IN THE SUPREME COURT OF INDIA

INHERENT JURISDICTION

(Under Article 137 of the Constitution of India)

REVIEW PETITION (CRL) NO. OF 2022

IN

TRANSFERRED CASE CRL. NO. 4 OF 2018

(Arising out of the judgment and order dated 27.07.2022 passed by this Hon'ble Court in Transferred Case (Crl.) No. 4 of 2018)

IN THE MATTER OF:-

Karti P. Chidambaram … Petitioner

VERSUS

Directorate of Enforcement … Respondent

WITH

CRL.M.P. NO. _____ OF 2022

APPLICATION FOR GRANT OF AD-INTERIM EX-PARTE STAY OF JUDGMENT AND ORDER UNDER REVIEW DATED 27.07.2022

AND

CRL.M.P. NO. _____ OF 2022

APPLICATION SEEKING DIRECTIONS FOR HEARING OF THE REVIEW PETITION IN THE OPEN COURT

PAPER – BOOK

[FOR INDEX: KINDLY SEE INSIDE]

ADVOCATE FOR THE PETITIONER : SHALLY BHASIN

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A

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Karti P. Chidambaram … Petitioner

VERSUS

Directorate of Enforcement … Respondent

OFFICE REPORT ON LIMITATION

1. √ The Review Petition is/are within time.

2. The Review Petition is barred by time and there is delay of ……days in filing the same against order dt. 27.07.2022 and petition for condonation of …… days delay has been filed.

3. There is delay of ……days in refilling the Review Petition and petition for condonation of …… days delay in refilling has been filed.

BRANCH OFFICER

NEW DELHI
DATED: 22.08.2022

SYNOPSIS

The Petitioner is constrained to prefer the instant Review Petition invoking the jurisdiction of this Hon'ble Court under Article 137 read with Article 142 of the Constitution of India, 1950 praying for reconsideration of the final judgment and order dated 27.07.2022 (hereinafter referred to as the "**impugned judgment**") passed by this Hon'ble Court in *inter alia* Transferred Case Crl. No. 4 of 2018.

It is most respectfully submitted that the impugned judgment deserves to be reviewed on grounds of grave error, being contrary to earlier judgements of this Hon'ble Court including judgements of Constitution Benches, being contrary to Articles 20 and 21 of the Constitution, being contrary to settled principles of criminal jurisprudence and being *per incuriam* on several grounds and as such, deserves reconsideration by this Hon'ble Court.

Re: Amendments by way of Money Bills

1. The impugned judgement has not dealt with the most crucial issue arising in the batch of cases, namely, whether the Prevention of Money Laundering Act, 2002 (hereinafter PMLA) could be amended by Parliament through a Money Bill. Several crucial provisions of the PMLA were introduced or amended by Money Bills (mostly Finance Bills) and these provisions were challenged on the ground of violation of the Constitution. The impugned judgement itself states that:

> *"**21.** We are conscious of the fact that if that ground of challenge is to be accepted, it may go to the root of the matter and amendments effected vide Finance Act would become unconstitutional or ineffective. ……we proceeded with the hearing of the batch of cases before us to deal with the other challenges*

regarding the concerned provision(s) being otherwise unconstitutional and ultra vires."

2. Indisputably, while this issue struck at the root of the matter, the impugned judgment proceeded to adjudicate the constitutional validity of the provisions of the PMLA without first adjudicating this crucial issue and/ or referring the matter to a larger bench, as was done in ***Rojer Mathew v. South Indian Bank Ltd.***, reported in (2020) 6 SCC 1 and/ or awaiting the decision of the reference to the larger bench in ***Roger Mathew (supra)***. It is most humbly submitted that in the interest of justice and following the due process of law, the impugned judgment ought to have awaited the outcome of the reference to the larger bench in ***Roger Mathew (supra)***. In this regard, reliance is placed on the following:

(i) ***Ram Shiroman Mishra v. Vishwanath Pandey***, (2012) 8 SCC 575 @ Para 9.
(ii) ***Asgar Ali v. State of Jammu and Kashmir***, 2021 SCC OnLine SC 3095 @ Paras 1-2.
(iii) ***Karan Singh v. DTC***, (2017) 16 SCC 72 @ Paras 9-10.
(iv) Dissenting Opinion of Chandrachud, J. in ***Beghar Foundation v. Justice K.S. Puttaswamy and Ors.***, (2021) 3 SCC 1 @ para 20.

3. The impugned judgment, while holding that it is not rendering any findings on the amendments made by way of Money Bills, has interpreted the provisions of the PMLA under challenge by referring to and relying on such amendments made by way of Money Bills, which were under challenge and which issue this

Hon'ble Court decided not to adjudicate. Thus, the impugned judgment deserves to be reviewed on this ground alone.

Re: Interpretation of Section 3 PMLA

4. The impugned judgement gravely erred in its interpretation of Sec. 3 PMLA. As the section was originally enacted in 1999, Parliament accepted the recommendation of the Select Committee (as noted in para 50), and added the words "***and projecting it as untainted property***" before the words "shall be guilty of offence of money-laundering". The Amendment Bill 2012 amended, *inter alia*, Sec. 3 and certain words were added after the words "*proceeds of crime*", but despite the criticism of the FATF in 2013 (noted in para 37), retained the words "*and projecting*". In fact, the words were expanded to "*and projecting or claiming*". Hence, it is abundantly clear, and it was so submitted to this Hon'ble Court, that the crucial words were *"**and projecting or claiming it as untainted property**"*.

5. By the Finance (No. 2) Act, 2019 (Act No. 23 of 2019) (which was passed as a ***Money Bill***), an Explanation was added to Sec. 3 which, without amending the main part of the section, used the word "*or*" before the words "*projecting as untainted property*" and before the words "*claiming as untainted property*". It was submitted that an Explanation cannot alter the words of the main part or their meaning and hence the Explanation was unconstitutional and beyond the competence of Parliament. The impugned judgement has rejected this submission in para 50. The finding is incorrect and contrary to the plain language of Sec.3 and the intention of Parliament.

6. The impugned judgement has also gravely erred in rejecting the Petitioner's submission that, if the words "*and projecting or claiming it as untainted property*" are given no meaning and the requirement of "*projecting*" has to be eschewed, it will render the '*predicate offence*' and '*money-laundering*' indistinguishable. Assume the predicate offence of robbery u/s 392 IPC. Assume there are proceeds of crime and PMLA may be attracted. If the robber keeps the proceeds or conceals them, he is guilty of robbery. It is only when he "*projects or claims*" the stolen money as "*untainted*", the offence of money-laundering is attracted. If "*projecting or claiming*" is eschewed as unnecessary, there will be no distinction between '*robbery*' and '*money-laundering*' as defined in Sec.3. The language of a provision of law made by Parliament cannot be re-written by the Court. The history of Sec.3, the original text, the Amendment Bill, the recommendation of the Select Committee (as noted in para 50) and the final language used by Parliament despite the criticism of FATF, make it abundantly clear that "***projecting or claiming it as untainted property****"* is an essential ingredient of the offence of money-laundering. The offence is not complete unless the proceeds of crime are "*projected or claimed as untainted property*". The impugned judgement is in grave error in rejecting this submission and deserves to be reviewed.

Re: Retrospective application of the offence of money laundering

7. The conclusion in the impugned judgement in para 43 that the offence of money laundering is a continuing one even in respect of an offence included in the Schedule on a subsequent date is

a conclusion that is opposed to the fundamental principle of criminal law as well as Article 20 of the Constitution. When a non-scheduled offence is committed, it may give rise to proceeds of crime (in common parlance). For example, '*cheating*' under S. 420, IPC. On that day or subsequently, even if the accused gained any benefit out of the crime (say, money or property), there are no "*proceeds of crime*" within the meaning of Sec. 2(u) of PMLA. Assume the said offence is included in the Schedule on a later date, mere possession of the "*proceeds of crime*" (money or property) would, according to the impugned judgement, become an offence of "money-laundering". If this conclusion is correct, what was not an offence on the date it was committed, namely gaining money or property as a result of cheating, would become an offence when the offence of cheating is included in the Schedule, and the PMLA would be triggered. Consequently, the accused would be prosecuted not only for the offence of cheating but also the alleged offence of money-laundering which he did not commit and had no intention to commit. Such a result is expressly forbidden by Article 20 of the Constitution. It is also opposed to the fundamental principle of criminal law that no person can be accused of or punished for an offence that was not an offence when the '*act*' was committed. The conclusion in the impugned judgement, therefore, deserves to be reviewed.

8. If the principle of 'continuing offence' can be invoked in respect of an act that had been committed and completed before the PMLA came into force (1-7-2005) or before the offence was included in the Schedule, it would lead to manifestly unjust

results. An act committed even 100 years ago (in respect of an offence under IPC) can be resurrected and the person concerned can be accused of 'money-laundering' after the PMLA was brought into force and the offence included in the Schedule. Such an unjust outcome cannot even be contemplated under the Constitution of India and under the fundamental principles of criminal law that are in force in India. In so far as the impugned judgement has arrived at such an unjust conclusion, it is gravely erroneous and deserves to be reviewed.

9. To arrive at the above conclusion in para 43 of the impugned judgment, it is manifest that the Court has been persuaded by the inclusion of clause (ii) of the Explanation to Sec.3 (***by a Money Bill,*** namely, the Finance (No. 2) Act, 2019 (Act No. 23 of 2019). Since the said Explanation was inserted by a Money Bill, either the impugned judgment ought to have referred the matter to a larger Bench along with the reference pending in ***Roger Mathew (supra)*** or awaited the outcome thereof.

<u>Re: Officers of the ED are police officers</u>

10. The impugned judgement gravely erred in holding in para 163 and 172 that officers of the Enforcement Directorate are not "police officers". PMLA is admittedly a "criminal law". It creates a new offence; it provides for investigation and trial of the said offence; and it provides for punishment for that offence. The PMLA also empowers the investigating officer to exercise other powers that are normally associated with, and available to, police officers. If the PMLA is essentially a criminal law, it follows logically that the persons investigating the commission of an offence under the law would, indubitably,

be police officers. The impugned judgement erred in holding that the PMLA is not only for investigating and punishing offenders but it is also for the prevention of money-laundering, and hence the officers of the ED are not police officers. This reasoning is untenable, because all criminal laws empower the police officers to both prevent the commission of crimes and to investigate and punish the offenders.

11. The impugned judgement failed to note certain crucial provisions of the PMLA that would conclusively show that the officers investigating under PMLA are police officers. The impugned judgement failed to note that under Sec.45(1A) PMLA, if so authorized by the Central Government (not the Director of Enforcement) by general or special order, a police officer can investigate the offence under PMLA. Such officer would exercise his powers under the Cr.P.C. and, ultimately, file a report under Sec 173 of the Cr.P.C. It would be invidious discrimination and violative of Article 14 of the Constitution to hold that if an offence is investigated by such officer, he would be a police officer, but when the offence is investigated by an officer of the Enforcement Directorate such officer would not be a police officer. Such a conclusion would be manifestly illogical and unconstitutional.

Re: Applicability of provisions contained in Chapter XII Cr.P.C. to PMLA

12. The impugned judgement gravely erred in failing to note the import of Sec.46 and Sec. 65 of PMLA which made the Cr.P.C. applicable as long as there was no inconsistent provision in the PMLA. The impugned judgement erred in holding in para 176

that the provisions of Cr.P.C. do not apply to the investigating officers of the Enforcement Directorate until after the arrest of a person. This conclusion excludes the applicability of Sections 41 and 41-A of Chapter V Cr.P.C. as well as Sections 154 to 170 of Chapter XII of the Cr.P.C. These provisions of the Cr.P.C. are an integral part of "*the procedure established by law*" under Article 21 of the Constitution which has been interpreted to mean "*fair and reasonable procedure*" as well as to include "*substantive due process*". Absent the applicability of these crucial provisions of the Cr.P.C., there is no equivalent procedure in the PMLA. The procedure followed by the Enforcement Directorate is completely opaque:

(i) there is no FIR which is registered or sent to the jurisdictional Magistrate or uploaded on the website;
(ii) the FIR, or equivalent ECIR, is not given to the accused even on demand;
(iii) there is no distinction between a witness and an accused;
(iv) there is no right to remain silent;
(v) there is no protection against self-incrimination;
(vi) there is no case diary or equivalent contemporaneous record of the investigation;
(vii) there is no judicial oversight of the investigation process; and
(viii) there is no judicial remedy against unlawful investigation.

Re: Section 45 PMLA

13. While considering the validity of Sec.45 of PMLA, the impugned judgement erred in not appreciating the well-settled principle of law that "*bail is the rule, and refusal of bail is the*

exception". The purpose of imposing conditions while granting bail is to secure the presence of the accused at the trial and to forbear the accused from tampering with the evidence or witnesses. Sec.45, in its application, will invariably amount to pre-trial incarceration, because in the absence of an FIR (or equivalent), Complaint (charge sheet), case diary (not maintained), and documents relied upon by the prosecution, no accused can present facts and submissions to persuade the Special Court to believe that he is "*not guilty of such offence*". It is placing on the accused a burden that, in most cases, is impossible to discharge. Such an outcome is extremely prejudicial to the accused and is violative of the principles of "*fair and reasonable procedure*" and "*substantive due process*" enshrined in Article 21 of the Constitution.

14. The above ground will apply in greater force to a case when the petitioner seeks anticipatory bail. At that stage, the petitioner is completely in the dark except that he genuinely apprehends arrest, more so since the petitioner is not even supplied with a copy of the ECIR on the ground that it is an internal document, which view has been endorsed in the impugned judgment in para 179. That is why in *Nikesh Tarachand Shah vs. Union of India*, reported in (2018) 11 SCC 1, this Hon'ble Court had held that the twin conditions will not apply in the case of anticipatory bail. The impugned judgement in para 137 gravely erred in overruling this opinion and holding that the twin conditions will apply even in a case of anticipatory bail, and hence deserves to be reviewed.

15. The conclusions in the impugned judgement regarding the validity of the twin conditions in Sec.45 of PMLA are *per incuriam,* contrary to settled law and not in consonance with the fundamental right guaranteed in Article 21 of the Constitution. In *Nikesh Tarachand Shah vs. Union of India*, reported in (2018) 11 SCC 1, this Hon'ble Court struck down Sec.45 of PMLA including the two conditions on several grounds including the ground that the twin conditions, as applied to the offence of money-laundering, violated Article 21 of the Constitution. While the other defects pointed out by this Hon'ble Court may or may not have been cured by Act 13 of 2018 (***a Money Bill),*** it did not cure, and could not have cured, the infirmity that the provision violated Article 21 of the Constitution. The judgement relying on earlier judgements concerning TADA Act, in para 129, has disagreed with the opinion in *Nikesh Tarachand Shah* and has equated the offence of "*terrorist act*" punishable with death or life imprisonment with the offence of "*money-laundering*" which is punishable with imprisonment for 3 to 7 years. It is obvious that Parliament has considered the offence of money-laundering as less heinous and has prescribed a lesser punishment than death or life imprisonment. Thus, the impugned judgement has ignored a vital and material fact that persuaded this Hon'ble Court in *Nikesh Tarachand Shah* to strike down the twin conditions attached to Sec.45 of PMLA on the ground that they violated Article 21 of the Constitution. The impugned judgement, therefore, deserves to be reviewed in light of the sound reasons given in *Nikesh Tarachand Shah* in so far as violation of Article 21 of the Constitution is concerned.

16. The impugned judgement is gravely erroneous in that it did not follow the law declared by a Constitution Bench in *Justice K.S. Puttaswamy (Retd.) vs. Union of India*, reported in (2019) 1 SCC 1. The declared law is that every legislation that is alleged to infringe the rights of citizens must satisfy the tests of (i) proportionality and (ii) that there were no less invasive measures to achieve the object. The Schedule to PMLA contains a number of predicate offences, some even non-cognizable and many with lesser punishment than 3 to 7 years. The twin conditions will be attracted irrespective of the predicate offence which allegedly gave rise to the proceeds of crime and even if the accused had been granted bail in the predicate offence. Such an outcome offends the principle of proportionality and there were less invasive means of achieving the object of securing the presence of the accused in the trial of the offence of money-laundering. The judgement gravely erred in not considering or dealing with these crucial submissions, and hence deserves to be reviewed.

17. A Constitutional Court, exercising powers under Article 32 or Article 226 of the Constitution, is not bound by restrictions imposed by a statute when it considers and applies the fundamental rights of a citizen. Articles 14, 19 and 21 of the Constitution are fundamental rights. When a person applies for bail and also invokes Articles 14, 19 and 21 of the Constitution, a Constitutional Court may grant bail irrespective of the twin conditions (or any other restriction) attached to Sec.45 of PMLA. Reliance was placed by the Petitioners on the judgement in *Union of India v. K.A. Najeeb*, reported in (2021)

3 SCC 713 @ Para 17. The impugned judgement gravely erred in law in not considering this submission, and hence the judgement deserves to be reviewed. In this regard, reliance is also placed on – (i) Order dated 25.07.2022 passed by the Hon'ble Supreme Court in Crl. Appeal No. 1023 of 2022 titled "*Sujay U Desai vs. Serious Fraud Investigation Office*" and (ii) Order dated 18.04.2022 passed by the Hon'ble Supreme Court in Crl. Appeal No. 640 of 2022 titled "*Jainam Rathod vs. State of Haryana*".

Re: Section 50 PMLA

18. The impugned judgement gravely erred in holding that statements obtained under Sec.50 of PMLA are admissible in evidence even in respect of a person accused of an offence or of a person in the position of an accused. The impugned judgement failed to note the enormity of the consequences of reading Sections 50(3), 50(4) and 63 of PMLA. It is settled law that:

(i) The protection of Article 20(3) is available to any person who is an accused or is an accused in a connected case or is in the position of an accused;

(ii) Such a person is entitled to remain silent; and

(iii) Any kind of duress — physical, emotional, circumstantial or statutory — would amount to testimonial compulsion.

The impugned judgement has disregarded or disagreed with the binding precedents laying down the above principles of law and has held that a statement obtained under Sec.50 of PMLA, even in the case of an accused or a person in the position of an

accused, would not violate Sec. 25 of Evidence Act or Article 20(3) of the Constitution.

19. The impugned judgement is *per incuriam* in that it has, in substance, disagreed with the law declared in larger bench decision in State of Bombay vs. *Kathi Kalu Ogad*, reported in AIR 1961 SC 1808, and in *Nandini Satpathy vs. P. L. Dani*, reported in (1978) 2 SCC 424, *Selvi vs. State of Karnataka*, reported in (2010) 7 SCC 263 and other cases decided by this Hon'ble Court, and hence deserves to be reviewed.

20. The impugned judgement gravely erred in holding in para 159 that when a summon is issued under Sec.50 of PMLA, the Authority under Sec.50 is not conducting an investigation but only undertaking an inquiry. The impugned judgement also gravely erred in holding that it is only if, after arrest of the person, a statement is obtained under Sec.50 of PMLA, that the person can claim the protection of Article 20(3) of the Constitution or Sec.25 of Evidence Act. It is submitted that this statement of the law has absolutely and erroneously overturned the settled law and hence the impugned judgment deserves to be reviewed.

21. The impugned judgment is in grave error in that it failed to note that the word used in Sec.50(2) is "investigation" and that word is defined in Sec.2(1)(na) of PMLA. Nevertheless, the impugned judgement has given a meaning to the word "investigation" contrary to the explicit meaning given in Sec.2(1)(na) and erroneously held that at the stage of issue of summon under Sec.50 PMLA, the investigating officer is not

conducting an investigation of an offence. These conclusions are manifestly erroneous and deserve to be reviewed.

Hence, the instant Petition.

LIST OF DATES

13.03.2007	An application was filed by M/s INX Media Private Limited ("**INX Media**") with the Chairman of the Foreign Investment Promotion Board ("**FIPB**") *inter alia* seeking approval of the FIPB for permission to issue equity shares and preference shares collectively representing approximately 46.216% of the issued equity share capital of INX Media.
18.05.2007	FIPB, in its 98th Meeting, recommended for approval of the above proposal of INX Media but advised the applicant company to make a separate application for the proposed downstream investment. Sometime thereafter, the FIPB placed the recommendation before the then Finance Minister (i.e. the father of the Petitioner herein) and being the competent authority, and the Petitioner's father accorded his approval to the recommendation in the normal course of official business.
31.05.2007	The FIPB Unit of the Department of Economic Affairs, Ministry of Finance, Government of India conveyed the approval of the above proposal to INX Media.

21.08.2008	INX News Private Limited ("**INX News**") filed an Application with the Chairman of the FIPB *inter alia* seeking approval of the FIPB for downstream investment from INX Media to the extent of 26% of the issued equity capital of INX News.
24.10.2008	FIPB, in its 128th Meeting, recommended for approval of the above proposal of INX News.
21.11.2008	The FIPB Unit of the Department of Economic Affairs, Ministry of Finance, Government of India conveyed the approval of the above proposal through INX Media.
15.05.2017	Criminal law was set in the motion wherein the Central Bureau of Investigation ("**CBI**") registered an FIR bearing No. RC No. 2202017 E-0011 ("**schedule offence FIR**") under Section 120B read with Section 420 of the Indian Penal Code, 1860 ("**IPC**") and Section 8 and 13(2) read with 13(1)(d) of the Preventing of Corruption Act, 1988 ("**PC Act**"), wherein the Petitioner was named as an accused.
18.05.2017	Solely based on the scheduled offence FIR registered by the CBI, the Respondent ED registered an Enforcement Case Information Report ("**ECIR**") bearing no. F. No. ECIR/7/HIU/2017 ("**subject ECIR**") under Section 3 of the Prevention of Money Laundering Act, 2002 ("**PMLA**") punishable under

	Section 4 of the PMLA. The said ECIR is a reproduction of the scheduled offence FIR and the Petitioner is named as an accused. Initially, the ECIR was not supplied to the Petitioner despite request and the ED claims it to be an internal document.
18.01.2018 & 15.02.2018	The Petitioner joined investigation in the subject ECIR and appeared in person before the investigating officer of the ED for questioning.
28.02.2018	The Petitioner was arrested by the CBI in the subject FIR.
08.03.2018	The Petitioner challenged *inter alia*, the subject ECIR and the consequent investigation, including the ED's power to arrest under Section 19 PMLA, by way of a Writ Petition being W.P. (Crl.) No. 739 of 2018 before the Hon'ble High Court of Delhi.
09.03.2018	The Hon'ble High Court of Delhi, *vide* Order dated 09.03.2018, issued notice on the above Writ Petition and also granted interim protection to the Petitioner from arrest.
13.03.2018	The above Order dated 09.03.2018 passed by the Hon'ble High Court of Delhi was challenged by the Respondent ED before this Hon'ble Court in SLP (Crl.) Dairy No. 9360 of 2018.

15.03.2018	This Hon'ble Court, *vide* Order dated 15.03.2018 in SLP (Crl.) Dy. No. 9360/2018, while continuing the interim protection granted to the Petitioner by the Hon'ble High Court of Delhi, transferred the W.P. (Crl.) No. 739/2018 filed before the Hon'ble High Court to its file, which came to be numbered as T.C. (Crl.) No. 4/2018.
23.03.2018	The Petitioner was enlarged on regular bail in the subject FIR by the Hon'ble High Court of Delhi.
26.03.2018, 02.04.2018, and 27.04.2018	This Hon'ble Court was pleased to extend the interim protection granted to the Petitioner in W.P. (Crl.) No. 739/2018 and the same is continuing till date.
03.08.2018	The CBI's challenge to the Petitioner's grant of regular bail in the subject FIR *vide* Order dt. 23.03.2018 passed by the Hon'ble High Court was dismissed by this Hon'ble Court.
10.08.2018	Respondent ED issued a provisional attachment order (PAO) attaching the Petitioner's immovable properties under Section 5(1) PMLA.
26.10.2018	ED filed a complaint being OC No. 1045/2018 under Section 5 of the PMLA seeking confirmation of the above PAO.
29.03.2019	The Adjudicating Authority passed an Order under Section 8(3) PMLA confirming the above PAO.

05.04.2019	Aggrieved by the above confirmation Order, the Petitioner filed an Appeal u/s 26 PMLA before the Appellate Tribunal, PMLA.
05.04.2019 r/w 03.09.2019	The Appellate Tribunal, PMLA was pleased to pass an order directing '*status quo*'.
12.12.2018, 07.02.2019, 09.10.2019, 20.01.2020, 31.01.2020 and 03.02.2020	The Petitioner again appeared in person before the investigating officer of the ED for questioning in the subject ECIR and fully cooperated. Various statements of the Petitioner were recorded under Section 50 of the PMLA.
June 2020	The ED filed a prosecution complaint under Section 45 PMLA before the jurisdictional Special Court at New Delhi. This indicates that the ED has completed its investigation.
07.07.2020	Petitioner filed an Application (being Crl. M.P. No. 59717/2020) *inter alia* seeking permission to plead additional facts, grounds and prayers.
10.07.2020	Petitioner filed his Reply in SLP (Crl.) Dy. No. 9360/2018.
24.03.2021	The Ld. Special Court was pleased to take cognizance of the offence alleged in the abovementioned prosecution complaint and was further pleased to direct issuance of summons to the Accused persons, including the Petitioner and

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directed the accused persons to enter appearance on 07.04.2021.

07.04.2021 The Petitioner duly entered appearance through counsel before the Ld. Special Court and even thereafter, on all subsequent dates, has been appearing regularly before the Ld. Special Court, either in person or through pleader.

27.07.2022 This Hon'ble Court was pleased to decide the common questions of law in relation to the constitutionality of various provisions of the PMLA in a batch of cases, including the instant case T.C. Crl. No. 4 of 2018. Further, the Petitioner was relegated to the Hon'ble High Court of Delhi to pursue his Writ Petition on merits in view of the judgment passed by this Hon'ble Court.

22.08.2022 Being aggrieved by the above final Order and Judgment dated 27.07.2022, the Petitioner is constrained to prefer the instant Petition.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (CRIMINAL) NO. 4634 OF 2014

VIJAY MADANLAL CHOUDHARY & ORS. ...PETITIONER(S)

VERSUS

UNION OF INDIA & ORS. ...RESPONDENT(S)

WITH

SPECIAL LEAVE PETITION (CIVIL) NO. 28394 OF 2011

SPECIAL LEAVE PETITION (CIVIL) NO. 28922 OF 2011

SPECIAL LEAVE PETITION (CIVIL) NO. 29273 OF 2011

SPECIAL LEAVE PETITION (CRIMINAL) NO.....OF 2022
(@ DIARY NO. 41063 OF 2015)

SPECIAL LEAVE PETITION (CRIMINAL) NO. 9987 OF 2015

SPECIAL LEAVE PETITION (CRIMINAL) NO.10018 OF 2015

SPECIAL LEAVE PETITION (CRIMINAL) NO. 10019 OF 2015

SPECIAL LEAVE PETITION (CRIMINAL) NO. 993 OF 2016

TRANSFER PETITION (CRIMINAL) NO. 150 OF 2016

TRANSFER PETITION (CRIMINAL) NOS.151-157 OF 2016

WRIT PETITION (CRIMINAL) NO. 152 OF 2016

SPECIAL LEAVE PETITION (CRIMINAL) NO. 11839 OF 2019

SPECIAL LEAVE PETITION (CRIMINAL) NO. 2890 OF 2017

SPECIAL LEAVE PETITION (CRIMINAL) NO. 5487 OF 2017

CRIMINAL APPEAL NO. 1269 OF 2017

CRIMINAL APPEAL NO. 1270 OF 2017

CRIMINAL APPEAL NOS. 1271-1272 OF 2017

WRIT PETITION (CRIMINAL) NO. 202 OF 2017

SPECIAL LEAVE PETITION (CRIMINAL) NO.....OF 2022
(@ DIARY NO(S). 9360 OF 2018)

SPECIAL LEAVE PETITION (CRIMINAL) NO.....OF 2022
(@ DIARY NO(S). 9365 OF 2018)

SPECIAL LEAVE PETITION (CRIMINAL) NO.....OF 2022
(@ DIARY NO(S). 17000 OF 2018)

SPECIAL LEAVE PETITION (CRIMINAL) NO.....OF 2022
(@ DIARY NO(S). 17462 OF 2018)

SPECIAL LEAVE PETITION (CRIMINAL) NO.....OF 2022
(@ DIARY NO(S). 20250 OF 2018)

SPECIAL LEAVE PETITION (CRIMINAL) NO.....OF 2022
(@ DIARY NO(S). 22529 OF 2018)

SPECIAL LEAVE PETITION (CRIMINAL) NO. 1534 OF 2018

SPECIAL LEAVE PETITION (CRIMINAL) NOS. 1701-1703 OF 2018

SPECIAL LEAVE PETITION (CRIMINAL) NO. 1705 OF 2018

SPECIAL LEAVE PETITION (CRIMINAL) NO. 2971 OF 2018

SPECIAL LEAVE PETITION (CRIMINAL) NO. 4078 OF 2018

SPECIAL LEAVE PETITION (CRIMINAL) NO. 5444 OF 2018

SPECIAL LEAVE PETITION (CRIMINAL) NO. 6922 OF 2018

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J U D G M E N T

A.M. KHANWILKAR, J.

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PREFACE

1. In the present batch of petition(s)/appeal(s)/case(s), we are called upon to deal with the pleas concerning validity and interpretation of certain provisions of the Prevention of Money-Laundering Act, 2002[1] and the procedure followed by the

[1] For short, "PMLA" or "the 2002 Act"

Enforcement Directorate[2] while inquiring into/investigating offences under the PMLA, being violative of the constitutional mandate.

(a) It is relevant to mention at the outset that after the decision of this Court in ***Nikesh Tarachand Shah vs. Union of India & Anr.***[3], the Parliament amended Section 45 of the 2002 Act vide Act 13 of 2018, so as to remove the defect noted in the said decision and to revive the effect of twin conditions specified in Section 45 to offences under the 2002 Act. This amendment came to be challenged before different High Courts including this Court by way of writ petitions. In some cases where relief of bail was prayed, the efficacy of amended Section 45 of the 2002 Act was put in issue and answered by the concerned High Court. Those decision(s) have been assailed before this Court and the same is forming part of this batch of cases. At the same time, separate writ petitions have been filed to challenge several other provisions of the 2002 Act and all those cases have been tagged and heard together as overlapping issues have been raised by the parties.

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[2] For short, "ED"

[3] (2018) 11 SCC 1

(b) We have various other civil and criminal writ petitions, appeals, special leave petitions, transferred petitions and transferred cases before us, raising similar questions of law pertaining to constitutional validity and interpretation of certain provisions of the other statutes including the Customs Act, 1962[4], the Central Goods and Services Tax Act, 2017[5], the Companies Act, 2013[6], the Prevention of Corruption Act, 1988[7], the Indian Penal Code, 1860[8] and the Code of Criminal Procedure, 1973[9] which are also under challenge. However, we are confining ourselves only with challenge to the provisions of PMLA.

(c) As aforementioned, besides challenge to constitutional validity and interpretation of provisions under the PMLA, there are special leave petitions filed against various orders of High Courts/subordinate Courts across the country, whereby prayer for grant of bail/quashing/discharge stood rejected, as also, special

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[4] For short, "1962 Act" or "the Customs Act"

[5] For short, "CGST Act"

[6] For short, "Companies Act"

[7] For short, "PC Act"

[8] For short, "IPC"

[9] For short, "Cr.P.C. or "the 1973 Code"

leave petitions concerned with issues other than constitutional validity and interpretation. Union of India has also filed appeals/special leave petitions; and there are few transfer petitions filed under Article 139A(1) of the Constitution of India.

(d) Instead of dealing with facts and issues in each case, we will be confining ourselves to examining the challenge to the relevant provisions of PMLA, being question of law raised by parties.

SUBMISSIONS OF THE PRIVATE PARTIES

2. Mr. Kapil Sibal, learned senior counsel appearing for the private parties/petitioners in the concerned matter(s) submitted that the procedure followed by the ED in registering the Enforcement Case Information Report[10] is opaque, arbitrary and violative of the constitutional rights of an accused. It was submitted that the procedure being followed under the PMLA is draconian as it violates the basic tenets of the criminal justice system and the rights enshrined in Part III of the Constitution of India, in particular Articles 14, 20 and 21 thereof.

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[10] For short, "ECIR"

(i) A question was raised as to whether there can be a procedure in law, where penal proceedings can be started against an individual, without informing him of the charges? It was contended that as per present situation, the ED can arrest an individual on the basis of an ECIR without informing him of its contents, which is *per se* arbitrary and violative of the constitutional rights of an accused. The right of an accused to get a copy of the First Information Report[10A] at an early stage and also the right to know the allegations as an inherent part of Article 21. Reference was made to ***Youth Bar Association of India vs. Union of India & Anr.***[11] in support of this plea. Further, as per law, the agencies investigating crimes need to provide a list of all the documents and materials seized to the accused in order to be consistent with the principles of transparency and openness[12]. It was also submitted that under the Cr.P.C., every FIR registered by an officer under Section 154 thereof is to be forwarded to the jurisdictional Magistrate. However, this procedure is not being followed in ECIR cases. Further, violation of Section 157 of the

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[10A] For short, "FIR"

[11] (2016) 9 SCC 473 (Para 11.1); and *Court on its Own Motion vs. State*, 2010 SCC OnLine Del 4309 (Paras 39 & 54)

[12] *Criminal Trials Guidelines Regarding Inadequacies and Deficiencies, In re, vs. State of Andhra Pradesh & Ors.,* (2021) 10 SCC 598 (Para 11); also see: *Nitya Dharmananda & Anr. vs. Gopal Sheelum Reddy & Anr.*, (2018) 2 SCC 93 (Para 8).

Cr.P.C. was also alleged and it was submitted that this has led to non-compliance with the procedure prescribed under the law (Cr.P.C.) and the law laid down by this Court in catena of decisions. It was vehemently argued that in some cases the ECIR is voluntarily provided, while in others it is not, which is completely arbitrary and discriminatory.

(ii) It was argued that as per definition of Section 3 of the PMLA, the accused can either directly or indirectly commit money-laundering if he is connected by way of any process or activity with the proceeds of crime and has projected or claimed such proceeds as untainted property. In light of this, it was suggested that the investigation may shed some light on such alleged proceeds of crime, for which, facts must first be collected and there should be a definitive determination whether such proceeds of crime have actually been generated from the scheduled offence. Thus, there must be at least a *prima facie* quantification to ensure that the threshold of the PMLA is met and it cannot be urged that the ECIR is an internal document. Therefore, in the absence of adherence to

the requirements of the Cr.P.C. and the procedure established by law, these are being violated blatantly[13].

(iii) An anomalous situation is created where based on such ECIR, the ED can summon accused persons and seek details of financial transactions. The accused is summoned under Section 50 of the PMLA to make such statements which are treated as admissible in evidence. Throughout the process, the accused might well be unaware of the allegations against him. It is clear that Cr.P.C. has separate provisions for summoning of the accused under Section 41A and for witnesses under Section 160. The same distinction is absent under the PMLA. Further, Chapter XII of the Cr.P.C. is not being followed by the ED and, as such, there are no governing principles of investigation, no legal criteria and guiding principles which are required to be followed. As such, the initiation of investigation by the ED, which can potentially curtail the liberty of the individual, would suffer from the vice of Article 14 of the Constitution of India[14].

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[13] *Lalita Kumari vs. Government of Uttar Pradesh and Ors.*, (2014) 2 SCC 1 (Para 120.1)

[14] *E.P. Royappa vs. State of Tamil Nadu & Anr.*, (1974) 4 SCC 3; also see: *S.G. Jaisinghani vs. Union of India and Ors*, (1967) 2 SCR 703 and *Nikesh Tarachand Shah,* (supra at Footnote No.3) (Paras 21-23).

(iv) Mr. Sibal, while referring to the definition of "money-laundering" under Section 3 of the PMLA, submitted that the ED must satisfy itself that the proceeds of crime have been projected as untainted property for the registration of an ECIR or the application of the PMLA. It has been vehemently argued that the offence of money-laundering requires the proceeds of crime to be mandatorily 'projected or claimed' as 'untainted property'. Meaning thereby that Section 3 is applicable only to the generation of proceeds of crime, such proceeds being projected or claimed as untainted property. It is stated that the pertinent condition of 'and' projecting or claiming cannot be ousted and made or interpreted to be 'or' by the Explanation that has been brought about by way of the amendment made vide Finance (No.2) Act, 2019. It has been submitted that such an act would also be unconstitutional, as being enlarging the ambit of a principal section by way of adding an Explanation.

(v) It is also stated that the general practice is that the ED registers an ECIR immediately upon an FIR of a predicate offence being registered. The cause of action being entirely different from the predicate offence, as such, can lead to a situation where there is no difference between the predicate offence and money-laundering. In

support of the said argument, reliance was placed on the Article 3 of the Vienna Convention[15], where words like "conversion or transfer of property", "for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions", have been used. It is urged that what was sought to be criminalised was not the mere acquisition and use of proceeds of crime, but it was the conversion or transfer for the purpose of either concealing or disguising the illicit origin of the property to evade the legal consequences of one's actions. Reference was also made to the Preamble of the PMLA which refers to India's global commitments to combat the menace of money-laundering. Learned counsel has then referred to the definition of "money-laundering" as per the Prevention of Money-Laundering Bill, 1999[16] to show how upon reference to the Select Committee of the Rajya Sabha, certain observations were made and, hence, the amendment was effected, wherein the words "and projecting it as untainted

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[15] United Nations adopted and signed the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter referred to as "Vienna Convention" or "the 1988 Convention" or "the UN Drugs Convention", as the case may be)

[16] For short, "1999 Bill"

property" were added to the definition which was finally passed in the form of PMLA. We have reproduced the relevant sections/provisions hereinbelow at the appropriate place. Reliance has also been placed on the decision of ***Nikesh Tarachand Shah***[17].

(vi) The safeguard provided by Section 173 of the Cr.P.C., it is argued, was present in the original enactment of 2002 (PMLA). The same has now supposedly been whittled down by various amendments over the years. It has been submitted that by way of amendments in 2009, proviso have been added to Sections 5 and 17, which have diluted certain safeguards. Further, it is submitted that the safeguard under Section 17(1) has been totally done away with in the amendment made in 2019. To further this argument, it has been suggested that the filing of chargesheet in respect of a predicate offence was impliedly there in Section 19 of the PMLA, since there is a requirement which cannot be fulfilled *sans* an investigation, to record reasons to believe that 'any person has been guilty of an offence punishable under this Act'. In respect of Section 50, it is urged that though there is no threshold mentioned in the

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[17] Supra at Footnote No.3 (Para 11)

Act, yet the persons concerned should be summoned only after the registration of the ECIR. It is, thus, submitted that any attempt to prosecute under the PMLA without *prima facie* recordings would be inconsistent with the Act itself and violative of the fundamental rights.

(vii) It is urged that the derivate Act cannot be more onerous than the original. It is suggested that the proceeds of crime and the predicate offence are entwined inextricably. Further, the punishment for generation of the proceeds of crime cannot be disproportionate to the punishment for the underlying predicate offence. The same analogy ought to apply to the procedural protections, such as those provided under Section 41A of the Cr.P.C., which otherwise would be foul of the constitutional protections under Article 21.

(viii) Learned counsel has also challenged the aspect of the Schedule being overbroad and inconsistent with the PMLA and the predicate offences. It is argued that even in the Statements of Objects and Reasons of the 1999 Bill, it has been stated that the Act was brought in to curb the laundering stemming from trade in narcotics and drug related crimes. Reference is also made to the

various conventions that are part of the jurisprudence behind the PMLA[18]. It was to be seen in light of organised crime, unlike its application today to less heinous crimes such as theft. It is submitted that there was no intention or purpose to cover offences under the PMLA so widely. It is also submitted that there are certain offences which are less severe and heinous than money-laundering itself and that the inclusion of such offences in the Schedule does not have a rational nexus with the objects and reasons of the PMLA and the same is unreasonable, arbitrary and violative of Articles 14 and 21 of the Constitution of India.

(ix) It has been submitted that the PMLA cannot be a standalone statute. To bolster this claim, reliance has been placed on speeches made by Ministers in the Parliament. Further reliance has been placed on ***K.P. Varghese vs. Income Tax Officer, Ernakulum & Anr.***[19], ***Union of India & Anr. vs. Martin Lottery Agencies***

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[18] United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (for short, "Vienna Convention"); Basle Statement of Principles, 1989; Forty Recommendations of the Financial Action Task Force on Money Laundering, 1990; Political Declaration and Global Program of Action adopted by the United Nations General Assembly on 23.02.1990; and Resolution passed at the UN Special Session on countering World Drug Problem Together – 8th to 10th June 1998.

[19] (1981) 4 SCC 173 (Para 8)

Limited[20] and ***P. Chidambaram vs. Directorate of Enforcement***[21].

(x) Our attention is also drawn to the provisions which have now been replaced in the statute. Prior to 2013 amendment, Section 8(5) of the PMLA was to the following effect: -

> "**8. Adjudication—**
>
> ....
>
> (5) **Whereon conclusion of a trial for any scheduled offence, the person concerned is acquitted,** the attachment of the property or retention of the seized property or record under sub-section (3) and net income, if any, shall cease to have effect."

However, vide amendment in 2013, the words 'trial for any scheduled offence' were replaced with the words 'trial of an offence under this Act'. It is urged that for the property to qualify as proceeds of crime, it must be connected in some way with the activity related to the scheduled offence. Meaning thereby that if there is no scheduled offence, there can be no property derived directly or indirectly; thus, an irrefutable conclusion that a scheduled offence is a pre-requisite for generation of proceeds of crime.

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[20] (2009) 12 SCC 209 (Para 38)

[21] (2019) 9 SCC 24 (Para 25)

(xi) It is further argued that an Explanation has been added to Section 44(1)(d) of the PMLA by way of Finance (No. 2) Act, 2019, which posits that a trial under the PMLA can proceed independent of the trial of scheduled offence. It is submitted that the Explanation is being given a mischievous interpretation when it ought to be read plainly and simply. It is stated that the Explanation relates only to the Special Court and not the trial of the scheduled offence. It is submitted that a Special Court can never convict a person under the PMLA without returning a finding that a scheduled offence has been committed.

(xii) It is submitted that the application of Cr.P.C. is necessary since it is a procedure established by law and there cannot be an investigation outside the purview of Section 154 or 155 of the Cr.P.C. Reference is made to the constitutional safeguards of reasonability and fairness. It is submitted that the Act itself, under Section 65, provides for the applicability of the Cr.P.C.[22] It is pointed out that several safeguards, procedural in nature are being violated. To illustrate a few - non registration of FIR, lack of a case diary,

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[22] *Ashok Munilal Jain & Anr. vs. Assistant Director, Directorate of Enforcement*, (2018) 16 SCC 158 (Paras 3-5)

restricted access to the ECIR, violation of Section 161 of the Cr.P.C., Section 41A of the Cr.P.C., lack of magisterial permission under Section 155 of the Cr.P.C. Such unguided use of power to investigate and prosecute any person violates Articles 14 and 21 of the Constitution.

(xiii) Another argument raised by the learned counsel is that the ED officers are police officers. It is submitted that the determination of the same depends on: (1) what is the object and purpose of the special statute and (2) the nature of power exercised by such officers? The first argument in this regard is that if it can be shown that in order to achieve the objectives of the special statute - preventive and detection steps to curb crime are permitted and coercive powers are vested, then such an officer is a police officer. Further, such an officer is covered within the ambit of Sections 25 and 26 of the Indian Evidence Act, 1872[23]. In support of the test to gauge the objective of the statute, reference has been made to ***State of Punjab vs. Barkat Ram***[24], wherein it was held —a customs

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[23] For short, "the 1872 Act" or "the Evidence Act"

[24] (1962) 3 SCR 338; Also see: *Tofan Singh vs. State of Tamil Nadu*, 2020 SCC OnLine SC 882 (Para 88)

officer is not a police officer within the meaning of Section 25 of the 1872 Act. It is also stated that police officers had to be construed not in a narrow way but in a wide and popular sense. Reference is made to Sections 17 and 18 of the Police Act, 1861[25], whereunder an appointment of special police officers can be made. Thus, it is stated that it is not necessary to be enrolled under the 1861 Act, but if one is invested with the same powers i.e., the powers for prevention and detection of crime, one will be a police officer. Then, the PMLA is distinguished from the 1962 Act, Sea Customs Act, 1878[26], Central Excise Act, 1944[27] and the CGST Act. The dissenting opinion of Subba Rao, J. in ***Barkat Ram***[28] is also relied upon. Thereafter, it is stated that PMLA, being a purely penal statute, one needs to look at the Statement of Objects and Reasons of the 1999 Bill and the Financial Action Task Force[29] recommendations.

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[25] For short, "1861 Act"

[26] For short, "1878 Act" or "the Sea Customs Act"

[27] For short, "1944 Act" or "the Central Excise Act"

[28] Supra at Footnote No.24

[29] For short, "FATF" – an inter-governmental body, which is the global money laundering and terrorist financing watchdog.

(xiv) Reliance was also placed on ***Raja Ram Jaiswal vs. State of Bihar***[30]. Further, it has been stated that even in ***Tofan Singh vs. State of Tamil Nadu***[31], the case of ***Raja Ram Jaiswal***[32] has been relied upon and it is concluded that when a person is vested with the powers of investigation, he is said to be a police officer, as he prevents and detects crime. Further, the powers under Section 50 of the PMLA for the purpose of investigation are in consonance with what has been held in ***Tofan Singh***[33] and establishes a direct relationship with the prohibition under Section 25 of the 1872 Act. Another crucial point raised is that most statutes where officers have not passed the muster of 'police officers' in the eyes of law, contain the term "enquiry" in contrast with the term "investigation" used in Section 50 of the PMLA. A parallel has also been drawn between the definition of "investigation" under the PMLA in Section 2(1)(na) and Section 2(h) of the Cr.P.C. Further, it is urged that the test of power to file 'chargesheet' is not determinative of being a police officer.

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[30] AIR 1964 SC 828

[31] 2020 SCC OnLine SC 882 (Para 88) (also at Footnote No.24)

[32] Supra at Footnote No.30

[33] Supra at Footnote No.31 (also at Footnote No.24)

(xv) It is then urged that Section 44(1)(b) of the PMLA stipulates that cognizance can be taken only on a complaint being made by the Authority under the PMLA. Whereas, in originally enacted Section 44(1)(b), both the conditions i.e., 'filing of a police report', as well as, 'a complaint made by an authority' were covered. Learned counsel also reminisces of the speech of the then Finance Minister on the Prevention of Money-Laundering (Amendment) Bill, 2005[34] in the Lok Sabha on 06.05.2005. However, it was also conceded that the amendment of Section 44(1)(b) of the PMLA removed the words, "upon perusal of police report of the facts which constitute an offence under this Act or". Next amendment made was insertion of Section 45(1A) and Section 73(2)(ua), by which the right of police officers to investigate the offence under Section 3 was restricted unless authorised by the Central Government by way of a general or special authorisation. Further amendment was deletion of Section 45(1)(a) of the PMLA, making the offence of money-laundering under the PMLA a non-cognizable offence. Further, it is submitted that amendment to Section 44(1)(b) has been made as a consequence for

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[34] For short, "2005 Amendment Bill"

making the offence under the PMLA non-cognizable. It is stated that even today if investigation is done by a police officer or another, he can only file a complaint and not a police report. Therefore, the above-mentioned test is irrelevant and inapplicable. Absurdity that arises is due to two investigations being conducted, one by a police officer and the other by the authorities specified under Section 48. An additional point has been raised that the difference between a complaint under the PMLA and a chargesheet under the Cr.P.C. is only a nomenclature norm and they are essentially the same thing. Thus, basing the determination of whether one is a police officer or not, on the nomenclature, is not proper.

(xvi) In respect of interpretation and constitutionality of Section 50 of the PMLA, our attention is drawn to Section 50(2) which pertains to recording of statement of a person summoned during the course of an investigation. In that, Section 50(3) posits that such person needs to state the truth. Further, he has to sign such statement and suffer the consequences for incorrect version under Section 63(2)(b); and the threat of penalty under Section 63(2) or arrest under Section 19.

(xvii) It is urged that in comparison to the constitutional law, the Cr.P.C. and the 1872 Act, the provisions under the PMLA are draconian and, thus, violative of Articles 20(3) and 21 of the Constitution. Our attention is drawn to Section 160 of the Cr.P.C. when person is summoned as a witness or under Section 41A as an accused or a suspect. In either case, the statement is recorded as per Section 161 of the Cr.P.C. Safeguards have been inserted by this Court in ***Nandini Satpathy vs. P.L. Dani & Anr.***[35], while also the protection under Section 161(2) is relied on. Thus, based on Sections 161 and 162, it is submitted that such evidence is inadmissible in the trial of an offence, unless it is used only for the purpose of contradiction as stipulated in Section 145 of the 1872 Act. Further, it is stated that proof of contradiction is materially different from and does not amount to the proof of the matter asserted[36] and can only be used to cast doubt or discredit the testimony of the witness who is testifying before Court[37]. The legislative intent behind Section 162 of the Cr.P.C. is also relied

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[35] (1978) 2 SCC 424

[36] *Tahsildar Singh & Anr. vs. State of U.P.,* AIR 1959 SC 1012 (paras 16-17, 42); Also see: *V.K. Mishra & Anr. vs. State of Uttarakhand & Anr.*, (2015) 9 SCC 588 (paras 15-20)

[37] *Somasundaram alias Somu vs. State represented by the Deputy Commissioner of Police*, (2020) 7 SCC 722 (para 24)

upon, as has been held in ***Tahsildar Singh & Anr. vs. State of U.P.***[38].

(xviii) It is, therefore, urged that the current practice of the ED is such that it violates all these statutory and constitutional protections by implicating an accused by procuring signed statements under threat of legal penalty. The protection under Section 25 of the 1872 Act is also pressed into service.

(xix) To make good the point, learned counsel proceeded to delineate the legislative history of Section 25 of the 1872 Act. He referred to the first report of the Law Commission of India and the Cr.P.C., which was based on gross abuse of power by police officers for extracting confessions.[39] Further, this protection was transplanted into the 1872 Act[40], where on the presumption that a confession made to a police officer was obtained through force or coercion was fortified[41]. It was pointed out that recommendations of three Law Commissions – 14th, 48th and 69th which advocated for allowance of

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[38] AIR 1959 SC 1012 (also at Footnote No.36)

[39] 185th Law Commission Report on the Indian Evidence Act, 1872 (2003)

[40] See also: *Barkat Ram* (supra at Footnote No.24)

[41] *Balkishan A. Devidayal vs. State of Maharashtra*, (1980) 4 SCC 600 (para 14)

such confessions to be admissible, were vehemently rejected in the 185th Law Commission Report. Thus, relying on ***Raja Ram Jaiswal***[42] where a substantial link between Section 25 of the 1872 Act, police officer and confession has been settled. Therefore, the present situation where prosecution can be mounted under Section 63 for failing to give such confessions is said to be contrary to procedure established by law interlinked with the right to a fair trial under Article 21. Reliance has also been placed on ***Selvi & Ors. vs. State of Karnataka***[43], the 180th Law Commission Report and Section 313 of the Cr.P.C. as being subsidiaries of right against self-incrimination and right to silence, not being read against him.

(xx) Learned counsel then delineated on the preconditions for protection of Article 20(3). First, the person standing in the character of an accused, as laid down in ***State of Bombay vs. Kathi Kalu Oghad***[44], has been referred to. In this regard, it is submitted that the term may be given a wide connotation and an inclusion in the FIR, ECIR, chargesheet or complaint is not necessary and can

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[42] Supra at Footnote No.30

[43] (2010) 7 SCC 263 (paras 87-89)

[44] AIR 1961 SC 1808

be availed even by suspects at the time of interrogation. It is urged that both the position of law stands clarified in ***Nandini Satpathy***[45] and ***Selvi***[46] — even to the extent where answering certain questions can incriminate a person in other offences or where links are furnished in chain of evidence required for prosecution. It is then urged that the expression 'shall be compelled' is not restricted to physical state, but also mental state of mind and it is argued that nevertheless a broad interpretation must be given to the circumstances in which a person can be so compelled for recording of statement. Additionally, the term 'to be a witness' would take within its fold 'to appear as a witness' and it is said that it must encompass protection even outside Court in investigations conducted by authorities such as the ED[47]. It was also argued that this protection should extend beyond statements that are confession, such as incriminating statements which would furnish a link in the chain of evidence against the person.

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[45] Supra at Footnote No.35

[46] Supra at Footnote No.43

[47] *M.P. Sharma & Ors. vs. Satish Chandra, District Magistrate, Delhi & Ors.*, (1954) SCR 1077 (para 10).

(xxi) It is submitted that the test which this Court ought to consider for determination of the vires of Section 50 of the PMLA is: whether a police officer is in a position to compel a person to render a confession giving incriminating statement against himself under threat of legal sanction and arrest? It is further pointed out that the ED as a matter of course records statement even when the accused person is in custody. In some circumstances, a person is not even informed of the capacity in which he/she is being summoned. What makes it worse is the fact that the ED claims the non-application of Chapter XII of the Cr.P.C. It does not register FIR and keeps the ECIR as an internal document. All the above-mentioned circumstances are said to render the questioning by the ED, which might not be restricted to the offence of money-laundering alone, as a testimonial compulsion[48]. Hence, advocating the protection of Article 20(3) of the Constitution, it is submitted that all safeguards and protections are rendered illusionary.

(xxii) Finally, an argument is raised that Section 50 of the PMLA is much worse than Section 67 of the Narcotic Drugs and Psychotropic

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[48] Even the applicability of Prevention of Money-Laundering (Forms, Search and Seizure or Freezing and the Manner of Forwarding the Reasons and Material to the Adjudicating Authority, Impounding and Custody of Records and the Period of Retention) Rules, 2005.

Substance Act, 1985[49]. Further, the NDPS Act is the underlying reason for the PMLA and this Court in ***Tofan Singh***[50], in no uncertain terms, has given protection in respect of confessional statement even in the NDPS Act. The much harder and harsher punishment of death in the NDPS Act is also contrasted against the PMLA. It is also submitted that constitutional safeguards cannot be undermined by the usage of the term 'judicial proceedings'. The term has been defined in Section 2(i) of the Cr.P.C. which includes any proceeding in the course of which evidence is or may be legally 'taken on oath'[51]. Section 50(1) has been distinguished for being in respect of only Section 13 of the PMLA. It is also submitted that the enforcement authority is not deemed to be a civil Court; it can be easily concluded that an investigation done by the enforcement authority is not a judicial proceeding and Section 50 of the PMLA falls foul of the constitutional safeguards.

(xxiii) Pertinently, arguments have also been advanced in respect of the implication of laws relating to money bills and their

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[49] For short, "NDPS Act"

[50] Supra at Footnote No.31 (also at Footnote No.24)

[51] *Assistant Collector of Central Excise, Guntur vs. Ramdev Tobacco Company*, (1991) 2 SCC 119 (para 6)

application to the Amendment Acts to the PMLA. However, at the outset, we had mentioned that this issue is not a part of the ongoing discourse in this matter and we refrain from referring to the arguments raised in that regard.

3. Next submissions were advanced by Mr. Sidharth Luthra, learned senior counsel on the same lines. He argued that the current procedure envisaged under the PMLA is violative of Article 21 of the Constitution of India. The procedure established by law has to be in the form of a statute or delegated legislation and pass the muster of the constitutional protections.[52] The Cr.P.C. has several safeguards in respect of arrested investigation; they are also rooted in the Cr.P.C. of 1898. They are reflective of the constitutional protections. The manual, circulars, guidelines of the ED are executive in nature and as such, cannot be used for the curtailment of an individual liberty. Under the PMLA, there is no visible sign of these protections against police's power of search and arrest; it is in stark contrast with the constitutional protections given also the

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[52] *Gudikanti Narasimhulu & Ors. vs. Public Prosecutor, High Court of Andhra Pradesh,* (1978) 1 SCC 240 (paras 1, 2, 10)

reverse presumption against innocence at stage of bail under Section 45 of the PMLA. Further, the destruction of the presumption of innocence under Sections 22, 23 and 45 cannot even meet the test at the pre-complaint and pre-cognizance stage[53] and the accused cannot escape the rigors of custody as per Section 167 of the Cr.P.C. As such, these conditions of reverse burden are in violation of Articles 14 and 21 of the Constitution. Presumption of innocence even in the pre-constitutional era has been a part of the right to a fair trial.[54] After the Constitution came into existence, it has formed a part of a human right and procedure established by law.[55] Lack of oversight in an investigation under the PMLA is said to be in gross violation of justice, fairness and reasonableness. It is also pointed out that while the predicate offence might be investigated, protected under the garb of the Cr.P.C., the non-application of such safeguards under the PMLA is wholly unjustified.[56] The procedure as envisaged under the PMLA, especially under Section 17, vests the

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[53] *Ranjitsing Brahmajeetsing Sharma vs. State of Maharashtra & Anr.,* (2005) 5 SCC 294 (paras 10, 11 and 21).

[54] *Attygalle & Anr. vs. The King,* AIR 1936 PC 169

[55] *Noor Aga vs. State of Punjab & Anr.*, (2008) 16 SCC 417

[56] *State of West Bengal & Ors. vs. Committee for Protection of Democratic Rights, West Bengal & Ors.,* (2010) 3 SCC 571 (Para 68)

executive with the supervisory power in an investigation. The same is anathema to the rule of law and the magisterial supervision of an investigation is an integral part and is a necessity for ensuring free and fair investigation.[57]

(i) It is further submitted that not supplying of the ECIR to the accused is in gross violation of Article 21 of the Constitution, the ECIR being equivalent to an FIR instituted by the ED. It contains the grounds of arrest, details of the offences; and as such, without the knowledge of the ingredients of such a document the ability of the accused to defend himself at the stage of bail cannot be fully realized. It may also hamper the ability to prepare for the trial at a later stage[58]. Further, it is submitted that even under the 1962 Act and the Foreign Exchange Regulation Act, 1973[59], Section 167 of the Cr.P.C. has been held to be applicable and also found to be a human right[60]. Further, it is argued that there is no rational basis for a search or a seizure to be reported to the Adjudicating Authority,

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[57] *Sakiri Vasu vs. State of Uttar Pradesh & Ors.,* (2008) 2 SCC 409 (paras 15-17)

[58] *Youth Bar Association of India* (supra at Footnote No.11); Also see: *D.K. Basu vs. State of W.B.,* (1997) 1 SCC 416

[59] For short, "FERA"

[60] *Directorate of Enforcement vs. Deepak Mahajan & Anr.,* (1994) 3 SCC 440

as they have no control. Further, the PMLA has two sets of processes for attachment and confiscation which is subject to final determination. Hence, lack of judicial oversight is irrational, as attachment is a step-in aid for final adjudication. In absence of safeguards and supply of ECIR, a fair investigation is not a statutory obligation. This is contrary to the Constitution and the Cr.P.C. Further, it is submitted that personal liberty under Article 21 cannot be curtailed as the ED manuals, circulars and guidelines are administrative directions and cannot be regarded as law under Article 13 of the Constitution. Such restrictions on personal liberty based on administrative directions are neither reasonable restrictions nor law under Articles 13 and 19(2) of the Constitution. Reliance has been placed on a plethora of cases, such as ***Bidi Supply Co. vs. Union of India & Ors.***[61], ***Collector of Malabar & Anr. vs. Erimmal Ebrahim Hajee***[62], ***G.J. Fernandes vs. The State of Mysore & Ors.***[63] and ***Bijoe Emmanuel & Ors. vs. State of***

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[61] AIR 1956 SC 479 (para 9)

[62] AIR 1957 SC 688 (paras 8,9)

[63] AIR 1967 SC 1753 (para 12)

Kerala & Ors.[64] to show that the inapplicability of Chapter XII of the Cr.P.C. cannot be countenanced.

(ii) It is also argued that the PMLA has inadequate safeguards for guaranteeing a fair investigation. For, there are no safeguards akin to Sections 41 to 41D, 46, 49, 50, 51, 55, 55A, 58, 60A of the Cr.P.C. Under Chapters V and VII of the PMLA, safeguards are limited to Sections 16 to 19 and 50. The onerous bail conditions under Section 45 are in the nature of jurisdiction of suspicion that is preventive detention under Article 22(3) to 22(7), which in itself has various safeguards which are absent in the PMLA. Further, post 2019 amendment, making money-laundering a cognizable and non-bailable offence, there are no more checks and balances present against the exercise of discretion by the ED. Magisterial oversight has been revoked; also, supervision envisaged under Section 17 is that of the executive which is against the rule of law and right of fair trial[65]. It is also stated that under the current scheme, an accused will be subject to two different procedures which is under the predicate offence and under the PMLA. To illustrate, Sections 410

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[64] (1986) 3 SCC 615 (paras 9, 10, 13-19)

[65] *Sakiri Vasu* (supra at Footnote No.57) (paras 15-17)

and 411 of the IPC are scheduled offences overlapping with Sections 3 and 4 of the PMLA. However, the safeguards provided are nowhere uniform. The same is unreasonable and manifestly arbitrary[66]. It is also to be noted that the PMLA does not expressly exclude the application of Chapter XII of the Cr.P.C. and as such, ambiguity must be interpreted in a way that protects fundamental rights of the people[67].

(iii) The next leg of the argument is to the effect that subsequent amendment cannot revive Section 45, which was struck down as unconstitutional by the decision in ***Nikesh Tarachand Shah***[68]. The same could have not been revived by the 2018 and 2019 amendments. A provision or a statute held to be unconstitutional must be considered stillborn and void, and it cannot be brought back to life by a subsequent amendment that seeks to remove the constitutional objection. It must be imperatively re-enacted[69]. Further, even in arguendo, the twin conditions are manifestly

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[66] *Subramanian Swamy vs. Director, Central Bureau of Investigation & Anr.,* (2014) 8 SCC 682 (paras 49, 70).

[67] *Tofan Singh* (supra at Footnote Nos. 24 and 31) (para 4.10)

[68] Supra at Footnote No.3

[69] *Saghir Ahmad vs. State of U.P. & Ors.*, AIR 1954 SC 728 (para 23); Also see: *Deep Chand vs. The State of Uttar Pradesh & Ors.,* (1959) Supp. 2 SCR 8 (para 21)

arbitrary as it is against the basic criminal law jurisprudence of the right of presumption of innocence. This right has been recognized under International Covenant on Civil and Political Rights[70], as well as, by this Court in ***Babu vs. State of Kerala***[71]. It is also contended that subjecting an accused person not arrested during investigation to onerous bail conditions under Section 45 is contrary to the decision of this Court[72]. It was urged that even other statutes have such twin conditions for bail such as Terrorist and Disruptive Activities (Prevention) Act, 1987[73], the Maharashtra Control of Organised Crime Act, 1999[74] and the NDPS Act. However, it is pointed out that it has been held that such onerous conditions were necessary only in certain kinds of cases - for example, terrorist offences, which are clearly a distinct and incompatible offence in the face of PMLA. Further, it is argued that even under the Unlawful Activities (Prevention) Act, 1967[75], the Court has to examine only

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[70] For short, "ICCPR"

[71](2010) 9 SCC 189 (paras 27 and 28)

[72] *Satender Kumar Antil vs. Central Bureau of Investigation & Anr.,* (2021) 10 SCC 773 and clarificatory order dated 16.12.2021 in MA No. 1849/2021

[73] For short, "TADA Act"

[74] For short, "MCOCA"

[75] For short, "UAPA"

whether the allegation is *prima facie* true while granting bail, but in case of PMLA, the Court has to reach a finding that there are reasonable grounds for believing that the accused is not guilty before granting bail. Thus, as soon as charges are framed, a person is disentitled to apply for bail as *prima facie* case is made out, which helps in achieving the purpose of preventive detention without procedure established by law[76]. Further, these deep restrictive conditions even under the UAPA and the NDPS Act are restricted only to parts of these Acts and not to the whole of them. However, the same is not the case under the PMLA, as it is applicable to all predicate offences. Such an approach ignores crucial distinctions such as nature, gravity and punishment of different offences in the Schedule of PMLA and treats unequals as equals. This is in violation of Article 14 of the Constitution of India. Reliance is also placed on ***United States vs. Anthony Salerno***[77], where restrictive bail provisions are permitted in pre-trial detention because of the presence of detailed procedural safeguards. Still, it is argued, that such restrictive bail provisions cannot oust the ability of

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[76] *Ayya alias Ayub vs. State of U.P. & Anr.*, (1989) 1 SCC 374 (paras 11-17)

[77] 107 S.Ct. 2095 (1987)

Constitutional Court to grant bail on the ground of violation of Part III of the Constitution[78]. Further, it has been held that Magistrate must ensure that frivolous prosecution is weeded out. Provisions such as Sections 21, 22, 23 and 45 of the PMLA reverse the burden and curtail the jurisdiction of the trial Court arbitrarily in violation of the findings of this Court[79]. Thus, various counts that have been argued herein point out that the PMLA suffers from manifest arbitrariness in light of ***Shayara Bano vs. Union of India & Ors.***[80] and ***Joseph Shine vs. Union of India***[81].

4. Next in line for submissions on behalf of private parties is Dr. Abhishek Manu Singhvi, learned senior counsel. He firstly argued the point of burden of proof under Section 24 of the PMLA. He has pointed out that prior to amendment, the entire burden of proof right from investigation till the judgment was on the accused. Even though this has changed post 2013 amendment and some balance has been restored, it has not fully cured this section of its

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[78] *Union of India vs. K.A. Najeeb,* (2021) 3 SCC 713 : 2021 SCC Online SC 50 (para 18)

[79] *Krishna Lal Chawla & Ors. vs. State of Uttar Pradesh & Anr.*, (2021) 5 SCC 435

[80] (2017) 9 SCC 1 (paras 87, 101)

[81] (2019) 3 SCC 39 (paras 61, 103, 105)

unconstitutional nature. He has gone into the legislative history of the Act and stated that originally the presumption was raised even prior to the trial and state of charge, this was diluted by the amendment of 2013 thereafter the presumption would only apply after the framing of charges.

(i) Learned senior counsel submits that the wording of Section 24 refers to formal framing of charges under Section 211 of the Cr.P.C. For this submission, he relies on the speech of the Minister introducing the amendment in the Parliament. It has been stated that presumption is raised in relation to the fact of money-laundering. Such a presumption cannot be raised in relation to an essential ingredient of an offence. The commission of an offence, as such, cannot be presumed. In reference to Section 4 of the 1872 Act, distinction between sub-sections (a) and (b) of Section 24 is highlighted, wherein the former states - 'shall presume' and the latter states - 'may presume'.

(ii) It is urged that post amendment also there is no requirement for the prosecution to prove any facts once the charges are framed. The entire burden of disproving the case, as set out in the complaint, inverts onto the accused. It is, hence, contrary to the requirement

of proof of foundational facts, as is seen in other legislations. Such an inversion is not present in any other statute. It is stated that even in the NDPS Act, where no requirement of foundational facts was provided, this Court has read such necessity into the Act. As for sub-section (b), it is pointed out that the 'may presume' provision eliminates the safeguards of sub-section (a) and provides no guidance as to when a presumption is to be invoked. The learned counsel also points the discrepancy that the word 'authority' appearing in Section 24, which also appears in Section 48, is distinctive in nature and that Section 24 absurdly allows an investigator to presume the commission of an offence. This is clearly arbitrary and *de hors* logic. In light of the same, the constitutional *vires* of the section are challenged or a reading down to fulfil the constitutional mandate is pressed for.

(iii) The next point of attack for Dr. Singhvi, learned senior counsel is the constitutionality of Sections 17 and 18. The absence of safeguards in lieu of searches and seizures is canvassed. It has been pointed out that such searches or seizures can take place even without an FIR having been registered or a complaint being filed before a competent Court. Foremost, the legislative history of these

two Sections is pointed out. It is shown that originally the search and seizure was to be conducted after the filing of a chargesheet or complaint in the predicate offence. Thereafter, the protection was diluted by the 2009 amendment, wherein it was provided that the search and seizure operations would take place only after forwarding a report to the Magistrate under Section 157 of the Cr.P.C. It was only in 2019 that these final safeguards were also completely removed by the Finance (No. 2) Act, 2019. The effect, it is argued, is such that the ED has unfettered powers to commit searches and seizures without any investigation having been done in the predicate offence, and sometimes even without an FIR being registered. There are no prerequisites or safeguards as the ED can now simply walk into a premises. Even for non-cognizable offences, the ED need not wait for the filing of a complaint before a Court. In this way, in the absence of any credible information to investigate, the ED cannot be allowed to use such uncanalized power. The magisterial oversight cannot be replaced by the limited oversight of the Adjudicating Authority, as they have no real control over the ED, especially in case of criminal investigations. Thus, it is submitted that such lack

of effective checks and balances is unreasonable and violative of Articles 14 and 21 of the Constitution.

(iv) Our attention is also drawn to the Prevention of Money-Laundering (Forms, Search and Seizure or Freezing and the Manner of Forwarding the Reasons and Material to the Adjudicating Authority, Impounding and Custody of Records and the Period of Retention) Rules, 2005[82], and it is prayed that this Court must clarify that these rules are not *ultra vires* Sections 17 and 18 of the PMLA. Pertinently, they relate to the provisions of Cr.P.C. being applicable to searches under the Act.

(v) Next leg of submissions challenges the *vires* of the second proviso of Section 5(1), as it allows for attachment independent of the existence of a predicate offence, given that such property might not even be proceeds of crime. Though an emergency procedure, no threshold had to be met and the first proviso has no application. It is also submitted that the proviso cannot travel beyond the scope of the main provision. Our attention is drawn to the legislative history; it is stated that the PMLA did not originally contain the second

[82] For short, "Seizure Rules, 2005"

proviso. Attachment was only to be done after filing of chargesheet in the predicate offence. For the first time, in 2009, this proviso was added, to avoid frustration of the proceedings. It is submitted that this proviso has no anchor to either the scheduled offence or the proceeds of crime. It is at the mere satisfaction of the officer. In this way, it is submitted, attachment of property of any person can be made, with no fetters. Our attention is also drawn to the use of word 'any' for person and property and its distinction from the term 'proceeds of crime', having a direct nexus with the ambit of the main Section. It is argued that it is not to be mixed with any offence but only scheduled offences. The ED is alleged to employ this language in attaching property purchased much before the commission of scheduled offences, to the extent not having any nexus. It is submitted that there has to be a link between the second proviso to the proceeds of crime and scheduled offence being investigated under a specific ECIR before the ED.[83]

(vi) Submissions with respect to Section 8 of the PMLA maintain that Section 8(4) allows the ED to take possession of the attached

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[83] *Dwarka Prasad vs. Dwarka Das Saraf*, (1976) 1 SCC 128, Also see: *Satnam Singh & Ors. vs. Punjab & Haryana High Court and Ors.*, (1997) 3 SCC 353

property at the stage of confirmation of provisional attachment made by the Adjudicating Authority. It is submitted that this deprivation of a person's right to property at such an early stage without the due process of law, is unconstitutional. Further the period of attachment under Section 8(3)(a) of the PMLA is also arbitrary and unreasonable. To make good the point, the relevant legislative history is pointed out. The original enactment where provisional attachment would continue during the pendency of proceedings related to 'any scheduled offence'. Thereafter in 2012, the same was changed to 'any offence under the PMLA', followed by 2018 amendment – 'a period of ninety days during investigation of the offence or during pendency of proceedings under the PMLA', and finally by 2019 amendment the increase from 'ninety days' to 'three hundred and sixty-five days'. We are also taken through the elaborate process of attachment of property. Thereby, it is highlighted that the ED can take possession of property after a single adjudicatory process, wherein there is no oversight over the ED. It is stated that such alienation of property without any proceedings having been brought before the Court is undoubtedly an unconstitutional act. As for Section 8(3)(a) clarification is sought in

light of the confusion that it allows for a continuation of the confirmed provisional attachment for three hundred and sixty-five days or during the pendency of proceedings under the PMLA. This might lead to a reading where the ED has a period of three hundred and sixty-five days to file its complaint.

(vii) Learned counsel then referred to the Prevention of Money-Laundering (Taking Possession of Attached or Frozen Properties Confirmed by the Adjudicating Authority) Rules, 2013[84] wherein specific challenge is raised against Rules 4(4), 5(3), 5(4) and 5(6). The main ground of challenge is disproportionality, similar to the attachment issue, transfer of attached shares and mutual funds, depressing of value of property, eviction of owners of a movable property, possession of productive assets along with gross income, all monetary benefit is stated to be arbitrary, reasonable, absurd and disproportionate. Herein, it is highlighted that various anomalies may crop up, such as taking of the shares and the ED becoming the majority shareholder in corporations, attachment of properties worth far more than the value of proceeds of crime. Under Section

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[84] For short, "Taking Possession Rules, 2013"

2(1)(zb), the expression "value" is defined as fair market value on the date of acquisition and not fair market value on date of attachment. Arguably, property bought years ago is thereby undervalued by the ED. Attachment of immovable property and eviction in case of unregistered leases is also challenged. To challenge this disproportionate imposition and restrictions, reliance is placed on ***Shayara Bano***[85]***and Anuradha Bhasin vs. Union of India & Ors.***[86].

(viii) It is then urged by the learned counsel that Section 45(1) of the PMLA, reverses the presumption of innocence at the stage of bail as an accused. According to him, the accused at this stage can never show that he is not guilty. It is also maintained that these are disproportionate and excessive conditions for a bail. Reference is also made to ***Nikesh Tarachand Shah***[87] to the limited extent that the 2018 amendment has not removed invalidity, pointed out in the aforesaid judgment of this Court. It is also stated that regardless of the amendment, the twin condition is in violation of Article 21 of the

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[85] Supra at Footnote No.80 (paras 101-102)

[86] 2020 (3) SCC 637

[87] Supra at Footnote No.3

Constitution by virtue of the nature of the offence under PMLA. It is stated that presumption of innocence is a cardinal principle of Indian criminal jurisprudence.[88] Reference is also made to ***Kiran Prakash Kulkarni vs. The Enforcement Directorate and Anr***.[89] Arguments have also been raised against an amendment through a Money Bill being violative of Article 110 of the Constitution. The need for interpretation by ***Rojer Mathew vs. South Indian Bank Limited and Ors***.[90] has also been asserted. The 2018 amendment is also challenged by referring to the notes on Clauses of the Finance Bill, 2018. It is also pointed out that similar amendments were proposed for the 1962 Act in the year 2012 and, yet, the same were dropped at the insistence of members of the Parliament[91].

(ix) Further, given the maximum punishment of seven (7) years under PMLA, it was argued that it is disproportionate when comparing the same to other offences under the IPC which are far more serious in nature and are punishable with death. In light of the same, it is highly questionable as to how such an onerous

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[88] *Arnab Manoranjan Goswami vs. State of Maharashtra & Ors.*, (2021) 2 SCC 427 (para 70)

[89] Order dated 11.4.2019 in S.L.P. (Criminal) No.1698 of 2019

[90] (2020) 6 SCC 1

[91] Speech of Shri. Arun Jaitley dated 26.3.2012 in the Rajya Sabha

condition can be imposed on an accused. It is also pointed out that several scheduled offences are bailable. Further, the anomaly that at the time of arrest under Section 19 no documents are provided in certain cases, has also been highlighted. It was also stated that it is a near impossibility to get bail as under the UAPA, TADA Act, or the Prevention of Terrorism Act, 2002[92].

5. Mr. Mukul Rohatgi, learned senior counsel was next to argue on behalf of private parties. He urged that the Explanation to Section 44 is contrary to Section 3 read with Section 2(1)(u), hence, the same is unsustainable and arbitrary in the eyes of law. Special emphasis was laid on the expression "shall not be dependent upon any order by the Trial Court in the scheduled offence". It was argued that both trials may be tried by the same Court. In such a case, Section 3 offence cannot be given pre-eminence, as that would run contrary to Section 3 and would be manifestly arbitrary, given the fact that an acquittal in the scheduled offence cannot lead to one being found guilty for the derivative offence of money-laundering. A direct link between the proceeds of crime and Section 3 offence was also

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[92] For short, "POTA"

highlighted. It was submitted that the Special Court cannot continue with the trial for Section 3 offence once acquittal in the predicate offence takes place. Section 44 unmistakably provides for the Special Court trial of money-laundering. It was pointed out that it is normal that if one is acquitted for the predicate offence, the money-laundering procedure could still go on. This is contrary to the definition under Section 3, which states that money-laundering is inextricably linked to the predicate offence.

(i) It was also pointed out that the usual practice is of filing an ECIR on the same day or right after the FIR has been filed by replicating it almost verbatim. Canvassing for proper procedure and investigation before filing of the ECIR and initiation of the process under the PMLA, reference was also made to other Acts, such as Smugglers and Foreign Exchange Manipulators Act, 1976[93], FERA or Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974[94] and the 1962 Act, being Acts which would not subsist alone or by themselves without the predicate offences[95].

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[93] For short, "SAFEMA"

[94] For short, "COFEPOSA"

[95] *Barendra Kumar Ghosh vs. The King Emperor,* 1924 SCC OnLine PC 49 : AIR 1925 PC 1

(ii) It was also argued that often the ED widens the investigation beyond what is contained in the chargesheet. This is contrary to the intentions of the Act. The true meaning of the definition under Section 3 of the PMLA was proposed to be divided into three components of predicate offence, proceeds of crime and projecting/claiming as untainted. It was conceded that even abetment would form a part of the offence and as a consequence, whoever attempts, assists, abets, incites - are all covered by the same. For predicate offence and Section 3, it was stated that if the former is gone, the latter cannot subsist.

(iii) Next argument raised pertained to the ambit and meaning of Section 3. It was submitted that mere possession or concealment of proceeds of crime will not constitute money-laundering and this was bolstered by the phrase 'projecting or claiming as untainted property'. The "and" was stated to be a watertight compartment. The Finance Minister's 2012 Rajya Sabha Speech was also relied upon to showcase how "and projecting" was an essential element.

