# LL.B. III Term

## LB 3037: Law of Crimes-III

**Course Materials: Selected and Edited By**


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## Paper: LB-3037 Law of Crimes-III

### Topic 1: Introduction

A. Concept of White Collar Crime - Definition, Scope, Evolution, and Consequences.
B. *Mens Rea*, Nature of Liability, Burden of Proof, and Sentencing Policy.
C. Distinction among White Collar Crimes, Socio-Economic Offences, Traditional Crimes, Organized Crimes, Corporate Crimes and Occupational Crimes.
D. White Collar Crimes in Different Professions: Tax Evasion, Corporate Fraud, and Health Care Fraud.

*Prescribed Readings:*

1. Mahesh Chandra, Socio-Economic Offences (1979).
2. J.S.P. Singh, Socio-Economic Offences (1st Ed., 2005, Reprint 2015).

***Suggested Readings:***

1. Geilbert Geis and Colin Goff, *The Problem of White Collar Crime*, Edwin H. Sutherland, White Collar Crime, 3-10 (1983).
2. Brian K. Payne, *White Collar Crime- The Essentials* (Sage Publication, 2nd Ed., 2016).
3. Bakshi Tek Chand, "Report on the Special Police Establishment Enquiry Committee" (1952).
4. Santhanam Committee Report on Prevention of Corruption (1962).
5. 29th Report of the Law Commission of India, "Proposal to include certain Social and Economic Offences in the Indian Penal Code" (1966).
6. K.N.Wanchoo, "Report on Malady of Black Money" (1970).
7. 47th Report of the Law Commission of India, "The Trial and the Punishment of Social and Economic Offences" (1972).
8. P. K. Gupta and Sanjeev Gupta, "Corporate Frauds in India – Perceptions and Emerging Issues" Vol. 22(1) *Journal of Financial Crime* 79 – 103 (2015).
9. Sarah Hodges, "The Case of the 'Spurious Drugs Kingpin': Shifting Pills in Chennai, India" 29(4) *Critical Public Health* 473-483 (2019).
10. *Serious Fraud Investigation Office* v. *Rahul Modi,* Criminal Appeal Nos. 538-539 of 2019.

11. *U.S.* v. *Ranbaxy USA, Inc.*, JFM-13-CR-0238 (D. Md.). [Fraudulent Representation to FDA] https://www.justice.gov/archives/opa/pr/generic-drug-manufacturer-ranbaxy-pleads-guilty-and-agrees-pay-500-million-resolve-false

## Topic 2: White Collar Criminality and Social Learning Theories

A. Edwin H. Sutherland's Concept of 'White Collar Criminality' **1-13**
B. The Theory of Differential Association by Edwin H. Sutherland **14-20**
C. Rationalization of White Collar Crimes- Fraud Triangle by Donald Cressey

***Prescribed Readings:***
1. Edwin H. Sutherland, "White Collar Criminality" Vol.5(1) *American Sociological Review* (1940).
2. Edwin H Sutherland, "The Theory of Differential Association," in David Dressler, *Readings in Criminology and Penology,* 365-370 (Columbia University Press, 2nd Ed., 1972)

***Suggested Readings:***
1. Katherine S. Williams*, "Differential Association", Textbook on Criminology, 501-519 (6th ed., 2012)*
2. Dr. Joseph T. Wells, *Corporate Fraud Handbook- Prevention and Detection,* 1-42 (John Wiley & Sons, 5th Edition, 2017).

## Topic 3: The Food Safety and Standards Act, 2006

A. The Food Safety and Standards Act, 2006: Definitions of 'food', 'adulterant', 'contaminant', 'food business', 'misbranded food'
B. Food Safety and Standards Authorities of India & State Food Safety and Standards: Establishment and Functions
C. Food Safety Officer- Power, Function and Liabilities
D. Food Analyst (Section 45)
E. General Principles to be followed for Food Safety under the Act (Section 18)
F. Licensing and Registration of Food Business (Section 31)
G. Purchaser may have food analyzed (Section 40)

***Cases:***



## Topic 4: The Narcotics and Psychotropic Substances Act, 1985

A. Definition of Narcotic Drugs and Psychotropic Substances, and Controlled Substance
B. Authorities and Officers: Sections 4,6,7
C. National Fund for Control of Drug Abuse: Section 7A
D. Prohibition, Control, and Regulation: Sections 8, 9, 9A
E. Presumptions: Sections 35 and 54
F. Offences and Penalties: Sections 18, 19, 20, 21, 22, 25A, 27, 27A, 30, 31, 31A, 32, 58
G. Procedure: Sections 36, 36A, 37, 39, 41, 42, 43, 49, 50, 52A, 60, 64.

***Cases:***



## Topic 5: The Prevention of Corruption Act, 1988

A. Need of the Act (read with Santhanam Committee Report, 1962 on Prevention of Corruption)
B. Role of Anti-Corruption Bureau, Central Vigilance Commission, and Central Bureau of Investigation
C. Definitions of ‘Public Servant’, ‘Public Duty’, and ‘Undue Advantage’
D. Offence committed by Public Servant and Bribe Giver, and their Penalties (Sec 7 to 14)
E. Punishment for Attempt (Section 15)

F. Section 17- Persons Authorised to Investigate, and Section 17A- Previous Approval before Enquiry, Inquiry or Investigation.
G. Sanction for Prosecution (Section 19 r/w Section 197 of the Code of Criminal Procedure, 1973)
H. Presumption where Public Servant accepts any Undue Advantage (Section 20)

***Cases:***



***Prescribed Readings:***

1. UN Convention against Corruption, 2003
2. Seth and Capoor, *Prevention of Corruption Act with a treatise on Anti- Corruption Laws* (3rd Ed., 2000).

***Suggested Readings and Cases:***

1. The Delhi Special Police Establishment Act, 1946
2. The Central Vigilance Act, 2003
3. *R. S. Nayak* v. *A. R. Antulay* AIR 1984 SC 684
4. *CBI, Bank Securities & Fraud Cell* v. *Ramesh Gelli,* (2016) 3 SCC 788

## Topic 5: The Prevention of Money-Laundering Act, 2002

A. Need for combating Money-Laundering
B. Magnitude of Money-Laundering, its steps and various methods
C. The Prevention of Money-Laundering Act, 2002
D. Definition of 'Money Laundering', Section 3 & 2(1)(p)
E. Punishment for Money Laundering (Section 4)
F. **Enforcement:**

Attachment (Section 5)

Survey, Search, & Seizure (Sections 16, 17, & 18)

Power to Arrest (Section 19)

G. **Adjudication under the Act:**

Adjudication by Adjudicating Authorities (Section 8)

Special Courts (Sections 43 to 47)

Vesting of Property in Central Government (Section 9)

H. **Preventive Mechanisms under the Act:**

Obligation of Banking Companies, Financial Institutions and Intermediaries (Sections 12 & 12A)

Reciprocal Arrangements with other countries (Overview of Chapter IX, i.e. Sections 55 to 61)

***Cases:***



***Prescribed Readings:***

1. UN Political Declaration & Action Plan against Money Laundering 1998.
2. M. C. Mehanathan, *Law on Prevention of Money Laundering in India* (2014).
3. Manu Sharma, Aditya Wadhwa, *Guide to the PMLA & Proceeds of Crime* (2022).

## TOPIC 2: WHITE COLLAR CRIMINALITY AND RELATED THEORIES

### (A) White Collar Criminality*

This paper[1] is concerned with crime in relation to business. The economists are well acquainted with business methods but not accustomed to consider them from the point of view of crime; many sociologists are well acquainted with crime but not accustomed to consider it as expressed in business. This paper is an attempt to integrate these two bodies of knowledge. More accurately stated, it is a comparison of crime in the upper or white-collar class, composed of respectable or at least respected business and professional men, and crime in the lower class, composed of persons of low socioeconomic status. This comparison is made for the purpose of developing the theories of criminal behavior, not for the purpose of muckraking or of reforming anything except criminology.

The criminal statistics show unequivocally that crime, *as popularly conceived and officially measured*, has a high incidence in the lower class and a low incidence in the upper class; less than two percent of the persons committed to prisons in a year belong to the upper class. These statistics refer to criminals handled by the police, the criminal and juvenile courts, and the prisons, and to such crimes as murder, assault, burglary, robbery, larceny, sex offenses, and drunkenness, but exclude traffic violations.

The criminologists have used the case histories and criminal statistics derived from these agencies of criminal justice as their principal data. From them, they have derived general theories of criminal behavior. These theories are that, since crime is concentrated in the lower class, it is caused by poverty or by personal and social characteristics believed to be associated statistically with poverty, including feeblemindedness, psychopathic deviations, slum neighborhoods, and "deteriorated" families. This statement, of course, does not do justice to the qualifications and variations in the conventional theories of criminal behavior, but it presents correctly their central tendency.

The thesis of this paper is that the conception and explanations of crime which have just been described are misleading and incorrect, that crime is in fact not closely correlated with

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* Edwin H. Sutherland, "White Collar Criminality" Vol. 5 No.1 *American Sociological Review* (1940).

[1] Thirty-fourth Annual Presidential Address delivered at Philadelphia, Pa., Dec. 27, 1939 in joint meeting with the American Economic Society (its Fifty-second) at which President Jacob Viner spoke on the relations of economic theory to the formulation of public policy.

poverty or with the psychopathic and sociopathic conditions associated with poverty, and that an adequate explanation of criminal behavior must proceed along quite different lines. The conventional explanations are invalid principally because they are derived from biased samples. The samples are biased in that they have not included vast areas of criminal behavior of persons not in the lower class. One of these neglected areas is the criminal behavior of business and professional men, which will be analyzed in this paper.

The "robber barons" of the last half of the nineteenth century were white-collar criminals, as practically everyone now agrees. Their attitudes are illustrated by these statements: Colonel Vanderbilt asked, "You don't suppose you can run a railroad in accordance with the statutes, do you?" A. B. Stickney, a railroad president, said to sixteen other railroad presidents in the home of J. P. Morgan in 189o, "I have the utmost respect for you gentlemen, individually, but as railroad presidents I wouldn't trust you with my watch out of my sight." Charles Francis Adams said, "The difficulty in railroad management . . . lies in the covetousness, want of good faith, and low moral tone of railway managers, in the complete absence of any high standard of commercial honesty."

The present-day white-collar criminals, who are more suave and deceptive than the “robber barons,” are represented by Krueger, Stavisky, Whitney, Mitchell, Foshay, Insull, the Van Sweringens, Musica-Coster, Fall, Sinclair, and many other merchant princes and captains of finance and industry, and by a host of lesser followers. Their criminality has been demonstrated again and again in the investigations of land offices, railways, insurance, munitions, banking, public utilities, stock exchanges, the oil industry, real estate, reorganization committees, receiverships, bankruptcies, and politics. Individual cases of such criminality are reported frequently, and in many periods, more important crime news may be found on the financial pages of newspapers than on the front pages. White-collar criminality is found in every occupation, as can be discovered readily in casual conversation with a representative of an occupation by asking him, “What crooked practices are found in your occupation?”

White-collar criminality in business is expressed most frequently in the form of misrepresentation in financial statements of corporations, manipulation in the stock exchange, commercial bribery, bribery of public officials directly or indirectly in order to secure favorable contracts and legislation, misrepresentation in advertising and salesmanship, embezzlement and misapplication of funds, short weights and measures and misgrading of commodities, tax frauds, misapplication of funds in receiverships and bankruptcies. These are what Al Capone called "the legitimate rackets." These and many others are found in abundance in the business world.

In the medical profession, which is here used as an example because it is probably less criminalistic than some other professions, are found illegal sale of alcohol and narcotics, abortion, illegal services to underworld criminals, fraudulent reports and testimony in accident cases, extreme cases of unnecessary treatment, fake specialists, restriction of competition, and fee-splitting. Fee-splitting is a violation of a specific law in many states and a violation of the conditions of admission to the practice of medicine in all. The physician who participates in fee-splitting tends to send his patients to the surgeon who will give him the largest fee rather than to the surgeon who will do the best work. It has been reported that two thirds of the surgeons in New York City split fees, and that more than one half of the physicians in a central western city who answered a questionnaire on this point favored fee-splitting.

These varied types of white-collar crimes in business and the professions consist principally of violation of delegated or implied trust, and many of them can be reduced to two categories: misrepresentation of asset values and duplicity in the manipulation of power. The first is approximately the same as fraud or swindling; the second is similar to the double-cross. The latter is illustrated by the corporation director who, acting on inside information, purchases land which the corporation will need and sells it at a fantastic profit to his corporation. The principle of this duplicity is that the offender holds two antagonistic positions, one of which is a position of trust, which is violated, generally by misapplication of funds, in the interest of the other position. A football coach, permitted to referee a game in which his own team was playing, would illustrate this antagonism of positions. Such situations cannot be completely avoided in a complicated business structure, but many concerns make a practice of assuming such antagonistic functions and regularly violating the trust thus delegated to them. When compelled by law to make a separation of their functions, they make a nominal separation and continue by subterfuge to maintain the two positions.

An accurate statistical comparison of the crimes of the two classes is not available. The most extensive evidence regarding the nature and prevalence of white-collar criminality is found in the reports of the larger investigations to which reference was made. Because of its scattered character, that evidence is assumed rather than summarized here. A few statements will be presented, as illustrations rather than as proof of the prevalence of this criminality.

The Federal Trade Commission in 1920 reported that commercial bribery was a prevalent and common practice in many industries. In certain chain stores, the net shortage in weights was sufficient to pay 3.4 percent on the investment in those commodities. Of the cans of ether sold to the Army in 1923-1925, 70 percent were rejected because of impurities. In Indiana, during the summer of 1934, 40 percent of the ice cream samples tested in a routine manner by the Division of Public Health were in violation of law. The Comptroller of the Currency in 1908 reported that violations of law were found in 75 percent of the banks examined in a three months' period. Lie detector tests of all employees in several Chicago banks, supported in almost all cases by confessions, showed that 20 percent of them had stolen bank property. A public accountant estimated, in the period prior to the Securities and Exchange Commission, that 8o percent of the financial statements of corporations were misleading. James M. Beck said, "Diogenes would have been hard put to it to find an honest man in the Wall Street which I knew as a corporation lawyer" (in 1916).

White-collar criminality in politics, which is generally recognized as fairly prevalent, has been used by some as a rough gauge by which to measure white-collar criminality in business. James A. Farley said, "The standards of conduct are as high among officeholders and politicians as they are in commercial life," and Cermak, while mayor of Chicago, said, "There is less graft in politics than in business." John Flynn wrote, "The average politician is the merest amateur in the gentle art of graft, compared with his brother in the field of business." And Walter Lippmann wrote, "Poor as they are, the standards of public life are so much more social than those of business that financiers who enter politics regard themselves as philanthropists."

These statements obviously do not give a precise measurement of the relative criminality of the white-collar class, but they are adequate evidence that crime is not so highly concentrated in the lower class as the usual statistics indicate. Also, these statements obviously do not mean that every business and professional man is a criminal, just as the usual theories do not mean that every man in the lower class is a criminal. On the other hand, the preceding statements refer in many cases to the leading corporations in America and are not restricted to the disreputable business and professional men who are called quacks, ambulance chasers, bucket-shop operators, dead-beats, and fly-by-night swindlers.[2]

The financial cost of white-collar crime is probably several times as great as the financial cost of all the crimes which are customarily regarded as the "crime problem." An officer of a chain grocery store in one year embezzled $600,000, which was six times as much as the annual losses from five hundred burglaries and robberies of the stores in that chain. Public enemies numbered one to six secured $130,000 by burglary and robbery in 1938, while the sum stolen by Krueger is estimated at $250,000,000, or nearly two thousand times as much. *The New York Times* in 1931 reported four cases of embezzlement in the United States with a loss of more than a million dollars each and a combined loss of nine million dollars. Although a million-dollar burglar or robber is practically unheard of, these million-dollar embezzlers are small-fry among white-collar criminals. The estimated loss to investors in one investment trust from 1929 to 1935 was $580,000,000, due primarily to the fact that 75 percent of the values in the portfolio were in securities of affiliated companies, although it advertised the importance of diversification in investments and its expert services in selecting safe securities. In Chicago, the claim was made six years ago that householders had lost $54,000,000 in two years during the administration of a city sealer who granted immunity from inspection to stores which provided Christmas baskets for his constituents.

The financial loss from white-collar crime, great as it is, is less important than the damage to social relations. White-collar crimes violate trust and therefore create distrust, which lowers social morale and produces social disorganization on a large scale. Other crimes produce relatively little effect on social institutions or social organization.

White-collar crime is real crime. It is not ordinarily called crime, and calling it by this name does not make it worse, just as refraining from calling it crime does not make it better

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[2]Perhaps it should be repeated that "white-collar" (upper) and "lower" classes merely designate persons of high and low socioeconomic status. Income and amount of money involved in the crime are not the sole criteria. Many persons of "low" socioeconomic status are "white-collar" criminals in the sense that they are well-dressed, well-educated, and have high incomes, but "white-collar" as used in this paper means "respected," "socially accepted and approved," "looked up to." Some people in this class may not be well-dressed or well-educated, nor have high incomes, although the "upper" usually exceed the "lower" classes in these respects as well as in social status.

than it otherwise would be. It is called crime here in order to bring it within the scope of criminology, which is justified because it is in violation of the criminal law. The crucial question in this analysis is the criterion of violation of the criminal law. Conviction in the criminal court, which is sometimes suggested as the criterion, is not adequate because a large proportion of those who commit crimes are not convicted in criminal courts. This criterion, therefore, needs to be supplemented. When it is supplemented, the criterion of the crimes of one class must be kept consistent in general terms with the criterion of the crimes of the other class. The definition should not be the spirit of the law for white-collar crimes and the letter of the law for other crimes, or in other respects be more liberal for one class than for the other. Since this discussion is concerned with the conventional theories of the criminologists, the criterion of white-collar crime must be justified in terms of the procedures of those criminologists in dealing with other crimes. The criterion of white-collar crimes, as here proposed, supplements convictions in the criminal courts in four respects, in each of which the extension is justified because the criminologists who present the conventional theories of criminal behavior make the same extension in principle.

First, other agencies than the criminal court must be included, for the criminal court is not the only agency which makes official decisions regarding violations of the criminal law. The juvenile court, dealing largely with offenses of the children of the poor, in many states is not under the criminal jurisdiction. The criminologists have made much use of case histories and statistics of juvenile delinquents in constructing their theories of criminal behavior. This justifies the inclusion of agencies other than the criminal court which deal with white-collar offenses. The most important of these agencies are the administrative boards, bureaus, or commissions, and much of their work, although certainly not all, consists of cases which are in violation of the criminal law. The Federal Trade Commission recently ordered several automobile companies to stop advertising their interest rate on installment purchases as 6 percent, since it was actually 11⁄2 percent. Also, it filed complaint against *Good Housekeeping,* one of the Hearst publications, charging that its seals led the public to believe that all products bearing those seals had been tested in their laboratories, which was contrary to fact. Each of these involves a charge of dishonesty, which might have been tried in a criminal court as fraud. A large proportion of the cases before these boards should be included in the data of the criminologists. Failure to do so is a principal reason for the bias in their samples and the errors in their generalizations.

Second, for both classes, behavior which would have a reasonable expectancy of conviction if tried in a criminal court or substitute agency should be defined as criminal. In this respect, convictability rather than actual conviction should be the criterion of criminality. The criminologists would not hesitate to accept as data a verified case history of a person who was a criminal but had never been convicted. Similarly, it is justifiable to include white-collar criminals who have not been convicted, provided reliable evidence is available. Evidence regarding such cases appears in many civil suits, such as stockholders' suits and patent-infringement suits. These cases might have been referred to the criminal court but they were referred to the civil court because the injured party was more interested in securing damages than in seeing punishment inflicted. This also happens in embezzlement cases, regarding which surety companies have much evidence. In a short consecutive series of embezzlements known to a surety company, 90 percent were not prosecuted because prosecution would interfere with restitution or salvage. The evidence in cases of embezzlement is generally conclusive, and would probably have been sufficient to justify conviction in all of the cases in this series.

Third, behavior should be defined as criminal if conviction is avoided merely because of pressure which is brought to bear on the court or substitute agency. Gangsters and racketeers have been relatively immune in many cities because of their pressure on prospective witnesses and public officials, and professional thieves, such as pickpockets and confidence men who do not use strong-arm methods, are even more frequently immune. The conventional criminologists do not hesitate to include the life histories of such criminals as data, because they understand the generic relation of the pressures to the failure to convict. Similarly, white-collar criminals are relatively immune because of the class bias of the courts and the power of their class to influence the implementation and administration of the law. This class bias affects not merely present-day courts but to a much greater degree affected the earlier courts which established the precedents and rules of procedure of the present-day courts. Consequently, it is justifiable to interpret the actual or potential failures of conviction in the light of known facts regarding the pressures brought to bear on the agencies which deal with offenders.

Fourth, persons who are accessory to a crime should be included among white-collar criminals as they are among other criminals. When the Federal Bureau of Investigation deals with a case of kidnapping, it is not content with catching the offenders who carried away the victim; they may catch and the court may convict twenty-five other persons who assisted by secreting the victim, negotiating the ransom, or putting the ransom money into circulation. On the other hand, the prosecution of white-collar criminals frequently stops with one offender. Political graft almost always involves collusion between politicians and business men but prosecutions are generally limited to the politicians. Judge Manton was found guilty of accepting $664,000 in bribes, but the six or eight important commercial concerns that paid the bribes have not been prosecuted. Pendergast, the late boss of Kansas City, was convicted for failure to report as a part of his income $315,000 received in bribes from insurance companies but the insurance companies which paid the bribes have not been prosecuted. In an investigation of an embezzlement by the president of a bank, at least a dozen other violations of law which were related to this embezzlement and involved most of the other officers of the bank and the officers of the cleaning house, were discovered but none of the others was prosecuted.

This analysis of the criterion of white-collar criminality results in the conclusion that a description of white-collar criminality in general terms will be also a description of the criminality of the lower class. The respects in which the crimes of the two classes differ are the incidentals rather than the essentials of criminality. They differ principally in the implementation of the criminal laws which apply to them. The crimes of the lower class are handled by policemen, prosecutors, and judges, with penal sanctions in the form of fines, imprisonment, and death. The crimes of the upper class either result in no official action at all, or result in suits for damages in civil courts, or are handled by inspectors, and by administrative boards or commissions, with penal sanctions in the form of warnings, orders to cease and desist, occasionally the loss of a license, and only in extreme cases by fines or prison sentences. Thus, the white-collar criminals are segregated administratively from other criminals, and largely as a consequence of this are not regarded as real criminals by themselves, the general public, or the criminologists.

This difference in the implementation of the criminal law is due principally to the difference in the social position of the two types of offenders. Judge Woodward, when imposing sentence upon the officials of the H.O. Stone and Company, bankrupt real estate firm in Chicago, who had been convicted in 1933 of the use of the mails to defraud, said to them, "You are men of affairs, of experience, of refinement and culture, of excellent reputation and standing in the business and social world." That statement might be used as a general characterization of white-collar criminals for they are oriented basically to legitimate and respectable careers. Because of their social status they have a loud voice in determining what goes into the statutes and how the criminal law as it affects themselves is implemented and administered. This may be illustrated from the Pure Food and Drug Law. Between 1879 and 1906, 140 pure food and drug bills were presented in Congress and all failed because of the importance of the persons who would be affected. It took a highly dramatic performance by Dr. Wiley in 1906 to induce Congress to enact the law. That law, however, did not create a new crime, just as the federal Lindbergh kidnapping law did not create a new crime; it merely provided a more efficient implementation of a principle which had been formulated previously in state laws. When an amendment to this law, which would bring within the scope of its agent's fraudulent statements made over the radio or in the press, was presented to Congress, the publishers and advertisers organized support and sent a lobby to Washington which successfully fought the amendment principally under the slogans of "freedom of the press" and "dangers of bureaucracy." This proposed amendment, also, would not have created a new crime, for the state laws already prohibited fraudulent statements over the radio or in the press; it would have implemented the law so it could have been enforced. Finally, the Administration has not been able to enforce the law as it has desired because of the pressures by the offenders against the law, sometimes brought to bear through the head of the Department of Agriculture, sometimes through congressmen who threaten cuts in the appropriation, and sometimes by others. The statement of Daniel Drew, a pious old fraud, describes the criminal law with some accuracy, "Law is like a cobweb; it's made for flies and the smaller kinds of insects, so to speak, but lets the big bumblebees break through. When technicalities of the law stood in my way, I have always been able to brush them aside easy as anything."

The preceding analysis should be regarded neither as an assertion that all efforts to influence legislation and its administration are reprehensible nor as a particularistic interpretation of the criminal law. It means only that the upper class has greater influence in moulding the criminal law and its administration to its own interests than does the lower class. The privileged position of white-collar criminals before the law results to a slight extent from bribery and political pressures, principally from the respect in which they are held and without special effort on their part. The most powerful group in medieval society secured relative immunity by "benefit of clergy," and now our most powerful groups secure relative immunity by "benefit of business or profession."

In contrast with the power of the white-collar criminals is the weakness of their victims. Consumers, investors, and stockholders are unorganized, lack technical knowledge, and cannot protect themselves. Daniel Drew, after taking a large sum of money by sharp practice from Vanderbilt in the Erie deal, concluded that it was a mistake to take money from a powerful man on the same level as himself and declared that in the future he would confine his efforts to outsiders, scattered all over the country, who wouldn't be able to organize and fight back. White-collar criminality flourishes at points where powerful business and professional men come in contact with persons who are weak. In this respect, it is similar to stealing candy from a baby. Many of the crimes of the lower class, on the other hand, are committed against persons of wealth and power in the form of burglary and robbery. Because of this difference in the comparative power of the victims, the white-collar criminals enjoy relative immunity.

Embezzlement is an interesting exception to white-collar criminality in this respect. Embezzlement is usually theft from an employer by an employee, and the employee is less capable of manipulating social and legal forces in his own interest than is the employer. As might have been expected, the laws regarding embezzlement were formulated long before laws for the protection of investors and consumers.

The theory that criminal behavior in general is due either to poverty or to the psychopathic and sociopathic conditions associated with poverty can now be shown to be invalid for three reasons. First, the generalization is based on a biased sample which omits almost entirely the behavior of white-collar criminals. The criminologists have restricted their data, for reasons of convenience and ignorance rather than of principle, largely to cases dealt with in criminal courts and juvenile courts, and these agencies are used principally for criminals from the lower economic strata. Consequently, their data are grossly biased from the point of view of the economic status of criminals and their generalization that criminality is closely associated with poverty is not justified.

Second, the generalization that criminality is closely associated with poverty obviously does not apply to white-collar criminals. With a small number of exceptions, they are not in poverty, were not reared in slums or badly deteriorated families, and are not feebleminded or psychopathic. They were seldom problem children in their earlier years and did not appear in juvenile courts or child guidance clinics. The proposition, derived from the data used by the conventional criminologists, that "the criminal of today was the problem child of yesterday" is seldom true of white-collar criminals. The idea that the causes of criminality are to be found almost exclusively in childhood similarly is fallacious. Even if poverty is extended to include the economic stresses which afflict business in a period of depression, it is not closely correlated with white-collar criminality. Probably at no time within fifty years have white-collar crimes in the field of investments and of corporate management been so extensive as during the boom period of the twenties.

Third, the conventional theories do not even explain lower class criminality. The sociopathic and psychopathic factors which have been emphasized doubtless have something to do with crime causation, but these factors have not been related to a general process which is found both in white-collar criminality and lower class criminality and therefore they do not explain the criminality of either class. They may explain the manner or method of crime—why lower class criminals commit burglary or robbery rather than false pretenses.

In view of these defects in the conventional theories, an hypothesis that will explain both white-collar criminality and lower class criminality is needed. For reasons of economy, simplicity, and logic, the hypothesis should apply to both classes, for this will make possible the analysis of causal factors freed from the encumbrances of the administrative devices which have led criminologists astray. Shaw and McKay and others, working exclusively in the field of lower class crime, have found the conventional theories inadequate to account for variations within the data of lower class crime and from that point of view have been working toward an explanation of crime in terms of a more general social process. Such efforts will be greatly aided by the procedure which has been described.

The hypothesis which is here suggested as a substitute for the conventional theories is that white-collar criminality, just as other systematic criminality, is learned; that it is learned in direct or indirect association with those who already practice the behavior; and that those who learn this criminal behavior are segregated from frequent and intimate contacts with law abiding behavior. Whether a person becomes a criminal or not is determined largely by the comparative frequency and intimacy of his contacts with the two types of behavior. This may be called the process of differential association. It is a genetic explanation both for white collar criminality and lower class criminality. Those who become white-collar criminals generally start their careers in good neighbourhoods and good homes, graduate from colleges with some idealism, and with little selection on their part, get into particular business situations in which criminality is practically a folkway and are inducted into that system of behavior just as into any other folkway. The lower class criminals generally start their careers in deteriorated neighbourhoods and families, find delinquents at hand from whom they acquire the attitudes toward, and techniques of, crime through association with delinquents and in partial segregation from law-abiding people. The essentials of the process are the same for the two classes of criminals. This is not entirely a process of assimilation, for inventions are frequently made, perhaps more frequently in white collar crime than in lower class crime. The inventive geniuses for many kinds of white-collar crime are generally lawyers.

A second general process is social disorganization in the community. Differential association culminates in crime because of the community is not organized solidly against that behavior. The law is pressing in one direction, and other forces are pressing in the opposite direction. In business, the "rules of the game" conflict with legal rules. A business man who wants to obey the law is driven by his competitors to adopt their methods. This is well illustrated by the persistence of commercial bribery in spite of the strenuous efforts of business organisations to eliminate it. Groups and individuals are individuated, they are more concerned with their specialized group or individual interests than with the larger welfare. Consequently, it is not possible for the community to present a solid front in opposition to crime. The better Business Bureaus and Crime Commissions, composed of business and professional men, attack burglary, robbery, and cheap swindles, but overlook the crimes of their own members. The forces which impinge on the lower class are similarly in conflict. Social disorganization affects the two classes in similar ways.

I have presented a brief and general description of white collar criminality on a framework of argument regarding theories of criminal behavior. That argument, stripped of the description, may be stated in the following proposition:

1. White-collar criminality is real criminality, being in all cases in violation of the criminal law.

2. White-collar criminality differs from lower class criminality principally in an implementation of criminal law which segregates white collar criminal administratively from other criminals.
3. The theories of the criminologists that crime is due to poverty or psychopathic and sociopathic conditions statistically associated with poverty are invalid because, first, they are derived from samples which are grossly biased with respect to the socio-economic status; second, they do not apply to the white collar criminals; and third, they do not even explain the criminality of the lower class, since the factors are not related to a general process characteristic to all criminality.
4. A theory of criminal behavior which will explain both white-collar criminality and lower class criminality is needed.
5. A hypothesis of this nature is suggested in terms of differential association and social disorganization.

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## (B) The Theory of Differential Association [3]

Any scientific explanation consists of a description of the conditions which are always present when a phenomenon occurs and which are never present when the phenomenon does not occur. Although a multitude of conditions may be associated in greater or less degree with the phenomenon in question, this information is relatively useless for understanding or for control if the factors are left as a hodgepodge of unorganized factors. Scientists strive to organize their knowledge in interrelated general proposition, to which no exceptions can be found. The heterogenous collection of factors associated with a phenomenon may be reduced to a series of interrelated general propositions by two general methods.

First, the multiple factors operating at a particular moment may be reduced to simplicity and generality by abstracting from them the elements which are common to all of them. Negroes, urban-dwellers, and young adult males all have comparatively high crime rates. What do they have in common that results in these high crime rates? Research studies of criminal behaviour have shown that criminal behaviour is associated in greater or less degree with the social and personal pathologies, such as poverty, bad housing, slum residence, lack of recreational facilities, inadequate and demoralized families, feeblemindedness, emotional instability, and other traits and conditions. At the same time, these research studies have demonstrated that many persons with those pathological traits and conditions do not commit crimes. Also, these studies have shown that persons in the upper socio-economic class frequently violate laws, although they are not in poverty, do not lack recreational facilities, are not feebleminded, or emotionally unstable. Such factors are obviously inadequate as an explanation of criminal behaviour, and no amount of calculation of the risks of different categories of persons will bring us much closer to an understanding of criminal behaviour. An adequate explanation of criminal behaviour can be reached only by locating the abstract mechanisms and processes which are common to both the rich and the poor, the emotionally stable

[3] Edwin H Sutherland, "The Theory of Differential Association", in David Dressler, *Readings in Criminology and Penology,* 365-370 (Columbia University Press, 2nd Ed., 1972).

and the emotionally unstable who commit crimes. In arriving at these abstract mechanisms and processes, some of the concrete factors can be reinterpreted in general terms. A motion picture several years ago showed two boys engaged in theft; they ran when they were discovered; one boy had longer legs, escaped, and became priest; the other had shorter legs, was caught, committed to reformatory, became a gangster. In this comparison, the boy who became a criminal was differentiated from the one who did not become a criminal by the length of his legs. In general, however, no significant relationship has been found between criminality and length of legs and certainly many persons with short legs are law abiding and many person with long legs are criminals. In this particular case, the length of the legs is probably of no significance in itself and is significant only as it determines the subsequent experiences and associations of the two boys.

Second, the casual analysis must be held at a particular level in order to arrive at valid generalizations. Two aspects of this may be mentioned. The first is limiting the problem to a particular part of the whole situation, largely in terms of chronology. In the heterogeneous collection of factors associated with criminal behaviour, one factor is often the cause of another factor or at least occurs prior to the other. Consideration of the time sequences among the factors often leads to simplicity of the statement. When physicist stated the law of falling bodies they were not concerned with the reasons why a body began to fall except as this might affect the initial momentum. It made no difference to the physicist whether a body began to fall because it was dropped from the hand of an experimental physicist or rolled off the edge of a bridge because of vibration caused by a passing by automobile. Such facts were on a different level of explanation and were irrelevant to the problem with which they were concerned. Much of the confusion regarding human behaviour is due to failure to define and hold constant the level of explanation. A second aspect of this problem is the definition of criminal behaviour. The problem in criminology is to explain the criminality of behaviour, not the behaviour, as such. Criminal behaviour is a part of human behaviour, has much in common with non-criminal behaviour, and must be explained within the same general framework as any other human behaviour. However, an explanation of criminal behaviour should be a specific part of that general theory of behavior and its task should be to differentiate criminal from non-criminal behaviour. Many things which are necessary factors in behavior are not necessary for the criminality of behavior. Respiration, for instance, is necessary for any behavior but it is not a factor in criminal behavior, as definer, since it does not differentiate criminal behavior from non-criminal behavior.

The scientific explanation of a phenomenon may be stated either in terms of the factors which are operating at the moment of the occurrence of a phenomenon or in terms of the processes operating in the earlier history of that phenomenon. In the first case the explanation is mechanistic, in the second historical or genetic; both are desirable. The physical and biological scientists favor the first of these methods and it would probably be superior as an explanation of criminal behaviour. Efforts at explanations of the mechanistic type have been notably unsuccessful, perhaps largely because they have been concentrated on the attempt to isolate personal and social pathologies. Work from this point of view has, at least, resulted in the conclusion that the immediate factors in criminal behaviour lie in the person-situation complex. Person and situation are not factors exclusive of each other, for the situation which is important is the situation as defined by the person who is involved. The tendencies and inhibitions at the moment of the criminal behavior are, to be sure, largely a product of the earlier history of the person, but the expression of these tendencies and inhibitions is a reaction to the immediate situation as defined by the person. The situation operates in many ways, of which perhaps the least important is the provision of an opportunity for a criminal act. A thief may steal from a fruit stand when the owner is not in sight but refrain when the owner is in sight; a bank burglar may attack a band which is poorly protected but refrain from attacking a bank protected by watchmen and burglar alarms. A corporation which manufactures automobiles seldom or never violates the Pure Food and Drug Law but a meat-packing corporation violates this law with great frequency.

The second type of explanation of criminal behaviour is made in terms of the life experience of a person. This is an historical or genetic explanation of criminal behaviour. This, to be sure, assumes a situation to be denied by the person in terms of the inclinations and abilities which the person has acquired up to that date. The following paragraphs state such a genetic theory of criminal behaviour on the assumption that a criminal act occurs when a situation appropriate for it, as defined by a person, is present.

***Genetic Explanation of Criminal Behaviour***

The following statement refers to the process by which a particular person comes to engage in criminal behavior.

A. *Criminal behavior is learned*. Negatively, this means that criminal behavior is not inherited, as such; also, the person who is not already trained in crime does not invent criminal behavior, just as a person does not make mechanical inventions unless he has had training in mechanics.

B. *Criminal behavior is learned in interaction with other persons in a process of communication.* This communication is verbal in many respects but also includes "communication of gestures."

C. *The principal part of the learning of criminal behavior occurs within intimate personal groups*. Negatively, this means that the impersonal agencies of communication, such as picture shows and newspapers, play a relatively unimportant part in the genesis of criminal behaviour.

D. *When criminal behavior is learned, the learning includes (a) techniques of committing the crime, which are sometimes very complicated, sometimes very simple*; *(b) the specific direction of motives, drives, rationalizations, and attitudes.*

E. *The specific direction of motives and drives is learned from definitions of the legal codes as favorable or unfavorable***.** In some societies, an individual is surrounded by persons who invariably define the legal codes as rules to be observed, while in others he is surrounded by persons whose definitions are favorable to the violation of the legal codes. In our American society, these definitions are almost always mixed and consequently we have cultural conflict in relation to the legal codes.

F. *A person becomes delinquent because of an excess of definitions favorable to violation of law over definitions unfavorable to violation of law.* This is the principle of differential association. It refers to both criminal and anti-criminal associations and has to do with counteracting forces. When persons become criminals, they do so because of contact with criminal patterns and also because of isolation from anti-criminal patterns. Any person inevitably assimilates the surrounding culture unless other patterns are in conflict; a Southerner does not pronounce “r” because other Southerners do not pronounce “r”. Negatively, this proposition of differential association means that associations which are neutral so far as crime is concerned have little or no effect on the genesis of criminal behavior. Much of the experience of a person is neutral in this sense, e.g., learning to brush one’s teeth. This behavior has no negative or positive effect on criminal behaviour except as it may be related to associations which are concerned with the legal codes. This neutral behavior is important especially as an occupier of the time of a child so that he is not in contact with criminal behavior during the time he is so engaged in the neutral behavior.

G. *Differential associations may vary in frequency, duration, priority, and intensity.* This means that associations with criminal behaviour and also associations with anti-criminal behavior vary in those respects. “Frequency” and “duration” as modalities of association are obvious and need no explanation. “Priority” is assumed to be important in the sense that lawful behavior developed in early childhood may persist throughout the life, and also that delinquent behavior developed early childhood may persist throughout life. This tendency, however, has not been adequately demonstrated. And priority seems to be important principally through its selective influence. “Intensity” is not precisely defined but it has to do with such things as the prestige of the source of a criminal or anti-criminal pattern and with emotional reactions related to the associations. In a precise description of the criminal behavior of a person these modalities would be stated in quantitative form and a mathematical ratio be reached. A formula in this sense has not been developed and the development of such formula would be extremely difficult.

H. *The process of learning criminal behavior by association with criminal and anti-criminal patterns involves all of the mechanisms that are involved in any other learning.* Negatively, this means that the learning of criminal behavior is not restricted to the process of imitation. A person who is seduced, for instance, learns criminal behavior by association but this process would not ordinarily be described as imitation.

I. *While criminal behavior is an expression of general needs and values, it is not explained by those general needs and values since non-criminal behavior is an expression of the same needs and values.* Thieves generally steal in order to secure money, but likewise honest laborers work in order to secure money. The attempts by many scholars to explain criminal behavior by general drives and values, such as the happiness principle, striving for social status, the money motive, or frustration, have been and must continue to be futile since as they explain lawful behavior as completely as they explain criminal behavior. They are similar to respiration, which is necessary for any behavior but which does not differentiate criminal from non-criminal behavior.

It is not necessary, at this level of explanation, to explain why person has the associations which he has; this certainly involves a complex of many things. In an area where the delinquency rate is high a boy who is sociable, gregarious, active, and athletic is very likely to come contact with the other boys in the neighborhood, learn delinquent behavior from them, and become a gangster; in the same neighborhood the psychopathic boy who is isolated, introvert, and inert may remain at home, not become acquainted with the other boys in the neighborhood, and not become delinquent. In another situation, the sociable, athletic, aggressive boy may become a member of a scout troop and not become involved in delinquent behavior. The person's associations are determined in a general context of social organization. A child is ordinarily reared in family; the place of residence of the family is determined largely by family income; and the delinquency rate is in many respects related to rental value of houses. Many other factors enter into this social organization, including many of the small personal group relationships.

The preceding explanation of criminal behavior was stated from the point of view of the person who engages in criminal behavior. It is possible, also, to state theories of criminal behavior from the point of view of the community, nation, or other group. The problem, when thus stated, is generally concerned with crimes rates and involves a comparison of the crime rates of a particular group at different times. One of the best explanations of crime rates from this point of view is that high crime rate is due to social disorganization. The term “social disorganization” is not entirely satisfactory and it seems preferable to substitute for it the term “differential social disorganization.” The postulate on which this theory is based, regardless of its name, is that crime is rooted in the social organization and is an expression of that social organization. A group may be organized for criminal behavior or organized against criminal behavior. Most communities are organized both for criminal and anti-criminal behavior and in that sense the crime rate is an expression of the differential group organization. Differential group organization as an explanation of crime rate must be consistent with the explanation of the criminal behavior of the person, since the crime rate is a summary statement of the number of persons in the group who commit crimes and the frequency with which they commit crimes.

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## TOPIC 3: THE FOOD SAFETY AND STANDARDS ACT, 2006

### *M. Mohammed* v. *Union of India* W.A.No.1491 of 2014

**M.VEUGOPAL, J.** The Appellant/Petitioner has projected the instant intra Court Writ Appeal before this Court as against the order dated 10.10.2014 passed by the Learned Single Judge in W.P.No.24999 of 2014.

**2.** The Learned Single Judge while passing the impugned order on 10.10.2014 in W.P.No.24999 of 2014 (filed by the Appellant/Writ Petitioner) in para 18 among other things it is observed that admittedly, the Areca Nut (Betel-Nuts) is an agriculture product include to fall within the definition of primary food and such primary food is covered in the definition of food as contained in Section 3(2) of the Food Safety and Standards Act. The definition of 'food' as contained in the provisions of the Prevention of Food Adulteration Act, 1954 is quite different from that of the definition under the Food Safety and Standards Act, 2006 referred supra and for better appreciation, the relevant definitions under the Prevention of Food Adulteration Act are quoted herein below:-

2(v) ‘food’ means any article used as food or drink for human consumption other than drugs and water and includes:- (a)any article which ordinarily enters into, or is used in the composition or preparation of, human food; (b)any flavouring matter or condiments and (c)any other article which the Central Government may, having regard to its use, nature, substance or quality, declare, by notification in the Official Gazette, as food for the purposes of this Act.

2(xii a) 'primary food' means any article of food, being a produce of agriculture or horticulture in its natural form and further, in para 21 held that the definition of 'Food' as contained under Section 3(j) of the Food Safety and Standards Act is an inclusive provision including any substance whether processed, partially processed or unprocessed, which is intended for human consumption and also includes primary food to the extent defined under clause (zk) of Section 2 and also includes any substance used in the food during its manufacture, preparation on treatment to be an article of food as defined under the Food Safety and Standards Act and consequently came to the conclusion that the Appellant/Petitioner failed to make out any case for granting the relief sought for in the Writ Petition and dismissed the same without costs.

**3.** The Learned counsel for the Appellant/Petitioner contends that the Appellant is engaged in the business of import, processing and wholesale of raw areca nut commonly called as Betel Nuts in ungarbled form and that the Firm had imported 688 bags of Srilankan Betel Nuts weighing 50,942 kgs from M/s. Commodities Importers, Sri Lanka, as per 'Bill of Entry' No.5853707 dated 19.06.2014. Also, the Appellant/Firm filed its 'Bill of Entry' in Cochin Port on 19.06.2014 and subsequently, the Third Respondent/Commissioner of Customs, Chennai on 19.06.2014 passed an

'Examination Order' on 19.06.2014, in and by which, a direction was issued to the Appellant/Firm that in order to obtain customs clearance for the consignment, it must obtain a test report and a No Objection Certificate from the Second Respondent/Authorised Officer, Food Safety & Standards Authority of India, Ministry of Health and Family Welfare, Chennai.

**4.** The Learned counsel for the Appellant/Petitioner strenuously submits that the Appellant's consignment comprises of 'Ungarbled Betel Nuts' which are neither intended for, nor commonly used for human consumption and in order to transform it into marketable commodity, 'Ungarbled Betel Nuts' required to undergo a series of multi-stage processes over a period of time that include, inter-alia, cleaning, drying and boiling and in fact, the consignment of import of 'Ungarbled Betel Nuts' would be subjected to the Plant Quarantine Test (PQ Test) in terms of the provision of Clause 3 (16) of the Plant Quarantine (Regulation of Import into India) Order, 2003 which is issued under Sub Section (1) of the Destructive Insects and Pests Act, 1914 and it is needless to state that if the consignment passes the test, it is cleared by the Customs Authorities.

**5.** The Learned counsel for the Appellant/Petitioner brings it to the notice of this Court that after clearance of the customs authorities, when the 'Ungarbled Betel Nuts' reach the appropriate maturity, the importer washes, cleans, dries and sorts the betel nuts after which they are soaked in water for ten days and subsequently, betel nuts are boiled, cleaned and dried again. Later, the outer shells are to be removed and only after completion of this process, the 'betel nuts' become consumable and marketable as a Food item.

**6.** The Learned counsel for the Appellant/Petitioner takes a categorical stand that in the 'Ungarbled Form' in which the betel nuts are imported, they did not qualify as a food item as they are not mentioned for human consumption in that way. As a matter of fact, the consumable betel nuts are sold to betel nuts vendors by the importer.

**7.** The Appellant with a view to secure clearance of the assignment at the earliest possible time, applied for approval through FICS system based on the reasonable expectation that No Objection Certificate would be granted by the Second Respondent on the footing that the relevant food standards are inapplicable to 'Ungarbled Betel Nuts' since it is not an article of food and therefore, it does not fall within the ambit of Food Safety and Standards Act.

**8.** The Learned counsel for the Appellant/Petitioner contends that the Second Respondent, acting outside the ambit of the Food Safety and Standards Act, 2006. Furthermore, it is represented on behalf of the Appellant that Second Respondent under FSS Act applied the food standard for 'dry nuts' and the same would be applicable only after the betel nut i.e., dried and cleaned and after it has reached proper maturity and it is not meant for raw betel nuts in ungarbled form, the current form, in which it has been imported.

**9.** The Learned counsel for the Appellant emphatically submits that the decision of the Division Bench of the Kerala High Court in **Al Marwa Traders v. Assistant Commissioner of Imports** [2007 (1) K.L.T. 381] squarely applies to the facts of the present case and the same is pending before the Respondents. Added further, as the test is the same under both the Acts, the change in law does not change the settled principle that 'Ungarbled Betel Nuts' cannot be tested in its current form.

**10.** The Learned counsel for the Appellant forcefully contends that the Referral Laboratory in the present case reported that the samples that from the Appellant's consignment did not conform to the standards set in the FSS Regulations and the report identified two defects in the Appellant's sample-the presence of mold on the split of the betel nuts and a higher percentage of damaged pieces can be allowed under regulations. Apart from that stand of the Appellant that since 'Ungarbled Betel Nuts' are not meant nor commonly used for human consumption in any market in our country, there is no question of a food safety concern arising on account of clearance being granted for the Appellant's shipment.

**11.** The core contention advanced by the Learned counsel for the Appellant is that even assuming but not conceding 'Ungarbled Betel Nuts' do fall within the ambit of food for the purposes of the Food Safety And Standards Act, they are certainly within the purview of primary food, being agricultural produce.

**12.** In this regard, the Learned counsel for the Appellant/Petitioner adverts to the ingredients of Section 48(2)(b) of the Food Safety and Standards Act, where the quality or purity of the article, being primary food, has fallen below the specified standard or its constituents are present in quantities not within the specified limits of variability, in either case, solely due to natural causes and beyond the control of human agency, then such article shall not be deemed to be unsafe or sub-standard or food containing extraneous matter.

**13.** The Learned counsel for the Appellant submits that the Learned Single Judge had committed a grievous error in interpreting Section 3(1)(j) of the Food Safety and Standards Act, 2006. At this stage, the Learned counsel for the Appellant submits that a purposeful and meaningful reading of the definition of Section 3(1)(j) of the Food Safety and Standards Act, 2006 makes it crystal clear that an essential element for an article to be 'Food' for the purposes of this Act is that the Article must be 'intended for human consumption' in that very form and further, article may be processed, unprocessed or partially processed and selling it to human consumption included within the ambit of 'Food' for the purpose of Food Safety and Standards Act. Apart from that, the Learned Single Judge failed to properly appreciate the reasoning in the Division Bench of the Kerala High Court in case of **Al Marwa Traders v. Assistant Commissioner of Imports [**2007 (1) KLT 381].

**14.** The Learned counsel for the Appellant refers to the Regulation 2.3.47 of the Food Safety and Standards (Food Product Standards & Food Additives) Regulation 2011 in the caption 'Nuts and Raisins' and the relevant portion is as follows:

1. Groundnut kernel (de-shelled) for direct human consumption commonly known as moongphali are obtained from the plant arachis hypogols. The kernels shall be free from non- edible seeds such as mahua, caster, neem or argemone etc. It shall be free from colouring matter and preservatives. It shall be practically free from extraneous matter, such as stones, dirt, clay etc. The kernels shall conform to the following standards, namely:-

Moisture Not more than 7.0 per cent Damaged kernel including slightly Not more than 5.0 per cent by damaged kernel weight. Aflatoxin content - Not more than 30 parts per billion Also refers to ITC (HS), 2012 Schedule I of Import Policy, Section II, Chapter 8 and the relevant portion is extracted as under:

Areca nuts: Whole Free Import permitted freely provided if value is Rs.35/- per kilogram and above Spilt Free Import permitted freely provided if value is Rs.35/- per Kilogram and above. Ground Free Import permitted freely provided if value is Rs.35/- per Kilogram and above.

**15.** The Learned counsel for the Appellant cites the order of W.P.(c) No.20920 of 2014(L) dated 15.10.2014 of High Court of Kerala between wherein in paragraphs 11 to 14 it is observed and held as follows:

> 11. Thus, in the light of the above, betel nuts are of heterogeneous class from dry fruits and nuts. This Court is of the view that the standards prescribed in Sub Clause (5) of Regulation 2.3.47 of the FSS Regulations for fruits and nuts have no application for betel nuts which by very nature form a different class.
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> 12. Learned counsel for the petitioners also relied on the decision of this Court in Al Marwa Traders. Therein, this Court, while considering betel nuts under the Prevention of Food Adulteration Act, 1954 (for short, the PFA Act) held that betel nut cannot be a dry fruit coming under the standards prescribed under PFA Act and further held that betel nuts imported cannot be subjected to the tests for the standards prescribed for dry fruits and nuts. I am also of the view that though AL Marwa's case (supra) was under the Prevention of Food Adulteration Act (for short, the PFA Act) there is no difference in prescription of standards in respect of dry fruits and nuts under the PFA Act or FSS Act. Therefore, for non conformity of the standards prescribed for dry fruits and nuts, betel nuts imported by the petitioners cannot be detained.

13.However, question that arises is whether goods imported for which no prescription of standards are prescribed under the FSS Act can be directed to be released if it is found that goods are contaminated or unfit for human consumption or injurious to human life. In the Centre for Public Interest Litigation case (supra), the Hon'ble Supreme Court reminded authorities of the constitutional principles to safe guard the interest of citizen and protect human life. Therefore, the authorities have a duty to protect interest of citizen from the potential danger of contaminated or adulterated food articles or substances. In Nilabati Behera Alias Lalit Behera v. State of Orissa and others [1993 AIR 1960], the Hon'ble Supreme Court after referring to the International Covenant on Civil and Political Rights, 1966 held that while considering fundamental right expressly granted in the Constitution, international covenants and norms can be relied on. In Vishaka and others v. State of Rajasthan and others [1997 (6) SCC 241], the Hon'ble Supreme Court held that in the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all workplaces, the contents of international conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity and in Articles 14, 15, 19(1) (g) and 21 of the Constitution of India and further, held that any international convention, not inconsistent in the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. The World Trade Organisation (WTO) agreement on the application of sanitary and phytosanitary measures (SPS Agreement) provides that in cases where relevant scientific evidence is insufficient, a Member State may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information. The above agreement is for providing measures to protect human/animal/plant life or health. SPS Agreement provides different types of precautionary measures and clearly permits the Government to take a final decision when sufficient scientific evidence does not exist on the safety of a product. Therefore, absence of standard does not prevent Government or Food Authority from exercising their power for bona fide reasons in terms of SPS Agreement, which in the light of the judgments in Nilabati and Vishaka's cases has to be considered as a part of domestic law. The Codex Alimentarius Commission is established by the Food and Agriculture Organisation (FAO) of the United Nations and WHO, wherein India is a Member State. The Codex Alimentarius provides international food standards, guidelines and codes of practice contribute to the safety, quality and fairness of this international food trade. The Codex Alimentarius provides standards for various food products. India, being a Member State, these standards are to be followed if there are no specific standards in FSS Act of India. Therefore, in the absence of any specific standards in FSS Act, the Food Safety and Standards Authority of India are bound to follow the standards of the Codex Alimentarius, if any, for determining the standards. In the absence of those standards as noted above, it is open for the Government and the authority to take precautionary measures, if any of the food articles that are being imported are dangerous to human or animal or plant life or health in India in terms of the SPS Agreement.

14. The learned Standing counsel for the Customs Shri John Varghese pointed out to para 17 of Al Marwa Trader's case wherein it is held by this Court as follows:

17. However, in public interest, we make it clear that although betel nuts imported by the appellants cannot be subjected to test for the standards prescribed under Item A.29.04, certainly, the respondents can ensure that the same is not adulterated in the sense mentioned in Section 2(b), (e) and (f) so as to see that the appellants are not importing betel nuts which are not injurious to the health of the ultimate consumer, who may consume the product made of betel nuts imported by the appellants. We are told by the counsel for the appellants that the inspection under the provisions of the Plant, Fruits and Seeds (Regulation of Import into India) Order-1989 and the Plant Quarantine (Regulation of Import into India) Order, 2003, would ensure the same. However, we leave it to the Customs Authorities to ensure, but without causing any delay in clearance of the goods on account of that, taking into account the perishable nature of the goods.

**16.** In response, the Learned counsel for the Second Respondent contends that the Food Safety and Standards (Food Product Standards and Food Additives) Regulation 2011 under 2.3.47(5) provides for authorized laboratory analysis of the sample of imported betel nut (supari) and in reality, Section 3(j) of the Food Safety and Standards Act, 2006 defines 'Food' as: 3(j) Food means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food to the extent defined in clause (zk), ......, and any substance including water used into the food during its manufacture, preparation or treatment .... narcotic or psychotropic substances.

**17.** The Learned counsel for the Second Respondent adverts to Section 3(zk) of the Food Safety and Standards Act, 2006 of 'primary food' and the same enjoins as: “primary food means an article of food, being a produce of agriculture or horticulture or animal husbandry and dairying or aquaculture in its natural form, resulting from the growing, raising, cultivation, picking, harvesting, collection or catching in the hands of a person other than a farmer or fisherman.”

**18.** The Learned counsel for the Second Respondent points out to Section 2(V) of the Prevention of Food Adulteration Act, 1954 deals with definition 'Food' which means any article used as food or drink for human consumption other than drugs and water and includes:- a) Any article which ordinarily enters into, or is used in the composition or preparation of, human food, b) Any flavouring matter or condiments and [c] .... and further, the definition under Section 2 (xii a) 'primary food' means any article of food, being a produce of agriculture or horticulture in its natural form.

**19.** The Learned counsel for the Second Respondent takes a stand that the Learned Single Judge had correctly held that the consignment imported by the Appellant would fall within the definition of 'Food' and 'Primary Food' which would also include any substance used in the food during its manufacture, preparation or on treatment to be an article of food under Food Safety and Standards Act, 2006.

**20.** The Learned counsel for the Second Respondent contends that the Learned Single Judge had primarily appreciated that there is vast difference between the definition of 'food' and 'primary food' in the Prevention of Food Adulteration Act, 1954 and the Food Safety and Standards Act, 2006.

**21.** The Learned counsel for the Second Respondent submits that in the counter to the Writ Petition, the Second Respondent had in para 6 referred to the decision of the Hon'ble Supreme Court in **Pyarali K. Tejani v. Mahadeo Ramchandra Dange and others [**1974 AIR 228; 1974 SCC (1) 167] wherein it was held as: "It is commonplace knowledge that the word food is a very general term and applies to all that is eaten by man for nourishment and takes in subsidiaries. Is supari eaten with relish by man for taste and nourishment? It is." And so it is food. Without carrying further on this unusual argument we hold that supari is food within the meaning of Sec.2 (v) of the Act.

Also in the decision of Al Marwa Traders, the Division Bench of Kerala High Court has taken a similar view and further, it is represented on behalf of the Second Respondent that after inspection of the Consignment, the Second Respondent, as per practice took the sample of Betel Nuts from the consignment and transmitted the same to authorized laboratory for analysis and the sample of imported supari was tested/analysed as per Regulation 2.3.47(5) of the Food Safety and Standards (Food Product Standards & Food Additives) Regulation 2011 and it came to be known soon after receipt of analysis report that the sample of betel nuts was found to be damaged/discoloured units beyond the prescribed limit and mould growth was observed on the split of areca nut. Therefore, the authorized officer of the Food Authority of India declined to issue No Objection Certificate for clearance of the betel nuts consignment, inasmuch as the consignment failed to confirm to the standards laid down by the notified laboratory and the referral laboratory.

**22.** At this stage, this Court worth recalls and recollects the decision of the Hon'ble Supreme Court in **Dineshchandra Jamnadas Gandhi v. State of Gujarat and another**, [1989 (1) SCC 420 at p. 421] whereby and where under it is observed and held as follows: "The object and the purpose of the Act are to eliminate the danger to human life from the sale of unwholesome articles of food. It is enacted to curb the widespread evil of food adulteration and is a legislative measure for social defence. It is intended to suppress a social and economic mischief. The construction appropriate to a social defence legislation is one which would suppress the mischief aimed at by the legislation and advance the remedy.”

**23.** Also, in the aforesaid decision at page 426 in para 16, it is laid down as follows: “The object and the purpose of the Act (Prevention of Food Adulteration Act, 1954) are to eliminate the danger to human life from the sale of unwholesome articles of food. The legislation is on the topic 'Adulteration of Food Stuffs and other Goods' [entry 18 List III Seventh Schedule]. It is enacted to curb the widespread evil of food adulteration and is a legislative measure for social defence. It is intended to suppress a social and economic mischief-an evil which attempts to poison, for monetary gains, the very sources of sustenance of life and the well-being of the community. The evil of adulteration of food and its effects on the health of the community are assuming alarming proportions. The offence of adulteration is a socio-economic offence. In **Municipal Corporation of Delhi v. Kacheroo Mal** [1976 (1) SCC 412] in para 5 Sarkaria, J. said: The Act has been enacted to curb and remedy the widespread evil of food adulteration, and to ensure the sale of wholesome food to the people. It is well-settled that wherever possible, without unreasonable stretching or straining, the language of such a statute should be construed in a manner which would suppress the mischief, advance the remedy, promote its object, prevent its subtle evasion and foil its artful circumvention.”

**24.** Further, this Court aptly cites the decision of the Hon'ble Supreme Court in **Pyarali K.Tejani v. Mahadeo Ramchandra Dange and others** observed and held as follows: “The Act (Prevention of Food Adulteration Act, 1954) defines 'food' very widely as covering any article used as food and every component which enters into it, and even flavouring matter and condiments...”

