); and (8) A.K. Roy v. Union of India [(1982) 1 SCC 271 : 1982 SCC (Cri) 152 : (1982) 2 SCR 272] wherein it has been held that liberty of individual has to be subordinated to the good of the people.*

226. *He on the basis of the above dictum laid down in those cited decisions, concluded that the reasonable and scientific classification of the offences and offenders under TADA Acts cannot be said to be offending either Article 14 or*

Article 21 and as such the contention of the learned counsel attacking this provision should be thrown overboard.

228. *In the light of the 'ratio decidendi' regarding the legislative competence to enact a law prescribing a special procedure departing from the procedure for trying offenders in the normal circumstances for achieving the object of the Act and the classification of 'offences' and 'offenders' to be tried under separate procedure for the offences specified — in the present case under the TADA Act — we shall examine the rival contentions of the parties and determine whether the procedure prescribed under this Act violates Articles 14 and 21 of the Constitution.*

243. *The above decision, in our view, cannot be availed of for striking down Section 15 of TADA Act because the classification of 'offenders' and 'offences' to be tried by the Designated Court under the TADA Act or by the Special Courts under the Act of 1984, are not left to the arbitrary and uncontrolled discretion of the Central Government but the Act itself has made a delineated classification of the offenders as terrorists and disruptionists in the TADA Act and the terrorists under the Special Courts Act, 1984 as well as the classification of offences under both the Acts.*

244. ***Therefore, the complaint of incorporation of invidious discrimina-tion in the Act has to be turned down. All that the court has to see is whether the power is used for any extraneous purpose i.e. to say not for achieving the object for which the power is granted and whether the Act (TADA) has been made on grounds which are not germane or relevant to the policy and purpose of this Act and whether it is discriminatory so as to offend Article 14. In our considered opinion, the classifications have rational nexus with the object sought to be achieved by the TADA Acts and Special Courts Act and consequently there is no violation of Article 14 of the Constitution****."*

63. It is submitted that in extension of the above, it is permissible for the Legislature to provide for a special procedure while establishing a special offence. It is submitted that further, it is also permissible to provide for a different standard for bail while establishing such separate procedure.

64. Similarly, the United States Supreme Court in ***Asbury Hospital*** **v.** ***Cass County*** **[90 L Ed 6 : 326 US 207 (1945)] [SGI Compilation – Volume X – pg. 4564-4573]** has stated :

"The Legislature is free to make classifications in the application of a statute which are relevant to the legislative purpose. The ultimate test of validity is not whether the classes differ but whether the differences between them are pertinent to the subject with respect to which the classification is made."

65. It is submitted that the meaning and scope of Article 14 of the Constitution of India has been examined by this Hon'ble Court. In ***State of Bombay*** **v.** ***F.N. Balsara,*** **1951 SCR 682 [SGI Compilation – Volume X – pg. 4574-4597]** approving the scope of Article 14 discussed in the case of ***Chiranjit Lal*** **v.** ***Union of India*** **1950 SCR 869 [SGI Compilation – Volume X – pg. 4598-4631],** this Hon'ble Court has laid down seven propositions as follows:

"1. ***The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the legislature understands and correctly appreciates the needs of its own people, that its laws are***

directed to problems made manifest by experience and its discriminations are based on adequate grounds.

2. The presumption may be rebutted in certain cases by showing that on the face of the statute, there is no classification at all and no difference peculiar to any individual or class and not applicable to any other individual or class, and yet the law hits only a particular individual or class.

3. The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position and the varying needs of different classes of persons often require separate treatment.

4. The principle does not take away from the State the power of classifying persons for legitimate purposes.

5. Every classification is in some degree likely to produce some inequality, and mere production of inequality is not enough.

6. If a law deals equally with members of a well defined class, it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons.

7. While reasonable classification is permissible, such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained, and the classification cannot be made arbitrarily and without any substantial basis."

66. Keeping the above proposition, it is to be adjudicated whether the provisions of PMLA and specifically Section 45 contravene Article 14. It is submitted that if the classification either as a whole or for the purpose of bail, has not been shown to be arbitrary and unreasonable and without any substantial basis, the PMLA or Section 45 cannot be held to be would be contrary to the equal protection of laws by Article 14. It is submitted that the principle of legislative classification is an accepted principle whereunder persons may be classified into groups and such groups may differently be treated if there is a reasonable basis for such difference or distinction. The rule of differentiation is that in enacting laws differentiating between different persons or things in different circumstances which govern one set of persons or objects such laws may not necessarily be the same as those governing another set of persons or objects so that the question of unequal treatment does not really arise between persons governed by different conditions and different set of circumstances.

67. It is submitted that classification in the PMLA as a whole and Section 45, is not arbitrary but has a specific background and rationale. It is submitted that the said background and rationale is strengthened by the object that Section 45 seeks to achieve – *deterrence effect*. It is submitted that deterrence is known theory of criminal law provides for a real and substantial distinction bearing reasonable and just relation to the needs in respect of which the classification has been made under Section 45.

PMLA and Section 45 – A representation of Directive Principles

68. It is submitted that the Prevention of Money Laundering Act, 2002, as evident form the Statement of object and reasons as well as the preamble, clearly provides that the offence of

NOTE – IV

Money Laundering is a very serious offence, which is considered so not only by India but also by the entire International community alike.

69. It is undisputed that Money Laundering poses a serious threat not only to the financial interest of a country but also to their integrity and sovereignty.

70. Therefore, the stringent bail condition, is to ensure that the gravity of the offence is such that only a person who is not guilty of the offence of money laundering can be granted bail upon the satisfaction of the Court to that effect under section 45 of PMLA.

71. It is submitted that Prevention of Money Laundering Act is also traceable to the objectives contained in Article 38, Article 39(b) and Article 39(c) as well as Article 51 (b) and 51 (c) of the Directives Principles of State Policy, which are extracted herein below:

> *"**38. State to secure a social order for the promotion of welfare of the people.**— (1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.*
>
> *(2) The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.*
>
> ***39. Certain principles of policy to be followed by the State.**—The State shall, in particular, direct its policy towards securing—*
> *...*
> *(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;*
>
> *(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;*
>
> ***
>
> ***51. Promotion of international peace and security.—The State shall endeavour to—***
>
> *...*
> *(b) maintain just and honourable relations between nations;*
>
> *(c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another..."*

72. The preambular goal of economic justice is also promoted by the effective implementation of the PMLA.

73. This Hon'ble Court in the case of ***Workmen v Meenakshi Mills Ltd. (1992) 3 SCC 336 at para 26 and 27*** **[SGI Compilation – Volume X – pg. 4706-4754]** has held that *"ordinarily any restriction so imposed which has the effect of promoting or effectuating a directive principle can be presumed to a reasonable restriction in public interest".*

74. The above decision was followed in the case of ***Papnasam Labour Union v. Madura Coats Limited & Anr. (1995) 1 SCC 501 at para 16*** **[SGI Compilation – Volume X – pg. 4755-4770]**.

75. Further this Hon'ble court in ***MRF Limited v Inspector Kerala Govt (1998) 8 SCC 227 Para 22*** **[SGI Compilation – Volume X – pg. 4771-4780]**, rejected a challenge on the ground of Article 14 by holding that a legislation which is brought in to give effect to the Directive Principles of State Policy of the Constitution cannot be said to be arbitrary nor it can be stuck down for being violative of Article 14 of the Constitution.

76. The mandatory twin conditions of bail contained in Section 45 of PMLA is a reasonable restriction which bears a reasonable nexus with the object sought to be achieved and pursues a legitimate State aim of creating deterrence from committing the offence of money laundering and therefore, cannot be termed either unreasonable or arbitrary or violative of Article 14 or 21 of the Constitution.

77. It is submitted that the expression contained in Article 39(b) of the Constitution, providing for the Directive Principles of State Policy that the state ***shall*** in particular, direct its policy towards securing that the ownership and control of material resources of the community are so distributed at best to serve the common good, must be read broadly. In ***State of Tamil Nadu and Ors. vs L. Abu Kavur Bai and Ors. (1984) 1 SCC 515 at para 89*** **[SGI Compilation – Volume X – pg. 4781-4817],** this Hon'ble Court explained the board-based concept of 'distribution' used in Article 39(b) of the Constitution.

78. Similarly, in ***State of Karnataka and Anr. V Shri Ranganatha Reddy & Anr. 1977 4 SCC 471 at Para 83*** **[SGI Compilation – Volume X – pg. 4818-4865]**, Hon'ble Justice Krishna Iyer observed that keeping mind the purpose of an Article like Article 39(b), a broad rather than a narrow meaning should be given to the words of that article. The relevant extract of the said judgment at para 83 is as follows:

> *"83. Two conclusions strike us as quintessential. Part IV, especially Article 39(b) and (c), is a futuristic mandate to the State with a message of transformation of the economic and social order. Firstly, such change calls for collaborative effort from all the legal institutions of the system: the legislature, the judiciary and the administrative machinery. Secondly and consequentially, loyalty to the high purpose of the Constitution viz. social and economic justice in the context of material want and utter inequalities on a massive scale, compels the Court to ascribe expansive meaning to the pregnant words used with hopeful foresight, not to circumscribe their connotation into contradiction of the objectives inspiring the provision. To be Pharisaic towards the Constitution through ritualistic construction is to weaken the social-spiritual thrust of the founding fathers' dynamic faith."*

The reasonability of 'twin conditions'

79. It is submitted that the twin conditions are similar to the provisions provided under several other statutes including but not limited to NDPS Act (Section 37); TADA Act (Section 20); Maharashtra Control of Organized Crime Act 1999 (Section 21). It is submitted that the aforesaid provisions have been upheld by the Hon'ble Supreme Court & High Courts *inter alia* in the following cases:

a. ***Kartar Singh v. State of Punjab*** **(1994) 3 SCC 569 [SGI Compilation – Volume VI – pg. 2603-2801]** decided by Hon'ble Supreme Court wherein validity of stringent provisions in TADA was upheld;

b. ***Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra and Anr.,*** **(2005) 5 SCC 294 [SGI Compilation – Volume X – pg. 4895-4930]** decided by Hon'ble Supreme Court upheld the provisions of MCOCA.

80. It is submitted that in ***Kartar Singh*** **supra [SGI Compilation – Volume VI – pg. 2603-2801]**, a Constitution Bench of this Hon'ble Court, on the constitutionality of such '*twin conditions*' held as under :

> *"**342. Sub-section (8) which imposes a complete ban on release on bail against the accused of an offence punishable under this Act minimises or dilutes that ban under two conditions, those being (1) the Public Prosecutor must be given an opportunity to oppose the bail application for such release; and (2) where the Public Prosecutor opposes the bail application the court must be satisfied that the two conditions, namely, (a) there are reasonable grounds for believing that the person accused is not guilty of such offence and (b) he is not likely to commit any offence while on bail.** Sub-section (9) qualifies sub-section (8) to the effect that the above two limitations imposed on grant of bail specified in sub-section (8) are in addition to the limitations under the Code or any other law for the time being in force on granting of bail. Section 436 of the Code provides for grant of bail to a person accused of a bailable offence, while Section 437 provides for grant of bail to any accused of, or suspected of, the commission of any non-bailable offence. Nonetheless, sub-section (1) of Section 437 imposes certain fetters on the exercise of the powers of granting bail on fulfilment of two conditions, namely (1) if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life; and (2) if the offence complained of is a cognizable offence and that the accused had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more or he had previously convicted on two or more occasions of a non-bailable and cognizable offence. Of course, these two conditions are subject to three provisos attached to sub-section (1) of Section 437. But we are not very much concerned about the provisos. However, sub-section (3) of Section 437 gives discretion to the court to grant bail attached with some conditions if it considers necessary or in the interest of justice. For proper understanding of those conditions or limitations to which two other conditions under clauses (a) and (b) of sub-section (8) of Section 20 of the TADA Act are attached, we reproduce those conditions in Section 437(3) hereunder:*
>
> *"437. (3) ****
>
> *(a) in order to ensure that such person shall attend in accordance with the conditions of the bond executed under this Chapter, or*
>
> *(b) in order to ensure that such person shall not commit an offence similar to the offence of which he is accused or of the commission of which he is suspected, or*
>
> *(c) otherwise in the interests of justice."*
>
> ***343.** Section 438 of the code speaks of bail and Section 439 deals with the special powers of High Court or Court of Session regarding bail. It will be relevant to cite Section 439(1)(a) also, in this connection, which reads as follows:*

"439. Special powers of High Court or Court of Session regarding bail.—(1) A High Court or Court of Session may direct—

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;

(b) …"

344. *In this connection, we would like to quote the following observation of this Court in* ***Usmanbhai Dawoodbhai Memon v. State of Gujarat [(1988) 2 SCC 271 : 1988 SCC (Cri) 318] , with which we are in agreement : (SCC pp. 286-287, para 19)***

"Though there is no express provision excluding the applicability of Section 439 of the Code similar to the one contained in Section 20(7) of the Act in relation to a case involving the arrest of any person on an accusation of having committed an offence punishable under the Act or any rule made thereunder, but that result must, by necessary implication, follow*. It is true that the source of power of a Designated Court to grant bail is not Section 20(8) of the Act as it only places limitations on such power. This is made explicit by Section 20(9) which enacts that the limitations on granting of bail specified in Section 20(8) are 'in addition to the limitations under the Code or any other law for the time being in force'. But it does not necessarily follow that the power of a Designated Court to grant bail is relatable to Section 439 of the Code. It cannot be doubted that a Designated Court is 'a court other than the High Court or the Court of Session' within the meaning of Section 437 of the Code. The exercise of the power to grant bail by a Designated Court is not only subject to the limitations contained therein, but is also subject to the limitations placed by Section 20(8) of the Act."*

349. The conditions imposed under Section 20(8)(b), as rightly pointed out by the Additional Solicitor General, are in consonance with the conditions prescribed under clauses (i) and (ii) of sub-section (1) of Section 437 and clause (b) of sub-section (3) of that section. Similar to the conditions in clause (b) of sub-section (8), there are provisions in various other enactments — such as Section 35(1) of Foreign Exchange Regulation Act and Section 104(1) of the Customs Act to the effect that any authorised or empowered officer under the respective Acts, if, has got reason to believe that any person in India or within the Indian customs waters has been guilty of an offence punishable under the respective Acts, may arrest such person. Therefore, the condition that "there are grounds for believing that he is not guilty of an offence", which condition in different form is incorporated in other Acts such as clause (i) of Section 437(1) of the Code and Section 35(1) of FERA and 104(1) of the Customs Act, cannot be said to be an unreasonable condition infringing the principle of Article 21 of the Constitution.

351. No doubt, liberty of a citizen must be zealously safeguarded by the courts; nonetheless the courts while dispensing justice in cases like the one under the TADA Act, should keep in mind not only the liberty of the accused but also the interest of the victim and their near and dear and above all the collective interest of the community and the safety of the nation so that the public may not lose faith in the system of judicial administration and indulge in private retribution."