6. Mr. Amit Desai, learned senior counsel also advanced submissions on behalf of private parties. He also took us through

the history of money-laundering, starting from the Conventions to the FATF and UN General Assembly Resolution[96], which led to the 1999 Bill to help combat and prevent money-laundering. He relies on the Statement of Objects and Reasons of the Act[97], followed by the initial ambit of Sections 2(1)(p), 2(1)(u) and 3, which were amended by the 2013 amendment. It is stated that the Act presupposes the commission of a crime which is the predicate offence; hence the questions to be answered by this Court are related to retrospectivity. Firstly - whether authorities can proceed against an accused when commission of the predicate offence predates the addition of the said offences to the Schedule of the PMLA? Secondly - whether the authorities can proceed against the properties obtained or projected prior to the commission of an offence under this Act? Thirdly - whether authorities can proceed when the predicate offence and the projecting predate the commencement of this Act? Fourthly - whether jurisdiction subsists under the Act

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[96] Special Session of the United Nations held for 'Countering World Drug Problem Together' held in June 1998.

[97] "objective was to enact a comprehensive legislation inter alia for preventing money laundering and connected activities confiscation of proceeds of crime, setting up of agencies and mechanisms for coordinating measures for combating money-laundering, etc". It was also indicated that the proposed Act was "an Act to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto".

when no cognizance has been taken, the accused has been discharged or acquitted or the offence compounded? Lastly, learned counsel also challenges the rigors of the twin conditions for being incongruent with general bail provisions under Sections 437 and 439 of the Cr.P.C. as being *ultra vires*.

(i) Learned counsel refers to one of the cases in this batch, wherein the properties sought to be acquired by the ED were obtained by the petitioner prior to 2009, while the commission of offence was in 2013 and Section 13 of the PC Act was inserted into the PMLA Schedule for the first time in 2009. This, it is maintained cannot fit into the term "proceeds of crime" under Section 2(1)(u), the same having been done prior to 2009. It has also been submitted that for the determination of money-laundering under Section 3 or any other provision of the Act, the relevant time has to be the time of the commission of the scheduled offence. The rationale being that only the presence of a scheduled offence can lead to the generation of proceeds of crime and, hence, in return the offence of money-laundering can be committed. Thus, in a way it is suggested that the starting point for a conviction for Section 3 might be the commission of a scheduled offence. The argument in respect of the

protections provided by the Constitution under Article 20(1), as per which ingredients for an offence must exist on the day the crime is committed or detected, have also been impressed in opposition of any retrospective or retroactive application of the Act. To bolster the arguments, reliance has been placed on the decisions of this Court in ***Soni Devrajbhai Babubhai vs. State of Gujarat and Ors.***[98], ***Mahipal Singh vs. Central Bureau of Investigation & Anr.***[99], ***Tech Mahindra Limited vs. Joint Director, Directorate of Enforcement, Hyderabad & Ors.***[100]**,** and ***Gadi Nagavekata Satyanarayana vs. Deputy Director Directorate of Enforcement***[101] and that of Delhi High Court in ***Arun Kumar Mishra vs. Directorate of Enforcement***[102], ***M/s. Ajanta Merchants Pvt. Ltd. vs. Directorate of Enforcement***[103] and ***M/s. Mahanivesh Oils & Foods Pvt. Ltd. vs. Directorate of Enforcement***[104].

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[98] (1991) 4 SCC 298 (also at Footnote No.131)

[99] (2014) 11 SCC 282

[100] WP No. 17525/2014 decided on 22.12.2014 by High Court of Andhra Pradesh

[101] 2017 SCC Online ATPMLA 2

[102] 2015 SCC OnLine Del 8658

[103] 2015 SCC OnLine Del 8659. The decision was assailed by ED before this Court in SLP (Crl.) No. 18478/2015, wherein an order of Status-quo came to be passed.

[104] 2016 SCC OnLine Del 475. The judgement however was challenged by ED in LPA before the Division Bench wherein it was held that the same shall not be treated as precedent.

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(ii) The argument that to qualify for the offence of money-laundering, the essential ingredient of 'projection' or 'claiming' it as 'untainted property' is imperative, has also been pressed into service. It is also urged that proceeds of crime can only be generated from the commission of a predicate offence and the commencement of investigation arises only if a predicate offence has generated such proceeds of crime only subsequent to the inclusion of the predicate offence to the Schedule of the PMLA. Another point that has been highlighted is that the projecting, if done prior to the date of inclusion of the offence to the Schedule, the same cannot be continuing and as such, is stated to be stillborn for the purposes of the PMLA.

(iii) It is urged that for the purposes of bail, it is settled law that offences punishable for less than seven years allows a person to be set free on bail. As such, the liberty as enunciated by Article 21 of the Constitution cannot be defeated by such an Act. Thus, Section 45(2) of the PMLA is contrary to general principles of bail and the Constitution of India. It is also pointed out that Section 437 of the Cr.P.C. imposing similar conditions as Section 45(2) restricts it to offences punishable with either life imprisonment or death.

Under no condition can it be said that the bail conditions under the PMLA, imposing maximum seven years, are reasonable. Without prejudice to the aforementioned argument, it was stated that Section 45(2) could only be applicable to bail applications before the Special Court and the special powers under Section 439 Cr.P.C. It was submitted that in light of the same, special powers be given to the Special Court under the PMLA, as these provisions, draconian in nature, were contemplated only in Acts, such as TADA Act, POTA, MCOCA & NDPS Act, since securing the presence was difficult in all of the above. Further, unless Section 3 was to be restricted to organised crime syndicate, which was in fact the real intent, the bail provisions are liable to be struck down.

7. Mr. S. Niranjan Reddy, learned senior counsel contends that it is essential to first understand as to whether money-laundering is a standalone offence or dependent on the scheduled offence? He points out that the ED has maintained the former stance. It has been pointed out that this view has been rejected by the High Courts of Delhi, Allahabad and Telangana. On the contrary, the High Courts of Madras and Bombay have accepted such a view. It has

been added that the ED's contention is based on the Explanation added to Section 44(1)(d) by the 2019 amendment. Concededly, though there are certain exemptions in Section 8(7), it is contended, that the same are only for special circumstances. Learned counsel then refers to the sequence of conducting the matters and points out Sections 43(2) and 44(1), whereby the Special Court can try the scheduled offence, as well as, the money-laundering offence. He points out that due to different findings of different High Courts, certain questions have arisen as to the sequence of conducting the said two cases. The High Courts of Jharkhand and Kerala have taken a view that both matters can be tried simultaneously; there is no necessity to hold back the trial of money-laundering until the scheduled offence has been tried. It has been submitted that the High Court of Kerala finds that the offence of money-laundering is dependent on the scheduled offence. The High Court for the State Telangana, on the other hand, finds money-laundering completely independent of the scheduled offence. To drive the point home, attention is drawn towards Section 212 of the IPC, where the High Courts have taken a view that unless the original offence is proved, the person harbouring the accused cannot be sentenced. However,

it is also pointed out that Section 212 can be tried simultaneously with the original offence.

(i) Additionally, it has been submitted that Section 2(1)(u) and Section 3 of the PMLA have been given a very expansive meaning, whereby people who do not have knowledge or have not participated, being totally unrelated third parties, are also being roped in to the investigations. The culpability has to be maintained. Wrong interpretation is given to proceeds of crime to be any property even obtained or derived indirectly. Persons who have not committed the scheduled offence deriving certain indirect benefits, even without knowledge, based on Section 24 presumption are held to be guilty of laundering money.

(ii) Further, the question of retrospectivity has also been addressed, whereby after the 2019 amendment, money-laundering is now said to be a continuing offence connected with the proceeds of crime. It is urged that the ED contends that prosecution or attachment can take place irrespective of whether the alleged offence was committed even prior to enactment in 2002, irrespective of the addition of the predicate offence in the PMLA Schedule. It is submitted that there are various amendments which are substantive

in nature, being given retrospective effect, such as Sections 2(1)(u), 3, 8, 24, 44, etc. It has also been brought to our notice that prior to the 2013 amendment in the context of Section 8, the High Court of Andhra Pradesh, the Madras High Court and the High Court of Gujarat have held that attachment causes civil consequences of confiscation. Meaning that in case a scheduled offence is committed prior to the enactment of the PMLA or inclusion of certain offences in its Schedule, attachment or confiscation can go on. However, since then, the amendment has brought about a new legal question. Today, the line between civil and criminal consequences has changed, since Section 8 now is dependent upon one being held guilty for money-laundering. Hence, it cannot be applied retrospectively for predicate offences or scheduled offences committed prior to the PMLA enactment. Reference has also been made to the finding of the Hyderabad High Court where Section 8(5) being quasi criminal, has been found to be prospective.

8. Dr. Menaka Guruswamy, learned senior counsel urged that substantive due process has replaced procedure established by

law[105]. Learned counsel has also pointed out aspects of substantive due process and the procedure of mandatory open Court review. In the context of right of accused during interrogation, it was submitted that this Court dealt with 'due process' rights in the ***Mohammed Ajmal Mohammad Amir Kasab alias Abu Mujahid vs. State of Maharashtra***[106], where the use of *Miranda* rights has been rejected. Learned counsel has also gone into the facts of the case, where it is stated that there has been a six year long pre-trial procedure in both the predicate offence and laundering offence with limited right of participation and a reverse burden of proof.

(i) It has also been argued that Section 50 infringes upon the right to liberty of a person summoned under the Act and violates the right against self-incrimination. The non-compliance with Section 53 is penalized through Section 63 of the PMLA. The learned counsel has adopted the arguments made by other learned counsel in reference to ***Tofan Singh***[107]. It is argued that the use of the term "any person"

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[105] *Mohd. Arif alias Ashfaq vs. Registrar, Supreme Court of India & Ors.*, (2014) 9 SCC 737 (para 28); Also see: *Sunil Batra vs. Delhi Administration & Ors.*, (1978) 4 SCC 494; *Mithu vs. State of Punjab,* (1983) 2 SCC 277.

[106] (2012) 9 SCC 1

[107] Supra at Footnote No.31 (also at Footnote No.24)

without exclusion of the accused under Section 50 is in violation of the due process. No safeguards provided under the Cr.P.C. and the 1872 Act are extended to person proceeded for PMLA offence. It is stated that the stage at which a person is guaranteed the constitutional right under Article 20(3), cannot be made malleable through legislation. It is stated that even though the PMLA is a complaint-based procedure, by way of Section 50, one cannot ignore the pre-complaint stage. As such, Section 50 must be rendered unconstitutional. Further, it is argued that the ED practice is a perverse incentive structure for constitutional infringement where an accused is trapped and sweeping interrogations are conducted aimed at justifying the summons issued. In respect of Section 44(1)(d), it is stated that the right to a fair trial is taken away and this provision irreversibly prejudices the accused in the trial adjudicating the predicate offence.[108]

(ii) Further, the Explanation to Section 44(1)(d) requires the two trials to be conducted before the Special Court, but as separate trials, is said to render the requirement of a fair trial impossible. To

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[108] *Nahar Singh Yadav & Anr. vs. Union of India & Ors.,* (2011) 1 SCC 307

bolster this ground, it is said that when a judge receives evidence under Section 50 of the PMLA in case of money-laundering, he cannot remain an independent authority when deciding the predicate offence based on the material placed before him. Thus, this paradoxical provision forms a complete absurdity for a judge dealing with two different sets of rights for the same accused regarding the connected facts. That is for every predicate offence which would have otherwise been tried by a Magistrate, the investigation by the ED will tend to influence the mind of the judge[109]. Further, reliance has also been placed on Suo Motu Writ (Crl.) No. 1 of 2017 in Re: To issue certain guidelines regarding inadequacies and deficiencies in criminal trials[110]. The Court has incorporated the Draft Rules of Criminal Practice, 2021 which have been circulated for adoption by all High Courts. It is also argued that Section 44 takes away the right of appeal from the predicate offences triable by the Magistrate's Court[111].

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[109] *Hanumant Govind Nargundkar & Anr. vs. State of Madhya Pradesh,* AIR 1952 SC 343 (para 10)

[110] *Criminal Trials Guidelines Regarding Inadequacies and Deficiencies, In re, vs. State of Andhra Pradesh & Ors.,* (supra at Footnote No.12)

[111] *Himanshu Singh Sabharwal vs. State of Madhya Pradesh & Ors.*, (2008) 3 SCC 602

(iii) It is urged that the PMLA creates an overbroad frame with no fetters on investigation. The refusal to provide a copy of the ECIR creating an opacity surrounding the usage of the ED Manual is also under challenge. Section 4(b)(v) of the Right to Information Act, 2005[112] is pressed into service to showcase that every public authority is obligated to publish within 120 days of enactment of the Act - the rules, regulations, instructions, manuals and records held by it or its employees for discharge of its functions. Contrary to the above-mentioned provisions, the ED Manual is said to be a mystery for the general public. Reference is also made to the decision of the Bombay High Court, wherein the Maharashtra Police was asked to provide a copy of the police manual in response to an RTI application[113]. It is submitted that such non-disclosure of the ED Manual is unsustainable in law. It makes the securing of pre-trial rights of an accused difficult. Even the CBI manual which is based on a statutory provision of the Cr.P.C., has been found by this Court to be necessary and to be adhered scrupulously by the CBI[114].

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[112] For short, "RTI Act"

[113] *State of Maharashtra vs. Chief Information Commissioner & Anr.*, 2018 SCC OnLine Bom 1199

[114] *Vineet Narain & Ors. vs. Union of India & Anr.,* (1998) 1 SCC 226; Also see: *Shashikant vs. Central Bureau of Investigation & Ors.,* (2007) 1 SCC 630; *Central Bureau of Investigation vs.*

Similarly, other authorities, such as the Central Vigilance Commission, Income Tax authorities, authorities under the 1962 Act, police authorities, jail authorities, are all governed by manual published by them. Thus, it is only the ED which follows a distinct approach of non-disclosure.

(iv) It has also been argued that the Schedule of the PMLA renders several bailable offences as non-bailable when this Court has repeatedly held that bail is the rule and jail is the exception[115]**.** Predicate offences which under their original act such as the Bonded Labour System (Abolition) Act, 1976[116], are bailable but on the application of the PMLA, become non-bailable. The intention and provision of the underlying special Act, hence, becomes otiose by the overbroad provisions of the PMLA. In another breath, it is argued that the attachment procedure under the PMLA runs contrary to the provisions contained in the predicate offence. It is also perplexing, as the underlying statute itself contain the procedure to attach

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Ashok Kumar Aggarwal, (2014) 14 SCC 295; and *State of Jharkhand through SP, Central Bureau of Investigation vs. Lalu Prasad Yadav alias Lalu Prasad,* (2017) 8 SCC 1.

115 *State of Rajasthan, Jaipur vs. Balchand alia Baliay,* (1977) 4 SCC 308; Also see: *Sanjay Chandra vs. Central Bureau of Investigation,* (2012) 1 SCC 40; *State of Kerela vs. Raneef,* (2011) 1 SCC 784 (para 15).

116 For short, "1976 Act"

illegal proceeds of crime. Aid of the UAPA and Securities and Exchange Board of India Act, 1992[117] is taken to buttress that while under the predicate offence, attachment can take place only after the conviction, Section 5 of the PMLA enables attachment of property prior to conviction. This creates two different standards and two different criminal attachment proceedings for essentially the same offence. Even the Cr.P.C. provides for depriving criminals of the fruit of the crimes and allows for the true owner of the property to be restored with the position thereof by way of Section 452(5).

(v) The next point argued is in respect of the adjudicatory paralysis in the Appellate Tribunal. It is submitted that it is one of the only safeguards in this draconian law to provide an oversight to prevent abuse of mechanism of attachment. Even this oversight has been rendered redundant since there has been no appointment of a chairperson or members of the said Tribunal since 21.09.2019. Thus, making the Tribunal redundant. Further, it is stated that taking the possession at the stage when only a provisional attachment has been made, can cause great hardship and financial

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[117] For short, "SEBI Act"

ruin, amounting to virtually declaring a person guilty and is avoidable. Further, certain official data has been brought to our attention to demonstrate the ineffectiveness of the unconstitutional legislations, where raids have increased each financial year and, yet, since 2005 the number of convictions till 2015-16 has remained zero and, thereafter, reached a maximum of four in 2018-19.

9. Then, Mr. Aabad Ponda, learned senior counsel contended that without prejudice to all the submissions, Section 50(3) and Section 63(2)(a) and (c) of the PMLA, insofar as they relate to the accused persons, are *ultra vires* being violative of Articles 20(3) and 21 of the Constitution of India. He submitted that under the current scheme of the Act, a scheduled offence requires a prior FIR. A person so named in the FIR would stand in the character of an accused person, and as such, he cannot be compelled to incriminate himself or produce documents incriminating himself under Section 50(3) of the PMLA. The next leg of the argument is to the extent that Section 63(2)(c), which mandatorily penalises person for disobedience of Section 50, cannot be applicable to an accused person given the constitutional protections of Articles 20(3) and 21, whereby he has

the right to exercise his fundamental right to silence. We are also shown the analogous provisions similar to Section 50(3) and 50(4) of the PMLA in other statutes, such as Section 171A of the 1878 Act, inserted by Section 12 of the Sea Customs (Amendment) Act, 1955; Section 108 of the 1962 Act; Section 14 of the Central Excises and Salt Act, 1944[118] and Section 40 of the FERA. Learned counsel further argued and distinguished custom officers and other above referred officers from the ED officers to the effect that they only recover duty and do not investigate crimes like the ED officials. Even otherwise, it is to be noted that even though Section 50 of the PMLA may appear to be akin to summons issued under Section 18 of 1962 Act and other above-mentioned statutes, however, there is a deep differentiation. For, when a person is summoned under the above-mentioned Acts, such as the 1962 Act, he is not in the shoes of an accused. He only becomes an accused once an FIR or complaint has been filed before a Magistrate. This, however, he states, is not the case under the PMLA. To drive home the point as to who stands in the character of an accused, reference has been made to certain Constitution Bench decisions of this Court, which have already been

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[118] For short, "CESA 1944 Act"

referred to by the previous learned counsel. To wit, ***Romesh Chandra Mehta vs. State of West Bengal***[119], ***Balkishan A. Devidayal vs. State of Maharashtra***[120] and ***Selvi***[121].

(i) Similarly, Mr. Ponda, learned senior counsel also relied on the decision in ***Ramanlal Bhogilal Shah & Anr. vs. D.K. Guha & Ors.***[122] and pointed out that even in cases of FERA, a person stands in the character of an accused in a separate FIR for the same transaction. He cannot be compelled to incriminate himself. He maintains that this is a case wherein the ED itself had investigated the accused under the FERA. It was found that even though ordinarily under the FERA a person is not an accused, however, in this particular case, an FIR had been registered against the said person and he, being an accused, could not be compelled to answer questions that would incriminate him. The same plea has also been upheld in ***Poolpandi & Ors. vs. Superintendent, Central Excise and Ors***.[123]. It was urged that an accused cannot be compelled to

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[119] (1969) 2 SCR 461 : AIR 1970 SC 940

[120] (1980) 4 SCC 600 (also at Footnote No.41)

[121] Supra at Footnote No.43

[122] (1973) 1 SCC 696 (paras 2, 3, 4, 5, 11, 12, 17, 18-25)

[123] (1992) 3 SCC 259

produce any incriminating documents which he does not want to produce. Reliance was placed on ***State of Gujarat vs. Shyamlal Mohanlal Choksi***[124]. Moreover, it is reiterated that the protection against self-incrimination applies not only in Court proceedings, but also at the stage of investigation[125].

(ii) Further, it was urged that Section 2(1)(na) of the PMLA defines "investigation". As such, proceedings under Section 50 is clearly a part of investigation for the collection of evidence. The summons under Section 50(2) is to give evidence or produce records during the course of investigation under the Act, thus, protected by Article 20(3). Section 50(4) of the PMLA also stipulates that they are judicial proceedings, therefore, a person accused will be protected under Article 20(3). Section 63(2)(a) and 63(2)(c) inflict grave prejudice upon the accused, as he is liable to be further prosecuted for the failure to give information and provide documents which will incriminate him. Our attention is also drawn to the usual practice wherein persons are labelled as non-cooperative during the

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[124] AIR 1965 SC 1251 (and the Majority view from paras 23 onwards, relevant paras 32, 34 and 41)

[125] Relied on *Kathi Kalu Oghad* (supra at Footnote No. 44), *Nandini Satpathy* (supra at Footnote No.35), *Selvi* (supra at Footnote No.43) and *Tofan Singh* (supra at Footnote Nos.24 and 31)

proceedings which are judicial in nature and used as a pretext to arrest or extend remand under the PMLA. It is a direct affront to fundamental rights and a travesty of justice.

10. Mr. Siddharth Aggarwal, learned senior counsel, also appeared for the private parties. His main opposition is to the retrospective application of the PMLA. Certain questions are raised with respect to whether prosecution for money-laundering is permissible if the commission of scheduled offence and proceeds of crime takes place prior to the PMLA coming into force; and, similarly, in a situation when it is committed prior to the offence being made part of the Schedule of the PMLA. It is submitted that the prohibition against retrospective operation of substantial criminal statutes is a constitutional imperative which needs to be given its fullest interpretation in a purposive manner. He highlights the three situations where interpretation is warranted. One, where transactions were concluded prior to the enforcement of PMLA; two, prior to the offences being added to the Schedule of the PMLA; and three, whether amendment is applied with retrospective effect

couched in the guise of an Explanation introduced by the 2019 amendment.

(i) It is urged that no person can be convicted for criminal offence unless it has been specifically given retrospective effect, given the essential ingredient of 'knowledge' of the person for taking such an action and exposing himself to criminal liability. In line with the protection under Article 20(1) and the maxim of *'nova constitutio futuris formam imponere debet non praeteritis'*[126], judgments of this Court were relied to urge that the general rule is applicable when the purpose of the statute in question is to affect vested rights/impose new burdens/impair existing obligations[127].

(ii) To make good the submission on retrospectivity, it is pointed out that as per the definition, money-laundering is dependent on proceeds of crime, which in turn depends on criminal activity relating to a scheduled offence. As such, it is stated that no proceeds of crime can exist to be generated from a criminal activity unless the

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[126] *Keshavan Madhava Menon vs. The State of Bombay,* AIR 1951 SC 128 (para 15)

[127] See : *Soni Devrajbhai Babubhai* (supra at Footnote No.98) (paras 8-10); *Ritesh Agarwal & Anr. vs. Securities and Exchange Board of India & Ors.*, (2008) 8 SCC 205 (para 25]; *Harjit Singh vs. State of Punjab,* (2011) 4 SCC 441 (paras 13-14); *Varinder Singh vs. State of Punjab & Anr.*, (2014) 3 SCC 151 (para 10); and *Commissioner of Income Tax (Central)-I, New Delhi vs. Vatika Township Private Limited*, (2015) 1 SCC 1 (paras 27-31)

PMLA comes into force. That too, it has to be connected to the date when the Schedule has accepted the new predicate offence. It only means that property which is not "proceeds of crime", cannot by virtue of PMLA, retrospectively characterised as such in a true sense. Further, prior to the enactment of the PMLA, there was no similar offence dealing in proceeds of crime or economic advantages derived from criminal offences. He points out that there were various enactments which dealt with the illegal fruits of criminal activity. Thus, the PMLA cannot be added to the list of disabilities in law to illegal monies in a retrospective manner. He was critical about many amendments taken place over the years and especially the fact that the true import of Section 3 is being expanded by a mere addition of an Explanation in 2019. As such the purport of the main, a much narrow provision, cannot be changed[128]. None of the amendments to Section 3 or changes in Schedule have a language bearing a retrospective effect. Section 3 amendment was only "for removal of doubts" in contrast with the amendment of Section 45 which was

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[128] *Bihta Co-operative Development and Cane Marketing Union Ltd. & Anr. vs. Bank of Bihar & Ors.*, AIR 1967 SC 389 (paras 5 & 7-8]; *Dattatraya Govind Mahajan & Ors. vs. State of Maharashtra & Anr.*, (1977) 2 SCC 548 (para 9); *S. Sundaram Pillai & Ors. vs. V.R. Pattabiraman & Ors.*, (1985) 1 SCC 591 (paras 27 & 45-53); *Jagan M. Seshadri vs. State of T.N.,* (2002) 9 SCC 639; and *Hardev Motor Transport vs. State of M.P. & Ors.*, (2006) 8 SCC 613 (para 31)

"deemed to have always meant". Several judgments of the High Courts, pending adjudication before this Court, holding that the PMLA cannot be applied retrospectively, were also referred[129].

(iii) Additionally, the impact of insertion of Clause (ii) of the Explanation to Section 3 vide the 2019 amendment, is also questioned. It is stated that a continuing offence is not defined in any statute. Some offences are described in a way that make it clear that the offending activity is a continuing one, some illustrations are in Section 281 in the Cantonments Act, 2006[130]; Section 36(1)(iii)(d) in the Pharmacy Act, 1948[131] and Sections 162(1) & 220(3) in the Companies Act. Hence, a continuing offence is one which can be distinguished from an offence which is committed once and for all. It is submitted that it is an offence where until the obeying or compliance of rule or a requirement is effectuated, every subsequent

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[129] *Tech Mahindra Ltd.* (supra at Footnote No.100) (Telangana & AP High Court, decided on 22.12.2014 – paras 12, 33, 65-67 & 68-71) read with Order dt. 08.12.2017 passed by this Court in SLP (Crl.) Diary No. 34143/2017; *M/s. Ajanta Merchants Pvt. Ltd.* (supra at Footnote No.103 – paras 20-22 & 29); *Arun Kumar Mishra* (supra at Footnote No. 102 – paras 19-21 & 27-28); *Mahanivesh Oils & Foods Pvt. Ltd.* (supra at Footnote no. 104 – paras 25-27, 33-35, 37 & 38-39]; *Obulapuram Mining Company Pvt. Ltd. vs. Joint Director, Directorate of Enforcement, Government of India,* ILR 2017 Kar 1846 (paras 5 & 10-12); *Ajay Kumar Gupta & Ors. vs. Adjudicating Authority (PMLA) & Ors.*, (2017) 2 LW (Cri) 252 (paras 7, 10 & 13-22) and *Madhu Koneru vs. The Director of Enforcement,* Crl. Pet.No. 4130/2019, decided on 02.06.2021 by the High Court of Telangana (paras 31-32).

[130] For short, "2006 Act"

[131] For short, "1948 Act"

non-compliance leads to the commission of the offence again and again[132]. In case of money-laundering, it is urged that there is a clear starting point and an end point to the same, where the generation of proceeds of crime starts and ends in the integration of proceeds of crime into the financial bloodstream as untainted money. Thus, though it may take place over time but it cannot be considered as a continuing offence. Further, for the purpose of substantive interpretation, no reference can be made to the Explanation added by the 2019 amendment, since it is a mere explanation which cannot widen the ambit of the main section itself[133].

11. Mr. Mahesh Jethmalani, learned senior counsel was next in line to advance submissions on behalf of the private parties. He submitted that Section 44(1)(a) of the PMLA is unconstitutional and violative of Articles 14 and 21 of the Constitution. He contends that there is no nexus of the said Section with the object of the PMLA.

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[132] *State of Bihar vs. Deokaran Nenshi & Anr.*, (1972) 2 SCC 890 (para 5); *Commissioner of Wealth Tax, Amritsar vs. Suresh Seth,* (1981) 2 SCC 790 (paras 11-17). [Note: observations on 'continuing offence' affirmed by this Court in *Smt. Maya Rani Punj (Smt.) vs. Commissioner of Income Tax, Delhi*, (1986) 1 SCC 445 (paras 15-20)]

[133] *M/s. Ajanta Merchants Pvt. Ltd.* (supra at Footnote No.103) (para 37)

This section does not contemplate a joint trial of the offence under Section 3 and the scheduled offence. Further, he interprets Section 44(1)(a) to mean that the Special Court can only try the scheduled offence, but not together; it has to be separately tried as per the provisions of the Cr.P.C. It is also said that the rationale behind this change is difficult to fathom. On the other hand, it is pointed out that the accused's right of being tried as per the Cr.P.C., for scheduled offence is being violated, at least in respect of 37 out of 58 scheduled offences of the IPC noted in the Schedule to the 2002 Act, are triable exclusively by a Magistrate of the First Class or any Magistrate. In support of this argument, reliance has been placed on ***A.R. Antulay vs. R.S. Nayak & Anr.***[134]. It is submitted that the present interpretation of this section leads to the violation of the right to be tried by a Magistrate First Class, the right of a first appeal to Sessions Court under Section 374(3) and the right of revision to the High Court under Section 401 of the Cr.P.C. from the appellate judgment of the Sessions Court. This leads to a rather oppressive interpretation where an accused who is not charged under the PMLA offence but only under the predicate offence is also tried by the

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[134] AIR 1988 SC 1531 (para 59): (1988) 2 SCC 602

Special Court. This is also hit by the fact that several of the scheduled offences within the PMLA are themselves part of special statutes which prescribe that they shall be tried by the Special Court established under those special statutes exclusively. For example, the PC Act, the NDPS Act and the National Investigation Agency Act, 2008[135]. Thus, in such a case the PMLA Special Court cannot have power to try offences punishable under those Acts. The phrase 'any scheduled offences' as contemplated under Section 44(1)(a) of the PMLA is in a manifest conflict with these three statutes and, hence, liable to be struck down. Learned counsel also submits that the Section is a legal absurdity as to how a Special Court could try a scheduled offence before the commencement of the Act without which commencement of the Special Court has no existence. It is also stated the discretion to choose which issue or scheduled offence to try before the Special Court lies only with the authority authorised to file a complaint under the PMLA, which is a discretionary and unfettered arbitrary power.

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[135] For short, "NIA Act"

(i) As regards Section 44(1)(c), it is urged that the same does not mandate disclosure of any reason for filing the application. Further, such an application can be moved at any stage of the proceedings for the inquiry or trial of a scheduled offence. Such a provision cannot be read to allow committal at a stage when the trial is over and only the judgment remains to be delivered. This tantamounts to authorising exercise of administrative fiat in respect of subject matter, which is in fact a quasi-judicial act. Similarly, even the Magistrate is not obligated to state reasons while deciding the application and as such his order, if not reasoned, will be a nullity. The interpretation of the words 'commit' and 'committed' is said to be misconceived under Section 44(1)(c). It is urged that the use of the word 'committal' is inappropriate and the real intention of the present Section is a mere transfer of the case to the PMLA Special Court. As such, it is submitted that the case be sent to the Special Court which has already taken cognizance of the complaint under the PMLA and not any other Special Court. Reliance has been placed on the decision of the Delhi High Court in ***Directorate of Enforcement vs. Surajpal & Ors.***[136] and on the other hand, the

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[136] 2018 SCC OnLine Del 10472 (Paras 15-16)

decision of the High Court of Kerala in ***Inspector of Police, CBI vs. Assistant Directorate, Directorate of Enforcement (PMLA) & Anr.***[137], wherein it is observed that it is not mandatory to make an application for committal to Special Court in every case and, similarly, not mandatory for the Court to allow every such application without application of mind and *dehors* the merits of the case. Hence, the conflict of view between the two High Courts needs to be resolved.

(ii) Referring to Section 45, it is argued that Sections 201 and 212 of the IPC provide for graded punishment or in line with the principle of an accessory after the fact. Attention has been drawn to a few cases to show that these Sections prescribe gradation of punishment depending on the nature of offence which the principal offender has committed[138]. It is stated that Section 3 of the PMLA offence also is one kind of an accessory after the fact offence. It is also maintained that in certain cases the proceeds of crime or the scheduled offence may be committed by some person and the laundering might be done

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[137] 2019 SCC OnLine Ker 4546

[138] *Sou. Vijaya Alias Baby vs. State of Maharashtra,* (2003) 8 SCC 296 (Para 6); Also see: *State of Karnataka vs. Madesha & Ors,* (2007) 7 SCC 35 and *In Re Kuttayan alias Nambi Thevar,* AIR 1960 Mad 9

by a completely different person. In such a case, where money-laundering is not directly connected with the scheduled offence, the laundering is merely an accessory after the fact. He submits that even though the offence of money-laundering is a serious offence, however, the severest punishment is only seven years. Thus, twin conditions under Section 45 are grossly disproportionate and illogical for the crimes provided under the PMLA. It is also stated that the equation of the bail provisions under the PMLA cannot be made to the NDPS Act or UAPA. Further, even a serial murderer who may be liable for capital punishment is not subjected to such stringent condition, as under Section 45 of the PMLA. Irrespective of the deleterious impact on the economy of a country, it does not shock the conscience of the society as much as the conduct of the serial murderer. Reliance is also placed upon ***Nikesh Tarachand Shah***[139] in support of the argument that even if the amendment to Section 45 (which was struck down in the aforementioned case) saves the conditions from the vices on which it was struck down, the vice of Article 21 persists owing to the presumption of innocence

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[139] Supra at Footnote No.3

having been turned on its head. It is also said that the current provision has no compelling State interest for tackling serious crime and we must be doubly sure to allow such attack on the fundamental right of personal liberty.

(iii) As for Section 24 and the burden of proof which is reversed within this Act, it is stated that Section 24(a) applies only after charges have been framed by the Special Court. Section 24(b) refers to persons not charged with the offence of money-laundering under Section 3 and it is further contended that Section 24(a) and (b) have no application to proceedings for bail. Furthermore, it is stated that presumption of innocence is a golden thread running through all criminal proceedings. This can apply only in cases of extremely serious offences on the ground of compelling State interest. It is submitted that in such a case where the maximum sentence is of seven years, such a provision is *ultra vires* Article 21 of the Constitution. It is argued that in special statutes like UAPA, MCOCA and the PC Act, the reverse burden of proof has only been upheld due to the compelling State interest, such as security and public order. Thus, it is agreed that in cases of narco terrorism, underworld, gangs the undoubted evils may prosper; hence, Section

24(a) can accordingly be read down so as to apply to cases of laundering where the predicate offence seeks to punish nefarious activities.

12. Mr. Abhimanyu Bhandari, learned counsel also argued on behalf of private parties. His foremost challenge is to the interpretation of Section 3, post addition of the Explanation vide the 2019 amendment**.** He has more or less reiterated the same arguments as advanced by the previous learned counsel that by way of Explanation, the ingredient of offence under Section 3 is sought to be altered by reading "and" as "or". He has relied upon the reports and speeches of the Minister in the Parliament. Additionally, he has placed reliance on the Vienna Convention and United Nations Convention Against Transnational Organized Crime, 2000[140], which state that money-laundering is only committed if the 'use' and/or 'concealment' is 'for the purposes of concealing or disguising the illicit origin of the property' or 'helping any person who has been involved in the commission of the predicate offence to evade the legal

[140] For short, "Palermo Convention" or "the 2000 UN Convention"

consequences of his/her action'[141]. Reliance is also placed on ***Nikesh Tarachand Shah***[142], wherein it has been held that it is the concealing or disguising by projecting tainted monies as untainted money and not their spending that is prohibited.

(i) Thus, exception is taken that the Explanation as added by the 2019 amendment has wholly changed the scope of the main provision which is the definition. It is contrary to the concerns of the Select Committee and subsequent to this Explanation, a person would now commit the offence of money-laundering the minute proceeds of crime are generated. A similarity is drawn with Section 1956 of the United States Code[143] where money-laundering is to conceal the illicit background of the source of the money. Further, reliance is also placed on American decisions where the Circuit Courts have held that it is not spending or using of proceeds of crime that amounts to the offence of money-laundering, but laundering of such proceeds of crime[144]. Further, it has been stated that this

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[141] See Article 6 of the Palermo Convention

[142] Supra at Footnote No.3

[143] Title 18 US Code S. 1956- Laundering of Monetary Instruments

[144] *United States of America vs. Renee Armstrong Sanders,* 929 F.2d 1466 (10th Cir. 1991); *United States of America vs. Paul Johnson*, 440 F.3d 1286, 1293 (11th Cir. 2006); *United States of America v Roger Faulkenberry*, 614 F.3d 573 (6th Cir. 2010); and *Jennifer Wang, Yes, That is*

Court in a catena of decisions, held that newly added Explanations must be read so as to harmonise and clear of ambiguity in the main Section and cannot be construed to widen the ambit of the previous state of the Section[145].

(ii) The next contention is regarding the definition of "proceeds of crime" and use of value thereof, defined under Section 2(1)(u) of the PMLA**.** It is argued that it can be categorised into three types namely: one - property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence; or, two - the value of such property that is property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence; and third - where such property is taken on field outside the country, then the property equivalent in value held within the country or abroad.

(iii) It is submitted that by reason of the Explanation(s) added in 2019, it cannot be interpreted to include property not only derived or obtained from the scheduled offence but also any property which

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Money Laundering. Oh Wait, It's Not: The Impact of Cuellar on Concealment Money Laundering Case Law, 18 J Bus L 255 (2015).

[145] *Nagar Palika Nigam vs. Krishi Upaj Mandi Samiti & Ors.*, AIR 2009 SC 187 and *Rohitash Kumar & Ors. vs. Om Prakash Sharma & Ors.*, AIR 2013 SC 30.

may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence. Further, the Explanation to the term "property", also would now include property "used in the commission of an offence". To this, reference is made to Articles 1 and 5 of the Vienna Convention and Article 12 of the Palermo Convention to show that if the criminal activity does not generate any proceeds, then there cannot be any 'proceeds of crime'. Further, the ambit of property also is said to have been enlarged disproportionately. As such, proceeds of crime need to be generated from the scheduled offence alone and not any criminal activity. To demonstrate the vice, various illustrations were also pointed out to us. It is imperative that Courts can differentiate between property being used to commit an offence and property derived from the commission of an offence, as is already accepted in other common law countries[146]. Thus, it is submitted that such an amendment by way of Explanation cannot expand the scope of a section. Reference is also made to the fact that attachment of property of an equivalent value where the actual proceeds are no longer available, is similar to other Acts, such as the UAPA, the NDPS Act, the Prohibition of

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[146] *R v Ahmad*, [2012] 2 All ER 1137; Also see: *R v James*, [2012] 2 Cr App R (S) 253

Benami Property Transactions Act, 1988[147] and the Fugitive Economic Offenders Act, 2018[148], all having similar definition of proceeds of crime. Objection is taken to term "property equivalent in value", where properties are attached which have been derived from proceeds of crime even if they are different from the original form when the proceeds were generated[149]. Further, for the interpretation of 'value thereof', it is said that a broader interpretation would be contrary to Sections 8(5) and 8(6) of the PMLA. Hence, by way of illustration, where the original proceeds of crime are interchanged and mixed with legitimate money, it is argued that giving a broad interpretation to 'value thereof' would be unreasonable[150].

(iv) In respect of Section 8, it is argued that the true meaning of the words "take possession" of property under Section 8(4) should be constructive possession instead of physical possession since it is highly prejudicial for the accused during the pendency of the trial.

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[147] For short, "1988 Act"

[148] For short, "2018 Act"

[149] *Abdullah Ali Balsharaf & Anr. vs. Directorate of Enforcement & Ors.,* 2019 SCC Online Del 6428; and *Seema Garg vs. Deputy Director, Directorate of Enforcement*, 2020 SCC Online P&H 738

[150] *Seema Garg* (supra at Footnote No.149 above)

Reliance is placed on a decision that has been stayed by the Division Bench of the Madras High Court which had originally held it to be symbolic possession instead of actual[151]. It is urged that Article 300A is not only a constitutional right but also a human right. Further, confiscation is only subject to conviction and such disposition in all practical sense, leads to a confiscation prior to such conviction. Further, since there is no compensation in case a person is eventually acquitted, this would be a disproportionate action. As such, the argument that one needs to be restrained from selling or creating encumbrance is valid, the dispossession is not.

13. Mr. N. Hariharan, learned senior counsel, who argued next, referred to ***Nikesh Tarachand Shah***[152]. Vide this decision, twin conditions in Section 45(1)(ii) of the PMLA, came to be struck down being violative of Articles 13(2), 14 and 21 of the Constitution. He submits that post Constitution laws declared unconstitutional for violation of Part III as void *ab initio* cannot be revived by

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[151] *A. Kamarunnisa Ghori vs. The Chairperson, Prevention of Money Laundering, Union of India*, 2012 (4) CTC 608 : 2012 Writ LR 719

[152] Supra at Footnote No. 3

amendments[153], as such laws are void since inception. Further, he relied upon ***State of Gujarat & Anr. vs. Shri Ambica Mills Ltd., Ahmedabad & Anr.***[154], to contend that Section 45(1) cannot survive on the statute books[155]. Reference has also been made to ***G. Mohan Rao vs. State of Tamil Nadu & Ors.***[156]. In his argument, two situations evolving from the decision of ***Nikesh Tarachand Shah***[157] have been put forth. One, where only the twin conditions were stuck down and the remaining provision remained untouched. Second, where classification based on Part A of the Schedule was also struck down in addition to striking down of the twin conditions. The second situation is said to be even more damaging given that the substitution by the Finance Act, 2018 is targeted only to this classification of Part-A of the Schedule, since the Court in the reported decision found this classification to be manifestly arbitrary, as it bore no rational relation to the object of the Act. Hence, the substitution by the Finance Act, 2018 cannot be justified, as the

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[153] *Deep Chand* (supra at Footnote No.69); *Saghir Ahmad* (supra at Footnote No. 69) and *Mahendra Lal Jaini vs. State of Uttar Pradesh & Ors.*, AIR 1963 SC 1019

[154] (1974) 4 SCC 656

[155] Supra at Footnote No.154

[156] 2021 SCC OnLine SC 440

[157] Supra at Footnote No. 3

substitution of this pre-existing term cannot appear on the statute book due to the striking down. It also reminded that this submission was made without prejudice to the contention that the twin conditions themselves need to be enacted separately since they have been struck down. Further, even if the violation of Article 14 has been cured, such amendments cannot go on to cure the defect of violation of Article 21.

14. Mr. Vikram Chaudhari, learned senior counsel also representing private parties, raised a challenge against the twin conditions of Section 45(1) which were held unconstitutional in ***Nikesh Tarachand Shah***[158]. Relying on the dictum of this Court in ***State of Manipur & Ors. vs. Surajkumar Okram & Ors.***[159], he submitted that once held unconstitutional, a statute is obliterated entirely, as if it had never been passed, *non-est* for all purposes. He has also relied on his own interpretation of how Section 45(1) is to be read post ***Nikesh Tarachand Shah***[160]. He has also pointed out

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[158] Supra at Footnote No. 3

[159] 2022 SCC OnLine SC 130

[160] Supra at Footnote No. 3

that despite this decision an editorial error where bare acts, post the judgment, did not remove the offending (void) provision. It is, therefore, submitted that issue is not whether twin conditions under Section 45(1) would apply or not or of their constitutional validity, but would be as to their existence. He also referred to Clauses 204 and 205 of the Bill which amended Section 45 in 2018[161]. The intention was to take steps to further delink the scheduled offence and money-laundering offence, and to allow the Courts to apply lenient bail provisions, for sick and infirm. Further, the interpretation to the amendment sought by the State is said to be ill-founded and untenable since there is no reference to the pronouncement of ***Nikesh Tarachand Shah***[162] and was for the purpose of delinking the scheduled offence and money-laundering.

(i) In respect of the procedure found in Chapter XII of the Cr.P.C. for the purposes of investigation, he relied upon ***Ashok Munilal***

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[161] Which states that "(v) to amend section 45 of the Act relating to offences to be cognizable and non-bailable and to amend sub-section (1) of section 45 to substitute the words "punishable for a term of imprisonment of more than three years under Part A of the Schedule" by words "under this Act" **so as to take a step further towards delinking the Scheduled offence and money laundering offence.** Further, it seeks to amend the proviso in subsection (1) by inserting the words "or is accused either on his own or along with other co-accused of money laundering a sum of less than Rupees one crore", after the words "sick or infirm" **to allow the Court to apply lenient bail provisions** in case of money laundering offence is not grave in nature."

(emphasis supplied)

[162] Supra at Footnote No. 3

Jain & Anr. vs. Assistant Director, Directorate of Enforcement[163], wherein it had been noted that Section 4(2) of the Cr.P.C. prescribes mandatory application even in respect to special statutes unless expressly barred[164]. Thus, the dictum is that the provisions of the Cr.P.C. would be applicable to the extent in the absence of any contrary provision in the special Act or any special provision excluding the jurisdiction or applicability of the Cr.P.C. The point of admissibility of statement made to customs officers and Section 25 of the 1872 Act is also touched again[165]. Relying upon ***Om Prakash & Anr. vs. Union of India & Anr.***[166], it is argued that in the absence of a procedure to investigate irrespective of cognizability, no investigation can be permitted in law. And in respect of cognizable offence, the investigation cannot go on without recording information under Section 154 or 155 of the Cr.P.C., forwarding of report or FIR to competent Magistrate under Section 157 of Cr.P.C., maintaining a paginated case diary as under Section

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[163] (2018) 16 SCC 158 (also at Footnote No.22)

[164] *M.K. Ayoob & Ors. vs. Superintendent, Customs Intelligence Unit, Cochin & Anr.*, 1984 Crl.L.J. 949; and *The Senior Intelligence Officer, Directorate of Revenue, Madras vs. M.K.S. Abu Bucker*, 1990 Cri.L.J 704.

[165] *A.R. Antulay vs. Ramdas Sriniwas Nayak & Anr.* (1984) 2 SCC 500

[166] (2011) 14 SCC 1

172 of the Cr.P.C., as also, its production before the Magistrate, as provided by Section 167.

(ii) A passing reference is also made to the Railway Property (Unlawful Possession) Act, 1966[167], whereby vide Section 6, the application of Section 155 Cr.P.C. was excluded, but in the case of PMLA, since there is no express departure from these provisions of the Cr.P.C., it being a non-cognizable offence, all these protections must come into play. In contradistinction, if it is found to be a cognizable offence, all protections including under Sections 154, 157, 167 and 172 Cr.P.C., will prevail.

(iii) Reliance was also placed on ***Union of India vs. Thamisharasi & Ors.***[168] with respect to the NDPS Act and the application of the provisions of the Cr.P.C. For our perusal, a comparative chart had been presented to show the various provisions of the Cr.P.C., which are not displaced in the PMLA. Thus, it is urged that safeguards of the Cr.P.C. were applicable being mandatory, to the extent of the Magistrate being a part of all stages of investigation, commencement and closure of investigation, maintenance of a case diary, adherence

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[167] For short, "1966 Act"

[168] (1995) 4 SCC 190

to Sections 154, 155 and 157, ability to pursue anticipatory bail, bail under Sections 437 and 439, inherent jurisdiction under Section 482 and Article 226 of the Constitution and other records or information which helps to curb fishing and roving enquiries.

(iv) Reliance is placed on the decision of Punjab & Haryana High Court at Chandigarh in ***Gorav Kathuria vs. Union of India & Ors.***[169], which has attained finality, as this Court has declined to interfere in the order of the High Court. Reliance is also placed on the decision of this Court in ***D.K. Basu vs. State of W.B.***[170]. It is urged that in a case under the Drugs and Cosmetics Act, 1940[171] where police officers could no longer investigate, FIRs were made over to the Drug Inspectors. This is indicative of the correct procedure to be followed, unless otherwise provided, even investigation of offences under the special Acts will be governed by Cr.P.C. alone.[172]

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[169] 2016 SCC OnLine P&H 3428

[170] (1997) 1 SCC 416 (also at Footnote No.58)

[171] For short, "1940 Act"

[172] *Union of India vs. Ashok Kumar Sharma & Ors.,* 2020 SCC OnLine SC 683

(v) It is then argued that an umbilical cord connection exists between the scheduled offence and the money-laundering offence. The Explanation of Section 44 is to disconnect the link between the two, since the findings recorded in the trial of the scheduled offence would not have a bearing on the case under the PMLA. Again, reference is made to ***Nikesh Tarachand Shah***[173]. It is urged that the proceeds of crime under Section 2(1)(u) are relatable to a specific scheduled or predicate offence due to the insertion of the word 'the' instead of 'any' and, as such, the ambit cannot be broadened to 'any' scheduled or predicate offence[174]. He submits that certain conclusions are inevitable. Before the ED starts investigation, there must be some commencement under the scheduled or predicate offence. The trials for the specifically connected proceeds of crime and scheduled or predicate offence must be tried together. Finding showing no involvement of accused to the proceeds of crime or criminal activity must cease the proceedings under the PMLA. Non-compliance of Section 44(1)(c) will vitiate the PMLA proceedings. Further, it is submitted that the scope of money-laundering is

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[173] Supra at Footnote No. 3

[174] *Canon India Private Limited vs. Commissioner of Customs,* 2021 SCC OnLine SC 200

limited to projecting and claiming as untainted property, that too relatable to the scheduled offence[175]. In light of the said argument, it is said that the projecting of such proceeds of crime as untainted can be termed as a standalone offence. In furtherance of same, certain facts of the case being Criminal Appeal Nos. 391-392/2018 titled ***Adjudicating Authority (PMLA) and Ors. vs. Ajay Kumar Gupta and Ors***., were also referred to, where the FIR and scheduled offence are both prior to the coming into force of the PMLA and, yet, an ECIR was filed in 2015 after a delay of about 10 years.

15. Mr. Akshay Nagarajan was the last learned counsel to argue on behalf of the private parties. He contended that even though the definitions under Section 3 read with Section 2(1)(u), two conjunctive parts, are meant to cover scheduled offences, they are being used to bring within its sweep even non-scheduled offences. He has contended that the present definition of Section 3 is wide enough to take within its sweep any non-scheduled offence due to the first part of the definition, "acquisition, use, concealment, possession is

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[175] *Attorney General for India & Ors. vs. Amratlal Prajivandas & Ors.*, (1994) 5 SCC 54

capable". However, this contrast is impermissible in law[176]. To buttress this plea, provision of Section 71 of the IPC and Article 20(2) are invoked[177]. He has also submitted that for the purpose of Section 50(3), any statement recorded and deemed to be judicial proceeding, cannot be used in light of Section 132 of the 1872 Act[178].

SUBMISSIONS OF THE UNION OF INDIA

16. Mr. Tushar Mehta, learned Solicitor General led the arguments on behalf of the Union of India, followed by Mr. S.V. Raju, learned Additional Solicitor General.

(i) At the outset, it is submitted by the learned Solicitor General that as on date, around 4,700 cases are being investigated by the ED, which is a small number as compared to annual registration of the cases under the Money Laundering Act in UK (7,900), USA (1,532), China (4,691), Austria (1,036), Hongkong (1,823), Belgium (1,862), Russia (2,764). Further, only 2086 cases were taken up for

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[176] *Sanjay Dutt vs. State through C.B.I., Bombay*, (1994) 6 SCC 86

[177] *The State of Bombay vs. S.L. Apte & Anr.*, AIR 1961 SC 578; Also see: *Thomas Dana vs. State of Punjab*, AIR 1959 SC 375

[178] *Hira H. Advani etc. vs. State of Maharashtra*, (1969) 2 SCC 662, Also see: *R. Dineshkumar alias Deena vs. State represented by Inspector of Police & Ors.*, (2015) 7 SCC 497 (paragraphs 41-44)

investigation in last five years under the PMLA out of registration of approximately 33 lakh FIRs relating to predicate offences by police and other enforcement agencies.

(ii) It is asserted that the validity of the PMLA shall have to be judged in the background of international development and obligation of India to prevent money-laundering, as money-laundering impacts not only the country in which the predicate offence takes place, but also the economy of other countries where "proceeds of crime" is laundered.

(iii) It is submitted that the object of the PMLA which affect the economic fabric of the nation, is to prevent money-laundering, regulate certain activities relatable to money-laundering, confiscate the "proceeds of crime" and the property derived therefrom and punish the offenders. The development of international consensus towards the offence of money-laundering has been highlighted. It is submitted that prior to 1988, there was no concept of "proceeds of crime" and the same was recognized for the first time in ***Regina vs. Cuthbertson & Ors.***[179] by the House of Lords. England was one of

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[179] [1981] A.C. 470

the first countries to take legislative action against proceeds of crime on the recommendations of the Hodgson Committee by enacting Drug Trafficking Offences Act, 1986 (later replaced by the Drug Trafficking Act, 1994) which empowered the Courts to confiscate the proceeds of drug trafficking.

(iv) Later, the Vienna Convention imposed obligation on each participating country to criminalize offences related to drug trafficking and money-laundering[180], to which India is a party.

(v) It is submitted that the provisions of the Palermo Convention were delineated to ensure that participating countries should have appropriate legislation to prevent money-laundering and further, the Convention also placed obligation on the participating nations to utilize relevant international anti-money laundering initiatives in establishing their domestic regulatory and supervisory regimes.

(vi) Further, it is submitted that on 31.10.2003, the UN General Assembly adopted United Nations Convention Against Corruption, whose Preamble recognized the importance of preventing, detecting and deterring international transfers of illicitly acquired assets, and

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[180] Article 3(1)(a)&(b) of the Vienna Convention, 1988

strengthening international cooperation in asset recovery. The Convention mandated the participating States to conduct enhanced scrutiny of accounts sought or maintained by politically exposed persons and their associates and to implement measures to monitor the movement of cash and other instruments across their borders so that a 'paper trail' be created which could assist law enforcement authorities in investigating the transfers of illicit assets.

(vii) Thus, relying on the international Conventions, the Union of India has submitted that it is the international obligations of the State to not only recognize the crime of money-laundering but also to take steps for preventing the same.

(viii) To highlight the role played by the FATF in combating the menace of money-laundering, the respondent has traced the origin of FATF and stated its process of reviewing the compliance with its recommendations by every State and the consequences of non-compliance. It is submitted that the FATF was established by the Heads of State or Government of the seven major industrial nations (Group of Seven, G-7) joined by the President of the European Commission in a summit in Paris in July, 1989 which is famous for its 'Forty Recommendations' to combat money-laundering and,

hence, carry out its own evaluation and enforcement on the issue of money-laundering across the world. Thus, it acts as a dedicated body dealing with this issue. It is submitted that FATF has recognized dynamic nature of money-laundering and thus attempted to respond to the money-laundering techniques that are constantly evolving, by reviewing its recommendations. Further, the FATF has adopted its Non-Cooperative Countries or Territories ("NCCT") initiative in a report issued on 14.2.2020, according to which a 25 points criteria was recognized which is consistent with the Forty Recommendations of the FATF and which identified 'detrimental rules and practices' in the international effort to combat laundering. It thus established a review process to target delinquent countries and territories where the anti-laundering regime is ineffective in practice and to take steps against those countries. The steps which FATF may take against a non-compliant nation include 'conditioning, restricting, targeting or even prohibiting financial transactions with non-cooperative jurisdictions'.

(ix) It is submitted that the measures against money-laundering have evolved over the period of time. Further, FATF has taken preventive, regulatory and monitoring steps through keeping a

watch on suspicious or doubtful transactions by amending its Forty Recommendations in 2003 and 2012.

(x) It is further submitted that FATF assess the progress of its members in complying with the FATF recommendations through assessments performed annually by the individual members and through mutual evaluations which provides an in-depth description and analysis of a country's system for preventing criminal abuse of the financial system, as well as, by focused recommendations to the country to further strengthen its system.

(xi) It is submitted that upon evaluation, a country will be placed immediately into enhanced follow-up if it does not comply with the FATF technical and "big six" recommendations or has a low effectiveness outcome[181].

(xii) It is further submitted that jurisdictions under monitoring then, based on their commitments and compliances, are put in two types of list *viz.*, *grey list and black list*, which serve as a signal to

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[181] (i) It has 8 or more Non-compliant NC/ Partially Compliant (PC) ratings for technical compliance; (ii) It is rated NC/PC on any one or more of R.3, 5, 10, 11 and 20 "big six" recommendations; or (iii) It has a low level of effectiveness for 4 or more of the 11 effectiveness outcomes.

the global financial and banking system about heightened risks in transactions with the country in question which not only severely affect its international reputation but also impose economic challenges, such as impacting the bond/credit market of the country, impacting the banking and financial sector of the country, affecting cross-border capital flows, especially for the trade sector, documentary requirements for export and import payments, such as letters of credit may become more challenging to fulfil, potentially raising costs and hampering business for companies engaged in trade, adversely affecting the economy due to a lack of investment opportunities which may further deteriorate the financial health of the country and the country may also be deemed as a 'high-risk country'.

(xiii) Further, the learned Solicitor General has relied on a report by the International Monetary Fund[182] (IMF) - *Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT)* Report on the Effectiveness of the Program to state the potential economic effects that may arise from such financial crimes, such as

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182 For short, "IMF"

destabilizing capital inflows and outflows, loss of access to international financial markets as a result of deterioration in the country's reputation, difficulty in supervising financial institutions, undermining of the stability of a country's financial system and adverse effect on growth of the country.

(xiv) The respondent has further relied on *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005)* to state that nations are free to choose the definition of 'predicate offences' for money-laundering purposes from the list of offences given under the Convention, for example, by providing a list of those offences, a category offences, or by reference to offences that have a maximum term of imprisonment of one year or more (or, for states that have minimum thresholds for offences, those with imprisonment of a minimum of six months) and to take measures which are preventive in nature.

(xv) To illustrate the global development of the approach against money-laundering, 1991 Money Laundering Directive ('First Directive') adopted by the European Union is cited which imposed obligations on credit institutions and financial institutions in

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relation to customer identification and record-keeping, internal controls and training of staff and mandatory reporting of suspicious transactions. The Second Directive (2001) widened the number of institutions that fell within the scope of reporting obligations and also expanded the range of predicate offences for the purpose of money-laundering. EU Third Directive (2005) was directed to bring the EU legislation into line with the revisions to the FATF Recommendations and further expanded the range of institutions within its scope to include life insurance intermediaries and widened the definition of high value dealers to capture those who accept cash payments of €15,000 or more. A definition of 'serious crimes' was included that constituted 'predicate offences', including all offences punishable by a maximum sentence of one year or more, or a minimum sentence of six months or more (in jurisdictions where minimum sentences are applied), as well as other specified offences including serious fraud and corruption. It is submitted that the EU Fourth Directive on Money Laundering (2015) aimed to improve the regulatory European framework after taking into account new FATF recommendations published in 2012.

(xvi) It is further submitted that the purpose of December 1988 Statement on Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering issued by the Basel Committee was to ensure that banks are not used to hide or launder funds acquired through criminal activities.

(xvii) To emphasize on the role of international cooperation to combat money-laundering, it has been stated that the Financial Intelligence Unit created by the Egmont Group, which is an international forum to combat money-laundering, should serve as a national centre for receiving, analyzing and disseminating suspicious transaction reports, and should have access on a timely basis to the financial, administrative and law enforcement information that it requires to properly undertake its functions as per the revised FATF Recommendations.

(xviii) The Union of India has further traced the origin of the term "money-laundering" and stated that the term arose in United States in 1920s, which was used by the American Police Officers with reference to the ownership and use of launderettes by mafia groups as the launderettes gave them a means of giving a legitimate appearance to money derived from criminal activities. The profits

gained through these launderettes were thus termed 'laundered'. Further, the term 'money-laundering' was first used with a legal meaning in an American judgment of 1982 concerning the confiscation of laundered Columbian drug proceeds.

(xix) It is further submitted that the goal of money-laundering is to conceal the predicate offences and to ensure that the criminals 'enjoy' their proceeds. Further, the money-laundering takes place through 'a complex process often using the latest technology, of sanitizing money in such a manner that its true nature, source or use is concealed, thereby creating an apparent justification for controlling or possessing the laundered money' in a number of intermediate steps.

(xx) It is stated that the reasons for fighting money-laundering, firstly, is to enable law enforcement authorities to confiscate the proceeds of predicate criminal activities so as to undermine organized crime by taking away the incentive for these criminal activities relatable to offences. Secondly, to apprehend high level criminals as they themselves stay aloof from criminal activities but do come into contact with the proceeds of these activities, thereby creating a 'paper trail'. Thirdly, to prevent criminals from

destabilizing the national economy because of its corruptive influence on financial markets and the reduction of the public's confidence in the international financial system and lastly to deter the money launderers from impacting the growth rate of the world economies.

(xxi) It is stated that the principal sources of illegal proceeds are collar crimes (tax, fraud, corporate crimes, embezzlement and intellectual property crimes), drug related crimes and smuggling of goods, evasion of excise duties, corruption and bribery (and the embezzlement of public funds).

(xxii) To show the global impact of money-laundering, it is submitted that the IMF and the FATF have estimated that the scale of money-laundering transactions is between 2% and 5% of the global GDP. It is also stated that the United Nations has recently put the figure of money-laundering at USD 2.1 trillion or 3.6% of global GDP. Thus, the operation of money-laundering has international dimension. It is submitted that measures being taken at the national level would be inadequate, which made it necessary to establish effective international co-operation mechanisms to allow

national authorities to co-operate in the prevention and prosecution of money-laundering and in international 'proceeds-hunting'.

(xxiii) Further, it is submitted that the measures to combat money-laundering have evolved from *post facto* criminalization to preventive approach with its stress on the reporting obligations. The definition of "money-laundering" is now no more restricted to the elements of projection and untainted property.

(xxiv) It is stated that India, and its version of the PMLA, is 'merely a cog in this international vehicle' and as India is a signatory to these treaties, therefore, is bound legally and morally, to adopt the best global practices and respond to the changing needs of the times. It is, therefore, submitted that the constitutionality of the PMLA has to be adjudicated from the stand point of the country's obligations and evolving responsibilities internationally.

(xxv) The learned Solicitor General invited our attention to the introduction to the PMLA. Making reference to the Statement of Objects and Reasons of the Act, he submits that the Act was enacted with the intent of establishing a strict and stringent framework to address the global menace of money-laundering. Refuting the

private parties' attempt to classify the Act as being a purely penal statute, he submits that the PMLA is an amorphous or hybrid statute, which has regulatory, preventive and penal aspects. Learned Solicitor General then walked us through the various provisions of the PMLA, and submitted that categorizing the Act as being merely penal in nature, would not only defeat the purpose of the Act, but would also be against the express provisions enshrined therein.

(xxvi) It is further submitted by the Union of India that the PMLA is a complete Code in itself, and establishes a specific separate procedure to the extent necessary and to be followed in proceedings under the Act. Laying down a brief summary of the legislative scheme of the Act, the respondent submits that there has been a conscious legislative departure from conventional penal law in India. Considering the peculiar nature of money-laundering – which requires prevention, regulation and prosecution, a completely different scheme is framed by the Legislature. The new scheme introduced for dealing with the money-laundering is as a part of India's global responsibility in international law. While complying with the mandate of FATF, the Legislature has very consciously

ensured that the Act becomes compliant with the Constitution of India. Referring to the rules formulated under the PMLA, it is also submitted that the scheme of the Act and rules framed thereunder prescribe an elaborate procedure to ensure complete confidentiality, and place sufficient inbuilt checks and balances to prevent potential abuse.

(xxvii) The respondent then sheds some light on the offences being investigated by the Directorate of Enforcement. It is submitted that the number of cases taken up for investigation each year has risen from 111 cases in 2015-16 to 981 in 2020-21. Comparing the number of cases registered annually under money-laundering legislations, it is submitted that the low registration of cases in India is due to the robust mechanism for risk-based selection of cases for investigation. The ED is focusing its attention on cases involving high value of proceeds of crime and cases involving serious predicate offence involving terror financing, narcotics, corruption, offence involving national security, etc. To that effect, it is highlighted that attachment proceedings concerning some of the fugitives, who are facing action, were done and assets worth Rs.19,111.20 crores out of a total fraud of Rs.22,585.83 crores were attached. Furthermore,

the investigation in 57 cases of terror and Naxal financing has resulted in identification of proceeds of crime worth over Rs.1,249 crores and attachment of proceeds of crime of Rs.982 crores (256 properties) and filing of 37 prosecution complaints and conviction of two terrorists under PMLA. Lastly, it is stated that the quantum of proceeds of crime involved in the bunch cases under the PMLA which are under consideration in these matters is Rs.67,104 crores.

(xxviii) Having laid down the basic scheme of the PMLA, learned Solicitor General proceeded to discuss the definition of "money-laundering" as per Section 3 of the Act. Tracing its origin, it is submitted that the term "money-laundering" finds its initial definition in Article 3.1(b)(i)(ii) and (c)(i) of the Vienna Convention. However, the Vienna Convention limited the predicate offences to drug trafficking offences, and, consequently, led to the adoption of an expansive definition covering the widest range of predicate offences under the Palermo Convention. Building upon the definitions contained in the Vienna Convention and the Palermo Convention, the FATF recommended member countries to expand the predicate offences to include serious crimes. The same was made binding on the member countries by way of Recommendation

No. 1 and Recommendation No. 3 of the FATF. Subsequent to its enactment, the PMLA became subject to evaluation by the FATF based on the Forty Recommendations formulated by the FATF. In 2010, the FATF adopted the 'Mutual Evaluation of the Anti-Money Laundering (AML) and Combating the Financing of Terrorism (CFT) Regime of India Report'[183]. As per Recommendation No. 1 of the Mutual Evaluation Report, the concealment, possession, disposition and use of proceeds of crime were not criminalized by PMLA, and India was, thus, held to be not fully compliant. Thus, with a view to address the legal deficiency as pointed out by FATF and to make it globally compliant, the Prevention of Money-Laundering (Amendment) Act, 2012 amended Section 3 to include these activities. In support of his argument, learned Solicitor General draws our attention to the Statement of Object and Reasons of Prevention of Money Laundering (Amendment) Bill, 2011[184], and the parliamentary debates surrounding the amendment.

(xxix) Summing up the recommendations of the FATF, it is clarified by the learned Solicitor General that even in an act of mere

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[183] For short, "Mutual Evaluation Report"

[184] For short, "2011 Bill"

concealment, mere possession or mere use of "proceeds of crime" or "activity" connected with the proceeds of crime, *per se*, is an offence. In other words, if a person conceals the proceeds of crime, keeps it in his possession or uses it, he is guilty of money-laundering irrespective of as to whether he is projecting it as untainted or not. This is for the simple reason that if a person conceals something (proceeds of crime), it is an act committed knowingly and, thus, the question of that person projecting that very thing either as tainted or untainted does not arise.

(xxx) It is further explained that the anomaly resulting from an erroneous drafting was successfully explained during the 2013 review of FATF by categorically contending that all expressions following the term "including" are mere illustrative and independently constitute an offence of money-laundering without being dependent upon each other. Thus, so long as a person knowingly becomes a party or is actually involved in any process or activity connected with proceeds of crime, such a person is guilty of money-laundering.

(xxxi) In order to lend further credibility to the sanctity of the FATF Mutual Evaluation Report and the recommendations contained

therein, the learned Solicitor General took us through the numerous amendments incorporated in the PMLA by way of the 2012 Amendment Act which was largely based on the recommendation of the FATF. Special emphasis is laid on the amendments carried out in Sections 5 and 8 of the Act pursuant to FATF recommendations. It is further submitted that apart from the PMLA, corresponding amendments to the UAPA, the NDPS Act and the Companies Act have been also made as a sequel to the FATF recommendation during the Mutual Evaluation of India.

(xxxii) Learned Solicitor General submitted that the interpretation put forth by the other side, would effectively result in granting the accused a license to commit the offence of money-laundering and thereafter either conceal the proceeds of crime, or keep them in his possession, or use them and thereby wriggle out of the legislative intent of preventing money-laundering by raising a plea that the same were never claimed/projected as being untainted property. Reliance is placed on ***Seaford Court Estates Ld. vs. Asher***[185], to point out that principles of statutory interpretation dictate that any

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[185][1949] 2 K.B. 481.

interpretation which leads to mischief should be avoided and the statute should be so construed that the legislative intent is not defeated. It is submitted that the limitations of traditional approach to crime and in fact, highlights the importance of the evolved approach of anti-money laundering laws in the nature of the PMLA. Thus, the definition of "money-laundering" as it exists, passes the muster, both under Articles 14 and 21 of the Constitution of India.

(xxxiii) It is further submitted that the Explanation to Section 3 inserted vide Finance (No.2) Act, 2019, is merely clarificatory in nature and elucidates the legislative intent behind the provision. Reliance is placed on the background/justification of the amendments to PMLA as contained in the debate on the Finance Bill, 2019[186].

(xxxiv) Strong emphasis is laid on the use of the word 'any' in the phrase 'any process or activity'. A careful reading of Section 3 of the PMLA clearly provides that any process or activity which itself has a wider meaning also includes the process or activity of concealment, possession, acquisition, use and/ or projecting, claiming it as

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[186] For short, "2019 Bill"

untainted property. Placing reliance on ***Shri Balaganesan Metals vs. M.N. Shanmugham Chetty & Ors.***[187], it is submitted that all or every type/ species of process or activity connected with proceeds of crime shall be included while interpreting the nature of process or activities connected with the proceeds of crime.

(xxxv) It is further submitted that all and any activities relating to proceeds of crime including solitary – possession, concealment, use or acquisition, constitute and offence of money-laundering, independent of the final projection. It is submitted that such an interpretation is necessary to effectively implement the Act in its true spirit. It is submitted that considering the definition prevailing in India, it is necessary that any and all of the activity or process occurring in the definition after the word 'including' is considered to be merely illustrative and not restrictive. Reliance is placed on catena of judgements[188] to show that the use of the term 'including'

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[187] (1987) 2 SCC 707

[188] *M/s. Doypack Systems Pvt. Ltd. vs. Union of India & Ors.*, (1988) 2 SCC 299; *Municipal Corporation of Greater Bombay & Ors. vs. Indian Oil Corporation Ltd.*, 1991 Supp (2) SCC 18; *Regional Director, Employees' State Insurance Corporation vs. High Land Coffee Works of P.F.X. Saldanha and Sons & Anr.*, (1991) 3 SCC 617; *Forest Range Officer & Ors. vs. P. Mohammed Ali & Ors.*, 1993 Supp (3) SCC 627; *Commercial Taxation Officer, Udaipur vs. Rajasthan Taxchem Ltd.*, (2007) 3 SCC 124; *Associated Indem Mechanical (P) Ltd. vs. W.B. Small Industries Development Corpn. Ltd., & Ors.* (2007) 3 SCC 607; *N.D.P. Namboodripad (Dead) by LRs. vs. Union of India & Ors.*, (2007) 4 SCC 502; *Oswal Fats and Oils Limited vs. Additional Commissioner (Administration), Bareilly Division, Bareilly & Ors.* (2010) 4 SCC 728; and *Mamta*

is not restrictive, but rather further enlarges the scope of the definition.

(xxxvi) Depending upon the facts of the case, he submits that it is quite likely that accused of money-laundering may fall in more than one of the above categories. Therefore, the focus of investigation should be on identification of all the process or activity connected with proceeds of crime including the specific processes and activities, which have been included as illustrations in Section 3. Reliance is placed on ***Rohit Tandon vs. Directorate of Enforcement***[189], to bring forth the interplay between various aspects of Section 3 of the PMLA.

(xxxvii) The learned Solicitor General has also cited other authorities including the observations made by this Court in ***Kartar Singh vs. State of Punjab***[190]***, R. Sai Bharathi vs. J. Jayalalitha & Ors.***[191] and ***Subramanian Swamy vs. Union of India, Ministry of Law & Ors.***[192], to show that it is the sole prerogative of the

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Surgical Cotton Industries, Rajasthan vs. Assistant Commissioner (Anti-Evasion), Bhilwara, Rajasthan, (2014) 4 SCC 87.

[189] (2018) 11 SCC 46

[190] (1994) 3 SCC 569

[191] (2004) 2 SCC 9

[192] (2016) 7 SCC 221

Legislature to define a "crime", and it is this definition that should be at the center of any challenge to a criminal provision.

(xxxviii) It is urged that the 'projection' of proceeds of crime cannot be held as a mandatory requirement under Section 3 of the Act; otherwise, it will become impossible to punish a person for the offence of money-laundering who "knowingly assists" or who is "knowingly a party" or who is "actually involved" in any process or activity connected with the proceeds of crime. It is, therefore, submitted that the correct interpretation of the word "and" should be "or" as it was always intended by the legislature. Further, it is stated that any interpretation contrary to this will render the provision meaningless. To bolster this argument, reliance is placed on the decision of this Court in ***Sanjay Dutt vs. State through C.B.I., Bombay (II)***[193]. In that case the Court held that the word 'and' should be interpreted as 'or' and the words "arms and ammunition" should not be read conjunctively; otherwise, the object of the Act will be defeated. Therefore, on a similar line, it is argued that mere concealment or use or possession of the proceeds of crime

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[193] (1994) 5 SCC 410

would amount to an offence of money-laundering and any other interpretation of the Section would be contrary to the India's international obligation and FATF recommendations. It is submitted that such interpretation of the word "and" would not amount to judicial legislation, as such exercise is only done to give effect to the legislative intent by correcting 'faultiness of expression'[194]. He has relied on ***Joint Directors of Mines Safety vs. M/s Tandur and Nayandgi Stone Quarries (P) Ltd.***[195] to contend that the word "and" was interpreted as "or" by the Court to give effect to the legislative intent of the Mines Act, 1952[196].

(xxxix) Emphasis is also laid on the application of international law while interpreting domestic law and it is stated that the domestic Courts are under an obligation to give due regard to the international Conventions for construing domestic laws[197]. The learned Solicitor General has further placed reliance on ***People's Union for Civil***

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[194] *Regina vs. Oakes* 1959 (2) QB 350, *Ishwar Singh Bindra & Ors. vs. The State of U.P.*, (1969) 1 SCR 219 and *Gujarat Urja Vikas Nigam Ltd. vs. Essar Power Ltd.,* (2008) 4 SCC 755

[195] (1987) 3 SCC 208

[196] For short, "Mines Act"

[197] *Pratap Singh vs. State of Jharkhand & Anr.*, (2005) 3 SCC 551 and *National Legal Services Authority vs. Union of India & Ors.*, (2014) 5 SCC 438

Liberties vs. Union of India & Anr.[198] and ***Githa Hariharan & Anr. vs. Reserve Bank of India & Anr.***[199] to submit that the international Treaties and Conventions may be relied on by the domestic Courts so as to give effect to the international law, if such law is not inconsistent with any domestic law.

(xl) While referring to Sections 4 and 5 of the Cr.P.C., it is urged that Cr.P.C is a generic procedural law with no universal application over any other special criminal or penal legislations. It is stated that the Legislature is competent to provide a different procedure than that of Cr.P.C, provided that the special procedure has adequate constitutional safeguards. Therefore, it is submitted that the Parliament has provided a distinct procedure under the PMLA which is also manifested from Sections 65 and 71 of the PMLA. It is stated that due to the peculiar nature of the offence of money-laundering, the Legislature in its wisdom has provided a special procedure for investigation and trial of the offence under the Act. However, it is submitted that where the application of Cr.P.C is not expressly or by

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[198] (2005) 2 SCC 436

[199] (1999) 2 SCC 228

necessary implication excluded, the provisions of Cr.P.C will apply in light of Section 65 of PMLA as well.

(xli) It is argued that the PMLA is a complete Code in itself, which creates a new offence and provides separate machinery to the extent necessary for dealing with it. Therefore, the provisions of PMLA would override the provisions of the Cr.P.C. in relation to such express dispensation in view of Section 71 of this (PMLA) Act. In support of this argument, reliance is placed on ***Rohtas vs. State of Haryana & Anr.***[200], ***Ajmer Singh & Ors. vs. Union of India & Ors.***[201], ***Usmanbhai Dawoodbhai Memon & Ors. vs. State of Gujarat***[202], ***Central Bureau of Investigation vs. State of Rajasthan & Ors.***[203], ***State (Union of India) vs. Ram Saran***[204], ***Mahmadhusen Abdulrahim Kalota Shaikh (2) vs. Union of India & Ors.***[205], ***Lalita Kumari vs. Govt. of Uttar Pradesh & Ors.***[206], ***Gautam Kundu vs. Directorate of Enforcement (Prevention of***

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[200] (1979) 4 SCC 229

[201] (1987) 3 SCC 340

[202] (1988) 2 SCC 271

[203] (1996) 9 SCC 735

[204] (2003) 12 SCC 578

[205] (2009) 2 SCC 1

[206] (2014) 2 SCC 1 (also at Footnote No.13)

Money-Laundering Act), Government of India[207] and ***Union of India & Ors. vs. Chandra Bhushan Yadav***[208]**.**

(xlii) Next, it is argued that wording of Section 71 must be given effect to. It is asserted that the insertion of a *non-obstante* clause in a statute has the effect of overriding anything inconsistent or repugnant thereto[209]. It is stated that this Court in ***Deep Chand vs. The State of Uttar Pradesh & Ors.***[210] laid down some tests for determining whether any inconsistency or repugnancy exists between two statutes. The Court held that it has to be seen whether the provisions are in direct conflict with each other; whether the legislative intent was to lay down an exhaustive Code on the subject matter and thereby replace the previous law and whether the two legislations operate in the same field.

(xliii) It is argued that when a statute has expressly provided a repealing section then the maxim '*est exclusio alterius'* (the express intention of one person or thing is the exclusion of another) will

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[207] (2015) 16 SCC 1

[208] (2020) 2 SCC 747

[209] *Aswini Kumar Ghose & Anr. vs. Arabinda Bose & Anr*, AIR 1952 SC 369 and *Central Bank of India vs. State of Kerala & Ors.*, (2009) 4 SCC 94

[210] (1959) Supp. 2 SCR 8 : AIR 1959 SC 648 (also at Footnote No.69)

apply, thereby application of existing statute is excluded in case of any inconsistency between the two[211].