**25.** Besides the above, this Court refers to the following decisions to prevent aberration of justice and to promote substantial cause of justice:

(i)In the decision of the Hon'ble Supreme Court in **State of Tamil Nadu v. R. Krishnamurthy** [AIR 1980 Supreme Court 538] it is observed and held as under:

> “In order to be 'food' for the purposes of the Act, (Prevention of Food Adulteration Act, 1954) an article need not be 'fit' for human consumption; it need not be described or exhibited as intended for human consumption; it may even be otherwise described or exhibited; it need not even be necessarily intended for human consumption, it is enough if it is generally or commonly used for human consumption or in the preparation of human food. Gingelly oil, mixed or not with groundnut oil or some other oil, whether described or exhibited as an article of food for human consumption or as an article for external use only is 'food' within the meaning of the definition contained in S.2 (v) of the Act.”

(ii) In the decision of the Delhi High Court in **Bishan Das Mehta and others v. Union of India and others** [AIR 1970 Del 267] wherein it is held as follows: "In order that an article should be food within the meaning of the Act (Prevention of Food Adulteration Act, 1954) it is not essential that it must be an article which is consumed by human being as such. Katha is admittedly used in composition of Pan and therefore, would be governed by the definition of food given in Section 2(v) of the Act. To constitute food what has to be seen is whether the article in question is usable and enters into the composition or preparation of food which is taken by human beings. The definition is worded in a very wide language and would govern any article which enters into the composition or preparation of human food and would cover any flavouring matter and condiments."

(iii) In the decision of the Hon'ble Supreme Court in **Ramlal v. State of Rajasthan** [AIR 2001 SC 47] and at special page 48 and 49 in para 5 it is observed as follows: "Part III of the Prevention of Food Adulteration Rules (for short 'the Rules') contains Definitions and Standards of Quality of various articles of food. Rule 5 which falls within the said part says that the standards of quality of various articles of food specified in Appendix B to these Rules are as defined in that appendix. Milk is defined in Item A.11.01.01 of Appendix B as the normal mammary secretion derived from complete milking of healthy milk animal without either addition thereto or extraction there from. But it shall be free from colostrum. The above definition does not differentiate between milk of different animals. Hence, it is clear that camel's milk also would fall within the amplitude of the said definition. The question whether the camel milk can be consumed by human beings as a food article need not vex us much, for the Food Inspector in this case took the sample on the assumption that it was a food article. If it was not a food article the Food Inspector had no power to take sample there from. Section 10 of the Act confers power on the Food Inspector to take sample of any article of food. Food is defined in S. 2(v) as any article used as food or drink for human consumption, other than drugs and water and includes .......(As the items included thereby are not very relevant for the purpose of this case the remaining part of the definition is omitted). We may observe that an article which is food does not lose its character as food by the fact that it was also used or sold for other purposes."

**26.** In so far as the present case is concerned, it is to be borne in mind that in the decision of the Division Bench of Kerala High Court in Al Marwa Traders 'Ungarbled Betel Nuts' was the subject matter in issue, but in case on hand, the Appellant in the 'Bill of Entry' had not mentioned the product as 'Ungarbled Betel Nuts'. However, in the affidavit filed in support of the Writ Petition, the Appellant/Petitioner had endeavour to mention that the product is as 'Ungarbelled Betel Nuts'. It is not in dispute that the Appellant/Petitioner, in the 'Bill of Entry' for home consumption dated 19.06.2014 in B.E.No.5853707 and it described the item as areca nuts (betel nuts). Admittedly, the product was imported from Srilanka. When the Appellant/Petitioner had applied to FICS which specifies inspection of the goods by drawing samples to find out/examination as to whether meets the required standards prescribed under Food Safety and Standards (Food Product Standards &

Food Additives) Regulation 2011. In this connection, this Court very significantly points out that by Section 97(1) of the Food Safety and Standards Act (Prevention of Food Adulteration Act, 1954, was repealed) and only the ingredients of Food Safety and Standards Act, 2006 is applicable to all kinds of exports (including import made by the Appellant).

**27.** It is to be noted that the Division Bench judgment of Kerala High Court in Al Marwa Traders case pertains to definition under the earlier Prevention of Food Adulteration Act, 1954 but in the instant case, only the Food Safety and Standards Act applies. To put it succinctly, in the Division Bench Judgment of the Kerala High Court in Al Marwa Trader's case, the decision came to be rendered in interpretation of the Prevention of Food Adulteration Act, 1954 and the Rules made thereto.

**28.** Moreover, the term 'Food' defined under the Prevention of Food Adulteration Act, 1954 is certainly different from that of the definition of 'Food' mentioned under Food Safety and Standards Act. Viewed from that angle, this Court is of the considered view that the decision of Al Marwa Trader's case relied on by the Appellant/Petitioner is to no avail to the Petitioner. At the risk of repetition, this Court pertinently points out that the term 'Food' under the Prevention of Food Adulteration Act, 1954 is to include any article which is used as food or drink for human consumption other than drugs and water whereas word 'Food' as defined under Section 3(j) of the Food Safety and Standards Act, 2006 is all inclusive and pervasive one dealing with any substance whether processed, partially processed or unprocessed which is intended for human consumption and include primary food to the extent defined in clause 3 (zk), genetically modified or engineered food etc.

**29**. In the light of qualitative and quantitative discussions and also, this Court on an entire conspectus of the attendant facts and circumstances of the present case in a cumulative fashion, comes to an irresistible conclusion that the view taken by the Learned Single Judge in the impugned order dated 10.10.2014 in W.P.No.24999 of 2014 to the effect that the Appellant/Petitioner had miserably failed to make it any case for granting the relief claimed by the Appellant in the writ petition in W.P.No.24999 of 2014 suffers from no material irregularity or patent illegality in the eye of law. Consequently, the Writ Appeal fails.

**30**. In the result, the Writ Appeal is dismissed leaving the parties to bear their own costs and resultantly, the order dated 10.10.2014 in W.P.No.24999 of 2014 passed by the Learned Single Judge is confirmed by this Court for the reasons as assigned in the present Writ Appeal. Consequently, connected Miscellaneous Petitions are also close

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# *Nestle India Limited* v. *The Food Safety and Standards Authority of India*

IN THE HIGH COURT OF BOMBAY W. P (L) No. 1688 of 2015

**Hon'ble Judges/Coram:** V.M. Kanade and B.P. Colabawalla, JJ.

**V.M. KANADE, J.**

1. Heard.

2. Rule. Rule is made returnable forthwith. Respondents waive service. By consent of parties, Petition is taken up for final hearing.

CHALLENGE:

3. Petitioner - Company is seeking an appropriate writ, order and direction for quashing and setting aside the order passed by the Chief Executive Officer - Respondent No.2 herein dated 05/06/2015 whereby Petitioner was directed to stop manufacture, sale and distribution etc of nine types of variants of noodles manufactured by them and also gave other directions by the impugned order which is at Exhibit-A to the Petition. Petitioner is also challenging the impugned order passed by the Commissioner of Food Safety, State of Maharashtra - Respondent No. 4 which is at Exhibit-B.

4. Petitioner has challenged these two impugned orders principally on the following five grounds:-

> (i) Firstly, it was contended that the said two impugned orders have been passed in complete violation of principles of natural justice since Respondent Nos. 2 and 3 had not issued any show cause notice to the Petitioner and had not given any particulars on the basis of which they proposed to pass the impugned orders. It was contended that Petitioner's representatives were called by Respondent No.2 at his Office on 05/06/2015 and they were informed about the result of analysis made by the Food Laboratories and, thereafter, the impugned order (Exhibit-A) was passed. It was contended that the said order was completely arbitrary, capricious and it was passed in undue haste.
>
> (ii) Secondly, it was contended that the reports of the Food Laboratories on the basis of which the impugned order (Exhibit-A) was passed were either not accredited by NBAL or notified under section 43 of the Food Safety and Standards Act, 2006 ("the Act") and even if some Food Laboratories were accredited, they did not have accreditation for the purpose of testing lead in the product.
>
> (iii) Thirdly, it was contended that the product had to be tested according to the intended use and this was not done and, therefore, no reliance could be placed on the said reports.
>
> (iv) Fourthly, the Petitioner contended that it had tested the samples of batches in its own accredited laboratory and the results showed that the lead contained in the product was well within the permissible limits.

(v) Lastly, it was contended that there was no question of challenging the analysis made by the Food Analyst in the Food Laboratory by filing an appeal under section 46(4) of the Act since by the final impugned orders Respondent Nos. 1 and 2 had already pre-determined the issue and, therefore, Petitioner had no other option but to challenge the orders at Exhibit-A and Exhibit-B.

5. On the other hand, Respondent Nos. 1, 2 and 3 have made the following submissions:-

(i) Firstly, the Petitioner had an alternative remedy of filing an appeal under section 46(4) of the Act and, therefore, Petition should not be entertained.

(ii) Secondly, it was submitted that the show cause notice had been issued to the Petitioner asking the Petitioner to show cause why product approval which was granted to it should not be cancelled and the Petitioner, instead of giving reply to the show cause notice and satisfying the Food Authority that there was nothing wrong in its product, had directly approached this Court by filing a Petition under Article 226 of the Constitution of India. Petition challenging the show-cause notice therefore, it was urged, was liable to be dismissed.

(iii) Thirdly it was submitted objection to the analysis by non-accredited that the /non-notified Food Laboratories was raised for the first time in rejoinder and was an afterthought. It was urged by the learned that there was suppression of material facts by the Petitioner and the results of the Laboratory from Pune were suppressed in the Petition filed by the Petitioner and therefore on that ground the Petition was liable to be dismissed.

(iv) Fourthly, it was submitted by the learned Counsel for Respondent No. 1 and 2 and adopted by Senior Counsel for Respondent Nos. 3 and 4 that the Petitioner was destroying the evidence by burning manufactured goods in order to avoid further prosecution. It was also urged on behalf of Respondent Nos. 1 and 2 that the Food Authority had discretion in prescribing the standards for proprietary food and that they were not bound even by the Regulations which were framed in respect of additives and contaminants which were found in proprietary foods.

(v) Fifthly, it was also urged that the Petitioner had violated the terms which were imposed upon it. It was submitted that in the application for product approval a representation was made by the Petitioner that the content of lead would be less than 1 ppm (parts-per-million). It was contended that therefore even if Regulations prescribe 2.5 ppm as the maximum amount of lead which was permissible, if the lead contained in the product of the Petitioner was above 1 ppm, the Food Authority could still ban the product since the lead contained in the Petitioner's product was contrary to the representation made by the Petitioner about the lead content in its product. This was notwithstanding that the Regulations permitted lead upto 2.5 ppm

(vi) Sixthly it was urged on behalf of Respondent Nos. 1 to 3 that the Food Authority had to act in public interest and even if lead was found in one sample, exceeding the permissible limit, the order of prohibition could be passed in public interest and 2, the said order (Exhibit-A) had been passed under sections 10(5), 16(1), 16(5), 22, 26 and 28 of the Act. According to Respondent No.3, the order passed by it (at Exhibit-B) is under section 30 of the said Act.

These are the broad submissions which have been urged by either side, apart from other detailed arguments which were made by both, the Petitioner and the Respondents.

FACTS:

6. Brief facts which are germane for the purpose of WPL/1688/2015 deciding this Petition are as under:-

7. Nestle S.A of Switzerland is a Company which is registered and incorporated under the Laws of Switzerland and is carrying on business of manufacture, sale and distribution of food products. Petitioner - Company is its subsidiary in India and is registered under the provisions of Companies Act, 1956. Petitioner is carrying on its business in India for more than 30 years.

8. One of the products which has been manufactured by the Petitioner is known as "MAGGI Noodles". Petitioner had been manufacturing and selling this product for more than 30 years and at no time they had come to the adverse notice of the Food Authorities in the past and also at no point of time criminal prosecution was launched against the Petitioner either for violation of the old Act or the new Act after it came into force in 2006 till the impugned order of ban was passed on 05/06/2015. Petitioner manufactured 9 variants of these noodles which are known as under:-

| Serial No. | MAGGI Noodles Variants |
|---|---|
| 1. | MAGGI Xtra Delicious Chicken Noodles |
| 2. | MAGGI Thrillin Curry Noodles |
| 3. | MAGGI Cuppa Mania Chilly Chow Masala YO |
| 4. | MAGGI Cuppa Mania Masala YO WPL/1688/2015 |
| 5. | MAGGI 2 Minutes Masala Noodles / MAGGI Hungroo Noodles |
| 6. | MAGGI Vegetable Multigrainz Noodles |
| 7. | MAGGI Vegetable Atta Noodles |
| 8 | MAGGI Xtra Delicious Magical Masala Noodles |
| 9. | MAGGI 2 Minute Masala Dumdaar Noodles |

These noodles are pre-cooked products. The purchaser is instructed to cook the noodles alongwith the taste maker which is separately packed inside the packed product and it has to be mixed in water and boiled for two minutes and, if necessary, the purchaser can add other vegetables to the noodles and consume them as a food supplement. Petitioner was granted license to manufacture these products even prior to the New Act coming into force in 2006. License was granted to the Petitioner under the old Act viz. Prevention of Food Adulteration Act in the year 1983. After 2006, Petitioner continued to manufacture noodles and in the year 2012 certain advisories were issued by the Food Authority - Respondent Nos. 1 and 2 introducing a regime which was called a product approval regime. Petitioner, accordingly, applied for product approval and the product approval was granted to 8 out of the 9 variants of noodles.

9. So far as one of the Variants is concerned viz. " MAGGI Oats Masala Noodles", at the relevant time, when the said product was to be introduced in the market, the advisory viz. of obtaining product approval was stayed by the High Court in Writ Petition No.2746 of 2013 in the case of ***Vital Nutraceuticals & Ors* v. *Union of India & Ors***. According to the Petitioner, since the stay order was in operation, they did not apply for product approval. However, the judgment and order of this Court was stayed by the Apex Court by its order dated 13/08/2014 passed in SLP (Civil) No.8372-8374 of 2014 ***(Food Safety Standards Authority of India* v. *Vital Nutraceuticals Private Limited & Ors).***

10. The Petitioner, after the Apex Court granted stay to the order passed by this Court, applied for product approval. However, certain clarifications were sought by Respondent Nos. 1 and 2, which clarifications were given by the Petitioner within the prescribed period of 30 days. However, thereafter, Petitioner's application was not processed and it was closed without giving reasons.

**CHRONOLOGY OF EVENTS IN RESPECT OF PRESENT DISPUTE:**

11. Sometime in the month of January, 2015, Food Inspector Barabanki, UP, became suspicious, after he saw packet of Maggi Noodles on which it was claimed that there was "No added MSG". Since the Food Inspector became suspicious about the said claim, he sent the packet to Food Laboratory viz. State Food Laboratory, Gorakhpur in UP. The result of the analysis showed that there was MSG in the said product which was found in the said packet. He therefore informed Respondent Nos. 1 and 2 and the Petitioner. At the instance of the Petitioner, the said sample was sent to Referral Laboratory at Kolkata which is a Laboratory which again tests the product if there is a dispute about authenticity of the Food Laboratory analysis.

12. This product which was seized was a packet containing Maggi Noodles manufactured on 15/01/2014. The shelf life of the product was nine months and there was a declaration made on the packet that the food can be best used for 9 months after the date of manufacture. The best use therefore was over on 15/09/2014. After the product was seized, on 22/01/2015 it was sent for analysis to the Referral Laboratory at Kolkata where it remained till 29/03/2015 and almost after 3 months the report was submitted.

13. The Referral Laboratory at Calcutta which was supposed to test the result regarding MSG found in the product also gave a report that the lead contained was 17 ppm which was much higher than the permitted lead content of 2.5 pm as per the Regulations.

14. Food Authorities were alarmed by the said results and therefore they tested the samples from other batches in Delhi and 9 other States. We must mention here that out of the 9 Variants of MAGGI Noodles only 3 Variants were tested.

15. The Food Analyst gave a report and Respondent No.2 found that out of 72 samples which were tested, in 30 samples there was lead in excess of 2.5 pm, though 42 samples showed that the lead content was within the permissible limits. Similarly in 7 States viz., (1) Delhi, (2) UP, (3) Tamil Nadu, (4) Gujarat (5) Maharashtra,(6) Punjab (7) Meghalaya the lead content in the product of the Petitioner was found above 2.5 pm, whereas in Goa and Kerala the lead content was found to be within the permissible limits. The said results were made known to Respondent No.2 on telephone on 04/06/2015.

16. According to the Petitioner, after reading the news items which were published in media regarding the excess lead in its product, Petitioner-Company immediately made an announcement on 4th June, 2015 and press release was given in which the Petitioner stated that though according to it its product was safe, the Petitioner was withdrawing its product from the market till its name was cleared. The following press release was given by the Petitioner - Company.

"PRESS RELEASE NESTLE HOUSE, Gurgaon, 5th June, 2015, MAGGI Noodles are completely safe and have been trusted in India for over 30 years.

The trust of our consumers and the safety of our products is our first priority. Unfortunately, recent developments and unfounded concerns about the product have led to an environment of confusion for the consumer, to such an extent that we have decided to withdraw the product off the shelves, despite the product being safe.

We promise that the trusted MAGGI Noodles will be back in the market as soon as the current situation is clarified."

**ISSUES**

17. (I) Whether the Writ Petition filed by the Petitioner - Company under Article 226 of the Constitution of India is maintainable, particularly when the impugned orders, according to the Respondents, are show cause notices and that the Petitioner has an alternative remedy of filing an appeal under section 46(4) of the Act?

(II) Whether there was suppression of fact on the part of the Petitioner and whether the Petitioner had made an attempt to destroy the evidence disentitling the Petitioner from claiming any relief from this Court?

(III) Whether Respondent No.2 could impose a ban on the ground that the lead found in the product of the Petitioner was beyond what the Petitioner had represented in its application for product approval, though it was below the maximum WPL/1688/2015 permissible limit laid down under the Regulations?

(IV) Whether the Food Authority had an unfettered discretion to decide what are the standards which have to be maintained by the manufacturers of proprietary food and whether in respect of the proprietary food, the Food Authority was not bound by the permissible limits of additives and contaminants mentioned in the Regulations and the Schedules appended thereto?

(V) Whether in view of the provisions of Section 22, there was a complete ban on the manufacture of sale and products mentioned in the said section?

(VI) Whether there is violation of principles of natural justice on the part of Respondent Nos. 1 to 4 on account of the impugned orders being passed without issuance of show cause notice and without giving the Petitioner an opportunity to explain the discrepancy pointed out by the Food Authority in respect of the product of the Petitioner?

(VII) What is the source of power under which the impugned orders were passed and whether such orders could have been passed sections 10(5), 16(1), 16(5), 18, 22, under 26, 28 and 29 of the Act?

(VIII) Whether the analysis of the product manufactured by the Petitioner could have been made in the Laboratories in which the said product was tested by the Food Authority and whether these Laboratories are accredited Laboratories by the NABL and whether the reports submitted by these Laboratories can be relied upon?

(IX) Whether reliance can be placed on the reports obtained by the Petitioner from its Laboratory and other accredited Laboratories?

(X) Whether the Food Analyst was entitled to test the samples in any Laboratory, even if it was not accredited and recognized by the Food Authority?

(XI) Whether it was established by the Food Authority that the lead beyond the permissible limit was found in the product of the Petitioner and the product of the Petitioner was misbranded on account of a declaration made by the Petitioner that the product contained "No added MSG"? were not justified in imposing the ban on all the 9 Variants of the Petitioner, though tests were conducted only in respect of 3 Variants and whether such ban orders are arbitrary, unreasonable and violative of Article 14 and 19 of the Constitution of India?

**REASONS AND FINDINGS:**

**FINDING ON ISSUE NO. (I)**

18. From the above observation, it is clear that contention of Respondent Nos. 1 and 2 that there was no ban order is totally incorrect since the order, in terms, imposes a ban on the Petitioner's production, sale etc of its product. Secondly, the penultimate para of the said order states that the Petitioner should show-cause why its product approval should not be cancelled and the Petitioner should show cause within 15 days from the date of the said order. The said show cause notice also had been issued after the order banning the product was already passed in the preceding paragraph of the impugned order. Having passed the ban order, further show cause notice for cancellation of the product approval which was already granted, was only a consequential order. Lastly, as rightly pointed out by Mr. Iqbal Chagla, the learned Senior Counsel appearing on behalf of the Petitioner, that the Petitioner had approached this Court under Article 226 of the Constitution of India inter alia on the ground of violation of principles of natural justice and the Petitioner was therefore entitled to approach this Court directly even assuming that an alternative remedy was available.

19. It is quite well settled that the alternative remedy by way of appeal is not always a bar in approaching the High Court under Article 226, particularly when the Petitioner challenges the order on the ground of violation of principles of natural justice. The Apex Court in ***Whirpool Corporation* v. *Registrar of Trade Marks, Mumbai and others*** [AIR 1999 SC 22 WPL/1688/2015] has observed in para 15 as under:-

"15. Under Article 226 of the Constitution, the High Court having regard to the facts of the case, has discretion to entertain or not to entertain a Writ Petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been violation of the principle of natural justice or where the order of proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case- law on this point put to cut down this circle of forensic Whirpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field."

It is, therefore, quite well settled that whenever allegation is made that there is violation of principles of natural justice the Petitioner is entitled to challenge the said order and, secondly, in the present case, the impugned order (Exhibit- A) cannot be strictly said to be a show cause notice since the order imposes a ban on manufacture, sale, distribution of 9 variants of Maggi Noodles. It, therefore, imposes a complete ban on the product.

20. In our view, ratio of the judgment in ***Aamir Khan Production Pvt. Ltd.* v. *Union of India*** [W.P. No. 358 of 2010, Bombay High Court] will not apply to the facts of the present case since in that case the Petitioner had challenged the show cause notices and not the final order. Hence the ratio of the said judgment can be distinguished on facts.

21. In our view, therefore, Petition filed by the Petitioner under Article 226 of the Constitution of India is maintainable. Issue No. (I) is, therefore, answered in the affirmative.

**FINDING ON ISSUE NO. (II)**

22. So far as the submission regarding destruction of evidence is concerned, in our view, the said submission is also without any substance. It is obvious that Respondent Nos.1 to 4 have not given proper instructions to their respective Counsel who was appearing on their behalf. The minutes of various meetings which were produced by the Petitioner clearly indicate that the Petitioner had taken every step as per the directions given by the Food Authority. The minutes of the meetings which had been tendered across the bar and which were not disputed and which were admitted by the Counsel appearing for Respondent Nos. 1 and 2 indicate that the Petitioner was directed to destroy the food packets which were manufactured by the Petitioner.

23. There is, therefore, absolutely no substance in the submissions made by the learned Senior Counsels appearing on behalf of Respondent Nos. 1 and 4 that there was suppression of fact and an attempt to destroy the evidence by the Petitioner.

**FINDING ON ISSUE NO. (III)**

24. Whether Respondent No.2 could impose a ban on the ground that the lead found in the product of the Petitioner was beyond what the Petitioner had represented in its application for product approval, though it was below the maximum permissible limit laid down under the Regulations?

25. Mr. Mehmood Pracha, the learned Counsel for Respondent No.2, vehemently urged that the obligation was cast on the Petitioner or the food manufacturer to manufacture the food which was safe and wholesome and an element of trust therefore was created on the basis of assurances given by the manufacturer. He submitted that if the trust was broken, the Food Authority could then act and imposes the ban on the product of the manufacturer. He submitted that the Petitioner had made representation in its application for product approval that the lead contained in its product, both, in the noodles and taste maker, was less than 0.1 ppm. He submitted that the Food Authority could impose a ban on the Petitioner's product if it was found that the lead contained was more than 0.1 ppm though the permissible limit was 2.5 ppm. He submitted that the Food Authority could so order the ban because the representation which was made by the Petitioner in its application for product approval was incorrect and though the permissible limit may be 2.5 ppm and the lead contained was less than 2.5 ppm, yet, such a ban order could be imposed and justified. He invited our attention to the averments made in the reply of Respondent No.1 to that effect in para 13. It would be fruitful to reproduce the said paragraph wherein it is mentioned as under:-

"13. The said product with its 9 approved variants are admittedly covered under Section 22 of the FSS Act and which, being non- standardised, have to undergo risk and safety assessment from the Food Authority through the process of product approval. The petitioner's company had submitted the composition of the 'Noodle Cake' along with the composition of 'Tastemaker' for each variant as part of the Product Approval applications. The package contains the 'Noodle Cake' and the 'Tastemaker' is placed inside the main package as a sealed Sachet, which is removable as an independent pack once the main package is opened. As such, both are liable to be tested separately. The Certificate of Analysis (CoA) furnished with the application for Maggi 2-Minute Noodles Masala variant showed 0.0153 ppm lead as against the maximum permissible limit of 2.5 ppm. The petitioner is trying to create confusion by making reference to different standards prescribed for 'Lead' under the FSS regulations, fully knowing that the Standards prescribed in the FSS Regulations cannot be applied to a Section 22 Product on a selective basis. Once it is Section 22 Product, the Safety assessment is undertaken on the basis of averments made in the application. The petitioner Company cannot go back on its own commitments in the application wherein it annexed the Codex Standards for Instant Noodles (wherein the maximum permissible limits for lead is far less than the limit prescribed under the FSS Act, 2006 Rules and Regulations). Even, if assumed, but not admitted, that the certificate of analysis was for the entire product, then the final product should have lead content of 0.0153 ppm or as promised in PA Applications. The contention of the petitioner that the product should be tested in the form as it is finally ready for consumption is not tenable because the final consumption ready product would include water therein which is not being supplied by the petitioner company as part of the product."

26. We are surprised and astonished at the stand taken by Mr. Pracha, the learned Counsel appearing on behalf of Respondent No.2 which is also reflected from the averments made in the affidavit in reply filed by Respondent No.1. The said submission is preposterous to say the least. The Scheme of the Act and provisions of the Rules and Regulations framed thereunder clearly indicate that the Regulations have been framed by the Food Authority giving manufacturers various standards which are to be maintained by the food. Most of these Regulations were placed before both the Houses of Parliament and they were approved. It is difficult to understand as to how such a submission therefore could be made which does not find any support from the provisions of the Act and the Rules and Regulations framed thereunder. If this is the interpretation which is sought to be made by Respondent No.2 then there is something inherently wrong in the manner in which the Rules and Regulations are being interpreted by the Food Authority. Such interpretation cannot be given by any standard or cannons of interpretation or rules of interpretation which have been formulated by the Apex Court over the last six decades. If the arguments of Mr. Pracha are to be accepted, it would effectively mean that for proprietary foods, the FSS Regulations would not apply and the food authority granting the product approval would decide what would be the limits WPL/1688/2015 prescribed for additives, contaminants and other substances that may be contained in a proprietary food. To our mind, this argument is wholly fallacious and would run contrary to the provisions of Section 22 of the Act itself. Section 22 inter alia deals with proprietary foods and explanation (4) to the said section defines "proprietary and novel food". The proviso appearing after explanation (4) clearly stipulates that such food should not contain any of the foods and ingredients prohibited under the Act and the regulations framed thereunder. If we are to accept the argument of Mr. Pracha, this proviso would be rendered otiose. The said submission is therefore wholly without merit and stands rejected. Issue No. (III) is therefore answered in the negative.

**FINDING ON ISSUE NO. (IV)**

27. Whether the Food Authority had an unfettered discretion to decide what are the standards which have to be maintained by the manufacturers of proprietary food and whether in respect of the proprietary food, the Food Authority was not bound by the permissible limits of additives and contaminants mentioned in the Regulations and the Schedules appended thereto?

28. Mr. Mehmood Pracha, the learned Counsel appearing on behalf of Respondent No.2, taking his argument further from the point which he has argued on the earlier question, then seriously contended that in respect of proprietary food, the Food Authority had an unfettered discretion to decide what standards have to be maintained by the manufacturers of proprietary food and the Food Authority was not bound by permissible limits of additives/contaminants mentioned in the Schedule given in the Act. We are again amazed and astonished by the submission made by the learned Counsel for Respondent No.2. The FSS Act no doubt gives power to the Food Authority to regulate and monitor the manufacture, storage, distribution, sale and import of food and for that purpose can frame Regulations under section 16(2) of the Act. After the Regulations so framed under section 92 of the Act, they are to be placed before both the Houses of Parliament under section 93 of the Act for approval and once the Regulations so framed are approved by both the Houses of Parliament

then it cannot be said that the Food Authority has an unfettered discretion to decide what are the standards which are to be maintained by the manufacturers of proprietary food.

29. It is not in dispute that the product which is manufactured by the Petitioner viz. Maggi Noodles is proprietary food. The limits of quantities and contaminants, heavy metals etc. also are prescribed under the Regulations which are framed under section 92 of the Act and this is applicable even in the case of proprietary food. Limit of various additives including contaminants is mentioned in the said Regulations. Limit of lead is also mentioned in the said Regulations. If the submission made by the learned Counsel for Respondent No.2 is accepted then these Regulations which are framed as per the procedure prescribed under section 93 namely of placing the same before both the Houses of Parliament would be rendered otiose. If this submission is to be accepted, it would mean that the Food Authority is not bound by the Regulations which are framed and approved after they are placed before both the Houses of Parliament and become lawful Regulations, having the force of law and it would also mean that the Food Authority is a law unto itself and which can take any decision according to its discretion. In fact, in exercise of powers conferred by Section 92(2)(i) read with Sections 20 and 21 of the Food Safety and Standards Act, 2006, Regulations have been framed regarding contaminants, toxins and residues known as the Food Safety and Standards (Contaminants, Toxins and Residues) Regulations, 2011. Regulation 2.1.1.(2) inter alia stipulates that no article of food specified in column (2) of the Table appended thereto can contain any metal specified in excess of quantities specified in the corresponding entry in column (3) thereof. At Sr. No.1 of the said table is lead and under the column Article of Food at (iii), there is an entry which states "Foods not specified". As far as this entry is concerned, under the Regulations, the lead level permissible is up to 2.5 ppm. If the argument of Mr. Pracha is to be accepted that in respect of proprietary food (i.e. in respect of foods where no standards have been set out) the food authority had unfettered discretion to decide what standards have to be maintained by the manufacturers of proprietary food for lead, Entry (iii) in the table appended to Regulation 2.1.1.(2) would be rendered otiose. These Regulations specifically contemplate different tolerance level of lead in different products. As a residuary item "foods not specified" finds place at item (iii) of Sr. No.1 of the table appended to regulation 2.1.1.(2) and specifies the permissible limit of lead in "foods not specified" would be 2.5 ppm. Such a proposition is therefore absolutely unacceptable. Issue No. (IV) is therefore answered in the negative.

**FINDING ON ISSUE NO. (V)**

30. On proper and plain reading and interpretation of section 22 of the Act and after hearing the learned Senior Counsel Mr. Chagla for the Petitoner and the learned Counsel Mr. Pracha for Respondent No.2 at some length, we find, at least prima facie, that there is considerable force in the arguments advanced by Mr. Chagla the learned Senior Counsel appearing on behalf of the Petitioner. In the facts of the present case, however, we find that product approval has, in fact, been granted to 8 out of 9 Variants of MAGGI Noodles manufactured by the Petitioner. In this view of the matter, the issue as to what would be the interpretation of section 22 does not really arise for

consideration before us in the facts of the present case and, therefore, we leave it open to be argued in an appropriate case. The Issue No.(V), therefore, does not arise.

31. However, in the Court reliance is placed on section 22 and this is the argument which is sought to be advanced in support of the action of the Food Authority. In our view, there is something fundamentally wrong in the approach of the Food Authority and in the interpretation which is sought to be given by it to several provisions of the Act, including section 22 of the Act.

**FINDING ON ISSUE NOS. (VI) & (VII) WHICH CAN BE DECIDED TOGETHER:**

32. The Act envisages that the authorities can pass orders which have adverse civil consequences and they can also prosecute those who violate the provisions of the Act and Rules and Regulations framed thereunder which may then result in imposition of fine and sentence on the accused. In cases of emergency, order banning the product can also be passed and, obviously, in such cases, question of giving hearing does not arise. The principal object in passing these orders is to protect public interest at large and to see the public welfare and to ensure that the food which is sold is not unsafe for human consumption.

33. According to Respondent Nos. 1 and 2 the impugned order at Exhibit-A has been passed while exercising powers vested in them under sections 10(5), 16(1), 16(5), 18, 22, 26, 28 and 29 of the Act, whereas, according to Respondent Nos. 3 and 4, the impugned order at Exhibit-B has been passed under section 30 of the Act. It will be necessary therefore to examine the contention of the Respondents that the impugned orders are passed under the aforesaid provisions before it can be accepted.

34. In our view, from the perusal of the aforesaid provisions it is difficult to accept that the Food Authority can pass the impugned orders under these provisions. It is difficult to trace the origin of the power to ban the product on emergency basis to sections 10(5), 16(1), 16(5), 18, 22, 26, 28, 29 of the Act.

35. Section 10(5) enumerates that the Chief Executive Officer shall exercise the powers of the Commissioner of Food Safety while dealing with matters relating to food safety of such articles. This section therefore empowers the Chief Executive Officer to exercise the powers which are exercised by the Commissioner of Food Safety and, to that extent, Respondent No.2 was authorized to pass the said order. However, the section does not specify as to whether the principles of natural justice have to be followed or not and, for that purpose, the powers vested in Commissioner of Food Safety will have to be examined. Section 10(5) of the Act reads as under:-

"10(5) The Chief Executive Officer shall exercise the powers of the Commissioner of Food Safety while dealing with matters relating to food safety of such articles."

36. Section 16(1) only imposes duty on the Food Authority to regulate and monitor the manufacture, processing, distribution, sale and import of the food so as to ensure safe and wholesome food. Sub-section (1) of section 16 is an omnibus provision which casts a duty and obligation on the part of the Food Authority to regulate the food business to ensure food safety. To

our mind, Section 16(1) does not empower the Food Authority to ban any product or article of food. That power would be found elsewhere. Section 16(1) of the Act reads as under:-

"16(1) It shall be the duty of the Food Authority to regulate and monitor the manufacture, processing, distribution, sale and import of food so as to ensure safe and wholesome food."

37. Section 16(5) also speaks about the directions which can be given by the Food Authority to the Commissioner of Food Safety. Section 16(5) of the Act reads as under:-

"16(5) The Food Authority may, from time to time give such directions, on matters relating to food safety and standards, to the Commissioner of Food Safety, who shall be bound by such directions while exercising his powers under this Act."

38. It is difficult to accept the contention of Respondent Nos. 1 and 2 that the impugned order at Exhibit-A has been passed under section 16(1) or under section 16(5) since section 16(1) only speaks about the duty cast on the Food Authority and section 16(5) authorizes Food Authority to give directions to the Commissioner of Food Safety who is bound by such directions. Therefore, in our view, the impugned order at Exhibit-A could not have been passed under these provisions.

39. The next section on which the reliance is placed by Respondent Nos.1 and 2 is section 18 which is found in Chapter-III of the Act which deals with general principles of food safety and sub-section (1) of section 18 enumerates the guiding principles which are to be followed while implementing the provisions of the Act. Sub-section (2) of section 18 lays down guiding principles which are to be kept in mind by the Food Authority while framing regulations and specifying standards under the Act. We fail to understand as to how these guiding principles can be said to give power to the Food Authority or Commissioner of Food Safety in passing the impugned order at Exhibit-A. This section also cannot be said to be a source of power since it only lays down the guidelines. Section 18 of the Act reads as under:-

40. Section 22 quoted above on which reliance is placed by Mr. Mehmood Pracha, the learned Counsel appearing on behalf of Respondent No.2, is a provision which is found in Chapter-IV of the Act which deals with general provisions as to articles of food and it clarifies that the categories of food mentioned in the said section viz. novel food, genetically modified articles of food, irradiated food, organic food, foods for special dietary uses, functional foods, neutraceuticals, health supplements, proprietary food etc cannot be manufactured by any person save and otherwise provided under the Act and Rules and Regulations framed thereunder.

41. The impugned order at Exhibit-A also does not in terms state that the order is passed under section 22 of the Act. This argument is advanced for the first time by Mr. Mehmood Pracha, the learned Counsel appearing on behalf of the Respondent No.2. The learned Additional Solicitor General appearing on behalf of Respondent No.1 or Mr. Darius Khambatta appearing on behalf of Respondent Nos. 3 and 4 have not argued that the the order has been passed under section 22. Even otherwise, from the aforesaid provisions, it can be seen that this order (Exhibit-A) could not have been passed under section 22 as canvassed by Mr. Mehmood Pracha, the learned Counsel appearing on behalf of Respondent No.2.

42. In our view, therefore, the Food Authority cannot trace its power to pass the impugned order at Exhibit-A under section 26, 28 and 29 of the said Act.

43. The learned Senior Counsel Mr. Darius Khambatta appearing on behalf of Respondent Nos. 3 and 4 has submitted that the order at Exhibit-B has been passed under section 30. The learned Counsels appearing on behalf of Respondent Nos. 1 and 2 have not relied on section 30 as a source of power for passing the impugned order at Exhibit-A. Whereas, according to Mr. Iqbal Chagla, the learned Senior Counsel appearing on behalf of the Petitioner, both the orders viz. Order at Exhibit-A and the Order at Exhibit-B had been passed under section 34 of the Act which reads as under:-

The learned Senior Counsel for the Petitioner then submitted that even if it is held that the both these orders had been passed under section 30, though it does not mention that principles of natural justice have to be followed, it is implied that before passing such order doctrine of audi alteram partem has to be complied with and hearing has to be given to the affected party.

44. In our view, after having seen all these provisions, it is difficult to accept the contention of Respondent Nos. 1 and 2 that the order at Exhibit-A has been passed under section 10(5), 16(1), 16(5), 18, 22, 26, 28 and 29 of the Act. In our view, it appears that Respondent Nos. 3 and 4 have passed the impugned order at Exhibit-B under section 30 of the Act and Respondent Nos. 1 and 2 have passed the impugned order at Exhibit-A either under section 30 or under section 34 of the Act. It appears that Respondent Nos. 1 and 2 have taken the aforesaid stand to justify their action of not giving show cause notice and hearing before passing the impugned order at Exhibit-A. Sub-section (1) of section 34 mentions that before passing any order under section 34, the Designated Officer has to serve a notice on the food business operator and then pass the order. Section 34, therefore, speaks about issuance of show cause notice and following the principles of natural justice. Section 30 even though it does not in terms mentions that principles of natural justice have to be followed, it is implied that such a course has to be normally followed. The Apex Court in ***C.B. Gautam* v. *Union of India and Others*** while deciding the issue as to whether in the absence of specific requirement of following the principles of natural justice in any section, whether it can be implied that such a hearing has to be given has observed in paras 28 and 30 as under:-

"28. It must, however, be borne in mind that courts have generally read into the provisions of the relevant sections a requirement of giving a reasonable opportunity of being heard before an order is made which would have adverse civil consequences for the parties affected. This would be particularly so in a case where the validity of the section would be open to a serious challenge for want of such an opportunity."

45. In the said case, under section 269-UD of the Income-tax Act no reference was made to principles of natural justice being followed and the Apex Court has held that it was implied that such a hearing should be given.

"76. In our view, even if the impugned notification falls into the last of the above category of cases, whatever material the Food (Health) Authority had, before taking a decision on the articles in question, ought to have been presented to the appellants who are likely to be affected by the ban order. The principle of natural justice requires that they should have been given an opportunity of meeting such facts. This has not been done in the present case. For this reason also, the notification is bad in law."

46. In the present case, the Food Authority and the Commissioner of Food Safety, banning State of Maharashtra have not issued any Notification all Noodles. The Food Authority has banned the product of the Petitioner relying on the results given by the Food Laboratories. It was, therefore, incumbent upon the Food Authority and the Commissioner of Food Safety to have given all the material to the Petitioner on the basis of which the impugned orders (Exhibit -A and Exhibit-B) were passed so that the Petitioner - Company could have got an opportunity of giving its reply to the material on the basis of the which the said impugned orders were passed.

47. From the facts of this case it can be seen that:-

(i) The Petitioner was carrying on business for more than 30 years and no such contamination was found in the past.

(ii) There was no risk analysis made by the authorities to determine the extent of damage which would be caused on the consumption of food as was done in ***Dhariwal Industries Ltd and another*** **v.** ***State of Maharashtra and others*** [2013(1) Mh.L.J. 461].

(iii) The reports received from other States were informed to the Food Authority on telephone and, in any case, so far as the Commissioner of Pune is concerned, he had conducted the test on 06/06/2015 that is one day after the impugned order at Exhibit-A was passed.

(iv) Petitioner - Company itself had already issued a press release stating therein that the Petitioner was recalling the product and was going to stop manufacture, sale distribution of the product etc.

(v) Out of 70 samples examined by Food Authority - Respondent Nos. 1 and 2, more than 50% i.e. about 42 samples were found to be within permissible limit and in 30 samples the lead was found to be in excess.

(vi) Delhi and Kolkata reports were available.

48. Under these circumstances therefore, in our view, the Food Authority should have given a proper opportunity to the Petitioner - Company to prove that its product was safe for human consumption and it was not necessary to impose a nationwide ban on the product, particularly when the Petitioner had already, one day before the impugned order at Exhibit-A was passed, had given a press release, stating therein that Petitioner was recalling its product from the market. Therefore, in our view, in this particular case, there is a clear violation of principles of natural justice and on that ground alone the impugned orders at Exhibit-A and respectively are liable to be set aside. Issue No.(VI) is therefore answered in the affirmative. The answer to Issue No(VII) is that the source of power under which the impugned orders were passed is traceable to either section 30 or section 34

of the Act and, in any case, the impugned orders could not have been passed under sections 10(5), 16(1), 16(5), 18, 22, 26, 28 and 29 of the Act. Issue No. (VII) therefore is answered accordingly.

**FINDINGS ON ISSUE NOS. (VIII) to (XI) WHICH CAN BE DECIDED TOGETHER:**

49. It will be relevant to take into consideration the provisions of section 3(p) which defines the "food laboratory" and section 43 which gives power to the Food Authority to give recognition to laboratory and notify it. Upon conjoint reading of both these sections, it is clear that under section 3(p), "food laboratory" is a laboratory which is either State or Central laboratory or any other allied laboratory which is accredited and recognized by NABL and by the Food Authority under section 43 of the Act. The laboratory, therefore, has to pass twin test before it can be said to be a recognized laboratory viz. (i) it has to be accredited by NABL and over and above that (ii) it has also to be recognized by the Food Authority under section 43 of the Act. Sub-section (1) of section 43 makes it abundantly clear that only in that laboratory which is recognized by the Food Authority by Notification, food can be sent for analysis by the Food Analyst. Upon conjoint reading of the said two provisions, it is clear that the submission made by Mr. Khambata, the learned Senior Counsel for Respondent Nos. 3 and 4 is without any substance. Section 43(1) mandates that the Food Analyst has to analyse the food in a laboratory accredited by NABL and also recognized by the Food Authority and notified by it. It is apparent that therefore if there is non-compliance of the said provisions and if the food is tested in a laboratory which does not fall within the definition of section 3(p) and not recognized by the Food Authority, the analysis made in such laboratory cannot be relied upon. Though the said observation is made in respect of provisions of the Prevention of Food Adulteration Act, 1954 (which has now been repealed by FSS Act, 2006), even under the new Act, the provisions of section 43(1) will have to be held mandatory and not directory. This is more so when Section 43(1) is read with the definition of the words "food laboratory" in Section 3(p) of the FSS Act, 2006.

50. It is not in dispute that the Laboratories in which these food samples were tested were either not accredited by NABL or not recognized by the Food Authority under section 43(1) of the Act or even if they were accredited or notified, they were not accredited to make analysis in respect of lead in the samples. There is no material on record to show whether the procedure of testing samples mentioned under the Act and Rules and Regulations framed which is thereunder has been followed. There is a grave doubt about the samples being tested at Avon Food Lab (Pvt.) Ltd. and even if they are so tested, prima facie, it does appear that procedure of testing the samples has not been followed. The contention of Mr. Pracha, the learned Counsel for Respondent No.2 that in view of the Notification issued on 5/7/2011 even the State and Central Laboratories, though not notified, were entitled to test the samples, is incorrect.

51. On the same ground, it will not be possible to accept the reports of the samples which have been tendered on behalf of the Petitioner since there is no manner of knowing whether procedure has been properly followed or not. Issue No. (VIII) to (XI) are therefore answered in the negative.

**FINDING ON ISSUE NO. (XII)**

52. Keeping all the observations of the Apex Court and other judgments in view, we will have to examine whether action of Respondent Nos. 1 to 4 is arbitrary capricious and violative of Article 14 and 19 of the Constitution of India.

53. Again, it will be necessary to briefly examine the facts of this case in order to see whether the impugned order is arbitrary in the facts of this case. We have already held that the mandatory provision for analysing sample as laid down under section 47 and the Regulations framed there under has not been followed by Respondent Nos. 1 to 4. We have considered those questions at length and we do not propose therefore to again repeat the said reasons. Secondly, it is an admitted position that on 04/06/2015, the Petitioner had given press release, stating therein that though its product was safe, in view of what had happened the Petitioner - Company was stopping the production, distribution and sale etc. of all 9 variants of Maggi before the Petitioner - Company clears the misunderstanding. On 05/06/2015, the impugned order at Exhibit-A was passed by Respondent No.2 - Food Authority imposing a complete ban on production, sale, distribution etc of Petitioner's product Maggi Noodles throughout India. In the said impugned order, three reasons were given viz. (i) that lead in excess of the prescribed standard was found in the product of the Petitioner - Company, (ii) the product was misbranded because though it was stated on the packet there was "No added MSG", MSG was found in the product of the Petitioner and (iii) one of the 9 variants viz. MAGGI Vegetable Atta Noodles was manufactured and sold without seeking product approval.

54. In our view the impugned order (Exhibit-A) is liable to be set aside because-

(i) It has been passed in an arbitrary manner. There is lack of transparency. It is unreasonable.

(ii) It has been passed in utter violation of principles of natural justice since no material on the basis of which the said order was passed was given to the Petitioner as is discussed hereinabove by us while deciding Issue No. (VI).

(iii) The samples of the product of the Petitioner have not been analysed as per the mandatory provision viz. Section 47(1) and Regulations framed there under, which has been elaborately discussed by us while dealing with Issue Nos. (VIII) to (XI).

(iv) The procedure which was followed by Respondent Nos. 1 to 4 was not fair and transparent. As observed by the Apex Court in ***Natural Resources Allocation*** (supra), the State action in order to escape the wrath of Article 14 has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment and State action must conform to norms which are rational, informed with reasons and guided by public interest.

55. Apart from that, the most important aspect is that the Respondents were aware that the Petitioner had recalled the its product on 04/06/2015 and the press release to that effect was given by the Petitioner and under these circumstances it was not necessary to impose ban all over India and

proper opportunity ought to have been given to the Petitioner to clear the misunderstanding or find out the correct position regarding safety of its product. Action of the State of not supplying the material on the basis of which the action was taken and not giving a personal hearing to the Petitioner and issuing an order of ban when Petitioner itself had withdrawn the product clearly falls within the four corners of arbitrariness and is therefore violative of Article 14 and 19 of the Constitution of India. In fact, the entire sequence culminating in imposition of ban on 05/06/2015 by Respondent No.2 shows that there is something more that what meets the eye which has resulted in passing the impugned orders by Respondent Nos. 2 and 4.

56. The Apex Court has held that procedure of sampling is mandatory in the case of ***Pepsi Co*** (supra). Though the said judgment was passed under the Prevention of Food Adulteration Act, 1954, the provisions under the repealed Prevention of Food Adulteration Act, 1954 and FSS Act, 2006 are almost identical and, therefore, observations of the Apex Court in the said case are squarely applicable even to the provisions under the FSS Act, 2006.

57. It has also to be seen that so far as second ground for imposing ban is concerned, it is stated in the impugned order (Exhibit-A) that the product was misbranded since it was mentioned on the packet of the product of the Petitioner that there was "No added MSG" and the "MSG" was found.

58. There is no material on record to substantiate the same. It is not the case of the Respondents that the Petitioner had added "MSG" though the Petitioner had declared that there was no added MSG. Secondly, it is an admitted position that the Glucomate is even otherwise found in its natural form in certain types of foods. Thirdly, the Petitioner had agreed that it would remove the declaration from the packet that there was "No added MSG". Fourthly, the maximum penalty for misbranding of product even in criminal prosecution as laid down under section 52 of the Act is to the extent of Rs 3 lakhs. Misbranding of the product, therefore, could not be a ground for banning the product indefinitely.

59. Lastly, the third ground which has been mentioned is that one of the Maggi Variants viz. MAGGI Vegetable Atta Noodles were not approved by the Food Authority and the product approval was not obtained. The Petitioner in its Petition has stated that it had applied for product approval after the order WPL/1688/2015 of stay granted by the High Court in ***Vital Nutraceuticals & Ors* v. *Union of India & Ors*** was stayed by the Apex Court. Respondents have merely stated in view of non-compliance of objections, the file was closed. The Respondents, firstly, could have asked the Petitioners not to produce, or sell the said variant. There was no reason to ban all other Nine Maggi Variants and, secondly, it was the duty of the Respondents to inform the Petitioner as to how the requirements were not complied with so that they could have complied with the requirements.

60. Additionally, it is an admitted position that the product approval in respect of 8 products was granted by the Respondents. Viewed from any angle therefore we have no hesitation in coming to the conclusion that the action of Respondents in passing the impugned orders at Exhibit-A and Exhibit-B is violative of Articles 14 and 19 of the Constitution of India and the said orders at

Exhibit-A and Exhibit-B will have to be set aside. Issue No.(XII) is therefore answered in the affirmative.

**FINAL ORDER:**

61. During the course of arguments, we asked Mr. Iqbal Chagla, the learned Senior Counsel appearing on behalf of the Petitioner whether irrespective of the final outcome of the Petition, whether Petitioner would continue to abide by the statement made by the Petitioner on 04/06/2015 for such time till the samples which were preserved by them could be tested in Food Laboratories mutually accepted by the Petitioner and the Respondents and he had answered in the affirmative. On the other hand, Mr. Darius Khambatta, the learned Senior Counsel appearing on behalf of Respondent Nos. 3 and 4 submitted that the food samples which were in their possession should be tested in an accredited Food the Petitioner.

62. Laboratory and not the samples which were in possession of The learned Senior Counsel Mr. Chagla appearing for the Petitioner, however, submitted that the authenticity of the samples which were with the Food Authority was in doubt and similar statement was made by the learned Counsels appearing for the Respondents regarding authenticity of the samples which were in possession of the Petitioner. While making the said suggestion, we had pointed out that this Court was concerned about public health and manufacture and sale of safe and wholesome food to the people of India. Mr. Chagla, learned Senior Counsel for the Petitioner accepted the suggestion made by this Court. However, the Respondents did not accept the suggestion made by this Court and, therefore, we are constrained to give directions for testing of food samples which have been preserved by the Petitioner pursuant to the directions given by Respondent No.2 which can be seen from the minutes of the meeting held between the representatives of the Petitioner and Respondent No.2.

63. Though, we have allowed the Petition and set aside the impugned orders, for the reasons mentioned hereinabove, we are still concerned about public health and public interest and therefore we are of the view that before allowing the Petitioner to manufacture and sell its product, Petitioner should send the 5 samples of each batch which are in their possession to three Food Laboratories accredited and recognized by NABL as per the provisions of section 3(p) and section 43 of the Act and which are as under:-

(1) Vimta Lab, Plot No.5, Alexandria Knowledge Park, Genome Valley, Shameerpet, Hyderabad-500078, Andhra Pradesh.

(2) Punjab Biotechnology Incubator, Agri & Food Testing Laboratory, SCO:7-8, Top Floor, Phase-5, SAS Nagar, Mohali-60 059.

(3) CEG Test House and Research Centre Private Limited, B-11(G), Malviya Industrial Area, Jaipur-17.

64. These samples shall be tested and analysed by these three Laboratories. The sampling process should be undertaken as per the provisions of section 47(1) and other relevant provisions of the Act and Regulations framed thereunder. If the results show that lead in these samples is within the

permissible limit then the Petitioner would be permitted to start its manufacturing process. However, even newly manufactured products of all the other Variants be tested in these three laboratories and if level of lead in these newly manufactured products is also within the permissible limit then the Petitioner - Company may be permitted to sell its products.

65. The contention of the Respondents that the 4th sample which is in their possession should also be tested cannot be accepted. We have already discussed the reason why we feel that procedure of sampling was not under taken as per the provisions of section 47(1) of the Act and the Regulations framed thereunder and therefore we feel that it would be an exercise in futility if the 4th sample is now permitted to be analysed.

**SUMMARY:**

66. Nestle (India) challenged the nationwide ban imposed by the Food Authority on its popular product Maggi Instant Noodles.

67. The Food Authority and Commissioner of Pune claimed that in public interest and to ensure food safety, the impugned orders were passed after the Food Laboratory Reports indicated the presence of lead in excess of the permissible limits and MSG being found in the product against the declaration of the Petitioner that there was "No added MSG" in the product.

68. After examining the rival contentions in great detail, we have come to the conclusion that:

(a) Principles of natural justice have not been followed before passing the impugned orders and on that ground alone the impugned orders are liable to be set aside, particularly when the Petitioner - Company, one day prior to the impugned orders, had given a Press Release that it had recalled the product till the authorities were satisfied about safety of its product.

(b) Secondly, we have held that the Food Laboratories where the samples were tested were not accredited and recognized Laboratories as provided under the Act and Regulations for testing presence of lead and therefore no reliance could be placed on the said results.

(c) We have further held that the mandatory procedure which has to be followed as per Section 47(1) of the Act and Regulations framed thereunder, was not followed.

(d) The impugned orders are held to be violative of Articles 14, 19(1)(g) of the Constitution of India.

69. Although we are setting aside the impugned orders, in public interest and in order to give an opportunity to the Petitioner to satisfy the Food Authority, we have directed that five samples from each batch cases out of 750 may be tested in three laboratories mentioned hereinabove and if the lead is found within permissible limits then the Petitioner would be permitted to manufacture all the Variants of the Noodles for which product approval has been granted by the Food Authority. These in turn would be tested again in the said three Laboratories and if the lead is found within permissible limits then the Petitioner would be permitted to sell its product. The three laboratories

shall follow the procedure laid down under section 47 of the Act and Rules and Regulations framed thereunder.

70. Since the Petitioner - Company has already made a statement that it will delete the declaration made by it viz. "No added MSG" on its product, no prejudice would be caused to the public at large and the allegation that product is misbranded also will not survive.

71. Petition is accordingly disposed of in the aforesaid terms. Rule is made absolute in terms of prayer clause (a) and (b) along with what we have mentioned hereinabove.

72. We clarify that though in the judgment we have mentioned that the samples of 9 Variants of Maggi Noodles should be tested, we make it clear that the Variants which are available with the Petitioner may be tested. Those Variants which are not available with the Petitioner, they may be manufactured after positive report is given in respect of the Variants which are available. So far as "Maggi Oats Masala Noddles with Tastemaker" is concerned, the Petitioner will have to undergo the procedure of obtaining product approval and the Respondents may consider the application of the Petitioner again, after such an application is made within a period of 8 weeks from the date of making of such application.

73. At this stage, Mr. Anil Singh, the learned Additional Solicitor General for Respondent No.1 and the learned Counsels for Respondent Nos. 2, 3 and 4 have submitted that the Judgment and Order passed by this Court may be stayed for a period of eight weeks.

74. In our view, since the Petitioner - Company has made a statement that it would not manufacture or sell the product, the question of granting stay to this Judgment and Order does not arise.

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## TOPIC 4: THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985

### *Harjit Singh* v. *State of Punjab* (2011) 4 SCC 441

**Dr. B.S. CHAUHAN, J.**

1. Leave granted.
2. This criminal appeal has been preferred against the judgment and order dated 19.5.2010 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 1711-SB/2005, by which the High Court has affirmed the judgment and order dated 2.9.2005 passed by learned Special Judge, Fatehgarh Sahib, in Sessions Case No. 72T/5.9.03/7.10.04, by which the appellant stood convicted for the offence punishable under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called as NDPS Act) and was sentenced to undergo RI for 10 years and to pay a fine of Rs.1,00,000/- in default whereof, to undergo further RI for 6 months.
3. Facts and circumstances giving rise to this appeal are that on 4.7.2003, a police party was proceeding from Focal Point, Mandi Gobindgarh to G.T. Road on patrol duty in a government vehicle. When the police party reached near the culvert of minor in the area of village Ambe Majra, the police party spotted the appellant who was coming on foot, from the side of Ambe Majra carrying a plastic bag in his right hand. On seeing the police, the appellant turned to the left side of the road. The police party apprehended the appellant, being suspicious of him. In the meantime, Ashok Kumar, an independent witness also came to the spot and joined the police party. The appellant was apprised of his right of being searched in the presence of a Gazetted Officer and in that respect his statement was recorded. Shri Dinesh Partap Singh, Assistant Superintendent of Police, was summoned to the spot by the Investigating Officer and in his presence, Amarjit Singh, Inspector (P.W.3) searched the plastic bag of the appellant and the substance contained therein was found to be opium. Two samples of 10 gms. each of the opium were taken. The remaining opium was found to be 7.10 Kgs. The samples and the remaining opium were sealed and taken into possession by the police party.

4. A formal FIR was registered against the appellant; on personal search, an amount of Rs. 510/- was found with the appellant; the arrest memo of the accused was prepared and he was formally arrested. After completion of investigation and on receipt of the report from the Forensic Science Laboratory, confirming the contents of the sample to be of opium, a

charge- sheet was filed against him for the offence punishable under Section 18 of the NDPS Act. He did not plead guilty to the charges and claimed trial.

5. The prosecution examined Manjinder Singh, Constable (P.W.1), Jagdish Singh, Head Constable (P.W.2), Amarjit Singh, Inspector (P.W.3), Dinesh Partap Singh, Assistant Superintendent of Police (P.W.4) and Dalip Singh, Sub Inspector (P.W.5). Ashok Kumar, an independent witness was not examined by the prosecution, as he had been won over by the appellant.

6. In his statement under Section 313 of the Code of Criminal Procedure, 1973, the appellant stated that the prosecution case was false; he had been taken by the police from his house and Rs.6,000/- had been snatched from him; he was not physically fit even to walk as he had met with an accident in 1999. The appellant also examined 6 witnesses in his defence.

7. The Trial Court after scrutinising the evidence held that the appellant was guilty of the offences charged with and was awarded the sentences as mentioned hereinabove. Being aggrieved, he preferred an appeal before the High Court which has been dismissed by the impugned judgment and order dated 19.5.2010. Hence, this appeal.

8. Shri R.S. Suri, learned senior counsel appearing for the appellant at an initial stage raised a large number of factual and legal issues. However, ultimately considering that there had been concurrent findings of fact against the appellant by the two courts, he primarily submitted that as the opium recovered from the appellant weighing 7.10 kgs. contained 0.8% morphine, i.e. 56.96 gms., the quantity was below the commercial quantity, however, more than the minimum quantity prescribed under the Notification issued in this respect, the maximum sentence awarded by the court was unwarranted.

9. Shri Suri has placed reliance upon the judgment of this Court in ***E. Micheal Raj* v. *Intelligence Officer, Narcotic Control Bureau,*** (2008) 5 SCC 161, wherein the Court dealt with the case of recovery of heroin from a carrier, and held that when any narcotic drug or psychotropic substance is found mixed with one or more neutral substance (s), for the purpose of imposition of punishment it is the content of the narcotic drug or psychotropic substance which shall be taken into consideration. Therefore, it will depend upon the morphine content and if this is less than the commercial quantity of morphine, the maximum sentence cannot be awarded.

10. On the contrary, Shri Jayant K. Sud, learned Addl. Advocate General, appearing for the State of Haryana has submitted that as the entire substance recovered from the appellant was opium and not any kind of mixture, the question of determining the quantity or percentage of morphine in the substance could not arise. The opium itself is an offending material under the NDPS Act. Therefore, the court has to proceed in view of Entry No.92 in the Notification in this regard which deals with opium and any preparation containing opium and specifies that a small quantity is only 25 gms., whilst a commercial quantity is 2.5 kgs. In the instant case as it was 7.10 kgs, i.e. the appellant was carrying about three times the minimum amount required for a commercial quantity. The judgment of this Court in ***E. Micheal Raj*** (supra) has no application in this case as that was a case of heroin and not of opium. More so, the accused was merely a carrier and not a dealer.