NOTE – IV

81. It is submitted that similar observations echoed in the judgment of this Hon'ble Supreme Court in ***Collector of Customs v. Ahmadalieva Nodira*, (2004) 3 SCC 549 [SGI Compilation – Volume X – pg. 4931-4935]**, which held as under:

> *"**6.** As observed by this Court in Union of India v. Thamisharasi [(1995) 4 SCC 190 : 1995 SCC (Cri) 665 : JT (1995) 4 SC 253] clause (b) of sub-section (1) of Section 37 imposes limitations on granting of bail **in addition to those provided under the Code.** The two limitations are: (1) an opportunity to the Public Prosecutor to oppose the bail application, and (2) satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail.*
>
> ***7.** The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the Public Prosecutor, the other twin conditions which really have relevance so far as the present accused-respondent is concerned, are: the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. **The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence.** The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence."*

82. It is submitted that this Hon'ble Court has, in other statutes providing for twin conditions with regard to the grant of bail, has had that the said conditions are mandatory in nature. The respondent seeks liberty to rely upon the following judgements in this regard:

STATUTE	CASES
SECTION 43 D (5) OF UAPA	• ***NIA v. Zahoor Ahmad Shah Watali*, (2019) 5 SCC 1 [SGI Compilation – Volume X – pg. 4936-4992]**
SECTION 21(5) OF MCOCA	• ***State of Maharashtra vs. Bharat Shanti Lal Shah and Ors.*** **, (2008) 13 SCC 5 [SGI Compilation – Volume XI – pg. 4993-5017]**
SECTION 21(4) OF MCOCA	• ***The State of Maharashtra Vs. Vishwanath Maranna Shetty*, (2012) 10 SCC 561 [SGI Compilation – Volume XI – pg. 5018-5031]** • ***Chenna Boyanna Krishna Yadav v. State of Maharashtra and Anr.*, (2007) 1 SCC 242 [SGI Compilation – Volume XI – pg. 5032-5039]** • ***Ranjitsing Brahmajeetsing Sharma vs. State of Maharashtra and Anr.*, (2005) 5 SCC 294 [SGI Compilation – Volume X – pg. 4895-4930]**
SECTION 37 - NDPS ACT	• ***Supdt., Narcotics Control Bureau, Chennai v. R. Paulsamy*, (2000) 9 SCC 549 [SGI Compilation – Volume XI – pg. 5040-5043]** • ***Union of India v. Gurcharan Singh*, (2003) 11 SCC 764 [SGI Compilation – Volume XI – pg. 5044]**

STATUTE	CASES
	• ***Collector of Customs v. Ahmadalieva Nodira*, (2004) 3 SCC 549 [SGI Compilation – Volume X – pg. 4931-4935]** • ***Union of India v. Abdulla*, (2004) 13 SCC 504 [SGI Compilation – Volume XI – pg. 5045-5047]** • ***Narcotics Control Bureau v. Karma Phuntsok*, (2005) 12 SCC 480 [SGI Compilation – Volume XI – pg. 5048-5049]** • ***N.R. Mon v. Mohd. Nasimuddin*, (2008) 6 SCC 721 [SGI Compilation – Volume XI – pg. 5050-5055]** • ***Union of India v. Rattan Mallik*, (2009) 2 SCC 624 [SGI Compilation – Volume XI – pg. 5056-5061]** • ***Satpal Singh v. State of Punjab*, (2018) 13 SCC 813 [SGI Compilation – Volume XI – pg. 5062-5069]** • ***Union of India v. Niyazuddin Sk.*, (2018) 13 SCC 738 [SGI Compilation – Volume XI – pg. 5070-5072]**
COMPANIES ACT – SECTION 212(6)	• ***Serious Fraud Investigation Office v. Nittin Johari*, (2019) 9 SCC 165 [SGI Compilation – Volume XI – pg. 5073-5082]**

83. It is further submitted that reasonableness of restriction has to be determined in an objective manner and from the standpoint of the interest of the general public and not from the point of view of person upon whom the restrictions are imposed or upon extract considerations. ***(Modern Dental College and Research Centre vs State of MP*, 2016(7) SCC 353** at para 65) **[SGI Compilation – Volume XI – pg. 5083-5203]**

84. It is submitted that the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment. ***Bell v. Wolfish, supra, at 537, 99 S.Ct., at 1873*. [SGI Compilation – Volume XI – pg. 5204-5283]**

85. To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent. ***Schall v. Martin, 467 U.S., at 269, 104 S.Ct., at 2412.* [SGI Compilation – Volume XI – pg. 5284-5340]**

Nikesh Tarachand analysis – Taking away basis

86. It is submitted that the case of the Petitioners is premised on the judgment of this Hon'ble Court in ***Nikesh Tarachand Shah v. Union of India*, (2018) 11 SCC 1 [KS Compilation – Volume III – pg. 210 – 252].** The legislative position has undergone a change post the said judgment. This Hon'ble Court, may note the factual position, on Section 45, as under:

SECTION 45 – PRIOR TO NIKESH TARACHAND SHAH	SECTION 45 POST NIKESH TARACHAND SHAH	SECTION 45 – AS ON DATE
Section 45. Offences to be cognizable and non-bailable. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of	***Section 45. Offences to be cognizable and non-bailable.*** (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of	***Section 45. Offences to be cognizable and non-bailable.*** (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of

SECTION 45 – PRIOR TO NIKESH TARACHAND SHAH	SECTION 45 POST NIKESH TARACHAND SHAH	SECTION 45 – AS ON DATE
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) 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 State Government authorised in writing in this behalf by the Central Government by a general or a special order made in this behalf by that Government. (1A) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, or any other provision of this Act, no police officer shall investigate into an offence under this Act unless specifically authorised, by the Central Government by a	1974), no person accused of an offence ~~**punishable for a term of imprisonment of more than three years under Part A of the Schedule**~~ **under this Act** shall be released on bail or on his own bond unless- (i) the Public Prosecutor has been given a 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, or is accused either on his own or 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. (1A) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or any other provision 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 a 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, or is accused either on his own or 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. (1A) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or any other provision of this Act, no police officer shall investigate into an offence under this Act unless

SECTION 45 – PRIOR TO NIKESH TARACHAND SHAH	SECTION 45 POST NIKESH TARACHAND SHAH	SECTION 45 – AS ON DATE
general or special order, and, subject to such conditions as may be prescribed. (2) The limitation on granting of bail specified in sub-section (1) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.	this Act, no police officer shall investigate into an offence under this Act unless specifically authorised, by the Central Government by a general or special order, and, subject to such conditions as may be prescribed. (2) The limitation on granting of bail specified in sub-section (1) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.	specifically authorised, by the Central Government by a general or special order, and, subject to such conditions as may be prescribed. (2) The limitation on granting of bail specified in sub-section (1) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail. **Explanation.—For the removal of doubts, it is clarified that the expression "Offences to be cognizable and non-bailable" shall mean and shall be deemed to have always meant that all offences under this Act shall be cognizable offences and non-bailable offences notwithstanding anything to the contrary contained in the Code of Criminal Procedure, 1973, and accordingly the officers authorised under this Act are empowered to arrest an accused without warrant, subject to the fulfilment of conditions under section 19 and subject to the conditions enshrined under this section.**

87. The Hon'ble Supreme Court, in ***Nikesh Tarachand Shah v. Union of India*, (2018) 11 SCC 1 [KS Compilation – Volume III – pg. 210 – 252]**, while declaring the said section as unconstitutional, from a reading of **Paragraphs 14, 27, and 31-41**, it is clear that the judgment in **Nikesh *supra***, was delivered on the premise that the twin conditions of bail would, as per the unamended provision, would apply to cases of bail in both, the predicate offence and also the offence of money laundering.

88. There appears to be two reasons based on which this Hon'ble Court struck down section 45(1) of the PMLA in Nikesh Tarachand (supra):

(i) a classification based on sentencing of the scheduled offence [as it existed at that time] was found to have no nexus with the objective of PMLA, thereby rendering it to be manifestly arbitrary or unjust and violative of Article 14 of the Constitution of India;

(ii) since the application of the twin conditions in section 45(1) was restricted only to a particular class of offences within the PMLA i.e. offences punishable for a term of

imprisonment of more than three years under Part-A of the Schedule, and not to all the offences under the PMLA, such an indiscriminate application of the twin conditions on bail as prescribed under section 45(1) would lead to a violation of rights enshrined under Article 21.

89. The Hon'ble Court, assuming such interpretation and considering the provision as it existed then, provided a series of illustrations wherein due to the ***dual applicability*** of twin conditions to scheduled offences [IPC, NDPS, Prevention of Corruption Act, etc] and also to PMLA offences, found the provision to be unconstitutional.

It is relevant to note, the said interpretation was possible due to the language in unamended Section 45 qua the phrases *"no person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule"* occurring in Section 45(1).

It is relevant to note that after the amendment post Nikesh *supra,* the said ***dual application*** has been removed and the twin conditions which were earlier applicable to both offences would now be applicable to the offence under the PMLA only.

It is submitted that the same ***has taken away the element of arbitrariness pointed out by this Hon'ble Court Nikesh*** **supra [KS Compilation – Volume III – pg. 210 – 252]** and the Parliament has taken away the basis of the judgment curing the defect. It is submitted that the dual applicability formed the basis of the finding of unconstitutionality and in light of the amendment, the basis of unconstitutionality has been taken away thereby making it impossible to come to the same findings as Nikesh *supra.*

Taking away the basis in general

90. The conceptual understanding of the legislative exercise whereby the legislature cures the "defect" can be explained thus.

- If a law is struck down by the constitutional court as lacking in legislative competence, there is no question of the legislature thereafter curing the defect.
- However, if the constitutional court strikes down a provision as violative of some fundamental rights traceable to Part III of the Constitution, the constitutional court does so as "a declaration under Article 13[2]" which will not have an effect of repealing the provisions. The power of repeal is vested only in the Parliament and none else. If a provision is repealed, it becomes non-existent for all times to come until re-enacted.
- However, the declaration for a constitutional court of some provision being declared offending the fundamental rights merely results in making that provision inoperative and unenforceable while remaining on the statute book as inoperative and unenforceable provision. In this category of cases, it is always open for the competent legislature to cure the reason / defect which persuaded the constitutional court to hold it to be violative of Part III.

This is the sum and substance of the law declared by this Hon'ble Court right from inception till date as discussed hereunder the latest judgment being **(2017) 1 SCC 283**

91. In the year 1969, the Hon'ble Supreme Court speaking through a Constitution Bench in ***Shri Prithvi Cotton Mills Ltd.*** **v.** ***Broach Borough Municipality*** **[(1969) 2 SCC 283] [J.**

Hidayatullah] [KS Compilation – Volume XII – pg. 189-194] laid down a proposition of law that has been followed consistently over the years. The same is regarded as the doctrine of *taking away the basis* or *validating acts*. The meaning of a Validation Act is to remove the causes for ineffectiveness or invalidity of actions or proceedings which are validated by a legislative measure. In ***Prithvi Cotton* supra [KS Compilation – Volume XII – pg. 189-194]** the Hon'ble Supreme Court dealt with the Gujarat Imposition of Taxes by Municipalities (Validation) Act, 1963. AS per the facts of the case, under Section 73 of the Bombay Municipal Boroughs Act, 1925 a municipality could levy a rate on building or lands or both situate within the municipality. The Hon'ble Supreme Court held in ***Patel Gordhandas Hargovindas* v. *Municipal Commissioner, Ahmedabad*** **[AIR 1963 SC 1742] [SGI Compilation – Volume XI – pg. 5587-5603]** that the term 'rate' must be confined to an impost on the basis of annual letting value and could not be validly a levy on the basis of capital value. It is submitted that because of this decision the Gujarat Legislature passed the Gujarat Imposition of Taxes by Municipalities (Validation) Act, 1963. The 1963 Act provided that past assessment and collection of 'rate' on lands and buildings on the basis of capital value or a percentage of capital value was declared valid despite any judgment of a court or Tribunal to the contrary. The earlier decision of the Hon'ble Supreme Court was applicable to the meaning of the word "rate" occurring in the 1925 Act. The Validation Act gave its own meaning and interpretation of the law under which the tax was collected.

> *"**1. M. HIDAYATULLAH, C.J.**—These matters arise under Article 226 of the Constitution and are appeals by certificate granted by the High Court of Gujarat against its judgment and order, dated September 10, 1966. The Appellant 1 is a Company which has spinning and weaving mills at Broach and manufactures and sells cotton yarn and cloth. Respondent 1 is the Broach Borough Municipality constituted under Section 8 of the Bombay Municipal Boroughs Act, 1925. In Assessment Years 1961-62, 1962-63 and 1963-64 the Municipality purporting to act under Section 73 of the Bombay Municipal Boroughs Act, 1925 and the Rules made thereunder imposed a purported rate on lands and buildings belonging to the respondents at a certain percentage of the capital value. Section 73 of the Act allows the Municipality to levy "a rate on buildings or lands or both situate within the municipal borough". The Rules under the Act applied the rates on the basis of the percentage on the capital value of lands and buildings. The assessment lists were published and tax was imposed according to the rates calculated on the basis of the capital value of the property of the appellant and bills in respect of the tax were served. The writ petitions were filed to question the assessment and to get the assessment cancelled.*
>
> ***2.** During the pendency of the writ petitions the Legislature of Gujarat passed the Gujarat Imposition of Taxes by Municipalities (Validation) Act, 1963. As a result the writ petitions were amended and the Validation Act was also questioned. The appellants also filed a second writ petition questioning the validity of the Validation Act under Articles 19(1)(f)(g) and 265 of the Constitution. By the order under appeal here both the writ petitions were dismissed although a certificate of fitness was granted.*
>
> ***3.** The Validation Act was presumably passed because of the decision of this Court reported in Patel Gordhandas Hargovindas v. Municipal Commissioner, Ahmedabad. [(1964) 2 SCR 608] In that case the validity of the Rules framed by the Municipal Corporation under Section 73 were called in question, particularly*

Rule 350-A for rating open lands which provides that the rate on the area of open lands shall be levied at 1 per centum on the valuation based upon capital value. Dealing with the word "rate" as used in these statutes, it was held by this Court that the word "rate" had acquired a special meaning in English legislative history and practice and also in Indian legislation and it meant a tax for local purposes imposed by local authorities. The basis of such tax was the annual value of the lands or buildings. It was discussed in the case that there were three methods by which the rates could be imposed: the first was to take into account the actual rent fetched by the land or building where it was actually let; the second was, where it was not let, to take rent based on hypothetical tenancy, particularly in the case of buildings; and the third was where neither of these two modes was available, by valuation based on capital value from which annual value had to be found by applying suitable percentage which might not be the same for lands and buildings. It was held that in Section 73 the word "rate" as used must have been used in the special sense in which the word was understood in the legislative practice of India before that date. Rule 350-A which laid the rate on land at a percentage of the valuation based upon capital was therefore declared ultra vires the Act itself. In short, the word "rate" was given a specialised meaning and was held to mean a kind of impost on the annual letting value of property, if actually let out, and on a notional letting value if the property was not let out. The Legislature of Gujarat then passed the Validation Act seeking to validate the imposition of the tax as well as to avoid any future interpretation of the Act on the lines on which Rule 350-A was construed. The Act came into force on January 29, 1964. After defining the expressions used in the Act and providing for its application, the Act enacted Section 3 which concerned validation of impositions and collections of taxes or rates by Municipalities in certain cases. That section reads as follows:

> *"3. Validation of imposition and Collection of taxes or rates by municipalities in certain cases.—Notwithstanding anything contained in any judgment, decree or order of a Court or Tribunal or any other authority, no tax or rate assessed or purporting to have been assessed by a municipality under the relevant municipal law or any rules made thereunder on the basis of the capital value of a building or land, as the case may be, or on the basis of a percentage of such capital value, and imposed, collected or recovered by the municipality at any time before the commencement of this Act shall be deemed to have been invalidly assessed, imposed, collected or recovered by reason of the assessment being based on the capital value or the percentage of the capital value, and not being based on the annual letting value, of the building or land, as the case may be, and the imposition, collection and recovery of the tax or rate so assessed and the provisions of the rules made under the relevant municipal law under which the tax or rate was so assessed shall be valid and shall be deemed always to have been valid and shall not be called in question merely on the ground that the assessment of the tax or rate on the basis of the capital value of the building or land, as the case may be, or on the basis of a percentage of such capital value was not authorised by law; and accordingly any tax or rate, so assessed before the commencement of this Act and leviable for a period prior to such commencement but not collected or recovered before such commencement, may be collected and recovered in accordance with the relevant municipal law, and the rules made thereunder."*

If this section is valid then the imposition cannot be questioned and the short question which arises in this case is as to the validity of this section. It is not denied that a Legislature does possess the power to validate statutes and to pass retrospective laws. It is, however, contended that the Validation Act is ineffective in carrying out its avowed object. This is the only point which falls for consideration in these appeals.