(xliv) Reliance has also been placed on ***Innoventive Industries Limited vs. ICICI Bank & Ors.***[212], wherein in respect of a similar provision in the Insolvency and Bankruptcy Code, 2016[213], it was held that the provisions of the stated Code ought to be given primacy over other statutes. It is, therefore, submitted that the procedure under the Cr.P.C to the extent of inconsistent proviso in PMLA, stands excluded by way of Section 71 of the Act by necessary implication. The doctrine of '*generalia specialibus non derogant*', has also been invoked, which means that general law yields to special law. Reliance is placed on the decision of House of Lords in ***Elizabeth Warburton vs. James Loveland***[214]. It is submitted that the said decision has been followed in ***Patna Improvement Trust vs. Smt. Lakshmi Devi & Ors.***[215], ***The South India Corporation (P) Ltd. vs. The Secretary, Board of Revenue, Trivandrum &***

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[211] *Kishorebhai Khamanchand Goyal vs. State of Gujarat & Anr.*, (2003) 12 SCC 274

[212] (2018) 1 SCC 407

[213] For short, "IBC"

[214] (1831) 2 Dow & Cl 480

[215] 1963 (Supp.) 2 SCR 812

Anr.[216]***, Anandji Haridas and Co. (P) Ltd. vs. S.P. Kasture & Ors.***[217]***, Maharashtra State Board of Secondary and Higher Secondary Education & Anr. vs. Paritosh Bhupeshkumar Seth & Ors.***[218]***, Usmanbhai Dawoodbhai Memon***[219] and ***Ethiopian Airlines vs. Ganesh Narain Saboo***[220]***.***

(xlv) It is then submitted that the controversies regarding offence under the Act being cognizable or non-cognizable is irrelevant because the definitions of the cognizable offence under Section 2(c) and non-cognizable offence under Section 2(l) of the Cr.P.C. are clearly inapplicable in the case of ED officers who are not police officers[221], as these two definitions only apply to "police officer". Secondly, the application of these two definitions is restricted to the offences mentioned under the First Schedule of the Cr.P.C. and the offence under the Act (PMLA) is clearly not an offence specified therein. It is submitted that even under Part II of the First Schedule, the offence under the Act would be cognizable. Further, the purpose

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[216] (1964) 4 SCR 280

[217] AIR 1968 SC 565

[218] (1984) 4 SCC 27

[219] Supra at Footnote No.202

[220] (2011) 8 SCC 539

[221] *Romesh Chandra Mehta* (supra at Footnote No.119)

of categorizing an offence on the basis of cognizable and non-cognizable offence is to indicate whether a police officer can arrest a person without warrant. The Act under Section 19 confers unequivocal power of arrest without warrant. Therefore, the question as to whether an offence of money-laundering is cognizable or non-cognizable, is irrelevant.

(xlvi) It is submitted that from the very inception of the PMLA, the offences were made cognizable under Section 45 of the Act. However, the word 'cognizable' was causing unnecessary confusion, as it seemed that offence being cognizable, the jurisdictional police officers are also empowered to investigate the offence and submit chargesheet after the investigation. Although such confusion had no basis as only the ED officers have been empowered to conduct investigation, who are not police officers under the Act, and after the investigation only a complaint could be filed by him before the Special Court. To remove this anomaly, the word 'cognizable' was deleted and the definition of investigation was inserted under Section 2(1)(na) of the Act. In this regard, the learned Solicitor General has cited relevant extracts of speech of then Finance Minister while introducing 2019 amendment.

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(xlvii) It is submitted that the Legislature had no intention to make the offence under the PMLA to be non-cognizable which is manifest from the unamended marginal note[222] of Sections 19 and 45 of the Act. It is further stated that Section 19 of the PMLA has a special purpose with regard to the peculiar nature of the offence. It is then submitted that the Legislature has deliberately avoided the provision of registration of FIR, supplying the copy of FIR to the Magistrate and requiring the authorities to obtain arrest warrant because due to the nature of offence, there are high chances that the accused may eliminate the traces of offence if he had any prior notice of the investigation. The same view has been taken by the Jharkhand High Court in ***Hari Narayan Rai vs. Union of India & Anr.***[223], Punjab & Haryana High Court at Chandigarh in ***Karam Singh & Ors. vs. Union of India & Ors.***[224], Bombay High Court in ***Chhagan Chandrakant Bhujbal vs. Union of India & Ors.***[225], Delhi High Court in ***Vakamulla Chandrashekhar vs.***

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[222] *Bhagirath vs. Delhi Administration*, (1985) 2 SCC 580 and *Eastern Coalfields Limited vs. Sanjay Transport Agency & Anr.*, (2009) 7 SCC 345

[223] 2010 SCC OnLine Jhar 475

[224] 2015 SCC OnLine P&H 19739

[225] 2016 SCC OnLine Bom 9938

Enforcement Directorate & Anr.[226]***, Virbhadra Singh & Anr. vs. Enforcement Directorate & Anr.***[227], ***Moin Akhtar Qureshi vs. Union of India & Ors.***[228] and this Court in ***Directorate of Enforcement vs. Vakamulla Chandrashekhar***[229]. However, in W.P. (Crl.) No. 363 of 2018 and Crl. M.A. No. 2151 of 2018 i.e., ***Rajbhushan Omprakash Dixit vs. Union of India & Anr.***, the Division Bench of the High Court took a different view and referred the matter to a larger bench. It is submitted that the said order is contrary to the decisions of this Court in ***Serious Fraud Investigation Office vs. Rahul Modi & Anr.***[230] and of the High Courts.

(xlviii) Further, the binary created by the private parties of an offence being cognizable or non-cognizable is immaterial in the case of PMLA, which is a Code in itself and provides a special procedure for investigation. It is argued that the compartmentalization of the offence under the Act is pointless because if the offence is held to be

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[226] 2017 SCC OnLine Del 12810

[227] 2017 SCC OnLine Del 8930

[228] vide order dated 01.12.2017 in W.P. (Crl.) No.2465/2017

[229] Order dated 04.01.2018 in SLP (Crl.) Diary No. 36918/2017

[230] (2019) 5 SCC 266

cognizable, then it will be mandatory to register an FIR. However, under the scheme of the PMLA, only an ECIR is registered, which cannot be equated with an FIR and it is only for administrative convenience for identification of each case.

(xlix) It is argued that the decision of this Court in ***K.I. Pavunny vs. Assistant Collector (HQ), Central Excise Collectorate, Cochin***[231], squarely applies to the present case, wherein it had been held that Chapter XII of the Cr.P.C will not apply during the investigations under the 1962 Act.

(l) It is submitted that various High Courts have already answered the question under consideration and held that the offence under the Act is cognizable, so far as power of arrest without warrant is concerned and the ECIR registered under the Act cannot be equated with an FIR.[232] Strong reliance has been placed upon the decisions in ***Virbhadra Singh***[233] and ***Dalmia Cement (Bharat) Limited & Anr. vs. Assistant Director of Enforcement Directorate***[234].

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[231] (1997) 3 SCC 721

[232] *Karam Singh* (supra at Footnote No.224) and *Chhagan Chandrakant Bhujbal* (supra at Footnote No.225)

[233] Supra at Footnote No.227

[234] 2016 SCC OnLine Hyd 64

(li) It is submitted that the nature of the amendment can only be inferred from the scheme of the Act prior to the amendment and subsequent to the amendment, and it is the substance rather than the form which determines the nature of the Act. To lend support to his submissions, learned Solicitor General has relied on ***Zile Singh vs. State of Haryana & Ors.***[235] ***and Commissioner of Income Tax I, Ahmedabad vs. Gold Coin Health Food Private Limited***[236]***.***

(lii) It is argued that the amendment of Section 45 only clarifies that the offence under the Act is cognizable in nature so far as the power of arrest without warrant is concerned. It is further submitted that the amendment being clarificatory in nature would operate retrospectively. To bolster this argument, reliance has been placed on ***Commissioner of Income Tax, Bhopal vs. Shelly Products & Anr.***[237]***, Gurcharan Singh vs. Directorate of Revenue Intelligence***[238]***, Assistant Electrical Engineer vs. Satyendra Rai & Anr.***[239]***, Commissioner of Income Tax (Central)-I, New Delhi***

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[235] (2004) 8 SCC 1

[236] (2008) 9 SCC 622

[237] (2003) 5 SCC 461

[238] (2008) 17 SCC 28

[239] (2014) 4 SCC 513

***vs. Vatika Township Private Limited*[240]*, State Bank of India vs. V. Ramakrishnan & Anr.*[241], and ***Union of India & Ors. vs. Mudrika Singh*[242].

(liii) It is then submitted that there are adequate safeguards under Section 19 of the PMLA, which makes the provision Constitution-compliant. It is submitted that firstly, the power of arrest under Section 19 can be exercised only by a Director, Deputy Director, Assistant Director or any other police officer authorized in this behalf by the Central Government as opposed to Cr.P.C., where the power of arrest can be exercised by any police officer without a warrant even on the basis of reasonable suspicion, as per Section 41 of the Cr.P.C. The Director, who is the head of ED, is appointed by a neutral process mentioned under Section 25 of Central Vigilance Commission Act, 2003[243]. Therefore, only persons of particular rank who are appointed by statute have the power to arrest any person under Section 19 of the PMLA. Secondly, there must be material in

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[240] (2015) 1 SCC 1 (also at Footnote No.127)

[241] (2018) 17 SCC 394

[242] 2021 SCC OnLine SC 1173

[243] For short, "CVC Act"

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possession with the Authority before the power of arrest can be exercised as opposed to Cr.P.C which gives the power of arrest to any police officer and the officer can arrest any person merely on the basis of a complaint, credible information or reasonable suspicion against such person. Thirdly, there should be reason to believe that the person being arrested is guilty of the offence punishable under PMLA in contrast to the provision in Cr.P.C., which mainly requires reasonable apprehension/suspicion of commission of offence. Also, such reasons to believe must be reduced in writing. Fifthly, as per the constitutional mandate of Article 22(1), the person arrested is required to be informed of the grounds of his arrest. It is submitted that the argument of the other side that the accused or arrested persons are not even informed of the case against them, is contrary to the plain language of the Act, as the Act itself mandates that the person arrested is to be informed of the ground of his arrest. Sixthly, the Authority arresting the person is required to forward a copy of the order of arrest and material in its possession to the Adjudicatory Authority in a sealed envelope, which is required to be retained for a period of ten (10) years as per the Prevention of Money Laundering [the Forms and Manner of Forwarding a Copy of Order of Arrest of a

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Person along with the Material to the Adjudicating Authority and its Period of Retention] Rules, 2005. Seventhly, it is stated that the person arrested is required to be produced before the Special Court or the Magistrate within twenty-four hours of his arrest. Thus, the competent Court can look at the material in possession of the Director and the reasons formed by him to believe that the person is guilty of the offence under the PMLA, so as to satisfy itself of the legality of his arrest.

(liv) It is submitted that as there is nothing contrary in the PMLA to Section 167 of Cr.P.C., therefore, the provisions of remand under Section 167 Cr.P.C. would also apply and any further detention of the arrested person would only be allowed by the competent Court and, for the same reasons, Chapter V of the Cr.P.C. would also apply in case of arrest made under the PMLA.

(lv) Further, it is submitted that the guidelines issued in ***Arnesh Kumar vs. State of Bihar & Anr.***[244] will have no application for the purpose of arrest under PMLA. The guidelines in the said decision were issued to avoid misuse of the provision of arrest, while

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[244] (2014) 8 SCC 273

in the case of the PMLA, there is already a higher threshold specified for arresting any person. Therefore, there is no possibility of arbitrary arrest under the PMLA. Whereas, since the decision to arrest is taken by high official after complying with threshold requirements in law, there will be presumption that he has acted *bona fide.*

(lvi) It is stated that considering the nature and gravity of the offence, the serving of notice to a person as prescribed under Section 41A of Cr.P.C. would materially interfere with fair investigation being done by high official bestowed with such responsibility and make the investigation redundant.

(lvii) Further, it is submitted that the contention of the private parties that the power under Section 19 of PMLA can only be invoked after a complaint is filed, is devoid of any merits. It is submitted that in a complaint case under the PMLA, a complaint is similar to the police report filed under Section 173 of the Cr.P.C, which makes the arrest a part of investigation which would always be prior to filing of the complaint under Section 44 or further complaint as contemplated in Explanation in Section 44. Further, the proviso to Section 44(1)(b) which provides for filing of a closure report before

the Special Court, if after investigation no offence of money-laundering is made out, makes it absolutely clear that the complaint is to be filed after the conclusion of investigation.

(lviii) It is submitted that Section 19 of PMLA is *pari materia* to Section 35 of the FERA and Section 103 of the 1962 Act and their validity has been upheld by this Court. Reliance is placed on ***Romesh Chandra Mehta***[245] to urge that the filing of complaint, after the investigation, is not a necessary prerequisite before arresting the person.

(lix) Reliance is then placed on the decision of this Court in ***Union of India vs. Padam Narain Aggarwal & Ors.***[246], wherein the Court examined the power to arrest under Section 104 of 1962 Act. Relying on the decision, it was stated that the power to arrest is statutory in character and cannot be interfered with and can only be exercised on objective considerations free from whims, caprice or fancy of the officer. The law takes due care to ensure individual freedom and liberty by laying down norms and providing safeguards

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[245] Supra at Footnote No.119

[246] (2008) 13 SCC 305

so that the authorities may not misuse such power. It is submitted that the requirement of "reason to believe" and "recording of such reasons in writing" prevent arbitrariness and makes the provision compliant with Article 14. This is reinforced from the fact that only 313 arrests have been made under the PMLA in 17 years of operations of the PMLA.

(lx) Canadian judgment in ***Gifford vs. Kelson***[247] was also relied on to state that "reason to believe" conveys conviction of the mind founded on evidence regarding the existence of a fact or the doing of an act, therefore, is of a higher standard than mere suspicion. Reliance has been further placed on ***Premium Granites & Anr. vs. State of T.N. & Ors.***[248] to urge that the requirement of giving reasons for exercise of the power by itself excludes chances of arbitrariness. The learned Solicitor General has further relied on the decision in ***M/s. Sukhwinder Pal Bipan Kumar & Ors. vs. State of Punjab & Ors.***[249] to state that there is a presumption that the discretion will not be abused where the discretion is vested with

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[247] (1943) 51 Man. R 120

[248] (1994) 2 SCC 691

[249] (1982) 1 SCC 31

a high-ranking officer. Lastly, reliance was placed on ***Ahmed Noormohmed Bhatti vs. State of Gujarat & Ors.***[250] and ***Manzoor Ali Khan vs. Union of India & Ors.***[251] to urge that mere possibility of abuse by the authority, which is vested with the discretion to exercise the power, cannot be a ground to render the provision unconstitutional.

(lxi) It is then submitted that the quantum of punishment cannot be the sole basis for determining the gravity of offence. The Legislature has several statutory mechanisms to bring about deterrence effect so as to prevent the commission of an offence and the quantum of punishment is only one such mechanism. It is further submitted that a stringent condition of bail is relatable to the object of creating a deterrent effect on persons who may commit the offence of money-laundering which is also manifest in the Preamble of the Act. To give effect to the international standards of preventing money-laundering prescribed by FATF and other international treaties, stringent bail conditions are necessary and the Legislature has provided enough safeguards under Section 19 so as to balance

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[250] (2005) 3 SCC 647

[251] (2015) 2 SCC 33

the rights of the accused and to protect the interest of the investigation as well. It is urged that the legislative policy of the country has consistently treated money-laundering as a serious offence affecting the microeconomic strength of the country. Further, it is stated that the twin conditions under Section 45 of the PMLA are reasonable from the stand point of the accused and his rights under Article 21 of the Constitution, which provides an objective criteria and intelligible differentia, hence, does not violate Article 14 of the Constitution. Further it is submitted that there are only some issues on which the international community is building consensus and money-laundering is one of them, others being terrorism, drug related offences and organized crime and the twin conditions are provided in all three categories of laws by the Legislature.

(lxii) Relying on international Conventions, such as Vienna Convention, Palermo Convention and FATF Recommendations, it is urged that the same concern has been expressed by the global community, which is reflected in all the above-mentioned Conventions. It is further submitted that Section 45 of the PMLA fulfils the mandate of international Conventions as the

implementation of the PMLA is monitored internationally and is linked to India's international obligations.

(lxiii) It is submitted that in furtherance of the legitimate State interest, departure from ordinary criminal procedure has been made under the PMLA. Reliance has been placed on ***A.K. Roy vs. Union of India & Ors.***[252] to urge that that 'the liberty of the individual has to be subordinated, within reasonable bounds, to the good of the people'. Further, the twin conditions are not novel or draconian in nature as they are also present in other numerous special enactments for the welfare of the people and they not only provide deterrent effect but also tackle the offence of money-laundering. It is submitted that this Court in ***Nikesh Tarachand Shah***[253] has not reckoned this crucial aspect. It is submitted that the length of punishment is not the only indicator of the gravity of the offence and private parties have wrongly argued that the twin conditions cannot be made applicable in a legislation which carry a punishment of only seven (7) years. Gravity of offence is to be judged on a totality of factors, especially keeping in mind the background in which the

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[252] (1982) 1 SCC 271

[253] Supra at Footnote No. 3

offence came to be recognized by the Legislature in the specific international context. To buttress this submission, the learned Solicitor General has relied on ***State of Gujarat vs. Mohanlal Jitamalji Porwal & Anr.***[254], ***Y.S. Jagan Mohan Reddy vs. Central Bureau of Investigation***[255], ***Nimmagadda Prasad vs. Central Bureau of Investigation***[256], ***Gautam Kundu***[257], and ***State of Bihar & Anr. vs. Amit Kumar alias Bachcha Rai***[258]. Further, reliance has been placed on ***Mohd. Hanif Quareshi & Ors. vs. State of Bihar & Ors.***[259] to state that the seriousness of an offence and its impact on society is the subject matter of legislative wisdom and Legislature understands and correctly appreciates the needs of its own people.

(lxiv) It is submitted that persons involved in the offence of money-laundering are influential, intelligent and resourceful and the crime is committed with full pre-meditation, which ensures that the

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[254] (1987) 2 SCC 364

[255] (2013) 7 SCC 439

[256] (2013) 7 SCC 466

[257] Supra at Footnote No.207

[258] (2017) 13 SCC 751

[259] AIR 1958 SC 731

offence is not detected and even if it is detected, investigation agency cannot trace the evidence. Further, it is stated that the offence is committed with the help of advanced technology so as to conceal the transaction, which makes the stringent bail conditions justified. Twin conditions of bail under Section 45 protect the interests of the accused as well as that of the prosecution. Reliance has been placed on ***Talab Haji Hussain vs. Madhukar Purshottam Mondkar & Anr.***[260], to state that the fair trial must not only be fair to the accused but also be fair to the prosecution, so that a person guilty of the offence may not be acquitted.

(lxv) It is submitted that in case of offence of money-laundering, mere routine conditions which ensure presence of the accused during trial or protect the evidence, are not enough because of the trans-border nature of the offence of money-laundering and influence which may be exercised by the accused. An accused can anonymously remove the money trail using the technology, which is available today so as to make the investigation infructuous. Therefore, even deposit of the passport of the accused may not deter

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[260] (1958) SCR 1226

the accused from fleeing the course of justice or to eliminate the evidence.

(lxvi) It is submitted that economic offences constitute a class apart and need to be visited with different approach in the matter of bail. Further, the fact that the economic offences are considered as a different class of offences, recognizes the grave and serious nature of the offence with deep rooted conspiracy, as they involve huge loss of public funds, thus, affecting the economy of the country as a whole. It is submitted that the Court while granting bail must 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 and the larger interests of the public/State. It is submitted that granting or refusal to grant bail depends on the nature of offence, needs of investigation, status of the accused and other factors. The Legislature, being aware of the need of the day, is competent to provide a special procedure for grant of bail. It would be wrong to say that the Court has unfettered discretion in granting or refusal to

grant the bail. It is true that the Court exercises discretion while granting or refusing bail, but that exercise of power has to be within the legislative framework. It is stated that the requirement of the Court being satisfied that the "accused is not guilty of an offence" is not a novel legislative device. Section 437 of Cr.P.C. also imposes a similar condition[261]. Moreover, the twin conditions have been provided for by the Parliament in numerous other enactments as well. It is submitted that the Parliament is competent to classify offences and offenders in different categories. The Parliament has classified the offence of money-laundering as a separate class of offence from ordinary criminal laws. The said classification was necessary because the PMLA was framed in a specific international context, providing for separate and special architecture for investigation.

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[261] **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;

.....

(emphasis supplied)

(lxvii) The offence of money-laundering is a new offence created by the PMLA, which has a high threshold of arrest as given under Section 19, which itself justifies high threshold for grant of bail. Nature of the offence being peculiar, makes manner of investigation far more difficult than in ordinary penal offences. The PMLA is a complete Code in itself, which creates a separate machinery to tackle the social menace, having adequate safeguards. It is submitted that Legislature has on numerous occasions made departures from the ordinary penal and procedural laws as and when the situation arrived. The classification of the offence on the basis of public policy and underlying purpose of the Act cannot be said to be unreasonable or arbitrary. Therefore, the Parliament is fully competent to deal with special type of cases by providing a distinct and different procedure which in the circumstances, cannot be said to be unreasonable. Therefore, it is submitted that a different standard for bail can be provided in an offence which serves a special purpose. To buttress these submissions, reliance has been placed on ***Kathi Raning Rawat vs. State of Saurashtra***[262], ***Kedar Nath Bajoria***

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[262] AIR 1952 SC 123

& Anr. vs. The State of West Bengal[263]***, Special Reference No.1 of 1978***[264] and ***Kartar Singh***[265].

(lxviii) Further reliance has been placed on ***Asbury Hospital vs. Cass County***[266]***, Chiranjit Lal Chowdhuri vs. The Union of India & Ors.***[267] and ***The State of Bombay & Anr. vs. F.N. Balsara***[268] to urge that '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'. Therefore, the State has power to classify persons on the basis of intelligible differentia and object which the legislation seeks to achieve. It is submitted that the classification of the offence of PMLA and the stringent conditions of bail under Section 45 are, therefore, not arbitrary and are based on intelligible differentia in

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[263] AIR 1953 SC 404

[264] (1979) 1 SCC 380

[265] Supra at Footnote No.190

[266] 326 US 207 [1945]

[267] (1950) SCR 869

[268] (1951) SCR 682

line with the object of the Act which is to bring about deterrence effect.

(lxix) Learned Solicitor General has further relied on Articles 38, 39(b), 39(c) and 51(b) & 51(c) of the Constitution to state that the objective of the Act is to fulfil the mandate of the Constitution, enshrined in the Directive Principles of State Policy. Reliance has been further placed on ***Workmen of Meenakshi Mills Limited & Ors. vs. Meenakshi Mills Ltd. & Anr.***[269], ***Papnasam Labour Union vs. Madura Coats Ltd. & Anr.***[270] and ***M.R.F. Ltd. vs. Inspector Kerala Govt. & Ors.***[271] to state that the Parliament can impose restriction which has the effect of promoting or effectuating a directive principle and such restriction can be safely presumed to be a reasonable restriction in public interest. Reliance has also been placed on ***State of Karnataka & Anr. vs. Shri Ranganatha Reddy & Anr.***[272] and ***State of Tamil Nadu and Ors. vs. L. Abu***

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[269] (1992) 3 SCC 336

[270] (1995) 1 SCC 501

[271] (1998) 8 SCC 227

[272] (1977) 4 SCC 471

Kavur Bai and Ors.[273], to state that the Article 39(b) of the Constitution shall be given a broad meaning.

(lxx) It is submitted that the mandatory twin conditions of bail contained in Section 45 of the PMLA prescribe a reasonable restriction which has a reasonable nexus with the object sought to be achieved viz., creating deterrence from committing the offence of money-laundering and, therefore, cannot be treated as arbitrary or unreasonable or violative of Article 14 or 21 of the Constitution. Reliance has been placed on ***Kartar Singh***[274] and ***Ranjitsing Brahmajeetsing Sharma vs. State of Maharashtra and Anr.***[275], wherein the similar twin conditions were upheld by this Court in TADA Act and MCOCA respectively, to contend that the twin conditions provided under PMLA are not unreasonable so as to violate Article 21 of the Constitution.

(lxxi) It is submitted that the limitations on the grant of bail is in addition to those provided under Cr.P.C. Reliance has also been placed on ***Collector of Customs, New Delhi vs. Ahmadalieva***

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[273] (1984) 1 SCC 515

[274] Supra at Footnote No.190

[275] (2005) 5 SCC 294 (also at Footnote No.53)

Nodira[276] to urge that the satisfaction contemplated under Section 45 regarding the accused being not guilty has to be based upon "reasonable grounds", which means something more than *prima facie* grounds. Further reliance has been placed on ***Supdt., Narcotics Control Bureau, Chennai vs. R. Paulsamy***[277], ***Union of India vs. Gurcharan Singh***[278], ***Ahmadalieva Nodira***[279], ***Union of India vs. Abdulla***[280], ***Ranjitsing Brahmajeetsing Sharma***[281], ***Narcotics Control Bureau vs. Karma Phuntsok & Ors.***[282], ***Chenna Boyanna Krishna Yadav vs. State of Maharashtra & Anr.***[283], ***N.R. Mon vs. Mohd. Nasimuddin***[284], ***State of Maharashtra vs. Bharat Shanti Lal Shah and Ors.***[285], ***Union of India vs. Rattan Mallik alias Habul***[286], ***The State of***

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[276] (2004) 3 SCC 549

[277] (2000) 9 SCC 549

[278] (2003) 11 SCC 764

[279] Supra at Footnote No.276

[280] (2004) 13 SCC 504

[281] Supra at Footnote No.275 (also at Footnote No.53)

[282] (2005) 12 SCC 480

[283] (2007) 1 SCC 242

[284] (2008) 6 SCC 721

[285] (2008) 13 SCC 5

[286] (2009) 2 SCC 624

Maharashtra vs. Vishwanath Maranna Shetty[287]***, Union of India vs. Niyazuddin Sk. & Anr.***[288]***, Satpal Singh vs. State of Punjab***[289]***, National Investigation Agency vs. Zahoor Ahmad Shah Watali***[290] and ***Serious Fraud Investigation Office vs. Nittin Johari & Anr.***[291] to urge that the twin conditions with regard to the grant of bail are mandatory in nature, as has already been held by the Courts in aforementioned cases.

(lxxii) Reliance has also been placed on ***Modern Dental College and Research Centre & Ors. vs. State of Madhya Pradesh & Ors.***[292] to urge that the reasonability of a statute should be seen from the point of view of general public and not from the point of view of a person on whom the restrictions are imposed. Reliance has also been placed on ***Bell, Attorney General vs. Wolfish***[293] to argue that detention of a person does not mean that he has been punished

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[287] (2012) 10 SCC 561

[288] (2018) 13 SCC 738

[289] (2018) 13 SCC 813

[290] (2019) 5 SCC 1

[291] (2019) 9 SCC 165

[292] (2016) 7 SCC 353

[293] 441 US 520 (1979)

by the government. Decision in ***Schall vs. Martin***[294], to state that the legislative intent must be looked at in order to determine whether the restriction on liberty constitutes 'impermissible punishment or permissible regulation'.

(lxxiii) Learned Solicitor General has argued that the decision in ***Nikesh Tarachand Shah***[295] was based on the fact that the twin conditions of bail, as per the unamended provision, would apply to cases of bail in respect of both the predicate offence and also the offence of money-laundering. It is submitted that the reasons due to which the Court in ***Nikesh Tarachand Shah***[296] held the twin conditions to be unconstitutional, are firstly because the unamended provision had a classification which was based on sentencing of the scheduled offence, and secondly, because the applicability of the twin conditions 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 (3) years under Part A of the Schedule and not to all the offences under the PMLA. It is stated

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[294] 467 US 253 (1984)

[295] Supra at Footnote No. 3

[296] Supra at Footnote No. 3

that both the above defects have been removed by the amendment post ***Nikesh Tarachand Shah***[297]. Therefore, the basis and the element of arbitrariness, as pointed out by the Court in ***Nikesh Tarachand Shah***[298], has been taken away by the Parliament so as to cure the defect.

(lxxiv) It is submitted that, concededly, a law which is struck down by the Court due to legislative incompetence can never be made operative by the logic of curing the defect. However, if a law has been struck down by the Court as being violative of Part III of the Constitution, then the Legislature has the power to cure the reason or defect which persuaded the Constitutional Court to hold it to be violative of Part III of the Constitution and, thereafter, the provision will be back in its full force, as the declaration by the Constitutional Court of the provision being unconstitutional mainly results in making the provision inoperative and unenforceable while the provision remains on the statute book. To buttress this submission reliance has been placed on ***Patel Gordhandas Hargovindas &***

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[297] Supra at Footnote No. 3

[298] Supra at Footnote No. 3

Ors. vs. The Municipal Commissioner, Ahmedabad & Anr.[299]***, Shri Prithvi Cotton Mills Ltd. & Anr. vs. Broach Borough Municipality & Ors.***[300]*, Bhubaneshwar Singh & Anr. vs. Union of India & Ors.*[301]***, Comorin Match Industries (P) Ltd. vs. State of T.N.***[302]*, Indian Aluminium Co. & Ors. vs. State of Kerala & Ors.*[303]*, Bakhtawar Trust & Ors. vs. M.D. Narayan & Ors.*[304]***, State of Himachal Pradesh vs. Narain Singh***[305]*, Goa Foundation & Anr. vs. State of Goa & Anr.*[306] and ***Cheviti Venkanna Yadav vs. State of Telangana & Ors.***[307].

(lxxv) It is further submitted that the judgment of this Court in ***Nikesh Tarachand Shah***[308] is *per incuriam,* as the Court failed to take note of the judgment of a larger Bench in ***Rohit Tandon***[309],

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[299] AIR 1963 SC 1742

[300] (1969) 2 SCC 283

[301] (1994) 6 SCC 77

[302] (1996) 4 SCC 281

[303] (1996) 7 SCC 637

[304] (2003) 5 SCC 298

[305] (2009) 13 SCC 165

[306] (2016) 6 SCC 602

[307] (2017) 1 SCC 283

[308] Supra at Footnote No.3

[309] Supra at Footnote No.189

which clearly indicated the mandatory nature and reasonability of twin conditions. Reliance has been placed on ***Behram Khurshed Pesikaka vs. The State of Bombay***[310], ***M.P.V. Sundararamier & Co. vs. The State of Andhra Pradesh & Anr.***[311] and ***F.N. Balsara***[312] to state that a law which is not within the competence of the Legislature is a nullity. However, a law which is within the competence of the Legislature but repugnant to the constitutional prohibitions, is only unenforceable and if the prohibitions are removed, then the law will become effective without any need of re-enactment of the provision. It is submitted that the Court in ***Deep Chand***[313] was concerned with the doctrine of eclipse and the observation of the Court that such eclipse cannot operate retrospectively and cannot save the validity of the law, was said in a different context. Further reference has been laid on ***Jagannath, etc. etc. vs. Authorised Officer, Land Reforms & Ors. etc.***[314], to submit that the Court in this case negated a similar argument made

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[310] (1955) 1 SCR 613

[311] (1958) SCR 1422

[312] Supra at Footnote No.268

[313] Supra at Footnote No.210 (also at Footnote No.69)

[314] (1971) 2 SCC 893

on the basis of ***Deep Chand***[315]. It is submitted that the contentions of the private parties based on the decision in ***State of Manipur***[316] are totally misconceived, as the Court in that case neither had the intent nor had the occasion to decide the issue of taking away the basis after declaration of unconstitutionality.

(lxxvi) It is, thus, submitted that the law laid down in ***Nikesh Tarachand Shah***[317] is *per incuriam*. For, it failed to take notice of the international background of the PMLA. Further, the judgment completely ignores the fact that economic offences form separate class and the twin conditions for money-laundering is a reasonable classification. The Court had no occasion to consider the question of 'legitimate State interest' in providing for twin conditions for a separate class of offences.

(lxxvii) Further, it is submitted that the Court was in error to make distinction between anticipatory bail and regular bail and wrongly restricted the operation of Section 45 to post-arrest bail. It is stated that if it is held that the twin conditions under Section 45

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[315] Supra at Footnote No.210 (also at Footnote No.69)

[316] Supra at Footnote No.159

[317] Supra at Footnote No.3

are only applicable to regular bail and not to anticipatory bail, then the provision may not stand the scrutiny on the touchstone of Article 14 of the Constitution. Thus, the finding of the Court in paragraph 42 of the reported decision needs to be overruled. It is submitted that there is no conceptual difference between anticipatory bail and regular bail and to substantiate this argument, reliance has been placed on the ***Sushila Aggarwal & Ors. vs. State (NCT of Delhi) & Anr.***[318]. It is urged that the observation of this Court in ***Nikesh Tarachand Shah***[319] about non-applicability of the twin conditions for bail in case of anticipatory bail should be considered as an *obiter dicta*. Reliance has been placed on ***Municipal Corporation of Delhi vs. Gurnam Kaur***[320] to state that the casual expressions of a Judge in the judgment carry no weight at all.

(lxxviii) It is further submitted that the interpretation of the Court in ***Nikesh Tarachand Shah***[321] is erroneous, because it ignores the *non-obstante* clause under Section 45 which ousts the applicability

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[318] (2020) 5 SCC 1

[319] Supra at Footnote No. 3

[320] (1989) 1 SCC 101

[321] Supra at Footnote No. 3

of Section 438 Cr.P.C. The words 'anticipatory bail' are not used separately in the Cr.P.C and pre-arrest bail is mainly a species of bail in the Cr.P.C. Therefore, it is submitted that Section 45 of the PMLA and the conditions mentioned therein govern the entire subject of bail under PMLA. It is further submitted that even the Constitutional Courts should be loath to ignore the express mandate of the statute which imposes stringent conditions of bail on a person accused of an offence under the PMLA.

(lxxix) Further it is argued that the reliance of the private parties on the decision in ***Hema Mishra vs. State of Uttar Pradesh & Ors.***[322] is completely misplaced, as the Court in that case was dealing with the situation wherein the provision concerning anticipatory bail had been deleted by a local State enactment, and even in that case, the Court held that the power under Article 226 of the Constitution to grant anticipatory bail ought to be exercised in extremely rare circumstances. Therefore, the said judgment has no applicability in the present case.

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[322] (2014) 4 SCC 453

(lxxx) It is submitted that the argument of the private parties which was based on the Section 44(2) of the PMLA, that the twin conditions in Section 45 are applicable only to the Special Court and not to the High Court, is totally erroneous. Clarification under Section 44 was required, as similar provision in special enactments have been interpreted to oust the maintainability of bail application directly to the High Court[323]. Thus, Section 44 mainly deals with the issue of jurisdiction. Further, it is submitted that if the twin conditions for bail are held to be applicable only when the application of bail is filed in the Special Court and not when the application for bail is filed before the High Court, then such interpretation would completely render the provision arbitrary.

17. At the outset, it is submitted by Mr S.V. Raju, Additional Solicitor General of India that for attracting Article 20(3) of the Constitution, three things should be established. Firstly, the person should be accused of an offence; secondly, such a person should be compelled to make the statement; and thirdly, such compulsion

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[323] *Usmanbhai Dawoodbhai Memon* (supra at Footnote No.202)

should be for the purpose of being a witness against himself. Unless all these three ingredients exist, the protection of Article 20(3) cannot be attracted.

(i) With regard to the requirement of "person accused of an offence", it is submitted that there has to be a formal accusation against such person, which should either be in the form of FIR or a complaint filed before the Court. It is urged that for Article 20(3) of the Constitution to apply, the concerned person should be an accused at the time when the statement was made by him and not because the person concerned is accused of offence at the time of trial. Therefore, the thrust of the plea is that a statement recorded under Section 50(2) of the PMLA would not violate Article 20(3) of the Constitution, if the person making the statement is not an accused of or named in money-laundering offence at the time when the statement under Section 50(2) was made. Reliance has been placed on ***M.P. Sharma & Ors. vs. Satish Chandra, District Magistrate & Ors.***[324] to state that 'formal accusation' relating to the commission of the offence is a pre-requisite condition for the

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[324] (1954) SCR 1077 (also at Footnote No.47)

applicability of Article 20(3). Reliance has also been placed on ***Mohammed Dastagir vs. The State of Madras***[325], wherein a Constitution Bench of this Court observed that Article 20(3) would be available only to those persons against whom FIR has been registered. Therefore, it is contended that necessity of a formal accusation can only be met by the registration of an FIR or submission of a complaint against the concerned person, in order to make him an accused for the purpose of Article 20(3) of the Constitution. Further reliance has been made on ***Kathi Kalu Oghad***[326], wherein an eleven-Judge Bench of this Court held that the person who made the statement must stand in the character of accused at the time when the statement was made in order to attract Article 20(3). The decision of five-Judge Bench of this Court in ***Raja Narayanlal Bansilal vs. Maneck Phiroz Mistry & Anr.***[327] has also been relied upon. It is urged that the examination of a person cannot be regarded as proceeding started against him, as it is only after gathering information against a person through examination,

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[325] AIR 1960 SC 756

[326] Supra at Footnote No.44

[327] AIR 1961 SC 29

it may be concluded that there is a commission of an offence or not. Accusation of an offence is, therefore, a condition precedent for the application of Article 20(3) of the Constitution[328]. Reliance has also been placed on ***Romesh Chandra Mehta***[329] to state that lodging of an FIR or a complaint is the essential requirement of formal accusation, as a person stands in the character of an accused only when a FIR is lodged against him in respect of an offence or when a complaint is made against him relating to the commission of an offence. It is stated that the Court in ***Romesh Chandra Mehta***[330] has further approved the view of the Madras High Court in ***Collector of Customs, Madras vs. Kotumal Bhirumal Pihlajani & Ors.***[331], wherein the Court held that when the statements are recorded by customs officers under Section 108 of 1962 Act, the maker of the statement do not stand in the position of an accused. Similar view of the Bombay High Court in the case of ***Laxman Padma Bhagat vs. The State***[332] was also approved and the contrary view of the

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[328] *K. Joseph Augusthi vs. M.A. Narayanan*, AIR 1964 SC 1552

[329] Supra at Footnote No.119

[330] Supra at Footnote No.119

[331] 1966 SCC OnLine Mad 145

[332] 1964 SCC OnLine Bom 59

Calcutta High Court in ***Calcutta Motor Cycle Co. vs. Collector of Customs & Ors.***[333] was held to be incorrect.

(ii) Reliance has been placed on ***Harbansingh Sardar Lenasingh & Anr. vs. The State of Maharashtra & Ors.***[334] to state that a statement recorded by a customs officer under Section 108 of the 1962 Act is admissible evidence and is not hit by Section 25 of 1872 Act or Article 20(3) of the Constitution, as the same has been concluded by the decision of this Court in ***Romesh Chandra Mehta***[335]. It is further submitted that the Court in ***Nandini Satpathy***[336] was not concerned with Article 20(3) of the Constitution and accepted the view of this Court in ***Romesh Chandra Mehta***[337] as correct. Therefore, it is submitted that at the stage of recording of statements under Section 50(2) of the PMLA, only information is being collected for deciding as to whether the attachment of the property has to take place and at that stage there is no accusation against any person. Reliance has also been placed

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[333] 1955 SCC OnLine Cal 275

[334] (1972) 3 SCC 775

[335] Supra at Footnote No.119

[336] Supra at Footnote No.35

[337] Supra at Footnote No.119

on ***Balkishan A. Devidayal***[338] and ***Poolpandi***[339] to state that only a person against whom any formal accusation of the commission of an offence has been made, can be a person accused of an offence within the meaning of Article 20(3)[340] of the Constitution, which may be specifically made against him in an FIR or a formal document resulting in the prosecution in Court. Further, reliance has been made on ***Poolpandi***[341] to state that the ratio of ***Romesh Chandra Mehta***[342] cannot be ignored because of observations made in ***Nandini Satpathy***[343]. Therefore, it is submitted that when statements under Section 50(2) of the PMLA are made by a person, then at that stage such person does not stand in the character of an accused, as there is no formal accusation against him by way of a complaint or an FIR and thus, there is no violation of Article 20(3) of the Constitution.

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[338] Supra at Footnote Nos.120 (also at Footnote No.41)

[339] Supra at Footnote No.123

[340] *K.I. Pavunny* (supra at Footnote No.231) and *Tofan Singh* (supra at Footnote Nos.24 and 31)

[341] Supra at Footnote No.123

[342] Supra at Footnote No.119

[343] Supra at Footnote No.35

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(iii) With regard to the issue of 'compulsion', it is submitted that this issue will arise only when the person concerned is held to be 'accused' of an offence. Reliance has been further placed on ***M.P. Sharma***[344] and ***Nandini Satpathy***[345] to state that compelled testimony can be 'procured not merely by physical threats or violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like, not legal penalty'. Therefore, it is submitted that 'compulsion' is a question of fact, to be decided at the stage of trial and cannot be generalized and decided in the present case.

(iv) Relying on the case of ***Nandini Satpathy***[346] and ***C. Sampath Kumar vs. Enforcement Officer, Enforcement Directorate, Madras***[347], it is submitted that the legal penalties imposed on a person on his refusal to answer truthfully, cannot be regarded as a compulsion within the meaning of Article 20(3) of the Constitution. Therefore, it is submitted that the contentions of the private parties

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[344] Supra at Footnote No.324 (also at Footnote No.47)

[345] Supra at Footnote No.35

[346] Supra at Footnote No.35

[347] (1997) 8 SCC 358

that provisions contained in Sections 50(3), 50(4) and 63(2) amount to legal compulsion violating the fundamental right under Article 20(3) of the Constitution, is devoid of any merit.

(v) With regard to the issue of 'being a witness against oneself', it is submitted that the witness can be classified into four types – (i) relevant yet innocent; (ii) relevant and may have no incriminatory force; (iii) incriminatory without being confessional; and (iv) confessional. Relying on the case of ***Nandini Satpathy***[348], it is submitted that Article 20(3) applies to confessions and self-incriminations, but leaves untouched other relevant facts. Therefore, unless there is an admission of an offence in clear terms, the statement even if it is gravely incriminatory in nature, will not amount to a confession[349]. It is further submitted that apart from above four categories of witnesses, there can be two other categories, namely, a witness who makes an admission not amounting to confession and a witness whose statement comprises both exculpatory and inculpatory statements. Reliance has been placed on the case of ***Central Bureau of Investigation vs. V.C. Shukla &***

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[348] Supra at Footnote No.35

[349] *Aghnoo Nagesia vs. State of Bihar*, AIR 1966 SC 119

Ors.[350], to state that a statement made by an accused is admissible in evidence under Section 21 of the 1872 Act, if it falls short of a confession. It is, therefore, submitted that the question whether a statement is a confession or not, is essentially a question of fact, which cannot be decided in the present case.

(vi) The respondent has further relied on the judgment of Andhra Pradesh High Court in ***Dalmia Cement (Bharat) Limited***[351], wherein it was held that an ECIR cannot be equated with an FIR. Therefore, the person against whom the summons has been issued under Section 50(2) read with Section 50(3), is not a person accused of an offence. Hence, Section 50 does not violate Article 20(3) of the Constitution. Reliance has been placed on the decision of the Delhi High Court in ***Virbhadra Singh***[352] to state that mere registration of an ECIR would not render any person an accused of the offence of money-laundering. Reliance has also been placed on ***Vakamulla Chandrashekhar***[353], wherein it is stated that a Division Bench of

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[350] (1998) 3 SCC 410

[351] Supra at Footnote No.234

[352] Supra at Footnote No.227

[353] Supra at Footnote No.226

the Delhi High Court held that the person against whom summons has been issued under Section 50 of the PMLA cannot be construed as person accused of an offence, unless a complaint is filed before the Special Court.

(vii) Replying to the submissions of Mr. Aabad Ponda, learned senior counsel, it is submitted by the learned Additional Solicitor General that in ***Ramanlal Bhogilal Shah***[354], there was already an FIR registered against the accused under the FERA Act, therefore, he stood in the character of accused person. Whereas, in the case of PMLA, the FIR is registered for the predicate offence and not for the offence of money-laundering. Therefore, the ratio of ***Ramanlal Bhogilal Shah***[355] cannot be applied in the present case as the two offences - predicate offence and the offence of money-laundering are different.

(viii) With regard to Section 25 of the 1872 Act, it is submitted that for the bar contained under Section 25 of the 1872 Act to apply, three things need to be established – (i) confession; (ii) such

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[354] Supra at Footnote No.122

[355] Supra at Footnote No.122

concession is made to a police officer; and (iii) the person should be an accused. It is submitted that the officers who record statements under Section 50 of the PMLA are not police officers; therefore, Section 25 of the 1872 Act will not apply in case the statement is made to ED officers. It is stated that the statements recorded by police under Section 161 of the Cr.P.C. are different than the statement recorded by the ED officer under Section 50(2) of the PMLA. As such, statements are treated as 'evidence' in the proceedings under the Act. It is further stated that Section 108 of the 1962 Act is *pari materia* to Section 50 of the PMLA and the statements recorded therein are considered as evidence. Reliance has been placed on ***Tofan Singh***[356], wherein it was held that Section 67 of the NDPS Act is different from Section 108 of the 1962 Act, insofar as the statements made therein are evidence as opposed to Section 67 of the NDPS Act. Therefore, it is stated that the same reasoning will apply in this case and as the statements recorded under Section 50(2) are considered as evidence, the ED officer cannot be termed as 'police officer'.

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[356] Supra at Footnote No.31 (also at Footnote No.24)

(ix) Further, reliance has been placed on Section 45(1A) of the PMLA to submit that the Section bars investigation of an offence by police officers into the offence of money-laundering and if the ED officers are held to be police officers, then they would become incompetent to investigate the offence of money-laundering under the PMLA. It is submitted that in various decisions of this Court, it has been held that the officers who are not empowered to file a chargesheet are not police officers. To buttress this submission, the reliance has been placed on ***Badaku Joti Svant vs. State of Mysore***[357], ***Romesh Chandra Mehta***[358], ***Illias vs. The Collector of Customs, Madras***[359], ***State of U.P. vs. Durga Prasad***[360] and ***Balkishan A. Devidayal***[361].

(x) It is urged that as the officers of the ED are not empowered to file a chargesheet and consequently, they cannot be regarded as police officer. After investigation, the ED officers can only file a complaint before the Special Court under Section 44(1)(b) of the

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[357] AIR 1966 SC 1746

[358] Supra at Footnote No.119

[359] AIR 1970 SC 1065

[360] (1975) 3 SCC 210

[361] Supra at Footnote No.120 (also at Footnote No.41)

PMLA. Further, it is stated that as per the definition of "complaint" under Section 2(d) of the Cr.P.C., a 'police report' cannot be regarded as a 'complaint', as they are both mutually exclusive terms. It is further submitted that a police officer cannot submit a complaint and an ED officer cannot file a chargesheet. Otherwise, Section 155(4) and Section 155(2) would be rendered otiose, as in a case falling under Section 155(4) of the Cr.P.C., if the police officer after investigation forms an opinion that only non-cognizable case is made out, then in such a situation he is required to file a police report in view of provision of Section 155(4), but due to the operation of Section 2(d), the same will be treated as a complaint and the police officer would be treated as a complainant. Also, in a case where Magistrate orders the police officer to investigate a non-cognizable offence under Section 155(2) of the Cr.P.C., then in view of operation of Section 155(3) of the Cr.P.C., the police officer would necessarily file a chargesheet. However, due to the operation of Section 2(d), the chargesheet will be treated as a complaint and he will be treated as a complainant. It is submitted that in case where a police officer investigates a non-cognizable offence, the Legislature has, by way of a deeming fiction, treated the chargesheet as a 'complaint', whereas

no such fiction applies in the case of officer investigating a PMLA offence, as he can only file a complaint which does not require any fiction or deeming provision. Therefore, even in case of non-cognizable offence, the police officer is only empowered to file a police report, whereas in case of the PMLA offence, the ED officers are only required to file a complaint which is not to be treated as a chargesheet, otherwise the Legislature would have provided for a reverse deeming fiction of treating the complaint as a chargesheet.

(xi) Reliance has been placed on ***Commissioner of Income Tax, West Bengal vs. Calcutta Stock Exchange Association Ltd***.[362] to state that the word "deemed" shows that the Legislature was deliberately using the fiction of treating something as something else. Reliance has been placed on the decision of the Delhi High Court in ***Lajpat Rai Sehgal & Ors. vs. State***[363], to state that after investigation of non-cognizable offence the police officer has to submit a report which is deemed to be a complaint. Reliance has also been placed on the decision of the Delhi High Court in ***Narain***

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[362] AIR 1959 SC 763

[363] 1983 (5) DRJ 1 : 23 (1983) DLT 314

Singh vs. The State[364], wherein a similar view has been taken. It is submitted that this Court in several cases, has held that the function of police officers are prevention and detection of a crime. Reliance has been placed on the decision in ***Barkat Ram***[365] to urge that the primary function of police officers is to maintain law and order. The Authority empowered to investigate the offence in above mentioned case was not concerned with the maintenance of law and order and detection and prevention of crime, but with some other function such as collection and levy of duty on goods or detection and prevention of smuggling of goods. Notwithstanding the fact that some incidental powers of search, seizure, arrest and investigation of an offence are also conferred on such officer, he cannot be termed as a police officer as his primary function is to detect and prevent smuggling of goods so as to protect the state exchequer. Therefore, it is submitted that the dominant purpose is to be seen. In case of the PMLA, the dominant purpose is prevention of money-

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[364] 1986 (10) DRJ 109 : 30 (1986) DLT 118

[365] Supra at Footnote No.24

laundering, attachment and confiscation of property involved in money-laundering, whereas all other matters with which the ED officers are involved, are only incidental matters. Therefore, as submitted, the ED officers cannot be termed as police officers. The Preamble of the Act and Statement of Objects and Reasons of the Act have been relied upon to state that the officers of the ED are primarily concerned with the prevention of money-laundering and for confiscation of property derived from or involved in money-laundering.

(xii) Reliance has been placed on ***Pareena Swarup vs. Union of India***[366] to state that the object of the PMLA is to bring the proceeds of crime back into the economy. Reliance has also been placed on the decision of the Delhi High Court in ***Vakamulla Chandrashekhar***[367] to state that the offence of money-laundering has both, civil and criminal consequences and the Act empowers the Adjudicating Authority with the powers of civil Court, so as to adjudicate on the issue of whether any property is involved in

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[366] (2008) 14 SCC 107

[367] Supra at Footnote No.226

money-laundering and to attach and ultimately confiscate such property.

(xiii) Relying on Section 50(4), it is stated that ED officers act judicially under Section 50(2), whereas a police officer recording a statement under Section 161 of the Cr.P.C. does not act judicially. To substantiate the argument, reliance has been placed on ***Balkishan A. Devidayal***[368].

(xiv) It is further stated that the proceedings under the PMLA are judicial proceedings, similar to the proceedings under the 1962 Act under Section 108. Therefore, on a parity of reasoning, the ED officials are not police officers, as held in ***Balkishan A. Devidayal***[369]. It is further submitted that under Section 63(2) of the PMLA, the ED officials are empowered to impose penalty which is a judicial function, whereas the police officials have no such power. It is also submitted that the contentions of the private parties that the statement recorded under Section 50(2) will have to comply with the requirements of Section 162 of the Cr.P.C., is devoid of any

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[368] Supra at Footnote Nos.120 (also at Footnote No.41)

[369] Supra at Footnote Nos.120 (also at Footnote No.41)

substance, as the statements recorded under Section 50(2) of the PMLA are not statements recorded under Section 161 of the Cr.P.C. Under Section 50(2) of PMLA, the ED officer is not a police officer as he is acting judicially under the provision. The statement recorded under Section 50(2) is treated as evidence, whereas such is not the case with the statement recorded under Section 161 of the Cr.P.C. Statements under Section 50(2) are required to be signed, whereas such is not the case with statements recorded under Section 161 of the Cr.P.C. Further, the investigation under the PMLA is different from the investigation under the Cr.P.C. It is then submitted that as the statements given under Section 50 of the PMLA are required to be signed and are given in the judicial proceeding within the meaning of Sections 193 and 228 of the IPC, therefore, the presumption under Section 80 of the 1872 Act will apply and it shall be presumed that the document is genuine and the circumstances under which it was taken are true and such evidence, statement or confession was duly taken. Whereas, Section 80 of the 1872 Act cannot have any application under the statements made under Section 161 of the Cr.P.C. To buttress the submission, reliance was placed on the decisions of this Court in ***Baleshwar Rai & Ors. vs.***

The State of Bihar[370] and ***Dipakbhai Jagdishchandra Patel vs. State of Gujarat & Anr.***[371]. Even by applying Section 65 of the PMLA, it is stated that the bar of Section 162 of the Cr.P.C. cannot be applied to statements made under Section 50(2) of the PMLA because of the inconsistencies shown above. Further, if the Legislature had intended to apply Section 162 of the Cr.P.C., then it would have done so in the Act itself, as it has been done under the Bihar and Orissa Excise Act, 1915[372].

(xv) It is submitted that the ratio of ***Tofan Singh***[373], where it was held that the statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement for the trial of an offence under the NDPS Act, will not apply to Section 50(2) of the PMLA. It is also submitted that the provisions of the PMLA are materially different from that of the NDPS Act. In the case of NDPS Act, a regular police officer, as well as, a designated officer, both are permitted to investigate the offence under the NDPS Act. Whereas, in the case of the PMLA, there is a bar contained in Section 45(1A)

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[370] (1963) 2 SCR 433

[371] (2019) 16 SCC 547

[372] For short, "1915 Act"

[373] Supra at Footnote No.31 (also at Footnote No.24)

of the PMLA which prohibits a police officer from investigating the offence under the PMLA. In the NDPS Act, because of such provision, Sections 161 to 164 of the Cr.P.C., as also Section 25 of the 1872 Act, would be applicable making the recorded statement inadmissible, in case the statements are recorded by a police officer. However, if the same investigation is conducted by a designated officer other than the police officer, then such provisions will not apply, making the procedure discriminatory and in violation of Article 14 of the Constitution, which is not the case under the PMLA.

(xvi) It is submitted that in case of the NDPS Act, there is no provision of further investigation by the designated officer. However, if the investigation is made by a police officer, then in that case he has the power to further investigate under Section 173(8) of the Cr.P.C. Such inconsistency does not occur in the case of the PMLA, as in this case, because of the bar contained in Section 45(1A), the police officers are not entitled to investigate the offence of money-laundering. And further, the Explanation (ii) to Section 44 of the PMLA contemplates filing of subsequent complaint in case any further investigation is conducted.

(xvii) Another anomaly noted by this Court in ***Tofan Singh***[374] is that when such designated officer is investigating the offence under the NDPS Act, then he has no power to file closure report. However, there is no such anomaly present in the PMLA Act because the investigating authority can file a closure report under the proviso to Section 44(1)(b) of the PMLA.

(xviii) It is further submitted that in ***Tofan Singh***[375], it was held that if the statement recorded under Section 67 of the NDPS Act is held to be admissible in all situations, then it will render Section 53A of the NDPS Act otiose, whereas the PMLA does not contain any provision similar to Section 53A of the NDPS Act.

(xix) Further, in the case of the NDPS Act, prevention, detection and punishment of crime was not held to be ancillary function of the Act. However, in the case of the PMLA, the main purpose is prevention of money-laundering and confiscation of property derived from or involved in money-laundering.

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[374] Supra at Footnote No.31 (also at Footnote No.24)

[375] Supra at Footnote No.31 (also at Footnote No.24)

(xx) Further, the PMLA does not contain any provision which invest the power of an officer in-charge of a police station, including the power to file a chargesheet, in the investigating officer as contained in the NDPS Act. Moreover, in case of the NDPS Act, the investigating authority is required to file a chargesheet. However, in case of the PMLA, cognizance is taken on a complaint.

(xxi) Lastly, it is contended that Section 50 of the PMLA is almost identical to Section 108 of the 1962 Act. Therefore, the statements made under Section 50 are evidence as opposed to Section 67 of the NDPS Act. Hence, Section 50(2) of the PMLA cannot be read down as done in ***Tofan Singh***[376], in case of Section 67 of the NDPS Act.

(xxii) The respondent has demonstrated the legislative history of Section 24 of the PMLA and cited Recommendation 3 of the FATF (2003)/ Recommendation 4 of FATF (2012) to state that the FATF had stipulated that the burden of proving the lawful origin of the property shall be on the accused. In view of the FATF recommendations and the recommendations of the Standing Committee of Finance (2011-12), comprehensive amendments were

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[376] Supra at Footnote No.31 (also at Footnote No.24)

made to the provisions of the PMLA. It is submitted that the Standing Committee of Finance recommended that there should be adequate safeguards for persons not charged with the offence of money-laundering; therefore Section 24 was amended in its present form. It is submitted that the concerns of the Standing Committee have been incorporated under the provision by using the word "may" in case of any other person and the word "shall" in case of a person charged with the offence of money-laundering under Section 24 of the PMLA. Therefore, it would be wrong to say that the provision is not constitutionally valid, as the provision itself contains safeguard for the person not charged with the offence of money-laundering.

(xxiii) It is submitted that in criminal trials the standard of proof is beyond reasonable doubt. However, such rule of evidence is neither found in Section 101 nor in Section 3 of the 1872 Act, which defines the word "proved". Therefore, it cannot be said that this principle is a principle of universal application and, therefore, Legislature in appropriate classes of legislations would be competent to take departure from this principle. It is submitted that when Legislature enacts a provision which states that the burden of proof is shifted to the accused then what is actually done is that standard

of proof beyond reasonable doubt is lowered. It is submitted that Professor Glanville Williams in his book - The Proof of Guilt has also criticized the doctrine of proving the guilt of the accused beyond reasonable doubt. It is stated that this principle generally entails the acquittal of the guilty person which frustrate the investigation of the police, as a result of which they may resort to improper methods of obtaining convictions, also the law and order gets into the turmoil.

(xxiv) Respondent admits that the principle of innocence is a human right and forms the basis of criminal jurisprudence[377]. Reliance has been placed on ***Hiten P. Dalal vs. Bratindranath Banerjee***[378], which dealt with an offence under Section 138 of the Negotiable Instruments Act, 1881[379] and considered the effect of presumption raised under Section 139 thereof, to urge that the presumptions are rule of evidence and do not conflict with the presumption of innocence. The prosecution is obliged to prove the case against the accused beyond reasonable doubt. However, such obligation may be discharged with the help of presumptions of law

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[377] *Narendra Singh & Anr. vs. State of M.P.,* (2004) 10 SCC 699

[378] (2001) 6 SCC 16

[379] For short, "1881 Act"

or fact unless the accused rebut the presumption by showing the reasonable possibility of non-existence of the presumed fact. It is stated that there is a need to balance the rights of the accused with the interest of the society. Reliance is placed on ***Krishna Janardhan Bhat vs. Dattatraya G. Hegde***[380] to urge that the nature of offence, seriousness and gravity thereof may be taken into consideration in interdicting the presumption of innocence. Reliance has also been placed on ***Sucha Singh vs. State of Punjab***[381] to state that departure from traditional rule relating to the burden of proof is imperative; otherwise, the offenders in serious offences would be the major beneficiaries and the society would be the casualty. It is submitted that the PMLA is an Act which tackles a social evil and does require departure from normal criminal jurisprudence. Reliance has been placed on ***P.N. Krishna Lal & Ors. vs. Govt. of Kerala & Anr.***[382] to state that the purpose of law should be taken into consideration while interpreting the law. It is submitted that sometimes harsh remedies are required, which takes

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[380] (2008) 4 SCC 54

[381] (2001) 4 SCC 375

[382] 1995 Supp (2) SCC 187

a departure from normal criminal jurisprudence to tackle new and emerging situations. Further reliance has been placed on the 47th Report of the Law Commission, 1972, which observed that special efforts are necessary to eliminate the effect of socio-economic offences and stringent provisions are essential to safeguard the national wealth and welfare. It is submitted that the PMLA seeks to achieve the goal of deterrence and also confiscation of proceeds of crime and, therefore, the provision is in line with the 47th Law Commission report. It is pointed out that even the general statutes such as the IPC and the 1872 Act also provide for the reverse burden of proof[383]. It is, therefore, submitted that the shifting of burden of proof which is nothing but a departure from ordinary criminal jurisprudence of proving the case beyond reasonable doubt, is not only contained in the special statutes, which tends to prevent serious crime against the society at large, but is also contained in the provisions of the IPC and the 1872 Act. Thus, it cannot be said that presumption of innocence is a constitutional guarantee.

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[383] *Mukesh Singh vs. State (Narcotic Branch of Delhi)*, (2020) 10 SCC 120

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(xxv) It is submitted that to give effect to the object of the NDPS Act, the Court in ***Noor Aga vs. State of Punjab & Anr.***[384], upheld the constitutional validity of Sections 35 and 54 of the NDPS Act, which provides presumption against the accused and reverse burden of proof. Reliance has also been placed on ***Seema Silk & Sarees & Anr. vs. Directorate of Enforcement & Ors.***[385], wherein the Court upheld the challenge to the constitutional validity of Section 18 of the FERA, which provides for reverse burden of proof, to state that a legal provision does not become unconstitutional merely because it provides for reverse burden of proof. Further Reliance is placed on ***Sodhi Transport Co. & Ors. vs. State of U.P. & Ors.***[386] to state that a rebuttable presumption, which is a rule of evidence, cannot be said to be unconstitutional because the person concerned has the opportunity to displace the presumption by leading evidence. It is submitted that Section 24 of the PMLA also provides for rebuttable presumption and, therefore, the accused has the opportunity to lead evidence so as to displace the presumption against him. Thus, it

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[384] (2008) 16 SCC 417 (also at Footnote No.55)

[385] (2008) 5 SCC 580

[386] (1986) 2 SCC 486

cannot be said that Section 24 is unreasonable, arbitrary or unconstitutional.

(xxvi) With regard to Section 24(a) of the PMLA, it is submitted that two conditions are required to be satisfied for the presumption under Section 24(a) to apply. Firstly, person should be 'charged' with the offence of money-laundering and secondly, there should be 'proceeds of crime'. It is only when both the conditions are satisfied, it can be said that the presumption will operate against the accused.

(xxvii) Reliance has been placed on ***Union of India vs. Prafulla Kumar Samal & Anr.***[387] to state that for framing of charges, a *prima facie* case against the accused has to be made out by the prosecution[388], which means that a grave suspicion should be there against the accused. Therefore, the requirement of framing of charges against the accused under Section 3 of the PMLA itself acts as a safeguard against the arbitrary exercise of the provision. Secondly, it is stated that the existence of proceeds of crime will be

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[387] (1979) 3 SCC 4

[388] *Dilawar Balu Kurane vs. State of Maharashtra,* (2002) 2 SCC 135, *Yogesh alias Sachin Jagdish Joshi vs. State of Maharashtra,* (2008) 10 SCC 394, *P. Vijayan vs. State of Kerala & Anr.,* (2010) 2 SCC 398, *Sajjan Kumar vs. Central Bureau of Investigation,* (2010) 9 SCC 368, *Sheoraj Singh Ahlawat and Ors. vs. State of Uttar Pradesh & Anr.,* (2013) 11 SCC 476 and *Dipakbhai Jagdishchandra Patel* (supra at Footnote No.371*)*

the foundational fact under Section 24(a) of the Act. It is further submitted by the learned Additional Solicitor General that even when the presumption against the accused is applied then also the accused will have the opportunity to rebut the same by leading evidence or by replying adequately under Section 313 of the Cr.P.C. or by cross examining the prosecution witness.

(xxviii) A comparison is drawn between Section 24 of the PMLA and Section 106 of the 1872 Act to submit that similar results would appear even if the provision like Section 24(a) of the PMLA was not there because of Section 106 of the 1872 Act. By way of an illustration, it has been explained that the results of Section 106 and Section 24(a) would be the same in a case where money is lying in a house where incidentally a person is found, then the burden of proving that the person has nothing to do with the proceeds of crime is on that person itself because of Section 106 of the 1872 Act, which states that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Reliance has been placed on the ***Sarbananda Sonowal vs. Union of India &***

Anr.[389], wherein it was held that the facts regarding date of birth, place of birth, name of parents, place of citizenship and birth, are all facts within the special personal knowledge of the concerned person and it will be impossible for the State to lead evidence on aforesaid points. Therefore, any fact which would be impossible for the prosecution to establish, as is specially and exceptionally within the exclusive knowledge of the accused, would have to be proved by the accused himself. Therefore, it is submitted that the shifting of burden of proof under Section 24(a) of the PMLA is not violative of Article 14 or 21 of the Constitution of India.

(xxix) It is further pointed out that the contentions of the private parties that the Court in ***Noor Aga***[390] and ***Tofan Singh***[391] has read into Section 54 of the NDPS Act the requirement of proving foundational fact of possession, is wholly incorrect and misplaced, as it would be clear from the bare language of Section 54 itself that the possession is the foundational fact which has to be established

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[389] (2005) 5 SCC 665

[390] Supra at Footnote No.384 (also at Footnote No.55)

[391] Supra at Footnote No.31 (also at Footnote No.24)

and only then the presumption under Section 54 of the NDPS Act will apply.

(xxx) With regard to Section 24(b) of the PMLA, it is submitted that it applies to a person who is not charged with the offence of money-laundering and uses the word 'may' instead of 'shall'. It is submitted that presumptions falling under the category of 'may presume' does not make it obligatory on the Court to regard such fact as proved and it is the discretion of the Court to either regard such fact as proved or may call proof of it. Whereas, presumptions falling under the category of 'shall presume' are mandatory in nature, also known as legal presumptions, and the Court has to regard such fact as proved unless and until it is disproved[392]. It is, therefore, submitted that presumption contained under Section 24(b) is discretionary in nature. It is submitted that the presumption under Section 24(b) can be raised at the stage of bail and other proceedings, prior to the stage of framing of charges. As before granting bail under the PMLA, the Court has to be satisfied that the accused is not guilty of the

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[392] *State of Madras vs. A. Vaidyanatha Iyer*, AIR 1958 SC 61 and *M. Narsinga Rao vs. State of A.P.*, (2001) 1 SCC 691

offence; therefore, the Court may resort to Section 24(b) in exercise of its discretion.

(xxxi) Further, it is submitted that the word "Authority" under the PMLA refers to the Adjudicating Authority and not authority under Section 48 of the PMLA. It is further submitted that the arguments of the private parties that Section 24(b) of the PMLA is draconian in nature, is wholly incorrect, as the presumption is discretionary in nature. Foundational fact of proceeds of crime is condition precedent to the application of the provision and the presumptions can only be raised before the Court or Adjudicating Authority.

(xxxii) Further, while relying on the decision in ***Pareena Swarup***[393] and ***Madras Bar Association vs. Union of India & Anr.***[394] and Section 6 of the PMLA, it is stated that Adjudicating Authority is an independent Authority, without prejudice to the fact that the functions of Authority is civil in nature and standard of

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[393] Supra at Footnote No.366

[394] (2021) 7 SCC 369

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proof would be preponderance of probabilities and not proof beyond reasonable doubt in a proceeding before it.

(xxxiii) Repelling the challenge under Article 20(1) of the Constitution with regard to the retrospective applicability of the Act, it is submitted that the Act does not punish or seek to punish a person for any act committed prior to the PMLA or prior to the addition of the concerned offence in the Schedule to the PMLA coming into force. It is submitted that Article 20(1) of the Constitution prohibits the making of an *ex post facto* criminal law i.e., making an act a crime for the first time and making that law retrospective. It also prohibits infliction of a penalty greater than that which might have been inflicted under the law in force when the act was committed. Reference has been made to ***Rao Shiv Bahadur Singh & Anr. vs. The State of Vindhya Pradesh***[395] to urge that what is prohibited under Article 20(1) is only the conviction or sentence and not trial thereof. It has been further emphasized that the expression 'law in force' used in Article 20(1), refers to the law in fact in existence and in operation at the time of the commission of

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[395] AIR 1953 SCC 394

the offence, as distinct from the law "deemed" to have become operative by virtue of the power of Legislature to pass retrospective law.

(xxxiv) In light of the said principles, it is submitted that an offence might be either a 'single act' i.e., an offence which is terminated by a single act, or a 'continuing offence' i.e., an act which does not terminate by a single act, but rather continues to subsist over a period of time. It is submitted that the offence of money-laundering, as described under Section 3 of the PMLA, in a given case would be a continuing offence, and, thus, cannot be labelled as having retrospective operation. It is submitted that the objective of the PMLA is not to punish the accused for the scheduled offence, but rather for the independent offence of money-laundering committed under Section 3 of the Act. The argument proceeds that an Act cannot be said to be retrospective just because a part of the requisites for its action is drawn from a time antecedent to its passing[396].

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[396] *The State of Maharashtra vs. Vishnu Ramchandra,* (1961) 2 SCR 26 and *Sajjan Singh vs. The State of Punjab*, (1964) 4 SCR 630

(xxxv) The respondent has placed reliance on ***Mohan Lal vs. State of Rajasthan***[397]. In this case, theft of 10 kgs of opium had taken place prior to the coming into force of the NDPS Act, but opium was subsequently recovered after the commencement of the NDPS Act. *Inter alia*, the conviction under the NDPS Act was challenged on the ground that there can be *ex post facto* application of the NDPS Act. This Court, while upholding the conviction and rejecting the plea of Article 20(1), observed that what is punishable is the possession of the prohibited article on or after a particular date when the statute was enacted, making the offence punishable or enhancing the punishment. It is, thus, submitted that in the case of an offence under the PMLA, the date of coming into force of the PMLA i.e., 01.07.2005 or the date when the predicate offence was committed, is irrelevant if the PMLA offence is committed on a date subsequent to both the above date. Similarly, reliance is also placed on the decisions of the Supreme Court of the United States in ***Samuels vs. McCurdy, Sheriff***[398] and ***Chicago & Alton Railroad Company vs. Henry A. Tranbarger***[399] to restate the

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[397] (2015) 6 SCC 222.

[398] 1925 SCC OnLine US SC 42.

[399] 238 U.S. 67.

aforementioned principles of law. Additionally, our attention was drawn to the provisions governing period of limitation, namely Sections 469[400] and 472[401] of the Cr.P.C. It is submitted that as per Section 469, in case of a single act, the date of commencement of the limitation period is the date on which the offence was committed. However, the position is different for a continuing offence, in as much as, the date of commencement of the limitation period in such a case would be the date on which the continuing offence ended[402]. Reliance has been placed on ***Gokak Patel Volkart Ltd. vs. Dundayya Gurushiddaiah Hiremath & Ors.***[403], wherein this Court while dealing with Section 630 of the Companies Act, held that the offence of wrongful possession is recurring and continues until the wrongful possession is put to an end. This Court further held

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[400] **469. Commencement of the period of limitation.—**(1) The period of limitation, in relation to an offender, shall commence,—

(a) on the date of the offence; or

(b) where the commission of the offence was not known to the person aggrieved by the offence or to any police officer, the first day on which such offence comes to the knowledge of such person or to any police officer, whichever is earlier; or

(c) where it is not known by whom the offence was committed, the first day on which the identity of the offender is known to the person aggrieved by the offence or to the police officer making investigation into the offence, whichever is earlier.

(2) In computing the said period, the day from which such period is to be computed shall be excluded.

[401] **472. Continuing offence.—**In the case of a continuing offence, a fresh period of limitation shall begin to run at every moment of the time during which the offence continues.

[402] Section 472 of the Cr.P.C.

[403] (1991) 2 SCC 141.

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that such an offence is committed over a span of time and the last act of the offence will control or amount to the commencement of the period of limitation. Thus, the offences involving possession are continuing in nature, and the period of limitation for such offences would start from the date of cessation of the possession.

(xxxvi) It is then submitted that the concept of possession is central to the offence of money-laundering. Inasmuch as, all the six activities recognized under Section 3 of the Act involve an element of possession of proceeds of crime. He further goes on to state that such possession need not necessarily be actual physical possession, but also may be legal or constructive possession. To this effect, reliance is placed on ***Gunwantlal vs. The State of Madhya Pradesh***[404], wherein the concept of constructive possession was recognized by this Court. Strong emphasis has been laid on Section 2(1)(fa)[405] of the Act, which defines the term "beneficial owner", to

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[404] (1972) 2 SCC 194.

[405] **2. Definitions.—**(1) In this Act, unless the context otherwise requires,—

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(fa) "beneficial owner" means an individual who ultimately owns or controls a client of a reporting entity or the person on whose behalf a transaction is being conducted and includes a person who exercises ultimate effective control over a juridical person.

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urge that the concept of constructive possession is recognized under the Act as well. It is submitted that possession of proceeds of crime being key to the offence of money, all activities having an element of possession after 01.07.2005 shall fall within the ambit of the Act irrespective of the date on which the scheduled offence was committed. For, the offence of money-laundering is a continuing offence, the cause of action for which renews with every day of possession. Thus, it is submitted that the argument of the private parties claiming protection of Article 20(1) is devoid of merit.

(xxxvii) At the outset, it is submitted that an ECIR under the PMLA is not required be registered like an FIR under Section 154, Cr.P.C. It is further submitted that as per the scheme of the Cr.P.C., a police officer is mandatorily required to register an FIR under Section 154 upon receipt of information regarding commission of a cognizable offence. However, the PMLA contains no such provision regarding receipt of information or registration[406]. To lend support to his arguments, the learned Additional Solicitor General points out certain differences between investigation under the Cr.P.C. and the

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[406] *Lalita Kumari* (supra at Footnote Nos.13 and 206)

PMLA. Firstly, the nature of "investigation", as envisaged under Section 2(h)[407] of the Cr.P.C. is different from that under the PMLA, as defined under Section 2(1)(na)[408] of the PMLA, insofar as the investigation under the Cr.P.C. is a proceeding for collection of evidence. Therefore, any proceeding that does not amount to collection of evidence, cannot amount to investigation, and only upon the registration of the FIR, can the police officer start investigation. Secondly, it is submitted that an investigation under the Cr.P.C. is ordinarily required to be conducted by a police officer, or any person so authorized by a Magistrate. In contrast, Section 45(1A)[409] of the PMLA explicitly bars investigation by a police officer,

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[407] **2. Definitions.—**(1) In this Code, unless the context otherwise requires,—

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(h) "investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf;

[408] **2. Definitions.—**(1) In this Act, unless the context otherwise requires,—

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(na) "investigation" includes all the proceedings under this Act conducted by the Director or by an authority authorised by the Central Government under this Act for the collection of evidence;]

[409] **45. Offences to be cognizable and non-bailable.**—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence under this Act shall be released on bail or on his own bond unless—

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(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 specifically authorised, by the Central Government by a general or special order, and, subject to such conditions as may be prescribed.

save for cases when the officer is specifically authorized by the Central Government. Thirdly, investigation under the Cr.P.C. necessarily needs to be for purpose of collecting evidence in relation to cognizable offences for which an FIR under Section 154 has been registered[410]. On the contrary, investigation i.e., collection of evidence under the PMLA need not necessarily be in relation to the cognizable offence of money-laundering, but it can also be for the purposes of attachment, confiscation, formulation of reasons to conduct search or seizure under Section 17, or personal search under Section 18, etc. This further implies that unlike the procedure under the Cr.P.C., where the registration of an FIR is a condition precedent to initiation of investigation[411], in such cases, the investigation can commence even prior to the receipt of information pertaining to commission of money-laundering. In this regard, the learned Additional Solicitor General draws our attention to Section 17(1)(iv) and Section 5(1) of the PMLA which empower the Director to collect evidence by way of search and seizure, and attachment of

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[410] *H.N. Rishbud and Inder Singh vs. The State of Delhi*, (1955) 1 SCR 1150; *Union of India vs. Prakash P. Hinduja & Anr.,* (2003) 6 SCC 195; and *Manubhai Ratilal Patel through Ushaben vs. State of Gujarat & Ors.*, (2013) 1 SCC 314

[411] *State of West Bengal & Ors. vs. Swapan Kumar Guha & Ors.*, (1982) 1 SCC 561 and *Shashikant* (supra at Footnote No.114).

property respectively. It is submitted that this power to investigate, conferred upon the Director by these provisions, is based on a 'reason to believe' that a person may be in possession of property related to crime[412] or proceeds of crime[413], and can be exercised at a stage preceding the receipt of information regarding commission of a cognizable offence.

(xxxviii) It is then submitted that the provisions of the Cr.P.C. have limited applicability to the proceedings under the PMLA. According to Section 65 of the PMLA, the provisions of the Cr.P.C. shall apply to arrest, search and seizure, attachment, confiscation, investigation, prosecution and all other proceedings under the Act, so long as the same are not inconsistent with the provisions of the Act. It is the case of the respondents that registration of an FIR does not amount to collection of evidence, and, thus, is outside the purview of "investigation", as defined under Section 2(1)(na) of the PMLA. Consequently, it is submitted that since the registration of an FIR does not fall into any of seven categories contemplated under

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[412] Section 17(1)(iv) of the PMLA

[413] Section 5(1)(a) of the PMLA

Section 65, Section 154 of the Cr.P.C. will not apply to proceedings under the PMLA.

(xxxix) As regards the provision of a copy of the ECIR to the accused, it is submitted that unlike an FIR which is a statutory mandate, an ECIR is an internal document and, thus, need not be supplied to the accused. In response to the argument of the private parties that the failure to supply a copy of the ECIR prejudices the rights of an accused, it is stated that revealing a copy of the ECIR would defeat the purpose of the Act and would frustrate recovery provisions like attachment of property. The learned Additional Solicitor General also refutes the submission of the private parties that a copy of the ECIR would be useful for grant of anticipatory bail. It is submitted that in cases of offences under the IPC, anticipatory bail can be applied for even prior to the registration of an FIR[414]. Moreover, it is often the case that the FIR is registered against unknown persons, and the FIR, therefore, cannot be said to be an encyclopaedia of all the facts[415].