11. It is further contended by Shri Sud that the Notification applicable in this case provides separate Entry No. 77 for morphine, wherein the minimum quantity is 0.5 gms. and commercial quantity is 250 gms. Entry No. 92 separately deals with opium. Entry No. 93 for opium derivatives provides that a minimum quantity is 5 gms. and a commercial quantity is 250 gms. The present case is to be dealt with under Entry No.92 and not Entry No.77 or any other Entry. More so, in view of the Notification dated 18.11.2009 under the provisions of Section 2 of NDPS Act, no consideration is required in respect of the material recovered from the appellant. Thus, the question of interference with the impugned judgment and order does not arise. The appeal is liable to be dismissed.

13. Notification dated 18.11.2009 has replaced the part of the Notification dated 19.10.2001 and reads as under:-

"In the Table at the end after Note 3, the following Note shall be inserted, namely:-

> (4) The quantities shown in column 5 and column 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content."

Thus, it is evident that under the aforesaid Notification, the whole quantity of material recovered in the form of mixture is to be considered for the purpose of imposition of punishment. However, the submission is not acceptable as it is a settled legal proposition that a penal provision providing for enhancing the sentence does not operate retrospectively. This amendment, in fact, provides for a procedure which may enhance the sentence. Thus, its application would be violative of restrictions imposed by Article 20 of the Constitution of India. We are of the view that the said Notification dated 18.11.2009 cannot be applied retrospectively and therefore, has no application so far as the instant case is concerned.

14. Opium is essentially derived from the opium poppy plant. The opium poppy gives out a juice which is opium. The secreted juice contains several alkaloid substances like morphine, codeine, thebaine etc. Morphine is the primary alkaloid in opium.

15. Opium is a substance which once seen and smelt can never be forgotten because opium possesses a characteristic appearance and a very strong and characteristic scent. Thus, it can be identified without subjecting it to any chemical analysis. It is only when opium is in a mixture so diluted that its essential characteristics are not easily visible or capable of being apprehended by the senses that a chemical analysis may be necessary. In case opium is not mixed up with any other material, its chemical analysis is not required at all. "Of course, an analysis will always be necessary if there is a mixture and the quantity of morphine contained in mixture has to be established for the purpose of definition (of opium under the Opium Act).

16. However, the aforesaid cases have been decided under the Opium Act and cannot be the authority so far as deciding the cases under the NDPS Act. Thus, chemical analysis of the contraband material is essential to prove a case against the accused under the NDPS Act.

17. The NDPS Act defines `opium' under Section 2(xv) as under:

(a) the coagulated juice of the opium poppy; and
(b) any mixture, with or without any neutral material, of the coagulated juice of the opium poppy, but does not include any preparation containing not more than 0.2 per cent of morphine.

18. Coagulated means solidified, clotted, curdled - something which has commenced in curdled/solid form. In case the offending material falls in clause (a) then the proviso to Section 2(xv) would not apply. The proviso would apply only in case the contraband recovered is in the form of a mixture which falls in clause (b) thereof.

19. Relevant part of the chemical analysis made by the Forensic Science Laboratory, Punjab, Chandigarh in the instant case, reads as: "xx xx xx xx On analysis of the substance kept in the bundle under reference, it is established that the substance is opium and percentage of morphine is 0.8%." **(Emphasis added)**

20. The amendment in 2001 was made in order to rationalise the sentence structure so as to ensure that while drug traffickers who traffic in huge quantities of drugs are punished with deterrent sentences; on the other hand, the addicts and those who commit less serious offences are sentenced to lesser punishment.

21. In the instant case, the material recovered from the appellant was opium. It was of a commercial quantity and could not have been for personal consumption of the appellant. Thus the appellant being in possession of the contraband substance had violated the provisions of Section 8 of the NDPS Act and was rightly convicted under Section 18(b) of the NDPS Act. The instant case squarely falls under clause (a) of Section 2(xv) of the NDPS Act and Clause (b) thereof is not attracted for the simple reason that the substance recovered was opium in the form of the coagulated juice of the opium poppy. It was not a mixture of opium with any other neutral substance. There was no preparation to produce any new substance from the said coagulated juice. For the purpose of imposition of punishment if the quantity of morphine in opium is taken as a decisive factor, Entry No.92 becomes totally redundant.

Thus, as the case falls under clause (a) of Section 2(xv), no further consideration is required on the issue. More so, opium derivatives have to be dealt with under Entry No.93, so in case of pure opium falling under clause (a) of Section 2(xv), determination of the quantity of morphine is not required. Entry No.92 is exclusively applicable for ascertaining whether the quantity of opium falls within the category of small quantity or commercial quantity.

22. The judgment in ***E. Micheal Raj*** (supra) has dealt with heroin i.e., Diacetylmorphine which is an "Opium Derivative" within the meaning of the term as defined in Section 2(xvi) of the NDPS Act and therefore, a `manufactured drug' within the meaning of Section 2(xi)(a) of the NDPS Act. As such the ratio of the said judgment is not relevant to the adjudication of the present case.

23. In ***Amarsingh Ramjibhai Barot* v. *State of Gujarat,*** (2005) 7 SCC 550, this Court dealt with a case where the black-coloured liquid substance was taken as an opium derivative.

The FSL report had been to the effect that it contained 2.8% anhydride morphine, apart from pieces of poppy (Posedoda) flowers. This was considered only for the purpose of bringing the substance within the sweep of Section 2(xvi)(e) as `opium derivative' which requires a minimum 0.2% morphine.

24. The Notification applicable herein specifies small and commercial quantities of various narcotic drugs and psychotropic substances for each contraband material. Entry 56 deals with Heroin, Entry 77 deals with Morphine, Entry 92 deals with Opium, Entry 93 deals with Opium Derivatives and so on and so forth. Therefore, the Notification also makes a distinction not only between Opium and Morphine but also between Opium and Opium Derivatives. Undoubtedly, Morphine is one of the derivatives of the Opium. Thus, the requirement under the law is first to identify and classify the recovered substance and then to find out under what entry it is required to be dealt with. If it is Opium as defined in clause (a) of Section 2(xv) then the percentage of Morphine contents would be totally irrelevant. It is only if the offending substance is found in the form of a mixture as specified in clause (b) of Section 2(xv) of NDPS Act, that the quantify of morphine contents become relevant.

25. Thus, the aforesaid judgment in ***E. Micheal Raj*** (supra) has no application in the instant case as it does not relate to a mixture of narcotic drugs or psychotropic substances with one or more substances. The material so recovered from the appellant is opium in terms of Section 2(xv) of the NDPS Act. In such a fact-situation, determination of the contents of morphine in the opium becomes totally irrelevant for the purpose of deciding whether the substance would be a small or commercial quantity. The entire substance has to be considered to be opium as the material recovered was not a mixture and the case falls squarely under Entry 92. Undoubtedly, the FSL Report provided for potency of the opium giving particulars of morphine contents. It goes without saying that opium would contain some morphine which should be not less than the prescribed quantity, however, the percentage of morphine is not a decisive factor for determination of quantum of punishment, as the opium is to be dealt with under a distinct and separate entry from that of morphine.

26. In view of the above, we do not find any substance in the appeal. It is devoid of any merit and, accordingly, dismissed.

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## *Hira Singh and Another* v. *Union of India*
## (2020) 20 SCC 272

**M.R. SHAH, J.—** Not agreeing with the view taken by this Court in ***E. Micheal Raj* v. *Narcotics Control Bureau*** (2008) 5 SCC 161 taking the view that when any narcotic drug or psychotropic substance is found mixed with one or more neutral substance(s), for the purpose of imposition of punishment it is the content of the narcotic drug or psychotropic substance which shall be taken into consideration (paras 15 and 19), the following questions are referred to a three-Judge Bench, vide order dated 3-7- 2017 : (***Hira Singh* v. *Union of India*** (2017) 8 SCC 162*,* para 12):

> "12. ... *12.1.* Whether the decision of this Court in *E. Micheal Raj* requires reconsideration having omitted to take note of Entry 239 and Note 2 (two) of the Notification dated 19-10-2001 as also the interplay of the other provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the NDPS Act") with Section 21?
> *12.2.* Does the impugned notification issued by the Central Government entail in redefining the parameters for constituting an offence and more particularly for awarding punishment?
> *12.3.* Does the NDPS Act permit the Central Government to resort to such dispensation? 12.4. Does the NDPS Act envisage that the mixture of narcotic drug and seized material/substance should be considered as a preparation in totality or on the basis of the actual drug content of the specified narcotic drug?
> *12.5.* Whether Section 21 of the NDPS Act is a standalone provision or intrinsically linked to the other provisions dealing with "manufactured drug" and "preparation" containing any manufactured drug? "

***Arguments on behalf of the Union of India***
**2.** Shri Aman Lekhi, learned Additional Solicitor General of India appearing on behalf of the Union of India has vehemently submitted that the decision in ***E. Micheal Raj*** has omitted to consider the interplay between different provisions of the NDPS Act. It is submitted that it has focused only on the interpretation of Section 21 of the NDPS Act, without giving effect to the purport of the said provision. It is submitted that the view taken by this Court in ***E. Micheal Raj***- in paras 15 and 19 that it is only the actual content by weight of the narcotic drug which is relevant for the purposes of determining whether it would constitute small quantity or commercial quantity, and the view that when any

narcotic drug or psychotropic substance is found mixed with one or more neutral substance(s), for the purposes of imposition of punishment, it is the content of the narcotic drug or psychotropic substance which shall be taken into consideration is clearly wrong and as such contrary to the entire scheme of the NDPS Act. He argued that if the entire scheme, including the object and purpose of the NDPS Act, is considered, it can be seen that where drugs are sold as a mixture, the determination for the purposes of punishment would be the aggregated quantity of the mixture.

**2.1.** In ***E. Micheal Raj,*** this Court has failed to consider that the expression "offending material" finds no mention in the NDPS Act. It is submitted that it is also not the intention of the legislature to levy punishment based on content of the offending drug in the mixture. It is submitted that in ***E. Micheal Raj*** **—** this Court has erred in relying upon the decision in ***Ouseph v. State of Kerala*** **(2004) 4 SCC 446** as the said decision was not binding as precedent as it passed sub silentio the issue with which *E. Micheal Raj* was seized with.

**2.2.** While deciding the case in E. Micheal Raj, this Court has ignored material provisions of the NDPS Act and the entire statutory scheme to reach a conclusion which was not borne out both by the spirit and the terms of the statute and defeated the very object behind the enactment and the amendment.

**2.3.** The NDPS Act, as originally enacted in 1985, included in Section 2(xx) the definition of "preparation". It is submitted that the definition of "preparation" reveals that preparation means "in relation to NDPS" one or more drugs or substance in dosage or solution or mixture. The "mixture" is defined as mechanical mixture of two or more substances as distinct from chemical combination or a fluid with foreign substance in suspension or foreign element in a composition. The "solution" is defined as a liquid or semi-liquid preparation obtained by the combination of a solid with the solvent. The "dosage" means a definite quantity or something regarded as analogous to medicine in use or effect. From a bare look at the definitions, it is apparent that a drug or substance can be mixed with one or more substances (mixture) or change its physical state by means of any fluid or solvent (solution) or be divided or apportioned (dosage). In other words, the NDPS Act as originally enacted dealt not only with the pure content of the drug or psychotropic substance but, its preparation in a mixture, solution or dosage. In ***E. Micheal Raj***, there is no reference to the aforesaid.

**2.4.** That, as per Section 2(xxxiii), also as originally enacted, defining "psychotropic substance" shows that psychotropic substance includes "a preparation of such substance". It is submitted that the said section has to be read with the Schedule appended to the NDPS Act. The Schedule itself, in Entry 77, included "salts and preparation" of the list of psychotropic substance mentioned in Entries 1 to 76 of the Schedule. The original NDPS Act, therefore, dealt with "preparations" of psychotropic substances. Further, contravention relating to psychotropic substance was punishable under Section 22 of the NDPS Act and reading Section 22 with Sections 2*(xx),* 2*(xxxiii)* and the Schedule makes it apparent that punishment covered preparation of psychotropic substance and was not based on pure substance content. Even Section 2*(xiv)* of the NDPS Act, as originally enacted, defined "narcotic drugs", they were defined to mean (i) coca leaf; (ii) cannabis; (iii) opium; (iv) poppy straw; and (v) manufactured drugs. Each of the above was defined separately. Therefore, even in the NDPS Act, as originally enacted, the "narcotic drugs" included their mixtures and preparations. It is only in the definition of "poppy straw" that the expression mixture or preparation finds no mention.

**2.5.** He argued that the only provision in the NDPS Act, as originally enacted, which specified the quantity was Section 27, the said section mentioned "small quantity of narcotic drugs or psychotropic substance" and provided for milder punishment where it is proved that possession in contravention of the NDPS Act or rule was intended for personal consumption or there was consumption of any narcotic drug or psychotropic substance. It is submitted that "small quantity" was notified in Notification No. S.O. 827 of 14-11-1985 which included only 5 drugs. By subsequent notifications, additions were made and more drugs were included in the list. Therefore, the "small quantity" under the amended Act is much higher than that specified in the earlier notification under the original NDPS Act. Thus, the NDPS Act, as originally enacted, insofar as narcotic drugs and psychotropic substances are concerned, only recognised "small quantity" where possession was for personal consumption or there was consumption. The punishment prescribed under the NDPS Act, originally enacted except in Section 20 which in some circumstances contemplated imprisonment up to 5 years, provided for punishment of not less than 10 years, but extendable to 20 years. The NDPS Act, as originally enacted, covered preparations of the narcotic drugs and psychotropic substances and not merely their pure drug content.

**2.6.** That in the year 1989, the NDPS Act was amended by Act 2 of 1989. That notwithstanding the amendment, the original scheme of punishment under the NDPS Act covering preparations and not just pure content was not interfered with. In the year 2001, the NDPS Act was further amended and clauses *(vii-a)* defining "commercial quantity" and *(xxiii-a)* defining "small quantity" were added. A bare look at the two sections shows that the same covered quantity greater/lesser, as the case may be, than the "quantity specified" by the Central Government by notification in the Official Gazette of the narcotic drugs and psychotropic substances. Even in/after the 2001 amendment, no change was made in the definition of "preparation" or in the definition of "narcotic drugs" and "psychotropic substances", more particularly even after the addition of the definitions of "small quantity" and "commercial quantity". Even the residuary entry in the list of psychotropic substances i.e. Entry 77 in the Schedule of the NDPS Act, as originally enacted, is retained even after the amendment as "Entry 111" of the said Schedule. The only reason for the amendment in the year 2001 was that all preparations in the NDPS Act, as originally enacted, were uniformly punishable with imprisonment from 10 to 20 years and even the condition for bail did not make any reference to the quantity. It was for this reason that Section 37 itself was amended to specifically deal with "commercial quantity" by the amendment of 2001;

**2.7.** He argued that the "commercial quantity" would necessarily apply to preparations of narcotic drugs and psychotropic substances as the clauses which were added needed to be read with the provisions of the statute which already stood therein and had not been amended. This was consistent with the scheme of the NDPS Act, as originally enacted. The amendment did not in any manner whatsoever tinker with the same. It is for this reason that the amended Act referred in the newly inserted clauses to "commercial quantity" and "small quantity". The emphasis, therefore, was on the quantity in relation to the drug/substance and not the content of the drug/substance. It was never the intent to modify the application of the statute to deal with pure quantity of the narcotic drugs and psychotropic substance. The same came to be reinforced by the notification published by the Central Government after coming of the 2001 Amendment which contained Note 2 as under:

> "2. The quantities shown against the respective drugs listed above also apply to the preparations of the drugs and the preparations of the substances of Note 1 above."

It is submitted that what was provided in Note 2 was always there since the original enactment.

**2.8.** He argued that the "small quantity" now mentioned in the notification is much higher than the "small quantity" in the NDPS Act as originally enacted. It is for this reason that both Sections 27 and Section 64-A have also been amended. The possession having been taken out of Section 27, there was no need to provide for milder punishment for possession as under Section 27 of the original NDPS Act. Section 27 as amended, therefore, is confined to "consuming" any narcotic drugs or psychotropic substance only and the immunity under Section 64-A is limited to "addicts" amongst those to whom Section 27 applies, in other words, possession even of "small quantity" is outside Section 27 of the amended Act and immunity is not available to all the persons to whom Section 27 applies but, only to such of them as are "addicts". This is a change consequential upon the grading of punishment but, the punishment continues to relate only to the quantities of the narcotic drugs and psychotropic substance which includes their preparations and not the pure drug content.

**2.9.** Even without Note 4 of the notification, the NDPS Act would apply to the entire mixture or solution of the narcotic drugs and psychotropic substance. It is further submitted that the addition of Note 4 under the notification of 2009, is irrelevant to the controversy and judgment in *E. Micheal Raj* cannot be sustained even if Note 4 is ignored. The notification, therefore, does not in any manner re-define the parameters for constituting an offence or awarding punishment under the NDPS Act. Shri Lekhi, learned Additional Solicitor General of India has heavily relied upon the decision of the US Supreme Court in ***Chapman v. United States* 1991 SCC Online US SC 85** in support of his submission that the sentences should be based exclusively on the weight of the "mixture or substance" and not on the content — pure drug. It is submitted that in the said case, the petitioner was convicted of selling 10 sheets of blotter paper containing 1000 doses of LSD. The weight of LSD alone was approximately 50 mg and combined weight of the LSD and the blotter paper was 5.7 gm. The petitioner was sentenced for mandatory minimum sentence of 5 years which was applicable for offences of distributing more than 1 gm of the substance. It is submitted that before the US Supreme Court, it was contended on behalf of the petitioner that weight of the carrier should not be included when computing the appropriate sentence for LSD distribution.

**2.10.** The US Supreme Court rejected the said contention and observed and held as under: (Chapman case, paras 8-9, 14 & 20)

> "*8.* We think that petitioners reading of the statute, a reading that makes the penalty turn on the net weight of the drug rather than the gross weight of the carrier and drug together is not a plausible one. The statute refers to a 'mixture or substance containing a detectable amount'. So long as it contains a detectable amount, the entire mixture or substance is to be weighed when calculating the sentence.

*9.* This reading is confirmed by the structure of the statute. With respect to various drugs, including heroin, cocaine, and LSD, it provides for mandatory minimum sentences for crimes involving certain weights of a 'mixture or substance containing a detectable amount' of the drugs. With respect to other drugs, however, namely, phencyclidine (PCP) or methamphetamine, it provides for a mandatory minimum sentence based *either* on the weight of a *mixture or substance* containing a detectable amount of the drug, or on lower weights of pure PCP or methamphetamine. For example, § 841(b)(l)(A)(iv) provides for a mandatory 10 year minimum sentence for any person who distributes ‘100 gm or more of phencyclidine (PCP) or 1 kg or more of a mixture or substance containing a detectable amount of phencyclidine (PCP).’ Thus, with respect to these two drugs, Congress clearly distinguished between the pure drug and a 'mixture or substance containing a detectable amount of' the pure drug. But with respect to drugs such as LSD, which petitioners distributed, Congress declared that sentences should be based exclusively on the weight of the “mixture or substance”. Congress knew how to indicate that the weight of the pure drug was to be used to determine the sentence, and did not make that distinction with respect to LSD.

*14.* ... A “mixture” is defined to include “a portion of matter consisting of two or more components that do not bear a fixed proportion to one another . ...

*20.* ... By measuring the quantity of the drugs according to the “street weight” of the drugs in the diluted form in which they are sold, rather than according to the net weight of the active component, the statute and the Sentencing Guidelines increase the penalty for persons who possess large quantities of drugs, regardless of their purity. That is a rational sentencing scheme. **(emphasis supplied)**

**2.11.** He argued that as such the NDPS Act does not make any distinction between pure drug and a preparation containing the drug. The Act applies to the street weight of the drug in the form in which they are sold rather than the net weight of the active component. This is what the Act has consistently been provided since its inception. The appellants want this Court to read the statute in a manner the provisions do not warrant. It is submitted that for instance, a “small quantity” of heroin is 5 gm, which if taken as only the pure drug content will translate into 100 gm of street level heroin. At the rate of 0.25 gm heroin the mixture of 100 gm of heroin can yield about 400 doses of heroin. It can never nor could have been the intention of the legislature or for that matter of the Government to send the person who possesses or sells heroin equivalent to 400 doses to a mere six months' imprisonment. That, therefore, if the submission on behalf of the appellants is accepted, in that case, it will be contrary to the object and purposes of enactment of the NDPS Act and in most of the cases there will be no punishment for the "commercial quantity" and the real culprits/accused will go away with the minor punishment.

**2.12.** It is further argued that as per *Crawford on Interpretation of Law (Statutory Construction),*

> "the Court should strive to avoid a construction which will tend to make the statute unjust, oppressive, unreasonable, absurd, mischievous or contrary to the public interest. That construction should be accepted which will make the statute effective and productive of the most good, as it is presumed that these results were intended by the legislature. In order to carry out the legislative intent, it is therefore apparent that the statute should be given a rational, logical and sensible interpretation."

**2.13**. It is further pointed out that the NDPS Act has been passed as per the Statement of Object and Reasons, to "strengthen the existing controls over drug abuse, considerably enhanced the penalties particularly for trafficking offences, make provisions for exercising effective control over psychotropic substances". The stringency of control cannot disregard the conditions in which the Act applies. The definitions clearly show that the object of the Act was to deal with the street weight of the drugs in the diluted form in which they are sold and not the net weight of the active component. The legislature know that the inactive ingredients will be combined with the pure drugs and substances and it would be the drugs or substances so prepared that would be sold to the consumers. He argued, if the arguments of the appellants are accepted, the legislative intent would be frustrated through a construction which will render the Act sterile and which in the circumstances in which the Act is to operate cannot be called either rational or sensible.

**2.14.** Shri Lekhi, learned Additional Solicitor General of India has also relied upon the decision of this Court in ***Murlidhar Meghraj Loya* v. *State of Maharashtra*** (1976) 3 SCC 684, as well as, ***Reema Aggarwal* v. *Anupam*** (2004) 3 SCC 199 in support of his submission that while interpreting and/or considering a particular statute, a Judge must not alter the material of which the Act is woven, but he can and should iron out the creases. The appellants want this Court to alter the material of which the NDPS Act is woven. In ***Rajinder Singh* v. *State of Punjab*** (2015) 6 SCC 477**,** it was observed and held by this Court that a statute must be given a fair, pragmatic, and common-sense interpretation so as to fulfil the object sought to be achieved by Parliament. Therefore, the judgment in *E. Micheal Raj* — is wrong and the preparations in totality and not the actual drug content will be seen for computing the quantity. It is submitted that as such *E. Micheal Raj* is per incuriam and even the Notification of 2009 does not redefine the parameters for constituting the offence under the NDPS Act. Section 21 of the NDPS Act is not a standalone provision and must be construed along with the other provisions in the statute as it is a settled principle of law that every statute must be construed as a whole and words in the statute take their meaning from the context and have to be understood to make a consistent enactment i.e. *ex visceribus actus*. It is submitted that even the insertion of Note 4 was *ex abundanti cautela* and even without it the same intention could be culled out from the statute as it stood. It made no change but was intended only to remove any misconception and was used merely by way of abundant caution.

**3.** Shri R.K. Kapoor, learned advocate appearing on behalf of the appellant in Criminal Appeal No. 722 of 2017 has made the following submissions:

**3.1.** That the challenge in the present appeal is to the impugned Notification dated 18-11-2009 issued by the Central Government in exercise of the powers conferred by clauses *(vii-a)* and *(xxiii-a)* of Section 2 of the NDPS Act. The Central Government did not have the power to issue the impugned notification by which it has empowered the inclusion of quantity of the neutral material also along with the quantity of the narcotic drugs or psychotropic substances in Columns 5 and 6 of the Table, in relation to the narcotic drugs or psychotropic substances mentioned in the corresponding entry in Columns 2 to 4 of the said Table. Such power to include the neutral material is not provided under clauses *(vii-a)* and *(xxiii-a)* of Section 2 of the NDPS Act. Thus, the impugned Notification dated 18-11-2019 is ultra vires the provisions of the NDPS Act, read with the amended 2001 Act which brought about rationalisation in awarding the punishment.

**3.2.** By the impugned notification, Note 4 has been added after Note 3 at the end of the Table appended to the NDPS Act, included vide Notification No. 5.0. l0SS(E) dated 19-10-2001, whereby the notification was issued specifying "small quantity" and "commercial quantity" of the narcotic drugs or psychotropic substances mentioned in Columns 5 and 6 of the Table, in relation to the narcotic drugs or psychotropic substances mentioned in the corresponding entry in Columns 2 to 4 of the said Table.

**3.3.** The result of the issuance of the impugned notification is that the offender would be awarded the punishment by looking into the total quantity of the material found in possession of the offender even if on chemical analysis it is found that the actual content of the narcotic drug or psychotropic substance is covered under the “small quantity”, but by adding the neutral material the punishment awarded is for “commercial quantity”. For instance, there are two offenders. One “A” is having quantity of 4 gm heroin which is less than the “small quantity” which is 5 gm, mentioned in Column 5 of the Table. Another "B" is in possession of 1 gm of heroin, but has mixed it with “neutral material” of 250 gm, it becomes 251 gm, more than the “commercial quantity” which is 250 gm as per Column 6 of the Table. It is submitted that if these two offenders “A” and “B” are convicted, then “A” would be given a punishment for 1 year while “B” can be given up to 20 years though actual content of the offending drug is lesser in case of “B”. It means one year punishment for heroin and 19 years for “neutral material” which is not otherwise punishable under the NDPS Act. Thus, the effect of Note 4 is more the dilution, less the potency of the drug, but more the punishment. Therefore, it would lead to injustice and would lead to variation in the punishment of the accused depending upon the quantity of the “neutral material” instead of the “drug material”.

**3.4.** The only power given to the Government is to increase or reduce the quantity of the narcotic drugs or psychotropic substance mentioned in Columns 5 and 6 and nothing more. For instance, in the case of heroin, the quantity for the “small quantity” can be reduced from 5 gm to 1 gm, and for “commercial quantity”, it can also be reduced from 250 gm to 100 gm or so, but no “neutral material” can be permitted to be added to award the quantum of punishment.

**3.5.** No “neutral material” has been specified in Column 2 or Column 4 of the Table. If “neutral material” was also to be made punishable under the NDPS Act, then it should have been mentioned under Columns 2 and 4 of the Table and then correspondingly the quantity of the “neutral material” would also have been specified under “small quantity” and “commercial quantity” under Columns 5 and 6 of the Table. Since “neutral material” is neither a narcotic drug nor a psychotropic substance, it has not been mentioned under Columns 2 and 4 and, therefore, cannot be made punishable under Note 4.

**3.6.** In the year 2001, the NDPS (Amendment) Act, 2001 was brought to rationalise the quantum of punishment for addicts and less serious offenders and severe punishment for serious offenders.

**3.7.** This Court in *E. Micheal Raj* held that only the quantity of the offending article is to be taken into consideration for the purpose of punishment. If it has been mixed with any other substance, which is non-offending substance, then not the whole bulk is to be taken into consideration and that the punishment must be graded in relation to the quantity of the offending article only.

**3.8.** A person can be convicted and punished only to the extent it has been specifically provided under the provisions of the NDPS Act. If a person has to be punished then there must be specific power and provision for punishment and only to the extent the punishment has been provided for the commission of a particular contravention and for a particular specified substance as mentioned under Columns 2 and 4 of the Schedule appended to the Act and not otherwise. Under the NDPS Act, Section 21 provides for punishment for contravention in relation to manufactured drugs and preparations thereof. Section 22 deals with punishment for contravention in relation to psychotropic substances. But there is no punishment for “neutral material” under the NDPS Act.

**3.9.** It is settled law that what cannot be done directly can also not be done indirectly. The NDPS Act was enacted by Parliament. When in the NDPS Act itself the “neutral substance” has not been made punishable, the “neutral substance” cannot be made punishable by the exercise of the executive power by the Central Government by issuing the impugned notification. Wherever “neutral material” was to be included it has been specified under the NDPS Act itself. It cannot be added with each drug as mentioned in the Table.

**3.10.** The expression “mixture” as such has not been defined under the NDPS Act, but it has a reference under the definition of the word “preparation”. Even in the word “preparation”, the reference is again to one or more of such drugs or psychotropic substances, but there is no reference to any “neutral material”.

**3.11.** Making the above submissions, it is submitted that thus the Central Government has no power to make any amendment in Act 9 of 2001 and make the whole of the quantity of the allegedly recovered material from the offender as the “small, commercial or non-commercial quantity”, by directing the inclusion of the “neutral substance” in it. Therefore, the Notification dated 18- 11-2009 is liable to be declared ultra vires and be struck down.

**4.** Shri Manoj Swarup, learned Senior Advocate appearing on behalf of the appellant in Criminal Appeal No. 721 of 2017 ***Gursewak Singh*** **v.** ***State of Punjab***, in addition, has made the following submissions:

**4.1.** The Act itself contemplates inclusion of "neutral material". Reliance is placed upon Sections 2*(iii),* 2*(vi),* 2*(xv)* and 2*(xvi).* That the Act itself provides the places where "neutral material" would be taken into account. The "neutral material" should be confined to the places permitted by the Act. Note 4 is to be limited to only such areas where "neutral material" is permitted by the Act. Only then Note 4 would be serving a clarificatory purpose.

**4.2.** In the event Note 4 goes beyond this, then Note 4 seeks to add something which is not in the Act. In that event, Note 4 would be legislating, identifying and defining what would constitute a criminal offence and in the process, Note 4 would be expanding the area covered by the Act. It is submitted that this would be impermissible in law. If "neutral material" is included across the board in all the narcotic drugs or psychotropic substances, then the object of the 2001 Amendment Act to rationalise sentence structure would be frustrated.

**4.3.** The judgment of this Court in ***E. Micheal Raj*** had noticed the distinction between "small quantity" and "commercial quantity" and the Objects and Reasons of the 2001 Amendment Act. It is thereafter that the Court concludes that the 2001 Amendment Act makes punishable vis-à-vis the "offending substance". It is submitted that there was no need to discuss Entry 239 of the 2001 notification in detail in the said judgment as Entry 239 was contained merely in a notification and was not the source of power. Therefore, ***E. Micheal Raj*** rightly concludes that the punishment should be commensurate to the quantity of the "offending substance" only.

**5.** Shri Anand Grover, learned Senior Advocate appearing on behalf of the proposed intervenor, the applicant Indian Drug Manufacturers' Association has, by and large, made the same submissions which are made by the learned Senior Advocate(s)/Advocate(s) appearing on behalf of the appellants. In addition, the following submissions are made:

**5.1.** In laying down thresholds for "small quantity" and "commercial quantity" for narcotic drugs and psychotropic substances vide the 2001 Notification, the Central Government refers to the "chemical name" of the drug concerned in Column 4 of the Table. Thus, the "chemical name", which identifies a particular substance in terms of its actual chemical composition, is relevant for determining the quantity of such substance. If it were not, there would be no need to have Column 4 and the chemical description of a substance in the 2001 Notification, which lays down small and commercial quantity of narcotic drugs and psychotropic substances.

**5.2.** The only drugs for which the entry in Column (4) for chemical name is not given in the 2001 Notification are "natural/plant-based drugs", namely, cannabis and cannabis resin (charas, hashish) at SI. No. 23; coca leaf at SI. No. 26; ganja at SI. No. 55; opium at SI. No. 92; opium straw at SI. No. 110 and preparation made from the extract of tincture of Indian hemp at SI. No. 111. That the aforesaid is consistent with the statutory definitions of the aforesaid substances, which allude to "with or without neutral material".

**5.3.** The quantity of the narcotic drug is also relevant for the purposes of determining whether a particular preparation is subject to the provisions of the NDPS Act or not. This is borne out by clause (xi) of Section 2 of the NDPS Act which empowers the Central Government to notify a narcotic substance or preparation either to be a manufactured drug or to not be a manufactured drug.

**5.4.** By making the percentage content of the drug irrelevant, the impugned notification has the effect of bringing pharmaceutical preparations that are exempt from the NDPS Act, under the fold of the law through the back door:

> (i) E.g.: Entry 35 'codeine' in the list of manufactured drugs vide Notification No. 5.0. 826(E) dated 14-11-1985, Notification No. 5.0. 40(E) dated 29-2-1993 and Notification No. 5.0. 1431(E) dated 21- 6-2011 (hereinafter collectively referred to as "the notification on manufactured drugs").
> *(ii)* Similar exemptions are contained at entries at SI. Nos. 35, 36, 37, 48, 70, 76, 83 and 87 of the notification on manufactured drugs.

**5.5.** The impugned notification is, therefore, inconsistent with the notification on manufactured drugs issued by the Central Government in exercise of powers conferred by Section 2*(xi)(b)* of the NDPS Act to declare a narcotic substance or preparation to be a manufactured drug or not to be a manufactured drug.

**5.6.** He argued that for legitimate entities like the members of the applicant IDMA, the impugned notification leads to arbitrary and absurd consequences in that the licence is given in terms of actual quantity of the drug, while punishment is imposed on the basis of total bulk quantity.

**5.7.** The respondent was aware that the impugned notification is beyond the powers conferred under Sections 2*(vii-a)* and *(xxiii-a)* for notifying "commercial" and "small" quantities of narcotic drugs and psychotropic substances under the NDPS Act. Accordingly, it sought to introduce legislative amendments in 2011 by introducing the NDPS (Amendment) Bill, 2011 (78 of 2011) in the Lok Sabha on 8-9-2011. The proposed amendments in Sections 2*(vii-a)* and 2*(xiii-a)* of the NDPS Act were as follows:

> **"2. (vii-a) "commercial quantity",** in relation to a narcotic drug, psychotropic substance or *any preparation of such drug or such substance,* means any quantity of such drug, substance or *preparation of such drug or substance* greater than the quantity specified, *in terms of the pure drug content or otherwise, by the Central Government* by notification in the Official Gazette;**"**
>
> (proposed amendments are italicized)

Identical changes were proposed in definition of Section 2*(xxiii-a)* for "small quantity".

**5.8.** The aforesaid proposed amendments were rejected by a Parliamentary Standing Committee with the following observations:

> "meanings denoted by the terms/expressions "preparation" and "otherwise" in proposed amendments are vague and unspecific. Such ambiguity in the clause would lead to arbitrariness in the interpretation of the law and may weaken the rationalised penalty structure proposed amendments intent to provide specific provisions for considering the pure drug content of a recovery to determine the consequential penalty/punishment for an offender, no word/term/clause with ambiguous meaning should be used in the provisions."

The respondent withdrew the aforesaid amendments in 2013. They are not part of the NDPS (Amendment) Act, 2014 (16 of 2014);

**5.9.** Entry 239 talks of a mixture or preparation of two or more drugs with or without neutral material and has asterisk (*, **) in Columns 5 and 6. The asterisks are explained by indicating that the lesser of the small quantities of the respective narcotic drugs or psychotropic substances will be taken for determining the small quantity and lesser of the commercial quantity will be taken to determine commercial quantity. Entry 239 along with asterisk makes it clear that it comes into operation only when the seizure is a combination of two or more drugs i.e. — a combination of two or more narcotic drugs (e.g.:"charas" and "ganja"), or two or more psychotropic substances (e.g.: "fentanyl" and "zolipidem") or a combination of narcotic drugs and psychotropic substances [e.g.: "Cocaine" and "lysergide" (LSD)]. The wording in Entry 239 of 2001 Notification is similar to that in Entry *(viii)* in the Table to Section 31-A of the NDPS Act, which also deals with a mixture of two or more drugs. That neither Entry *(viii)* in the Table to Section 31-A of the NDPS Act nor Entry 239 of the 2001 Notification suggest that in a mixture of two or more narcotic drugs, the weight of the entire mixture i.e. the aggregate weight of both the drugs has to be taken into consideration.

**5.10.** In determining the quantity involved in a mixture of two or more drugs, it is the substance with a lesser or lower threshold, whether for "small" or "commercial" quantity, which will be used as the reference. To illustrate, a mixture weighing 200 gm is seized. The constituents of the said seizure are: 110 gm of charas and 90 gm of ganja. As per the 2001 Notification, the small quantity of charas at Entry 23 is 100 gm while the small quantity of ganja at Entry 55 is 1000 gm or 1 kg. By virtue of Entry 239, the quantity seized in this case will be determined in relation to charas and not in relation to ganja. Accordingly, the person from whom such seizure is affected will be liable for intermediate quantity (quantity of charas found being more than the small quantity but less than commercial quantity) and will not be able to claim the benefit of the quantity threshold for ganja, though ganja found on him is lesser than the small quantity of ganja specified in the 2001 Notification.

**5.11.** He argued that *E. Micheal Raj* is decided correctly as it reviews various provisions of the NDPS Act; examines legislative intent of the NDPS Amendments in 2001; correctly decides that punitive consequences under the NDPS quantity are relatable to actual amount of offending material in the seizure; it reiterates the position stated in the statute.

**5.12.** It is submitted that the Supreme Court of Bangladesh in its decision dated 8 - 5 - 2012 in **Mohd. Jafar Alam v. State** Criminal Misc. Case No. 37461 of 2011 held that the actual and real quantity of the narcotics in question be ascertained accurately, and the law interpreted carefully and strictly.

**Discussion**

**6.** Having heard the learned advocates for the respective parties and considering the reference order, the question which is posed for consideration of this Court is whether the NDPS Act envisages mixture of narcotic drugs and seized material/substance should be considered as a preparation in totality or on the basis of actual drug content of the specific narcotic drugs? In other words, the question as to whether while determining the small or commercial quantity in relation to narcotic drugs or psychotropic substances in a mixture with one or more neutral substance(s), the quantity of neutral substance(s) is not to be taken into consideration or it is only the actual content by weight of the offending drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity?

**7.** At this stage, it is required to be noted that as such and after the decision of this Court in *E. Micheal Raj* by Notification No. S.O. 2941 (E) dated 18-11-2009, "Note 4" has been added to Notification No. S.O. 1055(E) dated 19-10-2001 specifying the "small quantity and commercial quantity" of the narcotic drugs or psychotropic substances covered under the NDPS Act. Note 4 which has been added by the aforesaid Notification reads as follows:

> "The quantities shown in Columns 5 and 6 of the Table relating to the respective drugs shown in Column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substance of the particular drug in dosage form or isomers, esters, ethers and salts or these drugs, including salts or esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content."

**7.1.** At the outset, it is pertinent to note that as such prior to the decision of this Court in *E. Micheal Raj* taking the view that in the mixture of narcotic drugs or psychotropic substance that one or more neutral substance(s), the quantity of the neutral substance(s) is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance and only the actual content by weight of the narcotic drug which is relevant for the purposes of determining whether it would constitute "small quantity or commercial quantity", a consistent view was that for the purpose of determining a "small quantity or commercial quantity" the weight of entire manufactured drug/preparation/mixture seized including that of the neutral substance is required to be taken into consideration. However, for the first time in *E. Micheal Raj,* a contrary view is taken solely on considering the Narcotic Drugs and Psychotropic

Substances (Amendment) Act, 2001, by which Sec 21 of the NDPS Act came to be amended.

**7.2.** Therefore, first of all we would like to consider the reasoning given by this Court in *E. Micheal Raj*. The facts indicate that what was seized in *E. Micheal Raj* was 4 kg of heroin, which would fall in Entry 56 of the Notification dated 19-10-2001. As per the Notification dated 19-10-2001 in case of heroin 5 gm is a small quantity and 250 gm is a commercial quantity. However, this Court considered the substance seized - heroin as opium derivative and hence a manufactured drug and therefore, treating the seized drug as opium derivative, this Court held the seized material as small quantity and awarded punishment accordingly. While holding so, this Court considered the Statement of Objects and Reasons concerning the Amendment Act, 2001 and thereafter observed in paras 12 to 15 as under:

> "*12* . The possession of offending substance would be considered an offence punishable under the NDPS Act, as heroin is an opium derivative as per Section 2*(xvi)(e)* which says that, all preparations containing more than 0.2 per cent of morphine or containing any diacetylmorphineµ is an opium derivative. Further, according to Section 2(xi), all opium derivatives fall under the category of manufactured drug. Thus, we conclude that the offending substance is an opium derivative and hence a manufactured drug, the possession of which is in contravention of the provisions of Section 8 of the NDPS Act which prohibits certain operations to the effect that no person shall produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter -State, import into India, export from India or tranship any narcotic drug or psychotropic substance.
>
> *13.* In the present case, the opium derivative which has been found in possession of the appellant-accused is prohibited under Section 8 of the NDPS Act and thus punishable under Section 21 thereof. The question is only with regard to the quantum of punishment.
>
> *14.* As a consequence of the amending Act, the sentence structure underwent a drastic change. The amending Act for the first time introduced the concept of "commercial quantity" in relation to narcotic drugs or psychotropic substances by adding clause *(vii-a)* in Section 2, which defines this term as any quantity greater than a quantity specified by the Central Government by notification in the Official Gazette. Further, the term "small quantity" is defined in Section 2, clause *(xxiii-a),*

as any quantity lesser than the quantity specified by the Central Government by notification in the Official Gazette. Under the rationalised sentence structure, the punishment would vary depending upon whether the quantity of offending material is “small quantity”, “commercial quantity” or something in-between.

*15.* It appears from the Statement of Objects and Reasons of the amending Act of 2001 that the intention of the legislature was to rationalise the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentence, the addicts and those who commit less serious offences are sentenced to less severe punishment. Under the rationalised sentence structure, the punishment would vary depending upon the quantity of offending material. Thus, we find it difficult to accept the argument advanced on behalf of the respondent that the rate of purity is irrelevant since any preparation which is more than the commercial quantity of 250 gm and contains 0.2% of heroin or more would be punishable under Section 21*(c)* of the NDPS Act, because the intention of the legislature as it appears to us is to levy punishment based on the content of the offending drug in the mixture and not on the weight of the mixture as such. This may be tested on the following rationale. Supposing 4 gm of heroin is recovered from an accused, it would amount to a small quantity, but when the same 4 gm is mixed with 50 kg of powdered sugar, it would be quantified as a commercial quantity. In the mixture of a narcotic drug or a psychotropic substance with one or more neutral substance(s), the quantity of the neutral substance(s) is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance. It is only the actual content by weight of the narcotic drug which is relevant for the purposes of determining whether it would constitute small quantity or commercial quantity. The intention of the legislature for introduction of the amendment as it appears to us is to punish the people who commit less serious offences with less severe punishment and those who commit grave crimes, such as trafficking in significant quantities, with more severe punishment.”

**7.3**. On considering the aforesaid reasoning given by this Court in *E. Micheal Raj*, we are of the opinion that while holding that in the mixture of a narcotic drug or psychotropic substance with one or more neutral substance, the quantity of neutral substance is not to be taken into consideration and it is only the actual content by weight of the narcotic drug which is relevant for the purposes of determining whether it would constitute “small quantity or commercial quantity”, this Court has not at all considered the relevant entry in the Notification dated 19-10-2001. As observed hereinabove, what was seized was heroin which falls in Entry 56. What was seized was not opium and/or opium derivative. There is no specific finding even given by this Court that it would fall under Entry 239, namely, any mixture or preparation that of with or without the neutral material. Therefore, the case of mixture of narcotic drugs or psychotropic substance was not at all in direct consideration of this Court.

**7.4.** Even it does not appear that this Court took into consideration Note 2 of the Notification dated 19-10-2001, which reads as follows:

> "The quantities shown against the respective drugs listed above also apply to the preparations of the drug and the preparations of substances of Note 1 above."

If Note 2 would have been considered by this Court and seized material was "heroin" in that case and what was seized was 4.5 kg heroin, the Court would have considered the same as a "commercial quantity" as considering Entry 56, 5 gm is "small quantity" and 250 gm and above is a "commercial quantity". Therefore, as such, we are not in agreement with the view taken by this Court in *E. Micheal Raj* taking the view that in mixture of a narcotic drug or psychotropic substance with one or more neutral substance, the quantity of neutral substance is not to be taken into consideration and it is only the actual content by weight of the narcotic drug which is relevant for the purposes of determining whether it would constitute "small quantity or commercial quantity".

**8.** Even considering the reasons while arriving at aforesaid conclusion, it appears to us that the Statement of Objects and Reasons concerning the Amendment Act, 2001 has not been properly appreciated and/or considered and/or properly construed. Considering the Statement of Objects and Reasons concerning the Amendment Act, 2001, by which, two-tier punishment was provided one for small quantity and another for commercial quantity, it cannot be said that intention of the legislature was to consider only the actual content by weight of offending drug for the purpose of determining whether it would constitute small quantity or commercial quantity.

**9.** The Statement of Objects and Reasons of the Amendment Act, 2001, is as follows:

> "The Statement of Objects and Reasons concerning the Amending Act of 2001 is as follows:

> The Narcotic Drugs and Psychotropic Substances Act, 1985 provides deterrent punishment for various offences relating to illicit trafficking in narcotic drugs and psychotropic substances. Most of the offences invite uniform punishment of minimum ten years' rigorous imprisonment which may extend up to twenty years. While the Act envisages severe punishments for drug traffickers, it envisages reformative approach towards addicts. In view of the general delay in trial it has been found that the addicts prefer not to invoke the provisions of the Act. The strict bail provisions under the Act add to their misery.
>
> Therefore, it is proposed to rationalise the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment. This requires rationalisation of the sentence structure provided under the Act. It is also proposed to restrict the application of strict bail provisions to those offenders who indulge in serious offences."

On a bare reading of the Statement of Objects and Reasons, it cannot be said that the intention of the legislature was to consider the actual content by weight of the offending drug for the purpose of determining whether it would constitute small quantity or commercial quantity. Therefore, we are of the opinion while holding that it is only the actual content by weight of the offending drug to be considered for the purpose of determining whether it would constitute small quantity or commercial quantity, this Court has read more than what was stated in the Statement of Objects and Reasons.

**9.1.** Therefore, while deciding the case in *E. Micheal Raj*, this Court had not at all considered Note 2 to the Notification dated 19-10-2001 and has read much more than what is stated in the Statement of Objects and Reasons of the Amendment Act, 2001 and for the reasons stated hereinbelow, even on merits also, we are not in agreement with the view taken by this Court in *E. Micheal Raj* that for the purpose of determining the "small or commercial quantity" in relation to narcotic drugs or psychotropic substances in a mixture with one or more neutral substance(s), the quantity of neutral substance(s) is not to be taken into consideration or it is only the actual content by weight of the offending drug which is relevant. At this stage, it is required to be noted that even before this Court in *E. Micheal Raj*, it was a case of "heroin" and not at all case of mixture falling in Entry 239 of the Notification dated 19-10-2001.

**10.** On merits whether any mixture of narcotic drugs or psychotropic substances with one or more neutral substance(s) the quantity of neutral substance(s) is not to be taken into consideration or it is only the actual content by weight of the offending drug which is relevant for the purpose of determining whether it would constitute "small quantity or commercial quantity", the Statement of Objects and Reasons of the NDPS Act is required to be considered. As per the Preamble of the NDPS Act, 1985, it is an Act to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operation relating to *narcotic drugs and psychotropic substances*. To provide for forfeiture of the property derived from or use in illicit traffic in Narcotic Drugs and Psychotropic Substance. The Statement of Objects and Reasons and the Preamble of the NDPS Act imply that the Act is required to act as a deterrent and the provisions must be stringent enough to ensure that the same act as deterrents.

**10.1.** In ***Directorate of Enforcement* v. *Deepak Mahajan*** (1994) 3 SCC 440, it is observed by this Court that every law is designed to further ends of justice but not to frustrate on the mere technicalities. It is further observed that though the intention of the Court is only to expound the law and not to legislate, nonetheless the legislature cannot be asked to sit to resolve the difficulties in the implementation of its intention and the spirit of the law. It is the duty of the Court to mould or creatively interpret the legislation by liberally interpreting the statute. In the said decision this Court has also quoted (pp. 453-54, para 25) the following passage in *Maxwell on Interpretation of Statutes*, 10th Edn. p. 229:

> "25 . ... 'Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence .... Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used.'"

Thereafter, it is further observed that to winch up the legislative intent, it is permissible for courts to take into account the ostensible purpose and object and the real legislative intent. Otherwise, a bare mechanical interpretation of the words and application of the legislative intent devoid of concept of purpose and object will render the legislature inane. It is further observed that in given circumstances, it is permissible for courts to have functional approaches and look into the legislative intention and sometimes it may be even necessary to go behind the words and enactment and take other factors into consideration to give effect to the legislative intention and to the purpose and spirit of the enactment so that no absurdity or practical inconvenience may result and the legislative exercise and its scope and object may not become futile.

**10.2.** Therefore, considering the Statement of Objects and Reasons and the Preamble of the NDPS Act and the relevant provisions of the NDPS Act, it seems that it was never the intention of the legislature to exclude the quantity of neutral substance and to consider only the actual content by weight of offending drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity. Right from clauses *(vii-a)* and *(xxiii-a)* of Section 2 of the NDPS Act, emphasis is on narcotic drug or psychotropic substance (Sections 21, 22, 23, 24, 27 and 43). Even in the Table attached to the Notification dated 19-10-2001, Column 2 is with respect to name of narcotic drug and psychotropic substance and Columns 5 and 6 are with respect to "small quantity and commercial quantity". Note 2 of the Notification dated 19-10-2001 specifically provides that quantity shown against the respective drugs listed in the Table also apply to the preparations of the drug and the preparations of substances of Note 1. As per Note 1, the small quantity and commercial quantity given against the respective drugs listed in the Table apply to isomers ..., whenever existence of such substance is possible. Therefore, for the determination of "small quantity or the commercial quantity" with respect to narcotic drugs and psychotropic substance mentioned in Column 2 the quantity mentioned in Clauses 5 and 6 are required to be taken into consideration. However, in the case of mixture of the narcotic drugs/psychotropic drugs mentioned in Column 2 and any mixture or preparation that of with or without the neutral material of any of the drugs mentioned in Table, lesser of the small quantity between the quantities given against the respective narcotic drugs or psychotropic substances forming part of mixture and lesser of commercial quantity between the quantities given against the respective narcotic drugs or psychotropic substance forming part of the mixture is to be taken into consideration . As per example, mixture of 100 gm is seized and the mixture is consisting of two different narcotic drugs and psychotropic substance with neutral material, one drug is heroin and another is methadone, lesser of commercial quantity between the quantities given against the aforesaid two respective narcotic drugs and psychotropic substance is required to be considered. For the purpose of determination of the "small quantity or commercial quantity", in case of Entry 239 the entire weight of the mixture/drug by whatever named called weight of neutral material is also required to be considered subject to what is stated hereinabove. If the view taken by this Court in *E. Micheal Raj* is accepted, in that case, it would be adding something to the relevant provisions of the statute which is not there and/or it was never intended by the legislature.

**10.3.** At this stage, it is required to be noted that illicit drugs are seldom sold in a pure form. They are almost always adulterated or cut with other substance. Caffeine is mixed with heroin, it causes that heroin to vaporise at a lower rate. That could allow users to take the drug faster and get a big punch sooner. Aspirin, crushed tablets, they could have enough powder to amend reversal doses of drugs. Take the example of heroin. It is known as powerful and illegal street drug and opiate derived from morphine. This drug can easily be "cut" with a variety of different substances. This means that drug dealer will add other drugs or non-intoxicating substances to the drug so that they can sell more of it at a lesser expense to themselves. Brown sugar/smack is usually made available in powder form. The substances is only about 20% heroin. The heroin is mixed with other substances like chalk powder, zinc oxide, because of these, impurities in the drug, brown sugar is cheaper but more dangerous. These are only few examples to show and demonstrate that even mixture of narcotic drugs or psychotropic substance is more dangerous. Therefore, what is harmful or injurious is the entire mixture/tablets with neutral substance and narcotic drugs or psychotropic substances. Therefore, if it is accepted that it is only the actual content by weight of offending drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity, in that case, the object and purpose of enactment of the NDPS Act would be frustrated. There may be few punishment for "commercial quantity". Certainly that would not have been the intention of the legislature.

**10.4**. Even considering the definition of "manufacture", "manufactured drug" and the "preparation" conjointly, the total weight of such "manufactured drug" or "preparation", including the neutral material is required to be considered while determining small quantity or commercial quantity. If it is interpreted in such a manner, then and then only, the objects and purpose of the NDPS Act would be achieved. Any other intention to defeat the object and purpose of enactment of the NDPS Act viz. to the Act is deterrent.

**10.5.** The problem of drug addicts is international and the mafia is working throughout the world. It is a crime against the society and it has to be dealt with iron hands. Use of drugs by the young people in India has increased. The drugs are being used for weakening of the nation. During the British regime control was kept on the traffic of dangerous drugs by enforcing the Opium Act, 1857the Opium Act, 1875 and the Dangerous Drugs Act, 1930. However, with the passage of time and the development in the field of illicit drug traffic and during abuse at national and international level, many deficiencies in the existing laws have come to notice. Therefore, in order to remove such deficiencies and difficulties, there was urgent need for the enactment of a comprehensive legislation on narcotic drugs and psychotropic substances, which led to enactment of the NDPS Act. As observed hereinabove, the Act is a special law and has a laudable purpose to serve and is intended to combat the menace otherwise bent upon destroying the public health and national health. The guilty must be in and the innocent ones must be out. The punishment part in drug trafficking is an important one but its preventive part is more important. Therefore, prevention of illicit traffic in the Narcotic Drugs and Psychotropic Substances Act, 1985 came to be introduced. The aim was to prevent illicit traffic rather than punish after the offence was committed. Therefore, the courts will have to safeguard the life and liberty of the innocent persons. Therefore, the provisions of the NDPS Act are required to be interpreted keeping in mind the object and purpose of the NDPS Act; impact on the society as a whole and the Act is required to be interpreted literally and not liberally which may ultimately frustrate the object, purpose and Preamble of the Act. Therefore, the interpretation of the relevant provisions of the statute canvassed on behalf of the accused and the intervener that quantity of neutral substance(s) is not to be taken into consideration and it is only actual content of the weight of the offending drug, which is relevant for the purpose of determining whether it would constitute "small quantity or commercial quantity", cannot be accepted.

**11.** Now, so far as the challenge to the impugned Notification No. 2942(E) dated 18- 11 - 2009 issued by the Union of India, by which, "Note 4" has been added to Notification No. S.O. 1055(E) dated 19-10- 2001 specifying small quantity and commercial quantity of the narcotic drugs and psychotropic substance covered under the NDPS Act, 1985 is concerned, as such it can be said to be clarificatory in nature and/or by way of *ex abundanti cautela*/abundant caution. As observed hereinabove, while determining the small or commercial quantity in relation to narcotic drugs or psychotropic substances in a mixture with one or more neutral substance(s), it includes the weight of neutral substance(s) also and not only the actual content by weight of the offending drug. Therefore, even if "Note 4" which has been added vide Notification dated 18-11-2009 is not added, in that case also, it makes no difference and/or change. It appears that after the decision of this Court in *E. Micheal Raj* by way of abundant caution, the Union of India has come out with a Notification dated 18-11-2009 adding "Note 4". Thus, adding "Note 4" by the Notification dated 18-11-2009 to the earlier Notification dated 19-10-2001 can be said to be clarificatory and by way of abundant caution only. Even otherwise, for the reasons stated above, the impugned Notification dated 18-11-2009 adding "Note 4" to the earlier Notification dated 19-10-2001, cannot be said to be contrary to the scheme and the various provisions of the NDPS Act.

**11.1.** At this stage, it is required to be noted that the Notification dated 19-10-2001 was issued in exercise of powers conferred by clauses *(vii-a)* and *(xxiii-a)* of Section 2 of the NDPS Act. Section 2*(viia)* defines "commercial quantity" and Section 2*(xxiii-a)* defines "small quantity" and it means any quantity greater or lesser than the quantity specified by the Central Government by notification in the Official Gazette, as the case may be. The Notification dated 19-10-2001 specifies the small quantity and commercial quantity with respect to respective narcotic drugs and psychotropic substances. As observed hereinabove, by abundant caution and to make it further clear, "Note 4" has been added. Therefore, it cannot be said to be ultra vires the scheme and the relevant provisions of the NDPS Act, as contended on behalf of the accused and intervener. Therefore, challenge to the impugned Notification dated 18-11-2009 adding "Note 5" of the clause to Notification No. 5.0. 1055(E) dated 19- 10- 2001 fails.

**12.** In view of the above and for the reasons stated above, reference is answered as under:

**12.1**. The decision of this Court in *E. Micheal Raj* taking the view that in the mixture of narcotic drugs or psychotropic substance with one or more neutral substance(s), the quantity of the neutral substance(s) is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance and only the actual content by weight of the offending narcotic drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity, is not a good law.

**12.2**. In case of seizure of mixture of narcotic drugs or psychotropic substances with one or more neutral substance(s), the quantity of neutral substance(s) is not to be excluded and to be taken into consideration along with actual content by weight of the offending drug, while determining the "small or commercial quantity" of the narcotic drugs or psychotropic substances.

**12.3.** Section 21 of the NDPS Act is not a standalone provision and must be construed along with other provisions in the statute including provisions in the NDPS Act including Notification No. 5.0. 2942(E) dated 18- 11 -2009 and Notification No. 5.0. 1055(E) dated 19- 10- 2001.

**12.4.** Challenge to the Notification dated 18-11-2009 adding "Note 4" to the Notification dated 19-10-2001, fails and it is observed and held that the same is not ultra vires the scheme and the relevant provisions of the NDP5 Act. Consequently, writ petitions and Civil Appeal No. 5218 of 2017 challenging the aforesaid notification stand dismissed.

**13.** The reference is answered accordingly. The intervener application stands disposed of. Now, respective appeals be placed before the appropriate court taking up such matters for deciding the appeals in accordance with law and on merits and in light of the observations made hereinabove and our answer to the reference, as above.

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## ***Karnail Singh* v. *State of Haryana***

(2009) 8 SCC 539

**P. Sathasivam, J.**

1) In the case of ***Abdul Rashid Ibrahim Mansuri* v. *State of Gujarat,*** (2000) 2 SCC 513, a three-Judge Bench of this Court held that compliance of Section 42 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "NDPS Act") is mandatory and failure to take down the information in writing and forthwith send a report to his immediate official superior would cause prejudice to the accused. In the case of ***Sajan Abraham* v. *State of Kerala,*** (2001) 6 SCC 692, which was also decided by a three-Judge Bench, it was held that Section 42 was not mandatory and substantial compliance was sufficient. In view of the conflicting opinions regarding the scope and applicability of Section 42 of the Act in the matter of conducting search, seizure and arrest without warrant or authorization, these appeals were placed before the Constitution Bench to resolve the issue.

2) The statement of objects and reasons of the NDPS Act makes it clear that to make the scheme of penalties sufficiently deterrent to meet the challenge of well organized gangs of smugglers, and to provide the officers of a number of important Central enforcement agencies like Narcotics, Customs, Central Excise, etc. with the power of investigation of offences with regard to new drugs of addiction which have come to be known as psychotropic substances posing serious problems to national governments, this comprehensive law was enacted by Parliament enabling exercise of control over psychotropic substances in India in the manner as envisaged in the Convention on Psychotropic Substances, 1971 to which India has also acceded, consolidating and amending the then existing laws relating to narcotic drugs, strengthening the existing control over drug abuse, considerably enhancing the penalties particularly for trafficking offences, making provisions for exercising effective control over psychotropic substances and making provisions for the implementation of international conventions relating to narcotic drugs and psychotropic substances to which India has become a party.