4. *Before we examine Section 3 to find out whether it is effective in its purpose or not we may say a few words about validating statutes in general. When a Legislature sets out to validate a tax declared by a court to be illegally* ***collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. The most important condition, of course, is that the Legislature must possess the power to impose the tax, for, if it does not, the action must ever remain ineffective and illegal. Granted legislative competence, it is not sufficient to declare merely that the decision of the Court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the Legislature does not possess or exercise. A court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances. Ordinarily, a court holds a tax to be invalidly imposed because the power to tax is wanting or the statute or the rules or both are invalid or do not sufficiently create the jurisdiction. Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law. Sometimes the Legislature gives its own meaning and interpretation of the law under which tax was collected and by legislative fiat makes the new meaning binding upon courts. The Legislature may follow any one method or all of them and while it does so it may neutralise the effect of the earlier decision of the court which becomes ineffective after the change of the law. Whichever method is adopted it must be within the competence of the legislature and legal and adequate to attain the object of validation. If the Legislature has the power over the subject-matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transactions. The validity of a Validating Law, therefore, depends upon whether the Legislature possesses the competence which it claims over the subject-matter and whether in making the validation it removes the defect which the courts had found in the existing law and makes adequate provisions in the Validating Law for a valid imposition of the tax.***

6. *The Legislature in Section 73 had not authorised the levy of a tax in this manner but had authorised the levy of a rate. That led to the discussion whether a rule putting the tax on capital value of buildings answered the description of the impost in the Act, namely, "a rate on buildings or lands or both situate within the Municipal borough". It was held by this Court that it did not, because the word "rate" had acquired a special meaning in legislative practice. Faced with*

this situation the Legislature exercised its undoubted powers of redefining "rate" so as to equate it to a tax on capital value and convert the tax purported to be collected as a "rate" into a tax on lands and buildings. The Legislature in the Validation Act, therefore, provided for the following matters. First, it stated that no tax or rate by whichever name called and laid on the capital value of lands and buildings must be deemed to be invalidly assessed, imposed, collected or recovered simply on the ground that a rate is based on the annual letting value. Next it provided that the tax must be deemed to be validly assessed, imposed, collected or recovered and the imposition must be deemed to be always so authorised. The Legislature by this enactment retrospectively imposed the tax on lands and buildings based on their capital value and as the tax was already imposed, levied and collected on that basis, made the imposition, levy collection and recovery of the tax valid, notwithstanding the declaration by the Court that as "rate", the levy was incompetent. The Legislature not only equated the tax collected to a tax on lands and buildings, which it had the power to levy, but also to a rate giving a new meaning to the expression "rate", and while doing so it put out of action the effect of the decisions of the courts to the contrary. The exercise of power by the Legislature was valid because the Legislature does possess the power to levy a tax on lands and buildings based on capital value thereof and in validating the levy on that basis, the implication of the use of the word "rate" could be effectively removed and the tax on lands and buildings imposed instead. The tax, therefore, can no longer be questioned on the ground that Section 73 spoke of a rate and the imposition was not a rate as properly understood but a tax on capital value. In this view of the matter it is hardly necessary to invoke the 14th clause of Section 73 which contains a residuary power to impose any other tax not expressly mentioned."

92. In ***Bhubaneshwar Singh v. Union of India,*** **(1994) 6 SCC 77 [SGI Compilation – Volume XII – pg. 6013-6022]**, it was held as under :

8. *As sub-section (2) has been introduced in Section 10 of the Nationalisation Act with retrospective effect, it shall be deemed to have been there since 1-5-1972, the day the Coking Coal Mines (Nationalisation) Act, 1972 came into force. The said sub-section provides and declares that the amount specified in the fifth column of the First Schedule against any coking coal mine specified in the said schedule which was required to be given by the Central Government to its owner under sub-section (1) shall be deemed to include, and deemed always to have included "the amount required to be paid to such owner in respect of all coke in stock or other assets referred to in clause (b) of Section 3 on the date immediately before the appointed day and no further amount shall be payable to the owner in respect of such coke or other assets". It cannot be disputed that if sub-section (2) was in existence on the date the writ application had been filed on behalf of the petitioner, there would have been no occasion for the High Court or this Court to direct that the account be taken also of the stock of coke lying on the date immediately before the appointed day because the amount which is payable to the petitioner shall be deemed to have included the payment even in respect of such coke.*

9. *The question is as to whether by introduction of sub-section (2) in Section 10 with retrospective effect, i.e., w.e.f. 1-5-1972, the respondents are absolved of their liability and are exonerated from the responsibility of complying with the*

direction given by the High Court and this Court in the earlier writ application filed on behalf of the petitioner. It is well settled that Parliament and State Legislatures have plenary powers of legislation on the subjects within their field. They can legislate on the said subjects prospectively as well as retrospectively. If the intention of the legislature is clearly expressed that it purports to introduce the legislation or to amend an existing legislation retrospectively, then subject to the legislative competence and the exercise being not in violation of any of the provisions of the Constitution, such power cannot be questioned. Sub-section (2) of Section 1 of the Coal Mines Nationalisation Laws (Amendment) Act, 1986 clearly and specifically says that the said amendment to the Coking Coal Mines (Nationalisation) Act, 1972 shall be deemed to have come into force on 1-5-1972. Sub-section (2) of Section 10 which has been introduced with retrospective effect says that the amount which has been mentioned in the schedule to be payable to the owner shall be deemed to include and deemed always to have included the amount required to be paid to such owner in respect of all coke in stock on the date immediately before the appointed day. The amount which is to be paid as compensation for acquisition of right, title and interest of the petitioner in the coking coal mine in question, shall include the compensation for all coke in stock on the date immediately before the appointed day. It can therefore be said that the amendments which have been introduced retrospectively, have taken away the substratum of the claim made on behalf of the petitioner, in respect of the price of the stock of coke lying on the date immediately before the appointed day.

10. *The question which however still requires to be examined is as to whether by this process which negatives the claim made on behalf of the petitioner, even the effect of the judgment of the High Court and this Court has been nullified. Section 19 of the Coal Mines Nationalisation Laws (Amendment) Act, 1986 referred to above says that notwithstanding any judgment, decree, order or direction of any court to the contrary every amount paid to the owner of every coking coal mine under Section 10 shall be deemed to include and deemed always to have included the amount required to be paid to the owner in respect of the coke in stock on the date immediately before the appointed day, as if the provisions of Section 10 as amended by the said Act had been in force at all material times, and no such payment shall be called in question in any court on the ground that it had not included the value of such coal or coke.*

11. From time to time controversy has arisen as to whether the effect of judicial pronouncements of the High Court or the Supreme Court can be wiped out by amending the legislation with retrospective effect. Many such Amending Acts are called Validating Acts, validating the action taken under the particular enactments by removing the defect in the statute retrospectively because of which the statute or the part of it had been declared ultra vires. Such exercise has been held by this Court as not to amount to encroachment on the judicial power of the courts. The exercise of rendering ineffective the judgments or orders of competent courts by changing the very basis by legislation is a well-known device of validating legislation. This Court has repeatedly pointed out that such validating legislation which removes the cause of the invalidity cannot be considered to be an encroachment on judicial power. At the same time, any action in exercise of the power under any enactment which has been declared to be invalid by a court cannot be made valid by a Validating Act by merely saying so unless the defect which has been

pointed out by the court is removed with retrospective effect. The validating legislation must remove the cause of invalidity. Till such defect or the lack of authority pointed out by the court under a statute is removed by the subsequent enactment with retrospective effect, the binding nature of the judgment of the court cannot be ignored.

93. In ***Comorin Match Industries (P) Ltd. v. State of T.N.***, **(1996) 4 SCC 281 [SGI Compilation – Volume XII – pg. 6023-6038]**, it was held as under :

12. *Before examining this argument of Mr Vaidyanathan, the majority judgment in Madan Mohan Pathak case [(1978) 2 SCC 50 : 1978 SCC (L&S) 103 : (1978) 3 SCR 334] will have to be read and properly understood. The Life Insurance Corporation (Modification of Settlement) Act, 1976 was an Act to alter the settlement which had been arrived at between the Corporation and its Class III and Class IV employees on 24-1-1974 under the Industrial Disputes Act, 1947 and which was in force up to 31-3-1976. The Act did not purport to change the law which formed the basis of the judgment of the Calcutta High Court in any manner. The Act did not contain any clause that it would be enforced notwithstanding anything contained in any judgment to the contrary. The majority judgment, which was delivered by Justice Bhagwati, J. (as His Lordship then was), highlighted this aspect. Bhagwati, J. observed: (SCC pp. 64-65, para 8)*

> *"It is significant to note that there was no reference to the judgment of the Calcutta High Court in the Statement of Objects and Reasons, nor any non obstante clause referring to a judgment of a court in Section 3 of the impugned Act. The attention of Parliament does not appear to have been drawn to the fact that the Calcutta High Court had already issued a writ of mandamus commanding the Life Insurance Corporation to pay the amount of bonus for the year 1-4-1975 to 31-3-1976. It appears that unfortunately the judgment of the Calcutta High Court remained almost unnoticed and the impugned Act was passed in ignorance of that judgment. Section 3 of the impugned Act provided that the provisions of the Settlement insofar as they relate to payment of annual cash bonus to Class III and Class IV employees shall not have any force or effect and shall not be deemed to have had any force or effect from 1-4-1975. But the writ of mandamus issued by the Calcutta High Court directing the Life Insurance Corporation to pay the amount of bonus for the year 1-4-1975 to 31-3-1976 remained untouched by the impugned Act. So far as the right of Class III and Class IV employees to annual cash bonus for the year 1-4-1975 to 31-3-1976 was concerned, it became crystallised in the judgment and thereafter they became entitled to enforce the writ of mandamus granted by the judgment and not any right to annual cash bonus under the Settlement. This right under the judgment was not sought to be taken away by the impugned Act. The judgment continued to subsist and the Life Insurance Corporation was bound to pay annual cash bonus to Class III and Class IV employees for the year 1-4-1975 to 31-3-1976 in obedience to the writ of mandamus."*

16. *Therefore, the majority view appears to be that if a judgment is pronounced by a court and the effect of that judgment is sought to be taken away by the legislature by passing an Act without altering the statute on the basis of which the judgment was pronounced, then such legislation will not nullify the*

effect or force of the judgment pronounced by a court in any manner. The statute being what it was, the judicial interpretation of the statute could not be held to be erroneous by legislative imprimatur, but if the statute itself was amended retrospectively so that the very basis of the judgment disappeared, then it could not be said that the judgment was still in force and will have to be given effect to even though the legislature had specifically laid down that the amended law will operate notwithstanding any judgment or decision or decree by the court to the contrary. In fact, that is how the judgment of Shri Prithvi Cotton Mills Ltd. [(1969) 2 SCC 283 : (1970) 1 SCR 388] was understood and explained.

24. This case does not lay down that after a judgment has been pronounced on the basis of an Act, the provisions of that Act cannot be amended so as to cure the defect pointed out in the judgment retrospectively. The effect of the amending Act of 1969 is not to overrule a judgment passed by a court of law, which the legislature cannot do. What the legislature can do is to change the law on the basis of which the judgment was pronounced retrospectively and thereby nullify the effect of the judgment. When the legislature enacts that notwithstanding any judgment or order the new law will operate retrospectively and the assessments shall be deemed to be validly made on the basis of the amended law, the legislature is not declaring the judgment to be void but rendering things or acts deemed to have been done under amended statute valid notwithstanding any judgment or order on the basis of the unamended law to the contrary. The validity to the assessment orders which had been struck down by the Court, is imparted by the amending Act by changing the law retrospectively.

94. In ***Indian Aluminium Co. v. State of Kerala,*** **(1996) 7 SCC 637 [SGI Compilation – Volume XII – pg. 6039-6066]**, it was held as under:

56. *From a resume of the above decisions the following principles would emerge:*

(1) The adjudication of the rights of the parties is the essential judicial function. Legislature has to lay down the norms of conduct or rules which will govern the parties and the transactions and require the court to give effect to them;

(2) The Constitution delineated delicate balance in the exercise of the sovereign power by the legislature, executive and judiciary;

(3) In a democracy governed by rule of law, the legislature exercises the power under Articles 245 and 246 and other companion articles read with the entries in the respective lists in the Seventh Schedule to make the law which includes power to amend the law.

(4) Courts in their concern and endeavour to preserve judicial power equally must be guarded to maintain the delicate balance devised by the Constitution between the three sovereign functionaries. In order that rule of law permeates to fulfil constitutional objectives of establishing an egalitarian social order, the respective sovereign functionaries need free play in their joints so that the march of social progress and order remains unimpeded. The smooth balance built with delicacy must always be maintained;

(5) In its anxiety to safeguard judicial power, it is unnecessary to be overzealous and conjure up incursion into the judicial preserve invalidating the valid law competently made;

(6) The court, therefore, needs to carefully scan the law to find out: (a) whether the vice pointed out by the court and invalidity suffered by previous law is cured complying with the legal and constitutional requirements; (b) whether the legislature has competence to validate the law; (c) whether such validation is consistent with the rights guaranteed in Part III of the Constitution.

(7) The court does not have the power to validate an invalid law or to legalise impost of tax illegally made and collected or to remove the norm of invalidation or provide a remedy. These are not judicial functions but the exclusive province of the legislature. Therefore, they are not encroachment on judicial power.

(8) In exercising legislative power, the legislature by mere declaration, without anything more, cannot directly overrule, revise or override a judicial decision. It can render judicial decision ineffective by enacting valid law on the topic within its legislative field fundamentally altering or changing its character retrospectively. ***The changed or altered conditions are such that the previous decision would not have been rendered by the court, if those conditions had existed at the time of declaring the law as invalid.*** *It is also empowered to give effect to retrospective legislation with a deeming date or with effect from a particular date. The legislature can change the character of the tax or duty from impermissible to permissible tax but the tax or levy should answer such character and the legislature is competent to recover the invalid tax validating such a tax on removing the invalid base for recovery from the subject or render the recovery from the State ineffectual. It is competent for the legislature to enact the law with retrospective effect and authorise its agencies to levy and collect the tax on that basis, make the imposition of levy collected and recovery of the tax made valid, notwithstanding the declaration by the court or the direction given for recovery thereof.*

(9) The consistent thread that runs through all the decisions of this Court is that the legislature cannot directly overrule the decision or make a direction as not binding on it ***but has power to make the decision ineffective by removing the base on which the decision was rendered, consistent with the law of the Constitution and the legislature must have competence to do the same.***

57. *Considered from these perspectives, the question is: whether Section 11 can answer the tests laid down hereinbefore. It is seen that the duty was collected under an order made in exercise of Section 3 of the Essential Articles Act and it was held to be not a tax but a duty for the benefit of KSEB. That duty being a compulsory exaction for the benefit of public exchequer is a tax. Duty on supply of electricity was declared to be an additional burden and a levy within Entries 26 and 27 of List II, subject to Entry 33 of List III (Concurrent List). Duty is an additional burden and partakes the character of a tax. Entry 53 of List II (State List) empowers the State Legislature to impose tax on consumption or sale of electricity. It is, therefore, a compulsory exaction for the benefit of the Revenue. Therefore, it is an additional tax in the form of a duty under the Act. The vice pointed out in Chakolas case [(1988) 2 KLT 680] has been removed under the Act. Consequently, Section 11 validated the invalidity pointed out in Chakolas*

case [(1988) 2 KLT 680] removing the base. In the altered situation, the High Court would not have rendered Chakolas case [(1988) 2 KLT 680] under the Act. It has made the writ issued in Chakolas case [(1988) 2 KLT 680] ineffective. Instead of refunding the duty illegally collected under invalid law, Section 11 validated the illegal collections and directed the liability of the past transactions as valid under the Act and also fastened liability on the consumers. In other words, the effect of Section 11 is that the illegal collection made under invalid law is to be retained and the same shall now stand validated under the Act. Thus considered, we hold that Section 11 is not an incursion on judicial power of the court and is a valid piece of legislation as part of the Act.