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[414] *Shri Gurbaksh Singh Sibbia & Ors. vs. State of Punjab*, (1980) 2 SCC 565; *Deepak Mahajan* (supra at Footnote No.60); and *Sushila Aggarwal* (supra at Footnote No.318)

[415] *Superintendent of Police, CBI & Ors. vs. Tapan Kumar Singh*, (2003) 6 SCC 175

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(xl) Next, learned Additional Solicitor General made submissions on the challenge to constitutionality of Sections 17 and 18 of the PMLA (i.e., the provisions relating to the power of search and seizure). According to him, Section 17 in itself contains sufficient safeguards. Reference is made to Section 17(1), to highlight that only the Director or any other officer not below the rank of Deputy Director, who are high ranking officials, can authorise a search and that too only on the basis of a reason to believe of the existence of conditions laid down therein. It is submitted that the vesting of the power to authorise a search and seizure under Section 17 with the highest responsible authority prevents misuse of the provision. Reliance is placed on ***Pooran Mal vs. The Director of Inspection (Investigation), New Delhi & Ors.***[416], to that effect. This is yet bolstered by the mandate of having to record the reasons to believe in writing. It is further pointed out that in terms of Section 17(2), the officer conducting the search shall forward a copy of the reasons recorded and material in his possession to the Adjudicating Authority in a sealed envelope immediately after the search and seizure. It is submitted that this safeguard ensures that the reasons

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[416] (1974) 1 SCC 345.

so recorded upon a search and seizure and the material in the possession of the concerned officer is not tampered with. It is also submitted that in terms of Section 17(4), the Authority seizing the records or property shall, within a period of thirty days from the date of such seizure, file an application with the Adjudicating Authority for the retention of the said records. Pursuant to such application, the Adjudicating Authority, in terms of Section 8, then issues a show cause notice to the concerned person whose records or property are seized. Thus, the concerned person is given ample opportunity to be heard and show cause as to why such records or property should not be retained.

(xli) Emphasis is laid on Section 62 of the PMLA, which provides for a punishment of imprisonment of up to a period of two years or a fine up to fifty thousand rupees or both for a vexatious search made without recording reasons in writing. It is submitted that providing a punishment for a vexatious search is sufficient safeguard against the arbitrary exercise of power of search by the concerned Authority[417].

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[417] *R.S. Seth Gopikrishan Agarwal vs. R.N. Sen, Assistant Collector of Customs & Ors.*, (1967) 2 SCR 340.

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(xlii) He then went on to illustrate various safeguards contained in Section 18 of the Act. It is submitted that in terms of Section 18(2), the Authority shall forward a copy of the reasons recorded to the Adjudicating Authority in a sealed envelope to ensure that the records of search and seizure are not tampered with. Other safeguards include the right of the person to be searched to be taken to a Gazetted Officer or Magistrate before the search, if such person so requires[418]; and the right of the person to be searched to be released if there are no reasonable grounds for search are found after the person is taken to a Gazetted Officer or Magistrate[419]. The PMLA also mandates the Authority to call at least two witnesses before a search and conduct the search before such witnesses.[420] The Authority seizing any property during the search of a person is mandated to prepare a list of the record or the property seized and get the same signed by the witnesses[421]. A female shall be searched only by a female[422]. Similar to the mandate of Section 17(4), the

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[418] Section 18(3). The inherent value of such a right has been recognised by this Court in *State of Punjab vs. Baldev Singh,* (1999) 6 SCC 172

[419] Section 18(5) of the PMLA

[420] Section 18(6) of the PMLA

[421] Section 18(7) of the PMLA

[422] Section 18(8) of the PMLA

provisions of Section 18(10) also provide the concerned person whose records or property are seized, an opportunity to show cause as to why such records or property should not be retained.

(xliii) Lack of safeguards in the Cr.P.C. are also highlighted. With respect to seizures, it is submitted that the same is governed by Section 102 of the Cr.P.C., and empowers a police officer to seize any property upon a mere suspicion. This is in stark contrast to Section 17(1) of the PMLA which permits seizure only when there is a reason to believe, and such reason is recorded in writing. With respect to search, it is submitted that Section 165 of the Cr.P.C. practically permits any officer above the rank of Constable to exercise such power, as opposed to Section 17 of the PMLA, which confers such power only upon the Director or any other officer not below the rank of Deputy Director.

(xliv) In an attempt to establish that the power of search and seizure is not arbitrary, our attention has been drawn to the decisions of this Court in ***Pooran Mal***[423]**;** ***Income-Tax Officer, Special Investigation Circle-B, Meerut vs. Messrs Seth Brothers***

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[423] Supra at Footnote No.416

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& Ors. etc.[424] and ***Dr. Partap Singh & Anr. vs. Director of Enforcement, Foreign Exchange Regulation Act & Ors.***[425] The learned Additional Solicitor General further defends the power of the Authority to search the place of a person without an FIR. It is submitted that the PMLA serves a two-fold purpose of not only being penal, but also preventive in nature. In order to avoid a situation where the property involved in money-laundering disappears or is disposed of before an FIR is filed in respect of predicate offence, the PMLA empowers seizure without an FIR. Attention is invited to Section 17(1)(iv) of the PMLA, which uses the phrase 'related to crime', and it is submitted that the use of these words show that the Authority is empowered to seize such properties without an FIR in order to ascertain whether such properties pertain to a scheduled offence or whether such properties are proceeds of crime. The argument of the private parties that the Authority under the PMLA cannot conduct a search on the same day without conducting any investigation, is also rebutted by the learned Additional Solicitor General. It is submitted that in light of the mandate to record the

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[424] (1969) 2 SCC 324

[425] (1985) 3 SCC 72

reasons to conduct the search/seizure in writing, such an apprehension is ill-founded. Rather, a party aggrieved by the sufficiency or lack of such reasons, always has the option to agitate the same before the Adjudicating Authority, when an application for the retention of the records seized or frozen is filed.

(xlv) Lastly, it is submitted that by virtue of Section 65 of the PMLA, the provisions of the Cr.P.C. relating to search and seizure cannot be applied to proceedings under the Act. Section 65 of the PMLA states that the provisions of Cr.P.C. shall apply subject to the condition that the same are not inconsistent with those of the PMLA. It is submitted that the provisions contained in Sections 17 and 18 are self-contained with adequate safeguards, and will override the provisions of the Cr.P.C. which are at variance.

(xlvi) In reply to the challenge of the private parties to the applicability of the proviso to Rule 3 of the Seizure Rules, 2005, learned Additional Solicitor General submits that the rules framed under a statute cannot be *ultra vires* the statute. Prior to the amendment of Section 17, the proviso to the Section required that a report be forwarded to the Magistrate under Section 157 of the Cr.P.C. prior to the conduct of a search under Section 17. After the

amendment, the proviso was removed, but a similar proviso continues to exists under Rule 3 of the aforementioned rules. Placing reliance on ***Union of India & Anr. vs. Purushottam***[426], it is submitted that rules must be interpreted in a manner which would be in harmony with the parent statute, and, therefore, even though the rules are unamended, the proviso to Rule 3 cannot be read into the Act and is *ultra vires* the Act.

(xlvii) The respondent has highlighted the legislative history of Sections 5 and 8 of the PMLA. It is submitted that sub-section (1) of Section 5 has been amended four times in the years 2009, 2013, 2015 and 2018 respectively. It is stated that Section 5(1) was amended vide Prevention of Money-Laundering (Amendment) Act, 2009 and second proviso was inserted for the first time which made the provision for 'immediate attachment' of the property involved in money-laundering.

(xlviii) It was observed in the Mutual Evaluation Report of the FATF and the Asia Pacific Group that the confiscation of criminal proceeds depends on conviction of the accused under the scheduled

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[426] (2015) 3 SCC 779.

offence, which gives rise to an apprehension of confiscation proceedings becoming infructuous if the accused dies during the pendency of criminal proceedings. This technical irregularity has a negative impact on the effectiveness of the confiscation regime; therefore, FATF recommended corrective steps to remove this irregularity. Accordingly, Sections 5 and 8 were amended on the recommendation of FATF, as pointed out above.

(xlix) It is submitted that in the Fifty Sixth Report of the Standing Committee on Finance relating to the 2011 Bill published by the Lok Sabha Secretariat on 08.05.2012, it was proposed to delete the requirement of framing of charge under the scheduled offence against a person before a property can be attached from such person, as in a given case a property may come to rest with someone who has nothing to do with the scheduled offence or even with the offence of money-laundering.

(l) It was further proposed to make confiscation of property independent of conviction of an accused under the scheduled offence, as in a given case money-laundering may be done by a person who has not committed the scheduled offence or property may come to rest with someone who has not committed any offence.

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Therefore, to avoid such situations, Section 8(5) was proposed to be amended so as to provide for attachment and confiscation of the proceeds of crime independent of conviction, so long as the predicate offence and the offence of money-laundering have taken place and the property in question is involved in money-laundering. The Parliament acting on such recommendations amended sub-section (1) of Section 5 vide Prevention of Money-Laundering (Amendment) Act, 2012 and deleted the requirement that attachment can be made only *qua* the person who has been charged for committing the scheduled offence. Further, Section 8(3)(a) of the PMLA was also amended to provide that on confirmation, the attachment would continue during the pendency of proceedings related to an offence under the PMLA or under the corresponding law of any other country. Therefore, it is averred that Sections 5 and 8 of the PMLA, as they now stand, enable the attachment and dispossession of the persons from the proceeds of crime without being dependent on the proceedings of the scheduled offence, in consonance with the recommendations of the FATF and global standards.

(li) Further to show the link between second proviso to Section 5 and the scheduled offence, it is submitted that the prerequisite for

the application of 'emergency attachment' provision under second proviso to Section 5 of the PMLA is that the Authority concerned must have some material in its possession showing that such property is involved in money-laundering, which clearly establishes the link of second proviso with the scheduled offence. Relying on sub-section (5) of Section 8, it is averred that the properties which can be confiscated are properties involved in money-laundering and also the properties used for the commission of the offence of money-laundering. It is submitted that the ambit of sub-section (1) of Section 5 is very wide, which not only covers persons who are involved in the commission of scheduled offence, but also any person in possession of the proceeds of crime, who need not be the person accused of PMLA offence or who is being tried for the scheduled offence. It is further submitted that it would not be correct to say that 'any property' of 'any person' can be attached by invoking the second proviso to Section 5, as the proviso only deals with the property which is involved in money-laundering. Further, it is stated that the person whose property is sought to be attached may not be charged under the scheduled offence. Therefore, it is urged that the scheme of second proviso is consistent with Section 5(1) of PMLA. It

is also submitted that under the second proviso the Parliament has provided various safeguards in the form of conditions that have to be satisfied before the power under the proviso can be invoked. It is stated that firstly, the power of provisional attachment can only be exercised by a high-ranking officer; secondly, such officer has to record the 'reasons to believe' that the property is proceeds of crime or involved in money-laundering and lastly, he should be satisfied that if the property is not attached immediately, the confiscation proceedings under the PMLA will get frustrated. Further, it is submitted that such belief must be formed on the basis of material in the possession of the officer. It is then submitted that the expression 'property involved in money-laundering' under the second proviso to Section 5 is wide enough to cover the proceeds of crime as well. Therefore, it is submitted that only the property that is involved in the money-laundering can be attached under the second proviso and not 'any property'. It is urged that the ambit of second proviso to Section 5 is wider than that of main provision of Section 5 itself, as second proviso enables the attachment of 'any property involved in money-laundering', whereas the main provision only allows the attachment of 'proceeds of crime'.

(lii) It is contended that although the function of a proviso is to add something or to carve out an exception on a subject not covered by the main Section, however, in many cases, Courts have treated even a proviso as 'a substantive provision conferring substantive powers'[427]. It is further submitted that even Section 8(5), on the conclusion of the trial, not only permits confiscation of property involved in money-laundering but also the property used for the commission of the offence of money-laundering. Therefore, such interpretation of the second proviso to Section 5 of the PMLA is consistent with the entire scheme of the Act.

(liii) Learned Additional Solicitor General has further refuted the argument of the private parties that the attachment of property equivalent in value of the proceeds of crime can only be done if the proceeds of crime are situated outside India. It is stated that it is manifest from the definition of "proceeds of crime" under Section 2(1)(u) of the PMLA that the proceeds of crime would not only cover the concerned property, but also the value of such property. It is further submitted that the attachment of property under second

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[427] *The Georgia Railroad and Banking Company vs. James M. Smith*, 128 US 174 (1888) and *Commissioner of Stamp Duties vs. Atwill & Ors.,* (1973) 1 All ER 576

proviso is in consonance with the object of the PMLA. Reliance has been placed on ***Attorney General for India & Ors. vs. Amratlal Prajivandas & Ors.***[428], wherein the Court upheld the constitutionality of definition of "illegally acquired property" and application of SAFEMA to the relatives and associates of detenues. Further, Order 38 Rule 5 of the Code of Civil Procedure, 1908[429] has also been relied upon to state that the attachment of property can also be done before judgment, so as to secure the subject matter of the suit during the pendency of the suit[430]. It is submitted that the object of Section 5(1) is similar to that of Order 38 Rule 5 which is to secure the properties from getting disposed of before the confiscation of such property.

(liv) The respondent has further highlighted the procedural safeguards given under second proviso to Section 5(1) of the PMLA. It is submitted that the Authority under the Act will have to first apply its mind to the materials on record and record its reasons to believe in writing before taking any further action. Secondly, the

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[428] (1994) 5 SCC 54 (also at Footnote No.175)

[429] For short, "CPC" or "1908 Code"

[430] *Raman Tech. & Process Engg. Co. & Anr. vs. Solanki Traders*, (2008) 2 SCC 302

Authority must be satisfied that if property will not be immediately attached, the confiscation proceedings might get frustrated. Thirdly, it is stated that order under Section 5(1) is only a provisional order which is valid only for 180 days, subject to the confirmation of Adjudicating Authority. Fourthly, a copy of the order of provisional attachment is to be forwarded to the Adjudicating Authority in a sealed envelope. Fifthly, the Authority is mandated to file a complaint before the Adjudicating Authority within 30 days of the order of the provisional attachment. Sixthly, it is stated that the life of a provisional attachment order is 180 days or the date when the Adjudicating Authority makes an order under Section 8(2) PMLA, whichever is earlier. Seventhly, a show cause notice is served on the aggrieved person, calling upon such person to indicate the sources of his income, earning or assets or by means of which he has acquired the property attached under Section 5(1) PMLA. Therefore, it is submitted that the PMLA ensures that the principles of natural justice do not get violated. Eighthly, the noticee will have the opportunity to produce evidence on which he relies before the Adjudicating Authority. Ninthly, it is stated that due procedure is

followed by the Adjudicating Authority which hear both the parties before passing any order

(lv) Further, under Section 8(6) of the PMLA, the Special Court is empowered to release the property if after the conclusion of the trial it is found that no offence of money-laundering has taken place or the property is not involved in money-laundering.

(lvi) Next, learned Additional Solicitor General highlights the provisions for challenging the orders passed by the Adjudicating Authority. It is submitted that the order passed by the Adjudicating Authority is subject to appeal before the Appellate Tribunal. Also, the order passed by the Tribunal is appealable under Section 42 of the PMLA before the High Court on any question of fact or question of law. Therefore, it is submitted that the ED cannot attach any property on its whims and fancies. Further, PMLA ensures ample judicial scrutiny of the order of attachment.

(lvii) It is submitted that even a third party has the right to challenge the provisional attachment order under Section 8(2) of the PMLA and if the Adjudicating Authority is satisfied that the property is not involved in money-laundering and the claim of the third party

is legitimate one, then it may release such property from attachment. Reliance has been placed on ***Radha Mohan Lakhotia, Indian National and Citizen vs. Deputy Director, PMLA, Directorate of Enforcement, Ministry of Finance, Department of Revenue***[431] to state that the Bombay High Court has even before the amendment of Section 5(1), held that a provisional attachment order can even be passed against the person who is not named as an accused in the commission of scheduled offence. Further it is stated that the High Courts in the following cases, while relying on ***Radha Mohan Lakhotia***[432], have upheld the validity of Section 5(1) of the PMLA: ***B. Rama Raju vs. Union of India & Ors.***[433], ***Alive Hospitality and Food Private Limited vs. Union of India & Ors.***[434], ***K. Sowbaghya vs. Union of India & Ors.***[435], ***Usha Agarwal vs. Union of India & Ors.***[436] and ***J. Sekar vs. Union of India & Ors.***[437].

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[431] 2010 SCC OnLine Bom 1116

[432] Supra at Footnote No.431

[433] 2011 SCC OnLine AP 152

[434] 2013 SCC OnLine Guj 3909

[435] 2016 SCC OnLine Kar 282

[436] 2017 SCC OnLine Sikk 146

[437] 2018 SCC OnLine Del 6523

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(lviii) With regard to the constitutional validity of Section 8, it is submitted that 'no person has a right to enjoy the fruits of a property which is the product of crime'.

(lix) It is submitted that the possession of the property involved in money-laundering can be validly taken before the conviction of a person for the offence of money-laundering, as the non-conviction-based asset forfeiture model, also known as civil forfeiture legislation, is prevalent even in countries such as United States of America, Italy, Ireland, South Africa, UK, Australia and certain provinces of Canada. Further, it is stated that the confiscation of property without conviction under Section 8(4) is in consonance with the Recommendation No.3 of FATF (2003)/Recommendation No.4 of FATF (2012).

(lx) It is further submitted that non-conviction-based attachment and taking possession of property cannot be considered as unconstitutional, since such property can only be confiscated upon conclusion of trial leading to conviction, as provided under Section 8(5) of the PMLA. It is averred that the judicial oversight of Adjudicating Authority is an adequate safeguard provided under the Act.

(lxi) The respondent has relied *on* ***Biswanath Bhattacharya vs. Union of India and Ors.***[438] to urge that the sovereign would be completely justified in confiscating a property which is obtained by a person through illegal means[439]. It is further submitted that the Taking Possession Rules, 2013 provides that before eviction of a person from the concerned property a notice of 10 days' time has to be served upon him, which is an adequate safeguard provided under the Act as it enables the aggrieved person to take a suitable action under Section 26 of the PMLA.

(lxii) It is further pointed out that before the confirmation of the attachment order, any person having an interest in the property have the opportunity of being heard by the Adjudicating Authority. Therefore, it is submitted that the power conferred by Section 8(4) of the PMLA to dispossess a person in possession of 'proceeds of crime' or 'the property involved in money-laundering' even before the conviction is perfectly valid, reasonable and justified.

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[438] (2014) 4 SCC 392

[439] *Divisional Forest Officer & Anr. vs. G.V. Sudhakar Rao & Ors.,* (1985) 4 SCC 573 and *Yogendra Kumar Jaiswal & Ors. vs. State of Bihar & Ors.*, (2016) 3 SCC 183

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(lxiii) To counter the argument of the private parties that the attachment of the property will lapse if no proceedings is initiated under the Act by way of filing a complaint before the Special Court before the expiry of three hundred and sixty-five days of the attachment, it is submitted that the period of attachment under Section 8(3) of the PMLA will be three hundred and sixty-five days or during the pendency of 'any proceedings' which includes any proceeding including of bail, quashing etc.

(lxiv) It is submitted that the expression 'pendency of proceedings' relating to an offence under the PMLA before a Court is broad enough to mean any pending proceedings relating to an offence under the Act[440]. Therefore, it is stated that even if for some reason a complaint has not been filed after three hundred and sixty-five days from the date of attachment then such attachment should not lapse.

(lxv) It is submitted that when a provisional attachment order is finally confirmed, then no person can claim any right, title or interest to the proceeds of crime or property involved in money-laundering.

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[440] *Kamlapati Trivedi vs. State of West Bengal*, (1980) 2 SCC 91

Therefore, only on a conclusion of trial under the Act and upon a finding by the Special Court that the offence of money-laundering has not taken place or the property is not involved in money-laundering, an order for release of such property can be made.

(lxvi) Further, it is stated a person may file frivolous litigations so as to prolong the proceedings. Therefore, Section 8(3)(a) requires a broad construction so as to deny the money launderer from enjoying the proceeds of crime. It is stated that the object of the Act is also manifest from Section 8(7) where even after the death of the accused the proceeds of crime or property involved in money-laundering can be confiscated upon an order of the Special Court. Therefore, for the abovementioned reasons, it is stated that the expression "during the pendency of the proceedings" requires a broad construction.

CONSIDERATION

18. We have heard Mr. Kapil Sibal, Dr. Abhishek Manu Singhvi, Mr. Sidharth Luthra, Mr. Mukul Rohatgi, Mr. Vikram Chaudhari, Mr. Amit Desai, Mr. S. Niranjan Reddy, Ms. Menaka Guruswami, Mr. Siddharth Aggarwal, Mr. Aabad Ponda, Mr. N. Hariharan and Mr. Mahesh Jethmalani, learned senior counsel appearing for private

parties and Mr. Tushar Mehta, learned Solicitor General of India and Mr. S.V. Raju, learned Additional Solicitor General of India, appearing for the Union of India.

THE 2002 ACT

19. The Act was enacted to address the urgent need to have a comprehensive legislation *inter alia* for preventing money-laundering, attachment of proceeds of crime, adjudication and confiscation thereof including vesting of it in the Central Government, setting up of agencies and mechanisms for coordinating measures for combating money-laundering and also to prosecute the persons indulging in the process or activity connected with the proceeds of crime. This need was felt world over owing to the serious threat to the financial systems of the countries, including to their integrity and sovereignty because of money-laundering. The international community deliberated over the dispensation to be provided to address the serious threat posed by the process and activities connected with the proceeds of crime and integrating it with formal financial systems of the countries. The issues were debated threadbare in the United Nation Convention Against Illicit

Traffic in Narcotic Drugs and Psychotropic Substances, Basle Statement of Principles enunciated in 1989, the FATF established at the summit of seven major industrial nations held in Paris from 14th to 16th July, 1989, the Political Declaration and Noble Programme of Action adopted by United Nations General Assembly vide its Resolution No.S-17/2 of 23.2.1990, the United Nations in the Special Session on countering World Drug Problem Together concluded on the 8th to the 10th June, 1998, urging the State parties to enact a comprehensive legislation. This is evident from the introduction and Statement of Objects and Reasons accompanying the Bill which became the 2002 Act. The same reads thus:

> "**INTRODUCTION**
>
> **Money-laundering poses a serious threat not only to the financial systems of countries, but also to their integrity and sovereignty**. To obviate such threats international community has taken some initiatives. It has been felt that to prevent money-laundering and connected activities a comprehensive legislation is urgently needed. To achieve this objective the Prevention of Money-laundering Bill, 1998 was introduced in the Parliament. The Bill was referred to the Standing Committee on Finance, which presented its report on 4th March, 1999 to the Lok Sabha. The Central Government broadly accepted the recommendation of the Standing Committee and incorporated them in the said Bill along with some other desired changes.
>
> **STATEMENT OF OBJECTS AND REASONS**
>
> **It is being realised, world over, that money-laundering poses a serious threat not only to the financial systems of countries, but also to their integrity and**

sovereignty. Some of the initiatives taken by the international community to obviate such threat are outlined below:—

(a) **the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, to which India is a party, calls for prevention of laundering of proceeds of drug crimes and other connected activities and confiscation of proceeds derived from such offence**.

(b) **the Basle Statement of Principles, enunciated in 1989, outlined basic policies and procedures that banks should follow in order to assist the law enforcement agencies in tackling the problem of money-laundering**.

(c) **the Financial Action Task Force established at the summit of seven major industrial nations, held in Paris from 14th to 16th July, 1989, to examine the problem of money-laundering has made forty recommendations, which provide the foundation material for comprehensive legislation to combat the problem of money-laundering. The recommendations were classified under various heads. Some of the important heads are—**

(i) declaration of laundering of monies carried through serious crimes a criminal offence;
(ii) to work out modalities of disclosure by financial institutions regarding reportable transactions;
(iii) confiscation of the proceeds of crime;
(iv) declaring money-laundering to be an extraditable offence; and
(v) promoting international co-operation in investigation of money-laundering.

(d) **the Political Declaration and Global Programme of Action adopted by United Nations General Assembly by its Resolution No. S-17/2 of 23rd February, 1990, *inter alia*, calls upon the member States to develop mechanism to prevent financial institutions from being used for laundering of drug related money and enactment of legislation to prevent such laundering**.

(e) **the United Nations in the Special Session on countering World Drug Problem Together concluded on the 8th to the**

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10th June, 1998 has made another declaration regarding the need to combat money-laundering. India is a signatory to this declaration.

2. In view of an urgent need for the enactment or a comprehensive legislation *inter alia* for preventing money-laundering and connected activities confiscation of proceeds of crime, setting up of agencies and mechanisms for coordinating measures for combating money-laundering, etc., the Prevention of Money-Laundering Bill, 1998 was introduced in the Lok Sabha on the 4th August, 1998. The Bill was referred to the Standing Committee on Finance, which presented its report on the 4th March, 1999 to the Lok Sabha. The recommendations of the Standing Committee accepted by the Central Government are that (a) the expressions "banking company" and "person" may be defined; (b) in Part I of the Schedule under Indian Penal Code the word offence under section 477A relating to falsification of accounts should be omitted; (c) 'knowingly' be inserted in clause 3(b) relating to the definition of money-laundering; (d) the banking companies financial institutions and intermediaries should be required to furnish information of transactions to the Director instead of Commissioner of Income-tax (e) the banking companies should also be brought within the ambit of clause II relating to obligations of financial institutions and intermediaries; (f) a definite time-limit of 24 hours should be provided for producing a person about to be searched or arrested person before the Gazetted Officer or Magistrate; (g) the words "unless otherwise proved to the satisfaction of the authority concerned" may be inserted in clause 22 relating to presumption on inter-connected transactions; (h) vacancy in the office of the Chairperson of an Appellate Tribunal, by reason of his death, resignation or otherwise, the senior-most member shall act as the Chairperson till the date on which a new Chairperson appointed in accordance with the provisions of this Act to fill the vacancy, enters upon his office; (i) the appellant before the Appellate Tribunal may be authorised to engage any authorised representative as defined under section 288 of the Income-tax Act, 1961, (j) the punishment for vexatious search and for false information may be enhanced from three months imprisonment to two years imprisonment, or fine of rupees ten thousand to fine of rupees fifty thousand or both; (k) the word 'good faith' may be incorporated in the clause relating to Bar of legal proceedings. The Central Government have broadly accepted the above

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recommendations and made provisions of the said recommendations in the Bill.

3. In addition to above recommendations of the standing committee the Central Government proposes to (a) relax the conditions prescribed for grant of bail so that the Court may grant bail to a person who is below sixteen years of age, or woman, or sick or infirm, (b) levy of fine for default of non-compliance of the issue of summons, etc. (c) make provisions for having reciprocal arrangement for assistance in certain matters and procedure for attachment and confiscation of property so as to facilitate the transfer of funds involved in money-laundering kept outside the country and extradition of the accused persons from abroad.

4. The Bill seeks to achieve the above objects."

(emphasis supplied)

Notably, before coming into force of the 2002 Act, various other legislations were already in vogue to deal with attachment and confiscation/forfeiture of the proceeds of crime linked to concerned offences and yet another added recently in 2016, such as:

a) The Forfeiture Act, 1857 [Repealed in 1922];

b) The Criminal Law Amendment Ordinance, 1944;

c) The Unlawful Activities (Prevention) Act, 1967 [Chapter V (inserted in 2013)];

d) The Wild Life (Protection) Act, 1972 [Chapter VIA inserted in 2003];

e) The Code of Criminal Procedure, 1973 [Chapter XXXIV – Disposal of Property];

f) The Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976;

g) The Narcotic Drugs and Psychotropic Substances Act, 1985 [Chapter VA inserted in 1989];

h) The Prevention of Corruption Act, 1988 [Section 5(6)];

i) The Maharashtra Control of Organised Crime Act, 1999 [Section 20] [While this is a State law, it has been adopted by several States, or has served as a model law for other States]; and

j) The Anti-Hijacking Act, 2016 [Section 19].

As aforesaid, notwithstanding the existing dispensation to deal with proceeds of crime, the Parliament enacted the Act as a result of international commitment to sternly deal with the menace of money-laundering of proceeds of crime having transnational consequences and on the financial systems of the countries. The Prevention of Money-laundering Bill was passed by both the Houses of Parliament and received the assent of President on 17.1.2003. It came into force

on 1.7.2005 titled “The Prevention of Money-Laundering Act, 2002 (15 of 2003)”.

20. The broad framework of the 2002 Act is that it consists of ten chapters. Chapter I deals with the short title, extent and commencement and definitions. Chapter II deals with offence of money-laundering. Chapter III deals with the mechanism of attachment, adjudication and confiscation. Chapter IV deals with obligations of the banking companies, financial institutions and intermediaries. Chapter V is in respect of steps and safeguards to be taken for issuing summons, carrying out searches and seizures including power to arrest, presumptions and burden of proof. Chapter VI deals with the matters concerning Appellate Tribunal. Chapter VII deals with matters concerning Special Courts, Chapter VIII is regarding the Authorities under the Act and their jurisdiction and powers. Chapter IX deals with reciprocal arrangement for assistance in certain matters and procedure for attachment and confiscation of property. Chapter X deals with miscellaneous and incidental matters. In terms of Section 73 in this Chapter, the

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Central Government has made rules for carrying out the provisions of the Act. The said rules deal with different aspects namely:

a) The Prevention of Money-laundering (the Manner of Forwarding a Copy of the Order of Provisional Attachment of Property along with the Material, and Copy of the Reasons along with the Material in respect of Survey, to the Adjudicating Authority and its period of Retention) Rules, 2005;

b) The Prevention of Money-laundering (Receipt and Management of Confiscated Properties) Rules, 2005;

c) The Prevention of Money-laundering (Maintenance of Records) Rules, 2005 as amended by (Fifth Amendment) Rules, 2019;

d) The Prevention of Money-laundering (Forms, Search and Seizure or Freezing & the Manner of Forwarding the Reasons and Material to the Adjudicating Authority, Impounding and Custody of Records and the Period of Retention) Rules, 2005;

e) The Prevention of Money-laundering (the Forms and the 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;

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f) The Prevention of Money-laundering (the Manner of Forwarding a Copy of the Order of Retention of Seized Property along with the Material to the Adjudicating Authority and the period of its Retention) Rules, 2005;

g) The Prevention of Money-laundering (Manner of Receiving the Records Authenticated Outside India) Rules, 2005;

h) The Prevention of Money-laundering (Appeal) Rules, 2005;

i) The Prevention of Money-laundering (Appointment and Conditions of Service of Chairperson and Members of Adjudicating Authorities) Rules, 2007;

j) The Adjudicating Authority (Procedure) Regulations, 2013;

k) The Prevention of Money-laundering (Issuance of Provisional Attachment Order) Rules, 2013;

l) The Prevention of Money-laundering (Taking Possession of Attached or Frozen Properties Confirmed by the Adjudicating Authority) Rules, 2013;

m) The Prevention of Money-laundering (Restoration of Property) Rules, 2016 as amended by (Amendment) Rules, 2019.

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We may further note that the 2002 Act has been amended from time to time to address the exigencies and for the need to strengthen the mechanisms as per the recommendations made by the international body to address the scourge of laundering of proceeds of crime affecting the financial systems and also integrity and sovereignty of the country. The list of amending Acts is as follows:

a) The Prevention of Money-Laundering (Amendment) Act, 2005 (20 of 2005) (w.e.f. 1-7-2005);

b) The Prevention of Money-Laundering (Amendment) Act, 2009 (21 of 2009) (w.e.f. 1-6-2009);

c) The Prevention of Money-Laundering (Amendment) Act, 2012 (2 of 2013) (w.e.f. 15-2-2013);

d) The **Finance Act, 2015** (20 of 2015) (w.e.f. 14-5-2015);

e) The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (22 of 2015) (w.e.f. 1-7-2015);

f) The **Finance Act, 2016** (28 of 2016) (w.e.f. 1-6-2016);

g) The **Finance Act, 2018** (13 of 2018) (w.e.f. 19-4-2018);

h) The Prevention of Corruption (Amendment) Act, 2018 (16 of 2018) (w.e.f. 26-7-2018);

i) The **Finance Act, 2019** (7 of 2019) (w.e.f. 20-3-2019);

j) The Aadhaar and other Laws (Amendment) Act, 2019 (14 of 2019) (w.e.f. 25-7-2019); and

k) The **Finance (No.2) Act, 2019** (23 of 2019) (w.e.f. 1-8-2019).

21. The petitioners have questioned the amendments brought about by the Parliament by taking recourse to Finance Bill/Money Bill. At the outset, it was made clear to all concerned that the said ground of challenge will not be examined in the present proceedings as it is pending for consideration before the Larger Bench of this Court (seven Judges) in view of the reference order passed in ***Rojer Mathew***[441]. We are conscious of the fact that if that ground of challenge is to be accepted, it may go to the root of the matter and amendments effected vide Finance Act would become unconstitutional or ineffective. Despite that, it had become necessary to answer the other contentions which may otherwise require consideration in the event of the principal ground of challenge is answered against the petitioners. In any case, until the larger Bench decides that issue authoritatively, the authorities and the Adjudicating Authority as well as the Courts are obliged to give

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[441] Supra at Footnote No.90

effect to the amended provisions. Resultantly, the other issues raised in this batch of cases being recurring and as are involved in large number of cases to be dealt with by the authorities and the Adjudicating Authority under the Act and the concerned Courts on daily basis, including the Constitutional Courts, it has become necessary to answer the other grounds of challenge in the meantime. On that understanding, we proceeded with the hearing of the batch of cases before us to deal with the other challenges regarding the concerned provision(s) being otherwise unconstitutional and *ultra vires*.

22. We do not deem it necessary to deal with the factual matrix involved in the concerned case. For, after answering the issues regarding the validity as dealt with herein, including interpretation of the concerned provision(s), the petitioners can be relegated to pursue their other remedies (such as for bail, quashing, discharge, etc.), before the appropriate forum.

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PREAMBLE OF THE 2002 ACT

23. The Preamble of the 2002 Act reads thus:

> *"An Act to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto.*
>
> WHEREAS the Political Declaration and Global Programme of Action, annexed to the resolution S-17/2 was adopted by the General Assembly of the United Nations at its seventeenth special session on the twenty-third day of February, 1990;
>
> AND WHEREAS the Political Declaration adopted by the Special Session of the United Nations General Assembly held on 8th to 10th June, 1998 calls upon the Member States to adopt national money-laundering legislation and programme;
>
> AND WHEREAS it is considered necessary to implement the aforesaid resolution and the Declaration."

Even the Preamble of the Act reinforces the background in which the Act has been enacted by the Parliament being commitment of the country to the international community. It is crystal clear from the Preamble that the Act has been enacted to prevent money-laundering and to provide for confiscation of property derived from or involved in money-laundering and for matters connected therewith or incidental thereto. It is neither a pure regulatory legislation nor a pure penal legislation. It is amalgam of several

facets essential to address the scourge of money-laundering as such. In one sense, it is a *sui generis* legislation.

24. As aforesaid, it is a comprehensive legislation dealing with all the related issues concerning prevention of money-laundering, attachment of proceeds of crime, adjudication and confiscation thereof including vesting of it in the Central Government, setting up of agencies and mechanisms for coordinating measures for combating money-laundering and also to prosecute the persons indulging in the process or activity connected with the proceeds of crime. While considering the challenge to the relevant provision(s) of the 2002 Act, we cannot be oblivious to the objects and reasons for enacting such a special legislation and the seriousness of the issues to be dealt with thereunder including having transnational implications. Every provision in the 2002 Act will have to be given its due significance while keeping in mind the legislative intent for providing a special mechanism to deal with the scrouge of money-laundering recognised world over and with the need to deal with it sternly.

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DEFINITION CLAUSE

25. Section 2 defines some of the expressions used in the relevant provision(s) of the 2002 Act. We may usefully refer to some of the expressions defined in this section having bearing on the matters in issue, namely (as amended from time to time) –

> "2. **Definitions**.—(1) In this Act, unless the context otherwise requires,—
>
> (a) "Adjudicating Authority" means an Adjudicating Authority appointed under sub-section (1) of section 6;
>
> (b) "Appellate Tribunal" means the Appellate Tribunal [442][referred to in] section 25;
>
> (c) "Assistant Director" means an Assistant Director appointed under sub-section (1) of section 49;
>
> (d) "attachment" means prohibition of transfer, conversion, disposition or movement of property by an order issued under Chapter III;
>
> *** *** ***
>
> (j) "Deputy Director" means a Deputy Director appointed under sub-section (1) of section 49;
>
> (k) "Director" or "Additional Director" or "Joint Director" means a Director or Additional Director or Joint Director, as the case may be, appointed under sub-section (1) of section 49;
>
> *** *** ***
>
> [443][(na)"investigation" includes all the proceedings under this Act conducted by the Director or by an authority authorised by the Central Government under this Act for the collection of evidence];
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> *** *** ***

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[442] Subs. by Act 28 of 2016, sec. 232(a), for "established under" (w.e.f. 1-6-2016)

[443] Ins. by Act 20 of 2005, sec. 2 (w.e.f. 1-7-2005)

(p) “money-laundering” has the meaning assigned to it in section 3;

*** *** ***

(t) “prescribed” means prescribed by rules made under this Act;

(u) “proceeds of crime” means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property [444][or where such property is taken or held outside the country, then the property equivalent in value held within the country] [445][or abroad];

[446][Explanation.—For the removal of doubts, it is hereby clarified that "proceeds of crime" include property not only derived or obtained from the scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence;]

(v) “property” means any property or assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and includes deeds and instruments evidencing title to, or interest in, such property or assets, wherever located;

[447][Explanation.—For the removal of doubts, it is hereby clarified that the term “property” includes property of any kind used in the commission of an offence under this Act or any of the scheduled offences];

*** *** ***

(x) “Schedule” means the Schedule to this Act;

(y) “scheduled offence” means—

(i) the offences specified under Part A of the Schedule; or

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[444] Ins. by the **Finance Act, 2015** (20 of 2015), sec. 145(i) (w.e.f. 14-5-2015).

[445] Ins. by Act 13 of 2018, sec. 208(a) (w.e.f. 19-4-2018, *vide* G.S.R. 383(E), dated 19th April, 2018)

[446] Ins. by the **Finance (No.2) Act, 2019**, sec. 192(iii) (w.e.f. 1-8-2019)

[447] Ins. by Act 2 of 2013, sec. 2(x) (w.e.f. 15-2-2013, *vide* S.O. 343(E), dated 8.2.2013).

[448][(ii) the offences specified under Part B of the Schedule if the total value involved in such offences is [449][one crore rupees] or more; or]

[450][(iii) the offences specified under Part C of the Schedule;]

(z) "Special Court" means a Court of Session designated as Special Court under sub-section (1) of section 43;

(za) "transfer" includes sale, purchase, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien;

(zb) "value" means the fair market value of any property on the date of its acquisition by any person, or if such date cannot be determined, the date on which such property is possessed by such person"

26. We would now elaborate upon the meaning of "investigation" in Clause (na) of Section 2(1). It includes all proceedings under the Act conducted by the Director or an authority authorised by the Central Government under this Act for collection of evidence. The expression "all the proceedings under this Act" unquestionably refers to the action of attachment, adjudication and confiscation, as well as actions undertaken by the designated authorities mentioned in Chapter VIII of the Act, under Chapter V of the Act, and for

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[448] Subs. by Act 21 of 2009, sec. 2(vi), for sub-clause (ii) (w.e.f. 1-6-2009). Sub-clause (ii), before substitution, stood as under:

"(ii) "the offences specified under Part B of the Schedule if the total value involved in such offence is thirty lakh rupees or more;"

[449] Subs. by the **Finance Act, 2015 (20 of 2015)**, sec. 145(ii), for "thirty lakh rupees" (w.e.f. 14.5.2015)

[450] Subs. by Act 21 of 2009 (see Footnote No.448)

facilitating the adjudication by the Adjudicating Authority referred to in Chapter III to adjudicate the matters in issue, including until the filing of the complaint by the authority authorised in that behalf before the Special Courts constituted under Chapter VII of the Act. The expression "proceedings", therefore, need not be given a narrow meaning only to limit it to proceedings before the Court or before the Adjudicating Authority as is contended but must be understood contextually. This is reinforced from the scheme of the Act as it recognises that the statement recorded by the Director in the course of inquiry, to be deemed to be judicial proceedings in terms of Section 50(4) of the 2002 Act. Needless to underscore that the authorities referred to in Section 48 of the Act are distinct from the Adjudicating Authority referred to in Section 6 of the 2002 Act. The Adjudicating Authority referred to in Section 6 is entrusted with the task of adjudicating the matters in issue for confirmation of the provisional attachment order issued under Section 5 of the 2002 Act, passed by the Authority referred to in Section 48 of the Act. The confirmation of provisional attachment order is done by the Adjudicating Authority under Section 8 of the 2002 Act, and if confirmed, the property in question is ordered to be confiscated and

then it would vest in the Central Government as per Section 9 of the 2002 Act subject to the outcome of the trial of the offence under the 2002 Act (i.e., Section 3 of offence of money-laundering punishable under Section 4). Suffice it to observe that the expression "proceedings" must be given expansive meaning to include actions of the authorities (i.e., Section 48) and of the Adjudicating Authority (i.e., Section 6), including before the Special Court (i.e., Section 43).

27. The task of the Director or an authority authorised by the Central Government under the 2002 Act for the collection of evidence is the intrinsic process of adjudication proceedings. In that, the evidence so collected by the authorities is placed before the Adjudicating Authority for determination of the issue as to whether the provisional attachment order issued under Section 5 deserves to be confirmed and to direct confiscation of the property in question. The expression "investigation", therefore, must be regarded as interchangeable with the function of "inquiry" to be undertaken by the authorities for submitting such evidence before the Adjudicating Authority.

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28. In other words, merely because the expression used is "investigation" — which is similar to the one noted in Section 2(h) of the 1973 Code, it does not limit itself to matter of investigation concerning the offence under the Act and Section 3 in particular. It is a different matter that the material collected during the inquiry by the authorities is utilised to bolster the allegation in the complaint to be filed against the person from whom the property has been recovered, being the proceeds of crime. Further, the expression "investigation" used in the 2002 Act is interchangeable with the function of "inquiry" to be undertaken by the Authorities under the Act, including collection of evidence for being presented to the Adjudicating Authority for its consideration for confirmation of provisional attachment order. We need to keep in mind that the expanse of the provisions of the 2002 Act is of prevention of money-laundering, attachment of proceeds of crime, adjudication and confiscation thereof, including vesting of it in the Central Government and also setting up of agency and mechanism for coordinating measures for combating money-laundering.

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29. Coming to the next relevant definition is expression "money-laundering", it has the meaning assigned to it in Section 3 of the Act. We would dilate on this aspect while dealing with the purport of Section 3 of the Act a little later.

30. The other relevant definition is "proceeds of crime" in Section 2(1)(u) of the 2002 Act. This definition is common to all actions under the Act, namely, attachment, adjudication and confiscation being civil in nature as well as prosecution or criminal action. The original provision prior to amendment vide Finance Act, 2015 and Finance (No.2) Act, 2019, took within its sweep any property (mentioned in Section 2(1)(v) of the Act) derived or obtained, directly or indirectly, by any person "as a result of" criminal activity "relating to" a scheduled offence (mentioned in Section 2(1)(y) read with Schedule to the Act) or the value of any such property. Vide Finance Act, 2015, it further included such property (being proceeds of crime) which is taken or held outside the country, then the property equivalent in value held within the country and by further amendment vide Act 13 of 2018, it also added property which is abroad. By further amendment vide Finance (No.2) Act, 2019, Explanation has been added which is obviously a clarificatory amendment. That is evident from the plain language of the inserted Explanation itself. The fact that it also includes any

property which may, directly or indirectly, be derived as a result of any criminal activity relatable to scheduled offence does not transcend beyond the original provision. In that, the word "relating to" (associated with/has to do with) used in the main provision is a present participle of word "relate" and the word "relatable" is only an adjective. The thrust of the original provision itself is to indicate that any property is derived or obtained, directly or indirectly, as a result of criminal activity concerning the scheduled offence, the same be regarded as proceeds of crime. In other words, property in whatever form mentioned in Section 2(1)(v), is or can be linked to criminal activity relating to or relatable to scheduled offence, must be regarded as proceeds of crime for the purpose of the 2002 Act. It must follow that the Explanation inserted in 2019 is merely clarificatory and restatement of the position emerging from the principal provision [i.e., Section 2(1)(u)].

31. The "proceeds of crime" being the core of the ingredients constituting the offence of money-laundering, that expression needs to be construed strictly. In that, all properties recovered or attached by the investigating agency in connection with the criminal activity

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relating to a scheduled offence under the general law cannot be regarded as proceeds of crime. There may be cases where the property involved in the commission of scheduled offence attached by the investigating agency dealing with that offence, cannot be wholly or partly regarded as proceeds of crime within the meaning of Section 2(1)(u) of the 2002 Act — so long as the whole or some portion of the property has been derived or obtained by any person "as a result of" criminal activity relating to the stated scheduled offence. To be proceeds of crime, therefore, the property must be derived or obtained, directly or indirectly, "as a result of" criminal activity relating to a scheduled offence. To put it differently, the vehicle used in commission of scheduled offence may be attached as property in the concerned case (crime), it may still not be proceeds of crime within the meaning of Section 2(1)(u) of the 2002 Act. Similarly, possession of unaccounted property acquired by legal means may be actionable for tax violation and yet, will not be regarded as proceeds of crime unless the concerned tax legislation prescribes such violation as an offence and such offence is included in the Schedule of the 2002 Act. For being regarded as proceeds of crime, the property associated with the scheduled offence must have

been derived or obtained by a person "as a result of" criminal activity relating to the concerned scheduled offence. This distinction must be borne in mind while reckoning any property referred to in the scheduled offence as proceeds of crime for the purpose of the 2002 Act. Dealing with proceeds of crime by way of any process or activity constitutes offence of money-laundering under Section 3 of the Act.

32. Be it noted that the definition clause includes any property derived or obtained "indirectly" as well. This would include property derived or obtained from the sale proceeds or in a given case in lieu of or in exchange of the "property" which had been directly derived or obtained as a result of criminal activity relating to a scheduled offence. In the context of Explanation added in 2019 to the definition of expression "proceeds of crime", it would inevitably include other property which may not have been derived or obtained as a result of any criminal activity relatable to the scheduled offence. As noticed from the definition, it essentially refers to "any property" including abroad derived or obtained directly or indirectly. The Explanation added in 2019 in no way travels beyond that intent of tracking and reaching upto the property derived or obtained directly or indirectly

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as a result of criminal activity relating to a scheduled offence. Therefore, the Explanation is in the nature of clarification and not to increase the width of the main definition "proceeds of crime". The definition of "property" also contains Explanation which is for the removal of doubts and to clarify that the term property includes property of any kind used in the commission of an offence under the 2002 Act or any of the scheduled offences. In the earlier part of this judgment, we have already noted that every crime property need not be termed as proceeds of crime but the converse may be true. Additionally, some other property is purchased or derived from the proceeds of crime even such subsequently acquired property must be regarded as tainted property and actionable under the Act. For, it would become property for the purpose of taking action under the 2002 Act which is being used in the commission of offence of money-laundering. Such purposive interpretation would be necessary to uphold the purposes and objects for enactment of 2002 Act.

33. Tersely put, it is only such property which is derived or obtained, directly or indirectly, as a result of criminal activity relating to a scheduled offence can be regarded as proceeds of crime.

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The authorities under the 2002 Act cannot resort to action against any person for money-laundering on an assumption that the property recovered by them must be proceeds of crime and that a scheduled offence has been committed, unless the same is registered with the jurisdictional police or pending inquiry by way of complaint before the competent forum. For, the expression "derived or obtained" is indicative of criminal activity relating to a scheduled offence already accomplished. Similarly, in the event the person named in the criminal activity relating to a scheduled offence is finally absolved by a Court of competent jurisdiction owing to an order of discharge, acquittal or because of quashing of the criminal case (scheduled offence) against him/her, there can be no action for money-laundering against such a person or person claiming through him in relation to the property linked to the stated scheduled offence. This interpretation alone can be countenanced on the basis of the provisions of the 2002 Act, in particular Section 2(1)(u) read with Section 3. Taking any other view would be rewriting of these provisions and disregarding the express language of definition clause "proceeds of crime", as it obtains as of now.

34. By and large the debate today is restricted to the discrepancy between the word 'and', which features in the original definition, against the 'or' in the newly inserted Explanation in Section 3. While the stand of the Government is that there is no requirement under Section 3 to project or claim the proceeds of crime as untainted property. The petitioners have claimed that said interpretation will be unconstitutional. For, the requirement is that not only does a predicate crime need to be committed, it in turn needs to generate proceeds of crime and it must also then be projected as untainted property to qualify for the crime of money-laundering. The general scheme of the law of this land is that any law which is questioned is presumed to be unblemished and within the confines of the Constitutional principles so laid down within the Constitution. Yet, as the arguments, challenges laid against the interpretation of the impugned section are so many we find it necessary to see how India embarked on the framing of the definition of "money-laundering" under Section 3 of the 2002 Act. Thereafter, we will see how the Parliament over the years responded to changes and suggestions from the outside world, notably the FATF. Thus, in *seriatim* we endeavour to see the international Conventions which led to the

evolution of money-laundering, based on which the Government decided to enact the law, followed by the FATF recommendations which have led to the amendments, then the debates in the Parliament of India followed by the law of the land as laid down by this Court.

35. For untying the knot, how money-laundering evolved — it is trite to refer to the tenets that have been laid down in what are commonly referred to as the Palermo and Vienna Conventions. The first step ever taken towards ridding the world of money-laundering were made in the Vienna Convention, 1988 wherein under Articles 3.1(b)(i),(ii),(c)(i) to (iv), 3.2 and 3.3, it was held as follows:

> "Article 3
>
> OFFENCES AND SANCTIONS
>
> 1. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:
>
> a)(i) to (v) ….
>
> b) i) The **conversion or transfer of property, knowing that such property is derived from any offence or offences established** in accordance with subparagraph a) of this paragraph, or from **an act of participation in such offence or offences**, **for the purpose of concealing or disguising the illicit origin of the property or of assisting any person** who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;

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ii) The **concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established** in accordance with subparagraph a) of this paragraph or from an act of participation in such an offence or offences;

c) **Subject to its constitutional principles** and the basic concepts of its legal system:

i) The **acquisition, possession or use of property,** knowing, at the time of receipt, that such property was **derived from an offence or offences** established in accordance with subparagraph a) of this paragraph or from an act of participation in such offence or offences;

ii) The **possession of equipment or materials or substances listed in Table I and Table II**, knowing that they are being or are to be used in or for the illicit cultivation, production or

iii) **Publicly inciting or inducing others, by any means, to commit any of the offences established** in accordance with this article or to use narcotic drugs or psychotropic substances illicitly;

iv) **Participation in, association or conspiracy to commit, attempts** to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

2. **Subject to its constitutional principles** and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.

3. **Knowledge, intent or purpose required** as an element of an offence set forth in paragraph 1 of this article may be **inferred from objective factual circumstances.**"

(emphasis supplied)

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Similarly, the next important Convention which bolstered the fight against money-laundering was the Palermo Convention wherein in Annex I it is stated that:

> "Article 2. Use of terms
>
> (a) to (d) .....
>
> (e) "Proceeds of crime" shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;
>
> .....
>
> (h) "Predicate offence" shall mean any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 6 of this Convention;
>
> .....
>
> *** *** ***
>
> Article 6. Criminalization of the laundering of proceeds of crime
>
> 1. Each State Party shall adopt**, in accordance with fundamental principles of its domestic law**, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
>
> (a) (i) The **conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action**;
>
> (ii) The **concealment or disguise of the true nature**, source, location, disposition, movement or ownership of or rights with respect to property, **knowing that such property is the proceeds of crime**;
>
> (b) **Subject to the basic concepts of its legal system**:

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(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

2. **For purposes of implementing** or applying paragraph 1 of this article:

(a) **Each State Party shall seek** to apply paragraph 1 of **this article to the widest range of predicate offences;**

(b) **Each State Party shall include as predicate offences all serious crime** as defined in article 2 of this Convention and the offences established in accordance with articles 5, 8 and 23 of this Convention. **In the case of States Parties whose legislation sets out a list of specific predicate offences, they shall, at a minimum, include in such list a comprehensive range of offences associated with organized criminal groups;**

(c) For the purposes of subparagraph (b), predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;

(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence;

(f) **Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances**."

(emphasis supplied)

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Thus, it is clear from a bare reading of two very initial international Conventions attempting to establish a world order to curb money-laundering, gave a very wide interpretation to the concept of money-laundering. There has been a consensus that acquisition, possession, use, concealing or disguising the illicit origin of illegitimately obtained money to evade legal consequences would be money-laundering. Further, concealing and disguising too were clearly a part of money-laundering and as such there was no bar or understating that pointed to the fact that there was a need to project the monies as untainted. This was obviously subject to the fundamental principles of the domestic law of the countries. However, the growth of the jurisprudence in this law did not stop or end there. As we progressed into a world equipped with the internet and into a digital age, criminals found new ways to launder and the law found new ways to tackle them. In the meanwhile, the FATF was established and it started working towards a goal of preventing money-laundering. It has since its inception been aimed towards reducing cross border and intra State money-laundering activities. In this endeavour, it has made many concerted efforts to study, understand, develop and mutually evaluate the state of the

compliance in countries towards reducing money-laundering. Today, as we will see, many of the amendments in the 2002 Act are in response to the recommendations of the FATF. Thereafter, forty recommendations dated 20.6.2003, were made by the FATF which had led to much deliberations go on to show that all endeavours were to be Vienna and Palermo Conventions compliant. During the evolution of the jurisprudence on money-laundering, it was found that India was in fact lacking in some aspects of curbing money-laundering. Hence, the recommendations were made to India time and again. It is pertinent also to reproduce the Mutual Evaluation of the Anti-Money Laundering (AML) and Combating the Financing of Terrorism (CFT) regime of India as adopted on 24.06.2010 in its recommendations, as it has been shown that it is based on these observations that the amendment have been made, herein it has been observed thus:

> "Recommendation 1
>
> ....
>
> Consistency with the United Nations Conventions
>
> 137. **The Vienna and Palermo Conventions require countries to establish a criminal offence for the following knowing/intentional acts: conversion or transfer of proceeds for specific purposes; concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with**

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respect to proceeds; and - subject to the fundamental/constitutional principles or basic concepts of the country's legal system - the sole acquisition, possession or use of proceeds (Art. 3(1)(b)&(c) of the Vienna Convention; and Art. 6(1) of the Palermo Convention against Transnational Organised Crime – the TOC Convention).

138. Section 8A of the NDPS Act offence is an almost faithful transposition of the Vienna Convention ML provisions. The PMLA takes a different approach by using a terminology that by its broad wording is intended to generally correspond with the criminal activity targeted by both the Vienna and Palermo Conventions.

139. As said, the PMLA (s.3) provides that money laundering is committed where someone "directly or indirectly attempts to indulge, knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime and projecting it as untainted property". The section 3 *mens rea* threshold is lower than the Art. 6.1(a) of the TOC Convention in that no specific purpose or intention is required. **The substantive element of "projecting it as untainted property" carries the notion of knowing disguise, as required by the Conventions, but does not appear to cover all concealment activity, such as the physical hiding of the assets.**

……

Recommendation 2

Scope of liability

……

Implementation and effectiveness

164. When the PMLA was enacted on 1 July 2005 implementing the Palermo TOC Convention, it was already clear that the scope of the law was too restrictive to withstand the test of the relevant international standards. With the extension of the list of predicate offences under Schedule A and B, and the addition of Schedule C offences since 1 June 2009, **India has made a serious effort to bring the ML criminalisation of the PMLA in line with the FATF criteria in this respect. It did not do away with all shortcomings, however.**

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165. Firstly, it is not clear why the legislator abandoned the NDPS Act approach to define the ML activity by simply incorporating the relevant Convention language in the domestic law. With the section 3 of the PMLA money laundering provision, a newly defined ML offence was introduced differing from the comprehensive qualification of section 8A of the NDPS Act that was not repealed, resulting in the coexistence of two divergent drug related ML offences.

166. The new definition of the ML offence in section 3 of the PMLA tries to capture all requisite mental and physical elements of the Convention's ML provision in one overarching sentence. The *mens rea* element is the "knowledge" standard as minimally required by the Conventions. **Section 3 of the PMLA does not require a specific intention or purpose, and as such its threshold is lower than that of Art. 6.1(a)(i) of the TOC Convention. The provision however falls short on the following *actus reus* aspects:**

a. The physical element in all cases includes the substantive condition of "*projecting (the proceeds of crime) as untainted property*", so although the broad formulation of "*any process or activity*" covers any conduct involving criminal proceeds, such conduct is only criminalised as money laundering when the property is concurrently projected as untainted. While this "projection" circumstance may correspond with the notion of "disguise" as in Art. 6.1(a)(ii) of the TOC Convention, it does not cover acts of physical concealment without any "projecting" (such as deposit in a safe), even if – as was argued - this act is seen as an attempt to "project", *quod non*.

b. With the imposition of the "projecting" condition the PMLA offence does not extend to the activity of sole "acquisition, possession or use" of criminal proceeds as stated in Article 6(1)(b)(i) of the TOC Convention, although this would not be contrary to the basic concepts of the Indian legal system. Only the offences of "holding" drug proceeds (NDPS Act s.68C) or "proceeds of terrorism" (UAPA s.21) are unconditional and may be considered to cover "possession" situations in these specific circumstances. Also, the sections

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410 and 411 IPC "receiving" offence may cover acts of "acquisition", but these provisions fall short in respect of the scope of predicate offences, as they only apply to stolen (or equivalent[451]) property.

*** *** ***

Table 2: Recommended Action Plan to Improve the AML/CFT System

AML/CFT system	Recommended Action
1. General	No text required
2. Legal System and Related Institutional	
2.1 Criminalisation of Money laundering Measures (R.1 & R.2)	Although recently an increased focus on the ML aspect and use of the ML provisions is to be acknowledged, there are still some important and often long-standing legal issues to be resolved. To that end following measures should be taken: • The monetary threshold limitation of INR 3 million for the Schedule Part B predicate offences should be abolished. • **The section 3 PMLA definition of the ML offence should be brought in line with the Vienna and Palermo Conventions so as to also fully cover the physical concealment and the sole acquisition,**

[451] "Stolen" property includes property derived from extortion, robbery, misappropriation or breach of trust (IPC s.410)

	possession and use of all relevant proceeds of crime. • The present strict and formalistic interpretation of the evidentiary requirements in respect of the proof of the predicate offence should be put to the test of the courts to develop case law and receive direction on this fundamental legal issue. • The level of the maximum fine imposable on legal persons should be raised or left at the discretion of the court to ensure a more dissuasive effect. • The practice of making a conviction of legal persons contingent on the concurrent prosecution/conviction of a (responsible) natural person should be abandoned."

(emphasis supplied)

Thus, it is clear that certain recommendations were made by the FATF concerning the definition of money-laundering. It is also clear from public records that India has time and again, since the inception of the Act, made active efforts to follow and evolve its own laws in line with the mandates and recommendations of the

FATF. Furthermore, it is noteworthy that even in other jurisdictions; the above-mentioned definition has gained a more holistic approach which is not *per se* the same as the colloquial term, "money launder" or simply turning black money into white. In the UK and Spain, possession of criminal proceeds is covered under money-laundering, similarly by way of interpretation, the same is the case in Germany and Italy[452]. Following these recommendations, amendments were brought about in India. This in turn led to debates as can be seen from the following speeches which were made in the Parliament. We first note the speech of the then Finance Minister made on 02.12.1999 in the Lok Sabha at the time of introducing the 1999 Bill, it is as follows:

> ".....The Foreign Exchange Regulation Act, 1973 primarily made compensatory transactions (known as Havala) illegal. The basic aim was to ensure that no one contravenes the exchange control regulations through unofficial channels. The emphasis was, therefore, on violation of foreign exchange regulations rather than on "money-laundering". **Money-laundering, that is the cleansing of proceeds of crimes such as extortion, treason, drug trafficking, gun running etc. poses a serious threat to the integrity and sovereignty of a country and also to its financial systems. This threat to the nation and its economy has been recognised the world over and several UN and other international conventions have called upon member countries to take legislative and other preventive measures to**

[452] National and International Anti-Money Laundering Law, Benjamin vogel and Jean-Baptiste Maillart, Max Planck Institute, 2020 ed. Pg. 798.

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> **combat the menace of money-laundering. As India is a signatory to some of these conventions, a committee was set up to examine and suggest a draft legislation for this purpose.** Based on their report, a separate legislation has been introduced with stringent penal provisions. At the same time, there is a need to consolidate and amend the law relating to foreign exchange consistent with the liberalisation policies pursued during the last eight years. While the provisions of Foreign Exchange Management Bill make foreign exchange contraventions civil wrongs, the offences under the prevention of Money-Laundering Bill have been made criminal and will attract stringent punishment.
>
> ....
>
> **The point I am making is that we have picked up certain offences which are heinous, as I said in the beginning, which are of very serious nature. We are bringing this legislation on money- laundering so that receipts from those crimes and properties acquired as a result thereof, are dealt with under this Act.** At the present moment, we have no legislation which will deal exclusively with this particular subject. So, we are bringing this Bill."
>
> (emphasis supplied)

This speech, thus, set the tone for the years to come in our fight against money-laundering. This law was enacted in 2002 yet brought into force in 2005. Later, a speech was made by the then Finance Minister, who had introduced the Prevention of Money Laundering (Amendment) Bill, 2012 in the Rajya Sabha on 17.12.2012

> "SHRI P. CHIDAMBARAM: Mr. Deputy Chairman, Sir, I am grateful to the hon. Members, especially ten hon. Members who have spoken on this Bill and supported the Bill. Naturally, some questions will arise; they have arisen. It is my duty to clarify those matters. **Sir, firstly, we must**

remember that money-laundering is a very technically-defined offence. It is not the way we understand 'money-laundering' in a colloquial sense. It is a technically-defined offence. It postulates that there must be a predicate offence and it is dealing with the proceeds of a crime. That is the offence of money-laundering. It is more than simply converting black-money into white or white money into black. That is an offence under the Income Tax Act. There must be a crime as defined in the Schedule. As a result of that crime, there must be certain proceeds — It could be cash; it could be property. **And anyone who directly or indirectly indulges or assists or is involved in any process or activity connected with the proceeds of crime and projects it as untainted property is guilty of offence of money-laundering. So, it is a very technical offence. The predicate offences are all listed in the Schedule. Unless there is a predicate offence, there cannot be an offence of money-laundering. Initially the thinking was unless a person was convicted of the predicate offence, you cannot convict him of money-laundering. But that thinking is evolved now. The Financial Action Task Force has now come around to the view that if the predicate offence has thrown up certain proceeds and you dealt with those proceeds, you could be found guilty of offence of money-laundering. What we are trying to do is to bring this law on lines of laws that are commended by FATF and all countries have obliged to bring their laws on the same lines.** I just want to point to some of my friends that this Bill was passed in 2002. In 2002, we felt that these provisions are sufficient. In the working of the law, we found that the provisions have certain problems. We amended it in 2005. We amended it in 2009. We still find that there are some problems. **The FATF has pointed out some problems. And, we are amending it in 2012. It is not finding fault with anyone. All I am trying to say is that this is an evolutionary process**. Laws will evolve in this way, and we are amending it again in 2012."

(emphasis supplied)

36. It is seen that there is clear inclination to follow the recommendations of the FATF, made from time to time. Yet, before

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we move forward, we must note other statements that were made before the latest amendment was made. In the Statement RE: Amendment/Background/Justification for amendments to the 2002 Act – Pg 226-235 of the Debate on the Finance Bill, 2019 it was noted that:

> "....
>
> 4. **It has been experienced that certain doubts are also raised as regards definition of 'Offence of money laundering' included in section 3 of the Act of 2002. It is observed that the legislative intent and object of the Act of 2002 is wrongly construed as if all the activities as mentioned therein are required to be present together to constitute the offence of Money Laundering. The intention of the legislature had always been that a person shall be held to be guilty of offence of money-laundering if he is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in any one or more of the process of activity included in section 3 of the Act of 2002. It is also observed that the original intention of the legislature is wrongly construed to interpret as if the offence of money laundering is a one time instantaneous offence and finishes with its concealment or possession or acquisition or use of projecting it as untainted property or claiming it as untainted property. The intention of the legislature had always been that a person will be held to be guilty of offence of money-laundering and will be punished as long as person is enjoying the "proceeds of crime" by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property or in any manner whatsoever. Accordingly, an Explanation is proposed to be inserted in section 3 of the Act of 2002 to clarify the above legislative intent.**"
>
> (emphasis supplied)

Thereafter, the following statement was made on two different occasions[453]:

> "SHRIMATI NIRMALA SITHARAMAN: The other amendments are into the PMLA, the Act relating to black money. On that, I would like to assure the Members regarding the kind of amendments. In fact, I would like to mention, well before that, the number of amendments, which are coming through for the PMLA, which is of 2002 vintage. Eight are being proposed by us. Of the eight, six are only explanations to the existing clause. The clause itself is not being changed. We are only coming with explanations. **These explanations are being brought into the Act because of pleading in the courts by some of those who are accused and because of some kind of a confusion or a grey area or an ambiguity which might exist. Therefore, the amendment is not amendment of the clause itself. It is more explaining the clause.** ...
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> *** *** ***
>
> SHRIMATI NIRMALA SITHARAMAN: More important is the amendment to the PMLA; The Prevention of Money Laundering Act. There are, one or two, a couple of amendments which are being made to the PMLA, which I just want to elaborate a bit so that the hon. Members know what is that we are doing to the PMLA. They are all explanatory changes that we are bringing in. Of the eight different changes that we are bringing into the PMLA, six relate to explanatory notes because we find that in the courts, many of those offenders under the PMLA–if there are two cases happening–try to club both the cases although they may be materially different and seek of a bail. Therefore, what happens is, a case which has a different procedural matter is also clubbed together with the case which is not procedural and at the end of the day, the law does not get invoked in its true letter and spirit. **So, such changes in the definition and explanatory matters have been done in the PMLA. One little proviso which was not really relevant has been removed and another which is being brought in again is more to make it clearer so that PMLA, when invoked, becomes far more effective.**

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[453] Seventeenth Series, Vol. III, First Session, 2019/1941 (Saka) No. 24, Thursday, July 18, 2019 / Ashadha 27, 1941 (Saka)

So, these are the points on the PMLA-related matters."[454]

(emphasis supplied)

It is seen that even though there were multiple arguments in respect of the definition of Section 3[455], yet we chose to implement the said definition in a particular way. Later it was realised by the Government and the Parliament that with the passage of time and the development of anti-money laundering jurisprudence world over, certain changes were to be made in the definition of money-laundering. We do not find it prudent or necessary to run into arguments of application of international law, as it is clear that the intentions of the successive Governments have been the same since day one of signing the international Conventions. It is only in light of this perception and understanding of the legislation that we have been implementing the recommendations of the FATF. However, we note that there has been a constant flow of thought from the FATF recommendations, directly into our polity, which has pushed the

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[454] GOVERNMENT BILLS — Contd. The Appropriation (No. 2) Bill, 2019 And The Finance (No. 2) Bill, 2019 [23 July, 2019]

[455] See debate of 25 July, 2002- RAJYA SABHA; available at: https://rsdebate.nic.in/bitstream/123456789/100942/1/PD_196_25072002_9_p237_p288_21.pdf

money-laundering legislation forward. Thus, there can be no doubt as to the *bona fides* of the Legislature in implementing an understating of Section 3 that will help not only stop but prevent money-laundering by nipping it in the bud.

SECTION 3 OF THE 2002 ACT

37. Coming to Section 3 of the 2002 Act, the same defines the offence of money-laundering. The expression "money-laundering", ordinarily, means the process or activity of placement, layering and finally integrating the tainted property in the formal economy of the country. However, Section 3 has a wider reach. The offence, as defined, captures every process and activity in dealing with the proceeds of crime, directly or indirectly, and not limited to the happening of the final act of integration of tainted property in the formal economy to constitute an act of money-laundering. This is amply clear from the original provision, which has been further clarified by insertion of Explanation vide Finance (No.2) Act, 2019. Section 3, as amended, reads thus:

> "**3. Offence of money-laundering**.—Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process

or activity connected with the [456][proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming] it as untainted property shall be guilty of offence of money-laundering.

[457][Explanation.—For the removal of doubts, it is hereby clarified that,—

(i) a person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely:—

(a) concealment; or

(b) possession; or

(c) acquisition; or

(d) use; or

(e) projecting as untainted property; or

(f) claiming as untainted property,

in any manner whatsoever;

(ii) the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever.]"

This section was first amended vide Act 2 of 2013. The expression "proceeds of crime and projecting" was substituted by expression "proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming". We are not so much concerned with this change introduced vide Act 2 of 2013. In other words, the provision as it stood prior to amendment vide Finance

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[456] Subs. by Act 2 of 2013, sec. 3, for "proceeds of crime and projecting" (w.e.f. 15-2-2013, *vide* S.O. 343(E), dated 8-2-2013)

[457] Ins. by the **Finance (No.2) Act, 2019**, sec. 193 (w.e.f. 1-8-2019)

(No.2) Act, 2019 remained as it is. Upon breaking-up of this provision, it would clearly indicate that — it is an offence of money-laundering, in the event of direct or indirect attempt to indulge or knowingly assist or being knowingly party or being actually involved in "any process or activity" connected with the proceeds of crime. The latter part of the provision is only an elaboration of the different process or activity connected with the proceeds of crime, such as its concealment, possession, acquisition, use, or projecting it as untainted property or claiming it to be as untainted property. This position stands clarified by way of Explanation inserted in 2019. If the argument of the petitioners is to be accepted, that projecting or claiming the property as untainted property is the quintessential ingredient of the offence of money-laundering, that would whittle down the sweep of Section 3. Whereas, the expression "including" is a pointer to the preceding part of the section which refers to the essential ingredient of "process or activity" connected with the proceeds of crime. The Explanation inserted by way of amendment of 2019, therefore, has clarified the word "and" preceding the expression "projecting or claiming" as "or". That being only clarificatory, whether introduced by way of Finance Bill or otherwise,

would make no difference to the main original provision as it existed prior to 2019 amendment. Indeed, there has been some debate in the Parliament about the need to retain the clause of projecting or claiming the property as untainted property. However, the Explanation inserted by way of amendment of 2019 was only to restate the stand taken by India in the proceedings before the FATF, as recorded in its 8th Follow-Up Report Mutual Evaluation of India June 2013 under heading "Core Recommendations". This stand had to be taken by India notwithstanding the amendment of 2013 vide Act 2 of 2013 (w.e.f. 15.2.2013) and explanation offered by the then Minister of Finance during his address in the Parliament on 17.12.2012 as noted above[458]. Suffice it to note that the municipal law (Act of 2002) had been amended from time to time to incorporate the concerns and recommendations noted by the international body. We may usefully refer to the Core Recommendations of the FATF concerning India of June 2013, which reads thus:

"**Core Recommendations**

Recommendations	**Rating**	**Summary of Factors underlying Rating**	**Actions taken to remedy deficiencies**
1-ML offence	PC	• (High) monetary	Amendments to India's Prevention of Money

[458] *See* paragraph 35 of this judgment

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		threshold condition for most ML predicates.	Laundering Act (PMLA) were enacted by Parliament on 17 December 2012 and came into force on 15 February 2013. All predicate offences previously contained in Part B of the Schedule (46 offences with a threshold value of INR 3 million ("30 lakh rupees" of USD 60 000) were added in Part A without a threshold value. Part C of the Schedule now includes all offences listed in Part A, supplemented by all offences covered by Chapter XVII of the Indian Penal Code, when these offences have cross-border implications. All in all, the list of predicate offences continues to include 156 offences under 28 different statutes but without any monetary threshold. As result, the major technical deficiency identified in relation to R.1 is fully addressed.
		• ML provision does not cover physical concealment of criminal proceeds.	Amendments to the PMLA were enacted by Parliament on 17 December 2012 and came into force on 15 February 2013.
		• **ML provision does not cover the sole knowing acquisition, possession and use of criminal**	The amended section 3 of the PMLA now reads. "Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or

		proceeds	activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of the offence of money laundering." While the current formulation specifically refers to concealment, possession, acquisition and use, it does not do away with the condition that the proceeds of crime need to be "projected or claimed as untainted property". **The working of the ML offence is thus not fully in line with the Vienna and Palermo Conventions but case law provided by India appears to mitigate the concerns regarding the possible limiting effect of the conditional element in the ML offence. On that basis, it can be concluded that the scope of these technical deficiencies is relatively minor. It is not expected that there will be any impact on the effectiveness of India's AML regime. The deficiency is mostly addressed.**"

(emphasis supplied)

38. To put it differently, the section as it stood prior to 2019 had itself incorporated the expression "including", which is indicative of reference made to the different process or activity connected with the proceeds of crime. Thus, the principal provision (as also the Explanation) predicates that if a person is found to be directly or indirectly involved in any process or activity connected with the proceeds of crime must be held guilty of offence of money-laundering. If the interpretation set forth by the petitioners was to be accepted, it would follow that it is only upon projecting or claiming the property in question as untainted property, the offence would be complete. This would undermine the efficacy of the legislative intent behind Section 3 of the Act and also will be in disregard of the view expressed by the FATF in connection with the occurrence of the word "and" preceding the expression "projecting or claiming" therein. This Court in ***Pratap Singh vs. State of Jharkhand & Anr.***[459], enunciated that the international treaties, covenants and conventions although may not be a part of municipal law, the same be referred to and followed by the Courts having

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[459] (2005) 3 SCC 551 (also at Footnote No.197)

regard to the fact that India is a party to the said treaties. This Court went on to observe that the Constitution of India and other ongoing statutes have been read consistently with the rules of international law. It is also observed that the Constitution of India and the enactments made by Parliament must necessarily be understood in the context of the present-day scenario and having regard to the international treaties and convention as our constitution takes note of the institutions of the world community which had been created. In ***Apparel Export Promotion Council vs. A.K. Chopra***[460], the Court observed that domestic Courts are under an obligation to give due regard to the international conventions and norms for construing the domestic laws, more so, when there is no inconsistency between them and there is a void in domestic law. This view has been restated in ***Githa Hariharan***[461], as also in ***People's Union for Civil Liberties***[462], and ***National Legal Services Authority vs. Union of India & Ors.***[463].

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[460] (1999) 1 SCC 759

[461] Supra at Footnote No.199

[462] Supra at Footnote No.198

[463] (2014) 5 SCC 438 (also at Footnote No.197)

39. In the Core Recommendations of the FATF referred to above, the same clearly mention that the word "and" in Section 3 of the 2002 Act would not be fully in line with the Vienna and Palermo Conventions. This doubt has been ably responded and elucidated by India to the international body by referring to the jurisprudence as evolved in India to interpret the word "and" as "or" in the context of the legislative intent — to reckon any (every) process or activity connected with the proceeds of crime constituting offence of money-laundering. To buttress the stand taken by India before the FATF, reliance has been justly placed on reported decisions of this Court amongst other ***Sanjay Dutt***[464], which had occasion to deal with the expression "arms and ammunition" occurring in Section 5 of the TADA Act. The Court noted that if it is to be read conjunctively because of word "and", the object of prohibiting unauthorised possession of the forbidden arms and ammunition would be easily frustrated by the simple device of one person carrying the forbidden arms and his accomplice carrying its ammunition so that neither is covered under Section 5 when any one of them carrying more would

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[464] Supra at Footnote No.193

be so liable. The principle underlying this analysis by the Constitution Bench must apply *proprio vigore* to the interpretation of Section 3 of the 2002 Act. To the same end, this Court in the case of ***Ishwar Singh Bindra & Ors. vs. The State of U.P.***[465]**, *Joint Director of Mines Safety***[466] and ***Gujarat Urja Vikas Nigam Ltd. vs. Essar Power Ltd***.[467], interpreted the word "and" in the concerned legislation(s) as word "or" to give full effect to the legislative intent.

40. The Explanation as inserted in 2019, therefore, does not entail in expanding the purport of Section 3 as it stood prior to 2019, but is only clarificatory in nature. Inasmuch as Section 3 is widely worded with a view to not only investigate the offence of money-laundering but also to prevent and regulate that offence. This provision plainly indicates that any (every) process or activity connected with the proceeds of crime results in offence of money-laundering. Projecting or claiming the proceeds of crime as untainted property, in itself, is an attempt to indulge in or being

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[465] (1969) 1 SCR 219 (also at Footnote No.194)

[466] Supra at Footnote No.195

[467] (2008) 4 SCC 755 (also at Footnote No.194)

involved in money-laundering, just as knowingly concealing, possessing, acquiring or using of proceeds of crime, directly or indirectly. This is reinforced by the statement presented along with the Finance Bill, 2019 before the Parliament on 18.7.2019 as noted above[468].

41. Independent of the above, we have no hesitation in construing the expression "and" in Section 3 as "or", to give full play to the said provision so as to include "every" process or activity indulged into by anyone, including projecting or claiming the property as untainted property to constitute an offence of money-laundering on its own. The act of projecting or claiming proceeds of crime to be untainted property presupposes that the person is in possession of or is using the same (proceeds of crime), also an independent activity constituting offence of money-laundering. In other words, it is not open to read the different activities conjunctively because of the word "and". If that interpretation is accepted, the effectiveness of Section 3 of the 2002 Act can be easily frustrated by the simple device of one person possessing proceeds of crime and his accomplice would

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[468] *See* paragraph 36 of this judgment

indulge in projecting or claiming it to be untainted property so that neither is covered under Section 3 of the 2002 Act.

42. From the bare language of Section 3 of the 2002 Act, it is amply clear that the offence of money-laundering is an independent offence regarding the process or activity connected with the proceeds of crime which had been derived or obtained as a result of criminal activity relating to or in relation to a scheduled offence. The process or activity can be in any form — be it one of concealment, possession, acquisition, use of proceeds of crime as much as projecting it as untainted property or claiming it to be so. Thus, involvement in any one of such process or activity connected with the proceeds of crime would constitute offence of money-laundering. This offence otherwise has nothing to do with the criminal activity relating to a scheduled offence — except the proceeds of crime derived or obtained as a result of that crime.