3) Let us consider the Scheme of the NDPS Act and its relevant provisions. The 1985 Act came into force on 14.11.1985. Certain provisions were subsequently amended in 1989 and in 2001. Chapter IV deals with offences and penalties whereas Chapter V deals with procedure. Section 41 relates to power to issue warrant and authorization. Section 42 with which we are concerned relates to power of entry, search, seizure and arrest without warrant or authorization. Section 43 relates to power of seizure and arrest in public place. Section 50 refers to conditions under which search of persons shall be conducted. The NDPS Act

prescribes stringent punishment. Hence a balance must be struck between the need of the law and the enforcement of such law on the one hand and the protection of citizens from oppression and injustice on the other. This would mean that a balance must be struck in. The provisions contained in Chapter V, intended for providing certain checks on exercise of powers of the authority concerned, are capable of being misused through arbitrary or indiscriminate exercise unless strict compliance is required. The statute mandates that the prosecution must prove compliance with the said provisions.

4) The facts in ***Abdul Rashid Ibrahim Mansuri*** *(supra)* were as follows: PW 2, Inspector of Police at Dariapur Police Station, got information on 12-1-1988 that one Iqbal Syed Husen was trying to transport charas up to Shahpur in an autorickshaw. At about 4.00 p.m. they sighted the autorickshaw which was then driven by the appellant. They stopped and checked it and found four gunny bags placed inside the vehicle. The police took the vehicle to the police station and when the gunny bags were opened ten packets of charas were found concealed therein. The value of the said contraband was estimated to be Rs. 5.29 lakhs. When appellant/accused was questioned by the trial court under Section 313 of the Code of Criminal Procedure he did not dispute the fact that he rode the autorickshaw and that the same was intercepted by the police party and the gunny bags kept in the vehicle were taken out and examined by them at the police station. His defence was that those four gunny bags were brought in a truck at Chokha Bazar by two persons who unloaded them into his vehicle and directed him to transport the same to the destination mentioned by them. He carried out the assignment without knowing what were the contents of the load in the gunny bags. The Trial Court acquitted the accused. But, State of Gujarat preferred an appeal before the High Court. The Division Bench of the High Court set aside the order of acquittal and convicted the accused of the offences charged. The convicted accused filed SLP before this Court and contended that there was non-compliance of Section 42 of the Act which was enough to vitiate the search as a whole. After referring Section 42 of the Act and the evidence of police officer as PW 2, the Court held that (1) he should have taken down the information in writing; and (2) he should have sent forthwith a copy thereof to his immediate official superior. After finding that PW 2 - police officer admitted that he proceeded to the spot only on getting the information that somebody was trying to transport a narcotic substance and noting that PW 2 admitted that he proceeded on getting prior information from a Constable and the information was precisely one falling within the purview of Section 42(1) of the Act, the Court decided that PW 2 cannot wriggle out of the conditions stipulated in the said sub-section and unhesitatingly found that there was non-compliance of Section 42 of the Act. The State contended before the Bench that such non-compliance with Section 42 of the Act cannot be visited with greater consequences than

what has been held by the Constitution Bench regarding non-compliance with the conditions prescribed in Section 50 of the Act. After referring to the dictum laid down in ***State of Punjab* v. *Baldev Singh*, (1999) 6 SCC 172**, this Court held that the views expressed with reference to Section 50 of the Act would apply with reference to Section 42 also and consequently held as follows:

"If the officer has reason to believe from personal knowledge or prior information received from any person that any narcotic drug or psychotropic substance (in respect of which an offence has been committed) is kept or concealed in any building, conveyance or enclosed place, it is imperative that the officer should take it down in writing and he shall forthwith send a copy thereof to his immediate official superior. The action of the officer, who claims to have exercised it on the strength of such unrecorded information, would become suspect, though the trial may not vitiate on that score alone. Nonetheless the resultant position would be one of causing prejudice to the accused"

It was also contended by the learned counsel for the State of Gujarat that as the accused did not dispute the factum of recovery of the "charas" from the vehicle it does not matter that the information was not recorded at the first instance by the police officer. The Court did not approve such contention because it held that non-recording of information has in fact deprived the accused as well as the Court of the material to ascertain what was the precise information which PW 2 got before proceeding to stop the vehicle. It further held that value of such an information, which was the earliest in point of time, for ascertaining the extent of the involvement of the accused in the offence, was of a high degree. It further held that it is not enough that PW 2 was able to recollect from memory, when he was examined in court after the lapse of a long time, as to what information he got before he proceeded to the scene. Even otherwise, it held that the information which PW 2 recollected itself tends to exculpate the appellant rather than inculpate him. Finally, the court held that non-recording of the vital information collected by the police at the first instance can be counted as a circumstance in favour of the accused. On analyzing this as well as the other materials, this court ultimately allowed the appeal filed by the accused/appellant and set aside the conviction and sentence passed on him by the High Court and restored the order of acquittal passed in his favour by the trial court. The ratio in ***Abdul Rashid*** *(supra)* is that the non-recording of vital information collected by the police at the first instance can be counted as a circumstance in favour of the accused-appellant. The police officer examined as a crucial witness, PW2, in that case admitted that he proceeded to the spot only on getting information that somebody was trying to transport a narcotic substance, but failed to take down the information in writing. Nor did he apprise his superior officer of any such information either then or later, much less send a copy of the information to the superior officer. Thus, it was a case of absolute non-compliance with the requirements of Section 42(1) and (2).

(5) The facts in ***Sajan Abraham*** **v.** ***State of Kerala*** *(supra),* were completely different. The appellant/accused - Sajan Abraham was put on trial for an offence punishable under Section 21 of the Act. As per the prosecution case, on 10.10.1993 at about 7.45 p.m. the appellant was in possession of a manufactured drug by the name of "Tidigesic" and three syringes for injecting the same near Blue Tronics Junction at Palluruthy. The Head Constable, PW 3 and two other Constables of the Special Squad got information at about 7.00 p.m. on the said date that a person was selling injectable narcotic drugs near Blue Tronics Junction at Palluruthy. They informed this to PW 5 - Sub-Inspector of Police, Palluruthy Cusba Police Station, who was coming in a jeep along with his police party. Thereafter PW 5 along with his police party including PW 3 and other members of the Special Squad went to the scene of occurrence found the accused standing on the road with a packet in his hand. He was identified by PW 3 and apprehended by PW 5. On search, the packet possessed by the appellant revealed that it contained 5 strips of 5 ampoules each of Tidigesic and three injection syringes and a purse containing currency note of Rs. 10. At the spot, one ampoule was taken as a sample for chemical analysis and the said contraband articles were seized as per Ext. P-1 and seizure mahazar was prepared at the spot. The appellant was also arrested. The charge-sheet was submitted, the appellant pleaded not guilty.

The trial court found discrepancies in the evidence of the prosecution witnesses and thus disbelieved the prosecution story, hence acquitted the appellant. The High Court, on reappraisal of the evidence, came to the conclusion that the Trial Court was not justified in acquitting the appellant. It held that the prosecution has established with positive evidence beyond reasonable doubt that the appellant has committed an offence punishable under Section 21 of the Act, hence convicted and sentenced the appellant before this court. Learned counsel for the appellant submitted before this Court with vehemence that the prosecution has violated the mandatory provisions under Section 42, Section 50 and Section 57 of Act and hence conviction and sentence is liable to be set aside. The conclusion of this Court with regard to Section 42 is as under:

"With regard to Section 42, the submission is that PW 5 has not recorded the information given by PW 3 with respect to the appellant's involvement before proceeding to arrest him in his case. This constitutes violation of Section 42 of the Act. It is true under Section 42(1), the officer concerned, when he has reason to believe from his personal knowledge or information received from any person, is obliged to take it down in writing if such information constitutes an offence punishable under Chapter IV of the Act and send it forthwith to his immediate superior. Such an officer is empowered to search any building, conveyance and in case of any resistance, break up any door or remove any obstacle for such entry, seizure of such drug or substance and to arrest such person whom he has reason to believe to have committed any offence punishable under the said Chapter. Thereafter such officer has to send a copy of this information forthwith to his immediate superior. Submission is that PW 5 after receiving the said information had not communicated it to his immediate superior which constitutes violation of Section 42. In construing any facts to find, whether the prosecution has complied with the mandate of any provision which is mandatory, one has to examine it with a pragmatic approach. The law under the aforesaid Act being stringent to the persons involved in the field of illicit drug traffic and drug abuse, the legislature time and again has made some of its provisions obligatory for the prosecution to comply with, which the courts have interpreted it to be mandatory. This is in order to balance the stringency for an accused by casting an obligation on the prosecution for its strict compliance. The stringency is because of the type of crime involved under it, so that no such person escapes from the clutches of the law. The court however while construing such provisions strictly should not interpret them so literally so as to render their compliance, impossible. However, before drawing such an inference, it should be examined with caution and circumspection. In other words, if in a case, the following of a mandate strictly, results in delay in trapping an accused, which may lead the accused to escape, then the prosecution case should not be thrown out."

"In the present case, PW 3 - Head Constable, got information with reference to the appellant only at about 7 p.m. that the person is selling injectable narcotic drugs near Blue Tronics Junction, Palluruthy. When he proceeded for Palluruthy Police Station to give this information to his immediate superior, SI of Police, PW 5, he found PW 5 along with his police party, who were on patrol duty coming, hence the said information was communicated there by PW 3 to PW 5. Thereafter, PW 5 along with his police party and PW 3 immediately proceeded towards the place where the appellant was standing. Had they not done so immediately, the opportunity of seizure and arrest of the appellant would have been lost. How PW 5 could have recorded the information given by PW 3 and communicated to his superior while he was on motion, on patrol duty, in the jeep before proceeding to apprehend him is not understandable. Had they not acted immediately, the appellant would have escaped. On these facts, this Court found that no inference could be drawn that there has been violation of Section 42 of Act."

It is clear from ***Sajan Abraham*** *(supra)* that to enforce the law under the NDPS Act stringently against the persons involved in illicit drug trafficking and drug abuse, the legislature has made some of its provisions obligatory for the prosecution to comply with, which the courts have interpreted to be mandatory. It is further clear that this is in order to balance the stringency for an accused by casting an obligation on the prosecution for its strict compliance. The court however while construing such provisions strictly should not interpret them literally so as to render their compliance impossible. It concluded that if in a case, the strict following of a mandate results in delay in trapping an accused, which may lead the accused to escape, then the prosecution case should not be thrown out. It is also clear that when substantial compliance has been made it would not vitiate the prosecution case.

(6) In the light of the above decisions and the principles enunciated therein, it would be appropriate to refer to Section 42 of the NDPS Act which is relevant for the present purpose as it stood before its amendment by Act 9 of 2001. It reads as under:-

"42. Power of entry, search, seizure and arrest without warrant or authorisation.-- (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may, between sunrise and sunset,:

a) enter into and search any such building, conveyance or place;
b) in case of resistance, break open any door and remove any obstacle to such entry;
c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any

document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under Chapter IV relating to such drug or substance; and

d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under Chapter IV relating to such drug or substance:

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior."

Sub-section (2) as replaced by Act 9 of 2001 is extracted below:

"(2) Where an officer takes down any information in writing under sub-Section (1) or records grounds for his belief under the proviso thereto, he shall within seventy two hours send a copy thereof to his immediate official superior."

7) It is well established that search and seizure are essential steps in the armoury of an investigator in the investigation of a criminal case. The Code of Criminal Procedure in various provisions, particularly, Sections 96 to 103 and Section 165 recognizes the necessity and usefulness of search and seizure during the investigation. Sub-section (1) of Section 41 of the Act provides that a Metropolitan Magistrate or a Magistrate of the First Class or any Magistrate of Second Class specially empowered by the State Government may issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under Chapter IV. Sub-Section (2) of Section 41 refers to issue of authorization for similar purposes by officers of departments of Central Excise, Narcotics, Customs, Revenue Intelligence, etc.

8) Sub-section (1) of Section 42 lays down that the empowered officer, if has a prior information given by any person, should necessarily take it down in writing and where he

has reason to believe from his personal knowledge that offences under Chapter IV have been committed or that materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search, without warrant between sunrise and sunset and he may do so without recording his reasons of belief. The proviso to sub-section (1) of Section 42 lays down that if the empowered officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place, at any time between sunset and sunrise, after recording the grounds of his belief.

9) Sub-section (2) of Section 42 as it originally stood mandated that the empowered officer who have taken down information in writing or records the grounds of his belief under the proviso to sub- section (1), should send a copy of the same to his immediate official superior forthwith. But after the amendment in the year 2001, the period within which such report has to be sent was specified to be 72 hours. Section 43 deals with the power of seizure and arrest of the suspect in a public place.

10. We may note that ***Abdul Rashid*** followed ***State of Punjab*** **v.** ***Balbir Singh*** - **1994 (3) SCC 299.** We extract below the passage that was followed:
(2-C) Under Section 42(1), the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc., he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1), if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief. To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.
(3) Under Section 42(1), such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case."
***Abdul Rashid*** was followed **in** ***Koluttumottil Razak*** **v.** ***State of Kerala*** **- 2004 (4) SCC 465,** which was also a case of total non-compliance with section 42, as the Sub-Inspector

of Police neither reduced the information received into writing nor informed the official superior about it.

11. A careful examination of the facts in ***Abdul Rashid*** and ***Sajan Abraham*** shows that the decisions revolved on the facts and do not really lay down different prepositions of law. In ***Abdul Rashid***, there was total non-compliance with the provision of section 42. The police officer neither took down the information as required under section 42(1) nor informed his immediate official superior, as required by Section 42(2). It is in that context this Court expressed the view that it was imperative that the police officer should take down the information and forthwith send a copy thereof to his immediate superior officer and the action of the police officer on the basis of the unrecorded information would become suspect though the trial may not be vitiated on that score alone. On the other hand, in ***Sajan Abraham***, the facts were different. In that case, it was very difficult, if not impossible for the Sub- Inspector of police to record in writing the information given by PW-3 and send a copy thereof forthwith to his official superior, as the information was given to him when he was on patrol duty while he was moving in a jeep and unless he acted on the information immediately, the accused would have escaped. The Sub-Inspector of Police therefore acted, without recording the information into writing, but however, sent a copy of the FIR along with other records regarding arrest of the accused immediately to his superior officer. It is in these circumstances that this Court held that the omission to record in writing the information received was not a violation of Section 42.

12. The material difference between the provisions of Sections 42 and 43 is that Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting under Section 43 of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful.

13. Section 50 prescribes the conditions under which search of a person shall be conducted. Sub- section (1) provides that when the empowered officer is about to search any suspected person, he shall, if the person to be searched so requires, take him to the nearest gazetted officer or the Magistrate for the purpose. Under sub-section (2) it is laid down that if such request is made by the suspected person, the officer who is to take the search, may detain the suspect until he can be brought before such gazetted officer or the Magistrate. Sub-section (3) lays down that when the person to be searched is brought before such a gazetted

officer or the Magistrate and such gazetted officer or the Magistrate finds that there are no reasonable grounds for search, he shall forthwith discharge the person to be searched, otherwise, he shall direct that the search be made.

14. The Constitution Bench in ***Baldev Singh*** *(supra)* considered the compliance of Section 50 of the Act. While doing so, the Bench also considered the provisions of Sections 41 and 42 of the Act. It observed as follows:

"8. Section 41 of the NDPS Act provides that a Metropolitan Magistrate or a Magistrate of the First Class or any Magistrate of the Second Class specially empowered by the State Government in this behalf, may issue a warrant for the arrest of and for search of any person whom he has reason to believe to have committed any offence punishable under Chapter IV. Vide sub-section (2) the power has also been vested in gazetted officers of the Departments of Central Excise, Narcotics, Customs, Revenue Intelligence or any other department of the Central Government or of the Border Security Force, empowered in that behalf by a general or special order of the State Government to arrest any person, who he has reason to believe to have committed an offence punishable under Chapter IV or to search any person or conveyance or vessel or building etc. with a view to seize any contraband or document or other article which may furnish evidence of the commission of such an offence, concealed in such building or conveyance or vessel or place.

9. Sub-section (1) of Section 42 lays down that the empowered officer, if has a prior information given by any person, he should necessarily take it down in writing and where he has reason to believe from his personal knowledge that offences under Chapter IV have been committed or that materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search, without a warrant between sunrise and sunset, and he may do so without recording his reasons of belief.

10. The proviso to sub-section (1) lays down that if the empowered officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place, at any time between sunset and sunrise, after recording the grounds of his belief. Vide sub- section (2) of Section 42, the empowered officer who takes down information in writing or records the grounds of his belief under the proviso to sub-section (1), shall forthwith send a copy of the same

to his immediate official superior. Section 43 deals with the power of seizure and arrest of the suspect in a public place. The material difference between the provisions of Section 43 and Section 42 is that whereas Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting under Section 43 of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful."

It is to be noted that ***Baldev Singh's*** case *(supra)* has dealt with Section 50 of the Act and the effect of non-compliance of the same. It was held that the same provisions of Section 50 containing certain protection and safeguards implicitly make it imperative and obligatory and cast a duty on the investigating officer to ensure that search and seizure of the person concerned is conducted in a manner prescribed by Section 50. The unamended Section 50 as existed during that period is as follows:

"Section 50 - Conditions under which search of persons shall be conducted (1) When any officer duly authorized under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate. (2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in subsection (1). (3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female."

The safeguard or protection to be searched in the presence of a gazetted officer or a Magistrate has been incorporated in Section 50 to ensure that persons are only searched with a good cause and also with a view to maintain the veracity of evidence derived from such search. But this strict procedural requirement has been diluted by the insertion of subsection (5) and (6) to the Section by Act 9 of 2001, by which the following subsections were inserted accordingly:

"(5) When an officer duly authorized under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior."

Through this amendment the strict procedural requirement as mandated by ***Baldev Singh's*** case was avoided as relaxation and fixing of the reasonable time to send the record to superior official as well as exercise of Section 100 of CrPC was included by the legislature. The effect conferred upon the previously mandated strict compliance of Section 50 by ***Baldev Singh's*** case was that the procedural requirements which may have handicapped an emergency requirement of search and seizure and give the suspect a chance to escape were made directory based on the reasonableness of such emergency situation. Though it cannot be said that the protection or safeguard given to the suspects have been taken away completely but certain flexibility in the procedural norms were adopted only to balance an urgent situation. As a consequence, the mandate given ***in Baldev Singh's*** case is diluted.

15. Under Section 42(2) as it stood prior to amendment such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same would adversely affect the prosecution case and to that extent, it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case, it is to be concluded that the mandatory enforcement of the provisions of Section 42 of the Act non-compliance of which may vitiate a trial has been restricted only to the provision of sending a copy of the information written down by the empowered officer to immediate official superior and not to any other condition of the Section. ***Abdul Rashid*** *(supra)* has been decided on 01.02.2000 but thereafter Section 42 has been amended with effect from 02.10.2001 and the time of sending such report of the required information has been specified to be within 72 hours of writing down the same. The relaxation by the legislature is evidently only to

uphold the object of the Act. The question of mandatory application of the provision can be answered in the light of the said amendment. The non-compliance of the said provision may not vitiate the trial if it does not cause any prejudice to the accused.

16. The advent of cellular phones and wireless services in India has assured certain expectation regarding the quality, reliability and usefulness of the instantaneous messages. This technology has taken part in the system of police administration and investigation while growing consensus among the policy makers about it. Now for the last two decades police investigation has gone through a sea- change. Law enforcement officials can easily access any information anywhere even when they are on the move and not physically present in the police station or their respective offices. For this change of circumstances, it may not be possible all the time to record the information which is collected through mobile phone communication in the Register/Records kept for those purposes in the police station or the respective offices of the authorized officials in the Act if the emergency of the situation so requires. As a result, if the statutory provisions under Section 41(2) and 42(2) of the Act of writing down the information is interpreted as a mandatory provision, it will disable the haste of an emergency situation and may turn out to be in vain with regard to the criminal search and seizure. These provisions should not be misused by the wrongdoers/offenders as a major ground for acquittal. Consequently, these provisions should be taken as discretionary measure which should check the misuse of the Act rather than providing an escape to the hardened drug-peddlers.

17. In conclusion, what is to be noticed is ***Abdul Rashid*** did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did *Sajan Abraham* hold that the requirements of Section 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information (of the nature referred to in Sub-section (1) of

section 42 from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior .

(c) In other words, the compliance with the requirements of Sections 42 (1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements of sub-sections (1) and (2) of section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of section 42 of the Act. Whether there is adequate or substantial compliance with section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to section 42 by Act 9 of 2001.

18) We answer the reference in the manner aforesaid. Let the appeals be now placed for disposal before the appropriate Bench.

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## ***Vijaysinh Chandubha Jadeja* v. *State of Gujarat***

(2011) 1 SCC 609

**D.K. Jain, J.** - 1. The short question arising for consideration in this batch of appeals is whether Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the NDPS Act") casts a duty on the empowered officer to 'inform' the suspect of his right to be searched in the presence of a Gazetted Officer or a Magistrate, if he so desires or whether a mere enquiry by the said officer as to whether the suspect would like to be searched in the presence of a Magistrate or a Gazetted Officer can be said to be due compliance with the mandate of the said Section?

2. When these appeals came up for consideration before a bench of three Judges, it was noticed that there was a divergence of opinion between the decisions of this Court in the case of ***Joseph Fernandez* v. *State of Goa*** (2000) 1 SCC 707, Prabha ***Shankar Dubey* v. *State of M.P***. (2004) 2 SCC 56 on the one hand and ***Krishna Kanwar (Smt) alias Thakuraeen* v. *State of Rajasthan*** (2004) 2 SCC 608 on the other, with regard to the dictum laid down by the Constitution Bench of this Court in ***State of Punjab* v. *Baldev Singh*** (1999) 6 SCC 172, in particular regarding the question whether before conducting search, the concerned police officer is merely required to ask the suspect whether he would like to be produced before the Magistrate or a Gazetted Officer for the purpose of search or is the suspect required to be made aware of the existence of his right in that behalf under the law. It would be expedient to extract the relevant portion of the order:

"When the matter came up before this Court, it was found that in some of the decisions rendered by this Court, a slightly different view was taken than what was expressed by the Constitution Bench with regard to interpretation of Section 50 of the NDPS Act. In the case ***Joseph Fernandez* v. *State of Goa*** 2001 (1) SCC 707, a Bench of three Hon'ble Judges held that even when the searching officer informed him that "if you wish you may be searched in the presence of a gazetted officer or a Magistrate"; it was held that it was in substantial compliance with the requirement of Section 50 of the NDPS Act, and the Court observed that it did not agree with the contention that there was non-compliance of the mandatory provisions contained in Section 50 of the NDPS Act. In another decision of this Court in ***Prabha Shankar Dubey* v. *State of M.P.***, the following information was conveyed to the accused: "By way of this notice, you are informed that we have received information that you are illegally carrying opium with you, therefore, we are required to search your scooter and you for this purpose. You would like to give me search or you would like to be searched by a gazetted officer or by a Magistrate". This was held to be substantial compliance of Section 50 of the NDPS Act. In ***Krishan Kanwar (Smt.) Alias Thakuraeen* v. *State of Rajasthan*** 2004(2) SCC 608, the same question was considered and it was held that there is no specific form prescribed or initiated for conveying the information required to be given under Section 50 of the NDPS Act and it was held that "what is necessary is that the accused (suspect) should be made aware of the existence of his right to be searched in the presence of one of the officers named in the section itself. Since no specific mode or manner is prescribed or intended, the court has to see the substance and not the form of intimation. Whether the requirement of Section 50 have been met is a question which is to be decided on the facts of each case and there cannot be any sweeping generalization and/or a straitjacket formula.

Thus, in a way, it all depends on the oral evidence of the officer who conducts search, in case nothing is mentioned in the search mahazar or any other contemporaneous document prepared at the time of search. In view of the large number of cases coming up under the provisions of the NDPS Act the interpretation of Section 50 of the Act requires a little more clarification as its applicability is quite frequent in many cases. In appreciating the law laid down by the Constitution Bench in Baldev Singh's case (supra), we have noticed that conflicting decisions have been rendered by this Court. We feel that the matter requires some clarification by a larger Bench. The matter be placed before the Hon'ble Chief Justice of India for taking further action in this regard."

That is how these appeals came to be placed before this Constitution Bench.

3. Since the cases have come up before us for a limited purpose of clarification as to the interpretation of Section 50 of the NDPS Act by the Constitution Bench in ***Baldev Singh's*** case (*supra*), we deem it unnecessary to state the background facts, giving rise to these appeals.

4. We have heard learned Counsel for the appellant, State of Gujarat, State of West Bengal, Government of National Capital Territory of Delhi and learned Additional Solicitor General on behalf of Union of India.

5. Mr. P.H. Parekh, learned senior counsel appearing on behalf of appellant (Criminal Appeal No. 943 of 2005), strenuously urged that a conjoint reading of Section 50(1) and 50(3) of the NDPS Act, in its common grammatical connotation, makes it abundantly clear

that the procedural safeguards envisaged under Section 50 are to be employed effectively and honestly while informing, apprising and advising the suspect of his vested right to be searched only by a Gazetted Officer or a Magistrate. It was contended that the ambit of statutory protection granted by the Parliament under Section 50(1) of the NDPS Act having been explained unambiguously and clearly by the Constitution Bench in the case of ***Baldev Singh*** *(supra),* there is no scope for any other interpretation or clarification of Section 50 of the NDPS Act.

6. Learned Counsel vehemently contended that in the light of the dictum laid down in ***Baldev Singh*** *(supra),* the decisions of this Court in ***Joseph Fernandez*** *(supra)* and Prabha Shankar Dubey (supra) wherein the concept of 'substantial compliance' has been erroneously read into Section 50 of the NDPS Act, do not lay down the correct proposition of law. It was argued that Section 50 being the only safeguard provided to the suspect under the NDPS Act, the legislature, while enacting it, gave it the character of a "due process" clause, thereby placing some minimum procedural limitations on the exercise of such extensive statutory power, by insisting on the strict observance of the procedure established under the said Section. According to the learned Counsel, this safeguard is meant to ensure that the powers under the NDPS Act are not abused and a person is not falsely implicated and subjected to grave consequences which are likely to follow under the said Act. Relying on the decision of this Court in ***Beckodan Abdul Rahiman*** **v.** ***State of Kerala*** (2002) 4 SCC 229, learned Counsel submitted that the harsh provisions of the NDPS Act cast a heavier duty upon the prosecution to strictly follow and comply with the safeguards.

7. Learned Counsel thus, argued that the theory of 'substantial compliance' cannot be applied to defeat, negate or neutralise important safeguards provided by the legislature. It was asserted that merely asking the suspect whether he would like to be produced before a Magistrate or a Gazetted Officer for the purpose of the search can never amount to due compliance with Section 50 of the NDPS Act.

8. Mr. Siddharth Luthra, learned senior counsel appearing on behalf of State of Gujarat, on the other hand, submitted that the rigours of Section 50 of the NDPS Act are neither applicable to the officers who have been empowered by a warrant under Section 41(1); nor to the gazetted/empowered officers who order search or arrest under Section 41(2). It was argued that Section 41(1) of the NDPS Act grants the Magistrate the power to issue warrants for arrest or search, whether by day or night, inter alia, in relation to a person whom the Magistrate has reason to believe has committed an offence under the NDPS Act.

It was urged that a reading of Sections 41(1), 41(3), 42, 43 and 50 of the NDPS Act shows that an officer acting under a warrant by a Magistrate under Section 41(1) would not fall within the ambit of Section 50(1) of the NDPS Act. It was submitted that from the language of Section 41(2) of the NDPS Act, it is clear that the Central Government or the State Government, as the case may be, can only empower an officer of a gazetted rank who can either himself act or authorise his subordinate on the terms stated in the Section. On the contrary, however, under Section 42(1) of the NDPS Act, there is no restriction on the Central Government or the State Government to empower only a gazetted officer and, therefore, additional checks and balances over officers acting under Section 42 have been provided in the proviso to Section 42(1) and in Section 42(2) of the NDPS Act. It was, thus, contended that the language of Section 42 of the NDPS Act makes it clear that the provision applies only to an officer empowered under Section 42(1) and not an empowered Gazetted Officer under Section 41(2) of the NDPS Act. In support of the submission that a distinction between a Gazetted Officer and an officer acting under Section 42 of the NDPS Act has to be maintained, learned Counsel commended us to the decisions of this Court in M. ***Prabhulal*** **v.** ***Assistant Director, Directorate of Revenue Intelligence*** (2003) 8 SCC 449 and ***Union of India*** **v.** ***Satrohan*** (2008) 8 SCC 313. It was pleaded that the divergent view on the point expressed by this Court in ***Ahmed*** **v.** ***State of Gujarat*** (2000) 7 SCC 477, does not lay down the correct proposition of law.

9. It was then contended by Mr. Luthra that a reading of Sub-sections (1) and (3) of Section 50 of the NDPS Act makes it clear that the right granted to a suspect is not the right to be searched before the nearest Gazetted Officer or nearest Magistrate, but the right to be taken before the nearest Gazetted Officer or nearest Magistrate, whereupon such officer or Magistrate is duly empowered under Section 50(3), to either discharge the suspect from detention or direct that a search be made. In support of the proposition, reliance is placed on a decision of this Court in ***State of Rajasthan*** **v.** ***Ram Chandra*** (2005) 5 SCC 151.

10. Learned Counsel also submitted that the decisions of this Court in ***State of Punjab*** **v.** ***Balbir Singh*** (1994) 3 SCC 299, ***Saiyad Mohd. Saiyad Umar Saiyad and Ors.*** **v.** ***State of Gujarat*** (1995) 3 SCC 610, ***Ali Mustaffa Abdul Rahman Moosa*** **v.** ***State of Kerala*** (1994) 6 SCC 569 and affirmed in ***Baldev Singh*** *(supra)* have all read the phrase 'for making the search' into Section 50(1) of the NDPS Act, which has led to safeguards and protections to an accused person, as envisaged under Section 50 of the NDPS Act to be read down, making the said provision virtually ineffective and, therefore, the decision of this Court in ***Baldev Singh*** *(supra)* needs reconsideration.

11. Adopting the same line of arguments, Mr. P.P. Malhotra, the learned Additional Solicitor General, appearing on behalf of the Government of NCT of Delhi maintained that it is clear from language of Sections 41(2), 42 and 43 of the NDPS Act that the legislature has dealt with gazetted officers differently, reposing higher degree of trust in them and, therefore, if a search of a person is conducted by a gazetted officer, he would not be required to comply with the rigours of Section 50 (1) of the Act. It was argued that the view expressed by this Court in ***Ahmed*** *(supra),* is incorrect and, therefore, deserves to be reversed.

12. The NDPS Act was enacted in the year 1985, with a view to consolidate and amend the law relating to narcotic drugs, incorporating stringent provisions for control and regulation of operations relating to narcotic drugs and psychotropic substances. The object of the said legislation has been explained time and again by this Court in a plethora of cases and, therefore, we feel that it is not necessary to delve upon this aspect all over again, except to re-emphasise that in order to prevent abuse of the provisions of the NDPS Act, which confer wide powers on the empowered officers, the safeguards provided by the Legislature have to be observed strictly. Moreover, having regard to the terms of reference to the larger Bench, extracted above, it is equally unnecessary to extract extensively all the provisions of the NDPS Act to which reference was made by learned Counsel appearing for the States, and a brief reference to these provisions would suffice.

13. Under Section 41 of the NDPS Act, certain classes of Magistrates are competent to issue warrants for the arrest of any person whom such Magistrates have reason to believe to have committed any offence punishable under the NDPS Act, or for the search of any building, conveyance or place in which such Magistrate has reason to believe any narcotic drug or psychotropic substance or controlled substance in respect of which an offence punishable under the said Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA is kept or concealed. Under Section 42 of the NDPS Act, the empowered officer can enter, search, seize and arrest even without warrant or authorisation, if he has reason to believe from his personal knowledge or information taken down in writing, that an offence under Chapter IV of the said Act has been committed. Under proviso to Sub-section (1), if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any

time between sunset and sunrise after recording the grounds of his belief and send the same to his immediate official superior in terms of Sub-section (2) of the Section.

14. Section 50 of the NDPS Act prescribes the conditions under which personal search of a person is required to be conducted. Being the pivotal provision, the Section, (as amended by Act 9 of 2001 -inserting Sub-sections (5) and (6) with effect from 2nd October 2001) is extracted in full. It reads as under:

> 50. Conditions under which search of persons shall be conducted.-- (1) When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.
> (2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in Sub- section (1).
> (3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.
> (4) No female shall be searched by anyone excepting a female.
> (5) When an officer duly authorised under Section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under Section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).
> (6) After a search is conducted under Sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy- two hours send a copy thereof to his immediate official superior.

15. Sub-section (1) of the said Section provides that when the empowered officer is about to search any suspected person, he shall, if the person to be searched so requires, take him to the nearest gazetted officer or the Magistrate for the purpose. Under Sub-section (2), it is laid down that if such request is made by the suspected person, the officer who is to take the search, may detain the suspect until he can be brought before such gazetted officer or

the Magistrate. It is manifest that if the suspect expresses the desire to be taken to the gazetted officer or the Magistrate, the empowered officer is restrained from effecting the search of the person concerned. He can only detain the suspect for being produced before the gazetted officer or the Magistrate, as the case may be. Sub-section (3) lays down that when the person to be searched is brought before such gazetted officer or the Magistrate and such gazetted officer or the Magistrate finds that there are no reasonable grounds for search, he shall forthwith discharge the person to be searched, otherwise he shall direct the search to be made. The mandate of Section 50 is precise and clear, viz. if the person intended to be searched expresses to the authorised officer his desire to be taken to the nearest gazetted officer or the Magistrate, he cannot be searched till the gazetted officer or the Magistrate, as the case may be, directs the authorised officer to do so.

16. At this juncture, we must state that the issue before us in terms of the referral order is not about the applicability of Section 50 of the NDPS Act per se but is confined to the scope and width of the expression "if the person to be searched so requires" as figuring in Sub-section (1) of the said Section. Therefore, we deem it unnecessary to evaluate the submissions made by the learned Counsel regarding the applicability of the rigours of Section 50 of the NDPS Act when a search of the suspect is conducted by an officer empowered under Section 41 of the said Act. We may, however, add that while considering the question of compliance with Section 50 of the NDPS Act, the Constitution Bench in ***Baldev Singh*** *(supra)* considered the provisions of Section 41 as well. It observed as under:

8. Section 41 of the NDPS Act provides that a Metropolitan Magistrate or a Magistrate of the First Class or any Magistrate of the Second Class specially empowered by the State Government in this behalf, may issue a warrant for the arrest of and for search of any person whom he has reason to believe to have committed any offence punishable under Chapter IV. Vide Sub-section (2) the power has also been vested in gazetted officers of the Departments of Central Excise, Narcotics, Customs, Revenue Intelligence or any other department of the Central Government or of the Border Security Force, empowered in that behalf by a general or special order of the State Government to arrest any person, who he has reason to believe to have committed an offence punishable under Chapter IV or to search any person or conveyance or vessel or building etc. with a view to seize any contraband or document or other article which may furnish evidence of the commission of such an offence, concealed in such building or conveyance or vessel or place.

17. In the above background, we shall now advert to the controversy at hand. For this purpose, it would be necessary to recapitulate the conclusions, arrived at by the Constitution Bench in Baldev Singh's case (supra). We are concerned with the following conclusions:

57. (1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under Sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

(3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.

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(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the court on the basis of the evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50 and, particularly, the safeguards provided therein were duly complied with, it would not be permissible to cut short a criminal trial.

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from Sub-section (1) of Section 50, may render

the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search.

18. Although the Constitution Bench did not decide in absolute terms the question whether or not Section 50 of the NDPS Act was directory or mandatory yet it was held that provisions of Sub-section (1) of Section 50 make it imperative for the empowered officer to "inform" the person concerned (suspect) about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate; failure to "inform" the suspect about the existence of his said right would cause prejudice to him, and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act. The Court also noted that it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him. We respectfully concur with these conclusions. Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce.

19. As noted above, Sub-sections (5) and (6) were inserted in Section 50 by Act 9 of 2001. It is pertinent to note that although by the insertion of the said two Sub-sections, the rigour of strict procedural requirement is sought to be diluted under the circumstances mentioned in the Sub-sections, viz. when the authorised officer has reason to believe that any delay in search of the person is fraught with the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance etc., or article or document, he may proceed to search the person instead of taking him to the nearest gazetted officer or Magistrate. However, even in such cases a safeguard against any arbitrary use of power has been provided under Sub-section (6). Under the said Sub-section, the empowered

officer is obliged to send a copy of the reasons, so recorded, to his immediate official superior within seventy two hours of the search. In our opinion, the insertion of these two Sub- sections does not obliterates the mandate of Sub-section (1) of Section 50 to inform the person, to be searched, of his right to be taken before a gazetted officer or a Magistrate. The object and the effect of insertion of Sub-sections (5) and (6) were considered by a Constitution Bench of this Court, of which one of us (D.K. Jain, J.) was a member, in ***Karnail Singh* v. *State of Haryana*** (2009) 8 SCC 539. Although in the said decision the Court did observe that by virtue of insertion of Sub-sections (5) and (6), the mandate given in ***Baldev Singh's case*** *(supra)* is diluted but the Court also opined that it cannot be said that by the said insertion, the protection or

safeguards given to the suspect have been taken away completely. The Court observed:

> Through this amendment the strict procedural requirement as mandated by Baldev Singh case was avoided as relaxation and fixing of the reasonable time to send the record to the superior official as well as exercise of Section 100 CrPC was included by the legislature. The effect conferred upon the previously mandated strict compliance with Section 50 by Baldev Singh case was that the procedural requirements which may have handicapped an emergency requirement of search and seizure and give the suspect a chance to escape were made directory based on the reasonableness of such emergency situation. Though it cannot be said that the protection or safeguard given to the suspects have been taken away completely but certain flexibility in the procedural norms were adopted only to balance an urgent situation. As a consequence the mandate given in Baldev Singh case is diluted.

20. It can, thus, be seen that apart from the fact that in Karnail Singh (supra), the issue was regarding the scope and applicability of Section 42 of the NDPS Act in the matter of conducting search, seizure and arrest without warrant or authorisation, the said decision does not depart from the dictum laid down in Baldev Singh's case (supra) in so far as the obligation of the empowered officer to inform the suspect of his right enshrined in Sub-section (1) of Section 50 of the NDPS Act is concerned. It is also plain from the said paragraph that the flexibility in procedural requirements in terms of the two newly inserted Sub-sections can be resorted to only in emergent and urgent situations, contemplated in the provision, and not as a matter of course. Additionally, Sub-section (6) of Section 50 of the NDPS Act makes it imperative and obligatory on the authorised officer to send a copy of the reasons recorded by him for his belief in terms of Sub-section (5), to his immediate

superior officer, within the stipulated time, which exercise would again be subjected to judicial scrutiny during the course of trial.

21. We shall now deal with the two decisions, referred to in the referral order, wherein "substantial compliance" with the requirement embodied in Section 50 of the NDPS Act has been held to be sufficient. In ***Prabha Shankar Dubey*** *(supra)*, a two Judge bench of this Court culled out the ratio of ***Baldev Singh's case*** *(supra),* on the issue before us, as follows:

> What the officer concerned is required to do is to convey about the choice the accused has. The accused (suspect) has to be told in a way that he becomes aware that the choice is his and not of the officer concerned, even though there is no specific form. The use of the word "right" at relevant places in the decision of Baldev Singh case seems to be to lay effective emphasis that it is not by the grace of the officer the choice has to be given but more by way of a right in the "suspect" at that stage to be given such a choice and the inevitable consequences that have to follow by transgressing it.

However, while gauging whether or not the stated requirements of Section 50 had been met on facts of that case, finding similarity in the nature of evidence on this aspect between the case at hand and ***Joseph Fernandez*** *(supra)*, the Court chose to follow the views echoed in the latter case, wherein it was held that searching officer's information to the suspect to the effect that "if you wish you may be searched in the presence of a gazetted officer or a Magistrate" was in substantial compliance with the requirement of Section 50 of the NDPS Act. Nevertheless, the Court indicated the reason for use of expression "substantial compliance" in the following words:

> The use of the expression "substantial compliance" was made in the background that the searching officer had Section 50 in mind and it was unaided by the interpretation placed on it by the Constitution Bench in ***Baldev Singh*** case. A line or a word in a judgment cannot be read in isolation or as if interpreting a statutory provision, to impute a different meaning to the observations. It is manifest from the afore- extracted paragraph that Joseph Fernandez (supra) does not notice the ratio of Baldev Singh (supra) and in Prabha Shankar Dubey (supra), *Joseph Fernandez (supra*) is followed ignoring the dictum laid down in *Baldev Singh's case (supra).*

22. In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under Sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision. As observed ***In Re: Presidential Poll*** MANU/SC/0047/1974: (1974) 2 SCC 33, it is the duty of the courts to get at the real intention of the Legislature by carefully attending to the whole scope of the provision to be construed. "The key to the opening of every law is the reason and spirit of the law, it is *the animus imponentis,* the intention of the law maker expressed in the law itself, taken as a whole." We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in ***Joseph Fernandez*** *(supra)* and ***Prabha Shankar Dubey*** *(supra*) is neither borne out from the language of Sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in ***Baldev Singh's case*** *(supra)*. Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf. We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well.

23. Accordingly, we answer the reference in the manner aforesaid. The appeals shall, now, be placed before the appropriate Bench for disposal.

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## *Union of India* v. *Mohanlal & Anr*

(2016) 3 SCC 379

**T.S. THAKUR, J**. –

1. When this appeal came up for hearing before us on 11th April, 2012, it was contended by learned counsel for the appellant-Union of India that Standing Order No.1 of 1989 dated 13th June, 1989 which prescribes the procedure to be followed for seizure, sampling, safe keeping and disposal of the seized Drugs, Narcotics and Psychotropic substances, is being followed throughout the country. It was also contended that Ministry of Finance, Department of Revenue, Government of India, has in terms of a Circular dated 23rd February, 2011 impressed upon the Chief Secretaries and the concerned police heads of the State Governments to ensure that instructions given and the procedure prescribed in the Standing Order aforementioned was strictly adhered to. These submissions notwithstanding, doubts about the procedure being actually followed persisted. Pilferage of the contraband goods and their return to the market place for circulation being a major hazard, this Court appointed Mr. Ajit Kumar Sinha, Senior Advocate, as *Amicus Curiae,* with a view to making a realistic review of the procedure for search, disposal or destruction of the narcotics and the remedial steps that need to be taken to plug the loopholes, if any.

2. On 3rd July, 2012 this Court after hearing the *Amicus Curiae* prima facie came to the conclusion that the procedure prescribed for the destruction of the contraband seized in different States was not being followed resulting in a very piquant situation in which accumulation of huge quantities of the seized drugs and narcotics has increased manifold the chances of their pilferage for re-circulation in the market. This Court also noted a report published in the timesofindia.indiatimes.com under the heading "Bathinda"s police stores bursting at seams with seized narcotics" from which it appeared that large quantities of seized drugs had accumulated over the years including opium, poppy husk, charas etc. apart from modern narcotic substances. The report suggested that 39 lakhs sedatives and narcotic tablets, 1.10 lakhs capsules, over 21,000 drug syrups and 1828 sedative injections apart from 8 kgs. of smack and 84 kgs. of ganja were awaiting disposal in Bathinda Police stores alone. The position was, according to Mr. Sinha, no better in other States especially those situate along the international borders. It was argued by the *Amicus Curiae* that without proper data from the authorities concerned, it was not possible to take stock of the magnitude of the problem no matter challenges posed by rampant drug abuse had acquired alarming proportions affecting the youth, some of whom are driven to commission of crimes on account of deleterious effects of drug abuse.

3. It was in the above backdrop that by an order dated 3rd July, 2012 passed in Criminal Appeal No.652 of 2012 this Court directed collection of information from the police heads of each one of the States through the Chief Secretaries concerned in regard to seizure, storage, disposal and destruction of the seized contraband and judicial supervision over the same. Specific queries were formulated in the order passed by us with a direction to the Chief Secretaries of the States concerned to serve the same upon the Directors General of Police for a report to be forwarded through the Registrars General of the High Courts of the States concerned who were appointed Nodal Officers for that purpose. Registrars General were also asked to independently secure from the District and Sessions Judges concerned in their respective States, answers to the queries specified under the head "Judicial Supervision". Chiefs of Central Government Agencies viz. Narcotics Control Bureau, Central Bureau of Narcotics, Directorate General of Revenue Intelligence and

Commissionerates of Customs & Central Excise including the Indian Coast Guard were directed to issue similar queries to the officers concerned and to submit their respective reports detailing the information required in terms of the orders passed by this Court. The queries raised by this Court were in the following words:

**"12.1. Seizure**

(i) What narcotic drugs and psychotropic substances (natural and synthetic) have been seized in the last 10 years and in what quantity? Provide year-wise and district-wise details of the seizure made by the relevant authority.

(ii) What are the steps, if any, taken by the seizing authorities to prevent damage, loss and pilferage of the narcotic drugs and psychotropic substances (natural and synthetic) during seizure/transit?

(iii) What are the circulars/notifications/directions/guidelines, if any, issued to competent officers to follow any specific procedure in regard to seizure of contrabands, their storage and destruction? Copies of the same be attached to the report.

**12.2. Storage**

(i) Is there any specified/notified store for storage of the seized contraband in a State, if so, is the storage space available in each district or taluka?

(ii) If a store/storage space is not available in each district or taluka, where is the contraband sent for storage purposes? Under what conditions is withdrawal of the contraband permissible and whether a court order is obtained for such withdrawal?

(iii) What are the steps taken at the time of storage to determine the nature and quantity of the substance being stored and what are the measures taken to prevent substitution and pilferage from the stores?

(iv) Is there any check stock register maintained at the site of storage and if so, by whom? Is there any periodical check of such register? If so, by whom? Is any record regarding such periodic inspection maintained and in what form?

(v) What is the condition of the storage facilities at present? Is there any shortage of space or any other infrastructure lacking? What steps have been taken or are being taken to remove the deficiencies, if any?

(vi) Have any circulars/notifications/directions/guidelines been issued to competent officers for care and caution to be exercised during storage? If so, a copy of the same be produced.

**12.3. Disposal/Destruction**

(i) What narcotic drugs and psychotropic substances (natural and synthetic) have been destroyed in the last 10 years and in what quantity? Provide year-wise and district-wise details of the destruction made by the relevant authority. If no destruction has taken place, the reason therefor.

(ii) Who is authorised to apply for permission of the court to destroy the seized contraband? Has there been any failure or dereliction in making such applications? Whether any person having technical knowledge of narcotic drugs and psychotropic substances (natural and synthetic) is associated with the actual process of destruction of the contraband?

(iii) Was any action taken against the person who should have applied for permission to destroy the drugs or should have destroyed and did not do so?

(iv) What are the steps taken at the time of destruction to determine the nature and quantity of the substance being destroyed?

(v) What are the steps taken by competent authorities to prevent damage, loss, pilferage and tampering/substitution of the narcotic drugs and psychotropic substances (natural and synthetic) during transit from point of storage to point of destruction?

(vi) Is there any specified facility for destruction of contraband in the State? If so, a list of such facilities along with location and details of maintenance, conditions and supervisory bodies be provided.

(vii) If a facility is not available, where is the contraband sent for destruction purposes? Under whose supervision and what is the entire procedure thereof?

(viii) Is any record, electronic or otherwise prepared at the site of destruction of the contraband and by whom? Is there any periodical check of such record? What are the ranks/designation of the supervising officers charged with keeping a check on the same?

**12.4. Judicial supervision**

(i) Is any inspection done by the District and Sessions Judge of the store where the seized drugs are kept? If drugs are lying in the store, has the Sessions Judge taken steps to have them destroyed?

(ii) Is any report of the inspection conducted, submitted to the Administrative Judge of the High Court or the Registry of the High Court? If so, has any action on the subject being taken for timely inspection and destruction of the drugs?

(iii) Are there any pending applications for destruction of drugs in the district concerned, if so, what is the reason for the delay in the disposal of such application?

(iv) What level officers including the judicial officers are associated with the process of destruction?

(v) At what stages are the Magistrates/judicial officers/any other officer of the court associated with seizure/storage/destruction of drugs?

(vi) Are there any rules framed by the Court regarding its supervisory role in enforcement of the NDPA Act as regards seizure/storage/destruction of drugs?

(vii) What is the average time for completion of trial of NDPS matters?"

4. In compliance with the above directions, reports have been submitted by all the States except the States of Arunachal Pradesh, Jammu and Kashmir, Dadar & Nagar Haveli, Lakshadweep, Nagaland and Pondicherry.

6. Similarly, in answer to the query as to the steps taken at the time of storage to determine the nature and the quantity of the substance being stored and measures to prevent substitution and/or pilferage from the stores, the State Governments have sent their replies.

The reports submitted by the State Governments and the Central Agencies further claim that stock registers maintained at the storage sites are periodically checked by the staff mentioned in the reports. Another question that was asked from the State Governments and the Central Agency relates to the condition of the storage facilities, shortage of storage facilities, if any, and whether any steps have been taken or are being taken to remove the deficiencies. Answers to those queries suggest that no proper storage facilities are available in most of the States. For instance, in Gujarat no special storage facility is available for keeping the contraband, which is, therefore, stored in general muddamal room. In Assam the NBC Guwahati Zonal Unit is said to be running from a rented house and one secured room is earmarked for storage with triple locking system under the supervision of the Superintendent. In Imphal, the store room is overflowing with contraband. Since there is shortage of space, pre-trial disposal process has been initiated to decrease congestion in godowns. Although Mizoram Government claims that there is no lack of storage facility, no information as to any specific storage facility being earmarked for the purpose has been provided. In Tripura the enforcement branch is said to be maintaining the malkhana used for storage of contrabands. In Himachal Pradesh there is no storage facility except an old building used for the purpose, while in Chhattisgarh the storage facility is satisfactory but not sufficient for bulk storage. Similarly, Rajasthan has scarcity of storage facility. Jharkhand has no separate storage facility at all whereas Kerala has satisfactory storage facilities only in some of the districts. In Orissa and Bihar the storage facilities are totally insufficient and unsatisfactory. States of Haryana, Madhya Pradesh, Goa, Daman Diu and Dadar & Nagar Haveli and Andhra Pradesh claim to have no problems with storage facility while Tamil Nadu does not have any separate storage.

8. Directorate of Revenue Intelligence has not provided any information while NCB Zonal Office, Jodhpur has no shortage of space. NCB Zonal Office, Chandigarh has reported insufficiency of space and has started

the process for construction of a specified storage facility. Customs and Central Excise Authority has reported that their godown is full and no more space is available.

9. In answer to the question as to who is authorised to apply to the Court to destroy the seized contraband and whether there has been any failure or dereliction in making such applications and whether any person having technical knowledge of narcotic drugs and psychotropic substance (natural and synthetic) is associated with the process of destruction of the contraband, the reply submitted by the State Governments suggest that different persons in different States have been authorised to make such applications to the Courts concerned except in Tripura where no particular person is authorised. In some cases Officer-in- charge of the Police Station has been authorised while in others the I.O. is also empowered to apply for permission to destroy the contraband. In answer to the question whether any action has been taken against anyone who should have applied for permission to destroy the narcotics but had not done so, State Governments have all answered in the negative implying thereby that either no dereliction of duty has occurred on the part of any officer competent to apply for destruction or no action has been taken for any such dereliction.

10. Similarly, regarding the steps taken at the time of destruction to determine the nature and quantity of the substance being destroyed, the reports submitted by the State Governments give varying answers. There is no uniformity in the procedure adopted by those associated or in charge of the process of destruction. The reports suggest as if adequate steps are taken to prevent damage, loss, pilferage and tampering/substitution of the narcotic drugs and psychotropic substances from the point of search to the point of destruction but there is no uniformity or standard procedure prescribed or followed in that regard. Having said that we must mention that we are in these proceedings concerned with the following three issues only for the present: Seizure and sampling of the Narcotic drugs and Psychotropic substances their storage and their destruction Seizure and sampling:

11. Section 52-A (1) of the NDPS Act, 1985 empowers the Central Government to prescribe by a notification the procedure to be followed for seizure, storage and disposal of drugs and psychotropic substances. The Central Government have in exercise of that power issued Standing Order No. 1/89 which prescribes the procedure to be followed while conducting seizure of the contraband. Two subsequent standing orders one dated 10.05.2007 and the other dated 16.01.2015 deal with disposal and destruction of seized contraband and do not alter or add to the earlier standing order that prescribes the procedure for conducting seizures. Para 2.2 of the Standing Order 1/89 states that samples must be taken from the seized contrabands on the spot at the time of recovery itself. It reads:

“2.2. All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot.” Most of the States, however, claim that no samples are drawn at the time of seizure. Directorate of Revenue Intelligence is by far the only agency which claims that samples are drawn at the time of seizure, while Narcotics Control Bureau asserts that it does not do so. There is thus no uniform practice or procedure being followed by the States or the Central agencies in the matter of drawing of samples. This is, therefore, an area that needs to be suitably addressed in the light of the statutory provisions which ought to be strictly observed given the seriousness of the offences under the Act and the punishment prescribed by law in case the same are proved. We propose to deal with the issue no matter briefly in an attempt to remove the confusion that prevails regarding the true position as regards drawing of samples.

12. Section 52A as amended by Act 16 of 2014, deals with disposal of seized drugs and psychotropic substances. It reads:

"Section 52A: Disposal of seized narcotic drugs and psychotropic substances.

(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of-

> (a) certifying the correctness of the inventory so prepared; or
>
> (b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or
>
> (c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) When an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of [narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.]"

13. It is manifest from Section 52A (2)(c) *(supra)* that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn. Sub-section (3) of Section 52- A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-section (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure. Be that as it may, a conflict between the statutory provision governing taking of samples and the standing order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re- examine the matter and take suitable steps in the above direction.

14. Mr. Sinha, learned *Amicus*, argues that if an amendment of the Act stipulating that the samples be taken at the time of seizure is not possible, the least that ought to be done is to make it obligatory for the officer conducting the seizure to apply to the Magistrate for drawing of samples and certification etc. without any loss of time. The officer conducting the seizure is also obliged to report the act of seizure and the making of the application to the superior officer in writing so that there is a certain amount of accountability in the entire exercise, which as at present gets neglected for a variety of reasons. There is in our opinion no manner of doubt that the seizure of the contraband must be followed by an application for drawing of samples and certification as contemplated under the Act. There is equally no doubt that the process of making any such application and resultant sampling and certification cannot be left to the whims of the officers concerned. The scheme of the Act in general

and Section 52-A in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time frame into the provision, we are of the view that an application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by sub-section (3) of Section 52A (supra). We hope and trust that the High Courts will keep a close watch on the performance of the Magistrates in this regard and through the Magistrates on the agencies that are dealing with the menace of drugs which has taken alarming dimensions in this country partly because of the ineffective and lackadaisical enforcement of the laws and procedures and cavalier manner in which the agencies and at times Magistracy in this country addresses a problem of such serious dimensions.

**STORAGE:**

15. The Narcotic Drugs and Psychotropic Substances Act, 1985 does not make any special provision regulating storage of the contraband substances. All that Section 55 of the Act envisages is that the officer in charge of a Police Station shall take charge of and keep in safe custody the seized article pending orders of the Magistrate concerned. There is no provision nor was any such provision pointed out to us by learned counsel for the parties prescribing the nature of the storage facility to be used for storage of the contraband substances. Even so the importance of adequate storage facilities for safe deposit and storage of the contraband material has been recognised by the Government inasmuch as Standing Order No.1/89 has made specific provisions in regard to the same. Section III of the said Order deals with "Receipt of Drugs in Godowns and Procedure" which inter alia provides that all drugs shall invariably be stored in "safes and vaults" provided with double locking system and that the agencies of the Central and the State Governments may specifically designate their godowns for storage purposes and such godowns should be selected keeping in view their security angle, juxtaposition to courts etc. We may usefully extract paras 3.2 to 3.9 comprising Section III supra at this stage for ready reference:

"3.2. All drugs invariably be stored in safes and vaults provided with double-locking system. Agencies of the Central and State Governments, may specifically, designate their godowns for storage purposes. The godowns should be selected keeping in view their security angle, juxtaposition to courts etc.

3.3 Such godowns, as a matter of rule, shall be placed under the over-all supervision and charge of a Gazetted Officer of the respective enforcement agency, who shall exercise utmost care, circumspection and personal supervision as far as possible. Each seizing officer shall deposit the drugs fully packed and sealed in the godown within 48 hours of such seizure, with a forwarding memo indicating NDPS Crime No. as per Crime and Prosecution (C & P Register) under the new law, name of the accused, reference of test memo, description of the drugs, total no. of packages/containers etc.

3.4 The seizing officer, after obtaining an acknowledgement for such deposit in the format (Annexure- I), shall hand acknowledged over such to the Investigation Officer of the case along with the case dossiers for further proceedings.

3.5 The officer-in-charge of the godown, before accepting the deposit of drugs, shall ensure that the same are properly packed and sealed. He shall also arrange the packages/containers (case-wise and lot- wise) for quick retrieval etc.

3.6 The godown-in-charge is required to maintain a register wherein entries of receipt should be made as per format at Annexure-II.

3.7 It shall be incumbent upon the Inspecting Officers of the various Departments mentioned at Annexure II to make frequent visits to the godowns for ensuring adequate security and safety and for taking measures for timely disposal of drugs. The Inspecting Officers should record their remarks/observations against Col. 15 of the Format at Annexure-II.

3.8 The Heads of the respective enforcement agencies (both Central and State Governments) may prescribe such periodical reports and returns, as they may deem fit, to monitor the safe receipt, deposit, storage, accounting and disposal of seized drugs.

3.9 Since the early disposal of drugs assumes utmost consideration and importance, the enforcement agencies may obtain orders for pre-trial disposal of drugs and other articles (including conveyance, if any) by having recourse to the provisions of sub-section (2) of Section 52A of the Act."

It is evident from a plain reading of para 3.2 (supra) that storage of all drugs in safes and vaults has been made mandatory and that agencies of the Central and the State Governments have been permitted to designate their godowns for storage purposes. It is also clear that keeping in view the importance of protecting the seized drugs against theft, substitution or pilferage the Central Government has prescribed that such godowns shall be placed under the overall supervision and charge of a gazetted officer of the respective enforcement agencies who shall exercise utmost care, circumspection and personal supervision over the storage facilities. The provision contained in paras 3.5, 3.6, 3.7 and 3.8 also are aimed at ensuring that the godown or storage facility is satisfactory and those in- charge of the same are made accountable for its upkeep and effective management. Subsequent Notification including Notification dated 16th January, 2015 have in no way diluted the above requirement. The result is that there is a statutory framework which governs the storage of drugs and matters relating and incidental thereto. The question is whether the said statutory mechanism has been effectively implemented by the Central Government agencies and by the State Governments. Our answer regretfully is in the negative. It is evident from the responses received from the State and the Central Government agencies that no notified storage facility- godown has been established for storage of the seized drugs. Even the Narcotics Control Bureau has admitted to using mallkhana of the Courts for storage of the seized drugs in certain cases and in certain circumstances. The Customs and Central Excise Department and DRI have also stated that they have no designated storage facility for storage of contraband. The position in the States is no different. Due to non-availability of any designated godown-facility with adequate vaults and double lock system, the seized contraband is stored in police maalkhana which is a common storage facility for all kinds of goods and weapons seized in connection with all kinds of offences including those specified by the IPC. This is a totally unhappy and unacceptable situation to say the least. It is indeed unfortunate that even after a lapse of 26 years since Standing Order No. 1/89 was issued, the Central Government or its agencies and the State Governments have paid little or no attention to the need for providing adequate storage facilities of the kind stipulated in Standing Order No. 1/89 with the necessary supervisory and other controls prescribed in Section III of the said order. The result is that while Standing Order No. 1/89 very early in point of time recognized the need for providing adequate and effective storage facilities by the States and the Central Government agencies, the failure on the part of the Central Government and the State Governments to provide for such storage has defeated, if not completely negated the very purpose underlying the said notification and the provisions made therein. There is as on date hardly any credible protection against theft, replacement, pilferage and destruction of the seized drugs on account of the wholly unsatisfactory and unscientific method of storage of drugs and psychotropic substances which at times hit the headlines in newspapers on account of what is often described by the agencies as “big catch” worth crores of rupees in the international market. What has defied our understanding is the neglect on the part of the Central Government and its agencies and the State Governments in realizing the importance of the storage facilities and in providing for the same to prevent hazardous and at times lethal substances with great potential to do harm to those who use the same from being replaced, pilfered, stolen or siphoned out on account of very poor supervision, control or invigilation over such storage facilities. The learned amicus has in that view very rightly argued that there is a complete failure on the part of the Central Government and its agencies as also the State Governments in taking adequate steps for providing proper storage facilities with proper system of supervision and control over the drugs that are stored in the same. It was contended by Mr. Sinha, and in our opinion rightly so, that the cumulative effect of the reports submitted by the States and the Central agencies is that only 16% of the contrabands seized between 2002 to 2012 have been actually disposed of. What happened to the remaining 84% of such seizures is anybody‟s guess and if it is still lying in the police maalkhana, why has nobody ever bothered to apply for their disposal according to the procedure established by law is hard to fathom. The fact that the States and the Central Government agencies have accepted that no specific register is maintained by the State Police and that general maalkhana register alone is being maintained for the seized drugs shows the neglect of all concerned towards this important aspect and the cavalier manner in which the issue regarding storage of ceased drugs is approached by them. Absence of periodical inspection of the storage facility and the absence of any record suggesting that any inspection has been carried out by any of the officers shows a complete failure bordering criminal negligence by officers who are supposed to be taking action in this regard but have failed to do so.

