LL.B. III Term

LB-3034 - Law of Crimes-III
(White Collar Crimes)

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LL.B. III Term

Paper: LB - 3034 Law of Crimes-III
(White Collar Crimes)

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, Organised Crimes, and Occupational Crimes.
D. Reports: The Santhanam Committee Report, 1964, and the 47th Report of the Law Commission of India, 1972.

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. Edwin H. Sutherland, "The Problem of White Collar Crime" in *White Collar Crime* 3-10 (Yale University Press 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. K.N.Wanchoo, "Report on Malady of Black Money", 1970.

Topic 2: White Collar Criminality and Related Theories

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

Readings:

1. Edwin H. Sutherland, "White Collar Criminality" Vol. 5 No.1 *American Sociological Review* (1940) **1-13**
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) **14-20**
3. Dr. Joseph T. Wells, *Corporate Fraud Handbook- Prevention and Detection*, pp. 1-42 (John Wiley & Sons, 5th Edition, 2017).

Suggested Readings:

1. Katherine S. Williams*, Textbook on Criminology, (*6th ed.*, 2012)*
2. Donald R. Cressey, *"*The Criminal Violation of Financial Trust*", American Sociological Review*, Vol. 15. No. 6, 738-743 (1950).

Topic 3: White Collar Crimes in Different Professions

A. Tax Evasion
B. Corporate Fraud
C. Health Care Fraud
D. Misbranding and Adulteration
E. Education Fraud

Readings and Case:

1. Doreen McBarnet, "Whiter than White Collar Crime: Tax, Fraud Insurance and the Management of Stigma," *The British Journal of Sociology*, Vol. 42(2) (1991). **21-25**
2. *M/S Nestle India Limited* v. *The Food Safety and Standards Authority of India*, W. P (L) No. 1688 of 2015 **26-44**
   [**Note:** Discuss the relevant provisions of the Food Safety and Standards Act 2006.]
3. I) William G. Tierney and Nidhi S. Sabharwal, "Analyzing the Culture of Corruption in Indian Higher Education", *International Higher Education*, Vol. 87 (2016) pp. 6-7.

II) Jacques Hallak and Muriel Poisson, Corrupt Schools, "Corrupt Universities: What Can Be Done?, *International Institute for Educational Planning*, UNESCO Publishing (2007) pp.57-58 **45-50**

Suggested Readings and Cases:

1. P. K. Gupta Sanjeev Gupta , (2015),"Corporate Frauds in India – Perceptions and Emerging Issues*", Journal of Financial Crime*, Vol. 22 (1) pp. 79 – 103.
2. *Serious Fraud Investigation Office* vs. *Rahul Modi,* Criminal Appeal Nos. 538-539 of 2019.
3. Sarah Hodges, "The case of the 'Spurious Drugs Kingpin': Shifting Pills in Chennai, India," Critical Public Health, 29(4), (2019) pp. 473-483.
4. *U.S*. v. *Ranbaxy USA*, Inc., JFM-13-CR-0238 (D. Md.). [Fraudulent Representation to FDA] https://www.justice.gov/opa/pr/generic-drug-manufacturer-ranbaxy-pleads-guilty-and-agrees-pay-500-million-resolve-false
5. *Glenn Paul* vs. *The State of Madhya Pradesh, MPHC*, WP No.12196 of 2014 (Vyapam Scam PIL)

Topic 4: The Prevention of Corruption Act, 1988

A. Need of the Act (read with Santhanam Committee Report)
B. Role of Anti-Corruption Bureau, Central Vigilance Commission, and Central Bureau of Investigation
C. The Prevention of Corruption Act, 1988 and 2018 Amendments
D. Definitions of 'Public Servant,', 'Public Duty,' and 'Undue Advantage'
E. Offence committed by Public Servant and Bribe Giver, and their Penalties (Sec 7 to 14)
F. Punishment for Attempts (Section 15)
G. Section 17- Persons Authorised to Investigate, and Section 17A- Previous Approval before Enquiry, Inquiry or Investigation.
H. Sanction for Prosecution (Section 19 r/w Section 197 of the Code of Criminal Procedure, 1973)
I. Presumption where Public Servant accepts Undue Advantage (Section 20)

Cases:

1. *Kalicharan Mahapatra* v. *State of Orissa,* AIR 1998 SC 2595 **51-54**
2. *K. Shanthamma* v. *State of Telangana,* SLP (Criminal) No. 7182 of 2019 **55-61**
3. *Kanwarjit Singh Kakkar* v. *State Of Punjab,* (2011) 6 S.C.R. 895 **62-67**
4. *Abhay Singh Chautala* v. *C.B.I,* (2011) 7 SCC 141 **68-77**
5. *CBI, Bank Securities & Fraud Cell* v. *Ramesh Gelli, (2016) 3 SCC 788*

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

1. Delhi Special Police Establishment Act, 1946
2. The Central Vigilance Act 2003

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:
Definitions- attachment, money laundering, proceeds of crime, reporting entity, and scheduled offence.
Offence of Money Laundering (Section 3)
Punishment for Money Laundering (Section 4)

Enforcement:

Attachment (Section 5)

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

Power to Arrest (Section 19)

Adjudication under the Act:

Adjudication by Adjudicating Authorities (Section 8)

Special Courts (Sections 43 to 47)

Vesting of Property in Central Government (Section 9)

Preventive Mechanisms under the Act:

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

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

Cases:

6. *Ram Jethmalani* v. *Union of India*, (2011) 9 SCC 761 **78-96**

7. *Binod Kumar* v. *State of Jharkhand & Ors,* (2011) 11 SCC 463 **97-104**

8. *B. Ramaraju* v. *Union of India,* W.P. No. 10765 of High Court of A.P. 2011 (164) Company Case 149 **105-149**

9. *Vijay Madanlal & Ors* v. *Union of India & Ors,* Special Leave Petition (Cr) No.4634 of 2014 **150-197**

10. *Parvathi Kollur & Anr* v. *State by Directorate of Enforcement***,** S.L.P (Cal.) No. 4258 of 2021 **198-199**

<u>Prescribed Readings:</u>

1. UN Political Declaration & Action Plan against Money Laundering 1998.
2. M. C. Mehanathan, *Law on Prevention of Money Laundering in India* (2014).

IMPORTANT NOTE:

1. The topics, cases, and suggested readings given above are not exhaustive. The committee of teachers teaching the Course shall be at liberty to revise topics/cases/suggested readings.

2. Students are required to study/refer to the legislations as amended from time to time, and consult the latest editions of books.

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, larcency, 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

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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.

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 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

[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.

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 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 agents 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. An 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

[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 processes which are common to both the rich and the poor, the emotionally stable 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 is a particular person comes to engage in criminal behavior.

1. *Criminal behavior is learned*. Negatively, this means that criminal behaviour 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.

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

3. *The principal part of the learning of criminal behavior occurs with 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.

4. *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.*

5. *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 culture conflict in relation to the legal codes.

6. *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 criminal, they do so because of contacts 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 not 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.

7. *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 from and a mathematical ratio be reached. A formula in this sense has not been developed and the development of such formula would be extremely difficulty.

8. *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.

9. *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

(A) TAX EVASION

Excerpt from “Whiter than White Collar Crime: Tax, Fraud Insurance and the Management of Stigma”

By Doreen McBarnet

Tax evasion is a term usually reserved for non-payment of tax by means of criminal fraud or other violations of law. Tax avoidance involves minimising or eliminating a tax-bill legally. On the face of it the first is a subject appropriate to white collar crime research; the second is not. It is a legitimate activity, whiter than white collar crime. It falls on the right side of the boundary between lawful and deviant behaviour.

The boundary between lawful and deviant behaviour, however, is not as clear as it might sound. In the first place transactions themselves may straddle the boundary, avoidance slipping into evasion, or being permeated by it. Second, the location of a transaction on the right or wrong side of the boundary depends on how those enforcing the law decide to label it - classic labelling theory. Third, the boundaries can be stretched not just by regulators but also by the regulated. What classic labelling theory does not take into account is the scope for those apparently subject to the law to turn the tables on law enforcement, to actively take the legal initiative and 'launder' activities into a non- taxable form. By using rather than breaking the law, however, they definitively label their activities legitimate and themselves as beyond the reach of criminal law enforcement.