43. Needless to mention that such process or activity can be indulged in only after the property is derived or obtained as a result of criminal activity (a scheduled offence). It would be an offence of money-laundering to indulge in or to assist or being party to the

process or activity connected with the proceeds of crime; and such process or activity in a given fact situation may be a continuing offence, irrespective of the date and time of commission of the scheduled offence. In other words, the criminal activity may have been committed before the same had been notified as scheduled offence for the purpose of the 2002 Act, but if a person has indulged in or continues to indulge directly or indirectly in dealing with proceeds of crime, derived or obtained from such criminal activity even after it has been notified as scheduled offence, may be liable to be prosecuted for offence of money-laundering under the 2002 Act — for continuing to possess or conceal the proceeds of crime (fully or in part) or retaining possession thereof or uses it in trenches until fully exhausted. The offence of money-laundering is not dependent on or linked to the date on which the scheduled offence or if we may say so the predicate offence has been committed. The relevant date is the date on which the person indulges in the process or activity connected with such proceeds of crime. These ingredients are intrinsic in the original provision (Section 3, as amended until 2013 and were in force till 31.7.2019); and the same has been merely explained and clarified by way of Explanation vide Finance (No.2)

Act, 2019. Thus understood, inclusion of Clause (ii) in Explanation inserted in 2019 is of no consequence as it does not alter or enlarge the scope of Section 3 at all.

44. As mentioned earlier, the rudimentary understanding of 'money-laundering' is that there are three generally accepted stages to money-laundering, they are:

(a) Placement: which is to move the funds from direct association of the crime.

(b) Layering: which is disguising the trail to foil pursuit.

(c) Integration: which is making the money available to the criminal from what seem to be legitimate sources.

45. It is common experience world over that money-laundering can be a threat to the good functioning of a financial system. However, it is also the most suitable mode for the criminals to deal in such money. It is the means of livelihood of drug dealers, terrorist, white collar criminals and so on. Tainted money breeds discontent in any society and in turn leads to more crime and civil unrest. Thus, the onus on the Government and the people to identify and seize such money is heavy. If there are any proactive

steps towards such a cause, we cannot but facilitate the good steps. However, passions aside we must first balance the law to be able to save the basic tenets of the fundamental rights and laws of this country. After all, condemning an innocent man is a bigger misfortune than letting a criminal go.

46. On a bare reading of Section 3, we find no difficulty in encapsulating the true ambit, given the various arguments advanced. Thus, in the conspectus of things it must follow that the interpretation put forth by the respondent will further the purposes and objectives behind the 2002 Act and also adequately address the recommendations and doubts of the international body whilst keeping in mind the constitutional limits. It would, therefore, be just to sustain the argument that the amendment by way of the Explanation has been brought about only to clarify the already present words, “any” and “including” which manifests the true meaning of the definition and clarifies the mist around its true nature.

47. We may profitably advert to the judgment in ***Seaford Court Estates ld.***[469], which states:

> "The question for decision in this case is whether we are at liberty to extend the ordinary meaning of "burden" so as to include a contingent burden of the kind I have described. Now this court has already held that this sub-section is to be liberally construed so as to give effect to the governing principles embodied in the legislation (*Winchester Court Ld. v. Miller*[470]); and I think we should do the same. **Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticized. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature. That was clearly laid down by the resolution of the judges in Heydon's case[471], and it is the safest guide today. Good practical advice on the subject was given about the same time by Plowden in his second volume *Eyston v.***

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[469] Supra at Footnote No.185

[470] [1944] K.B. 734

[471] (1584) 3 Co. Rep. 7a

> ***Studd***[472]**. Put into homely metaphor it is this: A judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases."**
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> (emphasis supplied)

48. Let us now also refer to the various cases that have been pressed into service by the petitioners. The same deal with the proposition as to the scope of an Explanation and the limits upto which it can stretch. Yet given the present scenario, we cannot find a strong footing to rely on the same in understating Section 3 of the 2002 Act as it stands today. Reference has been made to ***K.P. Varghese***[473] wherein the Court noted the Heydon Case and to the fact that the speech of the mover of the bill can explain the reason for introduction of the bill and help ascertain the mischief sought to be remedied, the objects and purposes of the legislation. Similarly, reference has been made to ***Hardev Motor Transport vs. State of M.P. & Ors.***[474] and ***Martin Lottery Agencies Limited***[475], which states that the role of an Explanation in the Schedule of the Act

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[472] (1574) 2 Plowden, 465

[473] Supra at Footnote No.19

[474] (2006) 8 SCC 613 (also at Footnote No.128)

[475] Supra at Footnote No.20

cannot defeat the main provision of the Act. Even otherwise, an Explanation cannot enlarge the scope and effect of a provision. Reference is also made to ***S. Sundaram Pillai & Ors. vs. V.R. Pattabiraman & Ors.***[476], which reads thus:

> "**50**. In *Bihta Cooperative Development Cane Marketing Union Ltd. v. Bank of Bihar*[477] this Court observed thus:
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> > The Explanation must be read so as to harmonise with and clear up any ambiguity in the main section. **It should not be so construed as to widen the ambit of the section**.
>
> *** *** ***
>
> **53**. Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is—
>
> (a) to explain the **meaning and intendment of the Act itself,**
>
> (b) **where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent** with the dominant object which it seems to subserve,
>
> (c) to provide an additional support to the dominant object of the Act in order **to make it meaningful and purposeful,**
>
> **(d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and**
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> (e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or

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[476] (1985) 1 SCC 591 (also at Footnote No.128)

[477] (1967) 1 SCR 848 : AIR 1967 SC 389 : 37 Com Cas 98 (also at Footnote No.128)

> set at naught the working of an Act by becoming an hindrance in the interpretation of the same."
>
> (emphasis supplied)

However, in the present case we find that the Explanation only sets forth in motion to clear the mist around the main definition, if any. It is not to widen the ambit of Section 3 of the 2002 Act as such. Further, the meaning ascribed to the expression "and" to be read as "or" is in consonance with the contemporary thinking of the international community and in consonance with the Vienna and Palermo Conventions.

49. Reference has also been made to judgments which refer to the purport of side notes in the interpretation of a statute in ***Thakurain Balraj Kunwar & Anr. vs. Rae Jagatpal Singh***[478], ***Nalinakhya Bysack vs. Shyam Sunder Haldar & Ors.***[479], ***Chandroji Rao vs. Commissioner of Income Tax, M.P., Nagpur***[480], ***Board of Muslim Wakfs, Rajasthan vs. Radha Kishan & Ors.***[481], ***Tara Prasad***

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[478] 1904 SCC OnLine PC 9: (1904) 1 All LJ 384

[479] AIR 1953 SC 148

[480] (1970) 2 SCC 23

[481] (1979) 2 SCC 468

Singh & Ors. vs. Union of India & Ors.[482], ***Sakshi vs. Union of India & Ors.***[483], ***Guntaiah & Ors. vs. Hambamma & Ors.***[484] and ***C. Gupta vs. Glaxo-Smithkline Pharmaceuticals Ltd***.[485]. However, we find them of no use in the present case as we have already held that the Explanation only goes on to clarify the main or original provision. Other cases, which are of no help to the present issue, are the cases of ***D.R. Fraser & Co. Ltd. vs. The Minister of National Revenue***[486], ***Tofan Singh***[487] and ***Ashok Munilal Jain***[488]. Reference has also been made to ***Nikesh Tarachand Shah***[489]. However, there the questions raised were not in respect of the meaning of money-laundering and pertinently the amendment has come post the judgment, hence, will have no real bearing, unless it can be shown that the amendment is in some other way contrary to the Indian law.

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[482] (1980) 4 SCC 179

[483] (2004) 5 SCC 518

[484] (2005) 6 SCC 228

[485] (2007) 7 SCC 171

[486] 1948 SCC OnLine PC 65 : AIR 1949 PC 120

[487] Supra at Footnote No.31 (also at Footnote No.24)

[488] Supra at Footnote No.163 (also at Footnote No.22)

[489] Supra at Footnote No.3

50. We also cannot countenance the argument made in light of possible harassment of innocent persons. It is noted that to the 1999 Bill, the Select Committee of the Rajya Sabha had pointed out that if even mere possession of money/property out of proceeds of crime were to be punishable then:

> "The Committee finds that sub-clauses (a) and (c) viewed in the context of the provisions contained in clause 23 of the Bill **may lead to harassment of innocent persons who bona fide and unknowingly deal with the persons who have committed the offence of money laundering and enter into transactions with them**. Such persons purchasing property born out of proceeds of crime without having any inkling whatsoever about that are liable to be prosecuted if the sub-Clauses (a) & (c) remain in the Bill in the existing form.
>
> The fact of the matter is that these sub-clauses do not provide any protection or defence to this category of persons."
>
> (emphasis supplied)

Accordingly, the phrase "and projecting it as untainted property" was added the initial definition in the 2002 Act. However, it can also be inferred from here that since the initial strokes of drafting the Act, the intention was always to have a preventive Act and not simply a money-laundering (penal) Act. Today, if one dives deep into the financial systems, anywhere in the world, it is seen that once a financial mastermind can integrate the illegitimate money into the bloodstream of an economy, it is almost indistinguishable. In fact,

the money can be simply wired abroad at one click of the mouse. It is also well known that once this money leaves the country, it is almost impossible to get it back. Hence, a simplistic argument or the view that Section 3 should only find force once the money has been laundered, does not commend to us. That has never been the intention of the Parliament nor the international Conventions.

51. We may also note that argument that removing the necessity of projection from the definition will render the predicate offence and money-laundering indistinguishable. This, in our view, is ill founded and fallacious. This plea cannot hold water for the simple reason that the scheduled offences in the 2002 Act as it stands (amended upto date) are independent criminal acts. It is only when money is generated as a result of such acts that the 2002 Act steps in as soon as proceeds of crime are involved in any process or activity. Dealing with such proceeds of crime can be in any form —being process or activity. Thus, even assisting in the process or activity is a part of the crime of money-laundering. We must keep in mind that for being liable to suffer legal consequences of ones action of indulging in the process or activity, is sufficient and not only upon projection of the ill-gotten money as untainted money. Many members of a crime

syndicate could then simply keep the money with them for years to come, the hands of the law in such a situation cannot be bound and stopped from proceeding against such person, if information of such illegitimate monies is revealed even from an unknown source.

52. The next question is: whether the offence under Section 3 is a standalone offence? Indeed, it is dependent on the wrongful and illegal gain of property as a result of criminal activity relating to a scheduled offence. Nevertheless, it is concerning the process or activity connected with such property, which constitutes offence of money-laundering. The property must qualify the definition of "proceeds of crime" under Section 2(1)(u) of the 2002 Act. As observed earlier, all or whole of the crime property linked to scheduled offence need not be regarded as proceeds of crime, but all properties qualifying the definition of "proceeds of crime" under Section 2(1)(u) will necessarily be crime properties. Indeed, in the event of acquittal of the person concerned or being absolved from allegation of criminal activity relating to scheduled offence, and if it is established in the court of law that the crime property in the concerned case has been rightfully owned and possessed by him,

such a property by no stretch of imagination can be termed as crime property and *ex-consequenti* proceeds of crime within the meaning of Section 2(1)(u) as it stands today. On the other hand, in the trial in connection with the scheduled offence, the Court would be obliged to direct return of such property as belonging to him. It would be then paradoxical to still regard such property as proceeds of crime despite such adjudication by a Court of competent jurisdiction. It is well within the jurisdiction of the concerned Court trying the scheduled offence to pronounce on that matter.

53. Be it noted that the authority of the Authorised Officer under the 2002 Act to prosecute any person for offence of money-laundering gets triggered only if there exists proceeds of crime within the meaning of Section 2(1)(u) of the 2002 Act and further it is involved in any process or activity. Not even in a case of existence of undisclosed income and irrespective of its volume, the definition of "proceeds of crime" under Section 2(1)(u) will get attracted, unless the property has been derived or obtained as a result of criminal activity relating to a scheduled offence. It is possible that in a given case after the discovery of huge volume of undisclosed property, the

authorised officer may be advised to send information to the jurisdictional police (under Section 66(2) of the 2002 Act) for registration of a scheduled offence contemporaneously, including for further investigation in a pending case, if any. On receipt of such information, the jurisdictional police would be obliged to register the case by way of FIR if it is a cognizable offence or as a non-cognizable offence (NC case), as the case may be. If the offence so reported is a scheduled offence, only in that eventuality, the property recovered by the authorised officer would partake the colour of proceeds of crime under Section 2(1)(u) of the 2002 Act, enabling him to take further action under the Act in that regard.

54. Even though, the 2002 Act is a complete Code in itself, it is only in respect of matters connected with offence of money-laundering, and for that, existence of proceeds of crime within the meaning of Section 2(1)(u) of the Act is quintessential. Absent existence of proceeds of crime, as aforesaid, the authorities under the 2002 Act cannot step in or initiate any prosecution.

55. In other words, the Authority under the 2002 Act, is to prosecute a person for offence of money-laundering only if it has

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reason to believe, which is required to be recorded in writing that the person is in possession of "proceeds of crime". Only if that belief is further supported by tangible and credible evidence indicative of involvement of the person concerned in any process or activity connected with the proceeds of crime, action under the Act can be taken forward for attachment and confiscation of proceeds of crime and until vesting thereof in the Central Government, such process initiated would be a standalone process.

SECTION 5 OF THE 2002 ACT

56. Section 5 forms part of Chapter III dealing with attachment, adjudication and confiscation. This provision empowers the Director or officer not below the rank of Deputy Director authorised by the Director for the purposes of attachment of property involved in money-laundering. Such authorised officer is expected to act only if he has reason to believe that any person is in possession of proceeds of crime. This belief has to be formed on the basis of material in his possession and the reasons therefor are required to be recorded in writing. In addition, he must be convinced that such proceeds of crime are likely to be concealed, transferred or dealt with in any

manner which is likely to result in frustrating any proceedings concerning confiscation thereof under the 2002 Act. The Section 5 as amended reads thus:

"*CHAPTER III*

ATTACHMENT, ADJUDICATION AND CONFISCATION

5. Attachment of property involved in money-laundering.— [490][(1)Where the Director or any other officer not below the rank of Deputy Director authorised by the Director for the purposes of this section, has reason to believe (the reason for such belief to be recorded

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[490] Subs. by Act 2 of 2013, sec. 5, for sub-section (1) (w.e.f. 15-2-2013 vide S.O. 343(E), dated 8-2-2013). Earlier sub-section (1) was amended by Act 21 of 2009, sec. 3(a) (w.e.f. 1-6-2009). Sub-section (1), before substitution by Act 2 of 2013, stood as under:

"(1) Where the Director, or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section, has reason to believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that—

(a) any person is in possession of any proceeds of crime;

(b) such person has been charged of having committed a scheduled offence; and

(c) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under this Chapter,

he may, by order in writing, provisionally attach such property for a period not exceeding one hundred and fifty days from the date of the order, in the manner provided in the Second Schedule to the Income-tax Act, 1961 (43 of 1961) and the Director or the other office so authorised by him, as the case may be, shall be deemed to be an officer under sub-rule (e) of rule 1 of that Schedule:

Provided that no such order of attachment shall be made unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, 1973 (2 of 1974), or a complaint has been filed by a person authorised to investigate the offence mentioned in the Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be:

Provided further that, notwithstanding anything contained in clause (b), any property of any person may be attached under this section if the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section has reason to believe (the reasons for such belief to be recorded in writing), on the basis of material in his possession, that if such property involved in money-laundering is not attached immediately under this Chapter, the non-attachment of the property is likely to frustrate any proceeding under this Act."

in writing), on the basis of material in his possession, that—

(a) any person is in possession of any proceeds of crime; and

(b) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner

which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under this Chapter,

he may, by order in writing, provisionally attach such property for a period not exceeding one hundred and eighty days from the date of the order, in such manner as may be prescribed:

Provided that no such order of attachment shall be made unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, 1973 (2 of 1974), or a complaint has been filed by a person authorised to investigate the offence mentioned in that Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or a similar report or complaint has been made or filed under the corresponding law of any other country:

Provided further that, notwithstanding anything contained in [491][first proviso], any property of any person may be attached under this section if the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section has reason to believe (the reasons for such belief to be recorded in writing), on the basis of material in his possession, that if such property involved in money-laundering is not attached immediately under this Chapter, the non-attachment of the property is likely to frustrate any proceeding under this Act.].

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[491] Subs. by the **Finance Act**, **2015 (20 of 2015)**, sec. 146, for "clause (b)" (w.e.f. 14-5-2015).

[492][Provided also that for the purposes of computing the period of one hundred and eighty days, the period during which the proceedings under this section is stayed by the High Court, shall be excluded and a further period not exceeding thirty days from the date of order of vacation of such stay order shall be counted.]

(2) The Director, or any other officer not below the rank of Deputy Director, shall, immediately after attachment 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 order of attachment made under sub-section (1) shall cease to have effect after the expiry of the period specified in that sub-section or on the date of an order made under [493][sub-section (3)] of section 8, whichever is earlier.

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[492] Ins. by Act 13 of 2018, sec. 208(b)(i) (w.e.f. 19-4-2018 vide G.S.R. 383(E), dated 19th April, 2018).

[493] Subs. by Act 13 of 2018, sec. 208(b)(ii), for "sub-section (2)" (w.e.f. 19-4-2018 vide G.S.R. 383(E), dated 19th April, 2018).

Section 5 as it stood originally reads thus:

"**5. Attachment of property involved in money laundering**. – (1) Where the Director, or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section, has reason to believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that—

(a) any person is in possession of any proceeds of crime;

(b) such person has been charged of having committed a scheduled offence; and

(c) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under this chapter,

he may, by order in writing, provisionally attach such property for a period not exceeding ninety days from the date of the order, in the manner provided in the Second Schedule to the Income-tax Act, 1961 (43 of 1961) and the Director or the other officer so authorised by him, as the case may be, shall be deemed to be an officer under sub-rule (e) of Rule 1 of that Schedule:

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(4) Nothing in this section shall prevent the person interested in the enjoyment of the immovable property attached under sub-section (1) from such enjoyment.

Explanation.—For the purposes of this sub-section, "person interested", in relation to any immovable property, includes all persons claiming or entitled to claim any interest in the property.

Provided that no such order of attachment shall be made unless, in relation to an offence under—

(i) Paragraph 1 of Part A and Part B of the Schedule, a report has been forwarded to a Magistrate under Section 173 of the Code of Criminal Procedure, 1973 (2 of 1974); or

(ii) Paragraph 2 of Part A of the Schedule, a police report or a complaint has been filed for taking cognizance of an offence by the Special Court constituted under sub-section (1) of Section 36 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985).

(2) The Director, or any other officer not below the rank of Deputy Director, shall, immediately after attachment 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 order of attachment made under sub-section (1) shall cease to have effect after the expiry of the period specified in that sub-section or on the date of an order made under sub-section (2) of Section 8, whichever is earlier.

(4) Nothing in this section shall prevent the person interested in the enjoyment of the immovable property attached under sub-section (1) from such enjoyment.

Explanation.—For the purposes of this sub-section, "person interested", in relation to any immovable property, includes all persons claiming or entitled to claim any interest in the property.

(5) The Director or any other officer who provisionally attaches any property under sub-section (1) shall, within a period of thirty days from such attachment, file a complaint stating the facts of such attachment before the Adjudicating Authority."

> (5) The Director or any other officer who provisionally attaches any property under sub-section (1) shall, within a period of thirty days from such attachment, file a complaint stating the facts of such attachment before the Adjudicating Authority."

From the plain language of this provision, it is evident that several inbuilt safeguards have been provided by the Parliament while enacting the 2002 Act. This provision has been amended vide Act 21 of 2009, Act 2 of 2013, Finance Act, 2015 and Act 13 of 2018, to strengthen the mechanism keeping in mind the scheme of the 2002 Act and the need to prevent and regulate the activity of money-laundering. As regards the amendments made vide Act 21 of 2009 and Act 2 of 2013, the same are not matters in issue in these cases. The challenge is essentially to the amendment effected in the second proviso in sub-section (1), vide Finance Act, 2015.

57. Be that as it may, as aforesaid, sub-section (1) delineates sufficient safeguards to be adhered to by the authorised officer before issuing provisional attachment order in respect of proceeds of crime. It is only upon recording satisfaction regarding the twin requirements referred to in sub-section (1), the authorised officer can proceed to issue order of provisional attachment of such

proceeds of crime. Before issuing a formal order, the authorised officer has to form his opinion and delineate the reasons for such belief to be recorded in writing, which indeed is not on the basis of assumption, but on the basis of material in his possession. The order of provisional attachment is, thus, the outcome of such satisfaction already recorded by the authorised officer. Notably, the provisional order of attachment operates for a fixed duration not exceeding one hundred and eighty days from the date of the order. This is yet another safeguard provisioned in the 2002 Act itself.

58. As per the first proviso, in ordinary situation, no order of provisional attachment can be issued until a report has been forwarded to a Magistrate under Section 173 of the 1973 Code in relation to the scheduled offence, or a complaint has been filed by a person authorised to investigate the offence mentioned in that Schedule, before a Magistrate or Court for taking cognizance of the scheduled offence, as the case may be. It further provides that a similar report or complaint has been made or filed under the corresponding law of any other country. In other words, filing of police report or a private complaint in relation to the scheduled

offence had been made a precondition for issuing an order of provisional attachment.

59. The second proviso, as it existed prior to Finance Act, 2015, had predicated that notwithstanding anything contained in Clause (b) of sub-section (1) any property of any person may be attached in the same manner and satisfaction to be recorded that non-attachment of property likely to frustrate any proceeding under the 2002 Act. By amendment vide Finance Act, 2015, the words "clause (b)" occurring in the second proviso came to be substituted to read words "first proviso". This is the limited change, but an effective one to give full play to the legislative intent regarding prevention and regulation of process or activity concerning proceeds of crime entailing in offence of money-laundering. Prior to the amendment, the first proviso was rightly perceived as an impediment. In that, to invoke the action of even provisional attachment order, registration of scheduled offence and completion or substantial progress in investigation thereof were made essential. This was notwithstanding the urgency involved in securing the proceeds of crime for being eventually confiscated and vesting in the Central Government.

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Because of the time lag and the advantage or opportunities available to the person concerned to manipulate the proceeds of crime, the amendment of 2015 had been brought about to overcome the impediment and empower the Director or any other officer not below the rank of Deputy Director authorised by him to proceed to issue provisional attachment order. In terms of the second proviso, the authorised officer has to record satisfaction and reason for his belief in writing on the basis of material in his possession that the property (proceeds of crime) involved in money-laundering if not attached "immediately", would frustrate proceedings under the 2002 Act. This is a further safeguard provided in view of the urgency felt by the competent authority to secure the property to effectively prevent and regulate the offence of money-laundering. In other words, the authorised officer cannot resort to action of provisional attachment of property (proceeds of crime) mechanically. Thus, there are inbuilt safeguards provided in the main provision as well as the second proviso to be fulfilled upto the highest ranking ED official, before invoking such urgent or "immediate" action. We fail to understand as to how such a provision can be said to be irrelevant much less manifestly arbitrary, in the context of the purposes and objects

behind the enactment of the 2002 Act. Such provision would strengthen the mechanism of prevention and regulation of process or activity resulting into commission of money-laundering offence; and also, to ensure that the proceeds of crime are properly dealt with as ordained by the 2002 Act, including for vesting in the Central Government.

60. As a matter of fact, prior to amendment of 2015, the first proviso acted as an impediment for taking such urgent measure even by the authorised officer, who is no less than the rank of Deputy Director. We must hasten to add that the nuanced distinction must be kept in mind that to initiate "prosecution" for offence under Section 3 of the Act registration of scheduled offence is a prerequisite, but for initiating action of "provisional attachment" under Section 5 there need not be a pre-registered criminal case in connection with scheduled offence. This is because the machinery provisions cannot be construed in a manner which would eventually frustrate the proceedings under the 2002 Act. Such dispensation alone can secure the proceeds of crime including prevent and regulate the commission of offence of money-laundering. The

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authorised officer would, thus, be expected to and, also in a given case, justified in acting with utmost speed to ensure that the proceeds of crime/property is available for being proceeded with appropriately under the 2002 Act so as not to frustrate any proceedings envisaged by the 2002 Act. In case the scheduled offence is not already registered by the jurisdictional police or complaint filed before the Magistrate, it is open to the authorised officer to still proceed under Section 5 of the 2002 Act whilst contemporaneously sending information to the jurisdictional police under Section 66(2) of the 2002 Act for registering FIR in respect of cognizable offence or report regarding non-cognizable offence and if the jurisdictional police fails to respond appropriately to such information, the authorised officer under the 2002 Act can take recourse to appropriate remedy, as may be permissible in law to ensure that the culprits do not go unpunished and the proceeds of crime are secured and dealt with as per the dispensation provided for in the 2002 Act. Suffice it to observe that the amendment effected in 2015 in the second proviso has reasonable nexus with the object sought to be achieved by the 2002 Act.

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61. The third proviso in Section 5(1) of the 2002 Act is another safeguard introduced vide Act 13 of 2018 about the manner in which period of one hundred and eighty days need to be reckoned thereby providing for fixed tenure of the provisional attachment order. Before the expiry of the statutory period relating to the provisional attachment order, the Director or any other officer not below the rank of Deputy Director immediately after attachment under sub-section (1) is obliged to forward a copy of the provisional attachment order to the three-member Adjudicating Authority (appointed under Section 6(1) of the 2002 Act, headed by, amongst other, person qualified for appointment as District Judge), in a sealed envelope under Section 5(2), which is required to be retained by the Adjudicating Authority for the period as prescribed under the rules framed in that regard. This ensures the fairness in the action as also accountability of the Authority passing provisional attachment order. Further, in terms of Section 5(3), the provisional attachment order ceases to operate on the date of an order passed by the Adjudicating Authority under Section 8(3) or the expiry of the period specified in sub-section (1), whichever is earlier. In addition, under Section 5(5) the authorised officer is obliged to file a complaint before

the Adjudicating Authority within a period of thirty days from such provisional attachment. Going by the scheme of the 2002 Act and Section 5 thereof in particular, it is amply clear that sufficient safeguards have been provided for as preconditions for invoking the powers of emergency attachment in the form of provisional attachment.

62. The background in which the amendment of 2013 became necessary can be culled out from the Report titled "Anti-Money Laundering and Combating the Financing of Terrorism" dated 25.6.2010. The relevant paragraphs of the said report read thus:

> "143. It is no formal and express legal condition that a conviction for the predicate offence is required as a precondition to prosecute money laundering, although some practitioners the assessment team met with felt that only a conviction would satisfactorily meet the evidentiary requirements. The definition of property in the PMLA (see supra) however requires property to be —related to a scheduled offence. Consequently, the section 3 ML offence not being an —all crimes offence, in the absence of case law, it is generally interpreted as requiring at the very minimum positive proof of the specific predicate offence before a conviction for money laundering can be obtained, be it for third party or self-laundering.
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> 144.Similarly, under section 8A of the NDPS Act, although it is debatable that the person charged with money laundering needs to have been convicted of a predicate offence, the positive and formal proof of a nexus with a drug related predicate offence is essential.
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> *** *** ***

168.The linkage and interaction of the ML offence with a specific predicate criminality is historically very tight in the Indian AML regime. The concept of stand-alone money laundering is quite strange to the practitioners, who cannot conceive pursuing money laundering as a sui generis autonomous offence. Some interlocutors were even of the (arguably erroneous) opinion that only a conviction for the predicate criminality would effectively satisfy the evidential requirements. As said, this attitude is largely due to the general practice in India to start a ML investigation only on the basis of a predicate offence case. Even if the ML investigation since recently can run concurrently with the predicate offence enquiry, there is no inter-agency MOU or arrangement to deal with evidentiary issues between the various agencies in investigating predicates and ML offences. Also, the way the interaction between the law enforcement agencies is presently structured carries the risk that ML prosecutions could be delayed while the other predicate offence investigation agencies try to secure convictions.

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175.Although recently an increased focus on the ML aspect and use of the ML provisions is to be acknowledged, there are still some important and often long-standing legal issues to be resolved. To that end following measures should be taken:

- The monetary threshold limitation of INR 3 million for the Schedule Part B predicate offences should be abolished.
- The section 3 PMLA definition of the ML offence should be brought in line with the Vienna and Palermo Conventions so as to also fully cover the physical concealment and the sole acquisition, possession and use of all relevant proceeds of crime.
- The present strict and formalistic interpretation of the evidentiary requirements in respect of the proof of the predicate offence should be put to the test of the courts to develop case law and receive direction on this fundamental legal issue.
- The level of the maximum fine imposable on legal persons should be raised or left at the discretion of the court to ensure a more dissuasive effect.
- The practice of making a conviction of legal persons contingent on the concurrent prosecution/conviction of a (responsible) natural person should be abandoned.

- Consider the abolishment of the redundant section 8A NDPS Act drug-related ML offence or, if maintained, bring the sanctions at a level comparable to that of the PMLA offence.

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233.Confiscation under Chapter III of the PMLA is only possible when it relates to ―proceeds of crime as defined in s. 2(1)(u), i.e. resulting from a scheduled offence, and when there is a conviction of such scheduled (predicate) offence. In addition, in such cases, only proceeds of the predicate offence can be confiscated and not the proceeds of the ML offence itself.

234.The predicate offence conviction condition creates fundamental difficulties when trying to confiscate the proceeds of crime in the absence of a conviction of a predicate offence, particularly in a stand-alone ML case, where the laundered assets become the corpus delicti and should be forfeitable as such. In the international context, the predicate conviction requirement also seriously affects the capacity to recover criminal assets where the predicate offence has occurred outside India and the proceeds are subsequently laundered in India (see also comments in Section 2.1 above).

235. The definition of proceeds of crime and property in the PMLA are broad enough to allow for confiscation of property derived directly or indirectly from proceeds of crime relating to a scheduled (predicate) offence, including income, profits and other benefits from the proceeds of crime. These definitions also allow for value confiscation, regardless of whether the property is held or owned by a criminal or a third party. As section 65 of the PMLA refers to the rules in CrPC, instrumentalities and intended instrumentalities can be confiscated in accordance with section 102 and 451 of the CrPC. However, there is no case law in this respect.

236. Also, the procedural provisions of Chapter III make confiscation of the proceeds of crime contingent on a prior seizure of attachment of the property by the Adjudicating Authority, and consequently substantially limit the possibilities for confiscation under the PMLA."

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"General comments"

244. Since confiscation is linked to a conviction it is not possible to confiscate criminal proceeds when the defendant has died during the criminal proceedings. However, it is possible to attach and dispose of any property of a proclaimed offender when that person has absconded. The absence of a regulation when the defendant has died may have a negative impact on the effectiveness of the confiscation regime in place in India."

63. In view of the observations made in said Report, the FATF made recommendations as follows:

"2.3.3 Compliance with Recommendations 3

	Rating	**Summary of factors relative to s.2.3 underlying overall rating**
R.3	**PC**	• Confiscation of property laundered is not covered in the relevant legislation and depends on a conviction for a scheduled predicate offence. • The UAPA does not allow for confiscation of intended instrumentalities used in terrorist acts or funds collected to be used by terrorist individuals. • The UAPA and NDPS Act do not allow for property of corresponding value to be confiscated. • There are no clear provisions and procedures on how to deal with the assets in the case of criminal proceedings when the suspect died. • Concerns based on the limited number of confiscations in relation to ML/FT offences."

64. As a sequel to these recommendations of FATF and the observations in the stated Report, Section 5 came to be amended vide Act 2 of 2013. In this connection, it may be useful to refer to

the Fifty Sixth Report of the Standing Committee on Finance relating to the 2011 Bill, which reads thus:

> "5. Amendment in provisions implemented by Enforcement Directorate:
>
> (i)Attachment of property: **The present Act in section 5 stipulates that the person from whom property is attached must "have been charged of having committed a scheduled offence". It is proposed to be deleted as property may come to rest with someone, who has nothing to do with the scheduled offence or even the money-laundering offence**. Procedure for attachment is at present done as provided in the Second Schedule to the Income Tax Act, 196. Now it is proposed in section 5(1) that the procedure will be prescribed separately. Time for Adjudicating Authority to confirm attachment of property by ED has been proposed to be increased from 150 days to 180 days.
>
> (ii)****
>
> **(iii) Making confiscation independent of conviction: At present attachment of property becomes final under section 8(3) "after the guilt of the person is proved in the trial court and order of such trial court becomes final". Problems are faced in such cases where money-laundering has been done by a person who has not committed the scheduled offence or where property has come to rest with someone who has not committed any offence. Therefore, it is proposed to amend section 8(5) to provide for attachment and confiscation of the proceeds of crime, even if there is no conviction, so long as it is proved that predicate offence and money laundering offence have taken place and the property in question (i.e. the proceeds of crime) is involved in money laundering."**
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> *** *** ***
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> **However, the MER 2010 highlighted certain deficiencies in the AML legislation which adversely affected the ratings on a few FATF recommendations**. The areas are broadly summarized below:—
>
> a) Commodities market out of the ambit of PMLA.

b) DNFBP sector not subjected to PMLA (except Casino).

c) Effectiveness concerns due to absence of ML conviction.

d) Identification and verification of beneficial ownership of legal persons.

e) Ineffective sanctions regime for non-compliance. India has suggested an Action Plan with short, medium and long term objectives to address the specific issues raised in the MER 2010 that includes proposed amendments in the PMLA."

(emphasis supplied)

65. As aforesaid, in this backdrop the amendment Act 2 of 2013 came into being. Considering the purport of the amended provisions and the experience of implementing/enforcement agencies, further changes became necessary to strengthen the mechanism regarding prevention of money-laundering. It is not right in assuming that the attachment of property (provisional) under the second proviso, as amended, has no link with the scheduled offence. Inasmuch as Section 5(1) envisages that such an action can be initiated only on the basis of material in possession of the authorised officer indicative of any person being in possession of proceeds of crime. The precondition for being proceeds of crime is that the property has been derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence. The sweep of Section 5(1) is not limited to the accused named in the criminal

activity relating to a scheduled offence. It would apply to any person (not necessarily being accused in the scheduled offence), if he is involved in any process or activity connected with the proceeds of crime. Such a person besides facing the consequence of provisional attachment order, may end up in being named as accused in the complaint to be filed by the authorised officer concerning offence under Section 3 of the 2002 Act.

66. Be it noted that the attachment must be only in respect of property which appears to be proceeds of crime and not all the properties belonging to concerned person who would eventually face the action of confiscation of proceeds of crime, including prosecution for offence of money-laundering. As mentioned earlier, the relevant date for initiating action under the 2002 Act — be it of attachment and confiscation or prosecution, is linked to the inclusion of the offence as scheduled offence and of carrying on the process or activity in connection with the proceeds of crime after such date. The pivot moves around the date of carrying on the process and activity connected with the proceeds of crime; and not the date on which the property has been derived or obtained by the person

concerned as a result of any criminal activity relating to or relatable to the scheduled offence.

67. The argument of the petitioners that the second proviso permits emergency attachment in disregard of the safeguard provided in the first proviso regarding filing of report (chargesheet) clearly overlooks that the second proviso contains *non-obstante* clause and, being an exceptional situation, warrants "immediate" action so that the property is not likely to frustrate any proceeding under the 2002 Act. Concededly, there is stipulation fastened upon the authorised officer to record in writing reasons for his belief on the basis of material in his possession that such "immediate" action is indispensable. This stipulation has reasonable nexus with the purposes and objects sought to be achieved by the 2002 Act.

68. It was also urged before us that the attachment of property must be equivalent in value of the proceeds of crime only if the proceeds of crime are situated outside India. This argument, in our opinion, is tenuous. For, the definition of "proceeds of crime" is wide enough to not only refer to the property derived or obtained as a result of criminal activity relating to a scheduled offence, but also

of the value of any such property. If the property is taken or held outside the country, even in such a case, the property equivalent in value held within the country or abroad can be proceeded with. The definition of "property" as in Section 2(1)(v) is equally wide enough to encompass the value of the property of proceeds of crime. Such interpretation would further the legislative intent in recovery of the proceeds of crime and vesting it in the Central Government for effective prevention of money-laundering.

69. We find force in the stand taken by the Union of India that the objectives of enacting the 2002 Act was the attachment and confiscation of proceeds of crime which is the quintessence so as to combat the evil of money-laundering. The second proviso, therefore, addresses the broad objectives of the 2002 Act to reach the proceeds of crime in whosoever's name they are kept or by whosoever they are held. To buttress this argument, reliance has been placed on the dictum in ***Attorney General for India***[494] and ***Raman Tech. & Process Engg. Co. & Anr. vs. Solanki Traders***[495].

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[494] Supra at Footnote No.428 (also at Footnote No.175)

[495] (2008) 2 SCC 302 (also at Footnote No.430)

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70. The procedural safeguards provided in respect of provisional attachment are effective measures to protect the interest of the person concerned who is being proceeded with under the 2002 Act, in the following manner as rightly indicated by the Union of India:

i. For invoking the second proviso, the Director or any officer not below the rank of Deputy Director will have to first apply his mind to the materials on record before recording in writing his reasons to believe is certainly a sufficient safeguard to the invocation of the powers under the second proviso to Section 5(1) of the 2002 Act.

ii. There has to be a satisfaction that if the property involved in money-laundering or 'proceeds of crime' are not attached "immediately", such non-attachment might frustrate the confiscation proceedings under the 2002 Act.

iii. The order passed under Section 5(1) of the 2002 Act is only provisional in nature. The life of this provisional attachment order passed under Section 5(1) of the 2002 Act is only for 180 days, subject to confirmation by an independent Adjudicating Authority.

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iv. Under Section 5(2) officer passing provisional attachment order has to immediately forward a copy of this order to the Adjudicating Authority in a sealed envelope.

v. Under Section 5(5) of the 2002 Act, the officer making such order must file a complaint before the Adjudicating Authority within 30 days of the order of provisional attachment being made.

vi. Section 5(3) of the 2002 Act provides that the provisional attachment order shall cease to have effect on the expiry of the period specified in Section 5(1) i.e. 180 days or on the date when the Adjudicating Authority makes an order under Section 8(2), whichever is earlier.

vii. Under Section 8(1), once the officer making the provisional attachment order files a complaint and if the Adjudicating Authority "has a reason to believe that any person has committed an offence under Section 3 or is in possession of the proceeds of crime", the Adjudicating Authority may serve a show cause notice of not less than 30 days on such person calling upon him to indicate the sources of his income, earning

or assets or by means of which he has acquired the property attached under Section 5(1) of the 2002 Act.

viii. The above SCN would require the noticee to produce evidence on which he relies and other relevant information and particulars to show cause why all or any of the property "should not be declared to be the properties involved in money-laundering and confiscated by the Central Government".

ix. Section 8(2) requires the Adjudicating Authority to consider the reply to the SCN issued under Section 8(1) of the 2002 Act. The Section further provides to hear the aggrieved person as well as the officer issuing the order of provisional attachment and also take into account "all relevant materials placed on record before the Adjudicating Authority". After following the above procedure, the Adjudicating Authority will record its finding whether all the properties referred to in the SCN are involved in money-laundering or not.

x. While passing order under Section 8(2) read with Section 8(3) there are two possibilities which might happen:

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a. the Adjudicating Authority may confirm the order of provisional attachment, in which case again, the confirmation will continue only up to

i. the period of investigation not exceeding 365 days, or

ii. till the pendency of any proceedings relating to any offence under the 2002 Act or under the corresponding law of any other country before the competent Court of criminal jurisdiction outside India.

b. Adjudicating Authority may disagree and not confirm the provisional attachment, in which case attachment over the property ceases.

xi. Under Section 8(4) of the 2002 Act, upon confirmation of the order of provisional attachment, the Director or other officer authorized by him shall take the possession of property attached.

xii. Under Section 8(5) of the 2002 Act, on the conclusion of a trial for an offence under the 2002 Act if the Special Court finds that the offence of money-laundering has been committed it will order that the property involved in money-laundering or

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the property which has been involved in the commission of the offence of money-laundering shall stand confiscated to the Central Government.

xiii. However, under Section 8(6) if the Special Court on the conclusion of the trial finds that no offence of money-laundering has taken place or the property is not involved in money-laundering it will release the property which has been attached to the person entitled to receive it.

xiv. Under Section 8(7), if the trial before the Special Court cannot be conducted because of the death of the accused or because the accused is declared proclaimed offender, then the Special Court on an application of the Director or a person claiming to be entitled to possession of a property in respect of which an order under Section 8(3) is passed either to confiscate the property or release the property to the claimant, after considering the material before it.

xv. Under Section 8(8), when a property is confiscated, Special Court may direct the central government to restore the property to a person with the legitimate interest in the property, who

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may have suffered a quantifiable loss as a result of money-laundering. Provided that the person must not have been involved in money-laundering and must have acted in a good faith and has suffered a considerable loss despite taking all reasonable precautions.

xvi. The order passed by the Adjudicating Authority is also subject to appeal before the Appellate Tribunal which is constituted under Section 25 of the 2002 Act. Thus, the Adjudicating Authority is not the final authority under the 2002 Act as far as the attachment of proceeds of crime or property involved in money-laundering is concerned.

xvii. Any person aggrieved of an order confirming the provisional attachment order can file an appeal before the Appellate Tribunal under Section 26(1) of the 2002 Act. The Appellate Tribunal on receipt of an appeal after giving the parties an opportunity of being heard will pass an order as it thinks fit either confirming or modifying or setting aside the provisional attachment order appealed against.

xviii. Further, the order passed by the Appellate Tribunal is further appealable before the High Court under Section 42 of the 2002 Act on any question of fact or question of law arising out of the order passed by the Appellate Tribunal.

It is, thus, clear that the provision in the form of Section 5 provides for a balancing arrangement to secure the interest of the person as well as to ensure that the proceeds of crime remain available for being dealt with in the manner provided by the 2002 Act. This provision, in our opinion, has reasonable nexus with the objects sought to be achieved by the 2002 Act in preventing and regulating money-laundering effectively. The constitutional validity including interpretation of Section 5 has already been answered against the petitioners by different High Courts[496]. We do not wish to dilate on those decisions for the view already expressed hitherto.

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[496] (1) Bombay High Court in *Radha Mohan Lakhotia* (supra at Footnote No.431); (2) High Court of Andhra Pradesh in *B. Rama Raju* (supra at Footnote No.433); (3) High Court of Gujarat in *J Alive Hospitality and Food Private Limited* (supra at Footnote No.434); (4) High Court of Karnataka in *K. Sowbaghya* (supra at Footnote No.435); (5) High Court of Sikkim at Gangtok in *Usha Agarwal* (supra at Footnote No.436); and Delhi High Court in *J. Sekar* (supra at Footnote No.437).

SECTION 8 OF THE 2002 ACT

71. This section is part of Chapter III dealing with attachment, adjudication and confiscation. It provides for the procedure and safeguards to be adhered to by the Authorities referred to in Section 48 and in particular the Adjudicating Authority appointed by the Central Government under Section 6, for dealing with the complaint filed by the authorised officer under Section 5(5) of the 2002 Act or applications made under Section 17(4) or 18(10) of the 2002 Act. This is a wholesome provision, not only protecting the interest of the person concerned, but affording him/her fair opportunity during the adjudication process. This section, as amended from time to time and as applicable to the present cases, reads thus:

> "**8. Adjudication.**—(1) On receipt of a complaint under sub-section (5) of section 5, or applications made under sub-section (4) of section 17 or under sub-section (10) of section 18, if the Adjudicating Authority has reason to believe that any person has committed an [497][offence under section 3 or is in possession of proceeds of crime], he may serve a notice of not less than thirty days on such person calling upon him to indicate the sources of his income, earning or assets, out of which or by means of which he has acquired the property attached under sub-section (1) of section 5, or, seized [498][or frozen] under section 17 or section 18, the evidence on which he relies and other relevant information and particulars, and to show cause why all or any of such properties should not

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[497] Subs. by Act 21 of 2009, sec. 5, for "offence under section 3" (w.e.f. 1-6-2009).

[498] Ins. by Act 2 of 2013, sec. 6(i) (w.e.f. 15-2-2013, vide S.O. 343(E), dated 8-2-2013).

be declared to be the properties involved in money-laundering and confiscated by the Central Government:

Provided that where a notice under this sub-section specifies any property as being held by a person on behalf of any other person, a copy of such notice shall also be served upon such other person:

Provided further that where such property is held jointly by more than one person, such notice shall be served to all persons holding such property.

(2) The Adjudicating Authority shall, after—

(a) considering the reply, if any, to the notice issued under sub-section (1);

(b) hearing the aggrieved person and the Director or any other officer authorised by him in this behalf; and

(c) taking into account all relevant materials placed on record before him,

by an order, record a finding whether all or any of the properties referred to in the notice issued under sub-section (1) are involved in money-laundering:

Provided that if the property is claimed by a person, other than a person to whom the notice had been issued, such person shall also be given an opportunity of being heard to prove that the property is not involved in money-laundering.

(3) Where the Adjudicating Authority decides under sub-section (2) that any property is involved in money-laundering, he shall, by an order in writing, confirm the attachment of the property made under sub-section (1) of section 5 or retention of property or [499][record seized or frozen under section 17 or section 18 and record a finding to that effect, whereupon such attachment or retention or freezing of the seized or frozen property] or record shall—

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[499] Subs. by Act 2 of 2013, sec. 6(ii)(a), for "record seized under section 17 or section 18 and record a finding to that effect, such attachment or retention of the seized property" (w.e.f. 15-2-2013), vide S.O. 343(E), dated 8-2-2013.

(a) continue during [500][investigation for a period not exceeding [501][three hundred and sixty-five days] or] the pendency of the proceedings relating to any [502][offence under this Act before a court or under the corresponding law of any other country, before the competent court of criminal jurisdiction outside India, as the case may be; and]

[503][(b) become final after an order of confiscation is passed under sub-section (5) or sub-section (7) of section 8 or section 58B or sub-section (2A) of section 60 by the [504][Special Court];]

[505][Explanation.—For the purposes of computing the period of three hundred and sixty-five days under clause (a), the period during which the investigation is stayed by any court under any law for the time being in force shall be excluded.]

(4) Where the provisional order of attachment made under sub-section (1) of section 5 has been confirmed under sub-section (3), the Director or any other officer authorised by him in this behalf shall forthwith take the [506][possession of the property attached under section 5 or frozen under sub-section (1A) of section 17, in such manner as may be prescribed:

Provided that if it is not practicable to take possession of a property frozen under sub-section

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[500] Ins. by Act 13 of 2018, sec. 208(c)(i) (w.e.f. 19-4-2018, vide G.S.R. 383(E), dated 19th April, 2018).

[501] Subs. by Act 7 of 2019, sec. 22(i), for "ninety days" (w.e.f. 20-3-2019, vide G.S.R. 225(E), dated 19th March, 2019).

[502] Subs. by Act 2 of 2013, sec. 6(ii)(b), for "Scheduled offence before a Court and" (w.e.f. 15-2-2013, vide S.O. 343(E), dated 8-2-2013).

[503] Subs. by Act 2 of 2013, sec. 6(ii)(c), for clause (b) (w.e.f. 15-2-2013, vide S.O. 343(E), dated 8-2-2013). Clause (b), before substitution, stood as under:

"(b) become final after the guilt of the person is proved in the trial court and order of such trial court becomes final".

[504] Subs. by the **Finance Act, 2015** (20 of 2015), sec. 147(i), for "Adjudicating Authority" (w.e.f. 14-5-2015).

[505] Ins. by Act 7 of 2019, sec. 22(ii) (w.e.f. 20-3-2019, vide G.S.R. 225(E), dated 19th March, 2019).

[506] Subs. by Act 2 of 2013, sec. 6(iii), for "possession of the attached property" (w.e.f. 15-2-2013, vide S.O. 343(E), dated 8-2-2013).

(1A) of section 17, the order of confiscation shall have the same effect as if the property had been taken possession of.]

[507][(5) Where on conclusion of a trial of an offence under this Act, the Special Court finds that the offence of money-laundering has been committed, it shall order that such property involved in the money-laundering or which has been used for commission of the offence of money-laundering shall stand confiscated to the Central Government.

(6) Where on conclusion of a trial under this Act, the Special Court finds that the offence of money-laundering has not taken place or the property is not involved in money-laundering, it shall order release of such property to the person entitled to receive it.

(7) Where the trial under this Act cannot be conducted by reason of the death of the accused or the accused being declared a proclaimed offender or for any other reason or having commenced but could not be concluded, the Special Court shall, on an application moved by the Director or a person claiming to be entitled to possession of a property in respect of which an order has been passed under sub-section (3) of section 8, pass appropriate orders regarding confiscation or release of the property, as the case may be, involved in the offence of money-laundering after having regard to the material before it.]

[508][(8) Where a property stands confiscated to the Central Government under sub-section (5), the Special Court, in such manner as may be prescribed, may also direct the Central Government to restore such confiscated property or part thereof of a claimant with a legitimate interest in

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[507] Subs. by Act 2 of 2013, sec. 6(iv), for sub-sections (5) and (6) (w.e.f. 15-2-2013, vide S.O. 343(E), dated 8-2-2013). Sub-sections (5) and (6), before substitution, stood as under:

"(5) Where on conclusion of a trial for any scheduled offence, the person concerned is acquitted, the attachment of the property or retention of the seized property or record under sub-section (3) and net income, if any, shall cease to have effect.

(6) Where the attachment of any property or retention of the seized property or record becomes final under clause (b) of sub-section (3), the Adjudicating Authority shall, after giving an opportunity of being heard to the person concerned, make an order confiscating such property."

[508] Ins. by the **Finance Act, 2015** (20 of 2015), sec. 147(ii) (w.e.f. 14-5-2015).

the property, who may have suffered a quantifiable loss as a result of the offence of money laundering:

Provided that the Special Court shall not consider such claim unless it is satisfied that the claimant has acted in good faith and has suffered the loss despite having taken all reasonable precautions and is not involved in the offence of money laundering:]

[509][Provided further that the Special Court may, if it thinks fit, consider the claim of the claimant for the purposes of restoration of such properties during the trial of the case in such manner as may be prescribed.]"

72. The grievance of the petitioners in respect of this provision is broadly about the period of attachment specified under Section 8(3)(a) and the modality of taking possession of the property under Section 8(4) of the 2002 Act. As a result, we will confine our discussion to the dispensation provided in the stated sub-sections. Reverting to sub-section (3), it postulates that where the Adjudicating Authority records a finding whether all or any of the properties referred to in the show cause notice issued under sub-section (1) by the Adjudicating Authority consequent to receipt of a complaint/application that the property in question is involved in money-laundering, he shall, by an order in writing confirm the attachment (provisional) of property made under Section 5(1) or

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[509] Ins. by Act 13 of 2018, sec. 208(c)(ii) (w.e.f. 19-4-2018, vide G.S.R. 383(E), dated 19th April, 2018).

retention of property or record seized or frozen under Section 17 or Section 18, and direct continuation of the attachment or retention or freezing of the concerned property for a period not exceeding three hundred and sixty-five days or the pendency of the proceedings relating to any offence under the 2002 Act before a Court or under the corresponding law of any country outside India and become final after an order of confiscation is passed under sub-section (5) or sub-section (7) of Section 8 or Section 58B or Section 60(2A) by the Special Court. The Explanation added thereat vide Act 7 of 2019 stipulates the method of computing the period of three hundred and sixty-five days after reckoning the stay order of the Court, if any. The argument proceeds that the period of attachment mentioned in Section 8(3)(a) of the 2002 Act does not clearly provide for the consequence of non-filing of the complaint within three hundred and sixty-five days from the date of attachment (provisional). This argument clearly overlooks the obligation on the Director or any other officer who provisionally attaches any property under Section 5(1), to file a complaint stating the fact of such attachment before the Adjudicating Authority within thirty days in terms of Section 5(5) of the 2002 Act. Concededly, filing of complaint before the

Adjudicating Authority in terms of Section 5(5) within thirty days from the provisional attachment for confirmation of such order of provisional attachment is different than the complaint to be filed before the Special Court under Section 44(1)(b) for initiating criminal action regarding offence of money-laundering punishable under Section 4 of the 2002 Act. Furthermore, the provisional attachment would operate only for a period of one hundred and eighty days from the date of order passed under Section 5(1) of the 2002 Act in terms of that provision. Whereas, Section 8(3) refers to the period of three hundred and sixty-five days from the passing of the order under sub-section (2) of Section 8 by the Adjudicating Authority and confirming the provisional attachment order and the order of confirmation of attachment operates until the confiscation order is passed or becomes final in terms of order passed under Section 8(5) or 8(7) or 58B or 60(2A) by the Special Court. The order of confirmation of attachment could also last during the pendency of the proceedings relating to the offence of money-laundering under the 2002 Act, or before the competent Court of criminal jurisdiction

outside India, as the case may be. We need not elaborate on this aspect any further and leave the parties to agitate this aspect in appropriate proceedings as it is not about the constitutional validity of the provision as such.

73. The other grievance of the petitioners is in reference to the stipulation in sub-section (4) of Section 8 providing for taking possession of the property. This provision ought to be invoked only in exceptional situation keeping in mind the peculiar facts of the case. In that, merely because the provisional attachment order passed under Section 5(1) is confirmed, it does not follow that the property stands confiscated; and until an order of confiscation is formally passed, there is no reason to hasten the process of taking possession of such property. The principle set out in Section 5(4) of the 2002 Act needs to be extended even after confirmation of provisional attachment order until a formal confiscation order is passed. Section 5(4) clearly states that nothing in Section 5 including the order of provisional attachment shall prevent the person interested in the enjoyment of immovable property attached under sub-section (1) from such enjoyment. The need to take

possession of the attached property would arise only for giving effect to the order of confiscation. This is also because sub-section (6) of Section 8 postulates that where on conclusion of a trial under the 2002 Act which is obviously in respect of offence of money-laundering, the Special Court finds that the offence of money-laundering has not taken place or the property is not involved in money-laundering, it shall order release of such property to the person entitled to receive it. Once the possession of the property is taken in terms of sub-section (4) and the finding in favour of the person is rendered by the Special Court thereafter and during the interregnum if the property changes hands and title vest in some third party, it would result in civil consequences even to third party. That is certainly avoidable unless it is absolutely necessary in the peculiar facts of a particular case so as to invoke the option available under sub-section (4) of Section 8.

74. Indisputably, statutory Rules have been framed by the Central Government in exercise of powers under Section 73 of the 2002 Act

regarding the manner of taking possession of attached or frozen properties confirmed by the Adjudicating Authority in 2013, and also regarding restoration of confiscated property in 2019. Suffice it to observe that direction under Section 8(4) for taking possession of the property in question before a formal order of confiscation is passed merely on the basis of confirmation of provisional attachment order, should be an exception and not a rule. That issue will have to be considered on case-to-case basis. Upon such harmonious construction of the relevant provisions, it is not possible to countenance challenge to the validity of sub-section (4) of Section 8 of the 2002 Act.

75. The learned counsel appearing for the Union of India, had invited our attention to the recommendations made by FATF in 2003 and 2012 to justify the provision under consideration. The fact that non-conviction based confiscation model is permissible, it does not warrant an extreme and drastic action of physical dispossession of the person from the property in every case — which can be industrial/commercial/business and also residential property, until a formal order of confiscation is passed under Section 8(5) or 8(7) of

the 2002 Act. As demonstrated earlier, it is possible that the Special Court in the trial concerning money-laundering offence may eventually decide the issue in favour of the person in possession of the property as not being proceeds of crime or for any other valid ground. Before such order is passed by the Special Court, it would be a case of serious miscarriage of justice, if not abuse of process to take physical possession of the property held by such person. Further, it would serve no purpose by hastening the process of taking possession of the property and then returning the same back to the same person at a later date pursuant to the order passed by the Court of competent jurisdiction. Moreover, for the view taken by us while interpretating Section 3 of the 2002 Act regarding the offence of money-laundering, it can proceed only if it is established that the person has directly or indirectly derived or obtained proceeds of crime as a result of criminal activity relating to or relatable to a scheduled offence or was involved in any process or activity connected with proceeds of crime.

76. It is unfathomable as to how the action of confiscation can be resorted to in respect of property in the event of his acquittal or

discharge in connection with the scheduled offence. Resultantly, we would sum up by observing that the provision in the form of Section 8(4) can be resorted to only by way of an exception and not as a rule. The analogy drawn by the Union of India on the basis of decisions of this Court in ***Divisional Forest Officer & Anr. vs. G.V. Sudhakar Rao & Ors.***[510], ***Biswanath Bhattacharya***[511], ***Yogendra Kumar Jaiswal & Ors. vs. State of Bihar & Ors.***[512], will be of no avail in the context of the scheme of attachment, confiscation and vesting of proceeds of crime in the Central Government provided for in the 2002 Act.

SEARCHES AND SEIZURES

77. After having traversed through the provisions of Chapter I to III, we may now turn to other contentious provision in Chapter V of the 2002 Act, dealing with summons, searches and seizures, etc. Section 16 provides for power of survey bestowed upon the Authorities under the 2002 Act. They have been empowered to enter

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[510] (1985) 4 SCC 573 (also at Footnote No.439)

[511] Supra at Footnote No.438

[512] (2016) 3 SCC 183 (also at Footnote No.448)

upon any place within the limits of the area assigned to them or in respect of which, has been specifically authorised for the purposes of Section 16 by the competent authority, for inspection of records or other matters, in the event, it has reason to believe on the basis of material in possession that an offence under Section 3 of the 2002 Act has been committed. However, when it comes to search and seizure, Section 17 of the 2002 Act permits only the Director or any other officer not below the rank of Deputy Director authorised by him to exercise that power on the basis of information in his possession and having reason to believe that any person has committed some act which constitutes money-laundering or is in possession of proceeds of crime involved in money-laundering, including the records and property relating to money-laundering. Section 17 of the 2002 Act, as amended, reads thus:

> "**17. Search and seizure.—**(1) Where [513][the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section,] on the basis of information in his possession, has reason to believe (the reason for such belief to be recorded in writing) that any person—
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> (i) has committed any act which constitutes money-laundering, or
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> (ii) is in possession of any proceeds of crime involved in money-laundering, or

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[513] Subs. by Act 21 of 2009, sec. 7(i), for "the Director" (w.e.f. 1-6-2009)

(iii) is in possession of any records relating to money-laundering, [514][or]

[515][(iv) is in possession of any property related to crime,]

then, subject to the rules made in this behalf, he may authorise any officer subordinate to him to—

(a) enter and search any building, place, vessel, vehicle or aircraft where he has reason to suspect that such records or proceeds of crime are kept;

(b) break open the lock of any door, box, locker, safe, almirah or other receptacle for exercising the powers conferred by clause (a) where the keys thereof are not available;

(c) seize any record or property found as a result of such search;

(d) place marks of identification on such record or [516][property, if required or] make or cause to be made extracts or copies therefrom;

(e) make a note or an inventory of such record or property;

(f) examine on oath any person, who is found to be in possession or control of any record or property, in respect of all matters relevant for the purposes of any investigation under this Act:

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[514] Ins. by Act 2 of 2013, sec. 14(i)(a) (w.e.f. 15-2-2013, vide S.O. 343(E), dated 8-2-2013)

[515] Ins. by Act 2 of 2013, sec. 14(i)(b) (w.e.f. 15-2-2013, vide S.O. 343(E), dated 8-2-2013)

[516] Ins. by Act 2 of 2013, sec. 14(i)(c) (w.e.f. 15-2-2013, vide S.O. 343(E), dated 8-2-2013)

[517] Proviso omitted by the **Finance (No.2) Act, 2019**, sec. 197 (w.e.f. 1-8-2019). Earlier the proviso was substituted by Act 2 of 2013, sec. 14(i)(d) (w.e.f. 15-2-2013, vide S.O. 343(E), dated 8-2-2013) and by Act 21 of 2009, sec. 7(ii) (w.e.f. 1-6-2009). The Proviso, before omission, stood as under:

> "Provided that no search shall be conducted unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under section 157 of the Code of Criminal Procedure, 1973 (2 of 1974) or a complaint has been filed by a person, authorised to investigate the offence mentioned in the Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or in cases where such report is not required to be forwarded, a similar report of information received or otherwise has been submitted by an officer authorised to investigate a scheduled offence to an officer not below the rank of Additional Secretary to the Government of India or equivalent being head of the office or Ministry or Department or Unit, as the case may be, or any other

[518][(1A) Where it is not practicable to seize such record or property, the officer authorised under sub-section (1), may make an order to freeze such property whereupon the property shall not be transferred or otherwise dealt with, except with the prior permission of the officer making such order, and a copy of such order shall be served on the person concerned:

Provided that if, at any time before its confiscation under sub-section (5) or sub-section (7) of section 8 or section 58B or sub-section (2A) of section 60, it becomes practical to seize a frozen property, the officer authorised under sub-section (1) may seize such property.]

(2) The authority, who has been authorised under sub-section (1) shall, immediately after search and seizure [519][or upon issuance of a freezing order], forward a copy of the reasons so recorded along with 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 reasons and material for such period, as may be prescribed.

(3) Where an authority, upon information obtained during survey under section 16, is satisfied that any evidence shall be or is likely to be concealed or tampered with, he may, for reasons to be recorded in writing, enter and search the building or place where such evidence is located and seize that evidence:

Provided that no authorisation referred to in sub-section (1) shall be required for search under this sub-section.

[520][(4) The authority seizing any record or property under sub-section (1) or freezing any record or property under sub-section (1A) shall, within a period of thirty days from such seizure or freezing, as the case may be, file an

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officer who may be authorised by the Central Government, by notification, for this purpose"

[518] Ins. by Act 2 of 2013, sec. 14(ii) (w.e.f. 15-2-2013, vide S.O. 343(E), dated 8-2-2013).

[519] Ins. by Act 2 of 2013, sec. 14(iii) (w.e.f. 15-2-2013, vide S.O. 343(E), dated 8-2-2013).

[520] Subs. by Act 2 of 2013, sec. 14(iv), for sub-section (14) (w.e.f. 15-2-2013, vide S.O. 343(E), dated 8.2.2013). Sub-section (14), before substitution, stood as under:

"(4) The authority, seizing any record or property under this section shall, within a period of thirty days from such seizure, file an application, requesting for retention of such record or property, before the Adjudicating Authority."

> application, requesting for retention of such record or property seized under sub-section (1) or for continuation of the order of freezing served under sub-section (1A), before the Adjudicating Authority.]"

As noticed from the amended provision, it has been amended vide Act 21 of 2009, Act 2 of 2013 and finally by the Finance (No.2) Act, 2019. The challenge is essentially in respect of deletion of proviso vide Finance (No.2) Act, 2019 — which provides that no search shall be conducted unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under Section 157 of the 1973 Code or a complaint has been filed by a person, authorised to investigate the offence mentioned in the Schedule, before a Magistrate or Court for taking cognizance of the scheduled offence, as the case may be, or in cases where such report is not required to be forwarded, a similar report of information received or otherwise has been submitted by an officer authorised to investigate a scheduled offence to an officer not below the rank of Additional Secretary to the Government of India or equivalent being Head of the Office or Ministry or Department or Unit, as the case may be, or any other officer who may be authorised by the Central Government, by notification, for this purpose. Further, the challenge is about no

safeguards, as provided under the 1973 Code regarding searches and seizures, have been envisaged and that such drastic power is being exercised without a formal FIR registered or complaint filed in respect of scheduled offence. The provision is, therefore, unconstitutional.

78. These challenges have been rightly refuted by the Union of India on the argument that the 2002 Act is a self-contained Code and the dispensation envisaged thereunder, must prevail in terms of Section 71[520A] of the 2002 Act, which predicates that the provisions of the 2002 Act have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force, which includes the provisions of the 1973 Code. Even Section 65[520B] of the 2002 Act predicates that the provisions of the 1973 Code shall apply, insofar as they are not inconsistent with the provisions of the 2002 Act in respect of arrest, search and seizure, attachment, confiscation, investigation, prosecution and all other proceedings under the 2002 Act. To bolster this submission, reliance is also

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[520A] **71. Act to have overriding effect**.—The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

[520B] **65. Code of Criminal Procedure, 1973 to apply.**—The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply, insofar as they are not inconsistent with the provisions of this Act, to arrest, search and seizure, attachment, confiscation investigation, prosecution and all other proceedings under this Act.

placed on Sections 4[521] and 5[522] of the 1973 Code. Section 4(2) pertains to offences under other laws (other than IPC) which are required to be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. Similarly, Section 5 of the 1973 Code envisages that nothing in the 1973 Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

79. Undoubtedly, the 2002 Act is a special self-contained law; and Section 17 is a provision, specifically dealing with the matters

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[521] **4. Trial of offences under the Indian Penal Code and other laws.—**(1) All offences under the India Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

[522] **5. Saving.—**Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special from of procedure prescribed, by any other law for the time being in force.

concerning searches and seizures in connection with the offence of money-laundering to be inquired into and the proceeds of crime dealt with under the 2002 Act. We have already noted in the earlier part of this judgment that before resorting to action of provisional attachment, registration of scheduled offence or complaint filed in that regard, is not a precondition. The authorised officer can still invoke power of issuing order of provisional attachment and contemporaneously send information to the jurisdictional police about the commission of scheduled offence and generation of property as a result of criminal activity relating to a scheduled offence, which is being made subject matter of provisional attachment. Even in the matter of searches and seizures under the 2002 Act, that power can be exercised only by the Director or any other officer not below the rank of Deputy Director authorised by him. They are not only high-ranking officials, but have to be fully satisfied that there is reason to believe on the basis of information in their possession about commission of offence of money-laundering or possession of proceeds of crime involved in money-laundering. Such reason(s) to believe is required to be recorded in writing and contemporaneously forwarded to the Adjudicating

Authority along with the material in his possession in a sealed envelope to be preserved by the Adjudicating Authority for period as is prescribed under the Rules framed in that regard. Such are the inbuilt safeguards provided in the 2002 Act. The proviso as it existed prior to 2019 was obviously corresponding to the stipulation in the first proviso in Section 5. However, for strengthening the mechanism, including regarding prevention of money-laundering, the Parliament in its wisdom deemed it appropriate to drop the proviso in sub-section (1) of Section 17 of the 2002 Act, thereby dispensing with the condition that no search shall be conducted unless in relation to the scheduled offence a report has been forwarded to a Magistrate under Section 157 of the 1973 Code or a complaint has been filed before a Magistrate in regard to such offence. As it is indisputable that the 2002 Act is a special Act and is a self-contained Code regarding the subject of searches and seizures in connection with the offence of money-laundering under the 2002 Act, coupled with the fact that the purpose and object of the 2002 Act is prevention of money-laundering; and the offence of money-laundering being an independent offence concerning the process and activity connected with the proceeds of crime, the

deletion of the first proviso has reasonable nexus with the objects sought to be achieved by the 2002 Act for strengthening the mechanism of prevention of money-laundering and to secure the proceeds of crime for being dealt with appropriately under the 2002 Act.

80. As aforementioned, Section 17 provides for inbuilt safeguards, not only mandating exercise of power by high ranking officials, of the rank of Director (not below the rank of Additional Secretary to the Government of India who is appointed by a Committee chaired by the Central Vigilance Commissioner in terms of Section 25 of the CVC Act) or Deputy Director authorised by the Director in that regard, but also to adhere to other stipulations of recording of reasons regarding the belief formed on the basis of information in his possession about commission of offence of money-laundering and possession of proceeds of crime involved in money-laundering. Further, such recorded reasons along with the materials is required to be forwarded to the three-member Adjudicating Authority (appointed under Section 6 of the 2002 Act headed by a person qualified for appointment as District Judge) in a sealed cover to be

preserved for specified period, thus, guaranteeing fairness, transparency and accountability regarding the entire process of search and seizure. This is unlike the provision in the 1973 Code where any police officer including the Head Constable can proceed to search and seize records or property merely on the basis of allegation or suspicion of commission of a scheduled offence.

81. Concededly, the 2002 Act provides for an inquiry to be conducted by the Authorities and with power to collect evidence for being submitted to the Adjudicating Authority for consideration of confirmation of provisional attachment order passed by the Authorities in respect of properties being proceeds of crime involved in the offence of money-laundering. In that sense, the provisions in 2002 Act are not only to investigate into the offence of money-laundering, but more importantly to prevent money-laundering and to provide for confiscation of property related to money-laundering and matters connected therewith and incidental thereto.

82. The process of searches and seizures under the 2002 Act are, therefore, not only for the purposes of inquiring into the offence of money-laundering, but also for the purposes of prevention of money-

laundering. This is markedly distinct from the process of investigating into a scheduled offence.

83. It is pertinent to note that if the action taken by the Authority under the 2002 Act, including regarding searches and seizures, is eventually found to be without reasons recorded in writing, would entail punishment for vexatious search under Section 62 of the 2002 Act. Such being the stringent safeguards provided under Section 17 of the 2002 Act and Rules framed regarding the process of searches and seizures concerning the offence of money-laundering and for prevention of money-laundering including attachment of proceeds of crime, it is unfathomable as to how the challenge under consideration can be countenanced. We may usefully advert to the decision of Constitution Bench of this Court in ***Pooran Mal***[523], which had dealt with similar power entrusted to the Director of Inspection or the Commissioner under the Income-tax Act, 1961 (also see ***Income-Tax Officer, Special Investigation Circle-B, Meerut***[524]). To the same end is the decision in ***R.S. Seth***

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[523] Supra at Footnote No.416

[524] Supra at Footnote No.424

Gopikrishan Agarwal vs. R.N. Sen, Assistant Collector of Customs & Ors.[525], dealing with Sections 105 and 136 of the Customs Act. In the case of ***Dr. Partap Singh***[526], this Court upheld the dispensation provided in Section 37 of the FERA by adopting purposive interpretation to give full play to the legislative intent and negating the argument regarding incorporation of the provisions of the 1973 Code by pen and ink in that section, as is the argument advanced before us.

84. As noticed earlier, in terms of Section 17(2) of the 2002 Act immediately after the search and seizure, the Authority conducting the search is obliged to forward a copy of the reasons recorded and materials in his possession to the Adjudicating Authority in a sealed envelope. This sealed envelope is required to be preserved for period as specified under the Rules framed in that regard so that it is not tempered with in any manner and to ensure fairness of the procedure including accountability of the Authority. Not only that, in terms of Section 17(4) of the 2002 Act the Authority seizing the

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[525] (1967) 2 SCR 340 (also at Footnote No.417)

[526] Supra at Footnote No.425

record or property is obliged to submit an application before the Adjudicating Authority within a period of thirty days therefrom for the retention of the said record and Adjudicating Authority in turn gives opportunity to be heard by issuing show cause notice to the person concerned before passing order of retention of record or property, as the case may be, under the 2002 Act and the Rules framed therefor. The Authorities carrying out search and seizure is also made accountable by providing for punishment under Section 62 of the 2002 Act for vexatious search and giving false information. All these inbuilt safeguards prevent arbitrary exercise or misuse of power by the authorities appointed under the 2002 Act.

85. The emphasis placed on Section 102 of the 1973 Code regarding seizure procedure by the petitioners, is of no avail. That provision does not provide for any safeguard prior to a seizure as is provided under Section 17 of the 2002 Act and the Rules framed thereunder. As noted earlier, it can be made even by a Head Constable as the expression used is “any police officer” that too merely on the basis of an allegation or suspicion of commission of an offence. In case of search, Section 165 of the 1973 Code

empowers the officer in-charge of a police station or a police officer making an investigation to take recourse to that in the event he has reasonable grounds for believing that it would be necessary to do so for investigating into any offence. This power can be exercised by any police officer (irrespective of his rank) investigating into an offence. Suffice it to observe that the power of search and seizure entrusted to the Authorities under Section 17 of the 2002 Act, is a special self-contained provision and is different from the general provisions in the 1973 Code, which, therefore, ought to prevail in terms of Section 71 of the 2002 Act. Further, in view of the inbuilt safeguards and stringent stipulations to be adhered to by the Authorities under the 2002 Act, it ought to be regarded as reasonable provision having nexus with the purposes and objects sought to be achieved by the 2002 Act. It is certainly not an arbitrary power at all.

86. It was urged that the Rule 3(2) proviso in the 2005 Rules regarding forms, search and seizure or freezing and the manner of forwarding the reasons and material to the Adjudicating Authority, impounding and custody of records and the period of retention, remained unamended despite deletion of the proviso in Section 17(1)

of the 2002 Act vide Finance (No.2) Act, 2019. In the first place, it is unfathomable that the effect of amending Act is being questioned on the basis of unamended Rule. It is well-settled that if the Rule is not consistent with the provisions of the Act, the amended provisions in the Act must prevail. The statute cannot be declared *ultra vires* on the basis of Rule framed under the statute. The precondition in the proviso in Rule 3(2) cannot be read into Section 17 of the 2002 Act, more so contrary to the legislative intent in deleting the proviso in Section 17(1) of the 2002 Act. In any case, it is open to the Central Government to take necessary corrective steps to obviate confusion caused on account of the subject proviso, if any.

SEARCH OF PERSONS

87. The subject of search of persons is dealt with in Section 18 of the 2002 Act forming part of Chapter V. Even in respect of this provision, the challenge is essentially founded on the deletion of proviso in sub-section (1) of Section 18 vide Finance (No.2) Act, 2019 which was *pari materia* with the proviso in Section 17(1) of the 2002 Act — stipulating that no search of any person shall be made unless in relation to the scheduled offence a report has been forwarded to

a Magistrate under Section 157 of the 1973 Code, etc. The Section 18, as amended reads thus:

> "**18. Search of persons**.—(1) If an authority, authorised in this behalf by the Central Government by general or special order, has reason to believe (the reason for such belief to be recorded in writing) that any person has secreted about his person or in anything under his possession, ownership or control, any record or proceeds of crime which may be useful for or relevant to any proceedings under this Act, he may search that person and seize such record or property which may be useful for or relevant to any proceedings under this Act:
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> **527**[***]
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> (2) The authority, who has been authorised under sub-section (1) shall, immediately after search and seizure, forward a copy of the reasons so recorded along with 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 reasons and material for such period, as may be prescribed.
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> (3) Where an authority is about to search any person, he shall, if such person so requires, take such person within twenty-four hours to the nearest gazetted officer, superior in rank to him, or a Magistrate:
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> Provided that the period of twenty-four hours shall exclude the time necessary for the journey undertaken to

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527 Proviso omitted by the **Finance (No.2) Act, 2019**, sec. 198 (w.e.f. 1-8-2019). Earlier the proviso was inserted by Act 21 of 2009, sec. 8(i) (w.e.f. 1-6-2009) and substituted by Act 2 of 2013, sec. 15 (w.e.f. 15-2-2013, vide S.O. 343(E), dated 8-2-2013). The proviso, before omission, stood as under:

> "Provided that no search of any person shall be made unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under section 157 of the Code of Criminal Procedure, 1973 (2 of 1974) or a complaint has been filed by a person, authorised to investigate the offence mentioned in the Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or in cases where such report is not required to be forwarded, a similar report of information received or otherwise has been submitted by an officer authorised to investigate a scheduled offence to an officer not below the rank of Additional Secretary to the Government of India or equivalent being head of the office or Ministry or Department or Unit, as the case may be, or any other officer who may be authorised by the Central Government, by notification, for this purpose"

take such person to the nearest gazetted officer, superior in rank to him, or Magistrate's Court.

(4) If the requisition under sub-section (3) is made, the authority shall not detain the person for more than twenty-four hours prior to taking him before the Gazetted Officer, superior in rank to him, or the Magistrate referred to in that sub-section:

Provided that the period of twenty-four hours shall exclude the time necessary for the journey from the place of detention to the office of the Gazetted Officer, superior in rank to him, or the Magistrate's Court.

(5) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge such person but otherwise shall direct that search be made.

(6) Before making the search under sub-section (1) or sub-section (5), the authority shall call upon two or more persons to attend and witness the search, and the search shall be made in the presence of such persons.

(7) The authority shall prepare a list of record or property seized in the course of the search and obtain the signatures of the witnesses on the list.

(8) No female shall be searched by any one except a female.

(9) The authority shall record the statement of the person searched under sub-section (1) or sub-section (5) in respect of the records or proceeds of crime found or seized in the course of the search:

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528 Proviso omitted by Act 21 of 2009, sec. 8(ii) (w.e.f. 1-6-2009). Proviso, before omission, stood as under:

"Provided that no search of any person shall be made unless, in relation to an offence under:

(a) Paragraph 1 of Part A or Paragraph 1 or Paragraph 2 or Paragraph 3 or Paragraph 4 or Paragraph 5 of Part B of the Schedule, a report has been forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, 1973 (2 of 1974); or

(b) Paragraph 2 of Part A of the Schedule, a police report or a complaint has been filed for taking cognizance of an offence by the Special Court constituted under sub-section (1) of section 36 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985)."

> (10) The authority, seizing any record or property under sub-section (1) shall, within a period of thirty days from such seizure, file an application requesting for retention of such record or property, before the Adjudicating Authority."

For the reasons noted to negate the challenge to the deletion of proviso in Section 17(1) of the 2002 Act, the same would apply with full force for rejecting the same argument in respect of deletion of proviso in Section 18(1) of the 2002 Act. Suffice it to observe that even under Section 18 of the 2002 Act, the Authority authorised to exercise power of search of person is obliged to adhere to identical inbuilt safeguards as in the case of exercise of power under Section 17 of the 2002 Act. In addition to the similar safeguards in terms of Section 18(3) of the 2002 Act, the Authority is obliged to take the person who is about to be searched to a Gazetted Officer or a Magistrate before the search of such person is carried out. The Constitution Bench of this Court while dealing with similar provisions of NDPS Act in ***State of Punjab vs. Baldev Singh***[529] upheld the search of person procedure being a fair and reasonable

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[529] (1999) 6 SCC 172 (also at Footnote No.418)

procedure. In paragraph 25 of the said decision, this Court observed as follows:

> "**25.** To be searched before a gazetted officer or a Magistrate, if the suspect so requires, is an extremely valuable right which the legislature has given to the person concerned having regard to the grave consequences that may entail the possession of illicit articles under the NDPS Act. It appears to have been incorporated in the Act keeping in view the severity of the punishment. The rationale behind the provision is even otherwise manifest. The search before a gazetted officer or a Magistrate would impart much more authenticity and creditworthiness to the search and seizure proceeding. It would also verily strengthen the prosecution case. There is, thus, no justification for the empowered officer, who goes to search the person, on prior information, to effect the search, of not informing the person concerned of the existence of his right to have his search conducted before a gazetted officer or a Magistrate, so as to enable him to avail of that right. It is, however, not necessary to give the information to the person to be searched about his right in writing. It is sufficient if such information is communicated to the person concerned orally and as far as possible in the presence of some independent and respectable persons witnessing the arrest and search. The prosecution must, however, at the trial, establish that the empowered officer had conveyed the information to the person concerned of his right of being searched in the presence of a Magistrate or a gazetted officer, at the time of the intended search. Courts have to be satisfied at the trial of the case about due compliance with the requirements provided in Section 50. No presumption under Section 54 of the Act can be raised against an accused, unless the prosecution establishes it to the satisfaction of the court, that the requirements of Section 50 were duly complied with."