16. The menace of drugs in this country, as observed earlier has alarming dimensions and proportions. Studies based on conferences and seminars have very often shown that the menace is deep rooted not only because drug lords have the money power and transnational links but also because the enforcement agencies like the Police and at times politicians in power help them in carrying on what is known to be a money spinning and flourishing trade. We only hope that the failure of the Central Government agencies and the State Governments in providing what is the bare minimum in terms of infrastructure required to arrest the growing menace and prevent pilferage and re-circulation of drugs back into the market is not on account of any unholy connect between the drug traffickers and the enforcement agencies. We would comfort ourselves by presuming them to be relatable only to apathy and indifference and hope that the system does not get corrupted by continued neglect lest all hopes are lost in the fight against drug menace which are eating into the vitals of our society. It is in that spirit that we deem it necessary to issue appropriate directions to the Central Government agencies and to the States to set up adequate storage facilities with effective supervisory and regulatory controls as prescribed in Notification No. 1/89.

**Disposal of Drugs:**

17. Section 52A as amended provides for disposal of the seized contraband in the manner stipulated by the Government under Clause 1 of that Section. Notification dated 16th January, 2015 has, in supersession of the earlier notification dated 10th May, 2007 not only stipulates that all drugs and psychotropic substances have to be disposed off but also identifies the officers who shall initiate action for disposal and the procedure to be followed for such disposal. Para 4 of the Notification inter alia, provides that officer-in-charge of the

Police Station shall within 30 days from the date of receipt of chemical analysis report of drugs, psychotropic substances or controlled substances apply to any Magistrate under Section 52A(2) in terms of Annexure 2 to the said Notification.

18. Sub-para (2) of Para (4) provides that after the Magistrate allows the application under sub-section (3) of Section 52A, the officer mentioned in sub para (1) of Para (4) shall preserve the certified inventory, photographs and samples drawn in the presence of the Magistrate as primary evidence for the case and submit details of seized items to the Chairman of the Drugs Disposal committee for a decision by the Committee on the question of disposal. The officer shall also send a copy of the details along with the items seized to the officer in-charge of the godown. Para (5) of the notification provides for constitution of the Drugs Disposal Committee while para (6) specifies the functions which the Committee shall perform. In para (7) the notification provides for procedure to be followed with regard to disposal of the seized items, while para (8) stipulates the quantity or the value upto which the Drugs Disposal Committee can order disposal of the seized items. In terms of proviso to para (8) if the consignments are larger in quantity or of higher value than those indicated in the table, the Drugs Disposal Committee is required to send its recommendations to the head of the department who shall then order their disposal by a high level Drugs Disposal Committee specially constituted for that purpose. Para (9) prescribes the mode of disposal of the drugs, while para (10) requires the Committee to intimate to the head of the Department the programme of destruction and vest the head of the Department with the power to conduct a surprise check or depute an officer to conduct such checks on destruction operation. Para (11) deals with certificate of destruction while paras (12) and (13) deal with details of sale to be entered into the godown register and communication to be sent to Narcotic Control Bureau.

19. There are two other aspects that need to be noted at this stage. The first is that notification dated 16th January, 2015 does not in terms supersede Standing Order No. 1/89 insofar as the said Standing Order also prescribes the procedure to be followed for disposal of Narcotic Drugs and Psychotropic and controlled Substances and Conveyances. Specific overriding of the earlier Standing Order would have avoided a certain amount of confusion which is evident on account of simultaneous presence of Standing Order No. 1/89 and notification dated 16th January, 2015. For instance in para (1) of Standing Order No. 1/89 only certain narcotic drugs and psychotropic substances enumerated therein could be disposed of while notification dated 16th January, 2015 provides for disposal of all Narcotic Drugs and Psychotropic and controlled Substances and Conveyances. Again in terms of Standing Order No. 1/89 the procedure for making of application was marginally different from the one stipulated in Notification dated 16th January, 2015 not only insofar as the procedure related to the officers who could make the application is concerned but also in relation to the procedure that the DDC would follow while directing disposal. In both the notifications are prescribed the limits upto which the disposal could be directed. In case of excess quantity the disposal under the Standing Order No. 1/89 had to be done in the presence of the head of the Department whereas according to notification of 2015 in the event of excess quantity or value the disposal has to be by a high level Drug Disposal Committee to be constituted by the head of the Department. Again while Standing Order No. 1/89 specifically required the approval of the Court for disposal, notification dated 16th January, 2015 does not stipulate such approval as a specific condition. Be that as it may, to the extent the subsequent notification prescribes a different procedure, we treat the earlier notification/Standing Order No. 1/89 to have been superseded. In order to avoid any confusion arising out of the continued presence of two notifications on the same subject we make it clear that disposal of Narcotic Drugs and Psychotropic and controlled Substances and

Conveyances shall be carried out in the following manner till such time the Government prescribes a different procedure for the same:

(1) Cases where the trial is concluded and proceedings in appeal/revision have all concluded finally:

In cases that stood finally concluded at the trial, appeal, revision and further appeals, if any, before 29th May, 1989 the continued storage of drugs and Narcotic Drugs and Psychotropic and controlled Substances and Conveyances is of no consequence not only because of the considerable lapse of time since the conclusion of the proceedings but also because the process of certification and disposal after verification and testing may be an idle formality. We say so because even if upon verification and further testing of the seized contraband in such already concluded cases it is found that the same is either replaced, stolen or pilferaged, it will be difficult if not impossible to fix the responsibility for such theft, replacement or pilferage at this distant point in time. That apart, the storage facility available with the States, in whatever satisfactory or unsatisfactory conditions the same exist, are reported to be over-flowing with seized contraband goods. It would, therefore, be just and proper to direct that the Drugs Disposal Committees of the States and the Central agencies shall take stock of all such seized contrabands and take steps for their disposal without any further verification, testing or sampling whatsoever. The concerned heads of the Department shall personally supervise the process of destruction of drugs so identified for disposal. To the extent the seized Drugs and Narcotic Substances continue to choke the storage facilities and tempt the unscrupulous to indulge in pilferage and theft for sale or circulation in the market, the disposal of the stocks will reduce the hazards that go with their continued storage and availability in the market.

(2) Drugs that are seized after May, 1989 and where the trial and appeal and revision have also been finally disposed of:

In this category of cases while the seizure may have taken place after the introduction of Section 52A in the Statute book the non-disposal of the drugs over a long period of time would also make it difficult to identify individuals who are responsible for pilferage, theft, replacement or such other mischief in connection with such seized contraband. The requirement of para 5.5 of standing order No. 1/89 for such drugs to be disposed of after getting the same tested will also be an exercise in futility and impractical at this distant point in time. Since the trials stand concluded and so also the proceedings in appeal, Revision etc. insistence upon sending the sample from such drugs for testing before the same are disposed of will be a fruitless exercise which can be dispensed with having regard to the totality of the circumstances and the conditions prevalent in the maalkhanas and the so called godowns and storage facilities. The DDCs shall accordingly take stock of all such Narcotic Drugs and Psychotropic and controlled Substances and Conveyances in relation to which the trial of the accused persons has finally concluded and the proceedings have attained finality at all levels in the judicial hierarchy. The DDCs shall then take steps to have such stock also destroyed under the direct supervision of the head of the Department concerned.

(3) cases in which the proceedings are still pending before the Courts at the level of trial court, appellate court or before the Supreme Court:

In such cases the heads of the Department concerned shall ensure that appropriate applications are moved by the officers competent to do so under Notification dated 16th January, 2015 before the Drugs Disposal Committees concerned and steps for disposal of such Narcotic Drugs and Psychotropic and controlled Substances and Conveyances taken without any further loss of time.

**20. To sum up we direct as under:**

No sooner the seizure of any Narcotic Drugs and Psychotropic and controlled Substances and Conveyances is effected, the same shall be forwarded to the officer in-charge of the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52A(ii) of the Act, which shall be allowed by the Magistrate as soon as may be required under Sub- Section 3 of Section 52A, as discussed by us in the body of this judgment under the heading „seizure and sampling". The sampling shall be done under the supervision of the magistrate as discussed in paras 13 and 14 of this order.

The Central Government and its agencies and so also the State Governments shall within six months from today take appropriate steps to set up storage facilities for the exclusive storage of seized Narcotic Drugs and Psychotropic and controlled Substances and Conveyances duly equipped with vaults and double locking system to prevent theft, pilferage or replacement of the seized drugs. The Central Government and the State Governments shall also designate an officer each for their respective storage facility and provide for other steps, measures as stipulated in Standing Order No. 1/89 to ensure proper security against theft, pilferage or replacement of the seized drugs.

The Central Government and the State Governments shall be free to set up a storage facility for each district in the States and depending upon the extent of seizure and store required, one storage facility for more than one districts.

Disposal of the seized drugs currently lying in the police maalkhans and other places used for storage shall be carried out by the DDCs concerned in terms of the directions issued by us in the body of this judgment under the heading "disposal of drugs".

21. Keeping in view the importance of the subject we request the Chief Justices of the High Courts concerned to appoint a Committee of Judges on the administrative side to supervise and monitor progress made by the respective States in regard to the compliance with the above directions and wherever necessary, to issue appropriate directions for a speedy action on the administrative and even on the judicial side in public interest wherever considered necessary.

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## TOPIC 5: THE PREVENTION OF CORRUPTION ACT, 1988

***Kalicharan Mahapatra* v. *State of Orissa***

AIR 1998 SC 2595; (1998) 6 SCC 411

Hon'ble Judges/Coram: M.M. Punchhi, C.J.I. and K.T. Thomas J.

**THOMAS.J.**

2. Appellant was an IPS Officer who reached upto the level of Superintendent of Police in the State Police Service, Orissa. Based on some sleuth information raid was conducted in the residence of the appellant on 12-5-1990 and a good amount of cash and jewellery were recovered. A case was registered against him under section 13(2) of the Prevention of Corruption Act, 1988 (for short "the Act"). On 31-12-1990 appellant retired from service but the investigation into the case continued. On 30-9-1992 the Vigilance Department submitted a charge-sheet against the appellant for the offence under Section 13(2) read with Section 13(1)(e) of the act.

4. The main contention of the appellant was that the legislature did not include a retired public servant within the purview of the Act and that there is no mention in the Act about a person who ceased to be a public servant. He invited our attention to Section 197 of the Code which envisages sanction for prosecution of public servants and pointed out that the section is now applicable to former public servants also by virtue of the specific words in the Section "any person who is or was......a public servant". According to the counsel since such words have not been employed in any of the provisions of the Act it could be launched or continued against a person who, though was a public servant at the time of commission of the offence, ceased to be so subsequently.

5. "Public servant" is defined in Section 2(c) of the Act. It does not include a person who ceased to be a public servant. Chapter III of the Act which contains provisions for offences and penalties does not point to any person who became a non-public servant, according to the counsel.

6. Among the provisions subsumed in the Chapter, Sections 8,9,12 and 15 deal with offences committed by persons who need not be public servants, though all such offences are intertwined with acts of public servants. The remaining provisions in the Chapter deal with offences committed by public servants. Section 7 of the Act contemplates offence committed by a person who expects to be public servant.

7. There is no indication anywhere in the above provisions that an offence committed by a public servant under the Act would vanish off from penal liability at the moment he demits

his office as public servant. His being a public servant is necessary when he commits the offence in order to make him liable under the Act. He cannot commit any such offence after he demits his office. If the interpretation now sought to be placed by the appellant is accepted it would lead to the absurd position that any public servant could commit the offences under the Act soon before retiring or demiting his office and thus avert any prosecution for it or that when a public servant is prosecuted for an offence under the Act he can secure an escape by protracting the trial till the date of superannuation.

8. Learned counsel for the appellant invited our attention to Section 19(1) of the Act which reads thus:

"19. Previous sanction necessary for prosecution.-

(1) No Court shall take cognizance of an offence punishable under sections 7,10,11,13 and 15 alleged to have been committed by a public servant, except with the previous sanction,-

> (a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the central government, of that Government;
>
> (b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government:
>
> (c) in the case of any other person, of the authority competent to remove him from his office."

9. It was contended that if the case does not fall under sub-clause (a) or sub-clause (b) it should necessarily fall under sub-clause (c) and otherwise no prosecution can lie for any offence under this Act. A person who ceased to be public servant cannot be removed from any office, and hence it is contended that he cannot be prosecuted for any offence under the Act.

10. Section 19(1) of the Act is in *para materia* with Section 6(1) of the preceding enactment i.e. Prevention of corruption Act, 1947 (the old Act). When a similar contention was raised before a three Judge Bench of this court regarding Section 6 of the Old Act in ***S.A. Venkataraman* v. *The State*** [1958 SCR 1040], that contention was repelled. It was held thus:

> "The words in s. 6(1) of the Act are clear enough and they must be given effect to. There is nothing in the words used in s.6(1) to even remotely suggest that previous sanction was necessary before a court could take cognizance of the offences mentioned therein in the case of a person who had ceased to be a public servant at

the time the court was asked to take cognizance, although he had been such a person at the time the offence was committed. It was suggested that cl.(c) in s.6(1) refers to persons other than those mentioned in cls. (a) and (b). The words 'is employed' are absent in this clause which would, therefore, apply to a person who had ceased to be a public servant though he was so at the time of the commission of the offence. Clause (c) cannot be construed in this way. The expressions 'in the case of a person' and 'in the case of any other person' must refer to a public servant having regard to the first paragraph of the sub-section. Clauses (a) and (b), therefore, servant who is employed in connection with the affairs of the Union or a State and is not removable from his office save by or with the sanction of the central Government or the State Government and cl.(c) would cover the case of any other public servant whom a competent authority could remove from his office. The more important words in cl.(c) are 'of the authority competent to remove him from his office'."

The same view was adopted by another three Judge Bench in ***C.R. Bansi*** **v.** ***State of Maharashtra*** [1971(3) SCR 236]. This was followed in ***State of West Bengal*** **v**. ***Manmal Bhutoria*** [1977 (3) SCR 758]. The Constitution Bench in ***K. Veeraswami*** **v.** ***Union of India*** [1991(3) SCC 655] upheld the view that no sanction is required to prosecute a public servant after retirement.

11. Learned counsel, however, contended that the legal position must be treated as changed under the Prevention of Corruption Act of 1988 since parliament has in the meanwhile changed the wording in section 197 of the Code. The provision provided a check against launching prosecution proceedings against a public servant on the accusation of having committed an offence while acting or purporting to act in the discharge of his official duty. For such prosecution sanction of the Government is made a condition precedent under Section 197 of the Code of criminal procedure 1898 (the old code). But such a sanction was not then necessary when a retired public servant was prosecuted. However, in the corresponding provision of the present code (Section 197) the necessity for previous sanction is made applicable to former public servants also by using the words "when any person who is or was a public servant". The contention here is that the earlier decisions of the court were rendered at a time when sanction for prosecution was not contemplated in Section 197 of the code as for a public servant who has retired from service. Hence, according to him those decisions are of no help to sustain the same view now.

12. In ***R. Balakrishna Pillai*** **v.** ***State of Kerala*** **[**1996 (1) SCC 478] learned Chief Justice Ahmadi has referred to the law commission's report which suggested an amendment to

Section 197 of the Code. The observation of the law commission in paragraph 15.123 of its Report reads thus:

> "It appears to us that protection under the section is needed as much after retirement of the public servant as before retirement. The protection afforded by the section would be rendered illusory if it were open to a private person harbouring a grievance to wait until the public servant ceased to hold his official position, and then to lodge a complaint. The ultimate justification for the protection conferred by Section 197 is the public interest in seeing that official acts do not lead to needless or vexatious prosecutions. It should be left to the Government to determine from that point of view the question of the expediency of prosecuting any public servant."

Their Lordships after referring to the above report have observed: "It was in pursuance of this observation that the expression 'is' to make the sanction applicable even in cases where a retired public servant is sought to be prosecuted."

13. It must be remembered that in spite of bringing such a significant change to section 197 of the Code in 1973, the Parliament was circumspect enough not to change the wording in Section 19 of the Act which deals with sanction. The reason is obvious. The sanction contemplated in Section 197 of the Code concerns a public servant who "is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty", whereas the offences contemplated in the P.C. Act are those which cannot be treated as acts either directly or even purportedly done in the discharge of his official duties. Parliament must have desired to maintain the distinction and hence the wording in the corresponding provision in the former P.C. Act was materially imported in the new P.C. Act, 1988 without any change in spite of the change made in section 197 of the Code.

14. The result of the above discussion is thus: A public servant who committed an offence mentioned in the Act, while he was a public servant when the court takes cognizance of the offence. But if he ceases to be a public servant by that time the court can take cognizance of offence without any such sanction. In other words, the public servant who committed the offence while he was public servant is liable to be prosecuted whether he continues in office or not at the time of trial or during the pendency of the prosecution.

15. The Special court and the High Court have, therefore, rightly repelled the preliminary objections of the appellant. Accordingly we dismiss this appeal.

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***K. Shanthamma* v. *State of Telangana***
Criminal Appeal No. 261 of 2022
(Arising out of SLP (Criminal) No. 7182 of 2019)

Ajay Rastogi, Abhay S. Oka, JJ.

6. The Special Court under the Prevention of Corruption Act, 1988 (for short 'the PC Act') convicted the appellant for the offences punishable under Sections 7 and 13 (1)(d) read with Section 13(2) of the PC Act. The order of conviction has been confirmed in appeal by the High Court of Telangana.

7. The prosecution case, in brief, is that the appellant was working as a Commercial Tax Officer at Secunderabad. PW1 2 Shri R.Seetharamulu @ Sharma is the complainant. PW1 was working at the relevant time as a supervisor in Farmers 'Service Co-operative Society (for short 'the said Society'). He was doing the work of filing returns of commercial tax of the said Society. Though the assessment of the said Society for the year 1997-98 was completed, till February 2000, the returns of the said Society for the year 1996-97 remained pending for assessment. The appellant issued a notice dated 14th February 2000 calling upon the said Society to produce cash book, general ledger, and purchase and sales statements for the year 1996-97. In February 2000, on the instructions of the Managing Director of the said Society, PW1 attended the office of the appellant along with the concerned record. After PW1 showed the documents to the appellant, she called PW4 Ahmed Moinuddin, ACTO, and directed him to verify the records. The case of PW1 is that on 24th February 2000, when he met the appellant, she demanded a bribe of Rs.3,000/- for issuing an assessment order. Though he showed unwillingness to pay the amount, for consecutive three days, the appellant reiterated the demand. On 29th February 2000, 3 PW1 requested the appellant to issue final assessment order. At that time, the appellant informed PW1 that unless the bribe as demanded is paid, she will not issue final assessment order. On 23rd March 2000, PW1 again approached the appellant when she scaled down her demand to Rs.2,000/-.

8. On 27th March 2000, PW1, along with the Managing Director of the said Society, visited the office of the Anti Corruption Bureau (ACB) at Hyderabad. PW1 filed a written complaint to the Deputy Superintendent of Police, ACB. Accordingly, a trap was laid. The allegation of the prosecution is that when PW1 tendered the tainted currency notes of Rs.2,000/- to the appellant in her office, instead of taking the amount directly, she took out a diary from her table drawer and opened the same. She asked the appellant to keep the currency notes in the diary. Accordingly, PW1 kept the notes in the said diary.

After closing the diary, the appellant kept the same in her table drawer. She locked the table drawer and kept the key in her handbag. After that, she called ACTO along with the record. The appellant signed on the last page of the ledger and cash book by putting the date as 26th 4 February 2000. Thereafter, the appellant directed the attender to affix an official rubber stamp below her signature. Accordingly, a rubber stamp was put by the attender. PW1 collected the general ledger and cash book from the attender, and after coming out of the office, he gave a signal to the trap party. Then the trap party entered the office of the appellant. When the appellant was questioned by the Deputy Superintendent of Police, she showed her right-hand side table drawer. She took out the key of the drawer from her handbag and opened the table drawer. She took out the diary from the drawer and placed the same on the table. After the diary was opened by the Deputy Superintendent of Police, he found a wad of currency notes. The numbers on the currency notes tallied with the serial numbers of currency notes described in pre-trap proceedings. After that, the seizure was carried out, and necessary formalities were completed. The Special Court found that the demand of bribe and acceptance of bribe was proved by the prosecution. The High Court has affirmed the said finding.

9. Mrs. V. Mohana, the learned Senior counsel appearing for the appellant, has taken us through the evidence of the prosecution witnesses. Her first submission is that the demand for a bribe by the appellant was not proved, and the evidence of PW1 to that effect is an improvement. Moreover, LW8, who was instructed by the Deputy Superintendent of Police of ACB to accompany PW1 inside the chamber of the appellant, did not enter the chamber along with the appellant. She pointed out that when the sodium carbonate test was conducted, the fingers of the appellant did not turn pink; therefore, it was not established that she accepted the currency notes. The alleged recovery of currency notes was shown from a diary. The recovery has not been proved. She pointed out the appellant's defence that PW1 deliberately kept the currency notes in the diary lying on her table when she went to the washroom before leaving her office. Her submission is that the recovery of currency notes has not been proved.

10. The learned Senior Counsel pointed out that the notice dated 26th February 2000 issued by the appellant was admittedly served on the said Society on 15th March 2000, which recorded that the net turnover of the said Society was nil in the year 1996-97. Therefore, the Society was not liable to pay any tax. Her submission is that this makes the entire prosecution case about the demand extremely doubtful. She pointed out that PW4, ACTO had a grudge against the appellant as, admittedly on 22nd March 2000, the appellant had served a memo on him pointing out the defaults committed by him in the discharge of his duties. The learned counsel relied upon various decisions of this Court

in support of the proposition that unless the demand and acceptance of bribe are established, a presumption under Section 20 of the PC Act will not apply. She urged that the demand and acceptance have not been proved. She also pointed out the case made out by the appellant in her statement under Section 313 of the Code of Criminal Procedure, 1973 (for short "the CrPC"). Her defence is that at about 5.30 pm on 27th March 2000, she went to the washroom attached to her chamber before leaving the office. When she came back, she found PW1 sitting in her room. She informed PW1 that the file was no longer pending with her. Afterward, she called PW4- ACTO through the attender and returned the account books to PW1. She pointed out that PW7, P.V.S.S.P. Raju, and PW8, U.V.S.Raju, the then Deputy Superintendent of Police, ACB, Hyderabad, accepted that there is a washroom attached to the chamber of the appellant. She submitted that both the Courts have committed an error by convicting the appellant.

11. Ms. Bina Madhavan, the learned counsel appearing for the respondent, supported the impugned Judgments. She pointed out that the evidence of PW1 on continuous demands made by the appellant is trustworthy as there is no reason for PW1 to make any false allegation or falsely implicate the appellant. She submitted that the tainted notes were found in the diary of the appellant, which was kept in her table drawer. She was in possession of keys of the table drawer. She herself opened the table drawer and produced the diary from her custody in which tainted notes were kept. Her submission is that though communication may have been served on the said Society on 15th March 2000 recording that the Society is not liable to pay any amount, the appellant did not issue the final assessment order. She pointed out that the demand made by the appellant was for issuing final assessment order, which was issued on the day of the trap. Her submission is that the Special Court and the High Court, after appreciating the evidence, have recorded findings of fact based on evidence on record. Her submission is that under Article 136 of the Constitution of India, no interference is called for.

12. We have given careful consideration to the submissions. We have perused the depositions of the prosecution witnesses. The offence under Section 7 of the PC Act relating to public servants taking bribe requires a demand of illegal gratification and the acceptance thereof. The proof of demand of bribe by a public servant and its acceptance by him is ***sine quo non*** for establishing the offence under Section 7 of the PC Act. In the case of ***P. Satyanarayana Murthy*** **v.** ***District Inspector of Police, State of Andhra Pradesh and another*** **(2015) 10 SCC 152**, this Court has summarised the well-settled law on the subject in paragraph 23 which reads thus:

> “23. The proof of demand of illegal gratification, thus, is the gravamen of the offence under Sections 7 and 13(1)(d)(i) and (ii) of the Act and in absence thereof, unmistakably the charge therefor, would fail. Mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, dehors the proof of demand, ipso facto, would thus not be sufficient to bring home the charge under these two sections of the Act. **As a corollary, failure of the prosecution to prove the demand for illegal gratification would be fatal and mere recovery of the amount from the person accused of the offence under Section 7 or 13 of the Act would not entail his conviction thereunder.”** **(e*mphasis added)***

8. The prosecution’s case is that the appellant had kept pending the return of commercial tax filed by the said Society for the year 1996-97. The appellant had issued a notice dated 14th February 2000 to the said Society calling upon the said Society to produce the record. Accordingly, the necessary books were produced by the said Society. The case made out by PW1 is that when he repeatedly visited the office of the appellant in February 2020, the demand of Rs.3,000/- by way of illegal gratification was made by the appellant for passing the assessment order. However, PW1, in his cross examination, accepted that the notice dated 26th February 10 2000 issued by the appellant was received by the said Society on 15th March 2000 in which it was mentioned that after verification of the books of accounts of the said Society, exemption from payment of commercial tax as claimed by the said Society was allowed. PW1 accepted that it was stated in the said notice that there was no necessity for the said Society to pay any commercial tax for the assessment year 1996-97. According to the case of the PW1, on 23rd March 2000, he visited the appellant’s office to request her to issue final assessment order. According to his case, at that time, initially, the appellant reiterated her demand of Rs.3,000/-. But she scaled it down to Rs.2,000/-. Admittedly, on 15th March 2000, the said Society was served with a notice informing the said Society that an exemption has been granted from payment of commercial tax to the said Society. Therefore, the said Society was not liable to pay any tax for the year 1996-97. The issue of the final assessment order was only a procedural formality. Therefore, the prosecution’s case about the demand of bribe made on 23rd March 2000 by the appellant appears to be highly doubtful.

9. PW1 described how the trap was laid. In the pre-trap mediator report, it has been recorded that LW8, Shri R.Hari Kishan, was to accompany PW1 - complainant at the time of offering the bribe. PW7 Shri P.V.S.S.P. Raju deposed that PW8 Shri U.V.S. Raju, the Deputy Superintendent of Police, ACB, had instructed LW8 to accompany PW1 -

complainant inside the chamber of the appellant. PW8 has accepted this fact by stating in the examination-in-chief that LW8 was asked to accompany PW1 and observe what transpires between the appellant and PW1. PW8, in his evidence, accepted that only PW1 entered the chamber of the appellant and LW8 waited outside the chamber. Even PW7 admitted in the cross-examination that when PW1 entered the appellant's chamber, LW8 remained outside in the corridor. Thus, LW8 was supposed to be an independent witness accompanying PW1. In breach of the directions issued to him by PW8, he did not accompany PW1 inside the chamber of the appellant, and he waited outside the chamber in the corridor. The prosecution offered no explanation why LW8 did not accompany PW1 inside the chamber of the appellant at the time of the trap.

10. Therefore, PW1 is the only witness to the alleged demand and acceptance. According to PW1, firstly, the demand was made of Rs.3,000/- by the appellant on 24th February 2000. Thereafter, continuously for three days, she reiterated the demand when he visited the appellant's office. Lastly, the appellant made the demand on 29th February 2000 and 23rd March 2000. On this aspect, he was cross-examined in detail by the learned Senior Counsel appearing for the appellant. His version about the demand and acceptance is relevant which reads thus :

> "In the vicinity of office of AO the jeep, in which we went there was stopped and I was asked to go into the office of AO and the trap party took vantage positions. Accordingly, I went inside the office of AO. I wished AO. <u>At that time apart from AO some other person was found in the office room of AO and he was talking to the AO. AO offered me a chair. After discussion with the AO the said other person left the room of AO. I informed AO that I brought the bribe amount as demanded by her and also asked her to issue the Final Assessment Orders. Then I took the said tainted currency notes from my shirt pocket and I was about to give the same to the AO and on which instead of taking the same amount directly by her with her hands she took out a diary from her table drawer, opened the diary and asked me to keep the said amount in the diary. Accordingly, I kept the amount in the said diary. She closed the said diary and again kept the 1same in her table drawer and locked the drawer and kept the keys in her hand bag which was hanging to her seat.</u> She pressed the calling bell and a lady attender came into the room of AO, then she instructed the lady attender to call concerned ACTO to her along with the concerned society records. Accordingly, ACTO came to AO along with record. After going through the Ledger and Cash Book etc., AO signed on the last page of the said Ledger and Cash Book mentioning 26.02.2000 below her signature in the said register though she signed on 27.03.2000 in my presence. AO directed her attender to affix official rubber stamp

below her signature in the Ledger and Cash Book and accordingly attender affixed the same. AO also signed on the office note of Final Assessment Orders at that time. Thereafter, I collected the General Ledger and Cash Book from the attender after affixing the said rubber stamp thereon and came out of the office of AO and relayed the pre-arranged signal to the trap party." (underlines supplied)

11. Thus, PW1 did not state that the appellant reiterated her demand at the time of trap. His version is that on his own, he told her that he had brought the amount. What is material is the cross-examination on this aspect. In the cross-examination, PW1 accepted that his version regarding the demand made by the appellant on various dates was an 14 improvement. The relevant part of the cross-examination of the appellant reads thus:

"I did not state to ACB Inspector in section 161 Cr.P.C. statement that on the evening of 24.02.2000 I met the AO and that she demanded the bribe. I did not mention in Ex.P3 complaint that continuously for 3 days after 24.02.2000 I met the AO and the AO reiterated her demand. I did not mention in Ex.P3 complaint that on 29.02.2000 I approached the AO and the AO demanded bribe of Rs.3,000/- and that unless I pay the said bribe amount she will not issue final assessment orders. I did not state in my Sec.164 statement before the Magistrate that 13.03.2000 to 16.03.2000 I was on leave and from 01.03.2000 to 12.03.2000, I was engaged in recovering the dues of the society. It is not true to suggest that I did not meet the AO continuously 3 days i.e., on 25th, 26th and 27th of February, 2000 and that 27.02.2000 is Sunday. It is not true to suggest that I did not meet the AO in the evening of 24.02.2000 and that AO did not demand any money from me. I did not state in my section 161 Cr.P.C. statement to Inspector of ACB that before I left the office of DSP on the date of trap I made a phone call enquiring about the availability of AO and the AO was in the office and informed me that she should be available in the office from 6.00 to 7.00 P.M. on that day so also in my Sec.164 Cr.P.C. I made such a phone call from the office of the DSP, ACB. I do not remember as to from which phone number I made phone call on that day. I cannot describe office telephone number of the AO. It is not true to suggest that I did not make any such phone call to AO and that she did not give any such reply to me. I did not state to ACB Inspector in 15 my 161 Cr.P.C. statement or to the Magistrate in my S.164 Cr.P.C. statement that I went inside the office of AO and I wished AO and at that time apart from AO some other person was found in the office room of AO and that he was talking to the AO and that the AO offered me a chair and that after discussion with the AO the said person left the room of AO

> and then I informed the AO that I brought the bribe amount. I did not state that said aspects to DSP during the post trap proceedings also. *(underlines supplied)*

12. Thus, the version of PW1 in his examination-in-chief about the demand made by the appellant from time to time is an improvement. As stated earlier, LW8 did not enter the appellant's chamber at the time of trap. There is no other evidence of the alleged demand. Thus, the evidence of PW1 about the demand for bribe by the appellant is not at all reliable. Hence, we conclude that the demand made by the appellant has not been conclusively proved.

13. PW2, Shri B.D.V. Ramakrishna had no personal knowledge about the demand. However, he accepted that on 15th March 2000, the said Society received a communication informing that the said Society need not pay any tax for the year 1996-97. PW3 Shri L. Madhusudhan was working as Godown Incharge with the said Society. He stated that on 15th 16 March 2000, when he visited the appellant's office, ACTO served the original notice dated 26th February 2000 in which it was mentioned that the Society was not liable to pay any tax. It is his version that when he met the appellant on the same day, she enquired whether he had brought the demanded amount of Rs.3,000/-. However, PW3 did not state that the appellant demanded the said amount for granting any favour to the said society.

14. PW 4 Ahmed Moinuddin was ACTO at the relevant time. He deposed that on 27th March 2000, the appellant instructed him to prepare the final assessment order, which was kept ready in the morning. He stated that he was called at 6 pm to the chamber of the appellant along with books of the said Society. At that time, PW1 was sitting there. He stated that the appellant subscribed her signature on a Register of the said Society and put the date as 26th February 2000 below it. He was not a witness to the alleged demand. However, in the cross-examination, he admitted that the appellant had served a memo dated 21st March 2000 to him alleging that he was careless in performing his duties.

15. Thus, this is a case where the demand of illegal gratification by the appellant was not proved by the prosecution. Thus, the demand which is *sine quo non* for establishing the offence under Section 7 was not established.

16. Hence, the impugned Judgments will have to be set aside. Accordingly, the appeal is allowed. The conviction of the appellant for the offences punishable under Sections 7 and 13(1)(d) read with Section 13(2) of the PC Act is set aside and the appellant is acquitted of the charges framed against her.

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## ***Kanwarjit Singh Kakkar* v. *State of Punjab***

(2011) 13 SCC 158

Hon'ble Judges/Coram: Markandey Katju and Gyan Sudha Misra, JJ.

**GYAN SUDHA MISRA, J.** These appeals by special leave had been filed against the order dated 2.4.2009 passed by the High Court of Punjab and Haryana at Chandigarh in two Criminal Miscellaneous Petitions Nos. M-15695/2007 and 23037-M of 2007 for quashing FIR No.13 dated 9.4.2003 which was registered for offences punishable under Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 and under Section 168 of the Indian Penal Code, at Police Station, Vigilance Bureau, Ludhiana but were dismissed as the learned single Judge declined to quash the proceedings against the appellants.

3. Relevant facts of the case under which the two cases were registered against the appellants disclose that the appellants are Medical Officers working with the State Government of Punjab against whom first information report was registered on the statement of informant/Raman Kumar alleging that he knew the appellants Dr. Rajinder Singh Chawla who was posted as Government Doctor at Dhanasu and Dr. Kanwarjit Singh Kakkar who also was serving as Government Doctor in Koom Kalan in District Ludhiana. It was alleged that both the doctors were doing private practice in the evening at Metro Road, Jamalpur and charged Rs.100/- in cash per patient as prescription fee. While Dr. Rajinder Singh Chawla checked the blood pressure of the patients Dr. Kanwarjit Singh issued prescription slips and medicines to the patients after checking them properly and charged Rs.100/- from each patient. The complainant Raman Kumar got medicines from the two doctors regarding his ailment and the doctor had charged Rs.100/- as professional fee from him. The informant further stated in his FIR that as per the government instructions, the government doctors are not supposed to charge any fee from the patients for checking them as the same was contrary to the government instructions. In view of this allegation, a raid was conducted at the premises of both these doctors and it was alleged that they could be nabbed doing private practice as they were trapped receiving Rs.100/- as consultation charges from the complainant. On the basis of this, the FIR was registered against the appellants under Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act and under Section 168, IPC which has registered at Police Station Vigilance Bureau, Ludhiana.

4. As already stated, the appellants felt aggrieved with the case registered against them and hence filed two Criminal Miscellaneous Petitions for quashing FIR No.13 dated April 9, 2003 before the High Court of Punjab and Haryana at Chandigarh wherein counsel for the

appellants contended that no offence is made out from the allegations in the FIR even as it stands. Substantiating the arguments, it was submitted that neither any medical instrument was recovered nor any apparatus or blood pressure checking machine or even thermometer was recovered from the residence of the appellants. It was explained that the complainant had come to the house of Dr. Kanwarjit Singh Kakkar which was under renovation and requested for treatment. It was added that on humanitarian grounds, the appellant just scribbled down the prescription on a plain paper which does not even bear the signature of the appellant.

5. It was also contended by learned counsel for the appellants that there is no law prohibiting government doctor from doing any act on humanitarian ground and the appellants could be alleged to have indulged in private practice only if they have deviated from the rules laid down by the State Government in this regard. In the alternative, it was contended that even if there is a deviation from these rules prohibiting private practice by government doctors contrary to the government instructions, it could warrant initiation of departmental proceeding and the punishment under the Punjab Civil Services (Punishment and Appeal) Rules and not under IPC much less under the Prevention of Corruption Act.

6. The learned single Judge, however, was pleased to dismiss the Criminal Miscellaneous Applications refusing to quash the FIR relying on Rule 15 of the Punjab Civil Medical (State Service Class I) Rules, 1972. As per Rule 15 of the said Rules, the Government may by general or special order permit any member of the Service to engage in private service on such terms and conditions and subject to such restrictions and limitations as may be specified in the order provided that such practice does not in any way interfere with the discharge of his or their official duties.

Rule 15 of the aforesaid Rules states as follows: "15. Private Practice: (1) The Government may, by general or special order, permit any member of the Service to engage in private practice on such terms and conditions and subject to such restrictions and limitations as may be specified in the order, provided that such practice does not in any way interfere with the discharge of his or their official duties. (2) Nothing contained herein shall be construed to limit or abridge the power of the Government at any time to withdraw such permission or to modify the terms on which it is granted without assigning any cause and without payment of compensation."

7. The relevant question which requires determination in these appeals is whether a government doctor alleged to be doing practice can be booked within the ambit and purview of the Prevention of Corruption Act or under Indian Penal Code, or the same would

amount to misconduct under the Punjab Civil Medical (State Service Class I) Rules, 1972 under Rule 15 which has been extracted above.

8. Learned counsel for the appellants submitted that the FIR was fit to be quashed as the case against the appellants who admittedly are government doctors could not have been registered under IPC or the Prevention of Corruption Act as Section 7 of the Prevention of Corruption Act explains `corruption' as acceptance or `demand' illegal gratification for doing any official act'. It was submitted that the demand/receipt of `fee' while doing private practice is not an illegal gratification for official duties. It was further submitted that even Section 13(1)(d) of the Prevention of Corruption Act does not apply since the main ingredients of this Section are: (a) the accused must be a public servant at the time of the offence; (b) he must have used corrupt or illegal means and obtain for himself or for any other person any valuable or pecuniary advantage; or (c) he must have abused his position as a public servant and have obtained for himself and for any other person any valuable thing or pecuniary advantage; or (d) while holding such office he must have obtained for any other person any valuable thing or pecuniary advantage without any motive.

9. Learned counsel for the respondents however repelled the arguments advanced in support of the plea of the appellants and it was contended that the provisions of Prevention of Corruption Act clearly apply as the government doctors in the State of Punjab have been specifically prohibited to carry private practice under the departmental rules and as such the act of the appellants were illegal.

10. By way of a rejoinder, it was again submitted by the counsel for the appellants that it is the `departmental rules' which bar private practice by a government doctor, hence action if any, is liable to be initiated/taken under the departmental rules which in the present case are the Punjab Civil Services (Punishment and Appeal) Rules. Rule 15 of the Punjab Civil Medical (State Service Class I) Rules, 1972 states that a government doctor may engage in practice with prior permission from the government.

11. On a critical analysis of the arguments advanced in the light of the definition of `corruption' defined under the Prevention of Corruption Act in its Preamble and under Section 7 of the Act, it clearly emerges that `corruption' is acceptance or demand of illegal gratification for doing an official act. We find no difficulty in accepting the submission and endorsing the view that the demand/receipt of fee while doing private practice by itself cannot be held to be an illegal gratification as the same obviously is the amount charged towards professional remuneration. It would be preposterous in our view to hold that if a doctor charges fee for extending medical help and is doing that by way of his professional duty, the same would amount to illegal gratification as that would be even against the plain

common sense. If however, for the sake of assumption, it were alleged that the doctor while doing private practice as Government doctor indulged in malpractice in any manner as for instance took money by way of illegal gratification for admitting the patients in the government hospital or any other offence of criminal nature like prescribing unnecessary surgery for the purpose of extracting money by way of professional fee and a host of other circumstances, the same obviously would be a clear case to be registered under the IPC as also under the Prevention of Corruption Act which is not the case in the instant matter. The FIR sought to be quashed, merely alleges that the appellants were indulging in private practice while holding the post of government doctor which restrained private practice, and charged professional fee after examining the patients.

12. We however, came across a case of ***Raj Rajendra Singh Seth alias R.R.S. Seth* v. *State of Jharkhand And Anr.*** [(2008) 11 SCC 681], wherein a doctor who had demanded Rs.500/- for giving proper medical treatment to the complainant's father resulted in conviction of the doctor as it was held in the circumstances of the said case that all the requisites for proving demand and acceptance of bribe were clearly established and the appellant therein was held to have been rightly convicted. However, the prosecution version in the said case disclosed that a written complaint was made to SP., CBI, Dhanbad that on 1.9.1985 one Raju Hadi, a Safai Mazdoor of the Pathological Laboratory Area -9, BCCL, Dhanbad, alleged therein that he had visited Chamodih Dispensary in connection with the treatment of his father who was examined by Dr. L.B. Sah who referred him to Central Hospital, Dhanbad. The complainant's father was admitted in the Central Hospital and the complainant visited his ailing father who complained of lack of proper treatment and he requested him to meet the doctor concerned. The complainant met Dr. R.R.S. Seth who was treating the complainant's father. It was alleged by the complainant therein that Dr. R.R.S. Seth demanded a sum of Rs. 500/- from the complainant for giving proper medical treatment to his father and also insisted that the amount be paid to the doctor on 1.9.1985. The doctor also told the complainant Raju Hadi that in case he was not available in the hospital, he should pay the amount to his ward boy Nag Narain who would pass the amount to him. Since the complainant Raju Hadi was not willing to make the payment of bribe amount to the doctor and ward boy, he lodged a complaint to the SP, CBI, Dhanbad for taking necessary action.

13. On the basis of this complaint, which was finally tried and resulted into conviction, came up to this Court (Supreme Court) challenging the conviction. This conviction was upheld by this Court as it was held therein that there is no case of the accused that the said amount was received by him as the amount which he was legally entitled to receive or collect from the complainant. It was, therefore, held that when the amount is found to have

been passed to the public servant, the burden is on public servant to establish that it was not by way of illegal gratification. This Court held that the said burden was not discharged by the accused and hence it was held that all the requisites for proving the demand and acceptance of bribe had been established and hence interference with the conviction and sentence was refused. The learned Judges in this matter had placed reliance on the case of ***B. Noha*** **v.** ***State of Kerala*** [(2006) 12 SCC 277], wherein this Court took notice of the observations made in the said case at paras 10 and 11 wherein it was observed as follows: "............When it is proved that there was voluntary and conscious acceptance of the money, there is no further burden cast on the prosecution to prove by direct evidence, the demand or motive. It has only to be deduced from the facts and circumstances obtained in the particular case." The learned Judges also took notice of the observations made by this Court in ***Madhukar Bhaskarrao Joshi*** **v.** ***State of Maharashtra*** [(2000) 8 SCC 571 at 577, para 12] wherein it was observed that "The premise to be established on the facts for drawing the presumption is that there was payment or acceptance of gratification. Once the said premise is established, the inference to be drawn is that the said gratification was accepted "as motive or reward" for doing or forbearing to do any official act. So the word "gratification" need not be stretched to mean reward because reward is the outcome of the presumption which the court has to draw on the factual premise that there was payment of gratification. ...............If acceptance of any valuable thing can help to draw the presumption that it was accepted as motive or reward for doing or forbearing to do official act, the word "gratification" must be treated in the context to mean any payment for giving satisfaction to the public servant who received it."

15. But the most important and vital check before a public servant can be booked under the Prevention of Corruption Act, the ingredients of the offence will have to be deduced from the facts and circumstances obtained in (2001) 1 SCC 691 the particular case. Judging the case of the appellants on this anvil, it is not difficult to notice that in the case at hand, the amount that is alleged to have been accepted even as per the allegation of the complainant/informant was not by way of gratification for doing any favour to the accused, but admittedly by way of professional fee for examining and treating the patients. However, no presumption can be drawn that it was accepted as motive or reward for doing or forbearing any official act so as to treat the receipt of professional fee as gratification much less illegal gratification. The professional fee even as per the case of the complainant/informant was that this act on the part of the accused appellants was, contrary to the government circular and the circular itself had a rider in it which stated that the government doctor could do private practice also, provided he sought permission from the government in this regard. Thus the conduct of the appellants who are alleged to have

indulged in private practice while holding the office of government doctor and hence public servant at the most, could be proceeded with for departmental proceeding under the Service Rules but in so far as making out of an offence either under the Prevention of Corruption Act or under the IPC, would be difficult to sustain as we have already observed that examination of patients by doctor and thereby charging professional fee, by itself, would not be an offence but as per the complaint, since the same was contrary to the government circular which instructed that private practice may be conducted by the government doctors in the State of Punjab provided permission was sought from the Government in this regard, the appellants were fit to be prosecuted. Thus, the appellants even as per the FIR as it stands, can be held to have violated only the government instructions which itself has not termed private practice as `corruption' under the Prevention of Corruption Act merely on account of charging fee as the same in any event was a professional fee which could not have been charged since the same was contrary to the government instructions.

Thus, if a particular professional discharges the duty of a doctor, that by itself is not an offence but becomes an offence by virtue of the fact that it contravenes a bar imposed by a circular or instruction of the government. In that event, the said act clearly would fall within the ambit of misconduct to be dealt with under the Service Rules but would not constitute criminal offence under the Prevention of Corruption Act.

16. In our considered view, the allegation even as per the FIR as it stands in the instant case, do not constitute an offence either under the Prevention of Corruption Act or under Section 168 of the IPC.

17. For the reasons discussed hereinbefore, we are pleased to set aside the impugned orders passed by the High Court and quash the FIR No.13 dated 9.4.2003 registered against the appellants as we hold that no prima facie case either under Section 168 of the IPC or Section 13 (1)(d) read with 13(2) of the Prevention of Corruption Act is made out under the prevailing facts and circumstances of the case and hence proceeding in the FIR registered against the appellants would ultimately result into abuse of the process of the Court as also huge wastage of time and energy of the Court. Hence, the respondent - State, although may be justified if it proceeds under the Punjab Civil Services (Punishment and Appeal) Rules against the appellants initiating action for misconduct, FIR registered against them under IPC or Prevention of Corruption Act is not fit to be sustained. Consequently, both the appeals are allowed.

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## *Abhay Singh Chautala* v. *C.B.I*

(2011) 7 SCC 141

Hon'ble Judges/Coram: V.S. Sirpurkar and T.S. Thakur, JJ.

**V.S. SIRPURKAR, J.** This judgment will dispose of two Special Leave Petitions, they being SLP (Crl.) No. 7384 of 2010 and SLP (Crl.) No. 7428 of 2010. While Abhay Singh Chautala is the petitioner in the first Special Leave Petition, the second one has been filed by Shri Ajay Singh Chautala. The question involved is identical in both the SLPs and hence they are being disposed of by a common judgment.

3. Whether the sanction under Section 19 of The Prevention of Corruption Act (hereinafter called "the Act" for short) was necessary against both the appellants and, therefore, whether the trial which is in progress against both of them, a valid trial, is common question. This question was raised before the Special Judge, CBI before whom the appellants are being tried for the offences under Sections 13(1) (e) and 13(2) of the Prevention of Corruption Act read with Section 109 of Indian Penal Code in separate trials.

4. Separate charge sheets were filed against both the appellants for the aforementioned offences by the CBI. It was alleged that both the accused while working as the Members of Legislative Assembly had accumulated wealth disproportionate to their known sources of income. The charges were filed on the basis of the investigations conducted by the CBI. This was necessitated on account of this Court's order in Writ Petition (Crl.) No.93 of 2003 directing the CBI to investigate the JBT Teachers Recruitment Scam. The offences were registered on 24.5.2004. The CBI conducted searches and seized incriminating documents which revealed that Shri Om Prakash Chautala and his family had acquired movable and immovable properties valued at Rs.1,467 crores. On this basis a Notification came to be issued on 22.2.2006 under Sections 5 and 6 of the DSPE Act with the consent of the Government of Haryana extending powers and jurisdiction under the DSPE Act to the State of Haryana for investigation of allegations regarding accumulation of disproportionate assets by Shri Om Prakash Chautala and his family members under the Prevention of Corruption Act. A regular First Information Report then came to be registered against Shri Om Prakash Chautala who is the father of both the appellants. It is found that in the check period of 7.6.2000 to 8.3.2005, appellant Abhay Singh Chautala had amassed wealth worth Rs.1,19,69,82,619/- which was 522.79 % of appellant Abhay Singh Chautala's known sources of income. During the check period, Shri Abhay Singh Chautala was the Member of the Legislative Assembly Haryana, Rori Constituency. Similarly, in case of Ajay Singh Chautala, his check period was taken as 24.5.1993 to 31.5.2006 during which he held the following offices :-

1. 2.3.90 to 15.12.92 MLA Vidhan Sabha, Rajasthan
2. 28.12.93 to 31.11.98 MLA Vidhan Sabha, Rajasthan
3. 10.10.99 to 6.2.2004 Member of Parliament, Lok Sabha from Bhiwani Constituency
4. 2.8.2004 to 03.11.09 Member of Parliament, Rajya Sabha

He was later on elected as MLA from Dabwali constituency, Haryana in November, 2009. It was found that he had accumulated wealth worth Rs.27,74,74,260/- which was 339.26 % of his known sources of income. It was on this basis that the charge sheet came to be filed.

5. Admittedly, there is no sanction to prosecute under Section 19 of the Act against both the appellants.

6. An objection regarding the absence of sanction was raised before the Special Judge, who in the common order dated 2.2.2010, held that the allegations in the charge sheet did not contain the allegation that the appellants had abused their current office as member of Legislative Assembly and, therefore, no sanction was necessary.

7. This order was challenged by way of a petition under Section 482 Cr.P.C. before the High Court. The High Court dismissed the said petition by the order dated 8.7.2010.

8. The learned Senior Counsel Shri Mukul Rohtagi as well as Shri U.U. Lalit arguing for the appellants, urged that on the day when the charges were framed or on any date when the cognizance was taken, both the appellants were admittedly public servants and, therefore, under the plain language of Section 19 (1) of the Act, the Court could not have taken cognizance unless there was a sanction. The learned senior counsel analyzed the whole Section closely and urged that in the absence of a sanction, the cognizance of the offences under the Prevention of Corruption Act could not have been taken. In this behalf, learned senior counsel further urged that the judgment of this Court in ***Prakash Singh Badal* v. *State of Punjab*** [2007 (1) SCC 1] as also the relied on judgment in ***RS Nayak* v. *A R. Antulay*** [1984 (2) SCC 183] were not correct and required reconsideration and urged for a reference to a Larger Bench.

9. Against these two judgments as also the judgments in ***Balakrishnan Ravi Menon* v. *Union of India*** [2007 (1) SCC 45], ***K. Karunakaran* v. *State of Kerala*** [2007 (1) SCC 59] and ***Habibullah Khan* v. *State of Orissa*** [1995 (2) SCC 437], this Court had clearly laid down the law and had held that where the public servant had abused the office which he held in the check period but had ceased to hold "that office" or was holding a different

office then a sanction would not be necessary. The learned Solicitor General appearing for the respondent urged that the law on the question of sanction was clear and the whole controversy was set at rest in ***AR Antulay's*** case (cited supra) which was followed throughout till date. The Solicitor General urged that the said position in law should not be disturbed in view of the principle of stare decisis. Extensive arguments were presented by both the parties requiring us now to consider the question.

S**ection 19 runs as under:- "19. Previous sanction necessary for prosecution**.

(1) No court shall take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction, - (a) In the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government; (b) In the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government; (c) In the case of any other person, of the authority competent to remove him from his office.

(2) Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section (1) should be given by the Central Government or the State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973- (a) No finding, sentence or order passed by a Special Judge shall be reversed or altered by a Court in appeal, confirmation or revision on the ground of the absence of, or any error, omission, irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has, in fact, been occasioned thereby; (b) No court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice; (c) No court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in inquiry, trial, appeal or other proceedings.

(4) In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the Court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings.

**Explanation:** For the purposes of this Section, - (a) Error includes competency of the authority to grant sanction; (b) A sanction required for prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority or with the sanction of a specified person or any requirement of a similar nature."

10. Shri Mukul Rohtagi and Shri U.U. Lalit, learned senior counsel appearing on behalf of the appellants, firstly pointed out that the plain meaning of Section 19(1) of the Act is that when any public servant is tried for the offences under the Act, a sanction is a must. The learned senior counsel were at pains to point out that in the absence of a sanction, no cognizance can be taken against the public servant under Sections 7, 10, 11, 13 and 15 of the Act and thus, a sanction is a must. The plain language of Section 19(1) cannot be disputed. The learned senior counsel argued that Section 19(1) of the Act creates a complete embargo against taking cognizance of the offences mentioned in that Section against the accused who is a public servant. The learned senior counsel also argued that it is only when the question arises as to which authority should grant a sanction that the sub-Section (2) will have to be taken recourse to. However, where there is no duty of any such nature, the Court will be duty bound to ask for the sanction before it takes cognizance of the offences mentioned under this Section.

11. As against this, Shri Gopal Subramanium, learned Solicitor General, pointed out the decision in ***RS Nayak* v. *A R. Antulay*** (cited supra) and the subsequent decisions in ***Balakrishnan Ravi Menon* v. *Union of India*** (cited supra), ***K. Karunakaran* v. *State of Kerala*** (cited supra), ***Habibullah Khan* v. *State of Orissa*** (cited supra) and lastly, in ***Prakash Singh Badal* v. *State of Punjab*** (cited supra).

12. Shri Mukul Rohtagi and Shri U.U. Lalit, learned senior counsel appearing on behalf of the appellants, have no quarrel with the proposition that in all the above cases, it is specifically held that where the alleged misconduct is in some different capacity than the one which is held at the time of taking cognizance, there will be no necessity to take the sanction.

13. To get over this obvious difficulty, the learned senior counsel appearing on behalf of the appellants contended that the basic decision in ***RS Nayak* v. *A R. Antulay*** (cited supra) was not correctly decided, inasmuch as the decision did not consider the plain language of the Section which is clear and without any ambiguity. The learned senior counsel contended that where the language is clear and admits of no ambiguity, the Court cannot reject the plain meaning emanating out of the provision. Further, the learned senior counsel pointed out that even in the judgments following the judgment in ***RS Nayak* v. *A R. Antulay*** (cited supra) upto the judgment in the case of ***Prakash Singh Badal* v. *State of Punjab***

(cited supra) and even thereafter, the learned Judges have not considered the plain meaning and on that count, those judgments also do not present correct law and require reconsideration. Another substantial challenge to the judgment in ***RS Nayak* v. *A R. Antulay*** (cited supra) is on account of the fact that the law declared to the above effect in ***RS Nayak* v. *A R. Antulay*** (cited supra) was obiter dictum, inasmuch as it was not necessary for the Court to decide the question, more particularly, decided by the Courts in paragraphs 23 to 26. The learned senior counsel pointed out that, firstly, the Court in ***RS Nayak* v. *A R. Antulay*** (cited supra), came to the conclusion that Shri Antulay who was a Member of the Legislative Assembly, was not a public servant. It is contended that once that finding was arrived at, there was no question of further deciding as to whether, the accused being a public servant in a different capacity, the law required that there had to be a sanction before the Court could take the cognizance. Learned senior counsel further argued that where the Court makes an observation which is either not necessary for the decision of the court or does not relate to the material facts in issue, such observation must be held as obiter dictum. The learned senior counsel also argued that the whole class of public servant would be deprived of the protection if the decision in ***RS Nayak* v. *A R. Antulay*** (cited supra) is followed.

For this purpose, learned senior counsel argued that in such case, public servants would be exposed to frivolous prosecutions which would have disastrous effects on their service careers, though they are required to be insulated against such false, frivolous and motivated complaints of wrong doing. It is then argued that the decision in ***K. Veeraswami* v. *Union of India*** [1991 (3) SCC 655] has in fact removed the very foundation of the decision in ***RS Nayak* v. *A. R. Antulay*** (cited supra) in respect of the sanction. It is also argued that, in effect, the decision in ***RS Nayak* v. *A R. Antulay*** (cited supra) has added further proviso to the effect "provided that nothing in this sub-Section shall apply to a case where at the time of cognizance, the public servant is holding a different post with a different removing authority from the one in which the offence is alleged to have been committed". It is argued that such an addition would be clearly impermissible as it would negate the very foundation of criminal law which requires a strict interpretation in favour of the accused and not an interpretation which results into deprivation of the accused of his statutory rights.

23. We do not think the finding given in ***Antulay's*** case (cited supra) was in any manner obiter and requires reconsideration. We, therefore, reject the argument on that count.

24. There is one more reason, though not a major one, for not disturbing the law settled in ***Antulay's*** case (cited supra). That decision has stood the test of time for last over 25 years and it is trite that going as per the maxim *stare decisis et non quieta movere*, it would be

better to stand by that decision and not to disturb what is settled. This rule of interpretation was approved of by Lord Coke who suggested - "those things which have been so often adjudged ought to rest in peace".

25. This leaves us with the other contention raised by learned Senior Counsel Shri Mukul Rohtagi as well as Shri U.U. Lalit arguing for the appellants. The learned senior counsel contended that the decision in ***Antulay's*** case (cited supra) is hit by the doctrine of *per incuriam*. We feel that the resultant argument on the part of the learned senior counsel is not correct. In support of their argument, the learned senior counsel contended that in ***Antulay's*** case (cited supra), Section 6(2) of the 1947 Act, as it therein existed, was ignored. In short, the argument was that Section 6(2) which is *pari materia* with Section 19(2) of the Act provides that in case of doubt as to which authority should give the sanction, the time when the offence is alleged to have been committed is relevant. The argument further goes on to suggest that if that is so, then the Act expressly contemplates that a public servant may be holding office in a different capacity from the one that he was holding when the offence is alleged to have been committed at the time when cognizance is taken so as to cause doubt about the sanctioning authority. Thus, there would be necessity of a sanction on the date of cognizance and, therefore, in ignoring this aspect, the decision in ***Antulay's*** case (cited supra) has suffered an illegality. Same is the argument in the present case.