95. In ***Bakhtawar Trust v. M.D. Narayan,*** **(2003) 5 SCC 298 [SGI Compilation – Volume XII – pg. 6092-6108]**, it was held as under :

14. *The validity of any statute may be assailed on the ground that it is ultra vires the legislative competence of the legislature which enacted it or it is violative of Part III or any other provision of the Constitution. It is well settled that Parliament and State Legislatures have plenary powers of legislation within the fields assigned to them and subject to some constitutional limitations, can legislate prospectively as well as retrospectively. This power to make retrospective legislation enables the legislature to validate prior executive and legislative Acts retrospectively after curing the defects that led to their invalidation and thus makes ineffective judgments of competent courts declaring the invalidity. It is also well settled that a validating Act may even make ineffective judgments and orders of competent courts provided it, by retrospective legislation, removes the cause of invalidity or the basis that had led to those decisions.*

15. *The test of judging the validity of the amending and validating Act is, whether the legislature enacting the validating Act has competence over the subject-matter; whether by validation, the said legislature has removed the defect which the court had found in the previous laws; and whether the validating law is consistent with the provisions of Part III of the Constitution.*

25. The decisions referred to above, manifestly show that it is open to the legislature to alter the law retrospectively, provided the alteration is made in such a manner that it would no more be possible for the Court to arrive at the same verdict. In other words, the very premise of the earlier judgment should be uprooted, thereby resulting in a fundamental change of the circumstances upon which it was founded.

26. Where a legislature validates an executive action repugnant to the statutory provisions declared by a court of law, what the legislature is required to do is first to remove the very basis of invalidity and then validate the executive action. In order to validate an executive action or any provision of a statute, it is not sufficient for the legislature to declare that a judicial pronouncement given by a court of law would not be binding, as the legislature does not possess that power. A decision of a court of law has a binding effect unless the very basis upon which it is given is so altered that the said decision would not have been given in the changed circumstances.

96. In ***State of H.P. v. Narain Singh,*** **(2009) 13 SCC 165 [SGI Compilation – Volume XII – pg. 6109-6121]**, it was held as under :

> ***21.*** *The power of the sovereign legislature to legislate within its field, both prospectively and retrospectively cannot be questioned. This position has been settled in many judgments of this Court. Some of them may be considered below. In Bhubaneshwar Singh v. Union of India [(1994) 6 SCC 77] the Court expressly approved the aforesaid position in para 9 at pp. 82-83. Insofar as the validating Acts are concerned, this Court in Bhubaneshwar Singh [(1994) 6 SCC 77] also considered the question in para 11 and held that the Court has the powers by virtue of such validating legislation, to "wipe out" judicial pronouncements of the High Court and the Supreme Court by removing the defects in the statute retrospectively when such statutes had been declared ultra vires by Courts in view of its defects.*
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> ***22.*** *This Court in Bhubaneshwar Singh [(1994) 6 SCC 77] has held that such legislative exercise will not amount to encroachment on the judicial power. This Court has accepted that such legislative device which removes the vice in previous legislation is not considered an encroachment on judicial power. In support of the aforesaid proposition, this Court in Bhubaneshwar Singh [(1994) 6 SCC 77] relied on the proposition laid down by Hidayatullah, C.J. speaking for the Constitution Bench in Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality [(1969) 2 SCC 283] .*
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> ***23.*** *Again in Indian Aluminium Co. v. State of Kerala [(1996) 7 SCC 637 : AIR 1996 SC 1431] this Court while summarising the principle held that a legislature cannot directly overrule a judicial decision but it has the power to make the decision ineffective by removing the basis on which the decision is rendered, while at the same time adhering to the constitutional imperatives and the legislature is competent to do so [see para 56 sub-para (9) at p. 1446].*
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> ***24.*** *In Comorin Match Industries (P) Ltd. v. State of T.N. [(1996) 4 SCC 281 : AIR 1996 SC 1916] , the facts were that the assessment orders passed under the Central Sales Tax Act were set aside by the High Court and the State was directed to refund the amount to the assessee. As the State failed to carry it out, contempt petitions were filed but the assessment orders were validated by passing the Amendment Act of 1969 with retrospective effect and the Court held that the tax demanded became valid and enforceable.*
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> ***25.*** *The Court in Comorin Match case [(1996) 4 SCC 281 : AIR 1996 SC 1916] held that in such a situation the State will not be precluded from realising the tax due as subsequently the assessment order was validated by the amending Act of 1969 and the order passed in the contempt proceeding will not have the effect of the writing off the debt which is statutorily owed by the assessee to the State. The learned Judges held that the effect of the amending Act is retrospective validation of the assessment orders which were struck down by the High Court. Therefore, the assessment order is legislatively valid and the tax demands are also enforceable. (See paras 33 & 35 at p. 1925.)*
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> ***26. It is therefore clear where there is a competent legislative provision which retrospectively removes the substratum of foundation of a judgment, the said exercise is a valid legislative exercise provided it does not transgress any other constitutional limitation. Therefore, this Court cannot uphold the reasoning in the High Court judgment that the***

impugned amendment is invalid just because it nullifies some provisions of the earlier Act.

97. In ***Goa Foundation v. State of Goa***, **(2016) 6 SCC 602 [SGI Compilation – Volume XII – pg. 6122-6140]**, it was held as under :

> ***24.*** *The principles on which first question would require to be answered are not in doubt. The power to invalidate a legislative or executive act lies with the Court. A judicial pronouncement, either declaratory or conferring rights on the citizens cannot be set at naught by a subsequent legislative act for that would amount to an encroachment on the judicial powers. However, the legislature would be competent to pass an amending or a validating act, if deemed fit, with retrospective effect removing the basis of the decision of the Court. Even in such a situation the courts may not approve a retrospective deprivation of accrued rights arising from a judgment by means of a subsequent legislation (Madan Mohan Pathak v. Union of India [Madan Mohan Pathak v. Union of India, (1978) 2 SCC 50 : 1978 SCC (L&S) 103]). However, where the Court's judgment is purely declaratory, the courts will lean in support of the legislative power to remove the basis of a court judgment even retrospectively, paving the way for a restoration of the status quo ante. Though the consequence may appear to be an exercise to overcome the judicial pronouncement it is so only at first blush; a closer scrutiny would confer legitimacy on such an exercise as the same is a normal adjunct of the legislative power. The whole exercise is one of viewing the different spheres of jurisdiction exercised by the two bodies i.e. the judiciary and the legislature. The balancing act, delicate as it is, to the constitutional scheme is guided by the well-defined values which have found succinct manifestation in the views of this Court in Bakhtawar Trust [Bakhtawar Trust v. M.D. Narayan, (2003) 5 SCC 298] .*
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> ***25.*** *The relevant part of the opinion expounded in Bakhtawar Trust [Bakhtawar Trust v. M.D. Narayan, (2003) 5 SCC 298] may be noticed below: (SCC pp. 307 & 311-12, paras 14-15 & 25-28)*
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> *xxx*
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> ***26.*** *If the above principles are to be applied to the present case what follows is that Sections 41(6) to (9) introduced in the principal Act by the Goa State Amendment renders ineffective Clause 4(viii) of the agreement executed by the parties under Section 41 of the principal Act. With Clause 4(viii) being deleted the embargo on constructions on the acquired land is removed. It is the aforesaid Clause 4(viii) and its legal effect, in view of Section 42, that was the basis of the Court's decision dated 20-1-2009 holding the construction raised by the third respondent on the acquired land to be illegal and contrary to the principal Act. Once Clause 4(viii) is removed the basis of the earlier judgment stands extinguished. In fact, it may be possible to say that if Clause 4(viii) had not existed at all, the judgment of the Court dated 20-1-2009 [Fomento Resorts & Hotels Ltd. v. Minguel Martins, (2009) 3 SCC 571 : (2009) 1 SCC (Civ) 877] would not have been forthcoming. It was, therefore, well within the domain of the legislature to bring about the Amendment Act with retrospective effect, the legislative field also being in the Concurrent List, namely, Entry 42 of List III (Acquisition and Requisition of Property) of the Seventh Schedule to the Constitution.*

98. It is submitted that on the issue of taking away the basis of unconstitutionality, reliance is placed on a recent judgment which has summarised a long line of cases on the point. In ***Cheviti Venkanna Yadav v. State of Telangana*, (2017) 1 SCC 283 [SGI Compilation – Volume XII – pg. 5618-5636]**, this Hon'ble Court, held as under :

> *"**26.** The second issue that emanates for consideration is whether the base of the earlier judgment has really been removed. Before stating the factual score it is necessary to state how this Court has viewed the said principle. In **Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality [Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality, (1969) 2 SCC 283]** , the Constitution Bench while dealing with the legislation which intended to validate the tax declared by law to be illegal, opined that when a legislature sets out to validate a tax declared by a court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. The most important condition, of course, is that the legislature must possess the power to impose the tax, for if it does not, the action must ever remain ineffective and illegal. Granted legislative competence, it is not sufficient to declare merely that the decision of the court shall not bind, for that tantamount to reversing the decision in exercise of judicial power which the legislature does not possess or exercise. **A court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances.** Thereafter, the Court proceeded to state that validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. The legislature does it many a way. One of the methods it may adopt is to give its own meaning and interpretation of the law under which tax was collected and by legislative fiat makes the new meaning binding upon the courts. On such legislation being brought, it neutralises the effect of the earlier decision as a consequence of which it becomes ineffective. The test of validity of a validating law depends upon whether the legislature possesses the competence which it claims over the subject-matter and whether in making the validation it removes the defect which the courts had found in the existing law and makes adequate provisions in the validating law for a valid imposition of the tax.*
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> ***27.** In Bhubaneshwar Singh v. Union of India [Bhubaneshwar Singh v. Union of India, (1994) 6 SCC 77] in view of Section 3 of the Coking Coal Mines (Emergency Provisions) Act, 1971 which was promulgated in the year 1971, the Custodian being appointed by the Central Government took over the management of the coking coal mines and the said mines remained under the management of the Central Government through the Custodian during the period from 17-10-1971 to 30-4-1972. The Coking Coal Mines (Nationalisation) Act, 1972 came into force w.e.f. 1-5-1972, and the right, title and interest of the owners in relation to the coking coal mines stood transferred to and vested absolutely in the Central Government free from all encumbrances. The provisions of the said Act were challenged before this Court in Tara Prasad Singh v. Union of India [Tara Prasad Singh v. Union of India, (1980) 4 SCC 179] and the Constitution Bench upheld the validity of the said Act. The writ petitioner before the High Court making a grievance that the Custodian had debited the expenses for raising the coal while the coking coal mine was under the management of the Custodian but had not credited the price for the quantity of the coal raised, which was lying in stock on*

the date prior to the date the said coal mine vested under the Central Government. The High Court allowed the writ petition and a direction was issued that account be recast and payment be made to the petitioner. The appeal before this Court by special leave was dismissed, as this Court was of the view that sale price of stock of extracted coal lying at the commencement of the appointed date had to be taken into account for determining the profit and loss during the period of management of the mine by the Custodian. After the appeal preferred by the Coal Fields was dismissed, the Coal Mines Nationalisation Laws (Amendment) Ordinance, 1986 was promulgated and later on replaced by the Coal Mines Nationalisation Laws (Amendment) Act, 1986 came into force. By Section 4 of the Amendment Act, sub-section (2) was introduced in Section 10 of the Coking Coal Mines (Nationalisation) Act, 1972. The said provision declared that the amounts specified in the fifth column of the First Schedule against any coking coal mines or group of coking coal mine specified in the second column of the said Schedule are required to be given by the Central Government to its owner under sub-section (1) shall be deemed to be included, and deemed always to have included, the amount required to be paid to such owner in respect of all coal in stock or other assets referred to in clause (j) of Section 3 on the date immediately before the appointed day and no other amount shall be paid to the owner in respect of such coal or other assets. Section 19 was the validating provision.

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To arrive at the said conclusion, the two-Judge Bench reproduced from the decision of the Constitution Bench in State of T.N. v. Arooran Sugars Ltd. [State of T.N. v. Arooran Sugars Ltd., (1997) 1 SCC 326] which is to the following effect: (Narain Singh case [State of H.P. v. Narain Singh, (2009) 13 SCC 165] , SCC p. 176, para 28)

*"28. ... '16. ... **It is open to the legislature to remove the defect pointed out by the court or to amend the definition or any other provision of the Act in question retrospectively. In this process it cannot be said that there has been an encroachment by the legislature over the power of the judiciary. A court's directive must always bind unless the conditions on which it is based are so fundamentally altered that under altered circumstances such decisions could not have been given. This will include removal of the defect in a statute pointed out in the judgment in question, as well as alteration or substitution of provisions of the enactment on which such judgment is based, with retrospective effect.**' (Arooran Sugars case [State of T.N. v. Arooran Sugars Ltd., (1997) 1 SCC 326] , SCC p. 341, para 16)"*

30. From the aforesaid authorities, it is settled that there is a demarcation between the legislative and judicial functions predicated on the theory of separation of powers. The legislature has the power to enact laws including the power to retrospectively amend laws and thereby remove causes of ineffectiveness or invalidity. When a law is enacted with retrospective effect, it is not considered as an encroachment upon judicial power when the legislature does not directly overrule or reverse a judicial dictum. The legislature cannot, by way of an enactment, declare a decision of the court as erroneous or a nullity, but can amend the statute or the provision so as to make it applicable to the past. The legislature has the power to rectify, through an amendment, a defect in law noticed in the enactment and even highlighted in the decision of the court. This plenary

power to bring the statute in conformity with the legislative intent and correct the flaw pointed out by the court, can have a curative and neutralising effect. When such a correction is made, the purpose behind the same is not to overrule the decision of the court or encroach upon the judicial turf, but simply enact a fresh law with retrospective effect to alter the foundation and meaning of the legislation and to remove the base on which the judgment is founded. This does not amount to statutory overruling by the legislature. In this manner, the earlier decision of the court becomes non-existent and unenforceable for interpretation of the new legislation. No doubt, the new legislation can be tested and challenged on its own merits and on the question whether the legislature possesses the competence to legislate on the subject-matter in question, but not on the ground of overreach or colourable legislation."

99. It is therefore submitted that with the amendment, carried out post the judgment in ***Nikesh* supra [KS Compilation – Volume III – pg. 210 – 252]**, the basis of the unconstitutionality [the dual application resulting in breach of Article 14 and 21] has been cured and therefore, the said conditions have been revived.

100. Further, the judgment in ***Nikesh* supra [KS Compilation – Volume III – pg. 210 – 252]**, decided on 23rd November 2017, did not take note of the judgment of a larger coram in ***Rohit Tandon v. Directorate of Enforcement*, 2018 (11) SCC 46 [SGI Compilation – Volume VII – pg. 3388-3414]**, which clearly indicated the mandatory nature and reasonability of twin conditions. The relevant portion of the said judgment is quoted as under :

*"**21.** The consistent view taken by this Court is that economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country. Further, when attempt is made to project the proceeds of crime as untainted money and also that the allegations may not ultimately be established, but having been made, the burden of proof that the monies were not the proceeds of crime and were not, therefore, tainted shifts on the accused persons under Section 24 of the 2002 Act.*

22. It is not necessary to multiply the authorities on the sweep of Section 45 of the 2002 Act which, as aforementioned, is no more res integra. The decision in Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra [Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra, (2005) 5 SCC 294 : (2005) SCC (Cri) 1057] and State of Maharashtra v. Vishwanath Maranna Shetty [State of Maharashtra v. Vishwanath Maranna Shetty, (2012) 10 SCC 561 : (2013) 1 SCC (Cri) 105] dealt with an analogous provision in the Maharashtra Control of Organised Crime Act, 1999. It has been expounded that the Court at the stage of considering the application for grant of bail, shall consider the question from the angle as to whether the accused was possessed of the requisite mens rea. The Court is not required to record a positive finding that the accused had not committed an offence under the Act. The Court ought to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. The duty of the Court at this stage is not to weigh

the evidence meticulously but to arrive at a finding on the basis of broad probabilities. Further, the Court is required to record a finding as to the possibility of the accused committing a crime which is an offence under the Act after grant of bail.

25. *Keeping in mind the dictum in the aforesaid decisions, we find no difficulty in upholding the opinion recorded by the Sessions Court as well as the High Court in this regard. In our opinion, both the courts have carefully analysed the allegations and the materials on record indicating the complicity of the appellant in the commission of crime punishable under Sections 3/4 of the 2002 Act.* ***The courts have maintained the delicate balance between the judgment of acquittal and conviction and order granting bail before commencement of trial. The material on record does not commend us to take a contrary view."***

101. It is submitted that arguments of the Respondent are to be adjudged in light of the above.

Effect of declaration of unconstitutionality

102. The twin conditions under S 45 have been validly re-enacted and merely because the entire section was not re-enacted would be of no consequence since the provision even after being declared unconstitutional, does not get repealed or wiped out from the statute book and it only becomes unenforceable.