The research project on which this paper draws, explores techniques of legal tax avoidance and how they work. It shows how the law can be used - by individuals, small firms and especially big business - to gain all the benefits of evasion - escaping tax - without the potential costs - penalties and stigma. It shows how sophisticated taxpayers - or non-taxpayers - can eschew fraudulent fake expenses, false representation of deals or non-declaration of interest or dividends, and opt instead for achieving the same results by legal techniques. Such well-tried devices as the 'Delaware Link', 'bed and breakfasting' or ‘bondwashing' have, in their time, allowed, without any recourse to criminal law, double charging of the same interest costs twice against profits, the artificial creation of losses, not actually sustained, to set against capital gains, and the legal laundering of interest into tax-free capital gains, all for the purpose of quite deliberately escaping tax.

This paper is also concerned with manipulation of the boundary between lawful and deviant activity, but here the focus is on the enforcement process and some of the ways in which this process is managed by taxpayers and their advisers, or by tax scheme promoters, in their own interests. Drawing on interviews with 105 accountants, city solicitors, barristers, judges, merchant bankers, insurers, Inland Revenue officers, tax consultants and scheme promoters, along with contextual interviews, and legal and documentary analysis, the paper examines how the boundary is drawn between tax evasion and tax avoidance, how it can be manipulated to ensure immunity from criminal stigma, and what implications this has for the study of white collar crime and labelling theory.

THE BOUNDARY BETWEEN EVASION AND AVOIDANCE: DISCLOSURE

Drawing a line between tax evasion and tax avoidance is not easy. Offshore invoicing, for example, might range from the genuinely commercial to the fraudulent. It may be a genuine invoice from one company to another (related) company for actual and precise services rendered at market prices. It may be an invoice from a real offshore office for vaguer management charges by staff based there. It may be an invoice issued from an office which is no more than a brass plate to show company registration. It may be an invoice on neat headed paper from a non-existent company. (Interviewee 94, Inland Revenue) Where, asked the Revenue officer who gave this example, do you draw the line? The first is clearly legal but what of the others? In his terms of legitimate and non-legitimate 'make-believe', the second is legitimate in form though possibly make believe in terms of the sums claimed. The third is make believe in all but *form.* Yet only the fourth is clearly *fraudulent* make believe. There is a spectrum of greys at the boundaries of lawful and deviant behaviour. For practical enforcement purposes, however, there has to be some way of drawing a line between what may be treated as deviant and what may not. The criterion currently employed is disclosure.

Faced with a tax bill there are four general responses to tax liabilities. First, one can pay the bill, second, one can pack the money in a suitcase and smuggle it offshore, third, one can negotiate over how much to pay, and fourth, one can technically launder the deal into a non-taxable form. Options two, three and four all escape paying tax: but only the second is criminal. The essential distinction between option two and options three and four is *disclosure*. In option two, the money packed in the suitcases and the transaction which produced it are never declared. In option three enough of the deal is disclosed to negotiate over tax liability. In option four the transaction is repackaged into a form which technically escapes tax liability and, *in its new form,* can be disclosed. If the techniques are

clever enough there may be nothing to hide since the key lies not in secrecy but in the legal repackaging. In short, avoidance may be disclosed and still succeed. Evasion by contrast necessarily involves lying about a transaction or hiding it- it is characterised by 'misstatements, omissions or false declarations'.:

Disclosure emerges repeatedly as the rule of thumb for distinguishing avoidance from evasion in law, professional codes of practice and the working rules of practitioners and Revenue officials. Text- books on tax law routinely draw a distinction between tax evasion and tax avoidance with concealment and disclosure as the key issues

> Tax avoidance is legal in that it incorporates no wrongful concealment of relevant facts. [Evasion by contrast involves] fraud or concealment.
>
> Tax evasion . . . occurs where a taxpayer . . . ignores or conceals his liability.

Where “tax evasion” is treated as fraud it is dealt with under the general criminal law via the common law offence of defrauding the public revenue, the Theft Acts 1968 and 1978 and the specific offences of false accounting, forgery or perjury. Deception and falsehood are the key aspects of these offences. The Roskill Committee 1986, noting that fraud is not a clearly defined term, described its 'main ingredients' in law as 'dishonest practice, deception, false disclosure, concealment of assets, etc'.