26. This argument is basically incorrect. In ***Antulay's*** case (cited supra), it is not as if Section 6(2) of the 1947 Act as it then existed, was ignored or was not referred to, but the Constitution Bench had very specifically made a reference to and had interpreted Section 6 as a whole. Therefore, it cannot be said that the Constitution Bench had totally ignored the provisions of Section 6 and more particularly, Section 6(2). Once the Court had held that if the public servant had abused a particular office and was not holding that office on the date of taking cognizance, there would be no necessity to obtain sanction. It was obvious that it was not necessary for the Court to go up to Section 6(2) as in that case, there would be no question of doubt about the sanctioning authority. In our opinion also, Section 6(2) of the 1947 Act, which is *pari materia* to Section 19(2), does not contemplate a situation as is tried to be argued by the learned senior counsel. We do not agree with the proposition that the Act expressly contemplates that a public servant may be holding office in a different capacity from the one that he was holding when the offence is alleged to have been committed at the time when cognizance is taken. That is not, in our opinion, the eventuality contemplated in Section 6(2) or Section 19(2), as the case may be. In ***Antulay's*** case (cited supra), the Court went on to hold that where a public servant holds a different capacity altogether from the one which he is alleged to have abused, there would be no

necessity of sanction at all. This view was taken on the specific interpretation of Section 6 generally and more particularly, Section 6(1)(c), which is *pari materia* to Section 19(1)(c) of the Act. Once it was held that there was no necessity of sanction at all, there would be no question of there being any doubt arising about the sanctioning authority. The doubt expressed in Section 19(2), in our opinion, is not a pointer to suggest that a public servant may have abused any particular office, but when he occupies any other office subsequently, then the sanction is a must. That will be the incorrect reading of the Section. The Section simply contemplates a situation where there is a genuine doubt as to whether sanctioning authority should be the Central Government or the State Government or any authority competent to remove him. The words in Section 19(2) are to be read in conjunction with Sections 19(1)(a), 19(1)(b) and 19(1)(c). These clauses only fix the sanctioning authority to be the authority which is capable of "removing a public servant". Therefore, in our opinion, the argument based on the language of Section 6(2) or as the case may be, Section 19(2), is not correct.

27. It is in the light of this that the Court did not have to specify as to under what circumstances would a duty arise for locating the authority to give sanction. The doubt could arise in more manners than one and in more situations than one, but to base the interpretation of Section 19(1) of the Act on the basis of Section 19(2) would be putting the cart before the horse. The two Sections would have to be interpreted in a rational manner. Once the interpretation is that the prosecution of a public servant holding a different capacity than the one which he is alleged to have abused, there is no question of going to Section 6(2) / 19(2) at all in which case there will be no question of any doubt. It will be seen that this interpretation of Section 6(1) or, as the case may be, Section 19(1), is on the basis of the expression "office" in three sub-clauses of Section 6(1), or the case may be, Section 19(1). For all these reasons, therefore, we are not persuaded to accept the contention that ***Antulay's*** case (cited supra) was decided *per incuriam* of Section 6(2). In our opinion, the decision in ***K. Veeraswami* v. *Union of India*** (cited supra) is not apposite nor does it support the contention raised by the learned senior counsel as regards ***Antulay's*** case (cited supra) being *per incuriam* of Section 6(2).

28. The learned Senior Counsel Shri Mukul Rohtagi as well as Shri U.U. Lalit arguing for the appellants, in support of their argument that ***Antulay's*** case (cited supra) require reconsideration, urged that that interpretation deprives the entire class of public servants covered by the clear words of Section 6(1)/19(1) of a valuable protection. It was further urged that such interpretation would have a disastrous effect on the careers of the public servants and the object of law to insulate a public servant from false, frivolous, malicious and motivated complaints of wrong doing would be defeated. It was also urged that such

interpretation would amount to re-writing of Section 19(1) and as if a proviso would be added to Section 19(1) to the following effect:- "Provided that nothing in this sub-Section shall apply to a case where at the time of cognizance, the public servant is holding a different post with a different removing authority from the one in which the offence is alleged to have been committed."

Lastly, it was urged that such an interpretation would negate the very foundation of criminal law, which requires a strict interpretation in favour of the accused. Most of these questions are already answered, firstly, in ***Antulay's*** case (cited supra) and secondly, in ***Prakash Singh Badal*** **v**. ***State of Punjab*** (cited supra). Therefore, we need not dilate on them. We specifically reject these arguments on the basis of ***Antulay's*** case (cited supra) itself which has been relied upon in ***Prakash Singh Badal*** **v.** ***State of Punjab*** (cited supra). The argument regarding the addition of the proviso must also fall as the language of the suggested proviso contemplates a different "post" and not the "office", which are entirely different concepts. That is apart from the fact that the interpretation regarding the abuse of a particular office and there being a direct relationship between a public servant and the office that he has abused, has already been approved of in ***Antulay's*** case (cited supra) and the other cases following ***Antulay's*** case (cited supra) including ***Prakash Singh Badal*** **v.** ***State of Punjab*** (cited supra). We, therefore, reject all these arguments.

29. It was also urged that a literal interpretation is a must, particularly, to sub- Section (1) of Section 19. That argument also must fall as sub-Section (1) of Section 19 has to be read with in tune with and in light of sub-Sections (a), (b) and (c) thereof. We, therefore, reject the theory of *litera regis* while interpreting Section 19(1). On the same lines, we reject the argument based on the word "is" in sub-Sections (a), (b) and (c). It is true that the Section operates in *praesenti*; however, the Section contemplates a person who continues to be a public servant on the date of taking cognizance. However, as per the interpretation, it excludes a person who has abused some other office than the one which he is holding on the date of taking cognizance, by necessary implication. Once that is clear, the necessity of the literal interpretation would not be there in the present case. We specifically hold that giving the literal interpretation to the Section would lead to absurdity and some unwanted results, as had already been pointed out in ***Antulay's*** case (cited supra).

30. Another novel argument was advanced basing on the language of Sections 19(1) and (2). It was pointed out that two different terms were used in the whole Section, one term being "public servant" and the other being "a person". It was, therefore, urged that since the two different terms were used by the Legislature, they could not connote the same meaning and they had to be read differently. The precise argument was that the term "public

servant" in relation to the commission of an offence connotes the time period of the past whereas the term "a person" in relation to the sanction connotes the time period of the present. Therefore, it was urged that since the two terms are not synonymous and convey different meanings in respect of time/status of the office, the term "public servant" should mean the "past office" while "person" should mean the "present status/present office". While we do agree that the different terms used in one provision would have to be given different meaning, we do not accept the argument that by accepting the interpretation of Section 19(1) in ***Antulay's*** case, the two terms referred to above get the same meaning. We also do not see how this argument helps the present accused. The term "public servant" is used in Section 19(1) as Sections 7, 10, 1 and 13 which are essentially the offences to be committed by public servants only. Section 15 is the attempt by a public servant to commit offence referred to in Section 13(1)(c) or 13(1)(d). Section 19(1) speaks about the cognizance of an offence committed by a public servant. It is not a cognizance of the public servant. The Court takes cognizance of the offence, and not the accused, meaning, the Court decides to consider the fact of somebody having committed that offence. In case of this Act, such accused is only a public servant. Then comes the next stage that such cognizance cannot be taken unless there is a previous sanction given. The sanction is in respect of the accused who essentially is a public servant. The use of the term "a person" in sub-Sections (a), (b) and (c) only denotes an "accused". An "accused" means who is employed either with the State Government or with the Central Government or in case of any other person, who is a public servant but not employed with either the State Government or the Central Government. It is only "a person" who is employed or it is only "a person" who is prosecuted. His capacity as a "public servant" may be different but he is essentially "a person" - an accused person, because the Section operates essentially *qua an* accused person. It is not a "public servant" who is employed; it is essentially "a person" and after being employed, he becomes a "public servant" because of his position. It is, therefore, that the term "a person" is used in clauses (a), (b) and (c). The key words in these three clauses are "not removable from his office save by or with the sanction of ....". It will be again seen that the offences under Sections 7, 10, 11 and 13 are essentially committed by those persons who are "public servants". Again, when it comes to the removal, it is not a removal of his role as a "public servant", it is removal of "a person" himself who is acting as a "public servant". Once the Section is read in this manner, then there is no question of assigning the same meaning to two different terms in the Section. We reject this argument.

31. Another novel argument was raised on the basis of the definition of "public servant" as given in Section 2(c) of the Act. The argument is based more particularly on clause 2(c)(vi) which provides that an arbitrator, on account of his position as such, is public servant. The

argument is that some persons, as contemplated in Sections 2(c)(vii), (viii), (ix) and (x), may adorn the character of a public servant only for a limited time and if after renouncing that character of a public servant on account of lapse of time or non-continuation of their office they are to be tried for the abuse on their part of the offices that they held, then it would be a very hazardous situation. We do not think so. If the person concerned at the time when he is to be tried is not a public servant, then there will be no necessity of a sanction at all. Section 19(1) is very clear on that issue. We do not see how it will cause any hazardous situation.

32. Same argument was tried to be raised on the question of plurality of the offices held by the public servant and the doubt arising as to who would be the sanctioning authority in such case. In the earlier part of the judgment, we have already explained the concept of doubt which is contemplated in the Act, more particularly in Section 19(2). The law is very clear in that respect. The concept of `doubt' or `plurality of office' cannot be used to arrive at a conclusion that on that basis, the interpretation of Section 19(1) would be different from that given in ***Antulay's*** case (cited supra) or ***Prakash Singh Badal*** **v**. ***State of Punjab*** (cited supra). We have already explained the situation that merely because a concept of doubt is contemplated in Section 19(2), it cannot mean that the public servant who has abused some other office than the one he is holding could not be tried without a sanction. The learned senior counsel tried to support their argument on the basis of the theory of "legal fiction". We do not see as to how the theory of "legal fiction" can work in this case. It may be that the appellants in this case held more than one offices during the check period which they are alleged to have abused; however, there will be no question of any doubt if on the date when the cognizance is taken, they are not continuing to hold that very office. The relevant time, is the date on which the cognizance is taken. If on that date, the appellant is not a public servant, there will be no question of any sanction. If he continues to be a public servant but in a different capacity or holding a different office than the one which is alleged to have been abused, still there will be no question of sanction and in that case, there will also be no question of any doubt arising because the doubt can arise only when the sanction is necessary. In case of the present appellants, there was no question of there being any doubt because basically there was no question of the appellants' getting any protection by a sanction.

33. We do not, therefore, agree with learned Senior Counsel Shri Mukul Rohtagi as well as Shri U.U. Lalit arguing for the appellants, that the decision in Antulay's case (cited supra) and the subsequent decisions require any reconsideration for the reasons argued before us. Even on merits, there is no necessity of reconsidering the relevant ratio laid down in Antulay's case (cited supra).

34. Thus, we are of the clear view that the High Court was absolutely right to hold that the appellants in both the appeals had abused entirely different office or offices than the one which they were holding on the date on which cognizance was taken and, therefore, there was no necessity of sanction under Section 19 of the Act. The appeals are without any merit and are dismissed.

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## <u>TOPIC 5: THE PREVENTION OF MONEY-LAUNDERING ACT, 2002</u>

***Binod Kumar* v. *State of Jharkhand & Ors***
(2011) 11 SCC 463

Hon'ble Judges/Coram: Dalveer Bhandari and Deepak Verma, JJ.

**<u>DALVEER BHANDARI, J.</u>** 3. In the impugned judgment, it is mentioned that the basic allegation is amassing of illicit wealth by various former Ministers, including a former Chief Minister of the State. The money alleged to have been so earned is of unprecedented amounts. However, there is no clear allegation so far about its laundering in the sense mentioned above, but there is an allegation of its investment in property, shares etc. not only in India but also abroad.

4. The basic investigation requires determining whether money has been acquired by an abuse of the official position amounting to an offence under the Prevention of Corruption Act and under the Indian Penal Code, the persons by whom this has been done, the amount which has been so earned and places where it has been invested.

5. The amount is alleged to run into several hundred crores. The investigations done so far allege that the amount unearthed so far in one case is about one and a half crore and in another case is about six and a half crores, which would appear to be merely the tip of the iceberg. The investments having been made not only in various States of the country outside the State of Jharkhand, but also in other countries means that the investigation called for is not only multi-state but also multi-national.

6. The matter on the face of it requires a systematic, scientific and analysed investigation by an expert investigating agency, like the Central Bureau of Investigation. It is incorporated in the affidavit that 32 companies have to be investigated and the money acquired by illegal means being invested in Bangkok (Thailand), Dubai (UAE), Jakarta (Indonesia), Sweden and Libya. It is also mentioned that there are several companies in other countries in which there are huge investments by the accused or with the help of their accomplices in foreign countries. The list of countries and companies indicate prima facie that the amount involved could not be a mere few crores, but would be nearer a few hundred crores.

7. The High Court in the impugned judgment has also mentioned that it is neither possible nor desirable at this stage to give a positive finding about how much of the crime proceeds have been ‘projected as untainted’. Therefore, there is an area of overlap and the same

cannot be allowed to form a tool in the hands of the accused to scuttle the investigation. Looking to the gravity and magnitude of the matter, after hearing learned counsel for the parties, the Division Bench of the High Court referred the matter to the Central Bureau of Investigation. The High Court also observed that the Central Government should exercise the powers under Section 45(1A) of the Prevention of Money Laundering Act, 2002 (for short 'the PML Act') for transferring investigation from the Enforcement Directorate to the CBI. If such an order is not passed by the Central Government, any material found by the CBI during investigation, which leads to an inference of money laundering within the PML Act will be shared by the CBI with the Enforcement Directorate from time to time, to enable the Enforcement Directorate to take such action, as may be necessary.

8. The appellant, aggrieved by the said judgment preferred this appeal before this court. Shri K.K. Venugopal, the learned senior counsel appearing on behalf of the appellant formulated following substantial questions of law concerning the impugned judgment and the interpretation of the PML Act:

> "1. Whether the PML Act is a self-occupied Code while the Act constituting the CBI is limited?
>
> 2. Whether, in light of Section 45(1A) read with Sections 43 and 44 of the PML Act, the CBI has any authority to investigate offences which are the sole domain of the Enforcement Directorate?
>
> 3. Whether the High Court was right in brushing aside all the allegations against the PIL and directing investigation by the CBI?"

9. According to the learned counsel for the appellant, the offence of money laundering, under section 4 of the PML Act may be investigated only by the Enforcement Directorate and tried only by the Special Court under the Act.

10. Mr. Venugopal submitted that the PML Act is a self-contained Code while the Act constituting the CBI is limited.

11. Mr. Venugopal further submitted that the PML Act was enacted pursuant to the Political Declaration adopted by the Special Session of the United Nations General Assembly on 8th to 10th June, 1998, which called upon member States to adopt national money-laundering legislation and programmes. (Preamble to the PML Act).

12. Learned counsel for the appellant submitted that the Delhi Special Police Establishment Act, 1946, 1946 ('DPSE Act') is limited to investigating offences in Delhi and the Union Territories.

13. Mr. Venugopal submitted that the PML Act was enacted pursuant to Article 253 of the Constitution and would prevail over any inconsistent State enactment. Reliance has been placed on ***Maganbhai Ishwarbhai Patel Etc.*** **v.** ***Union of India and Another*** [(1970) 3 SCC 400 at para 81] and ***S. Jagannath*** **v.** ***Union of India and Others*** [(1997) 2 SCC 87 at para 48]. This is however not the case with the DPSE Act.

14. Learned counsel for the appellant also submitted that the PML Act is a special legislation enacted by Parliament and not only sets out the 'Offences' (Chapter II) but also the 'manner of investigation', attachment and adjudication (Chapter III), the power to summon, search, seizure and arrest (Chapter V), establishment of Tribunals (Chapter VI), Special Courts (Chapter VII), Authorities and their powers (Chapter VIII) and International arrangements (Chapter IX).

15. Mr. Venugopal contended that the Act establishes a specialized agency which consists of Police Officials, Revenue Officials, Income Tax Officials and various specialized officials drawn from various departments. It also empowers the Enforcement Directorate under Section 54 to call on assistance of officials from: (a) Customs and Excise Department; (b) Under the NDPS Act; (c) Income Tax; (d) Stock Exchange; (e) RBI; (f) Police; (g) Under FEMA; (h) SEBI; or (i) Any Body Corporate established under an Act or by the Central Government.

16. Learned counsel for the appellant also contended that the CBI is comprised only of the police officers and does not have the expertise or wherewithal to deal with the offences under the PML Act. In addition, as specifically defined in Section 55 (c) of the PML Act, the ED is empowered internationally to trace the proceeds of crime, with great freedom accorded to the ED when the nexus is established with a contracting state. The CBI does not possess such an advantage.

17. Mr. Venugopal placed reliance on the judgment of this Court in ***Central Bureau of Investigation*** **v.** ***State of Rajasthan & Others*** [(1996) 9 SCC 735] where the identical issue arose of the CBI seeking to investigate offences under the FERA, which was the sole domain of the ED, the Court held as follows:

(i) The officers of the ED are empowered to exercise the powers under the FERA as per Sections 3 & 4, and no other authority has been empowered except as the Central Government may empower from time to time.

(ii) FERA is a special and a central legislation enacted later in time than the DSPE Act, and Section 4(2) of the Cr.P.C. makes it clear that only in the absence of any provision in any other law relating to investigation will a member of the police force be authorized to investigate the offence.

(iii) The FERA Act is a complete code in itself.

(iv) As the allegations in the case related to FERA offences outside India, and the DSPE Act under Sections 1 and 2 are authorized only to investigate offences inside India, the DSPE member is "not clothed with the authority to investigate offences committed outside India".

18. Learned counsel further submitted that in addition to the above, this court in ***Enforcement Directorate & Another* v. *M. Samba Siva Rao & Others*** [(2000) 5 SCC 431 at para 5] reiterated that the provisions of the FERA constitute a complete code. The provisions of the PML Act are identical, and in some ways more wide-ranging.

19. Learned counsel for the appellant further submitted that as the allegations in the complaint against the appellant relate to so-called national and trans-national offences, the only authority which is legally and factually equipped to investigate the offences is the Enforcement Directorate.

20. Mr. Venugopal further submitted that in the light of Section 45 (1A) read with sections 43 and 44 of the PML Act, the CBI has no authority to investigate the offences which are the sole domain of the Enforcement Directorate.

21. Mr. Venugopal referred various sections of the PML Act to demonstrate that only the Enforcement Directorate can investigate the matter. He also submitted that the conduct of investigation by the CBI is therefore contrary to both the intent of the Legislature as well as the Executive and further if the plea of CBI is put to test it leads to absurdity. It is submitted that in order to convict a person of an offence punishable under section 4 of the PML Act, the Enforcement Directorate has to first rule that the scheduled offence is committed which can be an offence under the Indian Penal Code or the Prevention of Corruption Act or the Narcotic Drugs and Psychotropic Substances Act or any other offence given in any other Act in the schedule in the PML Act. Once this first part is proved then the Enforcement Directorate has to prove how much money or what property was derived from committing the scheduled offence and lastly how was it being projected as untainted. The appellant prayed that the investigation by the CBI of Vigilance FIR No.09/09 registered at Ranchi be set aside and the appellant be released from illegal detention forthwith.

22. The written submissions have also been filed on behalf of the CBI and the Directorate of Enforcement. It is mentioned in the written submissions that the Vigilance P.S. Case No.09/2009 dated 02.07.2009 is instituted inter alia alleging commission of offence under Sections 409, 420, 423, 424, 465, 120-B of IPC and Sections 7, 10, 11, 13(2) read with Section 13(1)(e) of the Prevention of Corruption Act, 1988. The said complaint was registered on directions of the Special Judge, Vigilance, Ranchi, who exercised powers under Section 156(3) of the Cr.P.C. It named Shri Madhu Koda, former Chief Minister, Shri Kamlesh Singh, former Minister, Shri Bhanu Prasad Shah, former Minister and Bandhu Tirky, former Minister of Jharkhand.

23. During the course of investigation into the said complaint by the Vigilance, P.S., State of Jharkhand, involvement of the appellant Binod Kumar Sinha had surfaced. The FIR also contains clear allegations against the appellant. The Central Bureau of Investigation is investigating into the commission of these offences alone and is not investigating any offence under the PML Act, 2002 since the investigation under the said Act is solely and exclusively within the jurisdiction and domain of the Enforcement Directorate, which is of course subject to the exercise of powers by the Central Government under Section 45 (1-A) of the said Act.

24. In the written submissions, comprehensive information about investigation has been submitted. It is also incorporated that the appellant, who was an absconder and evaded arrest, is not entitled to any relief in exercise of discretionary jurisdiction of this court under Article 136 of the Constitution of India. It is also prayed that this appeal which challenges the order transferring investigation of Vigilance P.S. No. 09/2009 to the CBI deserves to be dismissed.

25. It is also incorporated that the appellant is involved in a multi crore scam - corruption in the matter of grant of iron ore mine leases and other acts as more particularly set out. It is incorporated in the affidavit that a perusal of various provisions of the Act would show that the said Act does not empower the Enforcement Directorate to investigate offences under IPC or the Prevention of Corruption Act, 1988 or any of the scheduled offences. It is the PML Act which authorizes the Enforcement Directorate only to investigate offences of money laundering as defined under Section 3 and punishable under Section 4 thereof. It also provides attachment, adjudication and confiscation of the property involved in money laundering and setting up of Special Courts.

26. Section **2(p)** defines Money Laundering as: ‘money-laundering’ has the meaning assigned to it in section 3.

27. Section **2(ra)** defines offence of cross border implications: “offence of cross border implications”, means--

(i) any conduct by a person at a place outside India which constitutes an offence at that place and which would have constituted an offence specified in Part A, Part B or Part C of the Schedule, had it been committed in India and if such person remits the proceeds of such conduct or part thereof to India; or

(ii) any offence specified in Part A, Part B or Part C of the Schedule which has been committed in India and the proceeds of crime, or part thereof have been transferred to a place outside India or any attempt has been made to transfer the proceeds of crime, or part thereof from India to a place outside India. Explanation.-- Nothing contained in this clause shall adversely affect any investigation, enquiry, trial or proceeding before any authority in respect of the offences specified in Part A or Part B of the Schedule to the Act before the commencement of the Prevention of Money-Laundering (Amendment) Act, 2009.

28. Section 2(u) defines proceeds of crime: **(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;

29. Section **2(x)** defines Schedule: "Schedule" means the Schedule to this Act".

30. Section 2(y) defines Scheduled Offences: **(2y)** "scheduled offence" means-- (i) the offences specified under Part A of the Schedule; or (ii) the offences specified under Part B of the Schedule if the total value involved in such offences is thirty lakh rupees or more; or (iii) the offences specified under Part C of the Schedule.

31. Section 3 and 4 are reproduced hereunder:-

“**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 proceeds of crime and projecting it as untainted property shall be guilty of offence of money-laundering.

**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 which may extend to five lakh rupees: 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.”

32. Mr. H.P. Raval, learned Additional Solicitor General appearing for the C.B.I. submitted that a bare perusal of the above provisions makes it clear that the offence of money laundering is a standalone offence within the meaning of the said Act and its investigation alone is in the exclusive domain of the Enforcement Directorate.

33. He also submitted that the provisions of the said Act do not contemplate the investigation of any of the Indian Penal Code, Prevention of Corruption Act, or any of the scheduled offences by the Enforcement Directorate.

34. Mr. Raval contended that having regard to the terminology of Section 3, any process or activity connected with the proceeds of the crime and projecting it as untainted property is the offence of money laundering which is made punishable under Section 4.

35. Mr. Raval submitted that Section 5 (1) of the said Act provides that the Director or Authorised Officer has reason to believe, to record in writing on the basis of material in his possession that any person is in possession of any proceeds of crime, that such person has been charged of having committed the scheduled offence and such proceeds of crime are likely to be conceded, transfer or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under Chapter III of the said Act, then by an order in writing such property may be provisionally attached for a period not exceeding 150 days.

36. According to Mr. Raval, a bare reading of the said provision makes it clear that the jurisdiction to initiate action of attachment has to be founded on a reasonable belief of a person being in possession of any proceeds of the crime and not on a concluded investigation of the person being in possession of the proceeds of the crime. The distinction is clear and it follows from Section 5(1)(b) that the second condition for initiation of action of attachment of property involved in money laundering is that such person in respect of whom there is reason to believe that he is in possession of any proceeds of the crime, has been charged of having committed a scheduled offence.

37. Mr. Raval contended that if the contentions of the appellant were true, then the sections of the said Act would have been differently worded. He also submitted that the contention of the appellant on the basis of provisions of Section 43 to 45 that any of the scheduled offences can only be investigated exclusively by the Enforcement Directorate is not justified and tenable at law.

38. Mr. Raval submitted that the embargo from taking cognizance by the Special Court of any offence as provided in the second proviso of sub section (1) of Section 45 is only with respect to an offence punishable under Section 4. It is only in respect of an offence

punishable under Section 4 of the Prevention of Money Laundering Act that cognizance is barred to be taken by the Special Court except on a complaint in writing as provided in sub clause (1) and (2) thereof.

39. He also submitted that this provision cannot be construed to mean that the Enforcement Directorate has the exclusive jurisdiction to investigate any of the scheduled offences.

40. Mr. Raval contended that the contention of the appellant that merely because under section 44 of the PML Act, the Special Court constituted in the area in which the offence has been committed, has been authorized statutorily to try the scheduled offence and the offence punishable under Section 4 is equally unsustainable in law since nothing in the said provision of Section 44 of the said Act envisages the exclusive investigation of the scheduled offences by the Enforcement Directorate. Mr. Raval submitted that the trial of the scheduled offence is distinct and different from investigation under the PML Act.

41. The above contention of the respondent is buttressed having regard to provisions contained in Section 43(2) which provides that while trying an offence under the PML Act (which means the offence of Money Laundering alone) the Special Court shall also try an offence other than referred to sub section (1) of Section 43 with which the accused under the Code of Criminal Procedure be charged at the same trial.

42. He contended that the scheme of the Act would, therefore, not construe the submission of the appellant that in case of there being an allegation of offence of money laundering, the scheduled offence also has to be exclusively investigated by the Enforcement Directorate. Such a contention is not supported by the provisions of the Act since there is no provision restricting the investigation of offence other than that of money laundering by any appropriate investigating agency.

43. Mr. Raval submitted that the money alleged to have been so earned is of unprecedented amounts. It is further recorded that, however, there is no clear allegation so far about its laundering in the sense mentioned in the PML Act. It is further observed that there is an allegation of his investment in the property, shares etc. not only in India, but, also abroad. Having so observed it is recorded that therefore the basic investigation requires determining whether money has been acquired by abuse of official position amounting to an offence under the Prevention of Corruption Act and under the Indian Penal Code and persons by whom the same has been done the amount of money which has been so earned and the places where it has been invested.

44. According to the learned counsel for the respondents, the High Court in the impugned order has recorded cogent reasons for directing the investigation by the Central Bureau of

Investigation. Even this court while issuing notice vide order dated 01.09.2010 has directed the CBI to continue to investigate as directed by the High Court. Under the circumstances, the appellant is not entitled to any relief as contended.

45. Mr. Raval informed the Court that the charge sheet in fact has been filed on 12.11.2010 before the Court of Competent Jurisdiction alleging inter alia commission of offence under Section 120-B IPC, Section 9, Section 13 (2) read with Section 13(1) (d) of the Prevention of Corruption Act, 1988 against various accused including the appellant Shri Binod Kumar Sinha. It is further submitted that the investigation is still on and subsequent charge sheets may be filed as and when during investigation sufficient material surfaces on other aspects.

46. In written submission it is categorically stated that the Central Bureau of Investigation is investigating into the commission of these offences alone and presently is not investigating any offence under the PML Act as the investigation under the PML Act is solely and exclusively within the jurisdiction and domain of the Enforcement Directorate, which is of course subject to the exercise of powers by the Central Government under Section 45 (1-A) of the said Act.

47. We have heard the learned counsel for the parties at length and perused the written submissions filed by them. On consideration of the totality of the facts and circumstances, we are clearly of the view that no interference is called for. The appeal being devoid of any merit is accordingly dismissed.

48. The appeal being devoid of any merit is accordingly dismissed.

49. In the facts and circumstances of the case, we direct the parties to bear their own costs.

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***B. Rama Raju* v. *Union of India, Ministry of Finance, Department of Revenue & Ors.***

WP Nos. 10765, 10769 and 23166 of 2010 Decided on March 4, 2011

In the High Court of Judicature, Andhra Pradesh at Hyderabad

Hon'ble Judges/Coram: G. Raghuram and R. Kantha Rao, JJ.

**GODA RAGHURAM, J.**:—

These writ petitions substantially challenge the vices of certain provisions of the Prevention of Money Laundering Act, 2002 (Central Act 15 of 2003) ['the Act']; amended by the Prevention of Money Laundering (Amendment) Act, 2005 (Central Act 20 of 2005) ['the Amendment Act']; further amended by the Prevention of Money-Laundering (Amendment) Act, 2009 [Central Act 21 of 2009] (the 2nd Amendment Act) and orders passed by the primary and attaching authorities and the adjudicating authority. The particulars, the circumstances and the defence to the provisions of the Act and the impugned orders are set out hereinafter. WP No. 10765 of 2010:

2. B. Rama Raju 5/0 B. Ramalinga Raju seeks (i) invalidation of Sections 5(1), 8 (1), 8(2), 8(3), 8(4), 23 and 24 of the Act; (ii) a declaration that the provisional attachment Order No. 1/09 in ECIR No. 01.H20/2009, dated 18.8.2009 passed by the Deputy Director, Enforcement, Hyderabad (R3), is arbitrary and illegal; (iii) that the order dated 14.1.2010 passed by the Adjudicating Authority (R4) in OC No. 38/09 is arbitrary and illegal; (iv) a declaration that the 4th respondent's direction to the petitioner to handover possession of the attached properties is without jurisdiction and contrary to law and the Directorate of Enforcement (R2) or any other officer is not entitled to take possession of the petitioner's properties; (v) a declaration that the petitioner's properties sought to be attached by the impugned provisional attachment order (dated 18.8.2009) as confirmed by the impugned order (dated 14.1.2010) of the 4th respondent are free from attachment or encumbrance; and (vi) for attendant reliefs.

5. (A) The Deputy Director, Enforcement, passed the provisional attachment order dated 18.8.2009, purportedly under Section 5 of the Act, in respect of movable properties comprising the shares of M/s SRSR Holdings Ltd., in M/s Satyam Computer Services Ltd., and 287 immovable properties of various companies and persons including the petitioner. The petitioner's immovable properties enumerated at SI. Nos. 246 to 251 in the table of immovable properties in the order were provisionally attached.

(B) The Deputy Director, Enforcement, filed Application No. 38/2009 on 15.9.2009 before the Adjudicating Authority against 132 defendants. The petitioner is the 8th defendant therein. The Adjudicating Authority issued notice to all the 132 defendants in respect of the movable and immovable properties enumerated in the complaint of the Deputy Director, Enforcement, on 15.9.2009, the day the complaints were filed.

(C) Several of the defendants including the petitioner filed applications before the Adjudicating Authority setting out objections to its jurisdiction; seeking dismissal of the complaint; and discharge of the notice. The Adjudicating Authority however orally pronounced disposal of the objection applications on 20.11.2009 (the date of the hearing). A copy of the order dated 20.11.2009 was furnished to the several defendants including the petitioner on 24.1.2009

(D) The petitioner and some other defendants filed WP No. 27058/09 challenging the Adjudicating Authority's notice dated 15.9.2009 and the order dated 20.11.2009 This Court by the order dated 1.12.2009 in WP No. 25846/09 (filed by another defendant) allowed the petitioner therein to appear before the Adjudicating Authority to seek information as to whether he was being proceeded against as one who committed an offence under Section 3 of the Act or for being in possession of the proceeds of a crime. Consequent on this order the petitioner also applied to the Adjudicating Authority for relevant information. On 7.12.2009 the Adjudicating Authority informed all the defendants seeking information that they were being proceeded against for committing an offence under Section 3 of the Act.

(E) This Court eventually disposed of the writ petition filed by the petitioner on 10.12.2009 on similar lines as other writ petitions directing that the proceedings before the Adjudicating Authority be postponed to 21.12.2009 and the writ petitioners submit their defense and proceed with the matter according to law.

(F) On 20.12.2009 the petitioner filed his response to the show-cause notice issued by the Adjudicating Authority. The Counsel for the petitioner was heard on 23.12.2009 Written submissions were also filed.

(G) On 14.1.2010 the Adjudicating Authority passed an order confirming attachment of the petitioners' properties; directed the attachment to continue during pendency of the proceedings pertaining to the scheduled offence before the trial Court and till its conclusion and until the order of the trial Court becomes final; and further directed that the defendants shall handover possession of properties to the Enforcement Directorate or any officer authorized, forthwith.

6. The challenge to the vires of provisions of the Act: 1. Section 2(u) of the Act defines "proceeds of crime" expansively to include property or the value thereof, derived or obtained, directly or indirectly, as a result of criminal activity relating to a scheduled offence even if in the hands of a person who has no knowledge or nexus with such criminal

activity allegedly committed by others. The expansive definition thus inflicts grossly unreasonable consequences on innocent persons and is, therefore, unconstitutional offending Articles 14, 20, 21 and Article 300 - A of the Constitution.

2. Under Section 5(1) of the Act the authorized officer may provisionally attach properties for a period not exceeding 150 days if he has reason to believe on the basis of material in his possession that any person is in possession of proceeds of crime; that such person has been charged of having committed a scheduled offence and such proceeds of crime are likely to be concealed etc., in any manner which could result in frustrating any proceedings relating to confiscation of such proceeds of crime, under Chapter III. The two provisos to Section 5(1) were incorporated by the 2nd Amendment Act. Under the first proviso no order of attachment shall be made unless the report is forwarded under Section 173 Cr.PC in relation to a includable offence, or a complaint is filed before a Magistrate or a Court for taking cognizance of the scheduled offence. The 2nd proviso enacts that notwithstanding anything in Clause (b), any property of a person may be attached under the Section if an authorized officer has reason to believe that such property involved in money-laundering, if not immediately attached is likely to frustrate any proceedings under the Act.

Section 5(1) is vague and confusing. While under the main provision [Section 5(1)], 'such property' is the property of a person charged of a scheduled offence; the 2nd proviso enables property of any person, and of involved in money-laundering, to be proceeded against. The term 'involved in money laundering' is vague and ambiguous. There is no indication as to the nature or degree of involvement required. It is not clear whether the liability runs with the property or is only in respect of property belonging to a person charged with committing a scheduled offence. The provision is also bereft of guidelines consistent and commensurate with the serious consequences that follow. The provision is therefore arbitrary and unconstitutional.

3. The proviso to Section 5(1) can be operated only from the date of coming into force of provisions of the 2nd Amendment Act. It cannot therefore apply against property acquired or possessed prior to enactment of this provision or in respect of any scheduled offence prior to its enactment. It is however being construed otherwise. Since the consequence of attachment and eventual confiscation are severe and have penal and punitive consequences there could be no retrospective incidence of liability. The operational reality of retrospective application of the provisos to Section 5(1) of the Act by the executing agencies - the respondents renders the provision unconstitutional as offending Articles 14, 20 and 300-A of the Constitution.

4 Section 8 of the Act provides for adjudication following a provisional attachment under Section 5(1) and a complaint under Section 5(5). Section 8 (1) sets out the conditions precedent to the exercise of jurisdiction and initiation of proceedings by a notice and as to the nature and scope of the notice. The Adjudicating Authority is required to apply its mind to the complaint and the material filed therewith and form a reason to believe that a person has committed an offence under Section 3 or is in possession of proceeds of crime. On settled principle and authority, the reason to believe is neither academic nor on subjective satisfaction but must follow upon an objective consideration, for good and sufficient reasons. The notice issued by the Adjudicating Authority should be directed only against such persons as it has reasons to believe have committed an offence under Section 3 or are in possession of the proceeds of crime.

The offence of money laundering as defined in Section 3 is in respect of acts of persons. There are no guidelines as to what properties can be said to be 'involved in money laundering' and thus subject to attachment and/or confiscation under the Act. The Act does not enable the Adjudicating Authority to go into the legality, validity, propriety or correctness of the provisional attachment order made under Section 5(1), even though the Adjudicating Authority is required to consider confirmation of such attachment. The criteria for provisional attachment are different from the course of enquiry and the consideration that the Adjudicating Authority must apply to confirm the order of attachment. The standard of evidence and the sequence of leading evidence is also uncertain. Thus, persons against whom proceedings are pursued are disabled from presenting their defence in the proceedings and are thus denied fair trial, violative of Article 14. The impugned order of the Adjudicating Authority illustrates absence of focus and clarity as to what is adjudicated and decided upon; on what criteria; and under what procedure and application of standards of appreciation of evidence. The scheme of adjudication set out in Section 8(1) to (3) being vague, unfair and diffused, is violative of Article 14.

5. Under the scheme of the Act even if a person is acquitted by the Special Court of the offence of money laundering, the Adjudicating Authority's finding as to such person being involved in money laundering and the involvement of such person in money laundering would nonetheless stand undisturbed and such person would not have any recourse against orders of attachment and confiscation. The same consequence follows if the person is not even accused of or charged with the offence of money laundering; and his guilt determined by improper standards of trial or proceedings and by an improper forum, is inflicted with punitive consequences. The provisions of the Act are thus arbitrary and offend Articles 14, 21 and 300-A of the Constitution.

6. Section 8(4) of the Act as construed by the respondent authorities enables deprivation of possession and enjoyment of an attached immovable property even/before conclusion of the trial of the scheduled offence. This provision is harsh and so disproportionate as to violate Articles 14, 21 and 300-A of the Constitution.

7. Section 23 provides that where money laundering involves two or more interconnected transactions, proving that one or more of such transactions is involved in money laundering raises a rebuttable presumption that the rest of the transactions form part of such interconnected transactions. Such legislatively enjoined presumption is grossly unreasonable and excessively disproportionate and places irrational burdens upon the defendant. Section 23 thus violates Article 14 and its consequences violate Article 300-A as well.

8. Section 24 enacts that the burden of proving that proceeds of crime are untainted property is on the person accused of having committed the offence under Section 3. This provision is contradictory and vague. It is being construed as if a bald and baseless allegation of there being proceeds of crime and/or that any property constitutes proceeds of crime is presumed to be true and the burden is upon the accused to prove to the contrary. These provisions offend Article 14. In any case Section 24 applies only to the trial of an offence under Section 3. In a proceedings under Section 8(1) the defendant is not an accused. However the Adjudicating Authority is construing the provisions of Section 24 as applicable to proceedings under Section 8(1) as well. On such construction Section 24 is illegal, unreasonable and offends Article 14.

9. The impugned provisional attachment order (dated: 18.8.2009) is illegal as properties of persons not even accused of any scheduled offence are attached; there is no assertion in the order as to the commission of any scheduled offence or of any fact disclosing commission of any scheduled offence; there is no statement of facts or material on the basis of which the officer has formed a belief that the properties are likely to transferred; no facts or reasons are recorded disclosing application of mind, a condition precedent to passing an order of provisional attachment. The provisional attachment order is thus invalid.

10. The order of the Adjudicating Authority (dated: 14.1.2010) passed under Section 8(3) of the Act is invalid since the Authority failed to apply its mind to whether there is substance in the complaint as to the commission of any scheduled offence, when and by whom the offence was allegedly committed. Since the Adjudicating Authority failed to deal with any of the submissions, contentions and arguments of the petitioner and other defendants; since the order proceeds on generalizations, surmises and conjectures; and the

Adjudicating Authority erred in assuming and holding that it was not necessary to draw a conclusion as to the commission of an offence to consider adjudication under Section 8 of the Act, the same is vitiated by an error in holding that the investigation by the CBI and the Directorate of Enforcement, are sufficient material to infer the commission of a scheduled offence as well as an offence under Section 3 of the Act. The confirmation order is unsustainable for failure to consider whether determination of guilt as to commission of a scheduled offence; whether for the purpose of punishment or for attachment and/or confiscation of property, must be predicated on the same standards of evidence - "beyond reasonable doubt".

There are other and detailed challenges pleaded to the validity of the order of the Adjudicating Authority (dated 14.1.2010).

We are not inclined to consider the several challenges to the merits of the orders of provisional attachment or of the Adjudicating Authority conforming the orders of provisional attachment, since any person aggrieved by the order passed by the Adjudicating Authority may appeal to the Appellate Tribunal constituted under Section 25, under Section 26 of the Act. There is a further appeal provided to the High Court against a decision or order of the Appellate Tribunal, under Section 42.

7. Pleadings in response:

On behalf of the respondents, in particular the Directorate of Enforcement, the Deputy Director of Enforcement, Hyderabad has filed a counter. It is generally contended that the writ petitions are misconceived; the challenge to provisions of the Act is asserted only to protract the proceedings and without any basis; and that the writ petitions are not maintainable and should not be countenanced since there is an effective and alternative remedy by way of an appeal under Section 26 of Act. The counter-affidavit sets out detailed responses to the several contentions of the petitioners regarding challenges to the provisions of the Act as well as to contentions assailing on merits provisional attachment and confirmation orders passed by the respondent authorities under the provisions of Sections 5 and 8 of the Act, respectively. As we are not inclined to consider the specific challenges to the orders of provisional attachment or of confirmation ort the merits of the decision making process or the eventual conclusion of the Authorities under the Act, in view of the available alternative remedy of an appeal, and a further appeal, we summarise herein only those responses in the counter-affidavit of the Enforcement Directorate pertaining to challenge to the provisions of the Act. (12) The counter asserts and sets out:

(A) The enacting history of the Act including international commitment and convention, resolutions of the General Assembly of the United Nations, the Statement of

Objects and Reasons accompanying the Bill which was eventually enacted by the Parliament; the preamble of the Act; and its several provisions disclosing a policy to address the scourge of Laundering of Money which destabilizes National and International economies, the sovereignty of several States and has adverse impact on law and order maintenance. The provisions of the Act must therefore be interpreted consistently with the evil the provisions are intended to address;

(B) Money-Laundering while facially appears to comprise one or more clear and simple financial transactions, involves and comprises a complex web of financial and other transactions. A money laundering transaction usually involves three stages: (i) The placement stage: The malfeasant places the crime money into the normal financial system; (ii) The layering stage: The money induced into the financial system is layered—spread out into several transactions within the financial system with a view to concealing the origin or original identity of the money and to make this origin/identity virtually disappear; and (iii) The integration stage: The money is thereafter integrated into the financial system in such a way that its original association with crime is totally obliterated and the money could be used by the malfeasant and/or the accomplices to get it as untainted/clean money. (C) Money laundering often involves five different directional fund flows:

(i) Domestic money laundering flows: In which domestic funds are laundered within the country and reinvested or otherwise spent within the country;

(ii) Returning laundered funds: Funds originate in a country, are laundered abroad and returned back.

(iii) Inbound funds : illegal funds earned out of crime committed abroad are either laundered [placed] abroad or within the country and are ultimately integrated into the country; (iv) Out bound funds: Typically constitute illicit capital flight from a country and do not return back to the country; and

(v) Flow-through: The funds enter a country as part of the laundering process and largely depart for integration elsewhere.

(D) The Act is a Special Law and a self contained code intended to address the increasing scourge of money laundering and provides fof confiscation of property derived from or involved in money laundering. The Act provides a comprehensive scheme for investigation, recording of statements, search and seizure, provisional attachment and its confirmation, confiscation and prosecution. The provisions of the Act [vide Section 71] are enacted to have an overriding effect [entrenched by a non-obstante provision], notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

(E) The provisions of the Act are fair, reasonable and have sufficient safeguards, checks and balances to prevent arbitrary exercise of power and/or abuse by the authorities and provide several layers of scrutiny at various stages of the proceedings.

(F) A person accused of money laundering is subject to broadly two parallel actions:

(i) prosecution for punishment under Section 4, for the offence of money-laundering defined in Section 3;

(ii) attachment of the property involved in money-laundering, under Section 5 of the Act. Proceedings under each section is independent.

(iii) The punishment specified for the offence of money-laundering under Section 4 of the Act can be administered only after prosecution by way of filing a complaint/charge sheet before the Special Court and due trial and conviction; while on investigation if any property is suspected to have been derived out of the proceeds of crime, that property is placed under provisional attachment under Section 5(1) and a complaint is filed before the Adjudicating Authority within thirty (30) days of such attachment [Section 5(5) of the Act]. An order of provisional attachment is operative for a period not exceeding one hundred and fifty days from the date of such order [Section 5(1) of the Act].

(iv) On receipt of a complaint, under Section 8(1) the Adjudicating Authority is required to issue a notice [to any person who has committed an offence under Section 3 or is in possession of proceeds of crime], to indicate the sources of income, earnings and assets out of which or by means of which he has acquired the property attached under Section 5(1) of the Act. If on considering the response and after granting an opportunity of hearing, the Adjudicating Authority is satisfied that any property is involved in money laundering, it shall under Section 8(3) issue an order confirming the provisional attachment. The confirmation of an order or provisional attachment by the Adjudicating Authority attains finality only after the Adjudicating Authority passes an order confiscating the property, after giving an opportunity to the persons concerned and when a person is found guilty of the scheduled offence by the competent Court, after trial.

(v) From the scheme of the Act and the evils its provisions are intended to address it is apparent that action by way of provisional attachment under Section 5(1) must be taken expeditiously during the course of investigation so that properties which comprise proceeds of crime are not concealed, transferred or dealt with in any manner that may frustrate proceedings for eventual confiscation of such proceeds of crime. For this purpose the Act provides a three tiered process and procedure before an order of confiscation;

(a) A provisional attachment by the Director or an officer authorized by the Director in this behalf, under Section 5(1);

(b) Confirmation of the provisional attachment by the Adjudicating Authority under Section 8(3); and

(c) A final order of confiscation by the Adjudicating Authority under Section 8(6).

The writ petitions are filed at the 2nd stage i.e, confirmation of the provisional attachment orders, under Section 8(3).

(G) At the present stage, when investigations are ongoing the Adjudicating Authority is required to take only a prima facie view, on whether the properties are involved in money-laundering. There is a presumption of culpability of the mental stage on the part of the defendant on whom shifts the burden to establish that the properties are not involved in money laundering, as the defendant is accused of money laundering under Section 3 of the Act. This shifting of burden is indicated in Section 24 of the Act. (H) A further and detailed opportunity is provided at the stage of confiscation. The Adjudicating Authority is required to consider the matter again while finally considering confiscation of properties under attachment, under Section 8(6). At this stage an opportunity of hearing is provided. Confiscation proceedings can be pursued only after the guilt of a person accused of a scheduled offence is established in the trial Court and when the order of such trial Court becomes final [Section 8(6) read with 8(3)(b) of the Act]. From the scheme of the Act an order of provisional attachment and confirmation thereof constitutes the first stage of the relevant proceedings involving a prima facie assessment. It is at the stage of confiscation (2nd stage) that the entire evidence is required to be appreciated and a definitive finding recorded by the Adjudicating Authority.

(I) Elaborate and fair procedures are incorporated in the Act. The order of provisional attachment shall be only by the Director or any other officer not below the rank of a Deputy Director, specifically authorized by the Director for the purposes of Section 5; the decision to provisionally attach the property must be supported by reasons to be recorded which must be based on material available in the possession of the attaching authority; no order of provisional attachment could 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 or a complaint has been filed by a person authorized to investigate the offence set out in the Schedule to the Act, before a Magistrate or Court for taking cognizance of the Scheduled Offence, as the case may be; the provisional attachment is limited for a period not exceeding one hundred and fifty days; under the 2nd proviso to Section 5 (1) attachment of property even of persons not charged with committing a scheduled offence is permitted but must be exercised only in exceptional cases for reasons to be recorded in writing and on the basis of the material in possession of the Authority concerned asserting that the property is involved in money laundering and non-attachment of such property would frustrate any proceedings under the Act; the order of provisional attachment and the material in possession of the Authority concerned must immediately after attachment be forwarded to the Adjudicating Authority for its consideration at appropriate stages; provisional attachment does not disable a person interested in the enjoyment of immovable property from such enjoyment; and only after the Adjudicating Authority confirms an order of provisional attachment under Section 8(3) is possession of the property taken over by the Director or any other officer authorized in this behalf—vide Section 8(4) of the Act.

(J) From the provisions of Section 6 it is clear that the Adjudicating Authority is comprised of expertise in the field of law, finance, accountancy or administration; is independent of the enforcement mechanism, ensuring a matrix of independent scrutiny of the actions and orders passed by Enforcement Authority. There are sufficient safeguards to prevent abuse of the powers conferred on the Adjudicating Authority as well. The Adjudicating Authority must consider any complaint or application received by it and issue a notice only when it has reasons to believe that a person has committed an offence under Section 3 or is in possession of proceeds of crime, calling upon such person to indicate the sources of income, earning or assets out of which or by means of which he has acquired the property provisionally attached under Section 5(1) or seized under Section 17 or 18, along with evidence on which the person relies and other relevant information and particulars and to show-cause why or all any of such property should not be declared to be properties involved in money laundering and confiscated by the Central Government.

(K) The provision mandating taking over possession of a provisionally attached property upon confirmation is in furtherance of the legislative intent of securing the property [pending completion of proceedings before a Court of competent jurisdiction and till the order of such trial Court becomes final], with a view to prevent frustration of the legislative intent by dissipation or spoilage of the immovable property during the interregnum proceedings.

(L) There are further salutary provisions to prevent abuses of authority and powers under the Act. An appeal is provided to the Appellate Tribunal, a body whose independence is legislatively entrenched qua the qualifications prescribed and tenure protection provided vide Sections 28 and 29 of the Act. A further appeal is provided to the High Court, to any person aggrieved by a decision or order of the Appellate Tribunal, both on a question of law and fact, arising from such order.

(M) The provisions of Sections 23 and 24 of the Act are valid and unassailable. These provisions are incorporated to regulate an inherently complex and layered series of transactions involved in money laundering operations. Section 23 enacts a presumption [applicable to adjudication or confiscation under Section 8 of the Act], that where money laundering involves plural and interconnected transactions and one or more of such transactions is/are proved to be involved in money laundering, it shall, unless otherwise proved to the satisfaction of the Adjudicating Authority, be presumed that the remaining transaction forms part of such interconnected transactions. The presumption is a rebuttable presumption.

(N) Section 24 inheres on a person accused of having committed the offence under Section 3, the burden of proving that the proceeds of crime are untainted property. The shifting of the incidence of the burden of proof, which is rebuttable, is an essential component of the scheme of the Act which targets money laundering, which as already noticed comprises a complex and series of financial dealings involving deceit, layering and diversion of the proceeds of the crime through several transactions.

(O) After the confession by Sri. B. Rama/inga Raju on 7.1.2009, the share price of Satyam Computer Services Limited [for short the SCSL] fell drastically and a large number of investors suffered huge financial losses. Pursuant to a complaint by one such investor Smt. L. Mangat, the A.P.C.I.D registered FIR No. 2/2009 on 9.1.2009 under Section 120-B read with Sections 406, 420, 467, 471, 477-A of the IPC. The State Government transferred the case to the CBI for investigation and the Anti Corruption Branch of the CBI, Hyderabad registered RC.4[S]/2009 on 20.2.2009 After completion of investigation a charge sheet was filed by the CBI before the XIV Additional Chief Metropolitan Magistrate's Court under Sections 420, 419, 467, 468, 471, 477-A and 201 of the IPC. The designated Court after considering the charge-sheet has taken cognizance of the offence. After the State CID registered FIR. 2/2009, the Enforcement Directorate registered an Enforcement Case Information Report [ECIR], under the Act against Sri. B. Ramalinga Raju and others since the FIR reveals information as to the commission of a scheduled offence i.e, under Section 467 IPC. The investigation under the Act reveals commission of a scheduled offence and generation of proceeds of crime thereby. Hence initiation of proceedings both for prosecution and for attachment and for subsequent proceedings, against persons accused of committing scheduled offences and for attachment and confiscation of the proceeds of crime against the accused and others in possession of proceeds of crime, is valid.

9. The enacting history: On 14.12.1984 the General Assembly of the U.N by a resolution requested the Economic and Social Council of the U.N to request the

Commission on Narcotic Drugs in its 31st Session, 1985, to initiate preparation of a draft convention about illicit traffic in Narcotic Drugs by considering the problem holistically on a priority basis. Eventually the U.N Conference for Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances [NDPS] met in Vienna and with participation of delegates of 106 States including India; specialized agencies; and representatives of Inter-Governmental Organizations; interested agencies and bodies drew up the U.N Convention Against Illicit Traffic in NDPS. The conference adopted a raft of resolutions pertaining to exchange of information; provisional application of the U.N Convention against Illicit Traffic in NDPS and provision of necessary resources to the Division of Narcotic Drugs and the Secretariat of the International Narcotic Board to enable discharge of the task entrusted to them under International Drug Control Treaties. The purpose of the Convention was to promote cooperation among the parties and to more effectively address various aspects of illicit traffic in NDPS, having an international dimension. The Convention exhorts the parties to take necessary measures including legislative and administrative, in conformity with the fundamental provisions of their respective domestic law. The Convention enumerated measures for incorporation as offences, conduct promoting NDPS and for confiscation of proceeds derived from offences established in relation to NDPS.

In 1990, the Financial Action Task Force [FATF— an inter governmental body, which sets standards, develops and promotes policies to combat money-laundering and terrorist financing with a membership of a number of countries and international organizations] drew up forty recommendations as initiatives to combat money-laundering and terrorist financing to provide an enhanced, comprehensive and consistent framework of measures for combating money-laundering and terrorist financing. The FATE recommendations have been revised from time to time.

11. From the above, it is clear that the law seeks to prevent money-laundry which in plain terms means the preventing legitimizing of the money earned through illegal and criminal activities by investments in movable and immovable properties. The need for a law on the subject has been the focus of the Government world over in recent times and that of the U.N also, because the scourge of money-laundering has threatened to wreck the foundations of the States and undermine their sovereignty even. The terrorist outfits and smuggling gangs have been depending upon money laundering to finance their operations and it is known that money for such operations are arranged through laundering. Many such illegal outfits have set up ostensibly legal front organization. The money generated through illegal activities is ultimately inducted and integrated with legitimate money and its species like movable and immovable property. Thus certain economic offences,

commercial frauds, crimes like murder, extortion have contributed to money-laundering in a significant manner. The perpetrators of such heinous crimes should not be allowed to enjoy the fruits of the money that passed under the activity and therefore the present enactment is intended to deprive the property which is related to the proceeds of specific crimes listed in the Schedule to the Act.

12. At the oral hearing, learned Counsel Sri. Gopal Chowdary [WP No. 23166 of 2010] and Sri. S. Niranjan Reddy [WP No. 10765 of 2010] made detailed submissions. In support of the contention that the definition of "Proceeds of Crime" [2[1](u)] is void for vagueness and over breadth and that in its broad connotation the expression traps innocent persons and their property; places disproportionately onerous burdens and requirements to make enquiries and investigation as to antecedent criminality adhering to a property; poses a pervasive and infinite threat to the title of a property and thus constitutes a confiscatory law, Sri. Gopal Chowdary has enumerated a few illustrations to assert that the expression "Proceeds of Crime" as defined/understood/interpreted by the Enforcement Authority is likely to target bona fide purchasers/transferees of the property who have no knowledge/nexus/participation in any antecedent criminality associated with a property. A similar exercise is undertaken by Sri. Chowdary, the learned Counsel to impeach the expression "Property involved in Money-Laundering", employed in the 2nd proviso to Section 5(1), 8(2) and 8(3) of the Act. Sri. Niranjan Reddy contends that the Act is applicable only against a person guilty of committing a scheduled offence and had derived any benefit either directly or indirectly therefrom and only such benefit as derived from a criminal conduct may be classified as "Proceeds of Crime". While a property in the domain, custody or possession of any person who knowingly assists or participates in the criminal activity of a person accused of a scheduled offence would constitute proceeds of crime, property in the domain, custody or possession of a person who is a bona fide purchaser/transferee of such property without knowledge of or participation in the malfeasance cannot constitute proceeds of crime, elaborates Sri. Niranjan Reddy. He further contends that mens rea must be considered an integral component of every shade of conduct criminalized under Section 3 of the Act; otherwise the provision would be unconstitutional. It is also contended by Sri. Reddy that the provisions of Section 8 are arbitrary and unconstitutional.

13. We are not inclined to identify or exhaustively enumerate the various factual circumstances and component parts of transactions, to which the provisions of the Act, whether with regard to the offence and its prosecution; or proceedings of attachment, its confirmation and eventual confiscation might or might not apply. The Act is a recent piece of legislation and the fullness of its personality and nuances of its several provisions will

manifest and must be identified in the fullness of time and as occasions arise. Our exercise is adjudicatory and not an academic exercise nor a treatise on the provisions of the Act. We will confine analysis of the provisions of the Act as applicable to the narrow set of facts and circumstances of the cases on hand. Even in this respect our analysis of the facts and circumstances the assertions and responses are predicated on a prima facie view of the relevant factual matrix, since the trial of the scheduled offence is under way. Though the petitioners assert to be not yet accused of having committed a scheduled offence, it is the contention on behalf of the Enforcement Directorate as expressed by Sri. Rajeev Awasthi, learned Counsel for the Enforcement Directorate that the petitioners will also be eventually charged of an offence under Section 3 of the Act. Our analysis of the provisions and their applicability to the facts of these cases is also tentative since the proceedings are now at the stage of confirmation of orders of provisional attachment which in our view involves only a prima fade assessment of the matter by the Adjudicating Authority; a comprehensive view to be taken at the stage of confiscation.

14. On the basis of rival pleadings, contentions and the material on record, the following issues are formulated for consideration. Issues:

(A) Whether property owned by or in possession of a person, other than a person charged of having committed a scheduled offence is liable to attachment and confiscation proceedings under Chapter-Ill and if so whether Section 2(1)(u) which defines "proceeds of crime" broadly, is invalid?;

(B) Whether provisions of the second proviso of Section 5(1) [incorporated by the 2nd amendment Act—w.e.f 6.3.2009] are applicable to property acquired prior to enforcement of this provision and if so, whether the provision is invalid for retrospective penalisation?;

(C) Whether the provisions of Section 8 are invalid for vagueness; incoherence as to the onus and standards of proof; ambiguity as regard criteria for determination of the nexus between a property targetted for attachment/confirmation and the offence of money-laundering; and for exclusion of mens rea/knowledge of criminality in the acquisition of such property?;

(D) Whether Section 8(4) is invalid for enjoining deprivation of possession of immovable property even before conclusion of guilt/conviction in the prosecution for an offence of money-laundering?;

(E) Whether the presumption enjoined by Section 23 is unreasonably restrictive, excessively disproportionate and thus invalid?; and

(F) Whether shifting/imposition of the burden of proof, by Section 24 is arbitrary and invalid; is applicable only to the trial of an offence under Section 3; not to proceedings for attachment and confiscation of property under Chapter-III; and in any case not in respect of a person not accused of having committed the offence under Section 3?

*Issue - A:*

15. The core contention on behalf of the petitioners is that property in ownership, control or possession of a person not charged of having committed a scheduled offence would not constitute proceeds of crime, liable to attachment and confiscation proceedings, under Chapter III of the Act.

16. Learned Counsel for the petitioners adverted to the Convention against Illicit Traffic in Narcotic Drugs and Substances, [to which India is a party and a signatory]. Article 3 in Part-XVII of this Convention sets out provisions pertaining to Offences and Sandions. Certain provisions, of clauses (b) and (c) of sub-section (1), and sub- sections (2) and (3) of Article 3 are adverted to in this behalf. The provisions adverted to by the petitioners read:

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;

(b)(i) The convention or transfer of property, knowing that such property is derived from any offence or offences, established in accordance with sub-paragraph (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;

(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 sub-paragraph (a) of this paragraph;

(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 sub-paragraph (a) of this paragraph or from an act of participation in such offence or offences;

(iv) Participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, finalizing and counseling the commission of any of the offences established in accordance with this Article

(2) Subject to its constitution, 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 1961Convention, 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 I of this Article may be inferred from objective factual circumstances.

17. Learned Counsel Sri. Rajeev Awasthi, referred to the General Assembly resolution 55/25, dated 15.11.2000, the United Nations Convention against Transnational Organized Crime. The purport of the Convention is to promote cooperation to prevent and combat Transnational Organised Crime more effectively. The Convention is aimed to integrate international cooperation inter a/ia for seizure and confiscation of proceeds of crime derived from predicate offences covered by the Convention or property the value of which corresponds to that of such proceeds; and property, equipment or other instrumentalities used in or destined for use in offences covered by the Convention. The scope of application of this Convention is to prevent, investigate and prosecute specified offences and other serious crime, where the offence is transnational in nature and involves an organised criminal group.