103. In ***Behram Khurshed Pesikaka case*** **[(1955) 1 SCR 613] [SGI Compilation – Volume XI – pg. 5490-5519]** this Hon'ble Court considered the legal effect of the declaration made in the case of ***State of Bombay*** **v.** ***F.N. Balsara*** **[(1951) SCR 682] [SGI Compilation – Volume X – pg. 4574-4597]** that clause (*b*) of Section 13 of the Bombay Prohibition Act (Bom. 25 of 1949) is void under Article 13(1) of the Constitution insofar as it affects the consumption or use of liquid medicinal or toilet preparations containing alcohol and held that it was to render part of Section 13(*b*) of the Bombay Prohibition Act inoperative, ineffective and ineffectual and thus unenforceable. It is submitted that Jagannadhadas., J., at p. 629, noticed the distinction between the scope of clauses (1) and (2) of Article 13 of the Constitution. After citing a passage from *Willoughby on Constitution of the United States*, the learned Judge observed:

"This and other similar passages from other treatises relate, however, to cases where the entire legislation is unconstitutional from the very commencement of the Act, a situation which falls within the scope of Article 13(2) of our Constitution. They do not directly cover a situation which falls within Article 13(1).... The question is what is the effect of Article 13(1) on a pre-existing valid statute, which in respect of a severable part thereof violates fundamental rights. Under Article 13(1) such part is 'void' from the date of the commencement of the Constitution, while the other part continues to be valid. Two views of the result brought about by this voidness are possible viz. (1) the said severable part becomes unenforceable, while it remains part of the Act, or (2) the said part goes out of the Act and the Act stands appropriately amended pro tanto. The first is the view which appears to have been adopted by my learned Brother. Justice Venkatarama Aiyar, on the basis of certain American decisions. I feel inclined to agree with it. This aspect, however, was not fully presented by either side and was only suggested from the Bench in

the course of arguments. We have not had the benefit of all the relevant material being placed before us by the learned advocates on either side. The second view was the basis of the arguments before us. It is, therefore, necessary and desirable to deal with this case on that assumption."

Critically, Venkatarama Aiyar, J. observed:

"Another point of distinction noticed by American jurists between unconstitutionality arising by reason of lack of legislative competence and that arising by reason of a check imposed on a competent legislature may also be mentioned. While a statute passed by a legislature which had no competence cannot acquire validity when the legislature subsequently acquires competence, a statute which was within the competence of the legislature at the time of its enactment but which infringes a constitutional prohibition could be enforced proprio vigore when once the prohibition is removed.

37. *In view of the principles discussed above, the use of the word "void" in Article 13(1) is not decisive on the question as to the precise effect of a law being repugnant to Article 19(1)(f). Reference may be made in this connection to the statement of the law in Corpus Juris, Vol. 67, p. 263 et seq. to which counsel for the respondent invited our attention. It is there pointed out that the word "void" in statutes and decisions might mean either that is "absolutely void" or "relatively void"; that "that is 'absolutely void' which the law or the nature of things forbids to be enforced at all and that is 'relatively void' which the law condemns as a wrong to individuals and refuses to enforce as against them"; that what is absolutely void is incapable of confirmation and ratification; and that what is relatively void could be waived."*

104. On the basis of this distinction, Aiyar J. held that Article 13(1) of the Constitution only placed a check on a competent legislature and therefore the word "void" in that article meant "relatively void" i.e. the law only condemned the Act as wrong to individuals and refused to enforce it against them.

105. It is submitted that subsequently, the observations J. Aiyar in ***Pesikaka*** **supra [SGI Compilation – Volume XI – pg. 5490-5519]** on the enactments being a nullity on account of lack of legislative competence have been affirmed. A constitution bench, speaking through J. Aiyar himself, in ***M.P.V. Sundararamier & Co. v. State of A.P.,*** **1958 SCR 1422 [SGI Compilation – Volume XI – pg. 5520-5553]**, held as under :

"41. Now, in considering the question as to the effect of unconstitutionality of a statute, it is necessary to remember that unconstitutionality might arise either because the law is in respect of a matter not within the competence of the legislature, or because the matter itself being within its competence, its provisions offend some constitutional restrictions. In a Federal Constitution where legislative powers are distributed between different bodies, the competence of the Legislature to enact a particular law must depend upon whether the topic of that legislation has been assigned by the Constitution Act to that Legislature. Thus, a law of the State on an Entry in List I, Schedule VII of the Constitution would be wholly incompetent and void. But the law may be on a topic within its competence, as for example, an Entry in List II, but it might infringe restrictions imposed by the Constitution on the character of the law to be passed, as for example, limitations enacted in Part III of the Constitution. Here also, the law to the extent of the repugnancy will be void. Thus, a legislation on a topic not within the competence of the legislature and a

legislation within its competence but violative of Constitutional limitations have both the same reckoning in a court of law; they are both of them unenforceable. ***But does it follow from this that both the laws are of the same quality and character, and stand on the same footing for all purposes?*** *This question has been the subject of consideration in numerous decisions in the American Courts,* ***and the preponderance of authority is in favour of the view that while a law on a matter not within the competence of the legislature is a nullity, a law on a topic within its competence but repugnant to the constitutional prohibitions is only unenforceable****. This distinction has a material bearing on the present discussion. If a law is on a field not within the domain of the legislature, it is absolutely null and void,* ***and a subsequent cession of that field to the legislature will not have the effect of breathing life into what was a still-born piece of legislation*** *and a fresh legislation on the subject would be requisite. But* ***if the law is in respect of a matter assigned to the legislature but its provisions disregard constitutional prohibitions, though the law would be unenforceable by reason of those prohibitions, when once they are removed, the law will become effective without re-enactment.***

42. Willoughby on the Constitution of the United States, Vol. I., at page 11 says:

> *"The validity of a statute is to be tested by the constitutional power of a legislature at the time of its enactment by that legislature, and, if thus tested it is beyond the legislative power, it is not rendered valid, without re-enactment, if later, by constitutional amendment, the necessary legislative power is granted.*
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> *However, it has been held that where an act is within the general legislative power of the enacting body, but is rendered unconstitutional by reason of some adventitious circumstance, as for example, when a State Legislature is prevented from regulating a matter by reason of the fact that the Federal Congress has already legislated upon that matter, or by reason of its silence is to be construed as indicating that there should be no regulation, the act does not need to be re-enacted in order to be enforced, if this cause of its unconstitutionality is removed."*

In Cooley on Constitutional Law at p. 201, it is stated that "a finding of unconstitutionality does not destroy the statute but merely involves a refusal to enforce it". In Wilkerson v. Rahrer [(1891) 140 U.S. 545 : 35 L. Ed. 572] the State of Kansas had enacted a law in 1889 forbidding the sale of intoxicating liquor. This was bad insofar as it related to sales in the course of inter-State trade, as it was in contravention of the Commerce Clause. But in 1890, the Congress passed a law conferring authority on the States to enact prohibition laws. The question was whether a prosecution under the law of 1889 in respect of a breach of that law subsequent to the Congress legislation in 1890 was maintainable. Repelling the contention that the statute of 1889 was a nullity when it was passed and could not be enforced without re-enactment, the Court observed:

> *"This is not the case of a law enacted in the unauthorized exercise of a power exclusively confided to Congress, but of a law which it was competent for the State to pass, but which could not operate upon articles occupying a certain situation until the passage of the Act of Congress. That Act in terms removed the obstacle, and we perceive no adequate ground for adjudging that a re-*

> *enactment of the State law was required before it could have the effect upon imported which it had always had upon domestic property."*

It should be noted that in this case the law of 1889 applied to intra-State sales also, and it was admittedly valid to that extent. The impugned legislation was therefore unconstitutional only in part. Rottschafer after referring to the conflict of authorities on this question in the States, refers to the decision in Wilkerson v. Rahrer [(1891) 140 U.S. 545 : 35 L. Ed. 572] as embodying the better view. Vide American Constitutional Law, 1939 Edn., p. 39.

43. A similar view was taken in Ulster Transport Authority v. James Brown & Sons Ltd. [(1953) Northern Ireland Reports 79] . There, construing Section 5(1) of the Act of 1920 which enacts that "any law made in contravention of the restrictions imposed by this sub-section shall so far as it contravenes these restrictions, be void", Lord MacDermott, L.C.J. observed:

> *"I am not aware of any authority for the view that language such as this necessarily means that contravention must produce an actual gap in the statute book in the sense that the measure concerned, or some specific part thereof, simply drops out of the authorized text. As well as this vertical severability, if I may so describe it, I see no reason why, if the circumstances warrant such a course, the terms of Section 5(1) should not be sufficiently met by what I may call a horizontal severance, a severance that is which, without excising any of the text, removes from its ambit some particular subject-matter, activity or application. This, I think, would give effect to the words 'so far as it contravenes' without impinging on the meaning or weight to be attached to the word 'void'."*

It will be noted that this decision also deals with a statute which was in part unconstitutional.

44. Coming to the authorities of this Court where this question has been considered: In Behram Khurshed Pesikaka v. State of Bombay [(1955) 1 SCR 613, 654] the question arose with reference to the Bombay Prohibition Act of 1949 which, subject to certain exceptions provided therein, prohibited the consumption of liquor. In State of Bombay v. F.N. Balsara [(1951) SCR 682] this Court had held that this provision was obnoxious to Article 19(1)(g) of the Constitution insofar as it related to medicinal and toilet preparations containing alcohol. The appellant was prosecuted for the offence of consuming liquor, and his defence was that he had taken medicine containing alcohol. The point in dispute was whether the burden was upon the appellant to prove that he had taken such a medicine or for the prosecution to show that he had not. This Court held that the onus was on the prosecution, and the same not having been discharged, the appellant was entitled to be acquitted. In the course of the judgment, Mahajan, C.J. made the following observations, which are relied on by the petitioners:

> *"The constitutional invalidity of a part of Section 13(b) of the Bombay Prohibition Act having been declared by this Court, that part of the section ceased to have any legal effect in judging cases of citizens and had to be regarded as null and void in determining whether a citizen was guilty of an offence."*

It must be observed that the question of the constitutionality of the Act did not arise directly for determination and was incidentally discussed as bearing on the

incidence of burden of proof. And further, these observations have reference to the enforceability of the provisions of the Bombay Prohibition Act, while the bar under Article 19 continued to operate. There was no question of the lifting of ban imposed by Article 19, and the question as to the effect of lifting of a ban did not arise for decision. In the context in which they occur, the words "null and void" cannot be construed as implying that the impugned law must be regarded as non est so as to be incapable of taking effect, when the bar is removed. They mean nothing more than that the Act is unenforceable by reason of the bar.

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47. The result of the authorities may thus be summed up: Where an enactment is unconstitutional in part but valid as to the rest, assuming of course that the two portions are severable, it cannot be held to have been wiped out of the statute book as it admittedly must remain there for the purpose of enforcement of the valid portion thereof, and being on the statute book, even that portion which is unenforceable on the ground that ***it is unconstitutional will operate proprio vigore when the Constitutional bar is removed, and there is no need for a fresh legislation to give effect thereto****. On this view, the contention of the petitioners with reference to the Explanation in Section 22 of the Madras Act must fail. That Explanation operates, as already stated, on two classes of transactions. It renders taxation of sales in which the property in the goods passes in Madras but delivery takes place outside Madras illegal on the ground that they are outside sales falling within Article 286(1)(a). It also authorises the imposition of tax on the sales in which the property in the goods passes outside Madras but goods are delivered for consumption within Madras. It is valid insofar as it prohibits tax on outside sales, but invalid insofar as sales in which goods are delivered inside the State are concerned, because such sales are hit by Article 286(2). The fact that it is invalid as to a part has not the effect of obliterating it out of the statute book, because it is valid as to a part and has to remain in the statute book for being enforced as to that part. The result of the enactment of the impugned Act is to lift the ban under Article 286(2), and the consequence of it is that that portion of the Explanation which relates to sales in which property passes outside Madras but the goods are delivered inside Madras and which was unenforceable before, became valid and enforceable. In this view, we do not feel called upon to express any opinion as to whether it would make any difference in the result if the impugned provision was unconstitutional in its entirety."*

106. Subsequently in ***Deep Chand v. State of U.P.*****, 1959 Supp (2) SCR 8 [SGI Compilation – Volume VIII – pg. 3630-3658]**, the Court considered the effect of declaration of unconstitutionality. It is submitted that the Court was tasked with the question of the effect of the "*doctrine of eclipse*" – wherein a constitutional amendment was carried out in order save the laws declared unconstitutional and specifically in order to save past transaction. It is submitted that in the said context, the Court held that such eclipse cannot operate retrospectively and will not save the validity of the law in the interregnum – where the law was declared unconstitutional post enactment of the Constitution and prior to the subsequent amendment to the Constitution itself. The opinion, expressed by S.R. Das, J. specifically declined to affirm the opinion of Subbarao J. on which the Petitioners placed reliance - which stated that declaration of unconstitutionality results in wiping off the provision from the statute books. It is submitted that the relevant part is quoted as under :

"Sudhi Ranjan Das, C.J.— We have had the advantage of perusing the judgment prepared by our learned Brother Subba Rao and we agree with the order proposed by him, namely, that all the above appeals should be dismissed with costs, although we do not subscribe to all the reasons advanced by him.

2. The relevant facts and the several points raised by learned counsel for the appellants and the petitioners in support of the appeals have been fully set out in the judgment which our learned Brother will presently deliver and it is not necessary for us to set out the same here. Without committing ourselves to all the reasons adopted by our learned Brother, we agree with his following conclusions, namely, (1) that the Uttar Pradesh Transport Service (Development) Act, 1955 (Act 9 of 1955), hereinafter referred to as the U.P. Act, did not, on the passing of the Motor Vehicles (Amendment) Act, 1956 (100 of 1956), hereinafter referred to as the Central Act, become wholly void under Article 254(1) of the Constitution but continued to be a valid and subsisting law supporting the scheme already framed under the U.P. Act; (2) that, even if the Central Act be construed as amounting, under Article 254(2), to a repeal of the U.P. Act, such repeal did not destroy or efface the scheme already framed under the U.P. Act, for the provisions of Section 6 of the General Clauses Act saved the same; (3) that the U.P. Act did not offend the provisions of Article 31 of the Constitution, as it stood before the Constitution (4th Amendment) Act, 1955, for the U.P. Act and in particular Section 11(5) thereof provided for the payment of adequate compensation. These findings are quite sufficient to dispose of the points urged by Mr Nambiyar and Mr Naunit Lal in support of the claims and contentions of their respective clients.