Additionally, under Section 18(5) of the 2002 Act, if the person to be searched is taken to a Gazetted Officer or the Magistrate, then such

Officer or Magistrate may release the person if there is no ground for search and under Section 18(6), the Authority is obliged to call at least two witnesses to attend to witness the search, in whose presence, the search is to be carried out. In terms of Section 18(7), the Authority seizing any property during the search of such a person has to prepare a list of the record or the property seized which is required to be signed by the witnesses to ensure that no tempering thereof takes place later on. In case, search of a female is to be carried out, in terms of Section 18(8), it could be done only by a female. Significantly, the Authority seizing any record or property during the search of the person, is obliged to submit an application to the Adjudicating Authority within thirty days for permitting retention of record or property. On such application, the Adjudicating Authority gives opportunity of hearing to the person concerned as to why record or property should not be retained in terms of Section 18(10). Such inbuilt safeguards are provided to secure the interest of the person being subjected to search, at the same time for strengthening the mechanism regarding prevention of money-laundering and attachment of proceeds of crime. Merely because Section 165 of the 1973 Code provides for a different

mechanism regarding search by the police officer, that will be of no consequence for dealing with the inquiry/investigation and adjudication including prosecution under the 2002 Act. Suffice it to observe that the provision in the form of Section 18, as amended, is a special provision and is certainly not arbitrary much less manifestly arbitrary. Instead, we hold that the amended provision in Section 18 has reasonable nexus with the purposes and objects sought to be achieved by the 2002 Act of prevention of money-laundering and attachment and confiscation of property (proceeds of crime) involved in money-laundering, as also prosecution against the person concerned for offence of money-laundering under Section 3 of the 2002 Act.

ARREST

88. Section 19 of the 2002 Act postulates the manner in which arrest of person involved in money-laundering can be effected. Sub-section (1) of Section 19 envisages that the Director, Deputy Director, Assistant Director, or any other officer authorised in this behalf by the Central Government, if has material in his possession giving rise to reason to believe that any person has been guilty of an

offence punishable under the 2002 Act, he may arrest such person. Besides the power being invested in high-ranking officials, Section 19 provides for inbuilt safeguards to be adhered to by the authorised officers, such as of recording reasons for the belief regarding the involvement of person in the offence of money-laundering. That has to be recorded in writing and while effecting arrest of the person, the grounds for such arrest are informed to that person. Further, the authorised officer has to forward a copy of the order, along with the material in his possession, in a sealed cover to the Adjudicating Authority, who in turn is obliged to preserve the same for the prescribed period as per the Rules. This safeguard is to ensure fairness, objectivity and accountability of the authorised officer in forming opinion as recorded in writing regarding the necessity to arrest the person being involved in offence of money-laundering. Not only that, it is also the obligation of the authorised officer to produce the person so arrested before the Special Court or Judicial Magistrate or a Metropolitan Magistrate, as the case may be, within twenty-four hours. This production is also to comply with the requirement of Section 167 of the 1973 Code. There is nothing in Section 19, which is contrary to the requirement of production under

Section 167 of the 1973 Code, but being an express statutory requirement under the 2002 Act in terms of Section 19(3), it has to be complied by the authorised officer. Section 19, as amended from time to time, reads thus:

> "**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.
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> (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.
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> (3) Every person arrested under sub-section (1) shall, within twenty-four hours, be taken to a [530][Special Court or] Judicial Magistrate or a Metropolitan Magistrate, as the case may be, having jurisdiction:
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> Provided that the period of twenty-four hours shall exclude the time necessary for the journey from the place of arrest to the [531][Special Court or] Magistrate's Court."

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[530] Ins. by Act 13 of 2018, sec. 208 (d)(i) (w.e.f. 19-4-2018, vide G.S.R. 383(E), dated 19th April, 2018).

[531] Ins. by Act 13 of 2018, sec. 208 (d)(ii) (w.e.f. 19-4-2018, vide G.S.R. 383(E), dated 19th April, 2018).

In the context of this provision, the challenge is that in absence of any formal complaint being filed, arrest under Section 19 is being made by the authorised officers. Whereas, the purport of Section 167 of the 1973 Code would suggest that the person can be arrested by the jurisdictional police without warrant under Section 41 of the 1973 Code only upon registration of a complaint under Section 154 of the 1973 Code in connection with cognizable offence or pursuant to the order of the Court. Even, in case of arrest pursuant to the order of the Court, a formal complaint against such person accusing him of being involved in commission of an offence is essential. Moreover, the person produced before the Court would be at a loss to know the grounds for arrest unless a formal FIR or complaint is filed accusing him about his involvement in the commission of an offence. The provision if interpreted to permit the authorised officer to arrest someone being involved in the commission of offence of money-laundering without a formal complaint against him, would be *ex facie* manifestly arbitrary and unconstitutional.

89. This argument clearly overlooks the overall scheme of the 2002 Act. As noticed earlier, it is a comprehensive legislation, not limited

to provide for prosecution of person involved in the offence of money-laundering, but mainly intended to prevent money-laundering activity and confiscate the proceeds of crime involved in money-laundering. It also provides for prosecuting the person involved in such activity constituting offence of money-laundering. In other words, this legislation is an amalgam of different facets including setting up of agencies and mechanisms for coordinating measures for combating money-laundering. Chapter III is a provision to effectuate these purposes and objectives by attachment, adjudication and confiscation. The adjudication is done by the Adjudicating Authority to confirm the order of provisional attachment in respect of proceeds of crime involved in money-laundering. For accomplishing that objective, the authorities appointed under Chapter VIII have been authorised to make inquiry into all matters by way of survey, searches and seizures of records and property. These provisions in no way invest power in the Authorities referred to in Chapter VIII of the 2002 Act to maintain law and order or for that matter, purely investigating into a criminal offence. The inquiry preceding filing of the complaint by the authorities under the 2002 Act, may have the semblance of an investigation conducted by them.

However, it is essentially an inquiry to collect evidence to facilitate the Adjudicating Authority to decide on the confirmation of provisional attachment order, including to pass order of confiscation, as a result of which, the proceeds of crime would vest in the Central Government in terms of Section 9 of the 2002 Act. In other words, the role of the Authorities appointed under Chapter VIII of the 2002 Act is such that they are tasked with dual role of conducting inquiry and collect evidence to facilitate adjudication proceedings before the Adjudicating Authority in exercise of powers conferred upon them under Chapters III and V of the 2002 Act and also to use the same materials to bolster the allegation against the person concerned by way of a formal complaint to be filed for offence of money-laundering under the 2002 Act before the Special Court, if the fact situation so warrant. It is not as if after every inquiry prosecution is launched against all persons found to be involved in the commission of offence of money-laundering. It is also not unusual to provide for arrest of a person during such inquiry before filing of a complaint for indulging in alleged criminal activity. The respondent has rightly adverted to somewhat similar provisions in other legislations, such as Section 35 of FERA and Section 102 of

Customs Act including the decisions of this Court upholding such power of arrest at the inquiry stage bestowed in the Authorities in the respective legislations. In ***Romesh Chandra Mehta***[532], the Constitution Bench of this Court enunciated that Section 104 of the Customs Act confers power to arrest upon the Custom Officer 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 of that Act. Again, in the case of ***Padam Narain Aggarwal***[533], while dealing with the provisions of the Customs Act, it noted that the term "arrest" has neither been defined in the 1973 Code nor in the Indian Penal Code, 1860 nor in any other enactment dealing with offences. This word has been derived from the French word "*arrater*" meaning "to stop or stay". It signifies a restraint of a person. It is, thus, obliging the person to be obedient to law. Further, arrest may be defined as "the execution of the command of a court of law or of a duly authorised officer". Even, this decision recognises the power of the authorised officer to cause arrest during the inquiry to be conducted under the concerned legislations. While

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[532] Supra at Footnote No.119

[533] Supra at Footnote No.246

adverting to the safeguards provided under that legislation before effecting such arrest, the Court noted as follows:

> "***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[534] 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**. …."
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> (emphasis supplied)

The safeguards provided in the 2002 Act and the preconditions to be fulfilled by the authorised officer before effecting arrest, as contained in Section 19 of the 2002 Act, are equally stringent and of higher

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[534] Ed.: Section 104 of the Customs Act, 1962.

standard. Those safeguards ensure that the authorised officers do not act arbitrarily, but make them accountable for their judgment about the necessity to arrest any person as being involved in the commission of offence of money-laundering even before filing of the complaint before the Special Court under Section 44(1)(b) of the 2002 Act in that regard. If the action of the authorised officer is found to be vexatious, he can be proceeded with and inflicted with punishment specified under Section 62 of the 2002 Act. The safeguards to be adhered to by the jurisdictional police officer before effecting arrest as stipulated in the 1973 Code, are certainly not comparable. Suffice it to observe that this power has been given to the high-ranking officials with further conditions to ensure that there is objectivity and their own accountability in resorting to arrest of a person even before a formal complaint is filed under Section 44(1)(b) of the 2002 Act. Investing of power in the high-ranking officials in this regard has stood the test of reasonableness in ***Premium Granites***[535], wherein the Court restated the position that requirement of giving reasons for exercise of power by itself excludes

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[535] Supra at Footnote No.248

chances of arbitrariness. Further, in ***M/s. Sukhwinder Pal Bipan Kumar***[536], the Court restated the position 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. Additionally, the Central Government has framed Rules under Section 73 in 2005, regarding the forms and the manner of forwarding a copy of order of arrest of a person along with the material to the Adjudicating Authority and the period of its retention. In yet another decision in ***Ahmed Noormohmed Bhatti***[537], this Court opined that the provision cannot be held to be unreasonable or arbitrary and, therefore, unconstitutional merely because the authority vested with the power may abuse his authority. (Also see ***Manzoor Ali Khan***[538]).

90. Considering the above, we have no hesitation in upholding the validity of Section 19 of the 2002 Act. We reject the grounds pressed into service to declare Section 19 of the 2002 Act as

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[536] Supra at Footnote No.249

[537] Supra at Footnote No.250

[538] Supra at Footnote No.251

unconstitutional. On the other hand, we hold that such a provision has reasonable nexus with the purposes and objects sought to be achieved by the 2002 Act of prevention of money-laundering and confiscation of proceeds of crime involved in money-laundering, including to prosecute persons involved in the process or activity connected with the proceeds of crime so as to ensure that the proceeds of crime are not dealt with in any manner which may result in frustrating any proceedings relating to confiscation thereof.

BURDEN OF PROOF

91. The validity of Section 24 of the 2002 Act has been assailed. This section has been amended in 2013 vide Act 2 of 2013. Before that amendment, it read thus:

> "**24. Burden of Proof.—** When a person is accused of having committed the offence under section 3, the burden of proving that proceeds of crime are untainted property shall be on the accused."

The amendment of 2013 was necessitated because of the recommendations made by FATF in 2012, wherein it was noted that the countries should adopt measures similar to those set forth in the Vienna Convention, Palermo Convention and Terrorist Financing

Convention. The Objects and Reasons for effecting amendment as appended to the Amendment Bill read thus:

> "The Prevention of Money Laundering Act, 2002 was enacted to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto. The aforesaid Act also addresses the international obligations under the Political Declaration and Global Programme of Action adopted by General Assembly of the United Nations to prevent money-laundering. The Act was amended in the year 2005 and 2009 to remove the difficulties arisen in implementation of the Act.
>
> The problem of money-laundering is no longer restricted to the geo-political boundaries of any country. It is a global menace that cannot be contained by any nation alone. In view of this, India has become a member of the Financial Action Task Force and Asia Pacific Group on money-laundering, which are committed to the effective implementation and enforcement of internationally accepted standards against money-laundering and the financing of terrorism. Consequent to the submission of an action plan to the Financial Action Task Force to bring anti money-laundering legislation of India at par with the international standards and to obviate some of the deficiencies in the Act that have been experienced by the implementing agencies, the need to amend the Prevention of Money-Laundering Act, 2002 became necessary."

The Amendment Bill had proposed substitution of Section 24 as under:

> "24. In any proceedings relating to proceeds of crime under this Act, unless the contrary is proved, it shall be presumed that such proceeds of crime is involved in money-laundering."

The Standing Committee of Finance then made some recommendations as follows:

> "The Committee recommend that the prescribed onus of proof that the property in question is not out of proceeds of money-laundering crime, being not only on the accused but also on anyone who is in possession of the proceeds of crime, should be subject to adequate safeguards to protect the innocent."

Finally, the provision came to be amended by Act 2 of 2013 which came into force with effect from 15.2.2013 and reads thus:

> "[539][**24. Burden of proof.—** In any proceeding relating to proceeds of crime under this Act,—
>
> (a) in the case of a person charged with the offence of money-laundering under section 3, the Authority or Court shall, unless the contrary is proved, presume that such proceeds of crime are involved in money-laundering; and
>
> (b) in the case of any other person the Authority or Court, may presume that such proceeds of crime are involved in money-laundering.]"

From the plain language of the amended provision, which is subject matter of assail in these cases being unconstitutional, clearly indicates that it concerns (all) proceeding(s) relating to proceeds of crime under the 2002 Act. The expression "proceeding" has not been defined in the 2002 Act or the 1973 Code. However, in the setting in which it has been placed in this provision, as rightly argued by

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[539] Subs. By Act 2 of 2013, sec. 19, for section 24 (w.e.f. 15-2-2013, vide S.O. 343(E), dated 8-2-2013).

the learned Additional Solicitor General for the Union of India, it must relate to the proceeding before the Adjudicating Authority or the Special Court. The proceeding before the authorities (referred to in Chapter VIII) relates to action taken regarding prevention of offence of money-laundering and ordering provisional attachment of property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence; and to inquire into all matters connected therewith and collect evidence to be presented before the Adjudicating Authority for consideration of application regarding confirmation of provisional attachment order as per Section 8 of the 2002 Act. This provision (Section 24) must, however, apply to proceeding before the Adjudicating Authority regarding confirmation of provisional attachment order and eventually for ordering confiscation of the attached property for vesting in the Central Government under Section 9 of the 2002 Act. This is reinforced from the purport of Section 23 of the 2002 Act. Further, it would also apply to proceeding before the Special Court empowered to try the offence of money-laundering under Section 3 of the 2002 Act upon presentation of a complaint by the authority authorised as per Section 44(1)(b) of the 2002 Act.

92. It is, thus, clear that this special provision regarding burden of proof in any proceeding relating to proceeds of crime under this Act would apply to stated proceeding before the Adjudicating Authority and not limited to the proceeding before the Special Court. That is evident from the plain language, indicative of applicability of the provision to "any" proceeding before the "Authority" or the "Court". The expression "Authority" occurring in this provision must be given its proper meaning indicative of the Adjudicating Authority appointed under Section 6 of the 2002 Act to adjudicate on matters concerning confirmation of provisional attachment order and eventual confiscation and vesting of the property, if the fact situation so warrant. It is an independent body, free from the control of the Executive[540]. It is ordained to deal with civil aspects of the action of attachment and confiscation of the proceeds of crime and not about the criminality of the offence under Section 3 of the 2002 Act. When this provision is made applicable to the proceeding before the Authority, it would not be necessary to follow the strict principle of standard of proof beyond reasonable doubt, as applicable in criminal

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[540] *See Pareena Swarup* (supra at Footnote No.366)

trials. That principle will have no bearing on the proceeding before the Authority. However, when the same evidence and provision is relied upon in the proceeding before the Special Court regarding trial of offence of money-laundering under Section 3 of the 2002 Act, it would have a different connotation in the context of a criminal trial.

93. Be that as it may, this Section 24 deals with two situations. The first part concerns the person charged with the offence of money-laundering under Section 3. The second part [Clause (b)] concerns any other person. Taking the second part first, such other person would obviously mean a person not charged with the offence of money-laundering under Section 3 of the 2002 Act. The two parts, in one sense, are mutually exclusive. If a person is charged with the offence of money-laundering under Section 3 of the 2002 Act owing to a complaint filed by the authority authorised before the Special Court, Clause (a) would trigger in. As regards the second category [Clause (b)] of person, the expression used is "may presume". Whereas, *qua* the first category [covered under Clause (a)] the expression used is "shall, unless the contrary is proved, presume". In this category, if a charge is already framed against the person for

having committed offence of money-laundering, it would presuppose that the Court framing charge against him was *prima facie* convinced that the materials placed before it had disclosed grave suspicion against such person. In such a case, once the issue of admissibility of materials supporting the factum of grave suspicion about the involvement of the person in the commission of crime under the 2002 Act, is accepted, in law, the burden must shift on the person concerned to dispel that suspicion. It would then not be a case of reversal of burden of proof as such, but one of shifting of burden on him to show that no offence of money-laundering had been committed and, in any case, the property (proceeds of crime) was not involved in money-laundering.

94. Before we proceed to analyse the efficacy of Section 24 of the 2002 Act, it may be appropriate to visit the definition of expressions in the Evidence Act, relevant to answer the issue of standard of proof in any proceeding. In the interpretation clause, Section 3 of the Evidence Act, expression "fact" has been defined as follows:

> "**3. Interpretation clause.—**In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:—
>
> ....

> **"Fact"**.—"Fact" means and includes—
>
> (1) any thing, state of things, or relation of things, capable of being perceived by the senses;
>
> (2) any mental condition of which any person is conscious."

We need not dilate on the expression "relevant", "facts in issue" and "document". We may usefully advert to the definition of "evidence", which reads thus:

> "**3. Interpretation clause.—**In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:—
>
> .....
>
> **"Evidence"**. —"Evidence" means and includes—
>
> (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry,
>
> such statements are called oral evidence;
>
> (2) [541][all documents including electronic records produced for the inspection of the Court],
>
> such documents are called documentary evidence."

The other relevant definitions are:

> "**3. Interpretation clause.—**In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:—
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> ......
>
> **"Proved"**.—A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the

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[541] Subs. by Act 21 of 2000, sec. 92 and Sch.II-1(a), for "all documents produced for the inspection of the Court" (w.e.f. 17-10-2000)

> circumstances of the particular case, to act upon the supposition that it exists.
>
> **"Disproved"**.—A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.
>
> **"Not proved"**. — A fact is said not to be proved when it is neither proved nor disproved.
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> *** *** ***
>
> **4. "May presume".**—Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.
>
> **"Shall presume".**—Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.
>
> **"Conclusive proof".**—When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it."

As aforementioned, standard of proof varies depending on the nature of proceedings. In civil actions, it can be preponderance of probability but in criminal actions, unless the law provides to the contrary, the onus is on the prosecution to establish the allegations and facts in issue beyond reasonable doubt. Furthermore, the burden or onus of establishing the facts in issue, keeps on shifting and is on the party who asserts a particular fact.

95. Indeed, in a criminal trial, the principle of innocence of the accused/offender is regarded as a human right — as held by this Court in ***Narendra Singh & Anr. vs. State of M.P.***[542]. However, that presumption can be interdicted by a law made by the Parliament/Legislature. It is well-settled that statutory provisions regarding presumptions are nothing but rule of evidence. As observed by this Court in ***State of W.B. vs. Mir Mohammad Omar & Ors.***[543], the pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The Court went on to observe that the doctrine of presumption is not alien to such a rule, nor would it impair the temper of the rule. On the other hand, if the traditional Rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty. This observation has been quoted with approval in ***Sucha Singh***[544]. In

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[542] (2004) 10 SCC 699 (also at Footnote No.377)

[543] (2000) 8 SCC 382

[544] Supra at Footnote No.381

the latter judgment, the Court relying upon other decisions including in ***Shambhu Nath Mehra vs. The State of Ajmer***[545], noted that the provisions, such as Section 106[546] of the Evidence Act, is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the Section would apply to cases where the prosecution has succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the Court to draw a different inference. The Court quoted with approval paragraph 33 of the decision in ***Shambhu Nath Mehra***[547], which reads thus:

> "**33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers**

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[545] AIR 1956 SC 404

[546] **106. Burden of proving fact especially within knowledge**. — When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

[547] Supra at Footnote No.545

> **the court to presume the existence of any fact which it thinks likely to have happened. In that process the court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case**."
>
> (emphasis supplied)

On similar lines, this Court in ***Hiten P. Dalal***[548], in paragraphs 22 and 23 observed thus:

> "**22.** Because both Sections 138 and 139 require that the court "shall presume" the liability of the drawer of the cheques for the amounts for which the cheques are drawn, as noted in *State of Madras* v. *A. Vaidyanatha Iyer*[549] it is obligatory on the court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. "It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused." (Ibid. at p. 65, para 14.) **Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court "may presume" a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter, all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact**.
>
> **23.** In other words, provided the facts required to form the basis of a presumption of law exist, no discretion is left with the court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when,

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[548] Supra at Footnote No.378

[549] AIR 1958 SC 61 (also at Footnote No.392)

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> "after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists"[550].
>
> Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the court in support of the defence that the court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the "prudent man"."
>
> (emphasis supplied)

The respondents have rightly invited our attention to several other statutes[551] providing for shifting of the burden of proof on the accused, as in the case of Section 24 of the 2002 Act. The constitutional validity of similar provisions has been upheld by this Court from time to time. In the case of ***Noor Aga***[552], it has been observed that the Court while interpreting the provision, such as Section 24 of the 2002 Act, must keep in mind that the concerned

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[550] Section 3, Evidence Act

[551] (i) Section 57A of the (Kerala) Abkari Act, I of 1077; (ii) Sections 105, 106, 113A and 113B of the Indian Evidence Act, 1872; (iii) Section 139 of the Negotiable Instruments Act, 1881; (iv) Section 9 of the Opium Act, 1878; (v) Section 9B of the Explosives Act 1884; (vi) Section 7 of the Prevention of Food Adulteration Act, 1954; (vii) Section 10C of the Essential Commodities Act, 1955; (viii) Section 138A of the Customs Act, 1962; (ix) Section 43E of the Unlawful Activities (Prevention) Act, 1967; (x) Section 98-B of the Gold (Control) Act, 1968; (xi) Section 57 of the Wild Life (Protection) Act, 1972; (xii) Section 18 of the Foreign Exchange Regulation Act, 1973; (xiii) Sections 35 and 54 of the Narcotic Drugs and Psychotropic Substances Act, 1985; (xiv) Sections 3C and 3D of the Epidemic Diseases Act, 1897; (xv) Section 21 of the Terrorist and Disruptive Activities (Prevention) Act, 1987; (xvi) Section 20 of the Prevention of Corruption Act, 1988; and (xvii) Sections 29 and 30 of the Protection of Children from Sexual Offences Act, 2012.

[552] Supra at Footnote No.384 (also at Footnote No.55)

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Act has been the outcome of the mandate contained in the international convention, as is the case on hand. Further, only because the burden of proof under certain circumstances is placed on the accused, the same, by itself would not render the legal provision unconstitutional. The question whether the burden on the accused is a legal burden or an evidentiary burden, would depend on the statute and its purport and object. Indeed, it must pass the test of the doctrine of proportionality. In any case, as the burden on the accused would be only an evidentiary burden, it can be discharged by the accused by producing evidence regarding the facts within his personal knowledge. Again, in the case of ***Seema Silk & Sarees***[553], this Court restated that a legal provision does not become unconstitutional only because it provides for reverse burden as it is only a rule of evidence. So long as the accused is entitled to show that he has not violated the provisions of the Act, such a legal provision cannot be regarded as unconstitutional. For, the accused is then entitled to rebut the presumption.

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[553] Supra at Footnote No.385

96. Suffice it to observe that the change effected in Section 24 of the 2002 Act is the outcome of the mandate of international Conventions and recommendations made in that regard. Further, keeping in mind the legislative scheme and the purposes and objects sought to be achieved by the 2002 Act coupled with the fact that the person charged or any other person involved in money-laundering, would get opportunity to disclose information and evidence to rebut the legal presumption in respect of facts within his personal knowledge during the proceeding before the Authority or the Special Court, by no stretch of imagination, provision in the form of Section 24 of the 2002 Act, can be regarded as unconstitutional. It has reasonable nexus with the purposes and objects sought to be achieved by the 2002 Act. In any case, it cannot be perceived as manifestly arbitrary as is sought to be urged before us.

97. Be that as it may, we may now proceed to decipher the purport of Section 24 of the 2002 Act. In the first place, it must be noticed that the legal presumption in either case is about the involvement of proceeds of crime in money-laundering. This fact becomes relevant, only if, the prosecution or the authorities have succeeded in

establishing at least three basic or foundational facts. First, that the criminal activity relating to a scheduled offence has been committed. Second, that the property in question has been derived or obtained, directly or indirectly, by any person as a result of that criminal activity. Third, the person concerned is, directly or indirectly, involved in any process or activity connected with the said property being proceeds of crime. On establishing the fact that there existed proceeds of crime and the person concerned was involved in any process or activity connected therewith, itself, constitutes offence of money-laundering. The nature of process or activity has now been elaborated in the form of Explanation inserted vide Finance (No.2) Act, 2019. On establishing these foundational facts in terms of Section 24 of the 2002 Act, a legal presumption would arise that such proceeds of crime are involved in money-laundering. The fact that the person concerned had no causal connection with such proceeds of crime and he is able to disprove the fact about his involvement in any process or activity connected therewith, by producing evidence in that regard, the legal presumption would stand rebutted.

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98. The person falling under the first category being person charged with the offence of money-laundering, presupposes that a formal complaint has already been filed against him by the authority authorised naming him as an accused in the commission of offence of money-laundering. As observed in ***P.N. Krishna Lal***[554], the Court cannot be oblivious about the purpose of the law. Further, the special provisions or the special enactments as in this case is required to tackle new situations created by human proclivity to amass wealth at the altar of formal financial system of the country including its sovereignty and integrity. While dealing with such provision, reading it down would also defeat the legislative intent.

99. Be it noted that the legal presumption under Section 24(a) of the 2002 Act, would apply when the person is charged with the offence of money-laundering and his direct or indirect involvement in any process or activity connected with the proceeds of crime, is established. The existence of proceeds of crime is, therefore, a foundational fact, to be established by the prosecution, including the involvement of the person in any process or activity connected

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[554] Supra at Footnote No.382

therewith. Once these foundational facts are established by the prosecution, the onus must then shift on the person facing charge of offence of money-laundering — to rebut the legal presumption that the proceeds of crime are not involved in money-laundering, by producing evidence which is within his personal knowledge. In other words, the expression "presume" is not conclusive. It also does not follow that the legal presumption that the proceeds of crime are involved in money-laundering is to be invoked by the Authority or the Court, without providing an opportunity to the person to rebut the same by leading evidence within his personal knowledge[555].

100. Such onus also flows from the purport of Section 106 of the Evidence Act. Whereby, he must rebut the legal presumption in the manner he chooses to do and as is permissible in law, including by replying under Section 313 of the 1973 Code or even by cross-examining prosecution witnesses. The person would get enough opportunity in the proceeding before the Authority or the Court, as the case may be. He may be able to discharge his burden by showing that he is not involved in any process or activity connected with the

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[555] *See Sarbananda Sonowal* (supra at Footnote No.389)

proceeds of crime. In any case, in terms of Section 114[556] of the Evidence Act, it is open to the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case. Considering the above, the provision under consideration [Section 24(a)] by no standards can be said to be unreasonable much less manifestly arbitrary and unconstitutional.

101. Reverting to Section 24(b) of the 2002 Act, that concerns person other than the person charged with the offence of money-laundering under Section 3 of the 2002 Act. In his case, the expression used in Clause (b) is "may presume". This is essentially a factual presumption or discretionary presumption as expounded by this Court in ***A. Vaidyanatha Iyer***[557]. In paragraph 14 of the decision, the Court noted the marked distinction between the words "shall presume" and "may presume" as follows:

> "(14). ..... Therefore where it is proved that a gratification has been accepted, then the presumption shall at once

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[556] **114. Court may presume existence of certain facts**.— The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

[557] Supra at Footnote No.549 (also at Footnote No.392)

arise under the section. It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused. **It may here be mentioned that the legislature has chosen to use the words 'shall presume' and not 'may presume', the former a presumption of law and latter of fact. Both these phrases have been defined in the Indian Evidence Act, no doubt for the purpose of that Act, but S. 4 of the Prevention of Corruption Act is in pari materia with the Evidence Act because it deals with a branch of law of evidence e.g., presumptions, and therefore should have the same meaning. "Shall presume" has been defined in the Evidence Act as follows:**

> **"Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved."**
> **It is a presumption of law and therefore it is obligatory on the court to raise this presumption in every case brought under S. 4 of the Prevention of Corruption Act because unlike the case of presumption of fact, presumptions of law constitute a branch of jurisprudence.** ....."

(emphasis supplied)

Again, in the case of ***M. Narsinga Rao vs. State of A.P.***[558], the Court observed in paragraphs 13 and 17as follows:

"**13. Before proceeding further, we may point out that the expressions "may presume" and "shall presume" are defined in Section 4 of the Evidence Act. The presumptions falling under the former category are compendiously known as "factual presumptions" or "discretionary presumptions" and those falling under the latter as "legal presumptions" or "compulsory presumptions". When the expression "shall be presumed" is employed in Section 20(1) of the Act it must have the same import of compulsion**.

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[558] (2001) 1 SCC 691 (also at Footnote No.392)

> **17**. Presumption is an inference of a certain fact drawn from other proved facts. While inferring the existence of a fact from another, the court is only applying a process of intelligent reasoning which the mind of a prudent man would do under similar circumstances. **Presumption is not the final conclusion to be drawn from other facts. But it could as well be final if it remains undisturbed later. Presumption in law of evidence is a rule indicating the stage of shifting the burden of proof**. From a certain fact or facts the court can draw an inference and that would remain until such inference is either disproved or dispelled."
>
> (emphasis supplied)

Notably, the legal presumption in the context of Section 24(b) of the 2002 Act is attracted once the foundational fact of existence of proceeds of crime and the link of such person therewith in the process or activity is established by the prosecution. The stated legal presumption can be invoked in the proceeding before the Adjudicating Authority or the Court, as the case may be. The legal presumption is about the fact that the proceeds of crime are involved in money-laundering which, however, can be rebutted by the person by producing evidence within his personal knowledge.

102. Be it noted that the presumption under Section 24(b) of the 2002 Act is not a mandatory legal presumption, unlike in the case falling under the other category, namely Section 24(a). If the person has not been charged with the offence of money-laundering, the legal

presumption under Section 24(b) can be invoked by the Adjudicating Authority or the Court, as the case may be. More or less, same logic as already noted while dealing with the efficacy of Section 24(a) of the 2002 Act, would apply even to the category of person covered by Section 24(b), in equal measure.

103. We, therefore, hold that the provision under consideration namely Section 24 has reasonable nexus with the purposes and objects sought to be achieved by the 2002 Act and cannot be regarded as manifestly arbitrary or unconstitutional.

SPECIAL COURTS

104. The expression "Special Court" has been defined in Section 2(1)(z), which in turn refers to Section 43. Section 43 reads thus:

> "*CHAPTER VII*
> **SPECIAL COURTS**
>
> **43. Special Courts**.—(1) The Central Government, in consultation with the Chief Justice of the High Court, shall, for trial of offence punishable under section 4, by notification, designate one or more Courts of Session as Special Court or Special Courts for such area or areas or for such case or class or group of cases as may be specified in the notification.
>
> Explanation.—In this sub-section, "High Court" means the High Court of the State in which a Sessions Court designated as Special Court was functioning immediately before such designation.

(2) While trying an offence under this Act, a Special Court shall also try an offence, other than an offence referred to in sub-section (1), with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial."

The Special Courts established under Section 43 of the 2002 Act are empowered to try the offences under the 2002 Act. Section 44 bestows that power in the Special Courts. The same reads thus:

"**44. Offences triable by Special Courts**.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

[559][(a) an offence punishable under section 4 and any scheduled offence connected to the offence under that section shall be triable by the Special Court constituted for the area in which the offence has been committed:

Provided that the Special Court, trying a scheduled offence before the commencement of this Act, shall continue to try such scheduled offence; or]

(b) a Special Court may, [560][***] upon a complaint made by an authority authorised in this behalf under this Act take [561][cognizance of offence under section 3, without the accused being committed to it for trial].

[562][Provided that after conclusion of investigation, if no offence of money-laundering is made out requiring filing

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[559] Subs. by Act 2 of 2013, sec. 21(i), for clause (a) (w.e.f. 15-2-2013, vide S.O. 343(E), dated 8-2-2013). Clause (a) before substitution, stood as under:

"(a) the scheduled offence and offence punishable under section 4 shall be triable only by the Special Court constituted for the area in which the offence has been committed:

Provided that the Special Court, trying a scheduled offence before the commencement of this Act, shall continue to try such scheduled offence; or"

[560] The words "upon perusal of police report of the facts which constitute an offence under this Act or" omitted by Act 20 of 2005, sec. 6 (w.e.f. 1-7-2005).

[561] Subs. by Act 2 of 2013, sec. 21(ii), for "cognizance of the offence for which the accused is committed to it for trial" (w.e.f. 15-2-2013, vide S.O. 343(E), dated 8-2-2013).

[562] Ins. by the **Finance (No.2) Act, 2019**, sec. 199(i) (w.e.f. 1-8-2019)

of such complaint, the said authority shall submit a closure report before the Special Court; or]

[563][(c) if the court which has taken cognizance of the scheduled offence is other than the Special Court which has taken cognizance of the complaint of the offence of money-laundering under sub-clause (b), it shall, on an application by the authority authorised to file a complaint under this Act, commit the case relating to the scheduled offence to the Special Court and the Special Court shall, on receipt of such case proceed to deal with it from the stage at which it is committed.

(d) a Special Court while trying the scheduled offence or the offence of money-laundering shall hold trial in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) as it applies to a trial before a Court of Session.]

[564][Explanation.—For the removal of doubts, it is clarified that,—

(i) the jurisdiction of the Special Court while dealing with the offence under this Act, during investigation, enquiry or trial under this Act, shall not be dependent upon any orders passed in respect of the scheduled offence, and the trial of both sets of offences by the same court shall not be construed as joint trial;

(ii) the complaint shall be deemed to include any subsequent complaint in respect of further investigation that may be conducted to bring any further evidence, oral or documentary, against any accused person involved in respect of the offence, for which complaint has already been filed, whether named in the original complaint or not.]

(2) 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 43."

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[563] Ins. by Act 2 of 2013, sec. 21(iii) (w.e.f. 15-2-2013, vide S.O. 343(E), dated 8-2-2013)

[564] Ins. by the **Finance (No.2) Act, 2019**, sec. 199(ii) (w.e.f. 1-8-2019)

This provision opens with a *non-obstante* clause making it clear that the dispensation provided therein is notwithstanding anything contained in the 1973 Code regarding the matters provided therein in relation to trials concerning offence of money-laundering to be conducted by the Special Court. This provision has undergone amendment vide Act 20 of 2005, Act 2 of 2013 and Finance (No.2) Act, 2019. In the present set of matters, we are essentially concerned with the provision as obtaining after Act 2 of 2013 and the subsequent amendment vide Finance (No.2) Act, 2019. To begin with, Clause (a) in sub-section (1) of Section 44, as existed prior to amendment Act 2 of 2013, stood thus:

> "**44. Offences triable by Special Courts**.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—
>
> (a) the scheduled offence and offence punishable under Section 4 shall be triable only by the Special Court constituted for the area in which the offence has been committed:
>
> Provided that the Special Court, trying a scheduled offence before the commencement of this Act, shall continue to try such scheduled offence; or."

Post amendment of 2013 and as applicable to this date, Clause (a) reads thus:

> "**44. Offences triable by Special Courts**.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

> [565][(a) an offence punishable under section 4 and any scheduled offence connected to the offence under that section shall be triable by the Special Court constituted for the area in which the offence has been committed:
>
> Provided that the Special Court, trying a scheduled offence before the commencement of this Act, shall continue to try such scheduled offence; or];
>
> ...."

The amendment of 2013 in fact clarifies the dispensation to be followed in regard to trials concerning offence of money-laundering under this Act and the trial in relation to scheduled offence including before the Special Court trying such (scheduled) offence. By virtue of this clause, the trials regarding the offence of money-laundering need to proceed before the Special Court constituted for the area in which the offence of money-laundering has been committed. In case the scheduled offence is triable by Special Court under the special enactment elsewhere, the provision, as amended, makes it amply clear that both the trials after coming into effect of this Act need to proceed independently, but in the area where the offence of money-laundering has been committed.

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[565] Subs. by Act 2 of 2013, sec. 21(i), for clause (a) (w.e.f. 15-2-2013, vide S.O. 343(E), dated 8-2-2013).

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105. In that, the offence of money-laundering ought to proceed for trial only before the Special Court designated to try money-laundering offences where the offence of money-laundering has been committed. This is a special enactment and being a later law, would prevail over any other law for the time being in force in terms of Section 71 of the 2002 Act.

106. The proviso in Clause (a) of sub-section (1) of Section 44, is in the nature of an exception. It predicates that before the commencement of this Act, if the Special Court elsewhere was already trying the scheduled offence, shall continue to try the same. *Prima facie*, it is possible to take the view that the effect of this proviso, which has come in 2013, may have retrospective effect. However, no specific case has been brought to our notice wherein the effect of such amendment is required to be examined. Accordingly, it is not necessary to dilate on this aspect any further.

107. This stipulation, however, will have to be regarded as directory provision. We say so because in a given case, the offence of money-laundering may have been committed at place x, which may be in one State, but the property which is subject matter of money-

laundering may have been derived or obtained, directly or indirectly, as a result of criminal activity relating to a scheduled offence committed at more than one place including in multiple States throughout the country. In such a case, it will not be open to the Special Court at place x to transfer all other cases in the area (even outside the State). If the provision is to be interpreted otherwise, it would have serious consequences on the trials which are pending in connection with the scheduled offences including before the Special Court elsewhere. This provision, therefore, needs to be read down to mean that as far as possible, the trial of scheduled offence before the Special Court under the concerned law, if in different area, that Special Court may continue to try such scheduled offence. For, the trial of the scheduled offence and the trial in connection with the money-laundering are in any way required to proceed independently. That is because, the offence of money-laundering by itself is an independent offence in respect of the process and activity connected with the proceeds of crime which may have been derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence.

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108. The stipulation in Clause (b) of sub-section (1) of Section 44 has been amended vide Act 20 of 2005, Act 2 of 2013 and the Finance (No.2) Act, 2019. Consequent to amendment of 2013, the Clause (b) read thus:

> "**44. Offences triable by Special Courts**.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—
>
> (a)***
>
> (b) a Special Court may, [566][***] upon a complaint made by an authority authorised in this behalf under this Act take [567][cognizance of offence under section 3, without the accused being committed to it for trial];
>
> …."

Later, a proviso came to be inserted vide Finance (No.2) Act, 2019, which reads thus:

> "**44. Offences triable by Special Courts**.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—
> (a)***
> (b)***
> [568][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]
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> …"

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[566] The words "upon perusal of police report of the facts which constitute an offence under this Act or" omitted by Act 20 of 2005, sec. 6 (w.e.f. 1-7-2005).

[567] Subs. by Act 2 of 2013, sec. 21(ii), for "cognizance of the offence for which the accused is committed to it for trial" (w.e.f. 15-2-2013, vide S.O. 343(E), dated 8-2-2013).

[568] Ins. by the **Finance (No.2) Act, 2019**, sec. 199(i) (w.e.f. 1-8-2019).

Clause (b) of sub-section (1) of Section 44 before amendment of 2019 envisaged that the Special Court upon a complaint made by any authority authorised in this behalf under this Act, could take cognizance of offence of money-laundering under Section 3 of the 2002 Act without the accused being committed to it for trial. This would mean that if the accused was already in custody and facing trial in respect of a scheduled offence elsewhere and is not required to be produced before the Special Court (PMLA) at the time of taking cognizance on the complaint filed by the authority authorised. This provision again must be regarded as directory or a discretionary provision and the Special Court trying the offence of money-laundering need not insist for producing the accused before it at the time of taking cognizance of offence of money-laundering, provided no prejudice is caused to such accused. The expression "committed" occurring in this clause can be also construed as "produced". If so understood, we fail to comprehend as to how this provision violates any right of the accused, much less constitutional rights.

109. Coming to the proviso inserted in this clause [Section 44(1)(b)] vide Finance (No.2) Act, 2019, is, in fact, an enabling provision. It

permits the Authority authorised to file a closure report before the Special Court in case it is of the opinion that no offence of money-laundering has been made out, requiring filing of such complaint. This provision is only to dispel the doubt that in the event the person has been arrested by the officer authorised under Section 19 of this Act on the basis of material in his possession and having reason to believe and recorded in writing of being guilty of an offence punishable under this Act, but after the inquiry done by him in exercise of powers under Chapters V and VIII of the 2002 Act, he forms an opinion that no offence of money-laundering is made out, requiring filing of complaint, it is open to him to file a closure report before the Special Court disclosing that position. The proviso would, thus, come into play in such cases where the complaint is yet to be filed owing to the pendency of inquiry before the authorities, under Chapters V and VIII of the 2002 Act. In that view of the matter and more so keeping in mind the purposes and objects behind the enactment of 2002 Act, such a provision must be regarded as having reasonable nexus with the purposes and objects sought to be achieved by the 2002 Act. Accordingly, for the view taken by us, we do

not find any dichotomy in these provisions, much less being manifestly arbitrary or unconstitutional.

110. We now revert to Clause (c) of sub-section (1) of Section 44 of the 2002 Act. The same has undergone amendment vide Act 2 of 2013 and post that amendment, it reads thus:

> "**44. Offences triable by Special Courts**.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—
>
> (a)***
>
> (b)***
>
> [569][(c) if the court which has taken cognizance of the scheduled offence is other than the Special Court which has taken cognizance of the complaint of the offence of money-laundering under sub-clause (b), it shall, on an application by the authority authorised to file a complaint under this Act, commit the case relating to the scheduled offence to the Special Court and the Special Court shall, on receipt of such case proceed to deal with it from the stage at which it is committed.]"

We must reconcile this provision with Clause (a) of sub-section (1) of Section 44. That provision has already been elaborated in the earlier part of this judgment and read down to mean that it is an enabling and discretionary provision. The same consideration must be kept in mind by the Special Court while considering the application filed in terms of this clause. For, this clause also recognises that the trial

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[569] Ins. by Act 2 of 2013, sec. 21(iii) (w.e.f. 15-2-2013, vide S.O. 343(E), dated 8-2-2013)

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of scheduled offence and the trial concerning offence of money-laundering need to proceed independently, even though it may be tried by the same Special Court as both are distinct and independent offences. In that, the offence of money-laundering is and can be only in relation to the process or activity connected with proceeds of crime and has nothing to do with the criminal activity relating to a scheduled offence as such.

111. In the context of this provision, it was emphatically argued before us by the petitioners that it would take away one right of appeal, otherwise available under the 1973 Code. Resultantly, Section 44(1)(c) of the 2002 Act in particular, is unconstitutional. To buttress this submission, reliance has been placed on the dictum in ***A.R. Antulay***[570]. However, this ground need not detain us in view of the just stand taken by the learned Additional Solicitor General appearing for Union of India relying on the decision of this Court in ***State (Through Central Bureau of Investigation) vs. Kalyan Singh (Former Chief Minister of Uttar Pradesh) & Ors.***[571], which

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[570] Supra at Footnote No.134

[571] (2017) 7 SCC 444

has considered similar challenge. The latter decision has distinguished the exposition in ***A.R. Antulay***[572]. In that, the core issue considered in ***A.R. Antulay***[573] was whether the High Court was competent to transfer the criminal trial pending before the Special Court dealing with the offence of PC Act, to itself by invoking powers under Section 407 of the 1973 Code. The Court answered the same in the negative and held that such power does not exist in the High Court and it would inevitably violate Article 21 of the Constitution. However, we are dealing with the dispensation provided by the law made by the Parliament in the form of 2002 Act. This being a special legislation and keeping in view the purport of Sections 65 and 71 of the 2002 Act, it is not possible to countenance the ground of challenge under consideration. We may usefully refer to paragraph 28 of ***Kalyan Singh***[574], which reads thus:

> "**28. In the present case, the power of transfer is being exercised to transfer a case from one Special Judge to another Special Judge, and not to the High Court. The fact that one Special Judge happens to be a Magistrate, whereas the other Special Judge has committed the case to a Court of Session would not make any difference as, as has been stated hereinabove, even a right of appeal from a Magistrate**

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[572] Supra at Footnote No.134

[573] Supra at Footnote No.134

[574] Supra at Footnote No.571

> **to the Sessions Court, and from the Sessions Court to the High Court could be taken away under the procedure established by law i.e. by virtue of Sections 407(1) and (8) if the case is required to be transferred from the Magistrate at Rae Bareilly to the High Court itself. Hence, under Section 407, even if 2 tiers of appeal are done away with, there is no infraction of Article 21 as such taking away of the right of appeal is expressly contemplated by Section 407(1)(iv) read with Section 407(8). In the circumstances, *Antulay*[575] judgment which dealt with the right of a substantive appeal from a Special Judge to the High Court being taken away by an order of transfer contrary to the non obstante clause in Section 7(1) of the Criminal Law Amendment Act, 1952 would not apply in the facts and circumstances before us**."
>
> (emphasis supplied)

Applying the principle underlying this decision, we have no hesitation in rejecting the challenge to Section 44 as unconstitutional being violative of Articles 14, 20(3) and 21 of the Constitution.

112. Reverting to Clause (d) of sub-section (1) of Section 44, it postulates that a Special Court while trying the scheduled offence or offence of money-laundering shall hold trial in accordance with the provisions of the 1973 Code as it applies to a trial before a Court of Sessions. Going by the plain language of this provision, no fault can be found for conducting trial in the respective cases in the same

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[575] Supra at Footnote No.134

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manner as provided in the 1973 Code. However, the grievance is about the insertion of Explanation vide Finance (No.2) Act, 2019. As a matter of fact, this insertion is only a clarificatory provision, as is evident from the opening statement of the provision which says that "for the removal of doubts, it is clarified that". None of the clauses inserted by this amendment travel beyond the principal provision contained in Clause (d). Clause (i) of the Explanation enunciates that the jurisdiction of the Special Court while dealing with the offence being tried under this Act, shall not be dependent upon any orders passed in respect of the scheduled offence, and the trial of both sets of offences by the same Court shall not be construed as joint trials. This, in fact, is reiteration of the earlier part of the same section, which envisages that even though both the trials may proceed before the same Special Court, it must be tried separately as per the provisions of the 1973 Code. Insofar as Clause (ii) of the Explanation, at the first glance, it does give an impression that the same is unconnected with the earlier part of the section. However, on closer scrutiny of this provision, it is noted that the same is only an enabling provision permitting to take on record material regarding further investigation against any accused person involved

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in respect of offence of money-laundering for which complaint has already been filed, whether he has been named in the complaint or not. Such a provision, in fact, is a wholesome provision to ensure that no person involved in the commission of offence of money-laundering must go unpunished. It is always open to the Authority authorised to seek permission of the Court during the trial of the complaint in respect of which cognizance has already been taken by the Court to bring on record further evidence which request can be dealt with by the Special Court in accordance with law keeping in mind the provisions of the 1973 Code as well. It is also open to the Authority authorised to file a fresh complaint against the person who has not been named as accused in the complaint already filed in respect of same offence of money-laundering, including to request the Court to proceed against such other person appearing to be guilty of offence under Section 319 of the 1973 Code, which otherwise would apply to such a trial.

113. The petitioners may be justified in making grievance that the provision though permits the Special Court to proceed with the trial in respect of scheduled offence, yet it may be oppressive as against

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the accused who is not charged with the offence of money-laundering but only scheduled offence. For, he may be denied of opportunity of one appeal or revision, as the case may be before the higher forum. Such a grievance can certainly be looked into by the Special Court if an application is moved by the Authority authorised. Since we have held that the provision is only to bestow enabling power in the Special Court, it must follow that the Special Court will examine the request of the Authority authorised for transfer of trial of predicate offence to itself on case-to-case basis. Similarly, request for trial of offence under another special statute, such as PC Act, NDPS Act, etc. can also be considered by the Special Court on case-to-case basis after examining all aspects of the matter.

114. In view of the above discussion, we do not find merit in the challenge to Section 44 being arbitrary or unconstitutional. We hold that the same is consistent with the legislative scheme and the purposes and objects behind the enactment of the 2002 Act to ensure that the proceeds of crime involved in money-laundering are dealt with appropriately as per the special Act and all concerned

involved in the process or activity connected with such proceeds of crime are prosecuted for offence of money-laundering.

BAIL

115. The relevant provisions regarding bail in the 2002 Act can be traced to Sections 44(2), 45 and 46 in Chapter VII concerning the offence under this Act. The principal grievance is about the twin conditions specified in Section 45 of the 2002 Act. Before we elaborate further, it would be apposite to reproduce Section 45, as amended. The same reads thus:

> "**45. Offences to be cognizable and non-bailable.**—(1) [576][Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence [577][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

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[576] Subs. by Act 20 of 2005, sec. 7, for "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 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" (w.e.f. 1-7-2005).

[577] Subs. by Act 13 of 2018, sec. 208(e)(i), for "punishable for a term of imprisonment of more than three years under Part A of the Schedule" (w.e.f. 19-4-2018, vide G.S.R. 383(E), dated 19th April, 2018).

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, [578][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.

[579][(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 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 [580][***] 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.

[581][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 (2 of 1974), and accordingly the officers authorised under this Act are

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[578] Ins. by Act 13 of 2018, s. 208(e)(ii) (w.e.f. 19-4-2018, vide G.S.R. 383(E), dated 19th April, 2018).

[579] Ins. by Act 20 of 2005, sec. 7 (w.e.f. 1-7-2005).

[580] The words "clause (b) of" omitted by Act 20 of 2005, sec. 7 (w.e.f. 1-7-2005).

[581] Ins. by the **Finance (No.2) Act, 2019**, sec. 200 (w.e.f. 1-8-2019).

> 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.]"

Section 45 has been amended vide Act 20 of 2005, Act 13 of 2018 and Finance (No.2) Act, 2019. The provision as it obtained prior to 23.11.2017 read somewhat differently. The constitutional validity of Sub-section (1) of Section 45, as it stood then, was considered in ***Nikesh Tarachand Shah***[582]. This Court declared Section 45(1) of the 2002 Act, as it stood then, insofar as it imposed two further conditions for release on bail, to be unconstitutional being violative of Articles 14 and 21 of the Constitution. The two conditions which have been mentioned as twin conditions are:

(i) that there are reasonable grounds for believing that he is not guilty of such offence; and

(ii) that he is not likely to commit any offence while on bail.

According to the petitioners, since the twin conditions have been declared to be void and unconstitutional by this Court, the same

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[582] Supra at Footnote No.3

stood obliterated. To buttress this argument, reliance has been placed on the dictum in ***State of Manipur***[583].

116. The first issue to be answered by us is: whether the twin conditions, in law, continued to remain on the statute book post decision of this Court in ***Nikesh Tarachand Shah***[584] and if yes, in view of the amendment effected to Section 45(1) of the 2002 Act vide Act 13 of 2018, the declaration by this Court will be of no consequence. This argument need not detain us for long. We say so because the observation in ***State of Manipur***[585] in paragraph 29 of the judgment that owing to the declaration by a Court that the statute is unconstitutional obliterates the statute entirely as though it had never been passed, is contextual. In this case, the Court was dealing with the efficacy of the repealing Act. While doing so, the Court had adverted to the repealing Act and made the stated observation in the context of lack of legislative power. In the process of reasoning, it did advert to the exposition in ***Behram Khurshid***

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[583] Supra at Footnote No.159

[584] Supra at Footnote No.3

[585] Supra at Footnote No.159

Pesikaka[586] and ***Deep Chand***[587] including American jurisprudence expounded in ***Cooley on Constitutional Limitations***[588] and ***Norton vs. Shelby County***[589].

117. In the present case, however, there is no issue of lack of legislative power of the Parliament to enact a law on the subject of money-laundering. In such a situation, the enunciation of the Constitution Bench of this Court, including seven-Judge Bench, may have direct bearing for answering the argument under consideration. We may usefully refer to the dictum of the Constitution Bench of five-Judges of this Court in ***M.P.V. Sundararamier & Co.***[590]. It had noted the distinction between the effect of unconstitutionality of a statute arising 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. It went on to observe that if a law is on a field not within the domain of the

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[586] Supra at Footnote No.310

[587] Supra at Footnote No. 210 (also at Footnote No.69)

[588] Vol.1, page 382

[589] 118 US 425 (1886)

[590] Supra at Footnote No.311

Legislature, it is absolutely null and void, and a subsequent cession of that field to or by the Legislature will not have the effect of breathing life into what was a still born piece of legislation. At the same time, it noted that 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. After discussing the American decisions and jurisprudence, it went on to sum up as follows:

> "**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 s. 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 Art. 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 in so far as it prohibits tax on outside sales, but invalid in so far as sales in which goods are delivered inside the State are concerned, because such sales are hit by Art. 286(2). The fact that it is invalid as

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> 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."
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> (emphasis supplied)

118. No doubt ***Deep Chand***[591] is a subsequent judgment as has been noticed in the ***State of Manipur***[592]. However, in the later judgment of the Constitution Bench of seven-Judges of this Court in ***Jagannath***[593], the legal position has been reviewed and answered. This decision has not only adverted to two earlier Constitution Bench decisions referred to and relied upon in ***State of Manipur***[594] (i.e., ***Behram Khurshid Pesikaka***[595] and ***Deep Chand***[596]), including American jurisprudence and decision in **Norton**[597], but to hosts of

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[591] Supra at Footnote No. 210 (also at Footnote No.69)

[592] Supra at Footnote No.159

[593] Supra at Footnote No.314

[594] Supra at Footnote No.159

[595] Supra at Footnote No.310

[596] Supra at Footnote No. 210 (also at Footnote No.69)

[597] Supra at Footnote No.589

other decisions. The first point noted in paragraph 9 of this decision is that when this Court has declared the concerned legislation void under the provisions of Article 13 sub-clause (2) of the Constitution, should the Court proceed on the basis that the legislation was void *ab initio* and *non est* or still born and, thus, any validating measure could not instil life therein. After having analysed all the relevant decisions, the Court went on to observe in paragraphs 22 and 23, as follows:

> "**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.**
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> **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."
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> (emphasis supplied)

Thus, where the defect as pointed out by the Court has been removed by virtue of the validating Act retrospectively, then the provision can be held to be *intra vires* provided that it does not transgress any other constitutional limitation. It is, therefore, clear from above that if by amending the provision retrospectively, the Parliament has removed the defect or has taken away the basis on which the provision was declared void then the provision cannot be said to be in conflict with Article 13 of the Constitution. In other words, if the very premise on which the judgment of the Court declaring the provision to be void has been uprooted by the Parliament, thereby resulting in the change of circumstances, the judgment could not be given effect to in the altered circumstances, then the provision cannot be held to be void. In this case, as has been stated above, the anomalies noted in ***Nikesh***

Tarachand Shah[598] have been removed by way of Act No. 13 of 2018. Further, it has been clarified by way of Finance (No.2) Act, 2019 that amendment shall operate retrospectively. Thus, it cannot be said that twin conditions under Section 45 of the 2002 Act does not get revived.

119. A *priori,* it is not open to argue that Section 45 of the 2002 Act post decision in ***Nikesh Tarachand Shah***[599] stood obliterated from the statute book as such. Indubitably, it is not unknown that even after declaration of unconstitutionality by the Court owing to violation of rights guaranteed under Part III of the Constitution, it is open to the Parliament/Legislature to cure the defect reckoned by the Constitutional Court in relation to the concerned provision whilst declaring it as unconstitutional.

120. In the case of ***Nikesh Tarachand Shah***[600], as aforesaid, this Court declared the twin conditions in Section 45(1) of the 2002 Act as unconstitutional being violative of Articles 14 and 21 of the

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[598] Supra at Footnote No.3

[599] Supra at Footnote No.3

[600] Supra at Footnote No.3

Constitution. That conclusion reached by this Court is essentially on account of two basic reasons. The first being that the provision, as it existed at the relevant time, was founded on a classification based on sentencing of the scheduled offence and it had no nexus with objectives of the 2002 Act; and secondly, because the twin conditions were restricted only to a particular class of offences within the 2002 Act, such as offences punishable for a term of imprisonment for more than three years under Part A of the Schedule, and not to all the offences under the 2002 Act. In paragraph 1 of the same decision, the Court had noted that the challenge set forth in the writ petition was limited to imposing two conditions for grant of bail wherein an offence punishable for a term of imprisonment for more than three years under Part A of the Schedule to the Act is involved. This aspect has been thoroughly analysed by the Court in the said decision. The Court also noted the legislative history for enacting such a law and other relevant material from paragraph 11 onwards upto paragraph 43. It adverted to several circumstances and illustrations to conclude that the provision, as it stood then, on the face of it, was discriminatory and manifestly arbitrary. Eventually in the operative order, being

paragraph 54 of the decision, the Court declared that Section 45(1) of the 2002 Act, as it stood then, insofar as it imposes two further conditions for release on bail, to be unconstitutional as it violated Articles 14 and 21 of the Constitution.

121. By the amendment vide Act 13 of 2018, the defects noted by this Court in the aforementioned decision have been duly cured by deleting the words "punishable for a term of imprisonment of more than three years under Part A of the Schedule" in Section 45(1) of the 2002 Act and substituted by words "under this Act". The question is: whether it was open to the Parliament to undo the effect of the judgment of this Court declaring the twin conditions unconstitutional? On a fair reading of the judgment, we must observe that although the Court declared the twin conditions as unconstitutional, but it was in the context of the opening part of the sub-section (1) of Section 45, as it stood then, which resulted in discrimination and arbitrariness as noticed in the judgment. But that opening part referring to class of offences, namely punishable for a term of imprisonment of more than three years under Part A of the Schedule having been deleted and, instead, the twin conditions

have now been associated with all the offences under the 2002 Act, the defect pointed out in the stated decision, stands cured. To answer the question posed above, we may also usefully refer to the enunciation of the Constitution Bench of this Court, which recognises power of the Legislature to cure the defect when the law is struck down by the Constitutional Court as violative of some fundamental rights traceable to Part-III of the Constitution. It has been consistently held that such declaration does not have the effect of repealing the relevant provision as such. For, the power to repeal vests only in the Parliament and none else. Only upon such repeal by the Parliament, the provision would become *non est* for all purposes until re-enacted, but it is open to the Parliament to cure the defect noticed by the Constitutional Court so that the provision, as amended by removing such defect gets revived. This is so because, the declaration by the Constitutional Court and striking down of a legal provision being violative of fundamental rights traceable to Part III of the Constitution, merely results in the provision, as it existed then, becoming inoperative and unenforceable, even though it may continue to remain on the statute book.

122. The decision of the Constitution Bench of this Court in ***Shri Prithvi Cotton Mills Ltd.***[601] recognises this doctrine of taking away as the basis or validating acts thereby removing the causes for ineffectiveness or invalidity of actions or proceedings which are validated by a legislative measure and, then by fiction, it becomes re-enacted law. We may usefully refer to the decision in ***Bhubaneshwar Singh***[602], wherein in paragraph 11, the Court noted as follows:

> **"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**

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[601] Supra at Footnote No.300

[602] Supra at Footnote No.301

> **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."**
>
> (emphasis supplied)

123. Again, in the case of ***Comorin Match Industries (P) Ltd.***[603]**,** this Court after adverting to earlier decisions, including ***Shri Prithvi Cotton Mills Ltd.***[604] observed in paragraph 24 as follows:

> **"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."**
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> (emphasis supplied)

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[603] Supra at Footnote No.302

[604] Supra at Footnote No.300

124. The legal principles have been recapitulated by this Court once again in ***Indian Aluminium Co.***[605], in paragraph 56, it was observed 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**

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[605] Supra at Footnote No.303

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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."**
>
> (emphasis supplied)

125. We may also usefully refer to the dictum in ***Narain Singh***[606], 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*[607] 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*[608] 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.
>
> **22.** This Court in *Bhubaneshwar Singh*[609] 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*[610] 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*[611].

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[606] Supra at Footnote No.305

[607] Supra at Footnote No.301

[608] Supra at Footnote No.301

[609] Supra at Footnote No.301

[610] Supra at Footnote No.301

[611] Supra at Footnote No.300

23. Again in *Indian Aluminium Co. v. State of Kerala*[612] 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].

24. In *Comorin Match Industries (P) Ltd. v. State of T.N.*[613], 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.

25. The Court in *Comorin Match case*[614] 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.

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

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[612] Supra at Footnote No.303

[613] Supra at Footnote No.302

[614] Supra at Footnote No.302

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

(emphasis supplied)

There are long line of decisions restating the above position and the recent being ***Cheviti Venkanna Yadav***[615], which after analysing all the relevant authorities on the point, noted in paragraph 30 as follows:

"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

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[615] Supra at Footnote No.307

> **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."**
>
> (emphasis supplied)

From the above discussion, it is amply clear that the twin conditions declared as unconstitutional by this Court in ***Nikesh Tarachand Shah***[616] was in reference to the provision, as it existed at the relevant time, predicating application of Section 45 of the 2002 Act to only offences punishable for a term of imprisonment of more than three years under Part A of the Schedule of the 2002 Act and not even linked to the offences of money-laundering under the 2002 Act. The reasons which weighed with this Court for declaring the twin conditions in Section 45(1), as it stood at the relevant time, unconstitutional in no way obliterated the provision from the statute book. Therefore, it was open to the Parliament to cure the defect noted by this Court and to revive the same provision as in the present form, post amendment Act 13 of 2018 with effect form 19.4.2018.

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[616] Supra at Footnote No.3

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126. Having said thus, we must now address the challenge to the twin conditions as applicable post amendment of 2018. That challenge will have to be tested on its own merits and not in reference to the reasons weighed with this Court in declaring the provision, (as it existed at the relevant time), applicable only to offences punishable for a term of imprisonment of more than three years under Part A of the Schedule to the 2002 Act. Now, the provision (Section 45) including twin conditions would apply to the offence(s) under the 2002 Act itself. The provision post 2018 amendment, is in the nature of no bail in relation to the offence of money-laundering unless the twin conditions are fulfilled. The twin conditions are that there are reasonable grounds for believing that the accused is not guilty of offence of money-laundering and that he is not likely to commit any offence while on bail. Considering the purposes and objects of the legislation in the form of 2002 Act and the background in which it had been enacted owing to the commitment made to the international bodies and on their recommendations, it is plainly clear that it is a special legislation to deal with the subject of money-laundering activities having transnational impact on the financial systems including sovereignty and integrity of the countries. This is

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not an ordinary offence. To deal with such serious offence, stringent measures are provided in the 2002 Act for prevention of money-laundering and combating menace of money-laundering, including for attachment and confiscation of proceeds of crime and to prosecute persons involved in the process or activity connected with the proceeds of crime. In view of the gravity of the fallout of money-laundering activities having transnational impact, a special procedural law for prevention and regulation, including to prosecute the person involved, has been enacted, grouping the offenders involved in the process or activity connected with the proceeds of crime as a separate class from ordinary criminals. The offence of money-laundering has been regarded as an aggravated form of crime "world over". It is, therefore, a separate class of offence requiring effective and stringent measures to combat the menace of money-laundering.

127. There is no challenge to the provision on the ground of legislative competence. The question, therefore, is: whether such classification of offenders involved in the offence of money-laundering is reasonable? Considering the concern expressed by the

international community regarding the money-laundering activities world over and the transnational impact thereof, coupled with the fact that the presumption that the Parliament understands and reacts to the needs of its own people as per the exigency and experience gained in the implementation of the law, the same must stand the test of fairness, reasonableness and having nexus with the purposes and objects sought to be achieved by the 2002 Act. Notably, there are several other legislations where such twin conditions have been provided for[617]. Such twin conditions in the concerned provisions have been tested from time to time and have stood the challenge of the constitutional validity thereof. The successive decisions of this Court dealing with analogous provision

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[617] **Central Legislations**:- Section 36AC of Drugs and Cosmetics Act, 1940; Section 51A of the Wild Life (Protection) Act, 1972; Section 6A of the Suppression of Unlawful Acts against Safety of Civil Aviation Act, 1982; Section 15 Terrorist Affected Areas Act (Special Courts), 1984; Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985; Section 20 of the Terrorist and Disruptive Activities (Prevention) Act, 1987; Section 8 of the Suppression Of Unlawful Acts Against Safety Of Maritime Navigation and Fixed Platforms On Continental Shelf Act, 2002; Section 212 of the Companies Act, 2013; and Section 12 of the Anti-Hijacking Act, 2016.

State Legislations:- Section 19 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986; Section 21 of the Maharashtra Control of Organised Crime Act, 1999; Section 22 of the Karnataka Control of Organized Crime Act, 2000; Section 21 of the Telangana Control of Organized Crime Act, 2001 (renamed from Andhra Pradesh COCA, 2001); Section 18 of the Sikkim Anti-Drugs Act, 2006; Section 20 of the Gujrat Control of Terrorism and Organised Crime Act, 2015; Section 19 of the Mizoram Drug (Controlled Substances) Act, 2016; and Section 18 of the Haryana Control of Organised Crime Act, 2020.

have stated that the Court at the stage of considering the application for grant of bail, is expected to 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.

128. For understanding whether such twin conditions can be regarded as reasonable condition, we may usefully refer to the decision of the Constitution Bench of this Court in ***Kartar Singh***[618]. While dealing with the challenge to Section 20(8) of TADA Act, the Court rejected the argument that such provision results in deprivation of liberty and violates Articles 14 and 21 of the

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[618] Supra at Footnote No.190

Constitution. It noted that such provision imposes complete ban on release of accused on bail involved in the stated offence under the special legislation, but that ban stands diluted by virtue of twin conditions. It noted that rest of the provision, as in the case of the Section 45 of the 2002 Act, is comparable with the conditions specified in the 1973 Code for release of accused on bail concerning ordinary offence under general law. The Constitution Bench approved the dictum in ***Usmanbhai Dawoodbhai Memon***[619] and in paragraph 349 noted thus:

> "**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.**"
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> (emphasis supplied)

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[619] Supra at Footnote No.202

Again, in paragraph 351, the Constitution Bench observed thus:

> "**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.**"
>
> (emphasis supplied)

We may immediately note that this judgment has been considered by the two-Judge Bench of this Court in ***Nikesh Tarachand Shah***[620] in paragraph 47 and distinguished in the following words:

> "**47**. ....
> It is clear that this Court upheld such a condition only because the offence under TADA was a most heinous offence in which the vice of terrorism is sought to be tackled. **Given the heinous nature of the offence which is punishable by death or life imprisonment, and given the fact that the Special Court in that case was a Magistrate and not a Sessions Court, unlike the present case, Section 20(8) of TADA was upheld as being in consonance with conditions prescribed under Section 437 of the Code of Criminal Procedure. In the present case, it is Section 439 and not Section 437 of the Code of Criminal Procedure that applies**. Also, the offence that is spoken of in Section 20(8) is an offence under TADA itself and not an offence under some other Act. For all these reasons, the judgment in *Kartar Singh*[621] cannot apply to Section 45 of the present Act."
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> (emphasis supplied)

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[620] Supra at Footnote No.3

[621] Supra at Footnote No.190

129. With utmost humility at our command, we do not agree with this (highlighted) observation. The reason for distinguishing the enunciation of the Constitution Bench noted above, is not only inapposite, but it is not consistent with the provisions in both the Acts. Even the TADA Act, the appointment of Designated Court is from amongst the Sessions Judge or Additional Sessions Judge in any State and the offences under that Act were made exclusively triable before such Designated Court and not the Magistrate. The powers of the Magistrate were required to be bestowed on the Designated Court being the Sessions Judge for the limited purpose of proceeding with the case directly before it. This is amply clear, *inter alia,* from Section 9, in particular Clause (6) thereof, including Sections 20(3)[622] and 20(4)[623] of the TADA Act. Same is the logic

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[622] **20. Modified application of certain provisions of the Code** .- (1) .....
....

(3) Section 164 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 modification that the reference in sub-section (1) thereof to "Metropolitan Magistrate or Judicial Magistrate" shall be construed as a reference to "Metropolitan Magistrate", "Judicial Magistrate, Executive Magistrate or Special Executive Magistrate".

[623] **20. Modified application of certain provisions of the Code** .- (1) .....
.....

(4) 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 reference to "Judicial Magistrate or Executive Magistrate or Special Executive Magistrate";

adopted under Chapter VII of the 2002 Act in constituting the Special Courts and empowering the Sessions Judge appointed as Special Court with the powers of the Magistrate. That aspect has been dealt with by the Constitution Bench in paragraphs 342 to 344, while approving the exposition in ***Usmanbhai Dawoodbhai Memon***[624]**.** The same reads thus:

> "**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-

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(b) the reference in sub-section (2) thereof the "fifteen days", "ninety days" and "sixty days", wherever they occur, shall be construed as references to "sixty days", one hundred and eighty days and one hundred and eighty days respectively; and

(bb) sub-section (2), 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 one hundred and eighty days, the Designated Court shall extend the said period up to one year, on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days; and.

(c) sub-section (2-A) thereof shall be deemed to have been omitted.

[624] Supra at Footnote No.202

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 nonbailable 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*[625], 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.""

This portion of the judgment of the Constitution Bench has not been noticed in ***Nikesh Tarachand Shah***[626]. Further, we do not agree with the observations suggestive of that the offence of money-laundering is less heinous offence than the offence of terrorism

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[625] Supra at Footnote No.202

[626] Supra at Footnote No.3

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sought to be tackled under TADA Act or that there is no compelling State interest in tackling offence of money-laundering. The international bodies have been discussing the menace of money-laundering on regular basis for quite some time; and strongly recommended enactment of stringent legislation for prevention of money-laundering and combating with the menace thereof including to prosecute the offenders and for attachment and confiscation of the proceeds of crime having direct impact on the financial systems and sovereignty and integrity of the countries. That concern has been duly noted even in the opening part of the introduction and Statement of Objects and Reasons, for which the 2002 Act came into being. This declaration by the Parliament itself is testimony of compelling necessity to have stringent regime (enactment) for prevention and control of the menace of money-laundering. Be it noted that under Article 38 of the Constitution of India, it is the duty of the State to secure social, economic and political justice and minimize income inequalities. Article 39 of the Constitution mandates the State to prevent concentration of wealth, thus, to realize its socialist goal, it becomes imperative for the State to make such laws, which not only ensure that the unaccounted money is

infused back in the economic system of the country, but also prevent any activity which damages the economic fabric of the nation. It cannot be gainsaid that social and economic offences stand on a graver footing as they not only involve an individual direct victim, but harm the society as a whole[627]. Thus, the Law Commission also in its 47th report recommended an increase in punishment for most of the offences considered therein. Further, the quantum of punishment for money-laundering offence, being only seven years, cannot be the basis to undermine the seriousness and gravity of this offence. The quantum of sentence is a matter of legislative policy. The punishment provided for the offence is certainly one of the principles in deciding the gravity of the offence, however, it cannot be said that it is the sole factor in deciding the severity of offence as contended by the petitioners. Money-laundering is one of the heinous crimes, which not only affects the social and economic fabric of the nation, but also tends to promote other heinous offences, such as terrorism, offences related to NDPS Act, etc. It is a proven fact that international criminal network that support home grown extremist groups relies on transfer of unaccounted money

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[627] 47th Law Commission Report

across nation States[628], thus, by any stretch of imagination, it cannot be said that there is no compelling State interest in providing stringent conditions of bail for the offence of money-laundering. In ***Ram Jethmalani & Ors. vs. Union of India & Ors.***[629], the Court expounded the theory of "soft state" which is used to describe a nation which is not capable of preventing the offence of money-laundering. The Court held thus:

> "**13.** The concept of a "soft state" was famously articulated by the Nobel Laureate, Gunnar Myrdal. It is a broad-based assessment of the degree to which the State, and its machinery, is equipped to deal with its responsibilities of governance. **The more soft the State is, greater the likelihood that there is an unholy nexus between the law maker, the law keeper, and the law breaker**."
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> (emphasis supplied)

In ***Mohanlal Jitamalji Porwal***[630], while explaining the impact of economic offences on the community, the Court observed that usually the community view the economic offender with a permissive

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[628] *Ram Jethmalani & Ors. vs. Union of India & Ors.*, (2011) 8 SCC 1

[629] (2011) 8 SCC 1 (also at Footnote No.628)

[630] Supra at Footnote No.254

eye, although the impact of the offence is way greater than that of offence of murder. The Court held thus:

> "**5**.....The entire Community is aggrieved if the economic offenders who ruin the economy of the State are not brought to books. 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.** ....."
>
> (emphasis supplied)

In ***Rohit Tandon***[631&632], this Court observed as follows:-

> "**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**

[631] Supra at Footnote No.189

[632] Supra at Footnote No.189

> **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."
>
> (emphasis supplied)

Thus, it is well settled by the various decisions of this Court and policy of the State as also the view of international community that the offence of money-laundering is committed by an individual with a deliberate design with the motive to enhance his gains, disregarding the interests of nation and society as a whole and which by no stretch of imagination can be termed as offence of trivial nature. Thus, it is in the interest of the State that law enforcement agencies should be provided with a proportionate effective mechanism so as to deal with these types of offences as the wealth of the nation is to be safeguarded from these dreaded criminals. As discussed above, the conspiracy of money-laundering, which is a three-staged process, is hatched in secrecy and executed in darkness, thus, it becomes imperative for the State to frame such a stringent law, which not only punishes the offender proportionately,

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but also helps in preventing the offence and creating a deterrent effect.

130. In the case of the 2002 Act, the Parliament had no reservation to reckon the offence of money-laundering as a serious threat to the financial systems of our country, including to its sovereignty and integrity. Therefore, the observations and in particular in paragraph 47 of ***Nikesh Tarachand Shah***[633], are in the nature of doubting the perception of the Parliament in that regard, which is beyond the scope of judicial review. That cannot be the basis to declare the law manifestly arbitrary.

131. It is important to note that the twin conditions provided under Section 45 of the 2002 Act, though restrict the right of the accused to grant of bail, but it cannot be said that the conditions provided under Section 45 impose absolute restraint on the grant of bail. The discretion vests in the Court which is not arbitrary or irrational but judicial, guided by the principles of law as provided under Section 45 of the 2002 Act. While dealing with a similar provision

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[633] Supra at Footnote No.3

prescribing twin conditions in MCOCA, this Court in ***Ranjitsing Brahmajeetsing Sharma***[634]**,** held as under:

> "**44. The wording of Section 21(4), in our opinion, does not lead to the conclusion that the court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act.** If such a construction is placed, the court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an event, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the legislature. **Section 21(4) of MCOCA, therefore, must be construed reasonably. It must be so construed that the court is able to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial.** Similarly, the Court will be required to record a finding as to the possibility of his committing a crime after grant of bail. However, such an offence in futuro must be an offence under the Act and not any other offence. Since it is difficult to predict the future conduct of an accused, the court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence.
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> **45. It is, furthermore, trite that for the purpose of considering an application for grant of bail, although detailed reasons are not necessary to be assigned, the order granting bail must demonstrate application of mind at least in serious cases as to why the applicant has been granted or denied the privilege of bail.**
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> **46. 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. However, while dealing with a special statute like MCOCA having regard to the provisions contained in sub-section (4)**

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[634] Supra at Footnote No.275 (also at Footnote No.53)

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> **of Section 21 of the Act, the court may have to probe into the matter deeper so as to enable it to arrive at a finding that the materials collected against the accused during the investigation may not justify a judgment of conviction. The findings recorded by the court while granting or refusing bail undoubtedly would be tentative in nature, which may not have any bearing on the merit of the case and the trial court would, thus, be free to decide the case on the basis of evidence adduced at the trial, without in any manner being prejudiced thereby"**
>
> (emphasis supplied)

We are in agreement with the observation made by the Court in ***Ranjitsing Brahmajeetsing Sharma***[635]. The Court while dealing with the application for grant of bail need not delve deep into the merits of the case and only a view of the Court based on available material on record is required. The Court will not weigh the evidence to find the guilt of the accused which is, of course, the work of Trial Court. The Court is only required to place its view based on probability on the basis of reasonable material collected during investigation and the said view will not be taken into consideration by the Trial Court in recording its finding of the guilt or acquittal during trial which is based on the evidence adduced during the trial. As explained by this Court in ***Nimmagadda Prasad***[636]**,** the words

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[635] Supra at Footnote No.275 (also at Footnote No.53)

[636] Supra at Footnote No.256

used in Section 45 of the 2002 Act are "reasonable grounds for believing" which means the Court has to see only if there is a genuine case against the accused and the prosecution is not required to prove the charge beyond reasonable doubt.

132. Sub-section (6) of Section 212 of the Companies Act imposes similar twin conditions, as envisaged under Section 45 of the 2002 Act on the grant of bail, when a person is accused of offence under Section 447 of the Companies Act which 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. The Court in ***Nittin Johari***[637], while justifying the stringent view towards grant of bail with respect to economic offences held that-

> "**24.** At this juncture, it must be noted that even as per Section 212(7) of the Companies Act, the limitation under Section 212(6) with respect to grant of bail is in addition to those already provided in the CrPC. Thus, it is necessary to advert to the principles governing the grant of bail under Section 439 of the CrPC. **Specifically, heed must be paid to the stringent view taken by this Court towards grant of bail with respect of economic offences**. In this regard, it is pertinent to

[637] Supra at Footnote No.291

refer to the following observations of this Court in ***Y.S. Jagan Mohan Reddy***[638]: (SCC p.449, paras 34-35)

> "34. **Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail.** The 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.
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> 35. 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 at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations."**
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> (emphasis supplied)

133. This Court has been restating this position in several decisions, including ***Gautam Kundu***[639] and ***Amit Kumar***[640]. Thus, while considering the application for bail under Section 45 of the 2002 Act, the Court should keep in mind the abovementioned principles governing the grant of bail. The limitations on granting bail as

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[638] Supra at Footnote No.255

[639] Supra at Footnote No.207

[640] Supra at Footnote No.258

prescribed under Section 45 of the 2002 Act are in addition to the limitations under the 1973 Code.