Suffice it to notice for the purposes of this /is that while detailing measures to be adopted by State Parties for seizure and confiscation of proceeds of crime, it is indicated that State may consider the possibility of requiring that an offender demonstrate the lawful origin of the alleged proceeds of crime or other property liable to confiscation, to the extent the requirement is consistent with the principle of their Domestic law and with the nature of judicial and other proceedings. It also provided that provisions for seizure and confiscation should not be construed to prejudice the rights of a bona fide third parties [Article 12 Clauses 7, 8].

18. Sri. Gopal Chowdury has also contended, by reference to provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 that mens rea or some measure of an informed association with an offence is the sine qua non to constitute "illegally acquired property" under the NDPS Act.

19. We are required, in the context of the rival contentions in these writ petitions to interpret the Act in accordance with established and applicable principles of statutory interpretation. The unit of interpretation is the Act as a whole and such of those provisions which are considered for interpretation but in the context of the provisions of Act. While the preamble to the Act refers to the U.N General Assembly Resolution S-17/2, dated 23.2.1990; and the political declaration adopted by the Special Session of the U.N General Assembly held on 8th to 10th June, 1998; these are among the reasons for the legislation and the contents of those resolutions or declarations are not to be considered while interpreting provisions of a domestic law such as the Act unless there is an ambiguity in any provision necessitating reference to extra textual sources for' guidance. The well established principle is that the words of a statute, passed after the date of a treaty and dealing with the same subject-matter, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the treaty obligation and not to be inconsistent with it Garland v. British Rail Engineering Ltd., (1983) 2 AC. 751; A (FC) v. Secretary of State for the Home Department, (2005) UKHL 71. This principle is reiterated in our jurisdiction as well. In **Visakha v. State of Rajasthan**, 1997 (2) ALD (Crl~.) 604 (SC) : (1997) 6 SCC 241. , the Supreme Court explained that is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law. While International Treaties, Conventions, Protocols or other instruments may catalyze domestic Legislation, these are not to be construed as the authority for Legislation. The Power to Legislate in India is derived from the grant of Legislative Power qua the provisions of the Constitution and the limits upon the legislative powers enumerated in the provisions of the Constitution including the authorised and enumerated fields of legislation in Lists 1, 2 and 3 of the Seventh Schedule of the Constitution.

The learned Counsel for the petitioners are not heard to contend that the provisions of the Act are u/tra vires international treaties, conventions; the FATF Standards etc. The contours of the powers of Parliament to make any law for the whole or any part of the territory of India for implementation of any treaty, agreement, convention or any decision made at any international conference, association or body is well established to justify the customary parade of familiar scholarship and a catena of precedent - see **Maganbhai v. Union of India,** (1970) 3 SCC 400; S. Jagannath v. Union of India, (1997) 2 SCC 87 : 1997 (3) ALD (SCSN) 28**; Nilabeti Behera v. State of Orissa**, (1993) 2 SCC 746; and Apparel Export Promotion Council v. A.K Chopra, (1999) 1 SCC 759 : 1999 (1) ALD (SCSN) 26. We therefore proceed to interpret the provisions of the Act within the framework of its provisions, tested on the anvil of the limits on legislative powers enjoined by the provisions of our Constitution; for we are not persuaded that there is any ambiguity that legitimizes a resort to trans-legislation sources for guidance.

20. We had benefit of perusing the judgment by a learned Division Bench of the Bombay High Court, dated 5.8.2010 in First Appeal Nos. 527 to 529 of 2010 [per A.M Khanwilkar, J] The very question as to whether the provisions in the Act are applicable for attachment and confiscation of property belonging to persons other than those charged and prosecuted of having committed a scheduled offence fell for consideration in this judgment. The appeals (to the Bombay High Court) were preferred [under Section 42 of the Act] against the judgment and order of the Appellate Tribunal rejecting a challenge to orders of the Adjudicating Authority confirming orders of provisional attachment. It however requires to be noted that the decision was delivered in the context of the provisions of Section 5 of the Act prior to its amendment by the 2nd Amendment Act, 2009 i.e, prior to the introduction of the second proviso to Section 5(1) of the Act. On an interactive interpretation of the several provisions of the Act including definition of the expressions- "Person"; "Proceeds of Crime"; "Property"; and "Transfer"; and the provisions of Sections 5 and 8, the Bombay judgment concluded that attachment of proceeds of crime in possession of any person [other than the person charged of having committed a scheduled offence] will fall within the sweep of Section 5 of the Act.

22. While it may perhaps be contended that the provisions of Section 5(1) [prior to the second provision exclude from the domain of the Act, attachment and confiscation of property in the possession of a person not charged of having committed a scheduled offence, this contention in our considered view is wholly misconceived after enactment of the second proviso. The second proviso enjoins that any property of any person may be attached if the specified authority therein ha reason to believe -. The non obstante clause in the second proviso clearly excludes clause (b) of Section 5(1). It is this clause [b] that incorporates the requirement that the proceeds of crime should be in possession of a person who is charged of having committed a scheduled offence, for initiating proceedings for attachment and confiscation. If the provisions of the Section 5(1)(b) are to be eschewed for ascertaining the meaning of the second proviso [qua the legislative injunct of the non obstante provision], on a true and fair construction of the provisions of Section 5(1) including the second proviso thereof but ignoring clause (b), the Legislative intent is clear, unambiguous and linear. Provided the other conditions set out in Section 5 of the Act are satisfied, any property of any person (the expression "person", is not restrictively defined in Section 2(s) limited to a person charged of having committed a scheduled offence), could be proceeded against for attachment, adjudication and confiscation. We are persuaded to

the view that incorporation of the 2nd proviso Section 5(1) is intended to clarify the position or remove any ambiguity as to the application of Section 5(1) to property of a person not charged of having committed a scheduled offence.

24. Inter alia it was suggested that attachment and confiscation proceedings could be initiated for instance against a shareholder of a Company who receives higher dividend or higher value on the sale of shares of such company, where the company makes and declares substantial profits by evading customs duties or the like. Would the higher dividends received by the shareholder or the gains made by selling his shares in the company at higher price relatable to the illegal activity of the Company, of which illegality he was clearly not aware, be liable to attachment and confiscation, query the petitioners. In response, Sh. Rajeev Awasthi for the respondent has stated that as a policy the Enforcement Officials are not proceeding against properties, under the Act, unless satisfied that the property is proceeds of the crime; is in possession of a person who is either accused/charged of a scheduled offence or has knowledge of the property being the proceeds of crime.

25. In our considered view the petitioners' contention proceeds on a misconception of the relevant provisions of the Act. Against transactions constituting money laundering, the provisions of the Act contemplate two sets of proceedings; (a) prosecution for the offence of money-laundering defined in Section 3 with the punishment provided in Section 4; and (b) attachment, adjudication and confiscation in the sequential steps and subject to the conditions and procedures enumerated in Chapter 111 of the Act. Section 2 (p) defines the expression "money- laundering" as ascribed in Section 3. Section 3 defines the offence of Money- Laundering in an expansive locus as comprehending direct or indirect attempt to indulge; assist, be a party to or actually involved knowingly in any process or activity connected with the proceeds of the crime and projecting it as untainted property. On proof of guilt and conviction of the offence of Money-Laundering, the punishment provided in Section 4 of the Act would follow after a due trial by the Special Court; which is conferred exclusive jurisdiction qua Section 44, Chapter VII of the Act. The prosecution, trial and conviction for the offence of money-laundering are the criminal sanction administered by the Legislation and effectuated by a deprivation of personal liberty as a disincentive to a malfeasant. The second matrix of proceedings targets the "proceeds of crime" defined in Section 2(u); as 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, for initial attachment and eventual confiscation.

26. Chapter III of the Act enables the specified authority, if he has reasons to believe [the reasons to be recorded in writing], on the basis of material in possession of the authority that any person charged of having committed a scheduled offence [Section

5(1)(b)] or even if not so charged [second proviso to Section 5(1)] is in possession of proceeds of crime and such proceeds are likely to be concealed, transferred etc., in a manner as may frustrate any proceeding relating to confiscation of such proceeds of crime under Chapter III, to provisionally attach [Section 5(1)]; confirm an order of provisional attachment after a process of adjudication [Section 8(3)]; and eventually pass an order confiscating such property [Section 8(6)].

27. On the afore-stated scheme the provisions of the Act, the prosecution under the Act; and attachment and eventual confiscation proceedings are distinct proceedings. These two sets of proceedings may be initiated against the same person if he is accused of the offence of money-laundering. Even when a person is not so accused, the property in his possession may be proceeded against for attachment and confiscation, on a satisfaction by the appropriate and competent authority that such property constitutes proceeds of crime.

28. In our considered view, the provisions of the Act which clearly and unambiguously enable initiation of proceedings for attachment and eventual confiscation of property in possession of a person not accused of having committed an offence under Section 3 as well, do not violate the provisions of the Constitution including Articles 14, 21 and 300-A and are operative *proprio vigore.*

29. While the offence of money-laundering comprises various degrees of association and activity with knowledge and information connected with the proceeds of crime and projection of the same as untainted property; for the purposes of attachment and confiscation (imposition of civil and economic and not penal sanctions) neither *mens rea* nor knowledge that a property has a lineage of criminality is either constitutionally necessary or statutorily enjoined. Proceeds of crime [as defined in Section 2(u)] is property derived or obtained directly or indirectly as a result of criminal activity relating to a scheduled offence or the value of any such property. "Property" is defined in Section 2(v) to include property of every description corporeal, incorporeal, movable, immovable, tangible, and intangible and includes deeds and instruments evidencing title to or interest in such property or assets wherever located.

30. The matrix of the relevant provisions of the Act compel the inference that the legislation subsumes that property which satisfies the definition of "proceeds of crime", *prime fade* is considered as property whose transfer [defined in Section 2 (za)] is subject to verification to consider whether the transfer is a stratagem of a money laundering operation and is part of a layering transaction. As the provisions of the Act target malfeasants charged of an offence under Section 3 and the proceeds of crime in the possession of a person so charged and any other person as well, the legislative intent is

manifest that attachment and confiscation constitute a critical and clearly intended and specifically enacted strategy to combat the evil of money-laundering. A person though not accused/charged of an offence under Section 3, when in possession of any proceeds of crime, from the provisions of the Act it is clear, has but a defeasible and not a clear title thereto. In the context of attachment and confiscation proceedings, knowledge that a property is proceeds of crime is not legislatively prescribed.

31. Proceeds of crime is defined to include not merely property derived or obtained as a result of criminal activity relating to a scheduled offence but the value of any such property as well. The bogey of apprehensions propounded on behalf of the petitioners is that where proceeds of crime are sequentially transferred through several transactions, in favour of a series of individuals having no knowledge or information as to the criminality antecedent to the property; the authorities may proceed against each and all of such sequential transactions, thus bringing within the vortex of Chapter-III of the Act, all the properties involved in several transactions.

32. Section 8(1) clearly postulates affording of an opportunity to a person in possession of proceeds of crime *to indicate the sources of his income, earnings or assets; out of which or by means of which he has acquired the property attached,* under Section 5(1) or seized under Sections 17 or 18 *the vidence on which he relies and other relevant information and particulars.* It is therefore clear that here a property is provisionally attached under Section 5, the person in possession of such property may avail the opportunity under Section 8 to indicate/establish that he has acquired the property attached *(prime fade* the proceeds of crime) out of his lawful earnings or assets, that he has the means to do so, and that his acquisition is therefore legitimate, *bona fide* and at fair market value of such property; and that the value paid for acquisition of the property and not the property in his possession that constitutes proceeds of crime, if at all. On such showing, to the satisfaction of the adjudicating authority, it would perhaps be not the property in possession of a person but the fair value for which he has acquired the property and paid to the transferor that constitutes proceeds of crime and the authorities may have to proceed against the property or value in the hands of the transferor. \

33. In the illustration proffered on behalf of the petitioners; since the dividend, the higher dividend or the value of the shares sold would be relatable to illegal conduct of a company or its officers (if such illegality is a scheduled offence and the company or a person in management or control of the company is accused of an offence under Section 3 and would be proceeds of crime, so much of the quantum of the dividend received or the value of a share sold as constitutes proceeds of crime could be liable to attachment and confiscation. This in our considered view is the true and fair construction of the provisions

of the Act. At this stage of the proceedings we cannot be oblivious of the fact that the petitioners and others, whose assets are being subjected to the processes under Chapter III of the Act, are alleged to be closely related to or employees of the individual(s) who orchestrated the massive scam and that these persons had traded in the shares of SCSL (with a presumptive insider information) when those shares had a peak value, achieved on account of the criminal conduct of *Sri Ramalinga Raju,* and others.

34. The contention by the petitioners that attachment and confiscation of proceeds of crime in possession of a person who is not charged of an offence under Section 3 or who has no knowledge or information as to the antecedent criminality are arbitrary and unfair legislative prescriptions is misconceived.

35 Section 24 inheres on a person accused/charged of having committed an offence under Section 3, the burden of proving that proceeds of crime are untainted property. Section 23 of the Act enjoins a presumption in inter""connected transactions that where money-laundering involves two or more inter-connected transactions and one or more of such transactions is or are proved to be involving in money-laundering, then for the purposes of adjudication or confiscation under Chapter'lll, the Act enjoins a rebuttable presumption that the remaining transactions form part of such interconnected transactions.

36. From the scheme of the provisions of the Act, it is apparent that, a person accused of an offence under Section 3 of the Act whose property is attached and proceeded against for confiscation must advisedly indicate the sources of his income, earnings or assets, out of which or means by which he has acquired the property attached, to discharge the burden (Section 24) that the property does not constitute proceeds of crime. Where a transaction of acquisition of property is part of interconnected transactions, the onus of establishing that the property acquired is not connected to the activity of money-laundering, is on the person in ownership, control or possession of the property, though not accused of a Section 3 offence, provided one or more of the interconnected transactions is or are proved to be involved in money-laundering (Section 23).

37. It further requires to be noticed that not only from the second proviso to Section 9 of the Act but on general, principles of law as well, a person deprived of the property in his ownership, control or possession on account of confiscation proceedings under the Act, has a right of action against the transferor of such property to recover the value of the property.

38. In the context of the fact that money-laundering is perceived as a serious threat to financial systems of countries across the globe and to their integrity and sovereignty as well; in view of the fact that targetting the proceeds of crime and providing for attachment

and confiscation of the proceeds of crime is conceived to be the appropriate legislative strategy; and given the several safeguards procedural and substantive alluded to hereinbefore, we are not persuaded to the view that attachment and confiscation of property constituting proceeds of crime in the possession of a person not accused/charged of an offence under Section 3 constitutes an arbitrary or unconstitutional legislative prescription.

39. The contention that the definition of "proceeds of crime" [Section 2(u)] is too broad and is therefore arbitrary and invalid since it subjects even property acquired, derived or in the possession of a person not accused, connected or associated in any manner with a crime and thus places innocent persons in jeopardy, is a contention that also does not merit acceptance. In **Attorney General for India v. Amratlal Prajivanda.s,** (1994) 5 SCC 54, a Constitution Bench of the Supreme Court considering the validity of provisions of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (SAFEMA) observed: The relatives and associates are brought in only for the purpose of ensuring that the illegally acquired properties of the convict or detenu, acquired or kept in their names, do not escape the net of the Act. It is a well-known fact that persons indulging in illegal activities screen the properties acquired from such illegal activity in the names of their relatives and associates. Sometimes they transfer such properties to them, may be, with an intent to transfer the ownership and title. In fact, it is immaterial how such relative or associate holds the properties of convict/detenu - whether as a benami or as a mere name-lender or as a bona fide transferee for value or in any other manner. He cannot claim those properties and must surrender them to the State under the Act. Since he is a relative or associate, as defined by the Act, he cannot put forward any defence once it is proved that that property was acquired by the detenu whether in his own name or in the name of his relatives and associates. 40. The Court further observed : By way of illustration, take a case where a convict/detenu purchases a property in the name of his relative or associate - it does not matter whether he intends such a person to be a mere name lender or whether he really intends that such person shall be the real owner and/or possessor thereof -or gifts away or otherwise transfers his properties in favour of any of his relatives or associates, or purports to sell them to any of his relatives or associates - in all such cases, all the said transactions will be ignored and the properties forfeited unless the convict/detenu or his relative/associate, as the case may be, establishes that such property or properties are not "illegally acquired properties" within the meaning of Section 3(c). In this view of the matter, there is no basis for the apprehension that the independently acquired properties of such relatives and associates will also be forfeited even if they are in no way connected with the convict/detenu. So far as the holders (not being relatives and associates) mentioned in Section 2(2)(e) are concerned, they are dealt with on a separate footing. If

such person proves that he is a transferee in good faith for consideration, his property - even though purchased from a convict/detenu - is not liable to be forfeited. It is equally necessary to reiterate that the burden of establishing that the properties mentioned in the show-cause notice issued under Section 6, and which are held on that date by a relative or an associate of the convict/detenu, are not the illegally acquired properties of the convict/detenu, lies upon such relative/associate. He must establish that the said property has not been acquired with the monies or assets provided by the detenu/convict or that they in fact did not or do not belong to such detenu/convict.

41. The Supreme Court concluded: The application of SAFEMA to the relatives and associates [in clauses (c) and (d) of Section 2(2)] is equally valid and effective inasmuch as the purpose and object of bringing such persons within the net of SAFEMA is to reach the properties of the detenu or convict, as the case may be, wherever they are, howsoever they are held and by whomsoever they are held. They are not conceived with a view to forfeit the independent properties of such relatives and associates as explained in this judgment.

42. SAFEMA targets for forfeiture 'illegally acquired property' of a person (defined as a convict or detenue under specified enactments and relative or associate of such convict or detenue (the expression relative or associate also defined)). This is a 1976 enactment that provides for forfeiture of illegally acquired properties of smugglers and foreign exchange manipulators. The Act, on the other hand, specifically targets the wider pathology of money-laundering in relation to a large number of scheduled offences enumerated from a variety of specified legislations. In the context of the objects sought to be achieved by the Act and the specificity of the definitions of the expressions "money-laundering" and "proceeds of crime"; the inherence of the burden of proof on a person accused of an offence under Section 3 (Section 24) and the presumptions in inter-connected transactions (Section 23), it is clear that what is targeted for confiscation is proceeds of crime in the ownership, control or possession of any person and not all property or proceeds of all crime in the ownership, control or possession of any person.

43. Again, in Smt. **Heena Kausar v. Competent Authority,** 2008 (7) SCALE 331 the validity of the proviso to Section 68 - C. of the Narcotic Drugs and Psychotropic Substances Act, 1985, (NDPS Act, 1985), prior to its amendment by Central Act 9 of 2001 fell for the consideration of the Supreme Court. Dealing with the challenge the Supreme Court observed: "...The purported object for which such a statute has been enacted must be noticed in interpreting the provisions thereof. The nexus of huge amount of money generated by drug trafficking and the purpose for which they are spent is well known ... Necessity was felt for introduction of strict measures so that money earned from the drug

trafficking by the persons concerned may not continue to be invested, inter alia, by purchasing movable or immovable properties not only in his own name but also in the names of his near relatives."

44. In Heena Kausar's case (supra), interpreting similar provisions in Chapter VA of the NDPS Act, 1985, the Apex Court pointed out that the property sought to be forfeited must be one which has a direct nexus with the income, etc., derived by way of contravention of any of the provisions of the Act or any property acquired therefrom. The Court explained that the meaning of "identification of such property" (a phrase employed in Section 68 - E of Chapter VA), is that the property was derived from or used in the illicit traffic.

45. The SAFEMA; The NDPS Act, 1985; The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988; and The Benami Transactions (Prohibition) Act, 1988 are illustrations of statutes that incorporate provisions for forfeiture, confiscation or acquisition without compensation, of property derived, acquired, possessed or dealt with in contravention of specified legislative prescriptions. The Act is a later statute to the aforementioned Acts and specifically targets the perceived evil of money-laundering. The category of offences enumerated in Parts A, B and C of the Schedule of the Act elucidate the legislative intent that the several offences and the unlawful gains/wealth derived therefrom by malfeasant(s) are targeted and confiscated, including from others when the property being the derivative of criminal activity is laundered through one or more layered transactions and finds its way to the ownership, control or possession of non-offenders as well; but in respect of scheduled offences.

46. The object of the Act is to prevent money - laundering and connected activities and confiscation of "proceeds of crime" and preventing legitimising of the money earned through illegal and criminal activities by investments in movable and immovable properties often involving layering of the money generated through illegal activities, i.e, by inducting and integrating the money with legitimate money and its species like movable and immovable property. Therefore, it is that the Act defines the expression "proceeds of crime" expansively to sub-serve the broad objectives of the Act. We thus do not find any infirmity in the provisions of the Act.

47. 1-SSUE-A is answered accordingly. Issue-B:

48. The Bombay High Court in the judgment dated 5.8.2010 (in First Appeal Nos. 527 to 529 of 2010) has interpreted the provisions of Section 5(1) of the Act even prior to incorporation of the second proviso by the Second Amendment Act, 2009) as enabling initiation of proceedings for attachment and confiscation of property in possession of a

person not accused/charged of an offence under Section 3 as well. The Second Amendment Act insofar as it has incorporated the second proviso to Section 5(1), it is contended on behalf of the respondents is by way of clarification and emphasis as to the true import and trajectory of Section 5(1). Be that as it may.

49. The process of adjudication under Section 8 of the Act is in respect of property attached under Section 5(1); proceeds of crime involved in money-laundering in possession of any person searched and seized under Section 17 and in respect of which the appropriate authority has filed an application to the adjudicating authority for retention of such property under Section 17(4); and proceeds of crime seized from the possession, ownership or control of any person under Section 18(1) and in respect of which an application is filed under sub-section (10) of Section 18 to the adjudicating authority, requesting for retention of such property. The common objective of Sections 5, 8, 17 and 18 is provisional attachment, confirmation of attachment and confiscation of property constituting proceeds of crime. While there was perhaps an ambiguity on the issue whether the process of provisional attachment under Section 5 and confirmation of such provisional attachment under Section 8(3) could lie against property in possession of a person other than one accused/charged of having committed an offence under Section 3 [this ambiguity has since been resolved by the provisions of the Second Amendment Act incorporating appropriate amendments by way of the second proviso to Section 5(1) and addition of the clause "or is in possession of proceeds of crime" in Section 8(1)], there was no ambiguity that the process of adjudication under Section 8 is available against all proceeds of crime whether in possession of a person accused/charged of an offence under Section 3 or otherwise, in view of the adjudication process applying to property seized under Sections 17 and 18 of the Act. Neither the provisions of Sections 17 nor 18 require for search and seizure operations that the proceeds of crime involved in money-laundering should be in possession only of a person accused/charged of an offence under Section 3. The provisions of Clause (ii) of Section 17(1) clearly (by employing the disjunctive 'or') stipulate that search and seizure operations may proceed not only against a person who has committed an act which constitutes money-laundering but also against a person in possession of any proceeds of crime involved in money-laundering or in possession of records relating to money-laundering. On search of any person or seizure of such record or property constituting proceeds of crime in the possession, ownership or control of any person, which may be useful or relevant to any proceedings under the Act, a property, which constitutes proceeds of crime seized under Section 17 or 18, is equally subject to the adjudicatory processes under Section 8.

50. On analysis of the provisions of Section 5, 8, 17 and 18, it is clear that provisions

of the Second Amendment Act have carefully ironed out the creases and the latent rucks in the texture of the provisions of the Act relating to attachment, adjudication and confiscation in Chapter-Ill. Attachment or confiscation of proceeds of crime in the possession of a person who is not accused or charged of an offence under Section 3 is thus not an incorporation for the first time by the provisions of the Second Amendment Act, 2009. The contention on behalf of the petitioners that the second proviso to Section 5(1) of the Act, applies only to property acquired/possessed prior to enforcement of this provision or if interpreted as being retrospective, the provision itself must be invalidated for arbitrary retrospective operation is therefore without substance or force.

51. The above contention does not merit acceptance even otherwise. Article 20 of the Constitution enacts an injunction only in respect of ex post facto laws resulting in conviction for offences or imposition of penalties greater than which might have been inflicted under the law enforceable at the time of commission of the offence. No provision of the Constitution has been brought to our notice which prohibits a legislative measure which targets for attachment and confiscation proceeds of crime.

On the text and authority of our Constitution while it may perhaps gainfully be contended that conviction for the offence of money-laundering cannot be recorded if the said offence is committed prior to the enforcement of Section 3 of the Act, such a contention cannot be advanced to target proceedings for attachment and confiscation, as these fall outside the pale of the prohibitions of the Constitution, in particular Article 20(1).

53. The majority opinion in Khemka & Co. is only a reiteration and application of the well-accepted "void for vagueness" principle which applies to invalidate irredeemably ambiguous statutory provisions. The observations in the majority opinions are not to be considered as encompassing legislative sanctions which do not effect personal liberties within the constitutional prohibition of ex post-facto laws enjoined by Article 20(2) of the Constitution. The Khemka majority opinion, in our carefully considered view, only means that no regulation of conduct; imposition of person's civil, economic rights or of personal liberty or regulation of freedoms, natural or guaranteed by constitutionally entrenched rights, may be brought about by overly vague and unspecific legislative prescriptions; and nothing more.

54. In **Amratlal Prajivandasrs** case (supra) the validity of SAFEMA was challenged and upheld by the Constitution Bench. Section 3(c) of the legislation defined 'illegally acquired property' as any property acquired whether before or after the commencement of SAFEMA, wholly or partly out of or by means of any income, earnings or assets derived or obtained from or attributable to any activity prohibited by or under any law which the

Parliament has the power to make. The challenge to the definition of illegally acquired wealth on grounds of over breadth and as an excessive and disproportionate legislative response to the perceived evil, was repelled. Jeevan Reddy, J., put it pithily when he observed: Bitter medicine is not bad medicine.

55. The huge quanta of illegally acquired wealth; acquired from crime and economic and corporate malfeasance corrodes the vitals of rule of law; the fragile patina of integrity of some of our public officials and State actors; and consequently threatens the sovereignty and integrity of the Nation. The Parliament has the authority to legislate and provide for forfeiture of proceeds of crime which is a produce of specified criminality acquired prior to the enactment of the Act as well. It has also the authority to recognise the degrees of harm and identified pejorative conduct has on the fabric of our society and to determine the appropriate remedy for the pathology.

56. Issue-B is answered accordingly.

Issues - C & D:

57. Under Issue - C, the challenge to the provisions of Section 8 on the ground of vagueness is considered. The petitioners also contend that the definitions, "money-laundering" [Section - 2(1)(p)]; "proceeds of crime" [Section - 2(1)(u)] and the provisions of Section 5 (enabling provisional attachment) are void for being vague. We analyse the authorities cited on behalf of the petitioners to support the void for vagueness contention.

58. Reliance is placed on precedents of foreign and domestic jurisdiction. Cited at the bar are decisions of the U.S Supreme Court in, Thornhill v. State of Alabama, 310 U.S 88 (1940), United States v. Harriss, 347 U.S 612 (1954), Papachristou v. City of Jacksonvill, 405 U.S 156 (1972), Grayned v. City of Rockford, 408 U.S 104 (1972); the decision of the Supreme Court of Canada In, R v. Nova Scotia Pharmaceutical Society, 408 U.S 104 (1972), Reliance is also placed on the decisions of our Supreme Court in **Romesh Thapar v. State of Madras,** AIR 1950 SC 124; **A.K Roy v. Union of India,** (1982) 1 SCC 271; **Kartar Singh v. State of Punjab,** (1994) 3 SCC 569.

59. The United States Courts have evolved the Void for Vagueness doctrine to scrutinize laws that are intrinsically vague and thus enable arbitrary and discriminatory enforcement of criminal statutes and other statutes that deter citizens from engaging in certain political and religious discourse. This doctrine advances four seminal constitutional policies flowing out of the Due Process Clauses of the 5th and 14th Amendments to the United. States Constitution: (a) It encourages the Government to clearly distinguish conduct that is lawful from that which is not so—enabling individuals to have adequate notice of their legal obligations so that they can govern their behaviour accordingly. Under

this value where individuals are left uncertain by the wording of an imprecise statute, the law becomes an arbitrary and a standardless trap for the unwary; (b) the doctrine curbs arbitrary and discriminatory enforcement of criminal statutes. The standard assumes that penal laws must be understood by those persons who are required to obey them and those persons who charged with the duty of enforcing them. Therefore, statutes that do not carefully outline detailed procedures by which Enforcement officials may perform an investigation, conduct a search or make an arrest, confer a wide discretion upon each officer to act as he sees fit. Precisely worded statutes confine the officers' activities to the letter of the law; (c) the doctrine discourages Judges from attempting to apply sloppily worded laws. In cases of vague provisions, the Courts may attempt to narrowly construe a vague statute so that it applies only to a finite set of circumstances. By a reading of specific enactment requirements into a vaguely structured or worded law, Courts attempt to insulate innocent behaviour from criminal sanction. Such interpretive techniques are not always possible. Eventually, a confusing law that cannot be cured by a narrow judicial interpretation will be struck down as unconstitutional violation of the Due Process Clause and; (d) the doctrine avoids encroachment on the First Amendment freedoms, such as speech and religion. Since vague laws produce uncertainty in the minds of average citizens, some citizens will inevitably decline to undertake risky behaviour that might deprive them of liberty. Where vague provisions of legislation deter citizens from engaging in certain political and religious discourse, Courts will apply heightened scrutiny to ensure that protected expressions are not suppressed. It must however be noted that though Courts will scrutinize a vague law that strikes a fundamental freedom, in other cases the void for vagueness doctrine does not however require mathematical precision on the part of the Legislators. Also, laws that regulate the economy are scrutinized less closely than those that regulate individual behaviour; and laws that impose civil or administrative penalties may be drafted with less clarity than those imposing criminal sanctions.

66. The decisions of our Supreme Court in Romesh Thapar, Khemka & Company, AX Roy and Kartar Singh's cases (supra), reiterate and reinforce the void for vagueness doctrine evolved and refined in other constitutional jurisdictions, in the United States and Canada. A prohibitory order issued by the Governor of Madras in exercise of powers under Section 9(1-A) of the Madras Maintenance of Public Order Act, 1949 — prohibiting the entry into or circulation, sale or distribution in the State of Madras of a newspaper "Cross Roads"; validity of certain provisions of the National Security Act, 1980; and challenge to the provisions of the Terrorist Effected Areas (Special Courts) Act, 1984, the Terrorist and Disruptive Activities (Prevention) Act, 1985; the Terrorist and Disruptive Activities (Prevention) Act, 1987 and Section 9 of the Code of Criminal Procedure (UP Amendment),

1976 respectively fell for consideration of our Supreme Court, in the above cases. In these decisions, the Apex Court reiterated the principle that a law would be void for vagueness particularly if it involves criminal sanctions. In A.K Roy, Chief Justice Chandrachud, reiterated the well established principle that crimes must be defined with appropriate definiteness and it is regarded as a fundamental concept in criminal law and must now be regarded as a pervading theme of our Constitution. The Court held: Neither the criminal law nor the Constitution requires the application of impossible standards and therefore, what is expected is that the language of the law must contain an adequate warning of the conduct which may fall within the prescribed area, when measured by common understanding.

67. Bhagwati, 3 pointed out in **Naraiandas Indurkhya v. State of M.P,** (1974) 4 SCC 764, where the power conferred by a statute on any authority of the State is vagrant and unconfined and no standards or principles are laid down by the statute to guide and control the exercise of such power, the statute would be violative of the equality clause, because it would permit arbitrary and capricious exercise of power, which is an anti-thesis of equality before the law.

68. The plea for invalidation of the provisions of the Act on the ground of vagueness is in our considered view misconceived. The vagueness doctrine prohibits only laws that fail either to give proper notice to regulate parties or to meaningfully limit the discretion of their enforcers. The judicial branch cannot determine a law's constitutionality simply by examining how it is enforced. The reason is readily apparent. If a Court makes only the determination that an enforcer is behaving arbitrarily and with unrestrained discretion, it cannot know whether the enforcer's actions are authorised by an unconstitutionally vague law or whether the enforcer is acting outside the authority granted by a sufficiently tailored and, therefore, intra wires law. It is therefore appropriate that a Court scrutinising a vagueness challenge must come to the law at issue rather than simply examine the actions or potential actions of its enforcer.

70. In the light of the authority of the precedents, we proceed to consider the provisions of the Act in the context of the challenges classified in issues 'C and 'D'. The scheme of Section 8:

71. The challenge to the validity of Section 8 is considered under these issues. 'Proceeds of crime' is defined as 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 [Section 2(u)]. Under Section 8, if on receipt of a complaint under Section 5(5) (after an order of provisional attachment) or applications under Section 17(4)

or 18(10) (pursuant to a search and seizure operation), where the adjudicating authority has reason to believe that any person has committed an offence under Section 3 or is in possession of proceeds of crime, he may initiate the process delineated in Section 8.

72. While Section 5 does not enjoin a notice or opportunity to any person in possession of proceeds of crime, whether charged of having committed a scheduled offence or otherwise, Section 8(1) mandates service of a notice (for the stipulated period) requiring the noticee 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 Section 5(1) or seized under Section 17 or 18; the evidence on which such person relies and other relevant information and particulars. The noticee must show-cause why all or any of the properties provisionally attached or seized as the case may be, be not declared to be properties involved in money laundering and confiscated by the Central Government.

73. We consider Sections 5; 8(1), (2) and (3); 17 and 18 to comprise an intermeshing raft of provisions. The process of provisional attachment under Section 5; seizure under Section 17(1)(c) or 18(1) are, in the legislative scheme of the Act, intended to empower the appropriate authority to provisionally attach but without the consequence of dispossession from immovable property (under Section 5) or to seize a property (under Section 17 or 18), on the basis of a unilateral satisfaction of the appropriate authority (if there is reason to believe; such belief to be recorded in writing), that such property constitutes proceeds of crime, in the possession, ownership or control of any person, whether or not accused of an offence under Section 3.

74. At the provisional attachment stage under Section 5(1) or a seizure under Section 17 or 18, the prima facie satisfaction that the property in question constitutes proceeds of crime as defined in the Act, is a satisfaction that the appropriate authority arrives on his own; on the basis of the report as to the scheduled offence forwarded to a Magistrate under Section 173 of the Code of Criminal Procedure, 1973 or a complaint filed by a person authorized to investigate an offence enumerated in the Schedule before a Magistrate or a Court for taking cognizance of the scheduled offence [first proviso to Section 5(1) and proviso to Section 18(1)]; or on the basis of information in the possession of the authorized officer [under Section 17(1)]. No notice or providing of an opportunity to the person in possession, ownership or control of the property, believed by the authorised officer to constitute proceeds of crime; hearing the version or considering the material produced by any such person (in support of a claim that the property does not constitute proceeds of crime in view of the sources of his income, earning or assets out of or by means of which the property was acquired), is envisaged or obligated, at this stage of the process.

75. Since the reason to believe or the satisfaction requisite for provisional attachment or seizure of a property under these provisions is unilateral, it is mandated that the period of provisional attachment shall not exceed 150 days from the date of the order and that within 30 (thirty) days therefrom a complaint should be filed before the adjudicating authority stating the facts of such attachment —[vide Section 5(5)]. Similarly, clause (4) of Section 17 and clause (10) of Section 18 enjoin that the authority seizing any record or property under the substantive provisions, shall within thirty (30) days from such seizure, file an application before the adjudicating authority requesting for retention of such record or property.

76. Section 20 enjoins that where a property has been seized under Section 17 or 18 and the authorized officer, on the basis of material in his possession, has a reason to believe (the reason to be recorded in writing) that such property is required to be retained for the purposes of adjudication under Section 8, such property may be retained for a period not exceeding three months, from the end of the month in which the property was seized. This provision also enjoins that the authorized officer, after passing an order for retention of the property for the purposes of adjudication under Section 8, shall forward a copy of the order along with the material in his possession to the adjudicating authority whereupon the adjudicating authority is required to keep such order and material for the prescribed period; further on expiry of the period specified in sub-section (1), the property shall be returned to the person from whom it was seized, unless the adjudicating authority permits retention of such property beyond the said period. To a similar effect are the provisions of Section 21 with regard to retention of records seized under Section 17 or 18.

77. Proceeds of crime is defined as any property, derived or obtained by any person as a result of criminal activity relating to a scheduled offence or the value of such property. For confirmation of provisional attachment [under Section 8(2)], the adjudicating authority must record a finding that all or any of the properties provisionally attached or seized are involved in money laundering and only thereafter may he pass an order under Section 8(3), confirming the provisional attachment made under Section 5(1) or retention of a property seized under Section 17 or 18. The vagueness challenge:

78. Within the scheme of the provisions of the Act, on receipt of a complaint under Section 5(5) (from the authority which passed the provisional attachment order) or pursuant to applications made under Section 17(4) or 18(10) (pursuant to a search and seizure), the adjudicating authority is required, on the basis of the material in his possession to have a reason to believe that any person has committed an offence under Section 3 or a person even if not so accused is in possession of proceeds of crime involved in money laundering. On such prima facie satisfaction, the adjudicating authority is required to serve

a notice (for the stipulated period) on such person; on any other person holding the property on behalf of another person; or where the property is jointly held by more than one person on all persons holding the property [1st and 2nd Provisos to Section 8(1)] calling upon him/them to indicate the sources of his/their income etc. The noticee is thus provided an opportunity to rebut the prima facie assumptions of the adjudicating authority and to establish that the property in question does not constitute/comprise proceeds of crime involved in money-laundering. This is a salutary safeguard to the noticee, also in view of the presumption regarding interconnected transactions enjoined by Section 23 of the Act. Where the noticee is a person accused of having committed the offence under Section 3 of the Act, in the light of the enjoined burden of proof on such person (Section 24), this opportunity provides an avenue to discharge the burden.

79. Sub-section (2) of Section 8 obligates the adjudicating authority to consider the reply if any submitted by a noticee; hear the aggrieved person (as well as the Director or any other officer authorised by him in this behalf); take into account all relevant materials available on record before him; and to record a finding by passing an order whether all or any of the properties referred to in the notice issued [under Section 8(1)], are involved in money-laundering. The proviso to Section 8(2) enables a person who claims the property but is not issued or served a notice under Section 8(1) to avail the opportunity of being heard to establish that the property claimed by him is not involved in money-laundering.

80. Only on a finding recorded under Section 8(2) that a property referred to in a notice [issued under Section 8(1)] is involved - in money-laundering, is the adjudicating authority authorised to pass an order (in writing) confirming attachment of the property or retention of the property or record seized. Section 8 (3) stipulates, vide Clauses (a) and (b) that where the adjudicating authority passes an order confirming attachment of a property [seized under Section 5(1)] or retention of property or the record seized (under Section 17 or 18), the attachment or retention of the seized property or record as the case may be shall continue during the pendency of any proceedings relating to any scheduled offence before a Court and would become final after the guilt of the person is proved in the trial Court and the order of such trial Court becomes final.

81. Under Section 8(4), on confirmation of an order of provisional attachment [under sub-section (3)], the specified authority is enjoined to take possession of the attached property.

82. Section 8(6) provides that only when the attachment of any property or retention of the seized property or record becomes final under Section 8(3)(b) i.e (proof of guilt of the accused in the trial Court and such order attaining finality), the adjudicating authority

may initiate the process and shall again afford an opportunity of being heard to the person concerned with the property, before passing an order confiscating the property.

83. Clause (5) of Section 20 and of Section 21 provide that after an order of confiscation under Section 8(6) is passed, the adjudicating authority shall direct release of all properties other than properties involved in money laundering to the person from whom such properties were seized; and direct release of records to the person from whom such records were seized, respectively.

84. In view of the clear and unambiguous provisions of Section 8 (analysed above), considered in the context of the other provisions of the Act, we discern no vagueness in the trajectory of the provisions of Section 8. It is clear that the stage of confirmation of an order of provisional attachment or retention of the property or record seized is an intermediary stage, anterior to confiscation. Where the property is provisionally attached or a record seized from the ownership, control or possession, of a person accused of an offence under Section 3 or not so accused, the attachment, retention and the eventual authority to order confiscation of the property is dependant and contingent upon proof of guilt and finality of an order of conviction of a person, of the offence of money-laundering, under Section 3 of the Act. The several degrees of assumptions and reasons to believe on the part of the adjudicating authority, anterior to the stage of confiscation are thus in the scheme of the Act prima facie and tentative assumptions or reasons to believe, since determination of the guilt of the person accused, of the offence of money-laundering is within the exclusive domain of the Special Court constituted for trial of the offence and outside the domain of the adjudicating authority under Section 8. Challenge: Incoherence as to the onus and standards of proof:

85. The processes under Chapter-III of the Act (provisional attachment, confirmation; seizure under Chapter-V and confiscation of property attached/seized under Section (8) as noticed supra are available against proceeds of crime involved in money-laundering, whether in the ownership, control or possession of a person accused of an offence under Section 3 or of a person not so accused.

86. The burden of proving, that proceeds of crime are untainted property inheres on a person accused of having committed an offence under Section 3 qua Section 24. The first proviso to Section 5 mandates that no order of provisional attachment shall be made unless a final report under Section 173 of the Code of Criminal Procedure has been forwarded to a Magistrate or a complaint filed for taking cognizance of a scheduled offence by a person authorized to investigate the scheduled offence. Further, confiscation proceedings in respect of an attached/retained property may be initiated only on proof of guilt of a person

charged of an offence under Section 3 and the order of the trial Court becomes final. Section 23 enjoins a presumption in inter-connected transactions; that where money - laundering involves two or more inter-connection transactions and one or more of these are proved to be involved in money-laundering, then for the purposes of adjudication or confiscation under Section 8, it shall, unless otherwise proved to the satisfaction of the adjudicating authority, be presumed that the remaining transactions form part of such inter-connected transactions (i.e, involved in money-laundering).

87. As we have observed earlier in this judgment in another context, the provisions of Sections 3, 5, 8, 23 and 24 are also inter-related provisions and must be considered as components of a statutory symphony that elucidate the true scope of the onus probandi and the burden of proof. The argument as to incoherence as to the onus and standards of proof in Section 8, proceeds on a misconception of the holistic trajectory of the several provisions of the Act. If the several provisions are considered together as they must, there is no incoherence discernible. On a person accused of having committed offence under Section 3, inheres the burden of proving that the proceeds of crime are untainted property. Proceeds of crime is defined [Section 2(u)] as any property derived or obtained, directly or indirectly by any person as a result of a criminal activity relating to a scheduled offence or the value of any such property. 'Value' is defined [Section 2(zb)] as 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. Where proceeds of crime continue in the ownership, control or possession of a person accused of an offence under Section 3, the burden of proof is clearly expressed (Section 24). Where however proceeds of crime are layered through a money-laundering operation and pass(es) through one or more transactions which are inter-connected transactions and one or more of such inter-connected transactions is/are proved to be involved in money-laundering, Section 23 enjoins a presumption that the other transactions form part of such inter-connected transactions (involved in money-laundering), unless proved (to rebut the enjoined presumption) otherwise (by the person in ownership, control or possession of property involved in the remaining transactions), for the purposes of adjudication and confiscation under Section 8.

88. At the stage of confirmation of an order of provisional attachment under Section 8, even where the provisional attachment and confirmation pertain to property in the ownership, control or possession of a person not accused of an offence under Section 3, there must be an anterior forwarding of a final report under Section 173 of the Cr.PC or a complaint made by an authorized person, in relation to a scheduled offence. It is only thus that a prima facie satisfaction (reason to believe), could be recorded by an adjudicating

authority that a person has committed an offence under Section 3 or in possession of proceeds of crime, since proceeds of crime is referable to property derived or obtained as a result of criminal activity relating to a scheduled offence or the value of any such property.

The clear implication, though prima facie at this stage, is that the property in the ownership, control or possession of any person not accused of an offence under Section 3 is proceeds of crime having a nexus with or inter-connected with the offence of money-laundering under Section 3. Therefore at the stage of confirmation of provisional attachment under Section 8, the person in possession of the property believed by the adjudicating authority to constitute proceeds of crime involved in money-laundering must satisfy the adjudicating authority by indicating the sources of his income, earning or assets, out of which or by means of which he has acquired the property attached under Section 5(1) or seized under Section 17 or 18, the evidence on which he relies to establish the claim of his income, earning or assets and other relevant information and particulars, that the property is acquired by him bona fide; without knowledge or information of the association with criminality; and out of his own income, earnings or assets and for fair market value, to dispel the presumption that the property is proceeds of crime involved in money-laundering.

89. The same is the burden even at the confiscation stage under Section 8(6). By then, there is proof of guilt of a person accused of a scheduled offence established before a Court and the conviction recorded by the trial Court would have become final. Where the property is in the ownership, control or possession of a person not accused of a scheduled offence but constitutes part of inter-connected transactions i.e, connected to one or more transactions proved to have been involved in money-laundering, the presumption under Section 23 comes into play and must be discharged by the person (though not an accused, but) in the ownership, control or possession of the property attached or seized and retained (under Sections 5; 17 or 18 and 8).

92. This section shows that the initial burden of proving a prima facie case in his favour is cast on the plaintiff; when he gives such evidence as will support a prima facie case, the onus shifts on to the defendant to adduce rebutting evidence to meet the case made out by the plaintiff. As the case continues to develop, the onus may shift back again to the plaintiff. It is not easy to decide at what particular stage in the course of the evidence the onus shifts from one side to the other. When after the entire evidence is adduced, the Tribunal feels it cannot make up its mind as to which of the versions is true, it will hold that the party on whom the burden lies has not discharged the burden; but if it has on the evidence no difficulty in arriving at a definite conclusion, then the burden of proof on the

pleadings recedes into the background.

94. In **Raghavanna v. Chenchamma,** AIR 1964 SC 136, Subba Rao, 3 (as his Lordship then was) again explained the distinction between burden of proof and onus ...There is an essential distinction between burden of proof and onus of proof: burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. The burden of proof in the present case, undoubtedly lies upon the plaintiff to establish the factum of adoption and that of partition. The said circumstances do not alter the incidence of the burden of proof. Such considerations, having regard to the circumstances of a particular case, may shift the onus of proof. Such a shifting of onus is a continuous process in the evaluation of evidence.

96. Section 22 of the Act also enjoins a presumption that where any records or property are or is found in the possession or control of any person in the course of a survey or a search, it shall be presumed that — (i) such records or property belong or belongs to such person; (ii) the contents of such records are true; and (iii) the signature and every other part of such records which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person, are in that person's handwriting, and in the case of a record, stamped, executed or attested, that it was executed or attested by the person by whom it purports to have been so stamped, executed or attested. Sub-section (2) of this section enjoins a substantially similar presumption in respect of records received from outside India.

98. From the scheme of the Act and its several provisions, in particular the provisions of Sections 8 and 22 to 24, it is clear that the Legislature considered it appropriate to inhere different shades of presumptions and thus corollary burdens, on persons in the ownership, control or possession of property believed to be proceeds of crime, depending on whether the person is accused of a scheduled offence or not, necessitating such person to dislodge the presumption by probative evidence or material. The inherence of such presumptions is a matter of legal policy and no case is made put to hold, nor is it contended that the inherence of the burden by the enactment of presumptions is ultra vires the legislative power for being in transgression of any limitations on such legislative power in the Constitution of India. Challenge: As to ambiguity as regards criteria for determination of nexus between the property attached and the offence of money-laundering: 99. In view of the analysis on the sub-issue relating to the challenge of incoherence on onus and standards of proof; the definition of the expressions -'proceeds of crime'; 'money-laundering'; and the fact that money-laundering includes acquisition of title to or possession of property derived or obtained as a result of criminal activity relating to a scheduled offence and passing it of as an untainted property including by layering such property through several transactions,

the contention as to ambiguity in criteria for determining the nexus between the property proceeded against for attachment and confiscation and the offence of money-laundering, does not commend acceptance by this Court.

100. Where the acquisition of property that is alleged to constitute proceeds of crime involved in money-laundering, is by a person not accused of a scheduled offence and such person in the ownership, control or possession of such property is able to establish, to the satisfaction of the adjudicating authority that he has acquired the property bona fide without information or knowledge as to the antecedent criminality or for fair market value (vide definition of value in Section 2 (zb), he may successfully campaign for extrication of the property from attachment or confiscation proceedings under Chapter-Ill of the Act. There are clearly discernable and statutorily explicated criteria for identification of the nexus between property; the commission of scheduled offence and money-laundering operations. The challenge as to ambiguity in identifying criteria or incoherence in ascertaining nexus, is thus without substance. Challenge to the exclusion of men, rea:

101. The contention is that provisional attachment, its confirmation and confiscation; of property in the ownership, control or possession of a person not accused of an offence under Section 3 and having no involvement or knowledge as regards a scheduled offence or the offence of money-laundering i.e. without *mens rea* or knowledge of antecedent criminality in the acquisition of such property, is an arbitrary prescription.

102. In our concluding analysis on issue-A, we have noticed that the legislative intent is clear and specifically expressed by the several provisions of the Act, that proceeds of crime involved in money-laundering is targeted for eventual confiscation as a multinational co-operative effort to control the incidence and spread of conduct which cripples financial systems of countries across the globe, corrodes the rule of law and governance systems and pejoratively impacts the integrity and sovereignty of Nations. We have also in the analysis on issue-A noted that a person in possession, ownership or control of a property (provisionally attached or seized) is provided ample opportunity to produce relevant material and evidence to satisfy the adjudicating authority, at the stage of confirmation of provisional attachment or retention of the seized property [Sections 8(1) to (3)], that the property was acquired out of lawful earnings or assets, that there were means to do so and thus the acquisition of the property is legitimate, bona fide and at the fair market value of such property. A person aggrieved by or concerned with the property provisionally attached may perhaps gainfully contend that in the circumstances it is the value paid for the acquisition of the property and not the property currently in his possession that constitutes proceeds of crime involved in money-laundering.

103. Since proceeds of crime is defined to include the value of any property derived or obtained directly or indirectly as a result of criminal activity relating to a scheduled offence, where a person satisfies the adjudicating authority by relevant material and evidence having a probative value that his acquisition is bona fide, legitimate and for fair market value paid therefore, the adjudicating authority must carefully consider the material and evidence on record (including the reply furnished by a notice in response to a notice issued under Section 8(1) and the material or evidence furnished along therewith to establish his earnings, assets or means to justify the bona fides in the acquisition of the property); and if satisfied as to the bona fide acquisition of the property, relieve such property from provisional attachment by declining to pass an order of confirmation of the provisional attachment; either in respect of the whole or such part of the property provisionally attached in respect whereof bona fide acquisition by a person is established, at the stage of the Section 8(2) process. A further opportunity of establishing bona fide acquisition of property or that the property in question is not proceeds of crime involved in money-laundering is available and mandated, prior to the adjudicating authority passing an order of confiscation, under Section 8(6).

104. Proceedings for attachment and confiscation of proceeds of crime are a process distinct and dissimilar to the process for prosecution of the offence of money -laundering. Deprivation of property involved in money-laundering is the sanction in the first process while deprivation of personal liberty is the sanction enjoined in conviction for the offence. Mens rea is not a jurisprudential non-derogable adjunct for visitation of civil consequences and therefore the legislative policy in this area is eminently within the domain of legislative choice. This challenge must therefore fail. Challenge to dispossession before conviction of the accused:

105. Section 8(4) of the Act enjoins the taking over of possession of an attached property on the passing of an order of confirmation of provisional attachment. This provision is arbitrary since dispossession precedes the recording of guilt/conviction by the Special Court in the prosecution of the offence of money-laundering under Section 3. Section 8(4) is therefore invalid, contend the petitioners. This conclusion in our considered view is without merit and misconceived.

106. At the stage of provisional attachment under Section 5(1) a person interested in the enjoyment of the suspect immovable property is not deprived of enjoyment, in view of the provisions of sub-section (4) thereof. However Section 8 (4) enjoins taking over possession of the attached property whose provisional attachment is confirmed under Section 8(3). On an holistic analysis of the several provisions of the Act, in particular of Sections 5 and 8, we are of the considered view that the legislative intent underlying the

preservation of the right to the enjoyment of immovable property provisionally attached under Section 5(1) while enjoining taking over of possession on confirmation under Section 8(3), is part of a consciously calibrated legislative schemata to achieve the object which the several provisions of the Act are designed to fulfil. The wholesome legislative intent underpinning the sequential provisions for provisional attachment, confirmation of such attachment and eventual confiscation; or for retention of a seized property, permitting continuance of such retention pending a determination as to confiscation under Section 8, while preserving the right to possession at the stage of provisional attachment while mandating dispossession after confirmation of the attachment; are conceived to balance the governmental interest expressed by the provisions of the Act on the one hand and the several degrees of rights of persons in possession of property that is believed to be proceeds of crime involved in money-laundering, on the other. In our analysis of the provisions of Sections 5 and 8, we have observed that the reason to believe that a property in possession of a person constitutes proceeds of crime involved in money-laundering, is a satisfaction that may legitimately be arrived at unilaterally and without a participatory process involving hearing or consideration of material that may be produced by, the person in the ownership, control or possession of the property, to disprove the assumption as to involvement of the property in money-laundering. The process of provisional attachment is also in the nature of an emergency prophylactic. An order of provisional attachment is passed where the authorized authority has reason to believe that if the property is not attached immediately, any proceedings under the Act may be frustrated. Having regard to the exigency of the public interest involved in attaching a property believed to be proceeds of crime involved in money-laundering, to prevent frustration of other proceedings under the Act, the maximal due process of hearing an affected party before passing an order of provisional attachment is consciously excluded under the presence of Section 5. It is for this reason that while passing an order of provisional attachment as a prophylactic measure to preserve the property, possession is not disturbed. This appears to be a finely calibrated legislative measure structured to meet the governmental interest at that stage, while not inflicting a disproportionate burden, of deprivation of possession, at this nascent stage of forming of a belief, unilaterally.

107. At the stage of confirmation of provisional attachment however, the person in ownership, control or possession of property is provided an opportunity to show-cause why all or part of such property be not declared to be involved in money-laundering and confiscated by the Central Government. The person interested in the property is required by notice to indicate the source of his income, earning or assets, out of which or by means of which he has acquired the property provisionally attached or seized. An order

confirming the provisional attachment, as already noticed, may be passed only on the adjudicating authority being satisfied, on considering the material on record including material or evidence furnished in response to the notice issued under Section 8(1); the reply furnished in response thereto; and taking all and other relevant material into consideration, to record a finding that the property or so much of it, is involved in money-laundering.

108. Only at the confirmation stage is taking possession of the attached property legislatively enjoined [Section 8(4)]. The reason for the prescription as to dispossession is apparent. The apparent purpose is also vouchsafed in the counter of the respondents and the contentions of the learned Counsel Sri Rajeev Awasthi. The satisfaction as to the provisional attached property constituting proceeds of crime involved in money-laundering is arrived at by the adjudicating authority after considering a fuller basket of information, material and evidence which includes a showing by a person concerned with the property. From the legislative scheme, in particular of Section 8, we infer that dispossession from immovable property is prescribed under Section 8(4) to prevent wastage or spoilage of the property and thus dissipation of its value so as to preserve the integrity and value of the property till the stage of confiscation. Thus construed the provisions of Section 8(4) are neither arbitrary nor disproportionate to the object sought to be achieved by the provisions of the Act. The provisions of Section 8(4) are reasonable and unimpeachable. The challenge to Section 8 of the Act must therefore fail.

109. Issues C & D are answered as above. Issue-E:

110. The challenge to Section 23 is projected on the ground that the presumption enjoined by this provision in respect of interconnected transactions is unduly restrictive of the right to property; is a disproportionate burden, not commensurate with legitimate Governmental interests in targetting proceeds of crime involved in money-laundering, for eventual confiscation.

111. Money-laundering, it is pleaded in the counter-affidavit by the Enforcement Directorate, while apparently comprising one or more apparently clear and simple financial transactions or dealings with property, in reality involve a complex web of transactions that are processed through three stages—the placement, layering and integration stage. When laundering operations are pursued across State boiundaries, flows of funds would involve several routes. Since the object of the Act is to seize or attach proceeds of crime involved in money-laundering for eventual confiscation to the State, the enforcement strategy must be commensurate with, correspond to and complement the degree of camouflage, deceit, layering and integration normally associated with a money-laundering operation, to be effective and successful, is the contention on behalf of the respondents.

112. Section 23 enjoins a presumption in respect of inter-connected transactions. Money-laundering is defined in Section 2(p) (with reference to Section 3). Though Section 3 defines the offence of money-laundering, the ingredients of the offence enumerated in this provision define money-laundering in its generic sense as applied by the Act to attachment and confiscation processes as well. Such duality is achieved by the drafting technique of defining money-laundering in Section 2(p) by ascription of the definition of the offence of money-laundering in Section 3.

113. This technique, though specific, is not unique. As observed in LIC of India v. Crown Life Insurance Co., AIR 1965 SC 1985, the object of a definition clause in a statute is to avoid the necessity of frequent repetitions in describing all the subject matter to which the word or expression so defined is intended to apply. A definition section may borrow definitions from an earlier or an existing statute; not necessarily in the definition section but in some other provision, of that Act; and may equally borrow the definition from some other section of the same Act where a word or an expression is defined for a distinct purpose, occasion, or in a specific context. Section 2(1)(p), thus, defines the expression "money-laundering" by borrowing the definition expressed in Section 3, where this expression is defined for the purpose of delineating the offence. In Section 2(1)(p), however, the expression "money-laundering" is defined for the generic purpose Gf describing the contours of the conduct; wherever the expression is employed in the several provisions of the Act, including in Chapter III - for attachment and confiscation. It is also well settled that the Legislature has the power to define a word or an expression artificially - Kishanlal v. State of Rajasthan, 1990 Supp SCC 742 : AIR 1990 SC 2269. The definition of a word or an expression in the definition section may thus be restrictive or extensive of its ordinary meaning. When a word is defined to 'mean" so and so, the definition is prima facie exhaustive and restrictive - Inland Revenue Commissioner v. Joiner, (1975) 3 ALL. E.R 1050; Vanguard Fire and General Insurance Co. Ltd. v. Frazer & Ross, AIR 1960 SC 971; and Feroze N. Dotiwala v. P.M Wadhwani, (2003) 1 SCC 433. 114. Conduct of directly or indirectly attempting to indulge, knowingly assist or being a party to or actual involvement in any process or activity connected with proceeds of crime and projecting such proceeds of crime as untainted property, constitutes money-laundering. The expression 'proceeds of crime' means 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 [Section 2 (u)]. Thus, a property acquires a taint on account of being a derivative of criminal activity relating to a scheduled offence and includes the value of such property. Since placement, layering and integration are among the essential features of money -laundering, the proceeds of crime may not necessarily continue in the hands of

the original malfeasant(s).

115. Where proceeds of crime are layered through plural transactions, the intent to camouflage the source of the property as a derivative of criminality renders it difficult to identify the succeeding transactions as relatable to the initial proceeds of crime. It is for this reason and to effectuate the purposes of the Act that Section 23 incorporates the presumption that where money -laundering involves two or more connected transactions and one or more such transactions is/are proved to be involved in money-laundering, then for the purposes of adjudication or confiscation under Section 8, it shall, unless otherwise proved to the satisfaction of the adjudicating authority, be presumed that the remaining transactions form part of such interconnected transactions i.e, involved in money-laundering as well.

116. The presumption enjoined by Section 23 is clearly a rebuttable presumption i.e, presumptio pro tantum. 117. In Izhar Ahmad v. Union of India, AIR 1962 SC 1052, Gajendragadkar, 3 (as his Lordship then was) observed (in the majority opinion of the Constitution Bench) that: The term "Presumption" in its largest and most comprehensive signification, may be defined to be an inference, affirmative or disaffirmative of the truth or false hood of a doubtful fact or proposition drawn by a process of probable reasoning from something proved or taken for granted. Quoting with approval the statement of principle set out in the Principles of the Law of Evidence by Best, his Lordship observed that when the rules of evidence provide for the raising of a rebuttable or irrebuttable presumption, they are merely attempting to assist the judicial mind in the matter of weighing the probative or persuasive force of certain facts proved in relation to other facts presumed or inferred.