3. In view of the aforesaid finding that the U.P. Act did not infringe the fundamental rights guaranteed by Article 31, it is wholly unnecessary to discuss the following questions, namely, (a) whether the provisions of Part III of the Constitution enshrining the fundamental rights are mere checks or limitations on the legislative competency conferred on Parliament and the State Legislatures by Articles 245 and 246 read with the relevant entries in the Lists in the Seventh Schedule to the Constitution or are an integral part of the provisions defining, prescribing and conferring the legislative competency itself and (b) whether the doctrine of eclipse is applicable only to pre-Constitution laws or can apply also to any post-Constitution law which falls under Article 13(2) of the Constitution. ***As, however, our learned Brother has thought fit to embark upon a discussion of these questions, we desire to guard ourselves against being understood as accepting or acquiescing in the conclusion that the doctrine of eclipse cannot apply to any post-Constitution law.*** *A post-Constitution law may infringe either a fundamental right conferred on citizens only or a fundamental right conferred on any person, citizen or non-citizen. In the first case the law will not stand in the way of the exercise by the citizens of that fundamental right and, therefore, will not have any operation on the rights of the citizens, but it will be quite effective as regards non-citizens.* ***In such a case the fundamental right will, qua the citizens, throw a shadow on the law which will nevertheless be on the Statute Book as a valid law binding on non-citizens and if that shadow is removed by a constitutional amendment, the law will immediately be applicable even to the citizens without being re-enacted****. The decision in John M. Wilkerson v. Charles A. Rahrer [(1891) 140 US 545 : 35 L Ed 572] cited by our learned Brother is squarely in point. In other words the doctrine of eclipse as explained by this Court in Bhikaji Narain Dhakras v. State of Madhya Pradesh [(1955) 2 SCR 589] also applies to a post-Constitution law of this kind.*

Whether a post-Constitution law of the other kind, namely, which infringes a fundamental right guaranteed to all persons, irrespective of whether they are citizens or not, and which, therefore, can have no operation at all when it is enacted, is to be regarded as a still born law as if it had not been enacted at all and, therefore, ***not subject to the doctrine of eclipse is a matter which may be open to discussion. On the findings arrived at in this case, however, a discussion of these aspects of the matter do not call for a considered opinion and we reserve our right to deal with the same if and when it becomes actually necessary to do so****."*

107. Critically, 7 judges, by way of a unanimous decision, in ***Jagannath v. Authorised Officer, Land Reforms*****, (1971) 2 SCC 893 [SGI Compilation – Volume XII – pg. 6141-6157]**, negated a similar argument made on the basis of ***Deep Chand*** **supra** and other cases. It was held as under :

9. *On the first point, learned counsel's contention may be summarised as follows. He urged that this Court having declared the Ceiling Act of 1961, void under the provisions of Article 13 sub-clause (2) of the Constitution we must proceed on the basis that the legislation was void ab initio inasmuch as it did not lie within the power of the State to make any law which abridged the rights conferred by Part III of the Constitution. In other words, it was said that the measure was non est or still-born and any validating measure could not instil life therein. It was argued that the effect of the Act being struck down by this Court was as if it had been effaced from the statute book and to make any such Act operative, it was necessary not only to give it the protection against violation of fundamental rights as was sought to be done by Article 31-B but to get the State of Madras to re-enact the provisions thereof. Learned counsel drew our attention to several decisions of this Court in support of his argument and we shall take note of them in the order in which they were placed before us.*

10. *The first case referred to was Behram Khrushed Pesikaka v. State of Bombay. [AIR 1955 SC 123 ...*

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11. *In Saghir Ahmed v. State of U.P. [AIR 1954 SC 728 : (1955) 1 SCR 707 : 1954 SCJ 819 : 1954 SCA 1218 : (1954) 2 MLJ 622] ....*

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12. *Strong reliance was placed on certain observations of this Court in Deep Chand v. State of Uttar Pradesh [AIR 1959 SC 648 : 1959 Supp 2 SCR 8 : 1959 SCJ 1069 : 1959 CA 377 : ILR 1959 All 293] ...*

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22. In our view, although decisions of the American Supreme Court and the comments of well known commentators like Willoughby and Cooley have great persuasive force, we need not interpret our Constitution by too much reliance on them. Nor is it necessary to scrutinise too closely the decisions wherein views appear to have been expressed that a law which is void under Article 13(2) is to be treated as still-born. Equally unfruitful would it be to consider the doctrine of eclipse.

23. Apart from the question as to whether fundamental rights originally enshrined in the Constitution were subject to the amendatory process of Article 368 it must now be held that Article 31-B and the Ninth

Schedule have cured the defect, if any, in the various Acts mentioned in the said Schedule as regards any unconstitutionality alleged on the ground of infringement of fundamental rights, and by the express words of Article 31-B such curing of the defect took place with retrospective operation from the dates on which the Acts were put on the statute book. These Acts even if void or inoperative at the time when they were enacted by reason of infringement of Article 13(2) of the Constitution, assumed full force and vigour from the respective dates of their enactment after their inclusion in the Ninth Schedule, read with Article 31-B of the Constitution. The States could not, at any time, cure any defect arising from the violation of the provisions of Part III of the Constitution and therefore the objection that the Madras Ceilings Act should have been re-enacted by the Madras legislature after the Seventeenth Constitutional Amendment came into force cannot be accepted."

108. Reliance may be placed on the decision of this Hon'ble Court in the case of ***Municipal Committee, Amritsar & Ors. vs State of Punjab & Ors. (1969) 1 SCC 475*** **[SGI Compilation – Volume X – pg. 4696-4705]**, wherein it is stated as under:

"7. We are unable to accept the argument that since the High Court of Punjab by their judgment in Mohinder Singh Sawhney case struck down the Act, Act 6 of 1968 had ceased to have any existence in law, and that in any event, assuming that, the judgment of the Punjab High Court in Mohinder Singh Sawhney case did not make the Act non-existent, as between the parties in whose favour the order was passed in the earlier writ petition, the order operated as res judicata, and on that account the Act could not be enforced without re-enactment."

109. Reliance may further be placed on the decision of the Hon'ble Supreme Court in the case of ***Devi Dass Gopal Krishnan Etc. vs. State of Punjab & Ors. (1967) 3 SCR 557***, **[SGI Compilation – Volume X – pg. 4683-4695]** wherein it was held as under:

"8. We shall now proceed to consider the points seriatim. The provisions relevant to the first two points read thus:

"East Punjab General Sales Tax Act, 1948 Act 46 of 1948

5. Subject to the provisions of this Act, there shall be levied on the taxable turnover every year of a dealer a tax at such rates as the Provincial Government may by notification direct.

East Punjab General Sales Tax (Second Amendment) Act, 1952 Act 19 of 1952.

2. Amendment of Section 5 of Punjab Act 46 of 1948.— In sub-section (1) of Section 5 of the East Punjab General Sales Tax Act, 1948, after the word "rates" the following words shall be inserted and shall be deemed always to have been so inserted, namely, 'not exceeding two pice in a rupee."

The High Court of Punjab held that Section 5 of the Act was void as it gave an unlimited power to the executive to levy sales tax at a rate which it thought fit. But it held that the amendment of Section 5 by the Punjab Act 19 of 1952 cured the defect in the said Act and had the effect of giving a new life to it.

...

21. It was then contended that even if the whole Act was not stillborn, Section 5 was non est, that the amending Act did not insert a new Section 5 but purported to amend the earlier Section 5 which was not in existence. Now under the East

> *Punjab General Sales Tax (Second Amendment) Act, 1952 (Act 19 of 1952) Section 5 of the East Punjab General Sales Tax Act, 1948 was amended. Section 2 of the said amending Act says:*
>
> > *"In sub-section (1) of Section 5 of the East Punjab General Sales Tax Act, 1948, after the word 'rates' the following words shall be inserted and shall be deemed always to have been so inserted, namely: 'not exceeding two pice in a rupee'."*
>
> *No doubt in terms the section inserts the words "not exceeding two pice in a rupee" in Section 5. If Section 5 is inserted in the Act by the Amending Act with the said words added, there cannot possibly be any objection, for that would be an amendment of an existing Act. But in substance the amendment brings about the same effect…"*

110. Therefore, it is submitted that it is clear that ***Deep Chand*** **supra [SGI Compilation – Volume VIII – pg. 3630-3658]** and other judgments following the same was delivered in the context of doctrine of eclipse which is not applicable to the present case. It is submitted that therefore, the judgment in ***State of Manipur v. Surajkumar Okram & Ors.*** **2022 SCConline SC 130 [SGI Compilation – Volume XI – pg. 5465-5474]**, to the extent it has been interpreted by the Petitioner to state that it holds that the statutes is wiped off the statute book and cannot be revived by an appropriate legislative amendment taking away the basis is wholly misconceived. It is submitted that in ***Okram*** **supra**, it was neither the intent nor the occasion for the Hon'ble Court to decide the issue of taking away the basis after declaration of unconstitutionality.

Alternative submission : Nikesh Tarachand [supra] is per incuriam

111. The entire judgment proceeds as if a non-serious offence of money laundering having 7 years imprisonment is being considered and the validity of twin condition is examined. The Court is never assisted with any international background which culminated into the enactment of PMLA to substantiate and justify stringent and deterrent provisions which were part of treaty obligations of India.

112. The Court merely records the scheme of the Act and does not examine from the point of view of a standalone enactment for providing, detecting and prosecuting a global menace.

113. The fundamental basis on which the Hon'ble Court proceeds in para 11 that projection as untainted property is must. This finding in para 11 becomes the foundation of further discussion by the bench consisting of two Hon'ble Judges which needs to be overruled. The Hon'ble Court in ***Nikesh Tarachand [supra]*** **[KS Compilation – Volume III – pg. 210 – 252]** completely ignores binding judgments referred above taking the view those economic offences forms a separate class and therefore, the twin condition for the money laundering offence is a reasonable classification.

114. In absence of the international background, the recommendations and periodical evaluation of FATF and the ratings based upon which a country's entitlement depends, the two Judge bench never had an occasion to consider the question of "legitimate State interest" in providing for twin condition for a separate class of offences.

NOTE – IV

115. Once "legitimate State interest" is shown, the provision can never be declared void on the basis of completely unguided principles of "manifest arbitrariness" since there are no judicially recognised standards to decide what is "manifestly arbitrary" and what is not.

116. Based upon the provision of section 45 as it stood then [where the twin conditions were applicable to "accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule"] considered certain illustrations which necessarily emanates from dual application of predicate offence as well as PMLA offence. Such extreme examines could not have been the basis of declaring a provision to be void.

117. The two judge bench wrongly demarcated anticipatory bail and regular bail. It is submitted that the CrPC provides only for bail which can be pre-arrest or post-arrest. There is nothing in section 45 to read its application only to post arrest bail.

118. If the twin conditions in section 45 is read only to regular bail i.e. post-arrest bail, which may not stand the scrutiny on the touchstone of Article 14 since a person yet to be arrested and a person already arrested will have separate regime though accused of the very same offence. The provision would, thus, become arbitrary. The finding to this fact in para 42 of the judgment needs to be overruled.

119. The finding at Para 46 in ***Nikesh Tarachand (supra)*** **[KS Compilation – Volume III – pg. 210 – 252]** that section 45 is a drastic provision which turns on its head the presumption of innocence is wrong for the reason that it fails to consider the legislative scheme as it exists. The power of arrest under section 19 of PMLA can only be exercised after recording a reason to believe that a person is guilty of an offence punishable under this Act and such reason to believe has to be on the basis of material in his possession i.e. objective considerations. Only once a reason to believe that a person is guilty of offence of money laundering, on the basis of material in possession of the offence is arrived at, can arrest be effected. Within 24 hours of such arrest, a remand application is filed before an appropriate Court, who will apply its Judicial mind and after satisfying itself, grant remand or custody to the Enforcement Directorate. Therefore, when a bail application is preferred for the offence of money laundering, the legislature in its wisdom with the objective of creating deterrence from the commission of offence of money laundering which is committed by white colour criminals has deemed it fit to impose stringent bail conditions and hence the same cannot be termed drastic or arbitrary. If the expression occurring in section 45(1)(ii) that "he is not guilty of <u>such offence</u> and that he is not likely to commit <u>any offence</u> while on bail" is construed to mean and relate to the offence of money laundering then the reliance by this Hon'ble Court in *Nikesh Tarachand (supra)* at Para 44 on the U.S. Supreme Court decision in ***United States vs. Salerno*** would, with respect, appear to be incorrect for the reason that under the Bail Reform Act, 1984 the likelihood of commission of any future crime was sufficient to deny bail and it was for this reason that the due process clause was found to be violated.

120. It is submitted that as stated above, it is always open for the Legislature to cure the defect found by the Court in declaring a provision to be unconstitutional and thereby remove the basis of the judgement.

NOTE – IV

Twin conditions apply to both – anticipatory bail and regular bail

121. Another issue that arises in the context of Section 45 is the question of ***pre-arrest bail***. Certain High Courts have taken the view that the twin conditions for bail under Section 45 do not apply to applications made under Section 438 of the CrPC seeking pre-arrest bail often *collectively* referred to as anticipatory bail.

122. The mandatory twin conditions for grant of bail would also be applicable to anticipatory bails and if it is held otherwise, it would lead to arbitrariness and violation of Article 14 for the reason that a person who has committed an offence of money laundering and seeks anticipatory bail would be tested on the lower threshold of Section 438 Cr.P.C. only, whereas a person who is arrested and then applies for bail, after having committed an offence of money laundering, would be governed by the mandatory twin conditions of section 45 of PMLA and therefore to avoid this impermissible classification, the mandatory twin conditions must be said to be applied to both anticipatory bail as well as regular bail. This submission is consistent with the legal principle that there is no conceptual difference between anticipatory bail and regular bail, rather the expression anticipatory bail or pre-arrest bail itself is a *misnomer*. In the case of anticipatory bail, a person is arrested and immediately released on bail by the police itself and the non-bailability of the offence is converted into bailability insofar as a person protected with anticipatory bail is concerned. In this regard, this Hon'ble Court in the case of ***Sushila Aggarwal & Ors. vs. State (NCT of Delhi) & Anr. (2020) 5 SCC 1 at Para 7.1*** **[Amit Desai Compilation – pg. 9-119]**, as under:

> *"7.1* ***At the outset, it is required to be noted that as such the expression "anticipatory bail" has not been defined in the Code. As observed by this Court in the case of Balchand Jain (supra), "anticipatory bail" means "bail in anticipation of arrest".*** *As held by this Court, the expression "anticipatory bail" is a misnomer inasmuch as it is not as if bail is presently granted by the Court in anticipation of arrest. An application for "anticipatory bail" in anticipation of arrest could be moved by the accused at a stage before an FIR is filed or at a stage when FIR is registered but the charge sheet has not been filed and the investigation is in progress or at a stage after the investigation is concluded. Power to grant "anticipatory bail" under Section 438 of the Cr.P.C. vests only with the Court of Sessions or the High Court. Therefore, ultimately it is for the concerned court to consider the application for "anticipatory bail" and while granting the "anticipatory bail" it is ultimately for the concerned court to impose conditions including the limited period of "anticipatory bail", depends upon the stages at which the application for anticipatory bail is moved. A person in whose favour a prearrest bail order is made under Section 438 of the Cr.P.C. has to be arrested. However, once there is an order of prearrest bail/anticipatory bail, as and when he is arrested he has to be released on bail. Otherwise, there is no distinction or difference between the prearrest bail order under Section 438 and the bail order under Section 437 & 439 of the Cr.P.C. The only difference between the prearrest bail order under Section 438 and the bail order under Sections 437 and 439 is the stages at which the bail order is passed. The bail order under Section 438 of the Cr.P.C. is prior to his arrest and in anticipation of his arrest and the order of bail under Sections 437 and 439 is after a person is arrested. A bare reading of Section 438 of the Cr.P.C. shows that there is nothing in the language of the Section which goes to show that the prearrest*

bail granted under Section 438 has to be time bound. The position is the same as in Section 437 and Section 439 of the Cr.P.C."

123. Moreover, the stray observation in ***Nikesh Tarachand Shah vs. Union of India & Anr. (2018) 11 SCC 1 in para 42*** **[KS Compilation – Volume III – pg. 210 – 252]** that there is no provision contained in PMLA imposing twin conditions for bail for the purpose of anticipatory bail and therefore, the twin condition will not apply to anticipatory bail is, with respect, at best an *obitor dicta* and cannot be considered to be binding.

124. In that sense these observations contained in Para 42 of ***Nikesh Tarachand (supra)*** **[KS Compilation – Volume III – pg. 210 – 252]** relating to anticipatory bail are also *sub silentio* apart from being *per incuriam*. This Hon'ble Court in ***Municipal Corporation of Delhi v. Gurnam Kaur (1989) 1 SCC 101*** **[SGI Compilation – Volume XI – pg. 5362-5374],** held as under:

"12. In Gerard v. Worth of Paris Ltd. (k). [(1936) 2 All ER 905 (CA)] , the only point argued was on the question of priority of the claimant's debt, and, on this argument being heard, the court granted the order. No consideration was given to the question whether a garnishee order could properly be made on an account standing in the name of the liquidator. When, therefore, this very point was argued in a subsequent case before the Court of Appeal in Lancaster Motor Co. (London) Ltd. v. Bremith Ltd. [(1941) 1 KB 675] , the court held itself not bound by its previous decision. Sir Wilfrid Greene, M.R., said that he could not help thinking that the point now raised had been deliberately passed sub silentio by counsel in order that the point of substance might be decided. He went on to say that the point had to be decided by the earlier court before it could make the order which it did; nevertheless, since it was decided "without argument, without reference to the crucial words of the rule, and without any citation of authority", it was not binding and would not be followed. Precedents sub silentio and without argument are of no moment. This rule has ever since been followed. One of the chief reasons for the doctrine of precedent is that a matter that has once been fully argued and decided should not be allowed to be reopened. The weight accorded to dicta varies with the type of dictum. Mere casual expressions carry no weight at all. Not every passing expression of a judge, however eminent, can be treated as an ex cathedra statement, having the weight of authority."