There are two routes to tax evasion. It might involve doing something which is in itself illegal - such as forging documents to claim allowances. That would be clearly fraudulent. Or it might simply involve engaging in some moneymaking activity which is in itself perfectly legal, but failing to disclose it to the tax authorities. In this case, it is not the activity but the failure to disclose it which constitutes the offence, and the question then becomes one of whether the omission was a product of criminal intent or honest error.

Failure or unwillingness to disclose information thus becomes a key issue in determining whether an activity is tax evasion or not, and continuing failure to disclose on investigation becomes prima facie evidence of criminal intent, and enhances the likelihood of prosecution. The Keith Committee (*Committee on Enforcement Powers of the Revenue Departments, London, 1983*) saw 'sustained failure to provide information' as a major offence and noted that 'the concealment of material facts, leading to an under-assessment, marks the point at which avoidance crosses the borderline and becomes evasion’. In law, evasion is characterised by deception and concealment: avoidance by honest disclosure.

Most direct dealing with the Revenue is done by accountants on behalf of their clients and the accountancy bodies' professional codes also emphasise the importance of

disclosure. In distinguishing tax evasion from avoidance the Institute of Chartered Accountants notes

> It is particularly important that in all tax matters the member should be in a position to assure himself that no relevant infor- mation has been or will be withheld from the tax authorities. It follows that the highest standards of disclosure should be observed by members.

The ability to disclose with confidence was noted repeatedly in interviews with tax practitioners as the litmus test for whether a scheme constitutes evasion or avoidance

> . . . you must feel you are no worse off if you have to lay all your cards on the table. (Interviewee 28, solicitor)

> . . . as a rule of thumb, a tax-saving proposal is likely to be on the right side of the line if, after it is carried out, a full disclosure of all the documents in the case can be put before the authorities without any concealment.'

The same rule of thumb is used in the Revenue as a matter of working practice: 'If it is not full disclosure it it evasion'. (Interviewee 95, Inland Revenue). The guidance note with the annual tax return form reminds taxpayers . . . that it is a serious offence to conceal any part of your income or chargeable gains" while the Revenue's tariff on penalties depends heavily on the degree of disclosure given.

The issue seems clear-cut: suitcases of cash heading for numbered Swiss bank accounts after undisclosed property deals constitute evasion: disclosed property deals with legal arguments over the rights and wrongs of the Revenue's claim to tax on the deal are at worst avoidance. One method is clear, open and legal. The other, dishonest, secretive and illegal. There is 'a sharp distinction' between the two.

Yet the same Revenue officials who accept and use the disclosure distinction, complain that they do not normally get full disclosure of information to work with. Interviewed accountants and solicitors tended to take a minimalist approach to disclosure of information to work with. Interviewed accountants and solicitors tended to take a minimalist approach to disclosure

> I don't subscribe to the belief that you should bare your soul to the Revenue. (Interviewee 44, accountant)

> You don't have to do the Inspector's work for him. (Interviewee 47, accountant)

A senior partner of one of the Big Eight firms of accountants, in a lecture to a group of Inland Revenue inspectors, noted that 'Full disclosure is very hard to achieve in

practice, and is not necessarily undertaken by even the big firms'. (Interviewee 47, accountant) The Inland Revenue feels disclosure only comes 'when they think the Revenue are getting onto it' (Interviewee 94, Inland Revenue). One Revenue officer talked of a letter from an accountant to his client which came to the Revenue in error. It noted that 'transactions were really distributions not royalties and the inspector is getting warm. We may have to admit it soon'. (Interviewee 94, Inland Revenue) The Association of Inspectors of Taxes gave evidence to the Keith Committee that 'deliberate attempts are often made to prevent the Inspector being aware of all the transactions in the scheme. Secrecy is often an important part of the scheme'. Respondents talked of the need for full disclosure 'if we have to lay all our cards on the table' suggesting that they did not always assume they would have to. (Interviewee 28, solicitor) In fact our research indicated that tax- payers and their advisers do not tend to 'lay all their cards on the table'. 'Misstatements, omissions and false declarations' have been noted as characteristic of evasion. Yet normal tax reporting clearly misleads, omits and is 'economic with the truth'.

The question is: if disclosure is the mark of legitimate non-payment of tax, non-disclosure the mark of evasion, how can the taxpayer avoid disclosure but still avoid the 'taint of fraud'? How can he manage the boundary between legal and deviant behaviour?