134. As aforementioned, similar twin conditions have been provided in several other special legislations[641] validity whereof has been upheld by this Court being reasonable and having nexus with the purposes and objects sought to be achieved by the concerned special legislations. Besides the special legislation, even the provisions in the general law, such as 1973 Code stipulate compliance of preconditions before releasing the accused on bail. The grant of bail, even though regarded as an important right of the accused, is not a mechanical order to be passed by the Courts. The prayer for grant of bail even in respect of general offences, have to be considered on the basis of objective discernible judicial parameters as delineated by this Court from time to time, on case-to-case basis.

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[641] **(i)** Section 43D(5) of the UAPA [*Zahoor Ahmad Shah Watali* (supra at Footnote No.290)]; **(ii)** Section 21(4) of the MCOCA [*Vishwanath Maranna Shetty* (supra at Footnote No.287); *Chenna Boyanna Krishna Yadav* (supra at Footnote No.283) and *Ranjitsing Brahmajeetsing Sharma* (supra at Footnote Nos.53 and 275)]; **(iii)** Section 21(5) of the MCOCA [*Bharat Shanti Lal Shah* (supra at Footnote No.285); **(iv)** Section 37 of the NDPS Act [*R. Paulsamy* (supra at Footnote No.277); *Gurcharan Singh* (supra at Footnote No.278); *Ahmadalieva Nodira* (supra at Footnote No.276); *Abdulla* (supra at Footnote No.280); *Karma Phuntsok* (supra at Footnote No.282); *N.R. Mon* (supra at Footnote No.284); *Rattan Mallik alias Habul* (supra at Footnote No.286); *Satpal Singh* (supra at Footnote No.289); and *Niyazuddin Sk.* (supra at Footnote No.288); and **(v)** Section 212(6) of the Companies Act [*Nittin Johari* (supra at Footnote No.291)].

135. We are conscious of the fact that in paragraph 53 of the ***Nikesh Tarachand Shah***[642], the Court noted that it had struck down Section 45 of the 2002 as a whole. However, in paragraph 54, the declaration is only in respect of further (two) conditions for release on bail as contained in Section 45(1), being unconstitutional as the same violated Articles 14 and 21 of the Constitution. Be that as it may, nothing would remain in that observation or for that matter, the declaration as the defect in the provision [Section 45(1)], as existed then, and noticed by this Court has been cured by the Parliament by enacting amendment Act 13 of 2018 which has come into force with effect from 19.4.2018. We, therefore, confined ourselves to the challenge to the twin conditions in the provision, as it stands to this date post amendment of 2018 and which, on analysis of the decisions referred to above dealing with concerned enactments having similar twin conditions as valid, we must reject the challenge. Instead, we hold that the provision in the form of Section 45 of the 2002 Act, as applicable post amendment of 2018, is reasonable and has direct nexus with the purposes and objects

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[642] Supra at Footnote No.3

sought to be achieved by the 2002 Act to combat the menace of money-laundering having transnational consequences including impacting the financial systems and sovereignty and integrity of the countries.

136. It was urged that the scheduled offence in a given case may be a non-cognizable offence and yet rigors of Section 45 of the 2002 Act would result in denial of bail even to such accused. This argument is founded on clear misunderstanding of the scheme of the 2002 Act. As we have repeatedly mentioned in the earlier part of this judgment that the offence of money-laundering is one wherein a person, directly or indirectly, attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime. The fact that the proceeds of crime have been generated as a result of criminal activity relating to a scheduled offence, which incidentally happens to be a non-cognizable offence, would make no difference. The person is not prosecuted for the scheduled offence by invoking provisions of the 2002 Act, but only when he has derived or obtained property as a result of criminal activity relating to or in relation to a scheduled

offence and then indulges in process or activity connected with such proceeds of crime. Suffice it to observe that the argument under consideration is completely misplaced and needs to be rejected.

137. Another incidental issue that had been raised is about the non-application of rigors of Section 45 of the 2002 Act in respect of anticipatory bail filed under Section 438 of the 1973 Code. This submission presumably is linked to the observation in paragraph 42 in the case of ***Nikesh Tarachand Shah***[643]. Similar argument was considered in ***The Asst. Director Enforcement Directorate vs. Dr. V.C. Mohan***[644]. We are in agreement with the observation in this decision that it is one thing to say that Section 45 of the 2002 Act refers to a scheduled offence under the general law, but, as noted earlier, the offence under this Act in terms of Section 3 is specific to involvement in any process or activity connected with the proceeds of crime which is generated as a result of criminal activity relating to a scheduled offence. It is also true that Section 45 does not make specific reference to Section 438 of the 1973 Code, but it cannot be overlooked that sub-section (1) opens with a *non-obstante* clause and

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[643] Supra at Footnote No.3

[644] Criminal Appeal No.21 of 2022, decided on 4.1.2022

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clearly provides that anything contained in the 1973 Code (2 of 1974), no person accused of an offence under this Act shall be released on bail or on his own bond, unless the stipulations provided therein are fulfilled. On account of the *non-obstante* clause in Section 45(1) of the 2002 Act, the sweep of that provision must prevail in terms of Section 71 of the 2002 Act. Further, the expression "anticipatory bail" is not used either in the 1973 Code or the 2002 Act. The relief granted in terms of Section 438 of the 1973 Code is one of directing release of the person on "bail" in case of his arrest; and such a relief has been described in judicial pronouncements as anticipatory bail. Section 45(1) uses generic expression "bail" without reference to any provision of the 1973 Code, such as Sections 437, 438 and 439 of the 1973 Code. Concededly, Section 65 of the 2002 Act states that the provisions of the 1973 Code shall apply to the provisions under the Act insofar as they are not inconsistent with the provisions of the 2002 Act. Further, Section 71 of the Act gives overriding effect to the Act. Section 45 of the Act begins with a *non-obstante* clause, thus excluding the application of the 1973 Code in matters related to

"bail". The word "anticipatory bail" has not been defined under the 1973 Code. In ***Sushila Aggarwal***[645], it was held 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 *Balchand Jain*[646], "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 CrPC vests only with the Court of Session or the High Court. Therefore, ultimately it is for the court concerned to consider the application for "anticipatory bail" and while granting the "anticipatory bail" it is ultimately for the court concerned 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 pre-arrest bail order is made under Section 438 of the CrPC has to be arrested. However, once there is an order of pre-arrest 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 pre-arrest bail order under Section 438 and the bail order under Section 437 & 439 CrPC. The only difference between the pre-arrest 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 CrPC 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 CrPC shows that there is nothing in the language of the Section which goes to show that the pre-arrest bail granted under

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[645] Supra at Footnote No.318

[646] *Balchand Jain (Shri) vs. State of Madhya Pradesh,* (1976) 4 SCC 572

> Section 438 has to be time-bound. The position is the same as in Section 437 and Section 439 CrPC."
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> (emphasis supplied)

Thus, anticipatory bail is nothing but a bail granted in anticipation of arrest, hence, it has been held in various judgments by this Court that the principles governing the grant of bail in both cases are more or less on the same footing, except that in case of anticipatory bail the investigation is still underway requiring the presence of the accused before investigation authority. Thus, ordinarily, anticipatory bail is granted in exceptional cases where the accused has been falsely implicated in an offence with a view to harass and humiliate him. Therefore, it would not be logical to disregard the limitations imposed on granting bail under Section 45 of the 2002 Act, in the case of anticipatory bail as well.

138. In ***P. Chidambaram***[647], this Court observed that the power of anticipatory bail should be sparingly exercised in economic offences and held thus:

> "**77**. After referring to *Siddharam Satlingappa Mhetre*[648] and other judgments and observing that anticipatory

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[647] Supra at Footnote No.21

[648] *Siddharam Satlingappa Mhetre vs. State of Maharashtra & Ors.,* (2011) 1 SCC 694

bail can be granted only in exceptional circumstances, in *Jai Prakash Singh v. State of Bihar* [649] , the Supreme Court held as under: (SCC p.386, para 19)

> "19. Parameters for grant of anticipatory bail in a serious offence are required to be satisfied and further while granting such relief, the court must record the reasons therefor. Anticipatory bail can be granted only in exceptional circumstances where the court is prima facie of the view that the applicant has falsely been enroped in the crime and would not misuse his liberty. (*See D.K. Ganesh Babu v. P.T. Manokaran*[650] *, State of Maharashtra v. Mohd. Sajid Husain Mohd. S. Husain*[651] *and Union of India v. Padam Narain Aggarwal*[652])

Economic Offences

78. Power under Section 438 CrPC being an extraordinary remedy, has to be exercised sparingly; more so, in cases of economic offences. Economic offences stand as a different class as they affect the economic fabric of the society. *In Directorate of Enforcement v. Ashok Kumar Jain*[653], it was held that in economic offences, the accused is not entitled to anticipatory bail.

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83. Grant of anticipatory bail at the stage of investigation may frustrate the investigating agency in interrogating the accused and in collecting the useful information and also the materials which might have been concealed. Success in such interrogation would elude if the accused knows that he is protected by the order of the court. Grant of anticipatory bail, particularly in economic offences

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[649] (2012) 4 SCC 379

[650] (2007) 4 SCC 434

[651] (2008) 1 SCC 213

[652] Supra at Footnote No.246

[653] (1998) 2 SCC 105

would definitely hamper the effective investigation. Having regard to the materials said to have been collected by the respondent Enforcement Directorate and considering the stage of the investigation, we are of the view that it is not a fit case to grant anticipatory bail.

84. **In a case of money-laundering where it involves many stages of "placement", "layering i.e. funds moved to other institutions to conceal origin" and "interrogation i.e. funds used to acquire various assets", it requires systematic and analysed investigation which would be of great advantage. As held in *Anil Sharma*[654], success in such interrogation would elude if the accused knows that he is protected by a pre-arrest bail order. Section 438 CrPC is to be invoked only in exceptional cases where the case alleged is frivolous or groundless**. In the case in hand, there are allegations of laundering the proceeds of the crime. The Enforcement Directorate claims to have certain specific inputs from various sources, including overseas banks. Letter rogatory is also said to have been issued and some response have been received by the Department. Having regard to the nature of allegations and the stage of the investigation, in our view, the investigating agency has to be given sufficient freedom in the process of investigation. Though we do not endorse the approach of the learned Single Judge in extracting the note produced by the Enforcement Directorate, we do not find any ground warranting interference with the impugned order[655]. Considering the facts and circumstances of the case, in our view, grant of anticipatory bail to the appellant will hamper the investigation and this is not a fit case for exercise of discretion to grant anticipatory bail to the appellant."

(emphasis supplied)

139. Therefore, as noted above, investigation in an economic offence, more so in case of money-laundering, requires a systematic

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[654] *State rep. by the C.B.I. vs. Anil Sharma,* (1997) 7 SCC 187

[655] *P. Chidambaram vs. Central Bureau of Investigation,* 2019 SCC OnLine Del 9703

approach. Further, it can never be the intention of the Parliament to exclude the operation of Section 45 of 2002 Act in the case of anticipatory bail, otherwise, it will create an unnecessary dichotomy between bail and anticipatory bail which not only will be irrational but also discriminatory and arbitrary. Thus, it is totally misconceived that the rigors of Section 45 of the 2002 Act will not apply in the case of anticipatory bail.

140. Suffice it to observe that it would be preposterous and illogical to hold that if a person applies for bail after arrest, he/she can be granted that relief only if the twin conditions are fulfilled in addition to other stipulations predicated in the 1973 Code; but another person, who is yet to be arrested in connection with the same offence of money-laundering, will not be required to fulfil such twin conditions whilst considering application for grant of bail under Section 438 of the 1973 Code. The relief of bail, be it in the nature of regular bail or anticipatory bail, is circumscribed by the stipulations predicated in Section 45 of the 2002 Act. The underlying principles of Section 45 of the 2002 Act would get triggered in either case before the relief of bail in connection with the

offence of money-laundering is taken forward. Any other view would be counterproductive and defeat the purposes and objects behind the stringent provision enacted by the Parliament for prevention of money-laundering and to combat the menace on account of such activity which directly impacts the financial systems, including the sovereignty and integrity of the country.

141. As a result, we have no hesitation in observing that in whatever form the relief is couched including the nature of proceedings, be it under Section 438 of the 1973 Code or for that matter, by invoking the jurisdiction of the Constitutional Court, the underlying principles and rigors of Section 45 of the 2002 must come into play and without exception ought to be reckoned to uphold the objectives of the 2002 Act, which is a special legislation providing for stringent regulatory measures for combating the menace of money-laundering.

142. There is, however, an exception carved out to the strict compliance of the twin conditions in the form of Section 436A of the 1973 Code, which has come into being on 23.6.2006 vide Act 25 of

2005. This, being the subsequent law enacted by the Parliament, must prevail. Section 436A of the 1973 Code reads as under:

> "[656][436A. **Maximum period for which an undertrial prisoner can be detained**.— Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties:
>
> Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties:
>
> Provided further that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.
>
> Explanation.—In computing the period of detention under this section for granting bail, the period of detention passed due to delay in proceeding caused by the accused shall be excluded.]"

In the Statement of Objects and Reasons, it was stated thus:

> "There had been instances, where under-trial prisoners were detained in jail for periods beyond the maximum period of imprisonment provided for the alleged offence. As remedial measure section 436A has been inserted to provide that where an under-trial prisoner other than the one accused of an offence for which death has been prescribed as one of the punishments, has been under detention for a period extending to one-half of the

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656 Ins. by Act 25 of 2005, sec. 36 (w.e.f. 23-6-2006)

> maximum period of imprisonment provided for the alleged offence, he should be released on his personal bond, with or without sureties. It has also been provided that in no case will an under-trial prisoner be detained beyond the maximum period of imprisonment for which he can be convicted for the alleged offence."

143. In ***Hussainara Khatoon & Ors. vs. Home Secretary, State of Bihar, Patna***[657], this Court stated that the right to speedy trial is one of the facets of Article 21 and recognized the right to speedy trial as a fundamental right. This dictum has been consistently followed by this Court in several cases. The Parliament in its wisdom inserted Section 436A under the 1973 Code recognizing the deteriorating state of undertrial prisoners so as to provide them with a remedy in case of unjustified detention. In ***Supreme Court Legal Aid Committee Representing Undertrial Prisoners vs. Union of India & Ors.***[658], the Court, relying on ***Hussainara Khatoon***[659], directed the release of prisoners charged under the Narcotic Drugs and Psychotropic Act after completion of one-half of the maximum term prescribed under the Act. The Court issued such direction after taking into account the *non obstante* provision of Section 37 of

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[657] (1980) 1 SCC 98

[658] (1994) 6 SCC 731

[659] Supra at Footnote No.657

the NDPS Act, which imposed the rigors of twin conditions for release on bail. It was observed:

> "**15**. ....We are conscious of the statutory provision finding place in Section 37 of the Act prescribing the conditions which have to be satisfied before a person accused of an offence under the Act can be released. Indeed we have adverted to this section in the earlier part of the judgment. We have also kept in mind the interpretation placed on a similar provision in Section 20 of the TADA Act by the Constitution Bench in *Kartar Singh* v. *State of Punjab*[660]. Despite this provision, we have directed as above mainly at the call of Article 21 as the right to speedy trial may even require in some cases quashing of a criminal proceeding altogether, as held by a Constitution Bench of this Court in *A.R. Antulay* v. *R.S. Nayak*[661], release on bail, which can be taken to be embedded in the right of speedy trial, may, in some cases be the demand of Article 21. As we have not felt inclined to accept the extreme submission of quashing the proceedings and setting free the accused whose trials have been delayed beyond reasonable time for reasons already alluded to, we have felt that deprivation of the personal liberty without ensuring speedy trial would also not be in consonance with the right guaranteed by Article 21. Of course, some amount of deprivation of personal liberty cannot be avoided in such cases; but if the period of deprivation pending trial becomes unduly long, the fairness assured by Article 21 would receive a jolt. It is because of this that we have felt that after the accused persons have suffered imprisonment which is half of the maximum punishment provided for the offence, any further deprivation of personal liberty would be violative of the fundamental right visualised by Article 21, which has to be telescoped with the right guaranteed by Article 14 which also promises justness, fairness and reasonableness in procedural matters. ..."

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[660] Supra at Footnote No.190

[661] (1992) 1 SCC 225

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144. The Union of India also recognized the right to speedy trial and access to justice as fundamental right in their written submissions and, thus, submitted that in a limited situation right of bail can be granted in case of violation of Article 21 of the Constitution. Further, it is to be noted that the Section 436A of the 1973 Code was inserted after the enactment of the 2002 Act. Thus, it would not be appropriate to deny the relief of Section 436A of the 1973 Code which is a wholesome provision beneficial to a person accused under the 2002 Act. However, Section 436A of the 1973 Code, does not provide for an absolute right of bail as in the case of default bail under Section 167 of the 1973 Code. For, in the fact situation of a case, the Court may still deny the relief owing to ground, such as where the trial was delayed at the instance of accused himself.

145. Be that as it may, in our opinion, this provision is comparable with the statutory bail provision or, so to say, the default bail, to be granted in terms of Section 167 of the 1973 Code consequent to failure of the investigating agency to file the chargesheet within the statutory period and, in the context of the 2002 Act, complaint

within the specified period after arrest of the person concerned. In the case of Section 167 of the 1973 Code, an indefeasible right is triggered in favour of the accused the moment the investigating agency commits default in filing the chargesheet/complaint within the statutory period. The provision in the form of Section 436A of the 1973 Code, as has now come into being is in recognition of the constitutional right of the accused regarding speedy trial under Article 21 of the Constitution. For, it is a sanguine hope of every accused, who is in custody in particular, that he/she should be tried expeditiously — so as to uphold the tenets of speedy justice. If the trial cannot proceed even after the accused has undergone one-half of the maximum period of imprisonment provided by law, there is no reason to deny him this lesser relief of considering his prayer for release on bail or bond, as the case may be, with appropriate conditions, including to secure his/her presence during the trial.

146. Learned Solicitor General was at pains to persuade us that this view would impact the objectives of the 2002 Act and is in the nature of super imposition of Section 436A of the 1973 Code over Section 45 of the 2002 Act. He has also expressed concern that the same

logic may be invoked in respect of other serious offences, including terrorist offences which would be counterproductive. So be it. We are not impressed by this submission. For, it is the constitutional obligation of the State to ensure that trials are concluded expeditiously and at least within a reasonable time where strict bail provisions apply. If a person is detained for a period extending up to one-half of the maximum period of imprisonment specified by law and is still facing trial, it is nothing short of failure of the State in upholding the constitutional rights of the citizens, including person accused of an offence.

147. Section 436A of the 1973 Code, is a wholesome beneficial provision, which is for effectuating the right of speedy trial guaranteed by Article 21 of the Constitution and which merely specifies the outer limits within which the trial is expected to be concluded, failing which, the accused ought not to be detained further. Indeed, Section 436A of the 1973 Code also contemplates that the relief under this provision cannot be granted mechanically. It is still within the discretion of the Court, unlike the default bail under Section 167 of the 1973 Code. Under Section 436A of the 1973 Code, however, the Court is required to consider the relief on

case-to-case basis. As the proviso therein itself recognises that, in a given case, the detention can be continued by the Court even longer than one-half of the period, for which, reasons are to be recorded by it in writing and also by imposing such terms and conditions so as to ensure that after release, the accused makes himself/herself available for expeditious completion of the trial.

148. However, that does not mean that the principle enunciated by this Court in ***Supreme Court Legal Aid Committee Representing Undertrial Prisoners***[662], to ameliorate the agony and pain of persons kept in jail for unreasonably long time, even without trial, can be whittled down on such specious plea of the State. If the Parliament/Legislature provides for stringent provision of no bail, unless the stringent conditions are fulfilled, it is the bounden duty of the State to ensure that such trials get precedence and are concluded within a reasonable time, at least before the accused undergoes detention for a period extending up to one-half of the maximum period of imprisonment specified for the concerned offence by law. [Be it noted, this provision (Section 436A of the 1973

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[662] Supra at Footnote No.658

Code) is not available to accused who is facing trial for offences punishable with death sentence].

149. In our opinion, therefore, Section 436A needs to be construed as a statutory bail provision and akin to Section 167 of the 1973 Code. Notably, learned Solicitor General has fairly accepted during the arguments and also restated in the written notes that the mandate of Section 167 of the 1973 Code would apply with full force even to cases falling under Section 3 of the 2002 Act, regarding money-laundering offences. On the same logic, we must hold that Section 436A of the 1973 Code could be invoked by accused arrested for offence punishable under the 2002 Act, being a statutory bail.

SECTION 50 OF THE 2002 ACT

150. The validity of this provision has been challenged on the ground of being violative of Articles 20(3) and 21 of the Constitution. For, it allows the authorised officer under the 2002 Act to summon any person and record his statement during the course of investigation. Further, the provision mandates that the person should disclose true and correct facts known to his personal

knowledge in connection with the subject matter of investigation. The person is also obliged to sign the statement so given with the threat of being punished for the falsity or incorrectness thereof in terms of Section 63 of the 2002 Act. Before we proceed to analyse the matter further, it is apposite to reproduce Section 50 of the 2002 Act, as amended. The same reads thus:

> "**50. Powers of authorities regarding summons, production of documents and to give evidence, etc**.— (1) The Director shall, for the purposes of section 13, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:—
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> (a) discovery and inspection;
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> (b) enforcing the attendance of any person, including any officer of a [663][reporting entity], and examining him on oath;
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> (c) compelling the production of records;
>
> (d) receiving evidence on affidavits;
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> (e) issuing commissions for examination of witnesses and documents; and
>
> (f) any other matter which may be prescribed.
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> (2) The Director, Additional Director, Joint Director, Deputy Director or Assistant Director shall have power to summon any person whose attendance he considers necessary whether to give evidence or to produce any records during the course of any investigation or proceeding under this Act.
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> (3) All the persons so summoned shall be bound to attend in person or through authorised agents, as such officer may direct, and shall be bound to state the truth upon any subject respecting which they are examined or make

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[663] Subs. by Act 2 of 2013, sec. 22, for "banking company or a financial institution or a company" (w.e.f. 15-2-2013, vide S.O. 343(E), dated 8-2-2013).

statements, and produce such documents as may be required.

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

(5) Subject to any rules made in this behalf by the Central Government, any officer referred to in sub-section (2) may impound and retain in his custody for such period, as he thinks fit, any records produced before him in any proceedings under this Act:

Provided that an Assistant Director or a Deputy Director shall not—

(a) impound any records without recording his reasons for so doing; or

(b) retain in his custody any such records for a period exceeding three months, without obtaining the previous approval of the [664][Joint Director].”

151. Section 50 forms part of Chapter VIII of the 2002 Act which deals with matters connected with authorities referred to in Section 48 in the same Chapter. Section 50 has been amended vide Act 2 of 2013 and again, by Act 13 of 2018. Nothing much would turn on these amendments.

152. By this provision, the Director has been empowered to exercise the same powers as are vested in a civil Court under the 1908 Code while trying a suit in respect of matters specified in sub-section (1). This is in reference to Section 13 of the 2002 Act dealing with powers

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[664] Subs. by Act 13 of 2018, sec. 208(f), for “Director” (w.e.f. 19-4-2018, vide G.S.R. 383(E), dated 19th April, 2018).

of Director to impose fine in respect of acts of commission and omission by the banking companies, financial institutions and intermediaries. From the setting in which Section 50 has been placed and the expanse of empowering the Director with same powers as are vested in a civil Court for the purposes of imposing fine under Section 13, is obviously very specific and not otherwise.

153. Indeed, sub-section (2) of Section 50 enables the Director, Additional Director, Joint Director, Deputy Director or Assistant Director to issue summon to any person whose attendance he considers necessary for giving evidence or to produce any records during the course of any investigation or proceeding under this Act. We have already highlighted the width of expression "proceeding" in the earlier part of this judgment and held that it applies to proceeding before the Adjudicating Authority or the Special Court, as the case may be. Nevertheless, sub-section (2) empowers the authorised officials to issue summon to any person. We fail to understand as to how Article 20(3) would come into play in respect of process of recording statement pursuant to such summon which is only for the purpose of collecting information or evidence in

respect of proceeding under this Act. Indeed, the person so summoned, is bound to attend in person or through authorised agent and to state truth upon any subject concerning which he is being examined or is expected to make statement and produce documents as may be required by virtue of sub-section (3) of Section 50 of the 2002 Act. The criticism is essentially because of sub-section (4) which provides that every proceeding under sub-sections (2) and (3) shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the IPC. Even so, the fact remains that Article 20(3) or for that matter Section 25 of the Evidence Act, would come into play only when the person so summoned is an accused of any offence at the relevant time and is being compelled to be a witness against himself. This position is well-established. The Constitution Bench of this Court in ***M.P. Sharma***[665] had dealt with a similar challenge wherein warrants to obtain documents required for investigation were issued by the Magistrate being violative of Article 20(3) of the Constitution. This Court opined that the guarantee in Article 20(3) is against

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[665] Supra at Footnote No.324 (also at Footnote No.47)

"testimonial compulsion" and is not limited to oral evidence. Not only that, it gets triggered if the person is compelled to be a witness against himself, which may not happen merely because of issuance of summons for giving oral evidence or producing documents. Further, to be a witness is nothing more than to furnish evidence and such evidence can be furnished by different modes. The Court went on to observe as follows:

> "Broadly stated the guarantee in article 20(3) is against "testimonial compulsion". It is suggested that this is confined to the oral evidence of a person standing his trial for an offence when called to the witness-stand. We can see no reason to confine the content of the constitutional guarantee to this barely literal import. So to limit it would be to rob the guarantee of its substantial purpose and to miss the substance for the sound as stated in certain American decisions. The phrase used in Article 20(3) is "to be a witness". A person can "be a witness" not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness (See section 119 of the Evidence Act) or the like. "To be a witness" is nothing more than "to furnish evidence", and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes. So far as production of documents is concerned, no doubt Section 139 of the Evidence Act says that a person producing a document on summons is not a witness. But that section is meant to regulate the right of cross-examination. It is not a guide to the connotation of the word "witness", which must be understood in its natural sense, i.e., as referring to a person who furnishes evidence. Indeed, every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part. Nor is there any reason to think that the protection in respect of the evidence so procured is

> confined to what transpires at the trial in the court room. The phrase used in article 20(3) is "to be a witness" and not to "appear as a witness". It follows that the protection afforded to an accused in so far as it is related to the phrase "to be a witness" is not merely in respect of testimonial compulsion in the court room but may well extend to compelled testimony previously obtained from him. **It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution.** Whether it is available to other persons in other situations does not call for decision in this case."
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> (emphasis supplied)

154. In the case of ***Mohammed Dastagir***[666]**,** the Court restated that the requirement to invoke the protection under Article 20(3) is that the person must be formally accused of the offence and observed thus:

> "(9) …
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> > **"Considered in this light, the guarantee under Art. 20(3) would be available in the present cases these petitioners against whom a First Information Report has been recorded as accused therein.** It would extend to any compulsory process for production of evidentiary documents which are reasonably likely to support a prosecution against them."
>
> These observations were unnecessary in Sharma's case[667], having regard to the fact that this Court held that the seizure of documents on a search warrant was not unconstitutional as that would not amount to a compulsory production of incriminating evidence. In the present case, even on what was stated in Sharma's

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[666] Supra at Footnote No.325

[667] Supra at Footnote No.324 (also at Footnote No.47)

> case[668], there was no formal accusation against the appellant relating to the commission of an offence. Mr. Kaliyappan had clearly stated that he was not doing any investigation. It does not appear from his evidence that he had even accused the appellant of having committed any offence. Even if it were to be assumed that the appellant was a person accused of an offence the circumstances do not establish that he was compelled to produce the money which he had on his person. No doubt he was asked to do so. It was, however, within his power to refuse to comply with Mr. Kaliyappan's request. In our opinion, the facts established in the present case show that the appellant was not compelled to produce the currency notes and therefore do not attract the provisions of Art. 20(3) of the Constitution."
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> (emphasis supplied)

155. In yet another case in ***Raja Narayanlal Bansilal***[669], the Constitution Bench dealt with the challenge to the validity of the notice served on the appellant for asking the appellant to attend the office of the Inspector appointed by the Central Government to investigate into the affairs of the company and for giving statement and producing books of accounts and other documents. The Court repelled the said challenge in the following words:

> "(23).....**Similarly, for invoking the constitutional right against testimonial compulsion guaranteed under Art. 20(3) it must appear that a formal accusation has been made against the party pleading the guarantee and that it relates to the commission of an offence which in the normal course may result in prosecution....** .

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[668] Supra at Footnote No.324 (also at Footnote No.47)

[669] Supra at Footnote No.327

> (25) ……The cardinal words of the section are those which empower the Commissioner or his inspector to examine into and report on the affairs of the society". **Thus it is clear that the examination of, or investigation into, the affairs of the company cannot be regarded as a proceeding started against any individual after framing an accusation against him. Besides it is quite likely that in some cases investigation may disclose that there are no irregularities, or if there are they do not amount to the commission of any offence; in such cases there would obviously be no occasion for the Central Government to institute criminal proceedings under S. 242(1). Therefore, in our opinion, the High Court was right in holding that when the inspector issued the impugned notices against the appellant he cannot be said to have been accused of any offence; and so the first essential condition for the application of Art. 20(3) is absent.** We ought to add that in the present case the same conclusion would follow even if the clause "accused of any offence" is interpreted more liberally than was done in the case of M.P. Sharma[670] because even if the expression "accused of any offence" is interpreted in a very broad and liberal way it is clear that at the relevant stage the appellant has not been, and in law cannot be, accused of any offence. …."
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> (emphasis supplied)

156. Again, the question came up for consideration before the eleven Judges of this Court in ***Kathi Kalu Oghad***[671], wherein the Court noted that the person on whom summon has been served, must fulfil the character of an accused person at the time of making the statement. The Court expounded thus:

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[670] Supra at Footnote No.324 (also at Footnote No.47)

[671] Supra at Footnote No.44

> "(15) **In order to bring the evidence within the inhibitions of cl. (3) of Art. 20 it is must be shown not only that the person making the statement was an accused at the time he made it** and that it had a material bearing on the criminality of the maker of the statement, but also that he was compelled to make that statement. 'Compulsion' in the context, must mean what in law is called 'duress'. In the Dictionary of English Law by Earl Jowitt, 'duress' is explained as follows:
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> > "Duress is where a man is compelled to do an act by injury, beating or unlawful imprisonment (sometimes called duress in strict sense) or by the threat of being killed, suffering some grievous bodily harm, or being unlawfully imprisoned (sometimes called menace, or duress per mines). Duress also includes threatening, beating or imprisonment of the wife, parent or child of a person."
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> …."
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> (emphasis supplied)

157. In another celebrated decision of this Court in ***Romesh Chandra Mehta***[672], while following the earlier decisions and dealing with the challenge in reference to the provisions of the Sea Customs Act, the Court noted thus:

> "In the two earlier cases *M.P. Sharma's case*[673] and *Raja Narayanlal Bansilal Case*[674] this Court in describing a person accused used the expression "against whom a formal accusation had been made", and in *Kathi Kalu Oghad's case*[675] this Court used the expression "the person accused must have stood in the character of an accused person". Counsel for Mehta urged that the earlier authorities were superseded in *Kathi Kalu Oghad's*

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[672] Supra at Footnote No.119

[673] Supra at Footnote No.324 (also at Footnote No.47)

[674] Supra at Footnote No.327

[675] Supra at Footnote No.44

> *case*[676] and it was ruled that a statement made by a person standing in the character of a person accused of an offence is inadmissible by virtue of Art. 20(3) of the Constitution. But the Court in *Kathi Kalu Oghad's case*[677] has not set out a different test for determining the stage when a person may be said to be accused of an offence. In *Kathi Kalu Oghad's case*[678] the Court merely set out the principles in the light of the effect of a formal accusation on a person, *viz.*, that he stands in the character of an accused person at the time when he makes the statement. **Normally a person stands in the character of an accused when a First Information Report is lodged against him in respect of an offence before an Officer competent to investigate it, or when a complaint is made relating to the commission of an offence before a Magistrate competent to try or send to another Magistrate for trial the offence. Where a Customs Officer arrests a person and informs that person of the grounds of his arrest, (which he is bound to do under Art. 22(1) of the Constitution) for the purposes of holding an enquiry into the infringement of the provisions of the Sea Customs Act which he has reason to believe has taken place, there is no formal accusation of an offence.** In the case of an offence by infringement of the Sea Customs Act and punishable at the trial before a Magistrate there is an accusation when a complaint is lodged by an officer competent in that behalf before the Magistrate."
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> (emphasis supplied)

158. Relying on the exposition in ***Nandini Satpathy***[679], it was urged that it is not necessary that a formal accusation is made against the person in the form of FIR/ECIR/chargesheet/complaint

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[676] Supra at Footnote No.44

[677] Supra at Footnote No.44

[678] Supra at Footnote No.44

[679] Supra at Footnote No.35

to invoke protection under Article 20(3) of the Constitution and that protection is available even to a suspect at the time of interrogation. (See also ***Balkishan A. Devidayal***[680] and ***Selvi***[681]).

159. In the context of the 2002 Act, it must be remembered that the summon is issued by the Authority under Section 50 in connection with the inquiry regarding proceeds of crime which may have been attached and pending adjudication before the Adjudicating Authority. In respect of such action, the designated officials have been empowered to summon any person for collection of information and evidence to be presented before the Adjudicating Authority. It is not necessarily for initiating a prosecution against the noticee as such. The power entrusted to the designated officials under this Act, though couched as investigation in real sense, is to undertake inquiry to ascertain relevant facts to facilitate initiation of or pursuing with an action regarding proceeds of crime, if the situation so warrants and for being presented before the Adjudicating Authority. It is a different matter that the information

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[680] Supra at Footnote Nos.120 (also at Footnote No.41)

[681] Supra at Footnote No.43

and evidence so collated during the inquiry made, may disclose commission of offence of money-laundering and the involvement of the person, who has been summoned for making disclosures pursuant to the summons issued by the Authority. At this stage, there would be no formal document indicative of likelihood of involvement of such person as an accused of offence of money-laundering. If the statement made by him reveals the offence of money-laundering or the existence of proceeds of crime, that becomes actionable under the Act itself. To put it differently, at the stage of recording of statement for the purpose of inquiring into the relevant facts in connection with the property being proceeds of crime is, in that sense, not an investigation for prosecution as such; and in any case, there would be no formal accusation against the noticee. Such summons can be issued even to witnesses in the inquiry so conducted by the authorised officials. However, after further inquiry on the basis of other material and evidence, the involvement of such person (noticee) is revealed, the authorised officials can certainly proceed against him for his acts of commission or omission. In such a situation, at the stage of issue of summons, the person cannot claim protection under Article 20(3) of the

Constitution. However, if his/her statement is recorded after a formal arrest by the ED official, the consequences of Article 20(3) or Section 25 of the Evidence Act may come into play to urge that the same being in the nature of confession, shall not be proved against him. Further, it would not preclude the prosecution from proceeding against such a person including for consequences under Section 63 of the 2002 Act on the basis of other tangible material to indicate the falsity of his claim. That would be a matter of rule of evidence.

160. The Andhra Pradesh High Court in ***Dalmia Cement (Bharat) Limited***[682], while dealing with the purpose of investigation under Section 50(2) noted that it is essentially for collecting evidence with regard to the involvement of a person or about existence of certain facts concerning proceeds of crime or process or activity connected with proceeds of crime, such inquiry or investigation could be commenced on the basis of information to be recorded in the internal document maintained by the authority authorised also described as ECIR. The High Court noted as follows:

> "**33**. In the light of the detailed submissions of the learned senior counsel on either side, the point for consideration is: Whether the summons issued to the second petitioner under Section 50(2) and (3) of PMLA is violative of the

[682] Supra at Footnote No.234

> Constitutional protection and guarantee under Article 20(3) of the Constitution of India.
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> *** *** ***
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> **47. At this stage, therefore, investigation is only for the purpose of collecting evidence with regard to proceeds of crime in the hands of the persons suspected and their involvement, if any, in the offence under Section 3 of PMLA. I am, therefore, unable to equate ECIR registered by the first respondent to an FIR under Section 154 Cr.P.C and consequently, I agree with the learned Additional Solicitor General that under PMLA the petitioners are not accused at present**. Consequently, therefore, the submission on behalf of the petitioners on the assumption that petitioners are accused under PMLA is liable to be rejected."
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> (emphasis supplied)

161. The Delhi High Court also had occasion to examine the provisions of the 2002 Act in ***Vakamulla Chandrashekhar***[683] and noted the special feature of the 2002 Act which deals with both civil and criminal consequences as against the offender. Having so noted, the High Court observed as follows:

> "**11**. The act of money laundering has both civil and criminal consequences for the perpetrator. To deal with the civil consequences, the Act creates, and empowers the adjudicating authority (under Section 2(1)(a) read with Section 6) with powers of a Civil Court to summon, direct production of documents and evidence (see Section 11), and adjudicate on the issue whether any property is involved in money laundering (Section 8). It also creates the right of appeal from orders of the Adjudicating Authority (Section 26), and designates the Appellate Tribunal authorized to hear appeals (Section 2(b) read

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[683] Supra at Footnote No.226

with Section 25). It also creates a right of further appeal before the High Court (Section 42)."

162. It is, thus, clear that the power invested in the officials is one for conducting inquiry into the matters relevant for ascertaining existence of proceeds of crime and the involvement of persons in the process or activity connected therewith so as to initiate appropriate action against such person including of seizure, attachment and confiscation of the property eventually vesting in the Central Government.

163. We are conscious of the fact that the expression used in Section 2(1)(na) of the 2002 Act is "investigation", but there is obvious distinction in the expression "investigation" occurring in the 1973 Code. Under Section 2(h) of the 1973 Code, the investigation is done by a "police officer" or by any person (other than a Magistrate) who is authorised by a Magistrate thereby to collect the evidence regarding the crime in question. Whereas, the investigation under Section 2(1)(na) of the 2002 Act is conducted by the Director or by an authority authorised by the Central Government under the 2002 Act for the collection of evidence for the purpose of proceeding under this Act. Obviously, this investigation is in the nature of inquiry to

initiate action against the proceeds of crime and prevent activity of money-laundering. In the process of such investigation, the Director or the authority authorised by the Central Government referred to in Section 48 of the 2002 Act is empowered to resort to attachment of the proceeds of crime and for that purpose, also to do search and seizure and to arrest the person involved in the offence of money-laundering. While doing so, the prescribed authority (Director, Additional Director, Joint Director, Deputy Director or Assistant Director) alone has been empowered to summon any person for recording his statement and production of documents as may be necessary by virtue of Section 50 of the 2002 Act. *Sensu stricto,* at this stage (of issuing summon), it is not an investigation for initiating prosecution in respect of crime of money-laundering as such. That is only an incidental matter and may be the consequence of existence of proceeds of crime and identification of persons involved in money-laundering thereof. The legislative scheme makes it amply clear that the authority authorised under this Act is not a police officer as such. This becomes amply clear from the speech of the then Finance Minister delivered in 2005, which reads thus:

> "Sir, the Money-Laundering Act was passed by this House in the year 2002, and number of steps have to be taken to implement it. Sir, two kinds of steps were required. One was to appoint an authority who will gather intelligence and

information, and the other was an authority to investigate and prosecute. This Act was made to implement the political declaration adopted by the Special Session of the UN General Assembly in 1999. Section 1(3) of the Act stipulates that the Act will come into force on such date as the Central Government may by notification appoint. While we were examining the question of notifying the Act, I found that there was certain lacunae in the Act. I regret to say that not enough homework had been done in the definitions, and in the division of responsibility and authority. So, in consultation with the Ministry of Law, we came to the conclusion that these lacunae had to be removed. Broadly, the reasons for the amendment are the following.

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

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

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

....

What we are doing is, we are inserting a new Section, 2(n)(a) defining the term, 'investigation'; making an amendment to Sections 28, 29 and 30, dealing with

> tribunals; amending Sections 44 and 45 of the Act to make the offence non-cognisable so that only the Director could take action; and also making consequential changes in Section 73. I request hon. Members to kindly approve of these amendments so that the Act could be amended quickly and we could bring it into force."
>
> (emphasis supplied)

From this speech, it is more than clear that the intention of the Parliament was to empower the prescribed Authority under Section 48 including the class of officers appointed for the purposes of this Act to investigate the matters falling within the purview of the Act and in the manner specified in that regard. By inserting Section 45(1A) in the 2002 Act vide amendment Act 20 of 2005, was essentially to restrict and explicitly disable the police officer from taking cognizance of the offence of money-laundering much less investigating the same. It is a provision to restate that only the Authority (Section 48) under this Act is competent to do investigation in respect of matters specified under the 2002 Act and none else. This provision rules out coextensive power to local police as well as the authority authorised. As aforementioned, the officer specifically authorised is also expected to confine the inquiry/investigation only in respect of matters under this Act and in the manner specified therein.

164. The purposes and objects of the 2002 Act for which it has been enacted, is not limited to punishment for offence of money-laundering, but also to provide measures for prevention of money-laundering. It is also to provide for attachment of proceeds of crime, which are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceeding relating to confiscation of such proceeds under the 2002 Act. This Act is also to compel the banking companies, financial institutions and intermediaries to maintain records of the transactions, to furnish information of such transactions within the prescribed time in terms of Chapter IV of the 2002 Act[684].

164A. Considering the above, it is unfathomable as to how the authorities referred to in Section 48 can be described as police officer. The word "police" in common parlance means a civil force whose main aim is to prevent and detect crimes and to maintain law and order of the nation as expounded in ***Barkat Ram***[685]. In this decision, while dealing with the role of Customs Officer under the Land Customs Act, 1924[686], the Court opined as follows:

> "The Police Act, 1861 (Act V of 1861), is described as an Act for the regulation of police, and is thus an Act for the

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[684] *See Pareena Swarup* (supra at Footnote No.366)

[685] Supra at Footnote No.24

[686] For short, "Land Customs Act"

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

And again, opined thus:

> "….The Customs Officer, therefore, is **not primarily concerned with the detection and punishment of crime committed by a person**, but is mainly interested in the detection and prevention of smuggling of goods and safeguarding the recovery of customs duties. He is more concerned with the goods and customs duty, than with the offender."

Thus, this Court concluded that the Customs Officer under the Land Customs Act is not a police officer within the meaning of Section 25 of the Evidence Act. In that, the main object of the Customs Officer

is to safeguard goods and customs duty and detection and prevention of crime is an ancillary function.

165. On similar lines, in the case of ***Raja Ram Jaiswal***[687], while examining the efficacy of confession made to an Excise Inspector under the 1915 Act, the Court held as follows:

> "(10). …Thus he can exercise all the powers which an officer in charge of a police station can exercise under Chapter XIV of the Code of Criminal Procedure. **He can investigate into offences, record statements of the persons questioned by him, make searches, seize any articles connected with an offence under the Excise Act, arrest an accused person, grant him bail, send him up for trial before a Magistrate, file a charge-sheet and so on. Thus his position in so far as offences under the Excise Act committed within the area to which his appointment extends are concerned is not different from that of an officer in charge of a police station.** As regards these offences not only is he charged with the duty of preventing their commission but also with their detection and is for these purposes empowered to act in all respects as an officer in charge of a police station. No doubt unlike an officer in charge of a police station he is not charged with the duty of the maintenance of law and order nor can he exercise the powers of such officer with respect to offences under the general law or under any other special laws. But all the same, in so far as offences under the Excise Act are concerned, there is no distinction whatsoever in the nature of the powers he exercises and those which a police officer exercises in relation to offences which it is his duty to prevent and bring to light. **It would be logical, therefore, to hold that a confession recorded by him during an investigation into an excise offence cannot reasonably be regarded as anything different from a confession to a police officer. For, in conducting the**

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[687] Supra at Footnote No.30

investigation he exercises the powers of a police officer and the act itself deems him to be a police officer, even though he does not belong to the police force constituted under the Police Act. It has been held by this court that the expression "police officer" in S. 25 of the Evidence Act is not confined to persons who are members of the regularly constituted police force. The position of an Excise Officer empowered under S. 77(2) of the Bihar and Orissa Excise Act is not analogous to that of a Customs Officer for two reasons. One is that the Excise Officer, does not exercise any judicial powers just as the Customs Officer does under the Sea Customs Act, 1878. Secondly, the Customs Officer is not deemed to be an officer in charge of a police station and therefore can exercise no powers under the Code of Criminal Procedure and certainly not those of an officer in charge of a police station. No doubt, he too has the power to make a search, to seize articles suspected to have been smuggled and arrest persons suspected of having committed an offence under the Sea Customs Act. But that is all. Though he can make an enquiry, he has no power to investigate into an offence under S. 156 of the Code of Criminal Procedure. Whatever powers he exercises are expressly set out in the Sea Customs Act. Though some of those set out in Ch. XVII may be analogous to those of a Police Officer under the Code of Criminal Procedure they are not identical with those of a police officer and are not derived from or by reference to the Code. In regard to certain matters, he does not possess powers even analogous to those of a Police Officer. Thus he is not entitled to submit a report to a Magistrate under S. 190 of the Code of Criminal Procedure with a view that cognizance of the offence be taken by the Magistrate. Section 187(A) of the Sea Customs Act specifically provides that cognizance of an offence under the Sea Customs Act can be taken only upon a complaint in writing made by the Customs Officers or other officer of the customs not below the rank of an Assistant Collector of Customs authorised in this behalf by the Chief Customs Officer.

(11) It may well be that a statute confers powers and imposes duties on a public servant, some of which are analogous to those of a police officer. But by reason of the nature of other duties which he is required to perform he may be exercising various other powers also. It is argued on behalf of the State that where such is the case the

> mere conferral of some only of the powers of a police officer on such a person would not make him a police officer and, therefore, what must be borne in mind is the sum total of the powers which he enjoys by virtue of his office as also the dominant purpose for which he is appointed. The contention thus is that when an officer has to perform a wide range of duties and exercise correspondingly a wide range of powers, the mere fact that some of the powers which the statute confers upon him are analogous to or even identical with those of a police officer would not make him a police officer and, therefore, if such an officer records a confession it would not be hit by S. 25 of the Evidence Act. In our judgment what is pertinent to bear in mind for the purpose of determining as to who can be regarded a 'police officer' for the purpose of this provision is not the totality of the powers which an officer enjoys but the kind of powers which the law enables him to exercise. The test for determining whether such a person is a "police officer" for the purpose of S. 25 of the Evidence Act would, in our judgment, be whether the powers of a police officer which are conferred on him or which are exercisable by him because he is deemed to be an officer in charge of police station establish a direct or substantial relationship with the prohibition enacted by S. 25, that is, the recording of a confession**. In other words, the test would be whether the powers are such as would tend to facilitate the obtaining by him of a confession from a suspect or delinquent. If they do, then it is unnecessary to consider the dominant purpose for which he is appointed or the question as to what other powers he enjoys**. These questions may perhaps be relevant for consideration where the powers of the police officer conferred upon him are of a very limited character and are not by themselves sufficient to facilitate the obtaining by him of a confession."
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> (emphasis supplied)

166. Again, in the case of ***Badaku Joti Svant***[688], the Constitution Bench of this Court held that a Central Excise Officer exercising

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[688] Supra at Footnote No.357

power under Central Excise and Salt Act, 1944 is not a police officer as he does not possess the power to submit a charge-sheet under Section 173 of the 1973 Code. The Court noted thus:

> "(9) .....It is urged that under sub-s. (2) of S. 21 a Central Excise Officer under the Act has all the powers of an officer-in-charge of a police station under Chap. XIV of the Cr.P.C. and, therefore, he must be deemed to be a police officer within the meaning of those words in S. 25 of the Evidence Act. It is true that sub-s. (2) confers on the Central Excise Officer under the Act the same powers as an officer-in-charge of a police station has when investigating a cognizable case; but this power is conferred for the purpose of sub-s. (1) which gives power to a Central Excise Officer to whom any arrested person is forwarded to inquire into the charge against him. Thus under S. 21 it is the duty of the Central Excise Officer to whom an arrested person is forwarded to inquire into the charge made against such person. Further under proviso (a) to sub-s. (2) of S. 21 if the Central Excise Officer is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused person, he shall either admit him to bail to appear before a Magistrate having jurisdiction in the case, or forward him in custody to such Magistrate. **It does not, however, appear that a Central Excise Officer under the Act has power to submit a charge-sheet under S. 173 of the Cr.P.C.** Under S. 190 of the Cr.P.C. a Magistrate can take cognizance of any offence either (a) upon receiving a complaint of facts which constitute such offence, or (b) upon a report in writing of such facts made by any police officer, or (c) upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been committed. **A police officer for purposes of Cl. (b) above can in our opinion only be a police officer properly so-called as the scheme of the Code of Criminal Procedure shows and it seems therefore that a Central Excise Officer will have to make a complaint under Cl. (a) above if he wants the Magistrate to take cognizance of an offence, for example, under S. 9 of the Act**. Thus though under sub-s. (2) of S. 21 the Central Excise Officer under the Act has the powers of an officer-in-charge of a

> police station when investigating a cognizable case, that is for the purpose of his inquiry under sub-s. (1) of S. 21. Section 21 is in terms different from S. 78(3) of the Bihar and Orissa Excise Act, 1915 which came to be considered in Raja Ram Jaiswal's case[689] and which provided in terms that "for the purposes of S. 156 of the Cr.P.C., 1898, the area to which an excise officer empowered under S. 77, sub-s. (2), is appointed shall be deemed to be a police-station, and such officer shall be deemed to be the officer-in-charge of such station". It cannot therefore be said that the provision in S. 21 is on par with the provision in S. 78(3) of the Bihar and Orissa Excise Act. All that S. 21 provides is that for the purpose of his enquiry, a Central Excise Officer shall have the powers of an officer-in-charge of a police station when investigating a cognizable case. But even so it appears that these powers do not include the power to submit a charge-sheet under S. 173 of the Cr.P.C., for unlike the Bihar and Orissa Excise Act, the Central Excise Officer is not deemed to be an officer in charge of a police station."

167. Another Constitution Bench of this Court in ***Romesh Chandra Mehta***[690] concluded that a Customs Officer under the Sea Customs Act, 1878 could not be coined as a police officer and noted thus:

> ".....The Customs Officer does not exercise, when enquiring into a suspected infringement of the Sea Customs Act, powers of investigation which a police-officer may in investigating the commission of an offence. He is invested with the power to enquire into infringements of the Act primarily for the purpose of adjudicating forfeiture and penalty**. He has no power to investigate an offence triable by a Magistrate, nor has he the power to submit a report under s. 173 of the Code of Criminal Procedure. He can only make a complaint in writing before a competent Magistrate**."

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[689] Supra at Footnote No.30

[690] Supra at Footnote No.119

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> ".....But the test for determining whether an officer of customs is to be deemed a police officer **is whether he is invested with all the powers of a police officer *qua* investigation of an offence, including the power to submit a report under s. 173 of the Code of Criminal Procedure**. It is not claimed that a Customs Officer exercising power to make an enquiry may submit a report under s. 173 of the Code of Criminal Procedure."
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> (emphasis supplied)

168. The petitioners, however, have pressed into service exposition of this Court in the recent decision in ***Tofan Singh***[691], which had occasion to deal with the provisions of the NDPS Act wherein the Court held that the designated officer under that Act must be regarded as a police officer. The Court opined that the statement made before him would be violative of protection guaranteed under Article 20(3) of the Constitution. This decision has been rightly distinguished by the learned Additional Solicitor General on the argument that the conclusion reached in that judgment is on the basis of the legislative scheme of the NDPS Act, which permitted that interpretation. However, it is not possible to reach at the same conclusion in respect of the 2002 Act for more than one reason. In this decision, the Court first noted that the Act (NDPS Act) under

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[691] Supra at Footnote No.31 (also at Footnote No.24)

consideration was a penal statute. In the case of 2002 Act, however, such a view is not possible. The second aspect which we have repeatedly adverted to, is the special purposes and objects behind the enactment of the 2002 Act. As per the provisions of the NDPS Act, it permitted both a regular police officer as well as a designated officer, who is not a defined police officer, to investigate the offence under that Act. This has resulted in discrimination. Such a situation does not emerge from the provisions of the 2002 Act. The 2002 Act, on the other hand, authorises only the authorities referred to in Section 48 to investigate/inquire into the matters under the Act in the manner prescribed therein. The provision inserted in 2005 as Section 45(1A) is not to empower the regular police officers to take cognizance of the offence. On the other hand, it is a provision to declare that the regular police officer is not competent to take cognizance of offence of money-laundering, as it can be investigated only by the authorities referred to in Section 48 of the 2002 Act. The third aspect which had weighed with the Court in ***Tofan Singh***[692] is that the police officer investigating an offence under the NDPS Act, the provisions

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[692] Supra at Footnote No.31 (also at Footnote No.24)

of Sections 161 to 164 of the 1973 Code as also Section 25 of the Evidence Act, would come into play making the statement made before them by the accused as inadmissible. Whereas, the investigation into the same offence was to be done by the designated officer under the NDPS Act, the safeguards contained in Sections 161 to 164 of the 1973 Code and Section 25 of the Evidence Act, will have no application and the statement made before them would be inadmissible in evidence. This had resulted in discrimination. No such situation emerges from the provisions of the 2002 Act. Whereas, the 2002 Act clearly authorises only the authorities under the 2002 Act referred to in Section 48 to step in and summon the person when occasion arises and proceed to record the statement and take relevant documents on record. For that, express provision has been made authorising them to do so and by a legal fiction, deemed it to be a statement recorded in a judicial proceeding by virtue of Section 50(4) of the 2002 Act. A regular police officer will neither be in a position to take cognizance of the offence of money-laundering, much less be permitted to record the statement which is to be made part of the proceeding before the Adjudicating Authority under the 2002 Act for confirmation of the provisional

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attachment order and confiscation of the proceeds of crime for eventual vesting in the Central Government. That may entail in civil consequences. It is a different matter that some material or evidence is made part of the complaint if required to be filed against the person involved in the process or activity connected with money-laundering so as to prosecute him for offence punishable under Section 3 of the 2002 Act. The next point which has been reckoned by this Court in the said decision is that in the provisions of NDPS Act, upon culmination of investigation of crime by a designated officer under that Act (other than a Police Officer), he proceeds to file a complaint; but has no authority to further investigate the offence, if required. Whereas, if the same offence was investigated by a regular Police Officer after filing of the police report under Section 173(2) of the 1973 Code, he could still do further investigation by invoking Section 173(8) of the 1973 Code. This, on the face of it, was discriminatory.

169. Notably, this dichotomy does not exist in the 2002 Act for more than one reason. For, there is no role for the regular Police Officer. The investigation is to be done only by the authorities under the 2002 Act and upon culmination of the investigation, to file complaint

before the Special Court. Moreover, by virtue of Clause (ii) of Explanation in Section 44(1) of the 2002 Act, it is open to the authorities under this Act to bring any further evidence, oral or documentary, against any accused person involved in respect of offence of money-laundering, for which, a complaint has already been filed by him or against person not named in the complaint and by legal fiction, such further complaint is deemed to be part of the complaint originally filed. Strikingly, in ***Tofan Singh***[692A] the Court also noted that, while dealing with the provisions of the NDPS Act, the designated officer has no express power to file a closure report unlike the power bestowed on the police officer, if he had investigated the same crime under the NDPS Act. Once again, this lack of authority to file closure report is not there in the 2002 Act. For, by the virtue of proviso in Section 44(1)(b), after conclusion of investigation, if no offence of money-laundering is made out requiring filing of a complaint, the Authority under the Act expected to file such complaint, is permitted to file a closure report before the Special Court in that regard. In that decision, while analysing the provisions of the Section 67 of the NDPS Act, the Court noted that the statement recorded under Section 67 of that Act was to be held

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[692A] Supra at Footnote No.31 (also at Footnote No.24)

as inadmissible in all situations. That renders Section 53A of the same Act otiose. Section 53A of the NDPS Act is about relevancy of statement made under certain circumstances. Realising the conflicting position emerging in the two provisions, the issue came to be answered.

170. However, in the case of provisions of the 2002 Act, there is no similar provision as Section 53A of the NDPS Act. As a result, even this deficiency noticed in that judgment has no application to the provisions of the 2002 Act. The Court also noted in that decision that unlike the provisions of in the Customs Acts, 1962, Central Excise Act, 1944 and Railway Property (Unlawful Possession) Act, 1966, in the case of NDPS Act prevention, detection and punishment of crime cannot be said to be ancillary to the purpose of regulating and exercising of control over narcotic drugs and psychotropic substances.

171. We have already adverted to the purposes and objects for enacting the 2002 Act. It is a *sui generis* legislation, not only dealing with the prevention, detection, attachment, confiscation, vesting and making it obligatory for the banking companies, financial

institutions and intermediaries to comply with certain essential formalities and make them accountable for failure thereof, and also permits prosecution of the persons found involved in the money-laundering activity. Keeping in mind the sweep of the purposes and objectives of the 2002 Act, the reason weighed with this Court while dealing with the provisions of the NDPS Act, will have no bearing whatsoever. In that decision, this Court also noted that the offences under the NDPS Act are cognizable as opposed to other statutes referred to above. The scheme of the NDPS Act, including regarding making offences under that Act as cognizable by the designated officer as well as the local police, and the scheme of the 2002 Act is entirely different.

171A. Indeed, in the original 2002 Act, as enacted, the offence of money-laundering was made cognizable as a result of which confusion had prevailed in dealing with the said crime when the legislative intent was only to authorise the Authority under the 2002 Act to deal with such cases. That position stood corrected in 2005, as noticed earlier. The fact that the marginal note of Section 45 retains marginal note that offences to be cognizable and non-

bailable, however, does not mean that the regular Police Officer is competent to take cognizance of the offence of money-laundering. Whereas, that description has been retained for the limited purpose of understanding that the offence of money-laundering is cognizable and non-bailable and can be inquired into and investigated by the Authority under the 2002 Act alone.

172. In other words, there is stark distinction between the scheme of the NDPS Act dealt with by this Court in ***Tofan Singh***[693] and that in the provisions of the 2002 Act under consideration. Thus, it must follow that the authorities under the 2002 Act are not Police Officers. *Ex-consequenti,* the statements recorded by authorities under the 2002 Act, of persons involved in the commission of the offence of money-laundering or the witnesses for the purposes of inquiry/investigation, cannot be hit by the vice of Article 20(3) of the Constitution or for that matter, Article 21 being procedure established by law. In a given case, whether the protection given to the accused who is being prosecuted for the offence of money-laundering, of Section 25 of the Evidence Act is available or not, may have to be considered on case-to-case basis being rule of evidence.

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[693] Supra at Footnote No.31 (also at Footnote No.24)

173. We may note that the learned Additional Solicitor General was at pains to persuade us to take the view that the decision in ***Tofan Singh***[694] is *per incuriam.* For the reasons already noted, we do not deem it necessary to examine that argument.

SECTION 63 OF THE 2002 ACT

174. By this provision, penal consequences are provided in respect of acts of commission and omission by any person who wilfully and maliciously gives false information and so causing an arrest or a search under this Act; also against the person legally bound to state the truth of any matter relating to an offence under Section 3, but refuses to answer such any question put to him by the Authority under the 2002 Act or refuses to sign any statement made by him in the course of any proceedings under the Act including failure to attend or produce books of account or documents when called upon to do so. Section 63 reads thus:

> "**63. Punishment for false information or failure to give information, etc.**—(1) Any person wilfully and maliciously giving false information and so causing an arrest or a search to be made under this Act shall on conviction be liable for imprisonment for a term which may extend to two years or with fine which may extend to fifty thousand rupees or both.

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[694] Supra at Footnote No.31 (also at Footnote No.24)

(2) If any person,—

(a) being legally bound to state the truth of any matter relating to an offence under section 3, refuses to answer any question put to him by an authority in the exercise of its powers under this Act; or

(b) refuses to sign any statement made by him in the course of any proceedings under this Act, which an authority may legally require to sign; or

(c) to whom a summon is issued under section 50 either to attend to give evidence or produce books of account or other documents at a certain place and time, omits to attend or produce books of account or documents at the place or time,

he shall pay, by way of penalty, a sum which shall not be less than five hundred rupees but which may extend to ten thousand rupees for each such default or failure.

(3) No order under this section shall be passed by an authority referred to in sub-section (2) unless the person on whom the penalty is proposed to be imposed is given an opportunity of being heard in the matter by such authority.

[695][(4) Notwithstanding anything contained in clause (c) of sub-section (2), a person who intentionally disobeys any direction issued under section 50 shall also be liable to be proceeded against under section 174 of the Indian Penal Code (45 of 1860).]"

This provision is only an enabling provision and applies to situations referred to therein. It is in the nature of providing consequences for not discharging the burden or cooperating with the authorities during the proceedings before the Authority and pursuant to summons, production of documents and to give evidence is issued by such Authority in exercise of power under Section 50 of the 2002

[695] Ins. by Act 2 of 2013, sec.26 (w.e.f. 15-2-2013, vide S.O. 343(E), dated 8-2-2013)

Act. The power exercised by the Authority is analogous to power vested in a civil Court under the 1908 Code while trying a suit in respect of matters referred to in Section 50 of the 2002 Act. This is in the nature of deeming provision empowering the concerned Authority to ensure prevention of money-laundering and also to take consequential steps for attachment and confiscation of the property involved in such money-laundering to be vested in the Central Government. Absent such authority given to the Director under the 2002 Act, the inquiry or investigation required to be done for fulfilling the mandate predicated under the 2002 Act, would eventually result in paper inquiry and no meaningful purpose would be served much less to combat the menace of money-laundering. In such inquiry if misleading revelations are made by any person or for that matter fails to cooperate, is required to be proceeded in accordance with law. In that sense, Section 63 is the procedure established by law. It is unfathomable to countenance the argument that such a provision must be regarded as unreasonable or manifestly arbitrary. It has clear nexus with the purposes and objects sought to be achieved by the 2002 Act.

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SCHEDULE OF THE 2002 ACT

175. The expression "scheduled offence" has been defined in Section 2(1)(y). This provision assumes significance as it has direct link with the definition of "proceeds of crime". In that, the property derived or obtained as a result of criminal activity relating to notified offences, termed as scheduled offence, is regarded as tainted property and dealing with such property in any manner is an offence of money-laundering. The Schedule is in three parts, namely Part A, B and C. Part A of the Schedule consists of 29 paragraphs. These paragraphs deal with respective enactments and the offences specified thereunder which are regarded as scheduled offences. Similarly, Part B deals with offence under the Customs Act specifically and Part C is in relation to offence of cross border implications. The Schedule reads thus:

"THE SCHEDULE
[*See* section 2(*y*)]
[696][PART A
PARAGRAPH 1
OFFENCES UNDER THE INDIAN PENAL CODE
(45 of 1860)

Section	**Description of offence**
120B	Criminal conspiracy.
121	Waging or attempting to wage war or abetting waging of war, against the

[696]Subs. by Act 2 of 2013, Sec. 30(i), for Part A (w.e.f. 15-2-2013, vide S.O. 343(E), dated 8-2-2013). Earlier Part A was amended by Act 21 of 2009, sec. 13 (w.e.f. 1-6-2009).

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	Government of India.
121A	Conspiracy to commit offences punishable by section 121 against the State.
255	Counterfeiting Government stamp.
257	Making or selling instrument for counterfeiting Government stamp.
258	Sale of counterfeit Government stamp.
259	Having possession of counterfeit Government stamp.
260	Using as genuine a Government stamp known to be counterfeit.
302	Murder.
304	Punishment for culpable homicide not amounting to murder.
307	Attempt to murder.
308	Attempt to commit culpable homicide.
327	Voluntarily causing hurt to extort property, or to constrain to an illegal act.
329	Voluntarily causing grievous hurt to extort property, or to constrain to an illegal act.
364A	Kidnapping for ransom, etc.
384 to 389	Offences relating to extortion.
392 to 402	Offences relating to robbery and dacoity.
411	Dishonestly receiving stolen property.
412	Dishonestly receiving property stolen in the commission of a dacoity.
413	Habitually dealing in stolen property.
414	Assisting in concealment of stolen property.
417	Punishment for cheating.
418	Cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect.
419	Punishment for cheating by personation.
420	Cheating and dishonestly inducing delivery of property.
421	Dishonest or fraudulent removal or concealment of property to prevent distribution among creditors.
422	Dishonestly or fraudulently preventing debt being available for creditors.
423	Dishonest or fraudulent execution of deed of transfer containing false statement of

	consideration.
424	Dishonest or fraudulent removal or concealment of property.
467	Forgery of valuable security, will, etc.
471	Using as genuine a forged document or electronic record.
472 and 473	Making or possessing counterfeit seal, etc., with intent to commit forgery.
475 and 476	Counterfeiting device or mark.
481	Using a false property mark.
482	Punishment for using a false property mark.
483	Counterfeiting a property mark used by another.
484	Counterfeiting a mark used by a public servant.
485	Making or possession of any instrument for counterfeiting a property mark.
486	Selling goods marked with a counterfeit property mark.
487	Making a false mark upon any receptacle containing goods.
488	Punishment for making use of any such false mark.
489A	Counterfeiting currency notes or bank notes.
489B	Using as genuine, forged or counterfeit currency notes or bank notes.

PARAGRAPH 2
OFFENCES UNDER THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985
(61 of 1985)

Section	Description of offence
15	Contravention in relation to poppy straw.
16.	Contravention in relation to coca plant and coca leaves.
17.	Contravention in relation to prepared opium.
18.	Contravention in relation to opium poppy and opium.
19.	Embezzlement of opium by cultivator.
20.	Contravention in relation to cannabis plant and cannabis.
21.	Contravention in relation to manufactured drugs and preparations.

22.	Contravention in relation to psychotropic substances.
23.	Illegal import into India, export from India to transhipment of narcotic drugs and psychotropic substances.
24.	External dealings in narcotic drugs and psychotropic substances in contravention of section 12 of the Narcotic Drugs and Psychotropic Substances Act, 1985.
25A	Contravention of orders made under section 9A of the Narcotic Drugs and Psychotropic Substances Act, 1985.
27A.	Financing illicit traffic and harbouring offenders.
29.	Abetment and criminal conspiracy.

PARAGRAPH 3
OFFENCES UNDER THE EXPLOSIVE SUBSTANCES ACT, 1908
(6 of 1908)

Section	Description of offence
3	Causing explosion likely to endanger life or property.
4	Attempt to cause explosion, or for making or keeping explosives with intent to endanger life or property.
5	Making or possessing explosives under suspicious circumstances.

PARAGRAPH 4
OFFENCES UNDER THE UNLAWFUL ACTIVITIES (PREVENTION) ACT, 1967
(37 of 1967)

Section	Description of offence
10 read with section 3	Penalty for being member of an unlawful association, etc.
11 read with section 3	Penalty for dealing with funds of an unlawful association.
13 read with section 3	Punishment for unlawful activities.
16 read with section 15	Punishment for terrorist act.
16A	Punishment for making demands of

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	radioactive substances, nuclear devices, etc.
17	Punishment for raising funds for terrorist act.
18	Punishment for conspiracy, etc.
18A	Punishment for organising of terrorist camps.
18B	Punishment for recruiting of any person or persons for terrorist act.
19	Punishment for harbouring, etc.
20	Punishment for being member of terrorist gang or organisation.
21	Punishment for holding proceeds of terrorism.
38	Offence relating to membership of a terrorist organisation.
39	Offence relating to support given to a terrorist organisation.
40	Offence of raising fund for a terrorist organisation.

PARAGRAPH 5
OFFENCES UNDER THE ARMS ACT, 1959
(54 of 1959)

Section	Description of offence
25	To manufacture, sell, transfer, convert, repair or test or prove or expose or offer for sale or transfer or have in his possession for sale, transfer, conversion, repair, test or proof, any arms or ammunition in contravention of section 5 of the Arms Act, 1959.
	To acquire, have in possession or carry any prohibited arms or prohibited ammunition in contravention of section 7 of the Arms Act, 1959.
	Contravention of section 24A of the Arms Act, 1959 relating to prohibition as to possession of notified arms in disturbed areas, etc.
	Contravention of section 24B of the Arms Act, 1959 relating to prohibition as to carrying of notified arms in or through public places in disturbed areas.

	Other offences specified in section 25.
26	To do any act in contravention of any provisions of section 3, 4, 10 or section 12 of the Arms Act, 1959 in such manner as specified in sub-section (1) of section 26 of the said Act.
	To do any act in contravention of any provisions of section 5, 6, 7 or section 11 of the Arms Act, 1959 in such manner as specified in sub-section (2) of section 26 of the said Act.
	Other offences specified in section 26.
27	Use of arms or ammunitions in contravention of section 5 or use of any arms or ammunition in contravention of section 7 of the Arms Act, 1959.
28	Use and possession of fire arms or imitation fire arms in certain cases.
29	Knowingly purchasing arms from unlicensed person or for delivering arms, etc., to person not entitled to possess the same.
30	Contravention of any condition of a licence or any provisions of the Arms Act, 1959 or any rule made thereunder.

PARAGRAPH 6
OFFENCES UNDER THE WILD LIFE (PROTECTION) ACT, 1972
(53 of 1972)

Section	Description of offence
51 read with section 9	Hunting of wild animals.
51 read with section 17A	Contravention of provisions of section 17A relating to prohibition of picking, uprooting, etc., of specified plants.
51 read with section 39	Contravention of provisions of section 39 relating to wild animals, etc., to be Government property.
51 read with section 44	Contravention of provisions of section 44 relating to dealings in trophy and animal articles without licence prohibited.
51 read with section 48	Contravention of provisions of section 48 relating to purchase of animal, etc., by

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	licensee.
51 read with section 49B	Contravention of provisions of section 49B relating to prohibition of dealings in trophies, animals articles, etc., derived from scheduled animals.

PARAGRAPH 7
OFFENCES UNDER THE IMMORAL TRAFFIC (PREVENTION) ACT, 1956
(104 of 1956)

Section	Description of offence
5.	Procuring, inducing or taking person for the sake of prostitution.
6.	Detaining a person in premises where prostitution is carried on.
8.	Seducing or soliciting for purpose of prostitution.
9.	Seduction of a person in custody.

[697][PARAGRAPH 8
OFFENCES UNDER THE PREVENTION OF CORRUPTION ACT, 1988
(49 of 1988)

Section	Description of offence
7.	Offence relating to public servant being bribed.
7A.	Taking undue advantage to influence public servant by corrupt or illegal means or by exercise of personal influence.

697 Subs. by Act 16 of 2018, sec. 19, for Paragraph 8 (w.e.f. 26-7-2018, vide S.O. 3664 (E), dated 26th July, 2018). Paragraph 8, before substitution, stood as under:

"**PARAGRAPH 8**
OFFENCES UNDER THE PREVENTION OF CORRUPTION ACT, 1988
(49 OF 1988)

Section	Description of offence
7	Public servant taking gratification other than legal remuneration in respect of an official act.
8	Taking gratification in order, by corrupt or illegal means, to influence public servant.
9	Taking gratification for exercise of personal influence with public servant.
10	Abetment by public servant of offences defined in section 8 or section 9 of the Prevention of Corruption Act, 1988.
13	Criminal misconduct by a public servant.".

8.	Offence relating to bribing a public servant.
9.	Offence relating to bribing a public servant by a commercial organisation.
10.	Person in charge of commercial organisation to be guilty of offence.
11.	Public servant obtaining undue advantage, without consideration from person concerned in proceeding or business transacted by such public servant.
12.	Punishment for abetment of offences.
13.	Criminal misconduct by a public servant.
14	Punishment for habitual offender.]

PARAGRAPH 9
OFFENCES UNDER THE EXPLOSIVES ACT, 1884
(4 of 1884)

Section	Description of offence
9B	Punishment for certain offences.
9C	Offences by companies.

PARAGRAPH 10
OFFENCES UNDER THE ANTIQUITIES AND ARTS TREASURES ACT, 1972
(52 of 1972)

Section	Description of offence
25 read with section 3	Contravention of export trade in antiquities and art treasures.
28	Offences by companies.

PARAGRAPH 11
OFFENCES UNDER THE SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992
(15 of 1992)

Section	Description of offence
12A read with section 24	Prohibition of manipulative and deceptive devices, insider trading and substantial.
24	Acquisition of securities or control.

PARAGRAPH 12
OFFENCES UNDER THE CUSTOMS ACT, 1962
(52 of 1962)

Section	Description of offence

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135	Evasion of duty or prohibitions.

PARAGRAPH 13
OFFENCES UNDER THE BONDED LABOUR SYSTEM (ABOLITION) ACT, 1976
(19 of 1976)

Section	Description of offence
16	Punishment for enforcement of bonded labour.
18	Punishment for extracting bonded labour under the bonded labour system.
20	Abetment to be an offence.

PARAGRAPH 14
OFFENCES UNDER THE CHILD LABOUR (PROHIBITION AND REGULATION) ACT, 1986
(61 of 1986)

Section	Description of offence
14	Punishment for employment of any child to work in contravention of the provisions of section 3.

PARAGRAPH 15
OFFENCES UNDER THE TRANSPLANTATION OF HUMAN ORGANS ACT, 1994
(42 of 1994)

Section	Description of offence
18	Punishment for removal of human organ without authority.
19	Punishment for commercial dealings in human organs.
20	Punishment for contravention of any other provision of this Act.

PARAGRAPH 16
OFFENCES UNDER THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000
(56 of 2000)

Section	Description of offence
23	Punishment for cruelty to juvenile or child.
24	Employment of juvenile or child for begging.
25	Penalty for giving intoxicating liquor or narcotic drug or psychotropic substance to juvenile or child.

26	Exploitation of juvenile or child employee.

PARAGRAPH 17
OFFENCES UNDER THE EMIGRATION ACT, 1983
(31 of 1983)

Section	Description of offence
24	Offences and penalties.

PARAGRAPH 18
OFFENCES UNDER THE PASSPORTS ACT, 1967
(15 of 1967)

Section	Description of offence
12	Offences and penalties.

PARAGRAPH 19
OFFENCES UNDER THE FOREIGNERS ACT, 1946
(31 of 1946)

Section	Description of offence
14	Penalty for contravention of provisions of the Act, etc.
14B	Penalty for using forged passport.
14C	Penalty for abetment.

PARAGRAPH 20
OFFENCES UNDER THE COPYRIGHT ACT, 1957
(14 of 1957)

Section	Description of offence
63	Offence of infringement of copyright or other rights conferred by this Act.
63A.	Enhanced penalty on second and subsequent convictions.
63B.	Knowing use of infringing copy of computer programme.
68A.	Penalty for contravention of section 52A.

PARAGRAPH 21
OFFENCES UNDER THE TRADE MARKS ACT, 1999
(47 of 1999)

Section	Description of offence
103	Penalty for applying false trade marks, trade descriptions, etc.
104	Penalty for selling goods or providing services to which false trade mark or false trade description is applied.

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105	Enhanced penalty on second or subsequent conviction.
107	Penalty for falsely representing a trade mark as registered.
120	Punishment of abetment in India of acts done out of India.

PARAGRAPH 22
OFFENCES UNDER THE INFORMATION TECHNOLOGY ACT, 2000
(21 of 2000)

Section	Description of offence
72	Penalty for breach of confidentiality and privacy
75	Act to apply for offence or contravention committed outside India.

PARAGRAPH 23
OFFENCES UNDER THE BIOLOGICAL DIVERSITY ACT, 2002
(18 of 2003)

Section	Description of offence
55 read with section 6.	Penalties for contravention of section 6, etc.

PARAGRAPH 24
OFFENCES UNDER THE PROTECTION OF PLANT VARIETIES AND FARMERS' RIGHTS ACT, 2001
(53 of 2001)

Section	Description of offence
70 read with section 68	Penalty for applying false denomination, etc.
71 read with section 68	Penalty for selling varieties to which false denomination is applied.
72 read with section 68	Penalty for falsely representing a variety as registered.
73 read with section 68	Penalty for subsequent offence.

PARAGRAPH 25
OFFENCES UNDER THE ENVIRONMENT PROTECTION ACT, 1986
(29 of 1986)

Section	Description of offence

15 read with section 7	Penalty for discharging environmental pollutants, etc., in excess of prescribed standards.
15 read with section 8	Penalty for handling hazardous substances without complying with procedural safeguards.

PARAGRAPH 26
OFFENCES UNDER THE WATER (PREVENTION AND CONTROL OF POLLUTION) ACT, 1974
(6 of 1974)

Section	Description of offence
41(2)	Penalty for pollution of stream or well.
43	Penalty for contravention of provisions of section 24.

PARAGRAPH 27
OFFENCES UNDER THE AIR (PREVENTION AND CONTROL OF POLLUTION) ACT, 1981
(14 of 1981)

Section	Description of offence
37	Failure to comply with the provisions for operating industrial plant.

PARAGRAPH 28
OFFENCES UNDER THE SUPPRESSION OF UNLAWFUL ACTS AGAINST SAFETY OF MARITIME NAVIGATION AND FIXED PLATFORMS ON CONTINENTAL SHELF ACT, 2002
(69 of 2002)

Section	Description of offence
3	Offences against ship, fixed platform, cargo of a ship, maritime navigational facilities, etc.]

[698][PARAGRAPH 29
OFFENCE UNDER THE COMPANIES ACT, 2013
(18 of 2013)

Section	Description of offence
447	Punishment for fraud.]