120. Having regard to the fact that money-laundering is indulgence, informed assistance or being a party to or actual involvement in any process or activity connected with proceeds of crime and projecting it as untainted property, inherently assuming a degree of deceit and camouflage in the process of layering the proceeds of crime through a series of transactions, in the considered legislative wisdom a presumption in inter-connected transactions is enjoined by Section 23 of the Act, contingent upon one or more of inter-connected transactions having to be proved to be involved in money-laundering. The legislatively enjoined presumption shifts the burden of proof to the person in the ownership, control or possession of a property comprising the inter-connected transactions to rebut the statutory presumption that this property is not involved in money-laundering. 121. Section 23 enacts a rule prescribing a rebuttable presumption and is a rule of evidence. The rule purports to regulate and structure the judicial process of appreciating evidence relating to adjudication of money-laundering for the purposes of confirmation of

attachment/seizure and confiscation and provides that the said appreciation will draw an inference from the fact of one or more transactions forming part of inter-connected transactions having been proved to be involved in money-laundering, that the other transactions are also to be presumed so, unless the contrary is established.

122. As observed in Izhar Ahmad's case (supra), the rule of presumption enjoined by Section 23 takes away judicial discretion either to attach or not due probative value to the fact that one or more of the inter-connected transactions have been proved to be involved money-laundering; and requires prima facie due probative value to be attached and mandates an inference that the other transactions form part of the raft of inter-connected transactions involved in money-laundering, subject of course to the said presumption being rebutted by proof to the contrary. 123. On the aforesaid analysis, since Section 23 enjoins a rule of evidence and a rebuttable presumption considered essential and integral to effectuation of the purposes of the Act in the legislative wisdom; a rebuttable and not an irrebuttable presumption, we are not persuaded to conclude that the provision is unduly harsh, oppressive or arbitrary. After all a legislative remedy must correspond to the social pathology it professes to regulate. 124. Issue-E is answered accordingly. Issue-F: 125. Section 24 shifts the burden of proving that proceeds of crime are untainted property onto person(s) accused of having committed the offence under Section 3. This provision is challenged as arbitrary; is contended to be applicable only to the trial of an offence under Section 3 and not the proceedings for attachment and confiscation of property under Chapter-Ill; and alternatively, as not applicable to proceedings for attachment and confiscation of property of a person not accused of an offence under Section 3. 126. On its textual and grammatical construction, the provision shifts the burden of proving that proceeds of crime are untainted property on person(s) accused of having committed the offence under Section 3. 127. We have noticed while on the analysis of Issues C to E that the provisions of Sections 3, 5, 8, 17, 18, 20, 21 and 23; the definitions of 'money-laundering' [Section 2(p); 'proceeds of crime' (Section 2(u); 'property' (Section 2(v) and 'value' (Section 2(b)] are inter twined, delineate the provisions of each other and in tandem operate to effectuate one of the two substantial purposes of the Act viz., attachment for the purposes of eventual confiscation, of proceeds of crime involved in money-laundering, whether in the ownership, control or possession of a person accused of the offence under Section 3 or not. The offence of money-laundering as defined in Section 3 comprises direct or indirect attempt to indulge, knowingly assist, and knowingly be a party to or actual involvement in any process or activity connected with the proceeds of crime and projecting it as untainted property. Proceeds of crime is 'any property' derived or obtained directly or indirectly by any person as a result of a criminal activity relating to a scheduled offence or

the value of any such property (Section 2(u). Qua the provisions in Chapter-Ill of the Act, the process of provisional attachment, confirmation of such attachment by the adjudicating authority and confiscation of the property attached is operative against Property constituting the proceeds of crime involved in money-laundering whether in the ownership, control or possession of a person who has committed an offence under Section 3 or otherwise. Section 8(1) while enjoining the adjudicating authority to issue a notice to a person in possession of proceeds of a crime, whether in his own right or on behalf of any other person, calling upon the noticee to indicate the sources of his income, earning or assets for the purposes of establishing that the acquisition of ownership, control or possession of the property by the noticee is bona fide and out of legitimate sources; of his income, earning or assets, does not enact a presumption that where the noticee is a person accused of the offence under Section 3, the provisionally attached property is proceeds of crime. Since camouflage and deceit are strategies inherent and integral to money-laundering operations and may involve successive transactions relating to proceeds of crime and intent to project the layered proceeds as untainted property, effectuation of the legislative purposes is achieved only where the burden is imposed on the accused to establish that proceeds of crime are untainted property. This is the legislative purpose and the justification for Section 24 of the Act.

127. In response to a notice issued under Section 8(1) and qua the legislative prescription in Section 24 of the Act the person accused of having committed the offence under Section 3 must show with supporting evidence and material that he has the requisite means by way of income, earning or assets, out of which or by means of which he has acquired the property alleged to be proceeds of crime. Only on such showing would the accused be able to rebut the statutorily enjoined presumption that the alleged proceeds of crime are untainted property. This being the purpose, we are not satisfied that the provisions of Section 24 are arbitrary or unconstitutional. Section 24 is not confined to the trial of an offence under Section 3 but operates to attachment and confiscation proceedings under Chapter-Ill, as well. The legislative prescription that the burden of proof inheres on a person accused of having committed the offence under Section 3 is only to confine the inherence of the expressed burden to an accused. Where the property is in the ownership, control or possession of a person not accused of having committed an offence under Section 3 and where such property/proceeds of crime is part of inter-connected transactions involved in money-laundering, then and in such an event the presumption enjoined in Section 23 comes into operation and not the inherence of burden of proof under Section 24. This is in our considered view the true and fair construction of the provisions of Section 24.

128. Clearly, therefore a person other than one accused of having committed the offence under Section 3 is not imposed the burden of proof enjoined by Section 24. On a person accused of an offence under Section 3 however, the burden applies, also for attachment and confiscation proceedings.

129. Issue F is answered accordingly.

133. R.K Garg v. Union of India, (1981) 4 SCC 675, exemplifies the latter approach of diffused scrutiny to economic legislation.

134. Having considered the several challenges to the provisions of the Act and on the various grounds addressed and in the context of the appropriate and applicable principles of judicial scrutiny we have recorded our conclusions on each of the issues formulated for decision. We now record a summary of our conclusions. Summary of Conclusions:

136. On the several issues framed herein-before we held:

(i) On Issue - A: that property owned or in possession of a person, other than a person charged of having committed a scheduled offence is equally liable to attachment and confiscation proceedings under Chapter-Ill; and Section 2(1) (u) which defines the expression "Proceeds of Crime", is not invalid;

(ii) On Issue - B: that the provisions of the second proviso to Section 5 are applicable to property acquired even prior to the coming into force of this provision (vide the second amendment Act with effect from 6.3.2009); and even so is not invalid for retrospective penalisation.

(iii) On Issues - C & D: that the provisions of Section 8 are not invalid for vagueness; incoherence as to the onus and standard of proof; ambiguity as regards criteria for determination of the nexus between a property targeted for attachment/confirmation and the offence of money-laundering; or for exclusion of mens real knowledge of criminality in the acquisition of such property; Section 8(4), which enjoins deprivation of possession of immovable property pursuant to an order confirming the provisional attachment and before conviction of the accused for an offence of money-laundering, is valid;

(iv) On Issue - E: that the presumption enjoined in cases of interconnected transactions enjoined by Section 23 is valid; and

(v) On Issue - F: that the burden of proving that proceeds of crime are untainted property is applicable not only to prosecution and trial of a person charged of committing an offence under Section 3 but to proceedings for attachment and confiscation - in Chapter III of the Act as well; but only to a person accused of having committed an offence under Section 3. The burden enjoined by Section 24 does not inhere on a person not accused of an offence under Section 3. The presumption under Section 23 however applies in interconnected transactions, both to a person accused of an offence under Section 3 and a person not so accused.

135. We record our appreciation for the methodical, clinical and meticulous assistance provided by Sri Copal Choudhary, Sri S. Niranjan Reddy and Sri Rajeev Awasthi. learned Counsel for the respective Parties in this case.

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***Vijay Madanlal Choudhary and others* vs *Union Of India and others***

Special Leave Petition (Criminal) No. 4634 of 2014

Decided on 27th July 2022

A.M. Khanwilkar, Dinesh Maheshwari and C.T. Ravi Kumar , JJ.

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 and the procedure followed by the Enforcement Directorate while inquiring into/investigating offences under the PMLA, being violative of the constitutional mandate.

2. It is relevant to mention at the outset that after the decision of this Court in ***Nikesh Tarachand Shah* vs. *Union of India & Anr.* (2018) 11 SCC 1**, 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.

**Submissions of the Private Parties**

6. 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 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.

8. 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.

9. 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.

10. 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.

11. 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 case offence and money laundering. In support of the said argument, reliance was placed on the Article 3 of the *Vienna Convention*, where the 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 ones 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 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" were added to the definition which was finally passed in the form of PMLA. Reliance has also been placed on the decision of ***Nikesh Tarachand Shah.***

16. 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."

17. 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.

35. 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 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.

38. 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.

40. 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 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.

41. Submissions with respect to **Section 8** of the PMLA maintain that Section 8(4) allows the ED to take possession of the attached property at the stage of confirmation of provisional attachment made by the Adjudicating Authority. It is submitted that this deprivation of a persons 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.

**SUBMISSIONS OF THE UNION OF INDIA**

86. 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.

87. 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 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.

88. 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.

89. 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 & Or*s**. **[1981] A.C. 470** by the House of Lords. England was one of 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.

90. Later, the Vienna Convention imposed obligation on each participating country to criminalize offences related to drug trafficking and money-laundering, to which India is a party.

91. 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.

92. 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 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.

93. 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.

94. 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…

95. 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.

96. 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.

97. 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.

98. 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 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'.

105. 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.

106. 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.

107. 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).

108. 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… 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'.

109. 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.

110. 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.

111. 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.

112. 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…

113. 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 f*inancing, 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.

114. 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.* 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.

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

116. 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.

117. 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.

119. 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.

120. 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 untainted property. Placing reliance on ***Shri Balaganesan Metals*** **vs.** ***M.N. Shanmugham Chetty & Ors.*** **(1987) 2 SCC 707,** 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.

121. 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.

122. 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.

124. 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)* (1994) 5 SCC 410.** 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 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.

138. 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* (2003) 5 SCC 461.**

147. …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 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.

150. 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 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 protects 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.*** **(1958) SCR 1226**, 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.

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

152. 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.

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.

153. 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.

156. 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.

159. Learned Solicitor General has argued that the decision in ***Nikesh Tarachand Shah*** 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*** 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 that both the above defects have been removed by the amendment post ***Nikesh Tarachand Shah***. Therefore, the basis and the element of arbitrariness, as pointed out by the Court in ***Nikesh Tarachand Shah,*** has been taken away by the Parliament so as to cure the defect.

160. 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.

162. It is, thus, submitted that the law laid down in ***Nikesh Tarachand Shah*** 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.

**CONSIDERATION**

234. 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**

235. 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.

240. 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* v. *South Indian Bank Ltd.* (2020) 6 SCC 1 .** 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 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.

**SECTION 3 OF THE 2002 ACT**

263. 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[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.

[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.]"

264. 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 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. 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.

265. … 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.

267. 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, in itself, is an attempt to indulge in or being involved in money laundering, just as knowingly concealing, possessing, acquiring or using of proceeds of crime, directly or indirectly.

268. 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 indulge in projecting or claiming it to be untainted property so that neither is covered under Section 3 of the 2002 Act.

269. 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.

270. 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.

271. 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.

272. 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.

273. 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.

279. 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.

280. 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.

281. 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.

282. 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.

283. 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.

284. In other words, the Authority under the 2002 Act, is to prosecute a person for offence of money-laundering only if it has 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**

285. 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.**

(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; 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 [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.].

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 [sub-section (3)] 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.

286. 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.

287. 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.

288. 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.

289. 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. 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.

290. 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 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.

291. 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.

292. 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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> 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.

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).
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> 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.
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> 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.
>
> **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.

925. 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.

296. 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.

297. 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.

298. 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.

299. 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.

300. 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.

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: **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 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 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. We do not wish to dilate on those decisions for the view already expressed hitherto.

**SECTION 8 OF THE 2002 ACT**

302. 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. *(Refer to section 8 of the Act)*

*303*. 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 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 there at 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.

304. 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.

305. 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.

306. 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.

307. 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.

**SEARCH AND SEIZURES**

308. 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 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. *(Refer to Section 16 and 17 of the Act).*

309. 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.

310 . 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 20A 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.

311. …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.

312. 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.

313. 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.

314. 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.

315. 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.

316. 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 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.

317. 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.

318. 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**

319. 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:
>
> [***]
>
> (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.
>
> (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:
>
> Provided that the period of twenty-four hours shall exclude the time necessary for the journey undertaken to 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 Magistrates 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:

[***]

(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.

320. 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*** **(1999) 6 SCC 172** upheld the search of person procedure being a fair and reasonable 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.

321. 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.

**BURDEN OF PROOF**

327. 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.

328. 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 ask 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.

329. 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.

330. 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.

331. 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:

> **[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.]

332. 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 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.

333. 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 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 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.

334. 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.

342. 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.

343. 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.

344. 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* v. *Government of Kerala* 1995 Supp (2) SCC 187**, 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.

345. 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 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.

346. 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 proceeds of crime. In any case, in terms of Section 114 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.

347. 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.

349. 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.

350. 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.

351. 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.

**BAIL**

371. 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. (Refer to amended Sec 45).

372. 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.*** 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:

(iii) that there are reasonable grounds for believing that he is not guilty of such offence; and

(iv) that he is not likely to commit any offence while on bail.

373. According to the petitioners, since the twin conditions have been declared to be void and unconstitutional by this Court, the same stood obliterated.

374. 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*** 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.

378. A priori, it is not open to argue that Section 45 of the 2002 Act post decision in ***Nikesh Tarachand Shah*** 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.

379. In the case of ***Nikesh Tarachand Shah***, 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 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.

380. 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.

387. …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 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.

388. 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. 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 Central Legislations, 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.

389. 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* v *State of Punjab* (1994) 3 SCC 569** 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 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* (1988) 2 SCC 271** 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. ***(emphasis supplied)***

390. 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***)

**391.** We may immediately note that this judgment has been considered by the two-Judge Bench of this Court in ***Nikesh Tarachand Shah*** 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*** cannot apply to Section 45 of the present Act. ***(emphasis supplied)***

392. 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.

395. …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 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. 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 across nation States, 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***. **(2011) 8 SCC 1**, 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. (emphasis supplied)

396. In ***State of Gujarat*** **v.** ***Mohanlal Jitamalji Porwal (*****1987) 2 SCC 364**, while explaining the impact of economic offences on the community, the Court observed that usually the community

view the economic offender with a permissive 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)***

398. 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, but also helps in preventing the offence and creating a deterrent effect.

399. 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***, 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.

400. 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.

405. We are conscious of the fact that in paragraph 53 of the ***Nikesh Tarachand Shah,*** 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 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.

406. 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.

**ECIR VIS-À-VIS FIR**

457. 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.

458. 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 Article22(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 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.

459. 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.

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***Parvathi Kollur & And* v. *State by Directorate of Enforcement***
S.L.P (Cal.) No. 4258 of 2021

Dinesh Maheshwari and Krishna Murari, JJ.

The appellants herein have questioned the judgment and order dated 17.12.2020 as passed by the High Court of Karnataka at Bengaluru in Criminal Revision Petition No. 590 of 2019 whereby, the High Court allowed the revision petition filed by the respondent and set aside the discharge order passed by the III Additional District and Sessions Judge, D.K., Mangaluru (Karnataka) for the offence under Section 3 of the Prevention of Money-Laundering Act, 2002 (hereinafter referred to as 'the Act of 2002').

The appellants herein are wife and son of the accused No. 1 against whom the allegations had been that during his tenure as Deputy Revenue Officer, he amassed assets disproportionate to his known source of income to an extent of Rs.42,25,859/-. For this, the Lokayukta Police registered a case under Section 13(1)(e) read with Section 13(2) of the Prevention of Corruption Act, 1988 (hereinafter referred to as 'the Act of 1988'). During the pendency of trial, the Directorate of Enforcement registered a case against the accused No. 1 and the appellants under the Act of 2002 and filed a complaint on 08.06.2016 before the Special Court for trial of the offence under Section 3 thereof.

In the meantime, the Special Judge (Lokayukta) acquitted the accused No. 1 of the offences aforesaid under the Act of 1988 while observing that the evidence produced by the prosecution was insufficient to hold him guilty. Then, the accused No. 1 as also the present appellants moved an application under Section 277 of the Code of Criminal Procedure, 1973 seeking discharge in the case pertaining to the Act of 2002. Before the said application was considered and decided, the accused No. 1 expired on 08.05.2018.

Thereafter, the Trial Court, by its judgment and order dated 04.01.2019, allowed the application and discharged the appellants from the offences pertaining to the Act of 2002 while observing that occurrence of a scheduled offences was the basic condition for giving rise to "proceeds of crime"; and commission of scheduled offence was a pre-condition for proceeding under the Act of 2002.

Aggrieved by the said discharge order, the Directorate preferred a revision petition before the High Court. The High Court proceeded to set aside the discharge order while observing that the allegations made in the complaint and the material produced, prima facie, made out sufficient ground for proceeding against the appellants for offences under the Act of 2002.

Learned counsel for the appellants has contended that the issue as involved in this matter is no more *res integra,* particularly for the view taken by a 3-Judge Bench of this Court in the case of *Vijay Madanlal Choudhary & Ors. vs.* Union Of India & Ors. decided on 27.07.2022 where, the consequence of failure of prosecution for the scheduled offence has been clearly provided in the following terms:

> "187. .......(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."

Learned ASG appearing for the respondent, in all fairness, does not dispute the above position of law declared by this Court.

The result of the discussion aforesaid is that the view as taken by the Trial Court in this matter had been a justified view of the matter and the High Court was not right in setting aside the discharge order despite the fact that the accused No. 1 had already been acquitted in relation to the scheduled offence and the present appellants were not accused of any scheduled offence.

In view of the above, this appeal succeeds and is allowed. The impugned judgment and order dated 17.12.2020 is set aside and the order dated 04.01.2019 as passed by the Trial Court, allowing discharge application of the appellants, is restored.

All pending applications stand disposed of.

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***Pankaj Bansal* v. *Union of India & Ors.***

(2024) 7 SCC 576

P.V. Sanjay Kumar and A.S. Bopanna, JJ**.**

**P.V. Sanjay Kumar, J.**

**1.** Leave granted.

**2.** Challenge in these appeals is to the orders dated 20.07.2023 and 26.07.2023 passed by a Division Bench of the Punjab & Haryana High Court dismissing CWP No. 14536 of 2023 filed by Pankaj Bansal and CWP No. 14539 of 2023 filed by his father, Basant Bansal. By the order dated 20.07.2023, the Division Bench opined that, as the constitutional validity of Section 19 of the Prevention of Money Laundering Act, 2002 (for brevity, 'the Act of 2002'), had been upheld by the Supreme Court, the challenge to the same by the writ Petitioners could not be considered only because of the fact that a review petition was pending before the Supreme Court. The prayer of the writ Petitioners to that effect was accordingly rejected. By the later order dated 26.07.2023, the Division Bench rejected the prayer of the writ Petitioners to quash/set aside their arrest orders along with their arrest memos and the consequential proceedings arising therefrom, including the orders dated 15.06.2023, 20.06.2023 and 26.06.2023 passed by the learned Vacation Judge/Additional Sessions Judge, Panchkula, whereby they were remanded to the custody of the Directorate of Enforcement (for brevity, 'the ED') and thereafter, to judicial custody. The Division Bench further held that, keeping in view the gravity of the allegations against them, their prayer to be released from custody did

not deserve acceptance and rejected the same. In consequence, the Division Bench dismissed both the writ petitions. Hence, these appeals by Pankaj Bansal and Basant Bansal.

**3.** The genesis of these appeals is traceable to FIR No. 0006 dated 17.04.2023 registered by the Anti-Corruption Bureau, Panchkula, Haryana, Under Sections 7, 8, 11 and 13 of the Prevention of Corruption Act, 1988, read with Section 120B Indian Penal Code for the offences of corruption and bribery along with criminal conspiracy. The names of the Accused in this FIR are:

i. Mr. Sudhir Parmar (the then Special Judge, CBI and ED, Panchkula);
ii. Mr. Ajay Parmar (nephew of Mr. Sudhir Parmar and Deputy Manager (Legal in M3M Group);
iii. Roop Bansal (Promoter of M3M Group); and
iv. other unknown persons.

**4.** Significantly, prior to this FIR, between the years 2018 and 2020, 13 FIRs were gotten registered by allottees of two residential projects of the IREO Group, alleging illegalities on the part of its management. On the strength of these FIRs, the ED recorded Enforcement Case Information Report No. GNZO/10/2021 dated 15.06.2021 (hereinafter, 'the first ECIR') in connection with the money laundering offences allegedly committed by the IREO Group and Lalit Goyal, its Vice-Chairman and Managing Director. Neither in the FIRs nor in the first ECIR were M3M Group or the Appellants herein arrayed as the Accused. Further, no allegations were levelled against them therein. On 14.01.2022, the ED filed Prosecution Complaint No. 01/2022, titled 'Assistant Director, Directorate of Enforcement v. Lalit Goyal and Ors. , against seven named Accused, under Section 200 of the Code of Criminal Procedure, read with Sections 44 and 45 of the Act of 2002. Notably, M3M Group and the Appellants did not figure amongst those named Accused. The number of FIRs had also increased from 13 to 30, as per this complaint. This case was numbered as COMA/01/2022, titled 'Directorate of Enforcement v. Lalit Goyal and Ors.', and was pending in the Court of Sudhir Parmar, Special Judge. At that stage, the Anti-Corruption Bureau, Panchkula, received information that Sudhir Parmar was showing favouritism to Lalit Goyal, the owner of IREO Group, and also to Roop Bansal and his brother, Basant Bansal, the owners of M3M Group. This led to the registration of FIR No. 0006 dated 17.04.2023. On 12.05.2023, the ED issued summons to M3M India Pvt. Ltd., calling upon it to provide information and documents pertaining to transactions with certain companies. Thereafter, on 01.06.2023, the ED raided the properties of M3M Group and effected seizures of assets and bank accounts. Roop Bansal was arrested by the ED on 08.06.2023 apropos the first ECIR.

**5.** Apprehending that action would be taken against them also in the context of the first ECIR, Pankaj Bansal and Basant Bansal secured interim protection from the Delhi High Court in Bail Application Nos. 2030 and 2031 of 2023. By separate orders dated 09.06.2023 passed therein, the Delhi High Court noted that Pankaj Bansal and Basant Bansal had not been named in the first ECIR and that the ED had not yet been able to implicate them in any of the scheduled offences under the Act of 2002. Further, the High Court noted that Pankaj Bansal had not even been summoned by the ED in that case. The High Court accordingly granted them interim protection by way of anticipatory bail, subject to conditions, till the next date of hearing, i.e., 05.07.2023. Special Leave Petition (Crl.) Nos. 7384 and 7396 of 2023 were filed by the ED assailing the orders dated 09.06.2023 before this Court and the same are stated to be pending.

**6.** In the meanwhile, on the basis of FIR No. 0006 dated 17.04.2023, the ED recorded another ECIR, viz., ECIR/GNZO/17/2023, on 13.06.2023 (hereinafter, 'the second ECIR') against:

i. Mr. Sudhir Parmar;
ii. Mr. Ajay Parmar;
iii. Mr. Roop Bansal; and
iv. Others who are named in the FIR/unknown persons.

However, summons were issued by the ED to Pankaj Bansal and Basant Bansal on 13.06.2023 at 06.15 pm in relation to the first ECIR, requiring them to appear before the ED on 14.06.2023 at 11.00 am. Though the copy of the summons placed before this Court pertains to Pankaj Bansal alone, the email dated 13.06.2023 of the Assistant Director of the ED, bearing the time 06.15 pm, was addressed to both Pankaj Bansal and Basant Bansal and required their compliance with the summons on 14.06.2023 at 11 am. While Pankaj Bansal and Basant Bansal were at the office of the ED at Rajokri, New Delhi, in compliance with these summons, Pankaj Bansal was served with fresh summons at 04.52 pm on 14.06.2023, requiring him to be present before another Investigating Officer at 05.00 pm on the same day. This summons was in connection with the second ECIR. There is lack of clarity as to when summons in relation to the second ECIR were served on Basant Bansal. According to the ED, he was served the summons on 13.06.2023 itself and refused to receive the same. However, it is an admitted fact that Basant Bansal was also present at the ED's office at Rajokri, New Delhi, on 14.06.2023 at 11.00 am. It is also not in dispute that, while he was there, Basant Bansal was arrested at 06.00 pm on 14.06.2023 and Pankaj Bansal was arrested at 10.30 pm on the same day. These arrests, made in connection with the second ECIR, were in exercise of power Under Section 19(1) of the Act of 2002. The arrested persons were then taken to Panchkula, Haryana, and produced before the learned Vacation Judge/Additional Sessions Judge, Panchkula. There, they were served with the remand application filed by the ED. The learned Vacation Judge/Additional Sessions Judge, Panchkula, initially passed order dated 15.06.2023 holding that custodial interrogation of the arrested persons was required and granted their custody to the ED for 5 days with a direction to produce them before the Court on 20.06.2023. By the later orders dated 20.06.2023 and 26.06.2023, their remand to the custody of the ED was extended by 5 more days and thereafter, they were sent to judicial custody.

**7.** Assailing the first remand order dated 15.06.2023, Pankaj Bansal and Basant Bansal approached the Delhi High Court, vide WP (Crl.) Nos. 1770 and 1771 of 2023. However, by order dated 16.06.2023, the Delhi High Court opined that the appropriate remedy for them would be to approach the Punjab & Haryana High Court and challenge the said order of remand. Holding so, the Delhi High Court dismissed their miscellaneous applications but ordered notice in the writ petitions. Aggrieved by the Delhi High Court's order, Pankaj Bansal and Basant Bansal filed SLP (Crl.) Nos. 7443 and 7444 of 2023 before this Court. The SLPs were disposed of as withdrawn on 04.07.2023, reserving liberty to approach the Punjab & Haryana High Court against the remand orders. This Court further held that WP (Crl.) Nos. 1770 and 1771 of 2023 before the Delhi High Court were rendered infructuous. Thereupon, Pankaj Bansal and Basant Bansal filed the subject writ petitions before the Punjab & Haryana High Court which came to be dismissed, vide the impugned orders of the Division Bench.

**8 .** Though Basant Bansal is not shown as an Accused along with his brother, Roop Bansal, in FIR No. 0006 dated 17.04.2023 on the file of the Anti- Corruption Bureau, Panchkula, his name finds mention in the body of the FIR as one of the owners of M3M Group to whom favouritism was shown by Sudhir Parmar, Special Judge. However, the name of Pankaj Bansal does not find mention even in the contents of the FIR. It was the specific case of the father and son in their writ petitions before the High Court that their arrest under the provisions of the Act of 2002 was a wanton abuse of power/authority and an abuse of process by the ED, apart from being blatantly illegal and unconstitutional. They also asserted that the ED acted in violation of the safeguards provided in Section 19 of the Act of 2002. In this milieu, they made the following prayers:

In view of the facts and circumstances mentioned above, it is, therefore, respectfully prayed that this Hon'ble Court may kindly be pleased to issue appropriate writ(s), order(s) and/or direction(s) to:

A. Read Down and/or Read into as well as expound, deliberate upon and delineate the ambit, sweep and scope of Section 19(1) of PMLA in consonance with the principles, inter alia, enunciated by the Hon’ble Supreme Court in “Vijay Madanlal Choudhary Versus Union of India & Ors. 2022 SCC OnLine SC 929” and hold that: -

i. The expression “material in possession” occurring therein must be confined, circumscribed and limited to legally admissible evidence of sterling quality and unimpeachable character on the basis whereof “reasons to believe” could be recorded in writing that the arrestee is “guilty” of the offence under Section 4 of PMLA;
ii. The word “guilt” occurring therein would qualify a higher yardstick than a mere suspicion and the Ld. Court at the stage of remand is required to apply its

judicial mind to the grounds as well as necessity for arrest as, *inter alia*, held in "***Arnesh Kumar* v. *State of Bihar,*** (2014) 8 SCC 273" and as accorded imprimatur in "***Satender Kumar Antil* v. *Central Bureau of Investigation and another*** 2022 SCC online SC 825";

iii. The expression 'communicate' occurring therein would definitely entail physical communication and furnishing the grounds of arrest to the arrestee in the context of the obligation for "reason for such belief to be recorded in writing" read with Rules 2(1)(g) & 2(1)(h) of the PMLA Rules 2005 (Arrest Rules) which postulates the meaning of the word "order" to include the grounds of such arrest.'

9. It is, therefore, clear that Pankaj Bansal and Basant Bansal did not assail the constitutional validity of Section 19 of the Act of 2002 but sought 'reading down' and/or 'reading into' the provisions thereof. Further, they asserted that the remand orders were passed in a patently routine and mechanical manner by the learned Vacation Judge/Additional Sessions Judge, Panchkula, without satisfying himself about due compliance with the mandate of Section 19 of the Act of 2002, and more particularly, whether the threshold requirements of the provision were duly satisfied. In consequence, they prayed for a direction to quash the remand orders as well as the underlying arrest orders and arrest memos.

10. Though the appellants did not challenge the constitutional validity of Section 19 of the Act of 2002 in their writ petitions and had only sought 'reading down' and/or 'reading into' the provisions thereof in the light of the judgment of this Court in ***Vijay Madanlal Choudhary and others* v. *Union of India and others,*** (2022 (10) SCALE 577***)*** , the Division Bench of the Punjab & Haryana High Court failed to note this distinction and disallowed their prayer under the mistaken impression that they were challenging the constitutional validity of the provision. The finer connotations and nuances of the language used in Section 19 of the Act of 2002, to the extent left uncharted by this Court in Vijay Madanlal Choudhray (supra), were still open to interpretation and resolution and, therefore, the High Court would have been well within its right to undertake that exercise. Be that as it may.

11. Saket Singh, IRS, Deputy Director, Directorate of Enforcement, Gurugram Zonal Office, Rajokri, New Delhi, deposed to the replies filed by the ED before this Court. Therein, he acknowledged that the second ECIR was recorded on 13.06.2023 based on FIR

No. 0006 dated 17.04.2023. He stated that the name of Pankaj Bansal and the owners of M3M Group specifically found mention in the said FIR. However, perusal of the FIR reflects that the name of Pankaj Bansal is not mentioned. Reference to 'the owners of M3M Group' was in the context of Roop Bansal and his brother, Basant Bansal, and not in a generic sense, as is now sought to be made out so as to rope in Pankaj Bansal also. Saket Singh further stated that though M3M Group, Pankaj Bansal and Basant Bansal were not named in the connected FIRs of the first ECIR, investigation therein had shown that the promoters of M3M Group were also involved in money laundering. According to him, Basant Bansal refused to accept the summons issued on 13.06.2023 in relation to the second ECIR and did not give any information relating thereto. Manual summons dated 14.06.2023 were stated to have been issued to Pankaj Bansal on 14.06.2023 for his personal appearance and for recording of his statement before the ED's Investigating Officer on the same day. He alleged that Pankaj Bansal accepted the summons but remained evasive in providing relevant information to the ED. He justified the issuance of summons on an immediate basis, by claiming that it was a necessity as the promoters/key persons of M3M Group, including Pankaj Bansal and Basant Bansal, had been deliberately avoiding investigation in the first ECIR as well and were not complying with the previously issued summons on multiple occasions. He alleged that Pankaj Bansal failed to comply with the summons in respect of the first ECIR on multiple occasions, i.e., with the summons dated 04.06.2023, 06.06.2023 and 07.06.2023. Again, this statement is factually incorrect as these summonses were issued to Basant Bansal and not to Pankaj Bansal.

12. Saket Singh then went on to state that when Pankaj Bansal came to the ED's office on 14.06.2023, the Investigating Officer of the second ECIR served a summons upon him and as the Investigating Officer had evidence to show that Pankaj Bansal was guilty of the offence of money laundering, he arrested him after following the due procedure prescribed under the Act of 2002 and the rules framed thereunder. He asserted that the arrests were made in accordance with Section 19 of the Act of 2002 and the information/details regarding the arrests of Pankaj Bansal and Basant Bansal were duly communicated to Mrs. Abha Bansal and Ms. Payal Kanodia over the telephone immediately after their arrests. He stated that the written grounds of arrest were first read out to Basant Bansal but he refused to sign the same. Subsequently, the written grounds of arrest were read over and explained in his language, viz., Hindi, to Basant Bansal in the presence of witnesses and the witnesses signed on the same as a token of correctness. Saket Singh again asserted that issuance of summons on immediate basis was a necessity as both of them had been deliberately avoiding investigation in the other case as well and were not complying with the previously issued summons on multiple occasions. This reiteration is incorrect as the first summons

issued to Pankaj Bansal was on 13.06.2023 at 06.15 pm requiring him to appear at 11.00 am on 14.06.2023 in connection with the first ECIR, which he duly complied with, and again, while he was in the ED's office at New Delhi, he was served with the summons in connection with the second ECIR at 04.52 pm requiring him to be present at 05.00 pm, which he again complied with. According to Saket Singh, during the investigation, both of them were found to be actively involved in money laundering and deliberately attempted to withhold information, that was in their exclusive knowledge, which was crucial to establish their roles and to take the money laundering investigation to its logical end. He asserted that they adopted an attitude of non-cooperation during the investigation and the fact that they had bribed the ED Judge to take benefit in the existing proceedings showed that they were capable of influencing witnesses/authorities involved in the case. He alleged that they were capable of tampering with the evidence and hence, Pankaj Bansal was arrested on 14.06.2023 around 10.30 pm on the basis of incriminating evidence. The written grounds of arrest were stated to have been read by Pankaj Bansal in the presence of witnesses and, thereafter, Pankaj Bansal and the witnesses signed on the same.

13. Though much was stated and argued by both sides on the merits of the matter in terms of the involvement of the appellants in the alleged offence of money laundering, we make it clear that we are not concerned with that issue at this point. The only issue for consideration presently is whether the arrest of the appellants under Section 19 of the Act of 2002 was valid and lawful and whether the impugned orders of remand passed by the learned Vacation Judge/Additional Sessions Judge, Panchkula, measure up. In that context, we may also make it clear that the mere passing of an order of remand would not be sufficient in itself to validate the appellants' arrests, if such arrests are not in conformity with the requirements of Section 19 of the Act of 2002. Though judgments were cited by the ED which held to the effect that legality of the arrest would be rendered immaterial once the competent Court passes a remand order, those cases primarily dealt with the issue of a writ of habeas corpus being sought after an order of remand was passed by the jurisdictional Court and that ratio has no role to play here. The understanding of the ED and its misplaced reliance upon that case law begs the question as to whether there was proper compliance with Section 19(1) of the Act of 2002 and as to whether the learned Vacation Judge/Additional Sessions Judge, Panchkula, correctly considered that issue while passing the remand orders. Therefore, as the very validity of the remand orders is under challenge on that ground, the issue as to whether the arrest of the appellants was lawful in its inception may also be open for consideration.

14. At this stage, it would be apposite to consider the case law that does have relevance to these appeals and the issues under consideration. In Vijay Madanlal Choudhary (supra), a

3-Judge Bench of this Court observed that Section 65 of the Act of 2002 predicates that the provisions of the Code of Criminal Procedure, 1973, shall apply insofar as they are not inconsistent with the provisions of the Act of 2002 in respect of arrest, search and seizure, attachment, confiscation, investigation, prosecution and all other proceedings thereunder. It was noted that Section 19 of the Act of 2002 prescribes the manner in which the arrest of a person involved in money laundering can be effected. It was observed that such power was vested in high-ranking officials and that apart, Section 19 of the Act of 2002 provided inbuilt safeguards to be adhered to by the authorized officers, such as, of recording reasons for the belief regarding involvement of the person in the offence of money laundering and, further, such reasons have to be recorded in writing and while effecting arrest, the grounds of arrest are to be informed to that person. It was noted that the authorized officer has to forward a copy of the order, along with the material in his possession, to the Adjudicating Authority and this safeguard is to ensure fairness, objectivity and accountability of the authorized officer in forming an opinion, as recorded in writing, regarding the necessity to arrest the person involved in the offence of money laundering. The Bench also noted that it is the obligation of the authorized officer to produce the person so arrested before the Special Court or Judicial Magistrate or a Metropolitan Magistrate, as the case may be, within 24 hours and such production is to comply with the requirement of Section 167 Cr.P.C. It was pointed out that there is nothing in Section 19 of the Act of 2002 which is contrary to the requirement of production under Section 167 Cr.P.C and being an express statutory requirement under Section 19(3) of the Act of 2002, it has to be complied by the authorized officer. It was concluded that the safeguards provided in the Act of 2002 and the preconditions to be fulfilled by the authorized officer before effecting arrest, as contained in Section 19 of the Act of 2002, are equally stringent and of higher standard when compared to the Customs Act, 1962, and such safeguards ensure that the authorized officers do not act arbitrarily, by making them accountable for their judgment about the necessity to arrest any person involved in the commission of the offence of money laundering, even before filing of the complaint before the Special Court. It was on this basis that the Bench upheld the validity of Section 19 of the Act of 2002. The Bench further held that once the person is informed of the grounds of arrest, that would be sufficient compliance with the mandate of Article 22(1) of the Constitution and it is not necessary that a copy of the ECIR be supplied in every case to the person concerned, as such a condition is not mandatory and it is enough if the ED discloses the grounds of arrest to the person concerned at the time of arrest. It was pointed out that when the arrested person is produced before the Court, it would be open to the Court to look into the relevant records presented by the authorized representative of the ED for answering the issue of need for continued detention in connection with the offence of money laundering. It was, in fact, such stringent safeguards provided under Section 19 of the Act of 2002 that prompted this Court to uphold the twin conditions contained in Section 45 thereof, making it difficult to secure bail.

15. This Court had occasion to again consider the provisions of the Act of 2002 in ***V. Senthil Balaji*** **v.** ***The State represented by Deputy Director and others***, Criminal Appeal Nos. 2284-2285 of 2023, decided on 07.08.2023, and more particularly, Section 19 thereof. It was noted that the authorized officer is at liberty to arrest the person concerned once he finds a reason to believe that he is guilty of an offence punishable under the Act of 2002, but he must also perform the mandatory duty of recording reasons. It was pointed out that this exercise has to be followed by the information of the grounds of his arrest being served on the arrestee. It was affirmed that it is the bounden duty of the authorized officer to record the reasons for his belief that a person is guilty and needs to be arrested and it was observed that this safeguard is meant to facilitate an element of fairness and accountability. Dealing with the interplay between Section 19 of the Act of 2002 and Section 167 Cr.P.C, this Court observed that the Magistrate is expected to do a balancing act as the investigation is to be completed within 24 hours as a matter of rule and, therefore, it is for the investigating agency to satisfy the Magistrate with adequate material on the need for custody of the accused. It was pointed out that this important factor is to be kept in mind by the Magistrate while passing the judicial order. This Court reiterated that Section 19 of the Act of 2002, supplemented by Section 167 Cr.P.C., provided adequate safeguards to an arrested person as the Magistrate has a distinct role to play when a remand is made of an accused person to an authority under the Act of 2002. It was held that the Magistrate is under a bounden duty to see to it that Section 19 of the Act of 2002 is duly complied with and any failure would entitle the arrestee to get released. It was pointed out that Section 167 Cr.P.C is meant to give effect to Section 19 of the Act of 2002 and, therefore, it is for the Magistrate to satisfy himself of its due compliance by perusing the order passed by the authority under Section 19(1) of the Act of 2002 and only upon such satisfaction, the Magistrate can consider the request for custody in favour of an authority. To put it otherwise, per this Court, the Magistrate is the appropriate authority who has to be satisfied about the compliance with safeguards as mandated under Section 19 of the Act of 2002. In conclusion, this Court summed up that any non-compliance with the mandate of Section 19 of the Act of 2002, would enure to the benefit of the person arrested and the Court would have power to initiate action under Section 62 of the Act of 2002, for such non-compliance. Significantly, in this case, the grounds of arrest were furnished in writing to the arrested person by the authorized officer.

16. In terms of Section 19(3) of the Act of 2002 and the law laid down in the above decisions, Section 167 Cr.P.C. would necessarily have to be complied with once an arrest is made under Section 19 of the Act of 2002. The Court seized of the exercise under Section 167 Cr.P.C. of remanding the person arrested by the ED under Section 19(1) of the Act of 2002 has a duty to verify and ensure that the conditions in Section 19 are duly satisfied and that the arrest is valid and lawful. In the event the Court fails to discharge this duty in right earnest and with the proper perspective, as pointed out hereinbefore, the order of remand would have to fail on that ground and the same cannot, by any stretch of imagination, validate an unlawful arrest made under Section 19 of the Act of 2002.

17. In the matter of ***In re Madhu Limaye and others,*** (1969) 1 SCC 292, was a 3-Judge Bench decision of this Court wherein it was observed that it would be necessary for the State to establish that, at the stage of remand, the Magistrate directed detention in jail custody after applying his mind to all relevant matters and if the arrest suffered on the ground of violation of Article 22(1) of the Constitution, the order of remand would not cure the constitutional infirmities attaching to such arrest.

18. Viewed in this context, the remand order dated 15.06.2023 passed by the learned Vacation Judge/Additional Sessions Judge, Panchkula, reflects total failure on his part in discharging his duty as per the expected standard. The learned Judge did not even record a finding that he perused the grounds of arrest to ascertain whether the ED had recorded reasons to believe that the appellants were guilty of an offence under the Act of 2002 and that there was proper compliance with the mandate of Section 19 of the Act of 2002. He merely stated that, keeping in view the seriousness of the offences and the stage of the investigation, he was convinced that custodial interrogation of the accused persons was required in the present case and remanded them to the custody of the ED! The sentence – 'It is further (sic) that all the necessary mandates of law have been complied with' follows – 'It is the case of the prosecution….' and appears to be a continuation thereof, as indicated by the word 'further', and is not a recording by the learned Judge of his own satisfaction to that effect.

19. In consequence, it would be necessary for us to examine how the appellants were arrested and verify whether it was in keeping with the safeguards in Section 19 of the Act of 2002. In this context, the sequence of events makes for an interesting reading. The first ECIR was registered by the ED on 15.06.2021 and Roop Bansal was arrested in connection therewith on 08.06.2023. Neither of the appellants was shown as an accused therein. However, it is the case of the ED that investigation in relation to the first ECIR is still ongoing. In any event, after the arrest of Roop Bansal, both the appellants secured interim

protection by way of anticipatory bail on 1809.06.2023, albeit till the next day of hearing, viz., 05.07.2023, from the Delhi High Court. However, both the appellants were summoned on 14.06.2023 for interrogation in connection with the first ECIR, in which they had interim protection. Summons in that regard were served upon them on 13.06.2023 at 06.15 pm. Significantly, the second ECIR was recorded only on that day, i.e., on 13.06.2023, in connection with FIR No. 0006 which was registered on 17.04.2023. Therein also, neither of the appellants was shown as an accused and it was only Roop Bansal who stood named as an accused. In compliance with the summons received by them vis-à-vis the first ECIR, both the appellants presented themselves at the ED's office at Rajokri, New Delhi, at 11.00 am on 14.06.2023. While they were there, Pankaj Bansal was served with summons at 04.52 pm, requiring him to appear before another Investigating Officer at 05.00 pm in relation to the second ECIR. As already noted, there is ambiguity as to when Basant Bansal was served with such summons. It is the case of the ED that he refused to receive the summons in relation to the second ECIR and he was arrested at 06.00 pm on 14.06.2023. Pankaj Bansal received the summons and appeared but as he did not divulge relevant information, the Investigating Officer arrested him at 10.30 pm on 14.06.2023.

20. This chronology of events speaks volumes and reflects rather poorly, if not negatively, on the ED's style of functioning. Being a premier investigating agency, charged with the onerous responsibility of curbing the debilitating economic offence of money laundering in our country, every action of the ED in the course of such exercise is expected to be transparent, above board and conforming to pristine standards of fair play in action. The ED, mantled with far-reaching powers under the stringent Act of 2002, is not expected to be vindictive in its conduct and must be seen to be acting with utmost probity and with the highest degree of dispassion and fairness. In the case on hand, the facts demonstrate that the ED failed to discharge its functions and exercise its powers as per these parameters.

21. In this regard, we may note that, though the appellants did not allege colourable exercise of power or malafides or malice on the part of the ED officials, they did assert in categorical terms that their arrests were a wanton abuse of power, authority and process by the ED, which would tantamount to the same thing. On that subject, we may refer to the observations of this Court in ***State of Punjab v. Gurdial Singh***, (1980) 2 SCC 471, : -

> 'The question, then, is what is malafides in the jurisprudence of power? Legal malice is gibberish unless juristic clarity keeps it separate from the popular concept of personal vice. Pithily put, bad faith which invalidates the exercise of power — sometimes called colourable exercise or fraud on power and oftentimes overlaps motives, passions and satisfactions — is the attainment of ends beyond the sanctioned purposes of power by simulation or pretension of gaining a legitimate

> goal. If the use of the power is for the fulfilment of a legitimate object the actuation or catalysation by malice is not legicidal. The action is bad where the true object is to reach an end different from the one for which the power is entrusted, goaded by extraneous considerations, good or bad, but irrelevant to the entrustment. When the custodian of power is influenced in its exercise by considerations outside those for promotion of which the power is vested the court calls it a colourable exercise and is undeceived by illusion. In a broad, blurred sense, Benjamin Disraeli was not off the mark even in law when he stated: "I repeat . . . that all power is a trust — that we are accountable for its exercise — that, from the people, and for the people, all springs, and all must exist". Fraud on power voids the order if it is not exercised bona fide for the end designed. Fraud in this context is not equal to moral turpitude and embraces all cases in which the action impugned is to effect some object which is beyond the purpose and intent of the power, whether this be malice-laden or even benign. If the purpose is corrupt the resultant act is bad. If considerations, foreign to the scope of the power or extraneous to the statute, enter the verdict or impel the action, mala fides or fraud on power vitiates the acquisition or other official act.'

A few years later, in ***Collector (District Magistrate), Allahabad and another vs. Raja Ram Jaiswal,*** (1985) 3 SCC 1 , this Court held as under:

> 'Where power is conferred to achieve a purpose, it has been repeatedly reiterated that the power must be exercised reasonably and in good faith to effectuate the purpose. And in this context "in good faith" means "for legitimate reasons". Where power is exercised for extraneous or irrelevant considerations or reasons, it is unquestionably a colourable exercise of power or fraud on power and the exercise of power is vitiated.'

Again, in ***Ravi Yashwant Bhoir vs. Collector***, (2012) 4 SCC 407, it was held thus:

> 'Malafide exercise of power does not imply any moral turpitude. It means exercise of statutory power for "purposes foreign to those for which it is in law intended". It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, where intent is manifested by its injurious acts. Passing an order for unauthorized purpose constitutes malice in law.'

22.The way in which the ED recorded the second ECIR immediately after the appellants secured anticipatory bail in relation to the first ECIR, though the foundational FIR dated back to 17.04.2023, and then went about summoning them on one pretext and arresting them on another, within a short span of 24 hours or so, manifests complete and utter lack of bonafides. Significantly, when the appellants were before the Delhi High Court seeking anticipatory bail in connection with the first ECIR, the ED did not even bring it to the notice of the High Court that there was another FIR in relation to which there was an ongoing investigation, wherein the appellants stood implicated. The second ECIR was recorded 4 days after the grant of bail and it is not possible that the ED would have been unaware of the existence of FIR No. 0006 dated 17.04.2023 at that time.

23. Surprisingly, in its 'Written Submissions', the ED stated that it started its inquiries in respect of this FIR in May, 2023, itself, but strangely, the replies filed by the ED do not state so! It is in this background that this suppression before the Delhi High Court demonstrates complete lack of probity on the part of the ED. Its prompt retaliatory move, upon grant of interim protection to the appellants, by recording the second ECIR and acting upon it, all within the span of a day, so as to arrest the appellants, speaks for itself and we need elaborate no more on that aspect.

24. Further, when the second ECIR was recorded on 13.06.2023 'after preliminary investigations', as stated in the ED's replies, it is not clear as to when the ED's Investigating Officer had the time to properly inquire into th matter so as to form a clear opinion about the appellants' involvement in an offence under the Act of 2002, warranting their arrest within 24 hours. This is a sine qua non in terms of Section 19(1) of the Act of 2002. Needless to state, authorities must act within the four corners of the statute, as pointed out by this Court in Devinder Singh v. State of Punjab, (2008) 1 SCC 728, and a statutory authority is bound by the procedure laid down in the statute and must act within the four corners thereof.

25. We may also note that the failure of the appellants to respond to the questions put to them by the ED would not be sufficient in itself for the Investigating Officer to opine that they were liable to be arrested under Section 19, as that provision specifically requires him to find reason to believe that they were guilty of an offence under the Act of 2002. Mere non-cooperation of a witness in response to the summons issued under Section 50 of the Act of 2002 would not be enough to render him/her liable to be arrested under Section 19. As per its replies, it is the claim of the ED that Pankaj Bansal was evasive in providing relevant information. It was however not brought out as to why Pankaj Bansal's replies were categorized as 'evasive' and that record is not placed before us for verification. In any event, it is not open to the ED to expect an admission of guilt from the person summoned for interrogation and assert that anything short of such admission would be an 'evasive reply'. In Santosh S/o Dwarkadas Fafat vs. State of Maharashtra, (2017) 9 SCC 714, this Court noted that custodial interrogation is not for the purpose of 'confession' as the right against self-incrimination is provided by Article 20(3) of the Constitution. It was held that

merely because an accused did not confess, it cannot be said that he was not cooperating with the investigation. Similarly, the absence of either or both of the appellants during the search operations, when their presence was not insisted upon, cannot be held against them.

26. The more important issue presently is as to how the ED is required to 'inform' the arrested person of the grounds for his/her arrest. Prayer (iii) in the writ petitions filed by the appellants pertained to this. Section 19 does not specify in clear terms as to how the arrested person is to be 'informed' of the grounds of arrest and this aspect has not been dealt with or delineated in ***Vijay Madanlal Choudhary*** (supra). Similarly, in ***V. Senthil Balaji*** (supra), this Court merely noted that the information of the grounds of arrest should be 'served' on the arrestee, but did not elaborate on that issue. Pertinent to note, the grounds of arrest were furnished in writing to the arrested person in that case. Surprisingly, no consistent and uniform practice seems to be followed by the ED in this regard, as written copies of the grounds of arrest are furnished to arrested persons in certain parts of the country but in other areas, that practice is not followed and the grounds of arrest are either read out to them or allowed to be read by them.

27. In this context, reliance is placed by the ED upon the decision of a Division Bench of the Delhi High Court in ***Moin Akhtar Qureshi* v. *Union of India and others***, 2017 SCC OnLine Del 12108, wherein it was observed that Section 19 of the Act of 2002 uses the expression 'informed of the grounds of such arrest' and does not use the expression 'communicate the grounds of such arrest' and, therefore, the obligation cast upon the authorized officer under Section 19(1) is only to inform the arrestee of the grounds of arrest and the provision does not oblige the authority to serve the grounds for such arrest on the arrestee. Reliance is also placed by the ED on the judgment of a Division Bench of the Bombay High Court in ***Chhagan Chandrakant Bhujbal* v. *Union of India and others***, 2017 Cri LJ (NOC 301) 89 2017 (1) AIR Bom R (Cri) 929, which held that the grounds of arrest are to be informed to the person arrested and that would mean that they should be communicated at the earliest but there is no statutory requirement of the grounds of arrest being communicated in writing.

28. No doubt, in ***Vijay Madanlal Choudhary (supra),*** this Court held that non-supply of the ECIR in a given case cannot be found fault with, as the ECIR may contain details of the material in the ED's possession and revealing the same may have a deleterious impact on the final outcome of the investigation or inquiry. Having held so, this Court affirmed that so long as the person is 'informed' of the grounds of his/her arrest, that would be sufficient compliance with the mandate of Article 22(1) of the Constitution.

29. In this regard, we may note that Article 22(1) of the Constitution provides, inter alia, that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest. This being the fundamental right guaranteed to the arrested person, the mode of conveying information of the grounds of arrest must necessarily be meaningful so as to serve the intended purpose. It may be noted that Section 45 of the Act of 2002 enables the person arrested under Section 19 thereof to seek release on bail but it postulates that unless the twin conditions prescribed thereunder are satisfied, such a person would not be entitled to grant of bail. The twin conditions set out in the provision are that, firstly, the Court must be satisfied, after giving an opportunity to the public prosecutor to oppose the application for release, that there are reasonable grounds to believe that the arrested person is not guilty of the offence and, secondly, that he is not likely to commit any offence while on bail. To meet this requirement, it would be essential for the arrested person to be aware of the grounds on which the authorized officer arrested him/her under Section 19 and the basis for the officer's 'reason to believe' that he/she is guilty of an offence punishable under the Act of 2002. It is only if the arrested person has knowledge of these facts that he/she would be in a position to plead and prove before the Special Court that there are grounds to believe that he/she is not guilty of such offence, so as to avail the relief of bail. Therefore, communication of the grounds of arrest, as mandated by Article 22(1) of the Constitution and Section 19 of the Act of 2002, is meant to serve this higher purpose and must be given due importance.

30. We may also note that the language of Section 19 of the Act of 2002 puts it beyond doubt that the authorized officer has to record in writing the reasons for forming the belief that the person proposed to be arrested is guilty of an offence punishable under the Act of 2002. Section 19(2) requires the authorized officer to forward a copy of the arrest order along with the material in his possession, referred to in Section 19(1), to the Adjudicating Authority in a sealed envelope. Though it is not necessary for the arrested person to be supplied with all the material that is forwarded to the Adjudicating Authority under Section 19(2), he/she has a constitutional and statutory right to be 'informed' of the grounds of arrest, which are compulsorily recorded in writing by the authorized officer in keeping with the mandate of Section 19(1) of the Act of 2002. As already noted hereinbefore, It seems that the mode of informing this to the persons arrested is left to the option of the ED's authorized officers in different parts of the country, i.e., to either furnish such grounds of arrest in writing or to allow such grounds to be read by the arrested person or be read over and explained to such person.

31. That apart, Rule 6 of 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, titled 'Forms of records', provides to the effect that the arresting officer while exercising powers under Section 19(1) of the Act of 27 2002, shall sign the Arrest Order in Form III appended to those Rules. Form III, being the prescribed format of the Arrest Order, reads as under: -

**"ARREST ORDER**

Whereas, I………. Director/Deputy Director/Assistant Director/ Officer authorized in this behalf by the Central Government, have reason to believe that ….. [name of the person arrested] resident of ….. has been guilty of an offence punishable under the provisions of the Prevention of Money-laundering Act, 2002 (15 of 2003);

Now, Therefore, in exercise of the powers conferred on me under sub-section (1) of section 19 of the Prevention of Money-laundering Act, 2002 (15 of 2003), I hereby arrest the said ……….. [name of the person arrested] at …….hours on ………….. and he has been informed of the grounds for such arrest.

Dated at ……. on this ……. day of ……. Two thousand …….

Arresting Officer
(Signature with Seal)

To
…………………..
…………………..
[Name and complete address of the person arrested]"

Needless to state, this format would be followed all over the country by the authorized officers who exercise the power of arrest under Section 19(1) of the Act of 2002 but, in certain parts of the country, the authorized officer would inform the arrested person of the grounds of arrest by
furnishing the same in writing, while in other parts of the country, on the basis of the very same prescribed format, the authorized officer would only read out or permit reading of the contents of the grounds of arrest. This dual and disparate procedure to convey the grounds of arrest to the arrested person cannot be countenanced on the strength of the very same arrest order, in the aforestated prescribed format.

32. That being so, there is no valid reason as to why a copy of such written grounds of arrest should not be furnished to the arrested person as a matter of course and without

exception. There are two primary reasons as to why this would be the advisable course of action to be followed as a matter of principle. Firstly, in the event such grounds of arrest are orally read out to the arrested person or read by such person with nothing further and this fact is disputed in a given case, it may boil down to the word of the arrested person against the word of the authorized officer as to whether or not there is due and proper compliance in this regard. In the case on hand, that is the situation insofar as Basant Bansal is concerned. Though the ED claims that witnesses were present and certified that the grounds of arrest were read out and explained to him in Hindi, that is neither here nor there as he did not sign the document. Non-compliance in this regard would entail release of the arrested person straightaway, as held in V. Senthil Balaji (supra). Such a precarious situation is easily avoided and the consequence thereof can be obviated very simply by furnishing the written grounds of arrest, as recorded by the authorized officer in terms of Section 19(1) of the Act of 2002, to the arrested person under due acknowledgment, instead of leaving it to the debatable *ipse dixit* of the authorized officer.

33. The second reason as to why this would be the proper course to adopt is the constitutional objective underlying such information being given to the arrested person. Conveyance of this information is not only to apprise the arrested person of why he/she is being arrested but also to enable such person to seek legal counsel and, thereafter, present a case before the Court under Section 45 to seek release on bail, if he/she so chooses. In this regard, the grounds of arrest in V. Senthil Balaji (supra) are placed on record and we find that the same run into as many as six pages. The grounds of arrest recorded in the case on hand in relation to Pankaj Bansal and Basant Bansal have not been produced before this Court, but it was contended that they were produced at the time of remand. However, as already noted earlier, this did not serve the intended purpose. Further, in the event their grounds of arrest were equally voluminous, it would be well-nigh impossible for either Pankaj Bansal or Basant Bansal to record and remember all that they had read or heard being read out for future recall so as to avail legal remedies. More so, as a person who has just been arrested would not be in a calm and collected frame of mind and may be utterly incapable of remembering the contents of the grounds of arrest read by or read out to him/her. The very purpose of this constitutional and statutory protection would be rendered nugatory by permitting the authorities concerned to merely read out or permit reading of the grounds of arrest, irrespective of their length and detail, and claim due compliance with the constitutional requirement under Article 22(1) and the statutory mandate under Section 19(1) of the Act of 2002.

34. We may also note that the grounds of arrest recorded by the authorized officer, in terms of Section 19(1) of the Act of 2002, would be personal to the person who is arrested and

there should, ordinarily, be no risk of sensitive material being divulged therefrom, compromising the sanctity and integrity of the investigation. In the event any such sensitive material finds mention in such grounds of arrest recorded by the authorized officer, it would always be open to him to redact such sensitive portions in the document and furnish the edited copy of the grounds of arrest to the arrested person, so as to safeguard the sanctity of the investigation.

35. On the above analysis, to give true meaning and purpose to the constitutional and the statutory mandate of Section 19(1) of the Act of 2002 of informing the arrested person of the grounds of arrest, we hold that it would be necessary, henceforth, that a copy of such written grounds of arrest is furnished to the arrested person as a matter of course and without exception. The decisions of the Delhi High Court in Moin Akhtar Qureshi (supra) and the Bombay High Court in Chhagan Chandrakant Bhujbal (supra), which hold to the contrary, do not lay down the correct law. In the case on hand, the admitted position is that the ED's Investigating Officer merely read out or permitted reading of the grounds of arrest of the appellants and left it at that,

which is also disputed by the appellants. As this form of communication is not found to be adequate to fulfil compliance with the mandate of Article 22(1) of the Constitution and Section 19(1) of the Act of 2002, we have no hesitation in holding that their arrest was not in keeping with the provisions of Section 19(1) of the Act of 2002. Further, as already noted supra, the clandestine conduct of the ED in proceeding against the appellants, by recording the second ECIR immediately after they secured interim protection in relation to the first ECIR, does not commend acceptance as it reeks of arbitrary exercise of power. In effect, the arrest of the appellants and, in consequence, their remand to the custody of the ED and, thereafter, to judicial custody, cannot be sustained.

36. The appeals are accordingly allowed, setting aside the impugned orders passed by the Division Bench of the Punjab & Haryana High Court as well as the impugned arrest orders and arrest memos along with the orders of remand passed by the learned Vacation Judge/Additional Sessions Judge, Panchkula, and all orders consequential thereto.

The appellants shall be released forthwith unless their incarceration is validly required in connection with any other case.

In the circumstances, we make no orders as to costs.

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*The End*