(Also see U.P. v Synthetics and chemicals limited (1991) 4 SCC 139 Para 40 and 41, Arnit Das vs State of Bihar (2000) 5 SCC 488 para 20 and Purvanchal Cables and Conductors Pvt. Ltd vs. Assam SEB (2012) 7 SCC 462.)

125. Even on merits, it is submitted that the interpretation in ***Nikesh*** **supra [KS Compilation – Volume III – pg. 210 – 252]** is erroneous due to the following:-

(a) It ignores the non-obstante clause which is present in Section 45, therefore, ousting the application of Section 438 CrPC.

(b) The words 'anticipatory bail' are not used separately in the CrPC and the concept of pre-arrest bail under Section 438 is merely a species of bail as enshrined in the CrPC.

(c) By virtue of the non-obstante clause all provisions for bail under the CrPC including Section 438 are altered to the extent mentioned in Section 45 of the PMLA.

(d) To provide for twin conditions for bail in case of a post-arrest bail while at the same time, excluding the application of twin conditions in case of pre-arrest bail is wholly absurd and arbitrary interpretation which ought to be avoided by this Hon'ble Court.

126. Therefore, Section 45 of the PMLA and the conditions mentioned therein govern the entire subject of bail under PMLA whether post-arrest or pre-arrest. The said provision considering the mandate of non-obstante clause in Section 45 of the PMLA overrides the generic law for bail in the CrPC, thereby making twin conditions for bail to be mandatory in all circumstances. Anticipatory bail as envisaged under Section 438 is not a separate concept and is merely a form of bail itself which would be covered by the non-obstante clause in Section 45 which state that no person accused of offence under the PMLA shall be released on bail without adhering to the twin conditions notwithstanding anything contained in the CrPC which would obviously have to include the provision concerning anticipatory bail in Section 438. A person who files for an anticipatory bail cannot be in a more advantageous position from a person who has already been arrested for the purpose of grant of bail especially when twin conditions would admittedly apply in case of post-arrest bail. Therefore, it is submitted that the twin conditions would also apply in case a person seeks anticipatory bail concerning the offence under the PMLA and the judgments which state contrary ought to be set aside/overruled.

Power of bail – Is it inherent in Court of Record

127. At this juncture, it is further important to make a clarification with regard to the submission of the Petitioners that the power of grant of bail is inherent in a Court of Record / Constitutional Courts. It is submitted that it is settled law that constitutional courts, even in exercise of powers under writ jurisdiction, cannot override expression statutory provisions. Therefore, a writ court cannot ignore the legislative mandate of Section 45 while considering the issue of bail under the PMLA as the said provision clearly overrides the provisions of CrPC and further contains unequivocal bar to the effect that no person accused of an offence shall be released on bail unless the conditions mentioned under Section 45 are satisfied. To assert that the powers of the writ court will override the express statutory mandate would be contrary to the law laid down by this Hon'ble Court on the subject and further would do violence to the scheme of PMLA. At this juncture, it may be clarified that the reliance of the Petitioners on the case of ***Hema Mishra vs. State of U.P.*** **(2014) 4 SCC 453 [SGI Compilation – Volume XI – pg. 5341-5361],** is completely misplaced as the said case was dealing with a situation wherein the provision concerning anticipatory bail (Section 439 CrPC) had been deleted by way of a local State enactment. Even in the said situation this Hon'ble Court held that the power under Article 226 to grant anticipatory bail in absence of any statutory provision ought to be exercised in extremely rare circumstances. The said judgment, therefore, has no applicability in the present case.

Meaning of Section 44(2)

128. In this regard, it is further necessary to clarify the effect of Section 44 (2) of PMLA which provides that nothing contained in Section 44 shall affect the powers of the High Court regarding bail under Section 439 of CrPC. On the basis of the said provision, it has been urged that the twin conditions in Section 45 apply only to the special court and not to the High Court

under Section 439 CrPC. It is submitted that the same is a complete misleading of Section 44 and 45 both. It is submitted that from the reading of Section 44 as a whole that the same deals with the jurisdiction of the special court. The clarification in sub-section 2 of Section 44 was required as similar provision in special enactments have been interpreted to oust the maintainability of a bail application directly to the High Court (***Usmanbhai Dawoodbhai Memon vs. State of Gujarat*** **– (1988) 2 SCC 271 [SGI Compilation – Volume VIII – pg. 3457-3478].** Therefore, it is clear that sub-section 2 Section 44 merely provides that an application for bail is maintainable in the case of PMLA even it is made directly to the High Court. However, the same would still be bound by the conditions mentioned in Section 45 as Section 44 is merely a provision dealing with the issue of jurisdiction and Section 45 is the relevant substantive provision dealing with the issue of bail. It is further submitted in this regard that to hold twin conditions to be applicable if a person files for bail in the special court and at the same time state that the said twin conditions will not apply in bail applications made to the Hon'ble High Court would be completely arbitrary as the mere change of forum cannot lead a change in the application of the relevant law. The conditions of bail would, therefore, have to be consistent both before the Hon'ble High Court and the special court and cannot vary according to the forum. It is settled law that any interpretation which leads to an absurd or arbitrary consequences ought to be avoided and in the present case the conditions in Section 45 would, therefore, also apply to bail applications made directly to the Hon'ble High Court.

129. In light of the above, the following is amply clear :

a. The classification of the offences and the separate procedure under PMLA forms a *separate* and *serious* form of crime and is clearly distinguishable from the ordinary crimes;

b. Twin conditions in PMLA are a reasonable classification meant for a definite object which has a rational relation to the legislative intent of creating a deterrent effect;

c. Twin conditions are a legislative recognition of the jurisprudence laid down by this Hon'ble Court regarding bails in case of economic offences being treated as a *class apart*;

d. The deterrence effect of twin conditions in case of a serious offence like money laundering represents a legitimate state interest;

e. Gravity of the offence of money laundering is to be adjudged in the context of the international development and the legislative intent as is visible from the entire scheme of the PMLA and not merely maximum punishment that the offence carries;

f. It is open to the legislature to make an exception to the discretion vested in court otherwise under the CrPC while dealing with serious offences under special enactments

g. Twin Conditions have been upheld by this Hon'ble Court in other statutes and have been consistently interpreted *reasonably* in tune with constitutional principles whilst balancing *legitimate state interests*;

h. The judgment in ***Nikesh* supra [KS Compilation – Volume III – pg. 210 – 252]** considered Section 45 in a form which resulted in a dual applicability thereby creating anomalous situations. The said lacunae in the provision resulting arbitrariness has been cured by the Legislature.

i. The effect of declaration of unconstitutionality due to a particular phrase resulting in arbitrariness can be legitimately cured by the Legislature through an appropriate legislative amendment.

j. The judgment in ***Nikesh* supra [KS Compilation – Volume III – pg. 210 – 252]** fails to consider the following :

i. The seriousness of the offence in the correct international and domestic perspective;
ii. considers the unamended provision;
iii. limits the analysis to anomalous situations;

therefore, ***cannot be held to be laying down the correct law***.

130. In light of the above, Section 45, in the present form, ought to be declared to be *constitution compliant*.

ANNEXURE A

TABLE FOR TWIN CONDITIONS IN CENTRAL LEGISLATION

STATUTE	PROVISION	PUNISHMENT	TREATY
Prevention of Money Laundering Act, 2002	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; 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, or is accused either on his own or 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. (1A) Notwithstanding anything contained in the Code of	S4 prescribes punishment for money laundering with a minimum of **3 years** rigorous imprisonment and a maximum of **7 years** imprisonment and fine, with the following proviso: "Provided that where the proceeds of crime involved in money-laundering relates to any offence specified under paragraph 2 of Part A of the Schedule, the provisions of this section shall have effect as if for the words "which may extend to seven years", the words "which may extend to **ten years**" had been substituted."	Political Declaration & Global Programme of Action S-17/2, UN 23 February 1990, Political Declaration adopted by the Special Session of the UN General Assembly, on 8th to 10th June 1998

STATUTE	PROVISION	PUNISHMENT	TREATY
	Criminal Procedure, 1973 (2 of 1974) or any other provision of this Act, no police officer shall investigate into an offence under this Act unless specifically authorised, by the Central Government by a general or special order, and, subject to such conditions as may be prescribed. (2) The limitation on granting of bail specified in sub-section (1) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.		
The Narcotic Drugs and Psychotropic Substances Act, 1985	37. Offences to be cognizable and non-bailable. -- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-- (a) every offence punishable under this Act shall be cognizable; (b) no person accused of an offence punishable for [1][offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] 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. (2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the	Chapter IV of the Act prescribes punishment for violations of the statute. Punishments range from imprisonment of **six months** for offence of contravening rules, provisions under the Act. or fine for (S32). For possession of small quantity of drugs, up to **1 year** of rigorous imprisonment or fine (Ss 15 (a), 17 (a), 18 (a)). For quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment up **to 10 years** (Ss 15 (b), 17 (b)) and fine S16 concerns punishment for contravention in relation to coca plant and coca leaves with rigorous imprisonment up to **10 years** and fine. For contraventions involving commercial quantity, rigorous imprisonment of at least **10 years**, and not exceeding **20 years**, and with fine (Ss 15 (c), 17 (c)). S31 provides enhanced punishment upon conviction following previous conviction, extending up to one and one half times the maximum imprisonment.	International Conventions on Narcotic Drugs and Psychotropic Substances

STATUTE	PROVISION	PUNISHMENT	TREATY
	limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.	In case of repeated offences under the NDPS with minimum imprisonment, S31 stipulates one and one half times the minimum imprisonment, as the minimum sentence the person is liable to.	
The Terrorist and Disruptive Activities (Prevention) Act, 1987	Section 20. Modified application of certain provisions of this Code: - (1) Notwithstanding anything contained in the Code or any other law, every offence punishable under this Act or any rule made thereunder shall be deemed to be a cognizable offence within the meaning of clause (c) of Section 2 of the Code, and "cognizable case" as defined in that clause shall be construed accordingly: *** (8) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act or any rule made thereunder shall, if in custody, be released on bail or on his own bond unless, – 1. the Public Prosecutor has been given an opportunity to oppose the application for such release, and 2. 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. (9) The limitations on granting of bail specified in sub-section (8) are in addition to the limitations under the Code or any other law for the time being in force on granting of bail.	Section 3 (2) prescribes punishment for terrorist acts, with a minimum imprisonment of **5 years** (S 3, sub sections 2 (ii), 3 to 6), and a maximum of **life imprisonment**/death. Section 4 prescribes punishment for disruptive activities, with a minimum **of 5 years**, but extending to **life imprisonment** and fine.	

STATUTE	PROVISION	PUNISHMENT	TREATY
The Companies Act, 2013	6) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), [offence covered under section 447] of this Act shall be cognizable and no person accused of any offence under those sections 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 referred to this subsection except upon a complaint in writing made by— (i) the Director, Serious Fraud Investigation Office; or (ii) any officer of the Central Government authorised, by a general or special order in writing in this behalf by that Government. (7) The limitation on granting of bail specified in sub-section (6) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.	S447 punishes fraud, with punishment of imprisonment **not less than six months** and extending up to **10 years**, with fine not less than the amount involved in the fraud, and extending up to 3 times the fraud.	
Drugs and	36AC Offences to be cognizable and non-bailable in certain	S13 (1) prescribes offences for importation of	

STATUTE	PROVISION	PUNISHMENT	TREATY
Cosmetics Act, 1940	cases. — (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),— (a) every offence, relating to adulterated or spurious drug and punishable under clauses (a) and (c) of sub-section (1) of section 13, clause (a) of sub-section (2) of section 13, sub-section (3) of section 22, clauses (a) and (c) of section 27, section 28, section 28A, section 28B and sub-sections (1) and (2) of section 30 and other offences relating to adulterated drugs or spurious drugs, shall be cognizable. (b) no person accused, of an offence punishable under clauses (a) and (c) of sub-section (1) of section 13, clause (a) of sub-section (2) of section 13, sub-section (3) of section 22, clauses (a) and (c) of section 27, section 28, section 28A, section 28B and sub-sections (1) and (2) of section 30 and other offences relating to adulterated drugs or spurious drugs, 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. (2) The limitation on granting of bail specified in clause (b) of sub-section (1) is in addition to the limitations under the	spurious, adulterated drugs, with the referred provisions, S13 (1) (a) and (c) prescribing punishment extending up to **3 years** and fine up to Rs 5000/- S13 (2) (a) prescribes punishment for repeat offences of S13 (1) (a) with imprisonment up to **5 years** and fine up to Rs 10,000/- S22 (3) prescribes punishment for obstructing Inspectors in the course of their duty, with imprisonment up to **3 years** or with fine or both. S27 prescribes punishment for contravening conditions for manufacturing drugs and cosmetics, with punishments ranging from not less than **one year up to 2 years** and fine not less than Rs 20,000/- (S27 (d) to imprisonment not less than 10 years to imprisonment for life and minimum fine of Rs 10 Lakhs and 3 times the drugs confiscated whichever is more. S28 prescribes the penalty for the non-disclosure of the name of the manufacturer, etc with imprisonment up to **1 year** and fine greater than Rs 20,000/- S28A concerns penalty for not keeping documents and for non disclosure of information with a punishment extending up to **1 year** imprisonment, and fine to the extent of Rs 20,000/- S28B prescribes the penalty for manufacture etc.	

STATUTE	PROVISION	PUNISHMENT	TREATY
	Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail. (3) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under section 439 of the Code of Criminal Procedure, 1973 (2 of 1974) and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to "Magistrate" in that section includes also a reference to a "Special Court" designated under section 36AB.	of drugs or cosmetics in violation of Section 26A, which entails imprisonment up to **3 years** and fine upto Rs 5000/- S30 describes the penalty for subsequent offences with punishment with a minimum of up to 2 years and up to Rs 2000 under S30 (2) for repeat conviction using Government Analyst's report for advertising. S30 (1) (a) concerns repeat conviction for an offence of manufacturing, selling, stocking etc, of deemed adulterated drugs or without valid licence, with punishment not less than 7 years up to 10 years and minimum fine of Rs 2 Lakhs. S30 (1) (b) concerns repeat conviction for manufacturing, distributing, stocking etc spurious drugs with imprisonment not less than 10 years and up to imprisonment for life, and fine not less than Rs 3 Lakhs. S30 (1) (c) concerns contravention by drug manufacturers, distributors etc, under Section 27 (d), with imprisonment between 2 years to 4 years and/or minimum fine of Rs 50 thousand.	
Wildlife Protection Act, 1972	51A. Certain conditions to apply while granting bail.—When any person accused of, the commission of any offence relating to Schedule I or Part II of Schedule II or offences relating to hunting inside the boundaries of National Park or wild life sanctuary or altering the boundaries of such parks and sanctuaries, is arrested under the provisions of the Act, then notwithstanding anything	Section 51, inter alia prescribes punishments for offences specified in Section 51A with a minimum of **6 months** imprisonment, and a maximum of **7 years** imprisonment, and/or fine.	