698 Ins. by Act 13 of 2018, sec. 208(h) (w.e.f. 19-4-2018, vide G.S.R. 383(E), dated 19th April, 2018).

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[699][PART B **OFFENCE UNDER THE CUSTOMS ACT, 1962**	
Section	**Description of offence**
132	False declaration, false documents, etc.]

[700][PART C

An offence which is the offence of cross border implications and is specified in,—

(1) Part A; or

[701][***]

(3) the offences against property under Chapter XVII of the Indian Penal Code.]

[702][(4) The offence of wilful attempt to evade any tax, penalty or interest referred to in section 51 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015.]"

This Schedule has been amended by Act 21 of 2009, Act 2 of 2013, Act 22 of 2015, Act 13 of 2018 and Act 16 of 2018, thereby inserting new offences to be regarded as scheduled offence. The challenge is not on the basis of legislative competence in respect of enactment of Schedule and the amendments thereto from time to time. However, it had been urged before us that there is no consistency in the approach as it includes even minor offences as scheduled offence for

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[699] Ins. by the **Finance Act, 2015** (20 of 2015), sec. 151 (w.e.f. 14-5-2015). Earlier Part B was amended by Act 21 of 2009, sec. 13 (w.e.f. 1-6-2009) and was omitted by Act 2 of 2013, sec. 30(ii) (w.e.f. 15-2-2013, vide S.O. 343(E), dated 8-2-2013).

[700] Ins. by Act 21 of 2009, sec. 13(iii) (w.e.f. 1-6-2009).

[701] Omitted by Act 2 of 2013, sec. 30(iii) (w.e.f. 15-2-2013, vide S.O. 343(E), dated 8-2-2013).

[702] Ins. by Act 22 of 2015, sec. 88 (w.e.f. 1-7-2015, vide S.O. 1790(E), dated 1st July, 2015).

the purposes of offence of money-laundering, more so even offences which have no trans-border implications and are compoundable between the parties. The classification or grouping of offences for treating the same as relevant for constituting offence of money-laundering is a matter of legislative policy. The Parliament in its wisdom has regarded the property derived or obtained as a result of specified criminal activity, being an offence under the concerned legislation mentioned in the Schedule. The fact that some of the offences may be non-cognizable offences under the concerned legislation or regarded as minor and compoundable offences, yet, the Parliament in its wisdom having perceived the cumulative effect of the process or activity concerning the proceeds of crime generated from such criminal activities as being likely to pose threat to the economic stability, sovereignty and integrity of the country and thus, grouped them together for reckoning it as an offence of money-laundering, is a matter of legislative policy. It is not open to the Court to have a second guess at such a policy.

175A. Needless to underscore that the 2002 Act is intended to initiate action in respect of money-laundering activity which

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necessarily is associated with the property derived or obtained by any person, directly or indirectly, as a result of specified criminal activity. The prosecution under this Act is not in relation to the criminal activity *per se* but limited to property derived or obtained from specified criminal activity. Resultantly, the inclusion of criminal activity which has been regarded as non-cognizable, compoundable or minor offence under the concerned legislation, should have no bearing to answer the matter in issue. In that, the offence of money-laundering is an independent offence and the persons involved in the commission of such offence are grouped together as offenders under this Act. There is no reason to make distinction between them insofar as the offence of money-laundering is concerned. In our opinion, therefore, there is no merit in the argument under consideration.

ECIR *VIS-À-VIS* FIR

176. As per the procedure prescribed by the 1973 Code, the officer in-charge of a police station is under an obligation to record the information relating to the commission of a cognizable offence, in

terms of Section 154 of the 1973 Code[703]. There is no corresponding provision in the 2002 Act requiring registration of offence of money-laundering. As noticed earlier, the mechanism for proceeding against the property being proceeds of crime predicated in the 2002 Act is a *sui generis* procedure. No comparison can be drawn between the mechanism regarding prevention, investigation or trial in connection with the scheduled offence governed by the provisions of the 1973 Code. In the scheme of 2002 Act upon identification of existence of property being proceeds of crime, the Authority under this Act is expected to inquire into relevant aspects in relation to such property and take measures as may be necessary and specified in the 2002 Act including to attach the property for being dealt with as per the provisions of the 2002 Act. We have elaborately adverted to the procedure to be followed by the authorities for such attachment of the property being proceeds of crime and the follow-up steps of confiscation upon confirmation of the provisional attachment order by the Adjudicating Authority. For facilitating the Adjudicating Authority to confirm the provisional attachment order and direct confiscation, the authorities under the 2002 Act (i.e., Section 48) are

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[703] *Lalita Kumari* (supra at Footnote Nos.13 and 206)

expected to make an inquiry and investigate. Incidentally, when sufficient credible information is gathered by the authorities during such inquiry/investigation indicative of involvement of any person in any process or activity connected with the proceeds of crime, it is open to such authorities to file a formal complaint before the Special Court naming the concerned person for offence of money-laundering under Section 3 of this Act. Considering the scheme of the 2002 Act, though the offence of money-laundering is otherwise regarded as cognizable offence (cognizance whereof can be taken only by the authorities referred to in Section 48 of this Act and not by jurisdictional police) and punishable under Section 4 of the 2002 Act, special complaint procedure is prescribed by law. This procedure overrides the procedure prescribed under 1973 Code to deal with other offences (other than money-laundering offences) in the matter of registration of offence and inquiry/investigation thereof. This special procedure must prevail in terms of Section 71 of the 2002 Act and also keeping in mind Section 65 of the same Act. In other words, the offence of money-laundering cannot be registered by the jurisdictional police who is governed by the regime under Chapter XII of the 1973 Code. The provisions of Chapter XII of the

1973 Code do not apply in all respects to deal with information derived relating to commission of money-laundering offence much less investigation thereof. The dispensation regarding prevention of money-laundering, attachment of proceeds of crime and inquiry/investigation of offence of money-laundering upto filing of the complaint in respect of offence under Section 3 of the 2002 Act is fully governed by the provisions of the 2002 Act itself. To wit, regarding survey, searches, seizures, issuing summons, recording of statements of concerned persons and calling upon production of documents, inquiry/investigation, arrest of persons involved in the offence of money-laundering including bail and attachment, confiscation and vesting of property being proceeds of crime. Indeed, after arrest, the manner of dealing with such offender involved in offence of money-laundering would then be governed by the provisions of the 1973 Code - as there are no inconsistent provisions in the 2002 Act in regard to production of the arrested person before the jurisdictional Magistrate within twenty-four hours and also filing of the complaint before the Special Court within the statutory period prescribed in the 1973 Code for filing of police report, if not released on bail before expiry thereof.

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177. Suffice it to observe that being a special legislation providing for special mechanism regarding inquiry/investigation of offence of money-laundering, analogy cannot be drawn from the provisions of 1973 Code, in regard to registration of offence of money-laundering and more so being a complaint procedure prescribed under the 2002 Act. Further, the authorities referred to in Section 48 of the 2002 Act alone are competent to file such complaint. It is a different matter that the materials/evidence collected by the same authorities for the purpose of civil action of attachment of proceeds of crime and confiscation thereof may be used to prosecute the person involved in the process or activity connected with the proceeds of crime for offence of money-laundering. Considering the mechanism of inquiry/investigation for proceeding against the property (being proceeds of crime) under this Act by way of civil action (attachment and confiscation), there is no need to formally register an ECIR, unlike registration of an FIR by the jurisdictional police in respect of cognizable offence under the ordinary law. There is force in the stand taken by the ED that ECIR is an internal document created by the department before initiating penal action or prosecution against the person involved with process or activity connected with

proceeds of crime. Thus, ECIR is not a statutory document, nor there is any provision in 2002 Act requiring Authority referred to in Section 48 to record ECIR or to furnish copy thereof to the accused unlike Section 154 of the 1973 Code. The fact that such ECIR has not been recorded, does not come in the way of the authorities referred to in Section 48 of the 2002 Act to commence inquiry/investigation for initiating civil action of attachment of property being proceeds of crime by following prescribed procedure in that regard.

178. The next issue is: whether it is necessary to furnish copy of ECIR to the person concerned apprehending arrest or at least after his arrest? Section 19(1) of the 2002 Act postulates that after arrest, as soon as may be, the person should be informed about the grounds for such arrest. This stipulation is compliant with the mandate of Article 22(1) of the Constitution. Being a special legislation and considering the complexity of the inquiry/investigation both for the purposes of initiating civil action as well as prosecution, non-supply of ECIR in a given case cannot be faulted. The ECIR may contain details of the material in possession of the Authority and recording

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satisfaction of reason to believe that the person is guilty of money-laundering offence, if revealed before the inquiry/investigation required to proceed against the property being proceeds of crime including to the person involved in the process or activity connected therewith, may have deleterious impact on the final outcome of the inquiry/investigation. So long as the person has been informed about grounds of his arrest that is sufficient compliance of mandate of Article 22(1) of the Constitution. Moreover, the arrested person before being produced before the Special Court within twenty-four hours or for that purposes of remand on each occasion, the Court is free to look into the relevant records made available by the Authority about the involvement of the arrested person in the offence of money-laundering. In any case, upon filing of the complaint before the statutory period provided in 1973 Code, after arrest, the person would get all relevant materials forming part of the complaint filed by the Authority under Section 44(1)(b) of the 2002 Act before the Special Court.

179. Viewed thus, supply of ECIR in every case to person concerned is not mandatory. From the submissions made across the Bar, it is noticed that in some cases ED has furnished copy of ECIR to the

person before filing of the complaint. That does not mean that in every case same procedure must be followed. It is enough, if ED at the time of arrest, contemporaneously discloses the grounds of such arrest to such person. Suffice it to observe that ECIR cannot be equated with an FIR which is mandatorily required to be recorded and supplied to the accused as per the provisions of 1973 Code. Revealing a copy of an ECIR, if made mandatory, may defeat the purpose sought to be achieved by the 2002 Act including frustrating the attachment of property (proceeds of crime). Non-supply of ECIR, which is essentially an internal document of ED, cannot be cited as violation of constitutional right. Concededly, the person arrested, in terms of Section 19 of the 2002 Act, is contemporaneously made aware about the grounds of his arrest. This is compliant with the mandate of Article 22(1) of the Constitution. It is not unknown that at times FIR does not reveal all aspects of the offence in question. In several cases, even the names of persons actually involved in the commission of offence are not mentioned in the FIR and described as unknown accused. Even, the particulars as unfolded are not fully recorded in the FIR. Despite that, the accused named in any ordinary offence is able to apply for anticipatory bail or regular bail, in which proceeding, the police papers are normally perused by the concerned Court. On the same analogy, the argument of prejudice

pressed into service by the petitioners for non-supply of ECIR deserves to be answered against the petitioners. For, the arrested person for offence of money-laundering is contemporaneously informed about the grounds of his arrest; and when produced before the Special Court, it is open to the Special Court to call upon the representative of ED to produce relevant record concerning the case of the accused before him and look into the same for answering the need for his continued detention. Taking any view of the matter, therefore, the argument under consideration does not take the matter any further.

ED MANUAL

180. It had been urged that the 2002 Act creates an overbroad frame with no fetters on investigation. Besides questioning the refusal to furnish copy of ECIR, grievance is also made about the opacity surrounding the usage of ED Manual. Relying on Section 4(b)(v) of the RTI Act, it was urged that it was obligatory on the part of the Public Authority to publish the stated Manual within 120 days of the enactment of RTI Act. All other authorities including the Central Vigilance Commission, Income-tax Authorities, Authorities under 1962 Act, Police Authorities, Jail Authorities have adhered to

this statutory compliance, except the ED. In response, it is submitted by the learned Additional Solicitor General that ED Manual is an internal departmental document only for the use of officers of the ED. It is to give them guidance on proper enforcement of 2002 Act and outlines the procedure for implementation of the provisions of this Act. In addition, reliance is placed on the exposition of the Constitution Bench of this Court in ***Lalita Kumari***[704]. In paragraph 89 of this decision, the Court observed thus:

> "**89.** Besides, the learned Senior Counsel relied on the special procedures prescribed under the CBI Manual to be read into Section 154. It is true that the concept of "preliminary inquiry" is contained in Chapter IX of the Crime Manual of CBI. However, this Crime Manual is not a statute and has not been enacted by the legislature. It is a set of administrative orders issued for internal guidance of the CBI officers. It cannot supersede the Code. Moreover, in the absence of any indication to the contrary in the Code itself, the provisions of the CBI Crime Manual cannot be relied upon to import the concept of holding of preliminary inquiry in the scheme of the Code of Criminal Procedure. At this juncture, it is also pertinent to submit that CBI is constituted under a special Act, namely, the Delhi Special Police Establishment Act, 1946 and it derives its power to investigate from this Act."

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[704] Supra at Footnote No.206 (also at Footnote No.13)

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181. It is true that the ED Manual may be an internal document for departmental use and in the nature of set of administrative orders. It is equally true that the accused or for that matter common public may not be entitled to have access to such administrative instructions being highly confidential and dealing with complex issues concerning mode and manner of investigation, for internal guidance of officers of ED. It is also correct to say that there is no such requirement under the 2002 Act or for that matter, that there is nothing like investigation of a crime of money-laundering as per the scheme of 2002 Act. The investigation, however, is to track the property being proceeds of crime and to attach the same for being dealt with under the 2002 Act. *Stricto sensu,* it is in the nature of an inquiry in respect of civil action of attachment. Nevertheless, since the inquiry in due course ends in identifying the offender who is involved in the process or activity connected with the proceeds of crime and then to prosecute him, it is possible for the department to outline the situations in which that course could be adopted in reference to specific provisions of 2002 Act or the Rules framed thereunder; and in which event, what are the options available to such person before the Authority or the Special Court, as the case

may be. Such document may come handy and disseminate information to all concerned. At least the feasibility of placing such document on the official website of ED may be explored.

APPELLATE TRIBUNAL

182. Serious grievance has been made about the vacancies in the Appellate Tribunal despite the serious prejudice being caused on account of provisional attachment order and, in some cases, taking over possession of the property so attached. This grievance, even though genuine, cannot be the basis to test the validity of the provisions of the 2002 Act or to question the efficacy of those provisions on that account. The Parliament by this special legislation having created an expert body being Appellate Tribunal to deal with matters concerning attachment, possession and confiscation and vesting of property in the Central Government, it is, but necessary, that the forum should be functional and accessible to the aggrieved persons uninterruptedly. We need to impress upon the Executive to take necessary corrective measures in this regard. Absent such forum, the aggrieved persons have to rush to the High Court on every occasion which indeed is avoidable.

PUNISHMENT UNDER SECTION 4 OF THE 2002 ACT

183. It is urged that there is no gradation of punishment depending on the nature of offence which may be committed by the principal offender and other offenders. Section 4[704A] of the 2002 Act makes no distinction between person directly involved in the process or activity connected with the proceeds of crime and the other not so directly involved. Further, the scheduled offence may have been committed by someone else and the offence of money-laundering by third person owing to being involved in the process or activity connected with the proceeds of crime. The petitioners have relied on Section 201 and 212 of IPC. It is their case that this distinction is absent in Section 4 of the 2002 Act which provides that the term of rigorous imprisonment shall not be less than three years and extend upto seven years or ten years, as the case may be, with fine. This argument to say the least is flimsy and tenuous. For, the punishment under Section 4 is not in relation to the predicate offence, but offence of money-laundering under Section 3 of the 2002

[704A] **4. Punishment for money-laundering.**—Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine [***]**:

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.

**The words "which may extend to five lakh rupees" omitted by Act 2 of 2013, sec. 4 (w.e.f. 15-2-2013, vide S.O. 343(E), dated 8-2-2013).

Act. The person may be involved in any one or more than one process or activity connected with the proceeds of crime. All of them are treated as one class of offender involved in money-laundering. The proceeds of crime may be derived or obtained as a result of criminal activity with which the offender involved in money-laundering offence may not be directly concerned at all. Even so, he becomes liable to be proceeded under Section 3 and punished under Section 4 of the 2002 Act. The principle of an accessory after the fact will have no application to the offence of money-laundering. Suffice it to observe that the argument under consideration is devoid of merit.

184. On the basis of same analogy, it was argued that the twin conditions of bail contained in Section 45 of the 2002 Act would act grossly disproportionate and illogical *qua* a person who is not directly connected with the scheduled offence but merely an accessory after the fact. Even this argument needs to be stated to be rejected for the same reason.

185. The above analysis, in our view, is sufficient to answer the diverse issues canvassed before us. We have attempted to extensively deal with the essential aspects to record our conclusion

issue-wise. Further, we do not wish to dissect every reported decision cited before us to obviate prolixity.

186. We once again clarify that in this judgment, we have confined our analysis only to the issues regarding the validity and interpretation of the provisions of the 2002 Act, referred to above. We have not dealt with any other issue involved in individual cases concerning 2002 Act as the parties have been given liberty to pursue their other remedies before appropriate forum. Furthermore, we have delinked the matters pertaining to other legislations and issues arising therefrom from this batch of cases, for being proceeded appropriately.

CONCLUSION

187. In light of the above analysis, we now proceed to summarise our conclusion on seminal points in issue in the following terms: -

(i) The question as to whether some of the amendments to the Prevention of Money-laundering Act, 2002 could not have been enacted by the Parliament by way of a Finance Act has not been examined in this judgment. The same is left open for being examined along with or after the decision of the Larger Bench (seven Judges) of this Court in the case of ***Rojer Mathew***[705].

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[705] Supra at Footnote No.90

(ii) The expression "proceedings" occurring in Clause (na) of Section 2(1) of the 2002 Act is contextual and is required to be given expansive meaning to include inquiry procedure followed by the Authorities of ED, the Adjudicating Authority, and the Special Court.

(iii) The expression "investigation" in Clause (na) of Section 2(1) of the 2002 Act does not limit itself to the matter of investigation concerning the offence under the Act and is interchangeable with the function of "inquiry" to be undertaken by the Authorities under the Act.

(iv) The Explanation inserted to Clause (u) of Section 2(1) of the 2002 Act does not travel beyond the main provision predicating tracking and reaching upto the property derived or obtained directly or indirectly as a result of criminal activity relating to a scheduled offence.

(v) (a) Section 3 of the 2002 Act has a wider reach and captures every process and activity, direct or indirect, in dealing with the proceeds of crime and is not limited to the happening of the final act of integration of tainted property in the formal economy. The Explanation inserted to Section 3 by way of amendment of 2019 does not expand the purport of Section 3 but is only clarificatory in

nature. It clarifies the word "and" preceding the expression projecting or claiming as "or"; and being a clarificatory amendment, it would make no difference even if it is introduced by way of Finance Act or otherwise.

(b) Independent of the above, we are clearly of the view that the expression "and" occurring in Section 3 has to be construed as "or", to give full play to the said provision so as to include "every" process or activity indulged into by anyone. Projecting or claiming the property as untainted property would constitute an offence of money-laundering on its own, being an independent process or activity.

(c) The interpretation suggested by the petitioners, that only upon projecting or claiming the property in question as untainted property that the offence of Section 3 would be complete, stands rejected.

(d) The offence under Section 3 of the 2002 Act is dependent on illegal gain of property as a result of criminal activity relating to a scheduled offence. It is concerning the process or activity connected with such property, which constitutes the offence of money-laundering. The Authorities under the 2002 Act cannot prosecute any person on notional basis or on the assumption that a scheduled offence has been committed, unless it is so registered with the

jurisdictional police and/or pending enquiry/trial including by way of criminal complaint before the competent forum. If the person is finally discharged/acquitted of the scheduled offence or the criminal case against him is quashed by the Court of competent jurisdiction, there can be no offence of money-laundering against him or any one claiming such property being the property linked to stated scheduled offence through him.

(vi) Section 5 of the 2002 Act is constitutionally valid. It provides for a balancing arrangement to secure the interests of the person as also ensures that the proceeds of crime remain available to be dealt with in the manner provided by the 2002 Act. The procedural safeguards as delineated by us hereinabove are effective measures to protect the interests of person concerned.

(vii) The challenge to the validity of sub-section (4) of Section 8 of the 2002 Act is also rejected subject to Section 8 being invoked and operated in accordance with the meaning assigned to it hereinabove.

(viii) The challenge to deletion of proviso to sub-section (1) of Section 17 of the 2002 Act stands rejected. There are stringent safeguards provided in Section 17 and Rules framed thereunder. Moreover, the pre-condition in the proviso to Rule 3(2) of the 2005 Rules cannot be

read into Section 17 after its amendment. The Central Government may take necessary corrective steps to obviate confusion caused in that regard.

(ix) The challenge to deletion of proviso to sub-section (1) of Section 18 of the 2002 Act also stands rejected. There are similar safeguards provided in Section 18. We hold that the amended provision does not suffer from the vice of arbitrariness.

(x) The challenge to the constitutional validity of Section 19 of the 2002 Act is also rejected. There are stringent safeguards provided in Section 19. The provision does not suffer from the vice of arbitrariness.

(xi) Section 24 of the 2002 Act has reasonable nexus with the purposes and objects sought to be achieved by the 2002 Act and cannot be regarded as manifestly arbitrary or unconstitutional.

(xii) (a) The proviso in Clause (a) of sub-section (1) of Section 44 of the 2002 Act is to be regarded as directory in nature and this provision is also read down to mean that the Special Court may exercise judicial discretion on case-to-case basis.

(b) We do not find merit in the challenge to Section 44 being arbitrary or unconstitutional. However, the eventualities referred to in this section shall be dealt with by the Court concerned and by the Authority concerned in accordance with the interpretation given in this judgment.

(xiii) (a) The reasons which weighed with this Court in ***Nikesh Tarachand Shah***[706] for declaring the twin conditions in Section 45(1) of the 2002 Act, as it stood at the relevant time, as unconstitutional in no way obliterated the provision from the statute book; and it was open to the Parliament to cure the defect noted by this Court so as to revive the same provision in the existing form.

(b) We are unable to agree with the observations in ***Nikesh Tarachand Shah***[707] distinguishing the enunciation of the Constitution Bench decision in ***Kartar Singh***[708]; and other observations suggestive of doubting the perception of Parliament in regard to the seriousness of the offence of money-laundering,

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[706] Supra at Footnote No.3

[707] Supra at Footnote No.3

[708] Supra at Footnote No.190

including about it posing serious threat to the sovereignty and integrity of the country.

(c) The provision in the form of Section 45 of the 2002 Act, as applicable post amendment of 2018, is reasonable and has direct nexus with the purposes and objects sought to be achieved by the 2002 Act and does not suffer from the vice of arbitrariness or unreasonableness.

(d) As regards the prayer for grant of bail, irrespective of the nature of proceedings, including those under Section 438 of the 1973 Code or even upon invoking the jurisdiction of Constitutional Courts, the underlying principles and rigours of Section 45 may apply.

(xiv) The beneficial provision of Section 436A of the 1973 Code could be invoked by the accused arrested for offence punishable under the 2002 Act.

(xv) (a) The process envisaged by Section 50 of the 2002 Act is in the nature of an inquiry against the proceeds of crime and is not "investigation" in strict sense of the term for initiating prosecution;

and the Authorities under the 2002 Act (referred to in Section 48), are not police officers as such.

(b) The statements recorded by the Authorities under the 2002 Act are not hit by Article 20(3) or Article 21 of the Constitution of India.

(xvi) Section 63 of the 2002 Act providing for punishment regarding false information or failure to give information does not suffer from any vice of arbitrariness.

(xvii) The inclusion or exclusion of any particular offence in the Schedule to the 2002 Act is a matter of legislative policy; and the nature or class of any predicate offence has no bearing on the validity of the Schedule or any prescription thereunder.

(xviii) (a) In view of special mechanism envisaged by the 2002 Act, ECIR cannot be equated with an FIR under the 1973 Code. ECIR is an internal document of the ED and the fact that FIR in respect of scheduled offence has not been recorded does not come in the way of the Authorities referred to in Section 48 to commence inquiry/investigation for initiating "civil action" of "provisional attachment" of property being proceeds of crime.

(b) Supply of a copy of ECIR in every case to the person concerned is not mandatory, it is enough if ED at the time of arrest, discloses the grounds of such arrest.

(c) However, when the arrested person is produced before the Special Court, it is open to the Special Court to look into the relevant records presented by the authorised representative of ED for answering the issue of need for his/her continued detention in connection with the offence of money-laundering.

(xix) Even when ED manual is not to be published being an internal departmental document issued for the guidance of the Authorities (ED officials), the department ought to explore the desirability of placing information on its website which may broadly outline the scope of the authority of the functionaries under the Act and measures to be adopted by them as also the options/remedies available to the person concerned before the Authority and before the Special Court.

(xx) The petitioners are justified in expressing serious concern bordering on causing injustice owing to the vacancies in the Appellate Tribunal. We deem it necessary to impress upon the executive to take corrective measures in this regard expeditiously.

(xxi) The argument about proportionality of punishment with reference to the nature of scheduled offence is wholly unfounded and stands rejected.

ORDER

T.P. (Crl.) No. 150/2016, T.P. (Crl.) Nos. 151-157/2016, T.P. (C) No. 1583/2018 and T.P. (Crl.) No. 435/2021

1. These transfer petitions are disposed of with liberty to the private parties to pursue the proceedings pending before the High Court. The contentions, other than dealt with in this judgment, are kept open, to be decided in those proceedings on its own merits. It would be open to the parties to pursue all (other) contentions in those proceedings, except the question of validity and interpretation of the concerned provision(s) already dealt with in this judgment.

T.C. (Crl.) Nos.3/2018 and 4/2018

2. In these transferred cases, the parties are relegated before the High Court by restoring the concerned writ petition(s) to the file of the concerned High Court to its original number limited to consider relief of discharge/bail/quashing, as the case may be, on its own

merits and in accordance with law. It would be open to the parties to pursue all (other) contentions in those proceedings, except the question of validity and interpretation of the concerned provision(s) already dealt with in this judgment. The transferred cases are disposed of accordingly.

W.P. (Crl.) Nos. 169/2020, 370/2021, 454/2021 and 475/2021

3. (a) These writ petitions involve issues relating to Finance Bill/Money Bill. Hence, the same are delinked, to be heard along with Civil Appeal No.8588 of 2019 titled '***Rojer Mathew vs. South Indian Bank Ltd. & Ors.***'.

W.P. (Crl.) Nos. 251/2018 and 532/2021

(b) In these writ petitions, as the relief claimed was only regarding the validity and interpretation of the provisions of the 2002 Act, the same are disposed of in terms of this judgment.

W.P. (Crl.) Nos. 152/2016, 202/2017, 26/2018, 33/2018, 75/2018, 117/2018, 173/2018, 175/2018, 184/2018, 226 of 2018, 309/2018, 333/2018, 9/2019, 16/2019, 49/2019, 122/2019, 127/2019, 139/2019, 147/2019, 205/2019, 217/2019, 244/2019, 272/2019, 283/2019, 289/2019,

300/2019, 308/2019, 326/2019, 365/2019, 367/2019, 39/2020, 259/2020, 60/2020, 91/2020, 239/2020, 267/2020, 366/2020, 385/2020, 404/2020, 429/2020, 18/2021, 19/2021, 21/2021, 27/2021, 66/2021, 179/2021, 199/2021, 207/2021, 239/2021, 263 of 2021, 268/2021, 282/2021, 303/2021, 305/2021, 323/2021 and 453/2021

(c) In these writ petitions as further relief of bail/discharge/quashing has been prayed, the same are disposed of in terms of this judgment with liberty to the private parties to pursue further reliefs before the appropriate forum, leaving all contentions in that regard open, to be decided on its own merits.

Crl. A. Nos. 1269/2017, 1270/2017, 223/2018, 391-392/2018, 793-794/2018, 1210/2018 and 682/2019

SLP (Crl.) Nos. 4634/2014, 9987/2015, 10018/2015, 10019/2015, 993/2016, 1271-1272/2017, 2890/2017, 5487/2017, 1701-1703/2018, 1705/2018, 5444/2018, 6922/2018, 8156/2018, 5350/2019, 8174/2019, 9652/2019, 10627/2019, 260/2020, 3474/2020, 6128/2020, 609/2021, 734/2021, 1355/2021, 1403/2021, 1440/2021, 1586/2021, 1855/2021, 1920/2021, 2237/2021, 2250/2021, 2435/2021, 2818/2021, 3228/2021, 3274/2021, 3439/2021, 3514/2021, 3629/2021, 3769/2021, 3813/2021, 3921/2021, 4024/2021, 4834/2021, 5156/2021, 5174/2021, 5252/2021, 5457/2021, 5652/2021, 5696-97/2021, 6189/2021, 7021-23/2021 and 8429/2021

SLP (C) Nos. 28394/2011, 28922/2011, 29273/2011 and 8764-67/2021

Diary Nos. 9360/2018, 9365/2018, 17000/2018, 17462/2018, 20250/2018 and 22529/2018, 8626/2021 and 11605/2021

4. These appeals/petitions are de-tagged and ordered to be listed separately before appropriate Bench as the impugned judgment in the concerned case deals with the prayer for bail/discharge/quashing. This relief will have to be decided on case-to-case basis. Accordingly, these matters be listed separately before appropriate Bench. The Registry to do the needful in this regard.

[709]WP (Crl.) Nos. 336/2018, 173/2019, 212/2019, 253/2019, 261/2019, 266/2019, 273/2019, 285/2019, 288/2019, 298/2019, 299/2019, 306/2019, 346/2019, 09/2020, 35/2020, 49/2020, 52/2020, 240/2020 and 329/2020

WP (C) Nos. 1401/2020 and 56/2021

SLP (Crl.) Nos. 1534/2018, 2971/2018, 7408/2018, 11049/2018, 11839/2019, 1732/2020, 2023/2020 and 6303/2020;

[710]WP (Crl.) Nos. 119/2019, 239/2019, 263/2019, 36/2020, 124/2020, 137/2020, 140/2020, 142/2020, 145/2020, 228/2020, 69/2021, 359/2021 and 520/2021

SLP (Crl.) Nos. 1114/2018, 1115/2018, 618/2020, 2814/2020, 6456/2020, 6660/2020, 6338/2021 and 6847/2021;

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[709] These matters relate to the Customs Act, 1962

[710] These matters relate to the Companies Act, 2013

[711]WP (Crl.) Nos. 118/2019, 267/2019, 286/2019, 287/2019, 303/2019, 305/2019, 309/2019, 313/2019, 28/2020, 61/2020, 89/2020, 90/2020, 93/2020, 184/2020, 221/2020, 223/2020, 285/2020, 286/2020, 410/2020, 411/2020, 04/2021, 06/2021, 33/2021, 40/2021, 47/2021, 144/2021 and 301/2021

SLP (Crl.) Nos. 244/2019, 3647/2019, 4322-24/2019, 4546/2019, 5153/2019, 9541/2019, 647/2020, 3366/2020, 5536/2020, 1031/2021, 1072/2021, 1073/2021, 1107/2021, 2050-54/2021 and 6834/2019

SLP (C) No. 20310/2021

Diary No. 31616/2021;

[712]WP (Crl.) Nos. 05/2020, 311/2020, 380/2020, 387/2020 and 11/2021

SLP (Crl.) Nos. 4078/2018, 8111/2019 and 6172/2020

Transferred Case (Crl.) No. 5/2018

Diary No. 41063/2015

5. In these cases, the challenge is regarding the validity and interpretation of other statutes (other than 2002 Act), such as Indian Penal Code, 1860, Code of Criminal Procedure, 1973, Customs Act, 1962, Prevention of Corruption Act, 1988, Companies Act, 2013, Central Goods & Services Act, 2017, etc. Hence, the same are delinked and be placed before the appropriate Bench "group-wise/Act-wise" as indicated above. The Registry to do the needful in that regard.

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711 These matters relate to Central Goods and Services Tax Act, 2017

712 These matters relate to Indian Penal Code, 1860, Prevention of Corruption Act, 1988, Information Technology Act, 2000, Foreign Contribution (Regulation) Act, 2010, etc.

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6. The interim relief granted in the petitions/appeals which are disposed of in terms of this order, to continue for a period of four weeks from today, to enable the private parties to take recourse to appropriate remedies before the concerned forum, if so advised.

7. The interim relief granted in petitions/appeals, which are delinked and ordered to be listed separately or otherwise, shall continue for four weeks from today, with liberty to the parties to mention for early listing of the concerned case including for continuation/vacation of the interim relief.

.....J.
(A.M. Khanwilkar)

.....J.
(Dinesh Maheshwari)

.....J.
(C.T. Ravikumar)

New Delhi;
July 27, 2022.

Abhasin

TRUE COPY

IN THE SUPREME COURT OF INDIA

INHERENT JURISDICTION

(Under Article 137 of the Constitution of India)

REVIEW PETITION (CRL.) NO. OF 2022

IN

TRANSFERRED CASE CRL. NO. 4 OF 2018

IN THE MATTER OF:-

Karti P. Chidambaram
S/o Shri P. Chidambaram
R/o No. 16, Pycrofts Garden Road,
Chennai, Tamil Nadu – 600 006 … Petitioner

VERSUS

Directorate of Enforcement
Ministry of Finance,
Government of India
Through: Dy. Legal Advisor
Mr. B. Naveen Kumar
Central Region Office
Directorate of Enforcement
Room No. 309, C Block,
Pravartan Bhawan,
11 APJ Abdul Kalam Road
New Delhi – 110 011 … Respondent

IN TRANSFERRED CASE CRL. NO. 4 OF 2018

IN THE MATTER OF:-

Karti P. Chidambaram
S/o Shri P. Chidambaram
R/o No. 16, Pycrofts Garden Road,
Chennai, Tamil Nadu – 600 006 … Petitioner

VERSUS

Directorate of Enforcement
Ministry of Finance
10-A, Jam Nagar House, Akbar Road,
New Delhi-110 001 … Respondent

TO

THE HON'BLE CHIEF JUSTICE OF INDIA
AND HIS HON'BLE COMPANION JUSTICES
OF HON'BLE SUPREME COURT OF INDIA

THE HUMBLE PETITION OF THE PETITIONER ABOVE NAMED

MOST RESPECTFULLY SHOWETH:-

1. That the Petitioner is filing the instant Review Petition praying for reconsideration of the final judgment and order dated 27.07.2022 passed by this Hon'ble Court in Transferred Case (Crl.) No. 4 of 2018 (hereinafter referred to as the "**impugned judgment**"). It is most respectfully submitted that the Petitioner is invoking the jurisdiction of this Hon'ble Court under Article 137 read with Article 142 of the Constitution of India and is also seeking a hearing in open Court because of the errors apparent from the impugned judgment, which are detailed in the Grounds below.

2. The detailed facts have already been placed in the List of Dates and the same are not being repeated herein for the sake of brevity.

3. It is submitted that the Petitioner is constrained to prefer the instant Review Petition on the following grounds, each of which is taken without prejudice to the other grounds:

GROUNDS

A. The impugned judgement deserves to be reviewed on grounds of grave error, contrary to earlier judgements of this Hon'ble Court including judgements of Constitution Benches, contrary to Articles 20 and 21 of the Constitution, contrary to settled principles of criminal jurisprudence and *per incuriam* on several grounds.

B. The impugned judgement has not dealt with the most crucial issue arising in the batch of cases, namely, whether the Prevention of Money Laundering Act, 2002 (hereinafter PMLA) could be amended by Parliament through a Money Bill. Several crucial provisions of the PMLA were introduced or amended by Money Bills (mostly Finance Bills) and these provisions were challenged on the ground of violation of the Constitution. The impugned judgement itself states that:

> *"**21.** We are conscious of the fact that if that ground of challenge is to be accepted, it may go to the root of the matter and amendments effected vide Finance Act would become unconstitutional or ineffective. ……we proceeded with the hearing of the batch of cases before us to deal with the other challenges regarding the concerned provision(s) being otherwise unconstitutional and ultra vires."*

It is submitted that the constitutionality of an Act of Parliament cannot be determined in this way: the Hon'ble Court ought to have either referred the cases to the larger Bench that is considering the validity of the Money Bills

or waited until that question was decided. Provisions of an Act of Parliament cannot be held as valid even while the constitutional validity of those provisions are pending consideration by this Hon'ble Court. On this ground alone, the impugned judgement deserves to be reviewed.

C. Indisputably, while this issue struck at the root of the matter, the impugned judgment proceeded to adjudicate the constitutional validity of the provisions of the PMLA without first adjudicating this crucial issue and/ or referring the matter to a larger bench, as was done in ***Rojer Mathew v. South Indian Bank Ltd.***, reported in (2020) 6 SCC 1 and/ or awaiting the decision of the reference to the larger bench in ***Roger Mathew (supra)***. It is most humbly submitted that in the interest of justice and following the due process of law, the impugned judgment ought to have awaited the outcome of the reference to the larger bench in ***Roger Mathew (supra)***. In this regard, reliance is placed on the following:

(i) ***Ram Shiroman Mishra v. Vishwanath Pandey***, (2012) 8 SCC 575 @ Para 9.

(ii) ***Asgar Ali v. State of Jammu and Kashmir***, 2021 SCC OnLine SC 3095 @ Paras 1-2.

(iii) ***Karan Singh v. DTC***, (2017) 16 SCC 72 @ Paras 9-10.

(iv) *Dissenting* Opinion of Chandrachud, J. in ***Beghar Foundation v. Justice K.S. Puttaswamy and Ors.***, (2021) 3 SCC 1 @ para 20.

D. The impugned judgment, while holding that it is not rendering any findings on the amendments made by way of Money Bills, has interpreted the provisions of the PMLA under challenge by referring to and relying on such amendments made by way of Money Bills, which were under challenge and which issue this Hon'ble Court decided not to adjudicate. Thus, the impugned judgment deserves to be reviewed on this ground alone.

E. The impugned judgement has gravely erred in examining the validity of the PMLA in the light of international conventions under the erroneous belief that the recommendations of the Financial Action Task Force (FATF) were part of an international convention. The FATF was a voluntary body founded by seven major industrial nations and other countries were invited to be members. The FATF made recommendations from time to time. The recommendations did not have the force of law; nor were they binding on the member-countries. The FATF's recommendations explicitly recognized that a country may make a law subject only to its Constitutional obligations and fundamental legal principles. The recommendations certainly did not amount to obligations incurred by signatories to an international convention or treaty. To the extent that the impugned judgement assumed that the FATF's recommendations were binding obligations arising out of an international convention and, on that erroneous premise, interpreted and upheld certain

provisions of PMLA, the impugned judgement is *per incuriam* and deserves to be reviewed.

F. The observations in the impugned judgement, the consequent findings in para 38 and the reference to precedents concerning international conventions are, therefore, erroneous in law and deserve to be reviewed. The finding in para 39 that if the recommendations of the FATF were not followed, the conduct of India "*would not be fully in line with the Vienna and Palermo Conventions*" is a manifestly erroneous conclusion. The further finding that India had responded to FATF that the word "*and*" can be interpreted as "*or*" has no basis in fact, and is therefore erroneous. The further finding that the word "*and*" has to be read as "*or*" in order to be in consonance with the Vienna and Palermo Conventions has no basis in fact or law, and is totally contrary to the intention of Parliament that accepted the recommendation of the Select Committee (as noted in para 50) and retained the words "*and projecting or claiming it as untainted property*". *(emphasis added)*

G. The impugned judgement gravely erred in its interpretation of Sec. 3 PMLA. As the section was originally enacted in 1999, Parliament accepted the recommendation of the Select Committee (as noted in para 50), and added the words "***and projecting it as untainted property***" before the words "shall be guilty of offence of money-laundering". The Amendment Bill 2012 amended, *inter alia,* Sec. 3 and certain words were added after the

words "*proceeds of crime*", but despite the criticism of the FATF in 2013 (noted in para 37), retained the words "*and projecting*". In fact, the words were expanded to "*and projecting or claiming*". Hence, it is abundantly clear, and it was so submitted to this Hon'ble Court, that the crucial words were *"**and projecting or claiming it as untainted property**"*.

H. By the Finance (No. 2) Act, 2019 (Act No. 23 of 2019) (which was passed as a ***Money Bill***), an Explanation was added to Sec. 3 which, without amending the main part of the section, used the word "*or*" before the words "*projecting as untainted property*" and before the words "*claiming as untainted property*". It was submitted that an Explanation cannot alter the words of the main part or their meaning and hence the Explanation was unconstitutional and beyond the competence of Parliament. The impugned judgement has rejected this submission in para 50. The finding is incorrect and contrary to the plain language of Sec.3 and the intention of Parliament.

I. Despite the clear recommendation of the Select Committee (as noted in para 50) that the words "*and projecting*" are critical and must be retained, and despite the intent of Parliament to accept the recommendation by using the words "*and projecting or claiming*", the impugned judgement holds, without any basis at all, that "*that has never been the intention of the Parliament nor the international Conventions*". The intention of

Parliament was exactly the opposite and the impugned judgement is manifestly erroneous. Further, there was no obligation arising from any international Convention that "*projecting or claiming*" should not be an ingredient of the offence of money-laundering. Presumably, this Hon'ble Court had erroneously assumed that the recommendations of FATF are akin to an international Convention. On this ground too, the impugned judgement deserves to be reviewed.

J. The impugned judgement has also gravely erred in rejecting the Petitioner's submission that, if the words "*and projecting or claiming it as untainted property*" are given no meaning and the requirement of "*projecting*" has to be eschewed, it will render the '*predicate offence*' and '*money-laundering*' indistinguishable. Assume the predicate offence of robbery u/s 392 IPC. Assume there are proceeds of crime and PMLA may be attracted. If the robber keeps the proceeds or conceals them, he is guilty of robbery. It is only when he "*projects or claims*" the stolen money as "*untainted*", the offence of money-laundering is attracted. If "*projecting or claiming*" is eschewed as unnecessary, there will be no distinction between '*robbery*' and '*money-laundering*' as defined in Sec.3. The language of a provision of law made by Parliament cannot be re-written by the Court. The history of Sec.3, the original text, the Amendment Bill, the recommendation of the Select Committee (as noted in para 50) and the final language used by Parliament despite the

criticism of FATF, make it abundantly clear that "***projecting or claiming it as untainted property****"* is an essential ingredient of the offence of money-laundering. The offence is not complete unless the proceeds of crime are "*projected or claimed as untainted property*". The impugned judgement is in grave error in rejecting this submission and deserves to be reviewed.

K. The impugned judgement is in error in so far as it failed to notice and examine the impact of the use of the word "*activity*" in two places: *firstly,* in the definition under Sec. 2(u) of "proceeds of crime"; and, *secondly,* the definition under Sec.3 of "money-laundering". The use of the word "*activity*" twice before the offence of money-laundering is made out is of enormous significance. The "*proceeds of crime*" must be generated out of criminal activity relating to a scheduled offence; and the accused must be involved in any process or activity connected with the proceeds of crime. Activity is more than a single act; it must be multiple acts or a series of acts. These are essential ingredients. Hence, the impugned judgement ought to have upheld the submission of the Petitioners that an innocent third party (implicated in a single case or otherwise) who was not involved either in the scheduled offence or in projecting or claiming the proceeds of crime as untainted property, cannot be accused of the offence of money-laundering.

L. The conclusion in the impugned judgement in para 43 that the offence of money laundering is a continuing one even

in respect of an offence included in the Schedule on a subsequent date is a conclusion that is opposed to the fundamental principle of criminal law as well as Article 20 of the Constitution. When a non-scheduled offence is committed, it may give rise to proceeds of crime (in common parlance). For example, '*cheating*' under S. 420, IPC. On that day or subsequently, even if the accused gained any benefit out of the crime (say, money or property), there are no "*proceeds of crime*" within the meaning of Sec. 2(u) of PMLA. Assume the said offence is included in the Schedule on a later date, mere possession of the "*proceeds of crime*" (money or property) would, according to the impugned judgement, become an offence of "money-laundering". If this conclusion is correct, what was not an offence on the date it was committed, namely gaining money or property as a result of cheating, would become an offence when the offence of cheating is included in the Schedule, and the PMLA would be triggered. Consequently, the accused would be prosecuted not only for the offence of cheating but also the alleged offence of money-laundering which he did not commit and had no intention to commit. Such a result is expressly forbidden by Article 20 of the Constitution. It is also opposed to the fundamental principle of criminal law that no person can be accused of or punished for an offence that was not an offence when the '*act*' was committed. The conclusion in the impugned judgement, therefore, deserves to be reviewed.

M. The impugned judgement gravely erred in invoking the principle of 'continuing offence'. The principle of 'continuing offence' will be attracted if the 'act' was on an offence on the date of commission, the 'act' is a continuing act, and the act was not completed. In the example cited in the Ground immediately above, the act of cheating had been committed and completed. If on the date of commission or completion, 'cheating' was not a Scheduled Offence, the PMLA is not applicable. If, on a subsequent date, 'cheating' becomes a Scheduled Offence, it does not follow that PMLA will be attracted and the accused can be charged with money-laundering. If the conclusion is that PMLA will be attracted, that will be directly in the teeth of Article 20 and the fundamental principles of criminal law. In so far as the impugned judgement invokes the principle of 'continuing offence' and holds that the offence of money-laundering can be invoked once the offence is included in the Schedule, the impugned judgement is gravely wrong, and deserves to be reviewed.

N. If the principle of 'continuing offence' can be invoked in respect of an act that had been committed and completed before the PMLA came into force (1-7-2005) or before the offence was Included in the Schedule, it would lead to manifestly unjust results. An act committed even 100 years ago (in respect of an offence under IPC) can be resurrected and the person concerned can be accused of 'money-laundering' after the PMLA was brought into

force and the offence included in the Schedule. Such an unjust outcome cannot even be contemplated under the Constitution of India and under the fundamental principles of criminal law that are in force in India. In so far as the impugned judgement has arrived at such an unjust conclusion, it is gravely erroneous and deserves to be reviewed.

O. The conclusion in para 43 that "*such process or activity in a given fact situation may be a continuing offence, irrespective of the date and time of commission of the scheduled offence*" is gravely erroneous and in direct conflict with Article 20 of the Constitution as well as the fundamental principles of criminal law.

P. It is manifest that it is only the inclusion of clause (ii) of the Explanation to Sec.3 (***by a Money Bill,*** namely, the Finance (No. 2) Act, 2019 (Act No. 23 of 2019)). that has persuaded this Hon'ble Court to arrive at the conclusion in para 43 of the impugned judgement. For the reasons stated in Grounds 10-12 above, the said conclusion is erroneous. Nonetheless, the impugned judgement holds that the "*inclusion of clause (ii) in Explanation inserted in 2019 is of no consequence as it does not alter or enlarge the scope of Section 3 at all.*" This conclusion is also in direct conflict with Article 20 of the Constitution as well as the fundamental principles of criminal law, and hence the impugned judgement deserves to be reviewed.

Q. The judgement is gravely erroneous in rejecting the precedents cited by the Petitioners to explain the true purpose and effect of an Explanation. In particular, the Hon'ble Court erred in law in not following the judgements noted hereunder:

(i) *Bihta Co-op. Development Cane Marketing Union Ltd. vs. Bank of Bihar*, reported in (1967) 1 SCR 848 (3 Judges)

> "***8.*** *We find ourselves unable to accept this contention. Before the amendments introduced in 1948, the Explanation to the section made no mention of non-members and non-members had to be included in the Explanation because of the inclusion of this class of persons in category (e) of sub-section (1) of Section 48.* ***The Explanation must be read so as to harmonise with and clear up any ambiguity in the main section. It should not be so construed as to widen the ambit of the section.*** *[…]*"

(ii) *Hardev Motor Transport vs. State of M.P.*, reported in (2006) 8 SCC 613 (2 Judges):

> "***31.*** *The role of an Explanation of a statute is well known. By inserting an Explanation in the Schedule of the Act, the main provisions of the Act cannot be defeated.* ***By reason of an Explanation, even otherwise, the scope and effect of a provision cannot be enlarged.*** *[…]*"

R. The impugned judgement gravely erred in holding in para 163 and 172 that officers of the Enforcement Directorate are not "police officers". PMLA is admittedly a "criminal law" made by Parliament and is traceable to List I Entry

14 and List I Entry 93 and List III Entry 1 of the Constitution. It creates a new offence; it provides for investigation and trial of the said offence; and it provides for punishment for that offence. The PMLA also empowers the investigating officer to exercise other powers that are normally associated with, and available to, police officers. If the PMLA is essentially a criminal law, it follows logically that the persons investigating the commission of an offence under the law would, indubitably, be police officers. The impugned judgement erred in holding that the PMLA is not only for investigating and punishing offenders but it is also for the prevention of money-laundering, and hence the officers of the ED are not police officers. This reasoning is untenable, because all criminal laws empower the police officers to both prevent the commission of crimes and to investigate and punish the offenders. The impugned judgement holds erroneously that the officers investigating under PMLA are not police officers, and hence deserves to be reviewed.

S. The impugned judgement failed to note certain crucial provisions of the PMLA that would conclusively show that the officers investigating under PMLA are police officers. The impugned judgement failed to note that under Sec.45(1A) PMLA, if so authorized by the Central Government (not the Director of Enforcement) by general or special order, a police officer can investigate the offence under PMLA. Such officer would exercise his powers under the Cr.P.C. and, ultimately, file a report

under Sec 173 of the Cr.P.C. It would be invidious discrimination and violative of Article 14 of the Constitution to hold that if an offence is investigated by such officer he would be a police officer, but when the offence is investigated by an officer of the Enforcement Directorate such officer would not be a police officer. Such a conclusion would be manifestly illogical and unconstitutional. In the light of Sec. 45(1A) PMLA, the impugned judgement ought to have held that the investigating officers of the Enforcement Directorate under PMLA are "police officers", and hence deserves to be reviewed.

T. The impugned judgement gravely erred in failing to note the import of Sec.46 and Sec. 65 of PMLA which made the Cr.P.C. applicable as long as there was no inconsistent provision in the PMLA. The impugned judgement erred in holding in para 176 that the provisions of Cr.P.C. do not apply to the investigating officers of the Enforcement Directorate until after the arrest of a person. This conclusion excludes the applicability of Sections 41 and 41-A of Chapter V Cr.P.C. as well as Sections 154 to 170 of Chapter XII of the Cr.P.C. These provisions of the Cr.P.C. are an integral part of "*the procedure established by law*" under Article 21 of the Constitution which has been interpreted to mean "*fair and reasonable procedure*" as well as to include "*substantive due process*". Absent the applicability of these crucial provisions of the Cr.P.C., there is no equivalent procedure in the PMLA. The

procedure followed by the Enforcement Directorate is completely opaque:

(i) there is no FIR which is registered or sent to the jurisdictional Magistrate or uploaded on the website;
(ii) the FIR, or equivalent ECIR, is not given to the accused even on demand;
(iii) there is no distinction between a witness and an accused;
(iv) there is no right to remain silent;
(v) there is no protection against self-incrimination;
(vi) there is no case diary or equivalent contemporaneous record of the investigation;
(vii) there is no judicial oversight of the investigation process; and
(viii) there is no judicial remedy against unlawful investigation.

The impugned judgement is gravely erroneous in so far as it has upheld the opaque and unconstitutional procedure followed by the Enforcement Directorate, and hence deserves to be reviewed.

U. The impugned judgement is gravely erroneous in so far as it has upheld in para 90 the unguided and unbridled power of the investigating officer to arrest a person under Sec.19 of PMLA. The subjective satisfaction of the investigating officer (who may be any person authorised) that a person has been guilty of an offence under PMLA is not a sufficient safeguard against unlawful and unjustified

arrests. It is the Cr.P.C., particularly, Sections 41 and 41-A, which provides a fair and reasonable procedure before an arrest is made. Absent the application of Sections 41 and 41-A of Cr P C, the power under Sec. 19 of PMLA is an unbridled power. Further, law declared by this Hon'ble Court in the following cases would be applicable to all arrests under any law:

(i) *Arnesh Kumar vs. State of Bihar*, reported in (2014) 8 SCC 273 (2 Judges) @ Para 11.6 and 12.

(ii) *Satender Kumar Antil vs. CBI*, reported in (2022) SCC OnLine 825 (2 Judges).

To the extent that the impugned judgement does not declare that the law laid down in the above cases would be applicable even in respect of an arrest under Sec.19 of PMLA, the impugned judgement has done away with all constitutional and legal safeguards and has upheld the arbitrary and uncanalised power of the investigating officer to arrest under Sec.19 of the PMLA. Hence, the impugned judgement deserves to be reviewed.

V. The impugned judgement gravely erred in relying upon *Romesh Chandra Mehta vs. State of West Bengal*, reported in AIR 1970 SC 940, *Union of India vs. Padam Narain Aggarwal*, reported in (2008) 13 SCC 305 and *Badaku Joti Savant vs. State of Mysore*, reported in AIR 1966 SC 1746 in para 89, which were cases that arose under the Customs Act or Central Excise and Salt Act. The Customs Act and the Excise Act are <u>not</u> essentially criminal laws, unlike the

PMLA which is essentially and exclusively a criminal law.

W. The impugned judgement erred in law in upholding the validity of Sec.24 of PMLA in the light of its interpretation of Sec.3 of PMLA. If, as held in the impugned judgement, Sec.3 does not require the essential ingredient of "*projecting or claiming*" the proceeds of crime as untainted property, the presumption under Sec.24(a) PMLA would completely overturn the fundamental principle of criminal law that "*every person is presumed innocent until proved guilty in a court of law*". As interpreted by the impugned judgement, a person can be charged under Sec.3 for mere "possession" of the proceeds of crime without knowing that they are proceeds of crime or without any involvement in any activity connected with the proceeds of crime. The Select Committee had cautioned the government that there should be adequate safeguards to protect the innocent. It is with that purpose that Sec.3 and Sec.24 were amended by Act 2 of 2013. Since "*projecting or claiming*" was made an additional and indispensable ingredient of the offence of money-laundering, the presumption under Sec.24(a) or (b) could be invoked only against a person who was "*projecting or claiming*" the proceeds of crime as untainted property. However, since the impugned judgement has rejected the submission that "*projecting or claiming*" is an indispensable ingredient of the offence, Sec.24 ought to have been struck down as opposed to

fundamental principles of criminal law as well as violating Article 21 of the Constitution. Hence, the impugned judgement deserves to be reviewed.

X. It is submitted that a variety of innocent persons may come into possession of "proceeds of crime" without the knowledge that they are proceeds of crime and without any involvement in any "process or activity connected with the proceeds of crime". Examples are (1) a banker who receives a deposit; (2) a doctor or lawyer who receives fees; (3) the electricity or water supply department which renders utility services; (4) a newspaper vendor or milkman who supplies newspapers or milk; (5) an employee who receives salary etc. If they are only in "possession" of proceeds of crime, without anything more, under the interpretation placed by the impugned judgement on Sec.3, the presumption in Sec.24 would apply and the burden of proving that he has not committed the offence of money-laundering would be on the accused. Such a conclusion is totally opposed to the fundamental principles of criminal law as well as violative of Article 21 of the Constitution. Hence, the impugned judgement deserves to be reviewed.

Y. The impugned judgement gravely erred in relying upon Sec.106 of the Evidence Act in para 100 in order to interpret Sec.24 of PMLA. Sec.106 of the Evidence Act places the burden of proving any "fact" which is "specially in the knowledge of any person" upon that person. On the contrary, Sec.24 is not concerned with

proving any "fact". Sec.24 draws a presumption against the accused in respect of essential ingredients of the offence of money-laundering. The fundamental principles of criminal law require that every ingredient of a criminal offence must be proved by the prosecution. The burden of proving every ingredient does not shift to the accused unless the foundational facts are proved. The accused has the right to lead rebuttal evidence. In the case of S.24 of PMLA, the provision has shifted the burden of disproving the essential ingredients of the offence of money-laundering on the accused. The impugned judgement has not kept the crucial difference between a fact in Sec.106 of Evidence Act and an essential ingredient of the offence under Sec.24 of PMLA, and hence deserves to be reviewed.

Z. The impugned judgement, while noting the distinction between legal burden and evidentiary burden, failed to note that Sec.106 of the Evidence Act deals with evidentiary burden whereas Sec.24 of PMLA deals with legal burden. Hence, in so far as the impugned judgement relies upon Sec.106 of Evidence Act to interpret and uphold Sec.24 of PMLA, the impugned judgement is gravely erroneous, and deserves to be reviewed.

AA. The impugned judgement has paragraphs which are seemingly contradictory. In paras 97, 99 and 101, the impugned judgement holds that three basic or foundational facts must be proved by the prosecution. As a matter of law, only if these foundational facts are proved

by the prosecution, the charge of money-laundering will be established. There is no scope for any presumption in law. The accused may only lead rebuttal evidence. It is submitted that if this is the correct position in law, the interpretation placed by the judgement on Sec.24 of PMLA is erroneous and deserves to be reviewed and set aside.

BB. The judgement is gravely erroneous in so far as it holds, in paras 95 and 96, that Sec.24 of PMLA was enacted, and later amended, pursuant to obligations under international conventions. There were no international conventions brought to the notice of the Court while interpreting Sec.24 of PMLA. It is apparent that the judgement has misunderstood the FATF recommendations as amounting to obligations under an international convention. For this reason also, the impugned judgement deserves to be reviewed.

CC. The impugned judgement is gravely erroneous in so far as it has, in para 111, rejected the submission that if the trial of the scheduled offence is withdrawn to the Special Court (under Sec.43), it would take away one right of appeal to an accused charged only with the scheduled offence and not charged with the offence of money-laundering. The judgement erred in relying upon the decision in *Kalyan Singh (2017) 7 SCC 444.* The judgement erred in not following the precedent in *A. R. Antulay vs. R. S. Nayak*, reported in (1988) 2 SCC 602. Hence, the impugned judgement deserves to be reviewed.

DD. The impugned judgement is gravely erroneous in so far as it has overlooked and/or summarily rejected the challenge to Explanation (i) to Sec.44 of PMLA. The impugned judgement has held in paras 33 and 52 that if the accused is discharged or acquitted in the scheduled offence, there is no scope of trying him or finding him guilty of the offence of money-laundering. Having interpreted the PMLA in that manner, it will logically follow that Explanation (i) is unconstitutional. Nevertheless, in para 114, without considering the submission in this behalf, the impugned judgement has upheld the validity of Sec.44 *in toto* including, presumably, Explanation (i). Hence, the impugned judgement deserves to be reviewed.

EE. The impugned judgement ignored the fact that by Act 20 of 2005 certain words in Sec.45(1) were omitted which made the offence "non-cognizable". By the same Amending Act, sub-section (1A) was inserted in Sec.45 of PMLA which enabled authorizing a police officer to investigate the offence of money-laundering. The import of these changes was to make the offence non-cognizable while at the same time restraining a police officer to investigate the offence unless he was authorized to do so. The impugned judgement failed to notice the significance and import of these changes. The Explanation to Sec.45 was added only by Act 23 of 2019 ***(a Money Bill)*** which applied prospectively. Hence, the offence remained non-cognizable between 2005 and 2019. By an Explanation, the offence could not have been made cognizable,

retrospectively. Parliament does not have the competence to enact a substantive provision of a criminal law with retrospective effect. It will be hit by Article 20 of the Constitution. If the offence of money-laundering remained non-cognizable between 2005 and 2019, all ECIRs recorded and investigations done without an order of the Magistrate under Sec.155(2) of Cr.P.C. were without jurisdiction. The impugned judgement gravely erred in not dealing with this submission, and hence deserves to be reviewed.

FF. While considering the validity of Sec.45 of PMLA, the impugned judgement erred in not appreciating the well-settled principle of law that "*bail is the rule, and refusal of bail is the exception*". The purpose of imposing conditions while granting bail is to secure the presence of the accused at the trial and to forbear the accused from tampering with the evidence or witnesses. Sec.45, in its application, will invariably amount to pre-trial incarceration, because in the absence of an FIR (or equivalent), Complaint (charge sheet), case diary (not maintained), and documents relied upon by the prosecution, no accused can present facts and submissions to persuade the Special Court to believe that he is "*not guilty of such offence*". It is placing on the accused a burden that, in most cases, is impossible to discharge. Such an outcome is extremely prejudicial to the accused and is violative of the principles of "*fair and reasonable*

procedure" and "*substantive due process*" enshrined in Article 21 of the Constitution.

GG. The above ground will apply in greater force to a case when the petitioner seeks anticipatory bail. At that stage, the petitioner is completely in the dark except that he genuinely apprehends arrest, more so since the petitioner is not even supplied with a copy of the ECIR on the ground that it is an internal document, which view has been endorsed in the impugned judgment in para 179. That is why in *Nikesh Tarachand Shah vs. Union of India*, reported in (2018) 11 SCC 1, this Hon'ble Court had held that the twin conditions will not apply in the case of anticipatory bail. The impugned judgement in para 137 gravely erred in overruling this opinion and holding that the twin conditions will apply even in a case of anticipatory bail, and hence deserves to be reviewed.

HH. The conclusions in the impugned judgement regarding the validity of the twin conditions in Sec.45 of PMLA are *per incuriam*, contrary to settled law and not in consonance with the fundamental right guaranteed in Article 21 of the Constitution. In *Nikesh Tarachand Shah vs. Union of India*, reported in (2018) 11 SCC 1, this Hon'ble Court struck down Sec.45 of PMLA including the two conditions on several grounds including the ground that the twin conditions, as applied to the offence of money-laundering, violated Article 21 of the Constitution. While the other defects pointed out by this Hon'ble Court may or may not have been cured by Act 13 of 2018 (***a Money***

Bill), it did not cure, and could not have cured, the infirmity that the provision violated Article 21 of the Constitution. The judgement relying on earlier judgements concerning TADA Act, in para 129, has disagreed with the opinion in *Nikesh Tarachand Shah* and has equated the offence of "*terrorist act*" punishable with death or life imprisonment with the offence of "*money-laundering*" which is punishable with imprisonment for 3 to 7 years. It is obvious that Parliament has considered the offence of money-laundering as less heinous and has prescribed a lesser punishment than death or life imprisonment. Thus, the impugned judgement has ignored a vital and material fact that persuaded this Hon'ble Court in *Nikesh Tarachand Shah* to strike down the twin conditions attached to Sec.45 of PMLA on the ground that they violated Article 21 of the Constitution. The impugned judgement, therefore, deserves to be reviewed in light of the sound reasons given in *Nikesh Tarachand Shah* in so far as violation of Article 21 of the Constitution is concerned.

II. The impugned judgement is gravely erroneous in that it did not follow the law declared by a Constitution Bench in *Justice K.S. Puttaswamy (Retd.) vs. Union of India*, reported in (2019) 1 SCC 1. The declared law is that every legislation that is alleged to infringe the rights of citizens must satisfy the tests of (i) proportionality and (ii) that there were no less invasive measures to achieve the object. The Schedule to PMLA contains a number of predicate

offences, some even non-cognizable and many with lesser punishment than 3 to 7 years. The twin conditions will be attracted irrespective of the predicate offence which allegedly gave rise to the proceeds of crime and even if the accused had been granted bail in the predicate offence. Such an outcome offends the principle of proportionality and there were less invasive means of achieving the object of securing the presence of the accused in the trial of the offence of money-laundering. The judgement gravely erred in not considering or dealing with these crucial submissions, and hence deserves to be reviewed.

JJ. A Constitutional Court, exercising powers under Article 32 or Article 226 of the Constitution, is not bound by restrictions imposed by a statute when it considers and applies the fundamental rights of a citizen. Articles 14, 19 and 21 of the Constitution are fundamental rights. When a person applies for bail and also invokes Articles 14, 19 and 21 of the Constitution, a Constitutional Court may grant bail irrespective of the twin conditions (or any other restriction) attached to Sec.45 of PMLA. Reliance was placed by the Petitioners on the judgement in *Union of India v. K.A. Najeeb*, reported in (2021) 3 SCC 713 @ Para 17. The impugned judgement gravely erred in law in not considering this submission, and hence the judgement deserves to be reviewed. Also refer to – (i) Order dated 25.07.2022 passed by the Hon'ble Supreme Court in Crl. Appeal No. 1023 of 2022 titled "*Sujay U Desai vs. Serious*

Fraud Investigation Office" and (ii) Order dated 18.04.2022 passed by the Hon'ble Supreme Court in Crl. Appeal No. 640 of 2022 titled "*Jainam Rathod vs. State of Haryana*".

KK. It is submitted that a Special Court may be bound to apply the twin conditions attached to Sec.45 of PMLA, but the Constitutional Courts are not bound by the said twin conditions and may grant bail having regard to the facts and circumstances of a case. The impugned judgement is erroneous in so far as it has not followed the precedent cited and erred in not declaring that Constitutional Courts are not bound by the twin conditions attached to Sec. 45 of PMLA, and deserves to be reviewed.

LL. The impugned judgement is gravely erroneous in so far as it has held that the power of granting bail in economic offences must be sparingly exercised. The judgement is also in error in relying upon the observations in *P. Chidambaram vs. Directorate of Enforcement*, reported in (2019) 9 SCC 24 and other cases. These observations have been held to be not good law and were overruled in *Sushila Aggarwal vs. State (NCT of Delhi)*, reporting in (2020) 5 SCC 1 in paras 60.4, 75 & 76.

MM. The impugned judgement gravely erred in holding that statements obtained under Sec.50 of PMLA are admissible in evidence even in respect of a person accused of an offence or of a person in the position of an accused. The impugned judgement failed to note the enormity of

the consequences of reading Sections 50(3), 50(4) and 63 of PMLA. It is settled law that:

(i) The protection of Article 20(3) is available to any person who is an accused or is an accused in a connected case or is in the position of an accused;

(ii) Such a person is entitled to remain silent; and

(iii) Any kind of duress — physical, emotional, circumstantial or statutory — would amount to testimonial compulsion.

The impugned judgement has disregarded or disagreed with the binding precedents laying down the above principles of law and has held that a statement obtained under Sec.50 of PMLA, even in the case of an accused or a person in the position of an accused, would not violate Sec. 25 of Evidence Act or Article 20(3) of the Constitution. The impugned judgement is *per incuriam* and gravely wrong and, in the interest of justice, it deserves to be reviewed.

NN. The impugned judgement is *per incuriam* in that it has, in substance, disagreed with the law declared in larger bench decision in State of Bombay vs. *Kathi Kalu Ogad*, reported in AIR 1961 SC 1808, and in *Nandini Satpathy vs. P. L. Dani*, reported in (1978) 2 SCC 424, and in *Selvi vs. State of Karnataka*, reported in (2010) 7 SCC 263 and other cases decided by this Hon'ble Court, and hence deserves to be reviewed.

OO. The impugned judgement gravely erred in holding in para 159 that when a summon is issued under Sec.50 of PMLA,

the Authority under Sec.50 is not conducting an investigation but only undertaking an inquiry. The impugned judgement also gravely erred in holding that it is only if, after arrest of the person, a statement is obtained under Sec.50 of PMLA, that the person can claim the protection of Article 20(3) of the Constitution or Sec.25 of Evidence Act. It is submitted that this statement of the law has absolutely and erroneously overturned the settled law and hence the impugned judgment deserves to be reviewed.

PP. The impugned judgment is in grave error in that it failed to note that the word used in Sec.50(2) is "investigation" and that word is defined in Sec.2(1)(na) of PMLA. Nevertheless, the impugned judgement has given a meaning to the word "investigation" contrary to the explicit meaning given in Sec.2(1)(na) and erroneously held that at the stage of issue of summon under Sec.50 PMLA, the investigating officer is not conducting an investigation of an offence. These conclusions are manifestly erroneous and deserve to be reviewed.

4. It is submitted that the instant Review Petition is being preferred by the Petitioner without prejudice to any other remedies that may be available to the Petitioner in accordance with law.

5. It is submitted that grave prejudice will be caused if the manifest and apparent errors in the impugned judgment are not reviewed and set aside.

6. The Petitioner above-named has not filed any other Review Petition earlier before this Hon'ble Court against the aforesaid final judgment and order dated 27.07.2022 passed by this Hon'ble Court in Transferred Case (Crl.) NO. 4 of 2018.

7. The instant Review Petition is being filed *bona fide* and in the interest of justice.

P R A Y E R

It is, therefore, most respectfully prayed that this Hon'ble Court may graciously be pleased to :-

a) allow the present Review Petition and set aside the final order and judgment dated 27.07.2022 passed by this Hon'ble Court in Transferred Case (Crl.) No. 4 of 2018; and

b) pass such other and further order or orders as this Hon'ble Court may deem fit and proper under the circumstances of the case.

AND FOR THIS ACT OF KINDNESS THE PETITIONER SHALL EVER PRAY AS DUTY BOUND.

FILED BY

Sbhasin

SHALLY BHASIN
ADVOCATE FOR THE PETITIONER

DRAWN ON: 12.08.2022
FILED ON: 22.08.2022
NEW DELHI

IN THE SUPREME COURT OF INDIA

INHERENT JURISDICTION

REVIEW PETITION (CRL) NO. OF 2022

IN

TRANSFERRED CASE CRL. NO. 4 OF 2018

IN THE MATTER OF:-

Karti P. Chidambaram … Petitioner

VERSUS

Directorate of Enforcement … Respondent

CERTIFICATE

"Certified that the present Review Petition is the first application for the review of the final order and judgment dated 27.07.2022 and it is based on the grounds admissible under the Rules. No additional facts, documents or grounds have been taken therein or relied upon in the Review Petition which were not part of the Transferred Case earlier."

FILED BY

Sbhasin

SHALLY BHASIN
ADVOCATE FOR THE PETITIONER

FILED ON: 22.08.2022
New Delhi

IN THE SUPREME COURT OF INDIA

(Under Article 137 of the Constitution of India)

REVIEW PETITION (CRL) NO. OF 2022

IN

TRANSFERRED CASE CRL. NO. 4 OF 2018

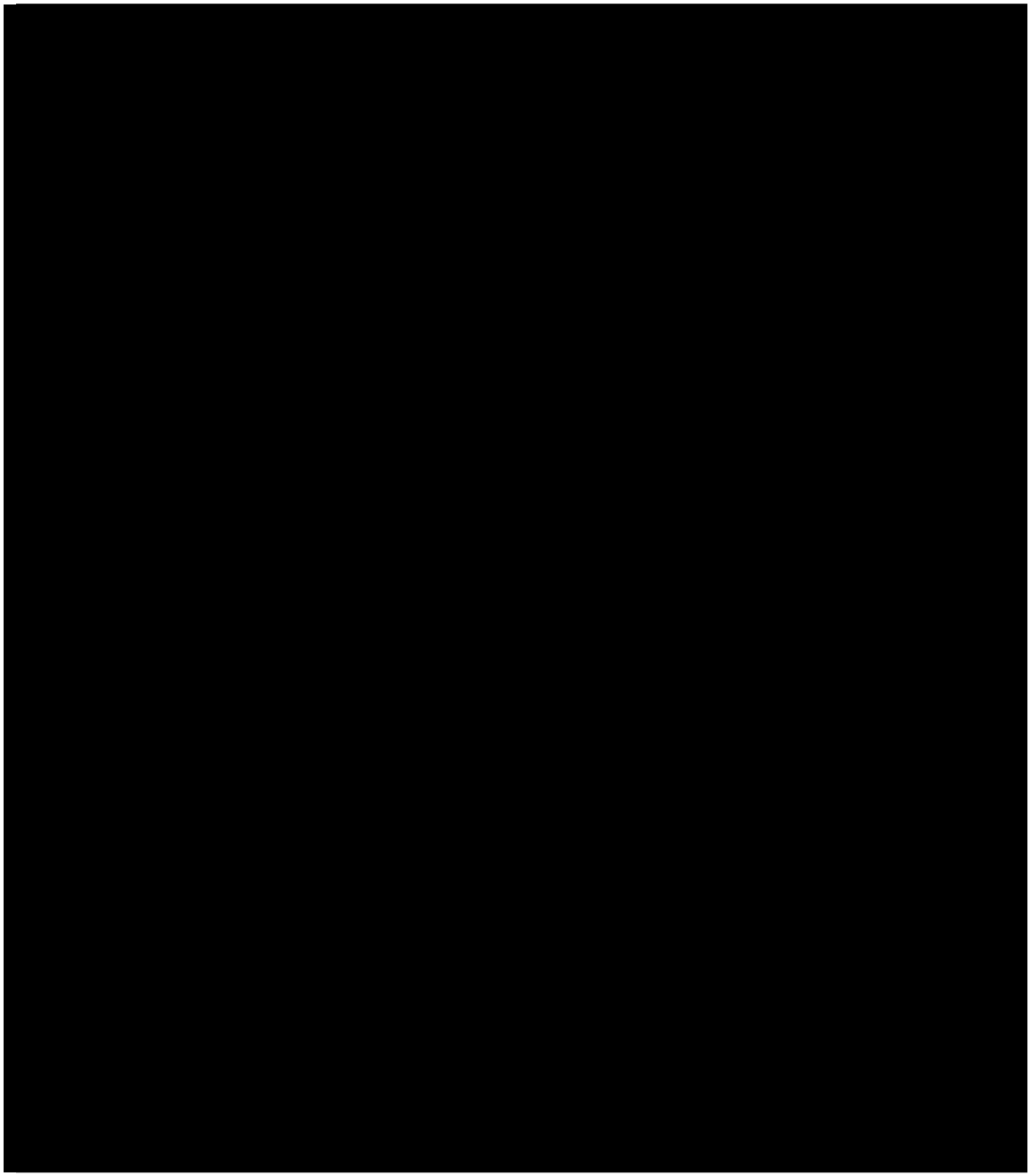
IN THE MATTER OF:-

Karti P. Chidambaram — Petitioner

Versus

Directorate of Enforcement — Respondent

AFFIDAVIT



IN THE SUPREME COURT OF INDIA

INHERENT JURISDICTION

CRL.M.P. NO. _____ OF 2022

IN

REVIEW PETITION (CRL) NO. OF 2022

IN

TRANSFERRED CASE CRL. NO. 4 OF 2018

IN THE MATTER OF:-

Karti P. Chidambaram … Petitioner

VERSUS

Directorate of Enforcement … Respondent

APPLICATION FOR GRANT OF AD-INTERIM EX-PARTE STAY OF THE FINAL ORDER AND JUDGMENT UNDER REVIEW DATED 27.07.2022.

To,

THE HON'BLE CHIEF JUSTICE OF INDIA
AND HIS HON'BLE COMPANION JUSTICES
OF HON'BLE SUPREME COURT OF INDIA

THE HUMBLE PETITION OF THE PETITIONER ABOVE NAMED

MOST RESPECTFULLY SHOWETH :-

1. That the Petitioner is filing the present Review Petition seeking reconsideration of the final order and judgment dated 27.07.2022 passed by this Hon'ble Court in Transferred Case (Crl.) No. 4 of 2018.

2. That the contents of the accompanying Review Petition are not being repeated for the sake of brevity, however, the same may be read as part of the present application.

3. That in view of the reasons stated in the review petition, it is imperative that the operation of the final order and judgment dated 27.07.2022 passed by this Hon'ble Court in Transferred Case Crl. No. 4 of 2018 is stayed during the pendency of the instant Review Petition.

4. That if the judgment is allowed to stand during the pendency of present review petition, the petitioner will suffer irreparable harm and injury which cannot be compensated in any manner.

5. That the Petitioner has got a very good prima facie case. Since, the Petitioner is filing the instant Review Petition, it is in the interest of justice to stay the final order and judgment dated 27.07.2022 passed by this Hon'ble Court in Transferred Case Crl. No. 4 of 2018.

6. That the present Petition is moved bona fide and in the interest of justice.

PRAYER

It is, therefore, most respectfully prayed that this Hon'ble Court may be graciously pleased to:

A) grant ad-interim ex-parte stay of the final order and judgment dated 27.07.2022 passed by this Hon'ble Court in Transferred Case (Crl.) No. 4 of 2018 till the pendency of the present review petition, and/or

B) pass such other and further order(s) that this Hon'ble Court may feel in the interests of justice and the facts and circumstances of the case.

AND FOR THIS ACT OF KINDNESS, THE PETITIONER AS IN DUTY BOUND SHALL EVER PRAY

FILED BY

SHALLY BHASIN
ADVOCATE FOR THE PETITIONER

FILED ON: 22.08.2022
New Delhi

IN THE SUPREME COURT OF INDIA

INHERENT JURISDICTION

CRL.M.P. NO. _____ OF 2022

IN

REVIEW PETITION (CRL) NO. OF 2022

IN

TRANSFERRED CASE CRL. NO. 4 OF 2018

IN THE MATTER OF:-

Karti P. Chidambaram … Petitioner

VERSUS

Directorate of Enforcement … Respondent

APPLICATION SEEKING DIRECTIONS FOR HEARING OF THE REVIEW PETITION IN THE OPEN COURT

To,

THE HON'BLE CHIEF JUSTICE OF INDIA

AND HIS HON'BLE COMPANION JUSTICES

OF HON'BLE SUPREME COURT OF INDIA

THE HUMBLE PETITION OF THE PETITIONER ABOVE NAMED

MOST RESPECTFULLY SHOWETH :-

1. That the Petitioner is filing the present Review Petition seeking reconsideration of the final order and judgment dated 27.07.2022 passed by this Hon'ble Court in Transferred Case (Crl.) No. 4 of 2018.

2. That the contents of the accompanying Review Petition are not being repeated for the sake of brevity, however, the same may be read as part of the present application.

3. That in view of the reasons stated in the review petition, oral arguments are essential in the present matter in order to assist this Hon'ble Court. Further, it would be in the interest of justice that oral arguments are permitted.

4. That the Applicant has a good prima facie case for review of the final order and judgment dated 27.07.2022 passed by this Hon'ble Court in Transferred Case Crl. No. 4 of 2018.

5. That the present Application is being made bona fide and in the interest of justice.

P R A Y E R

The Applicant/ Petitioner respectfully prays that this Hon'ble Court may graciously be pleased to:

A. Grant the Review Petitioner an opportunity of oral hearing and list the present Review Petition for hearing in the open court; and /or

B. pass such other order or orders as this Hon'ble Court may deem fit and proper in the interest of justice.

AND FOR THIS ACT OF KINDNESS THE PETITIONER AS IS DUTY BOUND SHALL EVER PRAY.

FILED BY

Sbhasin

SHALLY BHASIN
ADVOCATE FOR THE PETITIONER

FILED ON: 22.08.2022
New Delhi