STATUTE	PROVISION	PUNISHMENT	TREATY
	contained in the Code of Criminal Procedure, 1973 (2 of 1974) no such person who had been previously convicted of an offence under this Act shall, be released on bail unless— (a) the Public Prosecutor has been given an opportunity of opposing the release on bail; and (b) 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.		
Terrorist Affected Areas Act (Special Courts), 1984	15. Modified application of certain provisions of the Code.— *** (5) Notwithstanding anything contained in the Code, no person accused of a scheduled offence shall, if in custody, be released on bail or on his own bond unless— (a) the Public Prosecutor has been given an opportunity to oppose the application for such release, and (b) 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. (6) The limitations on granting of bail specified in sub-section (5) are in addition to the limitations under the Code or any other law for the time being in force on granting of bail	Scheduled Offences: Indian Penal Code, 1860: S121 prescribes punishment for waging or attempting to wage war, or abetting the waging of war against the Government of India, with death or **imprisonment for life** and fine. S121A prescribes conspiracy to commit offences punishable by Section 121, for which it prescribes **imprisonment for life** or with imprisonment either rigorous or otherwise **for 10 years** and fine. S122 concerns collecting arms with intention to wage war against government and prescribes punishment **not exceeding 10 years** & fine S123 concerns concealing with intent to facilitate design to wage war with imprisonment **up to 10 years** & fine Anti-Hijacking Act, 1982 (repealed): S4 concerns punishment for the offence of hijacking, with life imprisonment and fine.	
The Anti-	12. Provision as to bail.––	S4 (a) prescribes death – where offence results in	The Hague

STATUTE	PROVISION	PUNISHMENT	TREATY
Hijacking Act, 2016	(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond, unless,–– (a) the Public Prosecutor has been given an opportunity to oppose the application for such release; and (b) where Public Prosecutor opposes the application, the Designated 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. (2) The limitations on granting of bail as specified in sub-section (1) are in addition to the limitation under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force, on granting bail. (3) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under section 439 of the Code of Criminal Procedure, 1973 (2 of 1974).	death of any person not involved in commission of the offence S4 (b) prescribes imprisonment for life which shall mean the remainder of that person's natural life and fine, in other cases of hijacking which do not involve death.	Hijacking Convention 1970 & the Beijing Protocol, 2010
The Suppression Of Unlawful Acts Against Safety Of Maritime Navigation and Fixed Platforms On Continental Shelf Act, 2002	8. Provision as to bail.- (1) Notwithstanding anything in the Code, no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond unless- (a) the Public Prosecutor has been given an opportunity to oppose the application for such release; and (b) 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.	S3 prescribes punishments for offences against ship, fixed platform, maritime navigational facilities, with punishments ranging from imprisonment up to **2 years** (S3 (1) (g) (v)) to **imprisonment for life** (S3 (1) (b) & (c)), to death (S3 (1) (g) (i)).	International Maritime Organization Convention for Suppression of Unlawful Acts against the Safety of Maritime Navigation

STATUTE	PROVISION	PUNISHMENT	TREATY
	(2) The limitations on granting of bail specified in sub-section (1) are in addition to the limitations under the Code or any other law for the time being in force on granting of bail. (3) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under section 439 of the Code.		and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1988 (Rome).
The Suppression of Unlawful Acts against Safety of Civil Aviation Act, 1982	6A. Provision as to bail.— (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond unless— (a) the Public Prosecutor has been given an opportunity to oppose the application for such release; and (b) 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. (2) The limitations on granting of bail specified in sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting of bail. (3) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail	S3 prescribes punishments for offences of committing violence on board an aircraft in flight, **with punishment of imprisonment for life** and fine. S3A concerns offences at airport with **imprisonment for life and fine**. S4 concerns destruction or damage to air navigation facilities with **punishment of life imprisonment and fine.**	Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971 (Montreal)

STATUTE	PROVISION	PUNISHMENT	TREATY
	under section 439 of the Code of Criminal Procedure, 1973.		

TWIN CONDITIONS FOR BAIL – STATE LEGISLATIONS

	STATUTE	PROVISION	PUNISHMENT
1.	Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986	19. Modified application of certain provisions of the Code. (1) Notwithstanding anything contained in the Code every offence punishable under this Act or any rule made thereunder shall be deemed to be a cognizable offence within the meaning of clause (e) of section 2 of the Code and cognizable case as defined in that clause shall be construed accordingly. (2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act or any rule made thereunder subject to the modifications that— (a) the reference in sub-section (1) thereof to "Judicial Magistrate" shall be construed as a reference to "Judicial Magistrate or Executive Magistrate"; (b) the references in sub-section (2) thereof to "fifteen days", "ninety days" and "sixty days", wherever they occur, shall be construed as references to "sixty days", "one year" and "one year", respectively; (c) sub-section (2-A) thereof shall be deemed to have been omitted. (3) Sections 366, 367, 368 and 371 of the Code shall apply in relation to a case involving, an offence triable by a Special Court, subject to the modification that the reference to "Court of Session" wherever occurring therein, shall be construed as reference to "Special Court". (4) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act or any rule made thereunder shall, if in custody, be released on bail or on his own bond unless— (a) the Public Prosecutor has been given an opportunity	S3 (1) punishes gangsters with imprisonment between 2 to 10 years, and Rs 5 thousand. The proviso increases punishment for offences against public servants & their families, to a minimum of 3 years and minimum fine of Rs 5 thousand. S3 (2) punishes public servants extending support or help to gangsters with imprisonment between 3 to 10 years, and fine.

	STATUTE	PROVISION	PUNISHMENT
		to oppose the application for such release; and (b) 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. (5) The limitations on granting of bail specified in sub-section (4) are in addition to the limitations under the Code	
2.	Maharashtra Control of Organised Crime Act, 1999	Section 21: (4) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond, unless— (a) the Public Prosecutor has been given an opportunity to oppose the application of such release; and (b) 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. (5) Notwithstanding anything contained in the Code, the accused shall not be granted bail if it is noticed by the Court that he was on bail in an offence under this Act, or under any other Act, on the date of the offence in question.	S3 (1) (i) concerns punishment for organized crime, specifying for offences which result in the death of a person, imprisonment for life, or death and fine. In other cases of organized crime (S3 (1) (ii)), the prescribed punishment is a minimum of 5 years, up to imprisonment for life and minimum fine of Rs 5 lakhs. Ss 3 (2) to (4) concern, conspiracy/attempt/abet/facilitates, harbour/conceals organized crime and membership of organized crime syndicates respectively, with a minimum of **5 years'** imprisonment and minimum of Rs 2 Lakhs fine. Ss 3 (5) concerns property derived or obtained from commission of organized crime, or acquisition through organized crime syndicate funds, punishable with a minimum of 3 years and extending to life, with a minimum fine of Rs 2 Lakhs. S4 concerns punishment of past members in organized crime syndicates failing to satisfactorily account for property, specifying a minimum of 3 years, but extending up to 10 years, and minimum fine of Rs 2 Lakhs, and attachment and forfeiture.
3.	The Karnataka	22. Modified application of certain provisions of the Code. –	S3 (1) (i) concerns punishment for organized crime,

	STATUTE	PROVISION	PUNISHMENT
	Control of Organized Crime Act, 2000 (identical to MCOCA)	(1) Notwithstanding anything contained in the Code or in any other law, every offence punishable under this Act, shall be deemed to be a cognizable offence within the meaning of clause (c) of section 2 of the Code and "Cognizable case" as defined in that clause shall be constructed accordingly. *** (4) Notwithstanding anything contained in the code no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on own bond, unless- (a) The Public Prosecutor has been given an opportunity to oppose the application of such release; and (b) 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. (5) Notwithstanding anything contained in the Code, the accused shall not be granted bail if it is noticed by the Court that he was on bail in an offence under this Act or under any other Act on the date of the offence in question. (6) The limitations on granting of bail specified in sub-section (4) are in addition to the limitations under the Code or any other law for the time being in force on the granting of bail.	specifying for offences which result in the death of a person, imprisonment for life, or death and fine. In other cases of organized crime (S3 (1) (ii)), the prescribed punishment is a minimum of 5 years, upto imprisonment for life and minimum fine of Rs 5 lakhs. Ss 3 (2) to (4) concern, conspiracy/attempt/abet/facilitates, harbour/conceals organized crime and membership of organized crime syndicates respectively, with a minimum of **5 years'** imprisonment and minimum of Rs 2 Lakhs fine. Ss 3 (5) concerns property derived or obtained from commission of organized crime, or acquisition through organized crime syndicate funds, punishable with a minimum of 3 years and extending to life, with a minimum fine of Rs 2 Lakhs. S4 concerns punishment of past members in organized crime syndicates failing to satisfactorily account for property, specifying a minimum of 3 years, but extending up to 10 years, and minimum fine of Rs 2 Lakhs.
4.	The Telangana Control of Organized Crime Act, 2001 (renamed from Andhra Pradesh COCA, 2001, identical	21. Modified application of certain provisions of the Code.— (1) Notwithstanding anything contained in the Code or in any other law, every offence punishable under this Act shall be deemed to be a cognizable offence within the meaning of clause (c) of section 2 of the Code and "cognizable case" as defined in that clause shall be construed accordingly. (2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the	S3 (1) (i) concerns punishment for organized crime, specifying for offences which result in the death of a person, imprisonment for life, or death and fine. In other cases of organized crime (S3 (1) (ii)), the prescribed punishment is a minimum of 5 years, upto imprisonment for life and minimum fine of Rs 5 lakhs. Ss 3 (2) to (4) concern,

	STATUTE	PROVISION	PUNISHMENT
	provisions)	modifications that, in sub-section (2),— (a) the references to "fifteen days" and "sixty days", wherever they occur, shall be construed as references to "thirty days" and "ninety days", respectively; (b) after the proviso, the following proviso shall be inserted namely:— "Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Special Court shall extend the said period upto one hundred and eighty days, on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days". (3) Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence punishable under this Act. (4) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond, unless,— (a) the Public Prosecutor has been given an opportunity to oppose the application for such release; and (b) 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. (5) Notwithstanding anything contained in the Code, the accused shall not be granted bail if it is noticed by the Court that he was on bail in an offence under this Act or under any other law on the date of the offence in question. (6) The limitations on granting of bail specified in sub-section (4) are in addition to the limitations under the Code or any other law for the time being in force on the granting of bail.	conspiracy/attempt/abet/facilitates, harbour/conceals organized crime and membership of organized crime syndicates respectively, with a minimum of **5 years'** imprisonment and minimum of Rs 2 Lakhs fine. Ss 3 (5) concerns property derived or obtained from commission of organized crime, or acquisition through organized crime syndicate funds, punishable with a minimum of 3 years and extending to life, with a minimum fine of Rs 2 Lakhs. S4 concerns punishment of past members in organized crime syndicates failing to satisfactorily account for property, specifying a minimum of 2 years, but extending up to 10 years, and minimum fine of Rs 2 Lakhs, and attachment and forfeiture.

	STATUTE	PROVISION	PUNISHMENT
5.	The Sikkim Anti-Drugs Act, 2006	18. Offences to be cognizable and non-bailable.— (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973— (a) every offence punishable under this Act shall be cognizable; (b) no person accused of an offence punishable under this Act shall be released on bail or on his own bond unless— (i) the Public Prosecutor has been heard and also 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. (2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting of bail.	S9 concerns punishment for contravention of control of substances under the Act with rigorous imprisonment of at least 2 years, but extending to 5 years and fine between Rs 20,000/- to Rs 50,000/- under S9 (1) (a). S9 (1) (b) punishes the same offence for large quantity with rigorous imprisonment of at least 7 years, but up to 10 years, and fine between Rs 50,000/- to Rs 1,00,000/-. S9 (1) (c) concerns the same offence for commercial quantity with rigorous imprisonment between 10 to 14 years, and fine between Rs. 1 Lakhs to 2 Lakhs. S9 (2) concerns contravention by licensed dealers under Drugs and Cosmetics Act, with punishment of imprisonment of at least 3 years and minimum fine of Rs 1 lakh. S9 (4) concerns commission of offence using mode of transport, and specifies imprisonment between 10 years to 14 years, and fine between Rs 1 Lakh to 10 Lakhs. S10 concerns the owner or occupier allowing their property to be used for the contravention of the Act with imprisonment between 5-10 years and fine between Rs 50,000/- to Rs 1,00,000/- S11 concerns financing activities contravening the Act being punished with rigorous imprisonment not less than 10 years which may extend to 14 years, and fine between Rs 2 lakhs to 5 lakhs. S13 concerns enhanced punishment for offences with a term to twice the maximum punishment term and fine twice the amount, of the specific offence. S14 concerns contravention not specifically provided

	STATUTE	PROVISION	PUNISHMENT
			for with punishment, with imprisonment until six months, or with fine up to Rs 20,000/-.
6.	The Gujrat Control of Terrorism and Organised Crime Act, 2015	Section 20: (4) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond, unless,- (a) the Public Prosecutor has been given an opportunity to oppose the application for such release; and (b) 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. (5) Notwithstanding anything contained in the Code, the accused shall not be granted bail if it is noticed by the Court that he was on bail in an offence under this Act or under any other law on the date of the offence in question.	S3 (1) (i) concerns punishment for organized crime, specifying for offences which result in the death of a person, imprisonment for life, or death and fine up to Rs 10 Lakhs. In other cases of organized crime (S3 (1) (ii)), the prescribed punishment is a minimum of 5 years, upto imprisonment for life and minimum fine of Rs 5 lakhs. Ss 3 (2) to (4) concern, conspiracy/attempt/abet/facilitates, harbour/conceals organized crime and membership of organized crime syndicates respectively, with a minimum of **5 years'** imprisonment and minimum of Rs 2 Lakhs fine. Ss 3 (5) concerns property derived or obtained from commission of organized crime, or acquisition through organized crime syndicate funds, punishable with a minimum of 3 years and extending to life, with a minimum fine of Rs 2 Lakhs. S4 concerns punishment of past members in organized crime syndicates failing to satisfactorily account for property, specifying a minimum of 3 years, but extending up to 10 years, and minimum fine of Rs 2 Lakhs.
7.	The Mizoram Drug (Controlled Substances) Act, 2016	19. Offences to be cognizable and non-bailable (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 - (a) every offence punishable under this Act shall be cognizable; (b) no person accused of an offence punishable under this Act shall be released on bail or on his own bond unless -	S9 specifies punishment for contravention, with licensed dealers violating punishable with imprisonment up to 5 years, or fine (S9 (a)). S9 (b) concerns contravention by consumption of controlled substances without medical prescription, requiring compulsory detoxification and fine up to

	STATUTE	PROVISION	PUNISHMENT
		(i) the Public Prosecutor has been heard and also 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. (2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting of bail.	Rs 10,000/- S9 (c) concerns contravention involving mode of transport, with imprisonment up to 3 years and fine up to Rs 50,000/- and confiscation of the mode of transport to be released upon payment of Rs 20,000/- S9 (d) concerns contravention by manufacturers of controlled substances with punishment up to 3 years and fine up to Rs 50,000/- S10 involves punishment for illegal possession, with punishment ranging from imprisonment up to 3 months for small quantity (S10 (a)), to 2 years for less than commercial quantity (S10 (b), and 5up to 5 years for commercial quantity with fine. S11 concerns premises being allowed for contravention, with imprisonment up to 1 year, and fine of Rs 50,000/-. S12 concerns financing of illicit traffic with imprisonment of at least 2 years and minimum fine of Rs 1 Lakhs. S14 concerns enhanced punishment for repeat offences up to twice the maximum term of punishment and twice the maximum fine. S15 concerns punishment for contraventions without specified punishment, with imprisonment up to six months and fine up to Rs 20,000/-
8.	The Haryana Control of Organised Crime Act, 2020	Section 18: (4) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond, unless,- (a) the Public Prosecutor has been given an opportunity to oppose the application for such release; and (b) where the Public Prosecutor opposes the application,	S3 (1) (i) concerns punishment for organized crime, specifying for offences which result in the death of a person, imprisonment for life, or death and fine. In other cases of organized crime (S3 (1) (ii)), the prescribed punishment is a minimum of 5 years, upto imprisonment for life and minimum fine of Rs 5 lakhs.

	STATUTE	PROVISION	PUNISHMENT
		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. (5) Notwithstanding anything contained in the Code, the accused shall not be granted bail if it is noticed by the Court that he was on bail in an offence under this Act or under any other law on the date of the offence in question.	Ss 3 (2) to (4) concern, conspiracy/attempt/abet/facilitates, harbour/conceals organized crime and membership of organized crime syndicates respectively, with a minimum of **5 years**' imprisonment and a minimum of Rs 2 Lakhs fine. Ss 3 (5) concerns property derived or obtained from commission of organized crime, or acquisition through organized crime syndicate funds, punishable with a minimum of 3 years and extending to life, with a minimum fine of Rs 2 Lakhs. S4 concerns punishment of past members in organized crime syndicates failing to satisfactorily account for property, specifying a minimum of 3 years, but extending up to 10 years, and minimum fine of Rs 2 Lakhs, and attachment and forfeiture.