Of course one might ask, why bother? In tax evasion, as in other areas of white collar crime, policing is difficult so that one may never be caught: prosecution is rare - only around per cent of all acknowledged evasion cases per year; and settlement is normal. There are still penalties involved, however, and still stigma attached to criminal evasion, however settled, as opposed to avoidance, which, whether it actually succeeds or not, carries no taint of criminality. Major public companies do not want the adverse publicity of a tax evasion case. Even in the greyer areas of avoidance, 'company treasurers get nervous' about publicity (Interviewee 72, tax scheme promoter). There is some incentive, therefore, to stay on the right side of the line.

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(D) MISBRANDING AND ADULTERATION

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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<u>(E) Education Fraud</u>

(I) Analyzing the Culture of Corruption in Indian Higher Education

By William G. Tierney and Nidhi S. Sabharwal

All universities have individuals who commit unacceptable acts. A student cheats on an exam. A professor fakes data in an experiment. A college president enriches himself by fraud. Although singular acts of corruption are unacceptable and must be condemned, they are individual errors of judgment that differ from systemic corruption. Systemic corruption occurs when the entire system is mired in schemes that are unethical and perpetrated at institutional and system wide levels.

Many worry that India's postsecondary system is a poster child for systemic corruption. India garnered worldwide attention when a cheating scandal, involving thousands of individuals who took medical examinations on behalf of students, was exposed. Answers for entrance tests to professional courses continue to be regularly leaked. Images of family members scaling walls to help their children cheat are etched in the nation's memory.

The problems are structural. Over a generation ago, the Indian government faced a dilemma: it wanted to dramatically increase the number of students attending postsecondary institutions, but it lacked adequate funding. Consequently, private, non-profit colleges became prominent. According to the Ministry of Human Resource Development, India has 35,357 higher-education institutions and32.3 million students. 22,100 of the institutions are private colleges. Over 60 percent of private and public colleges have less than 500 students, and 20 percent have less than 100 students. Although many say that the system is riddled with corruption, most are troubled by the 22,100 private colleges. The majority of news reports pertain to those with less than 500 students.

No one claims that all private institutions are corrupt; but large-scale surveys also will not yield data about dis- honest practices. Who would admit on a survey that they engage in corruption? However, the sorts of activities that we discuss below are commonly acknowledged by those involved in higher education in India. Private institutions are, by law, non-profit. Yet, the manner in which they are man- aged has enabled profit through "black money," or bribery. Private colleges enable multiple actors to generate incomes for themselves and others.

Drivers of Corruption

Agents: Students frequently do not approach a college directly, but go through "agents," or middlemen. Colleges also depend on agents so they can admit adequate numbers of students. The agents charge the students a commission for facilitating the admission process and negotiating a dis- count with the college principal. Agents also charge the college a commission for supplying bulk admissions.

Students: Students pay for, and expect to earn a degree, but do not expect to attend classes. They often refer to them- selves as "non-attending students." The institutions honor, so to speak, that expectation. The reasons for their non- attendance vary. The college may be

located far from students' hometowns, or students may have work obligations. Students may appear when exams are given or do what is minimally required. Teachers, for example, e-mail lessons to students. Sometimes students come to the college if they are able, according to their own convenience. They take notes, show their work, take work home, and try to understand the lessons. The teachers then give them a final grade that will enable them to take the university examinations. The pass percentage in the college is mostly 100 percent.

Institutional Leaders: Institutional leaders often manipulate the system to maximize their financial gain. One strategy involves keeping teachers and the college principal "on paper" to meet the staffing norms set by the regulating authorities. Thus, teachers may be listed as full-time employees, but are actually not. A teacher gets a full salary on paper, but returns a substantial amount to the college. The institution's books appear to have a full complement of teachers, and the teachers receive an income for doing virtually nothing.
In addition, teachers and/or college principals may be involved in the university recruitment process, which creates revenue for the college and the recruiters.

Visiting Committees: College management works hard to ensure that their institution complies with a plethora of regulations concerning daily management. When government-specified committees visit to rate, review, or rank the college, management rolls out the red carpet. Site-visit committees are paid an official amount. However, on visits to weak (or entirely non-existent) institutions, members of the site committee might solicit more than ten times the official amount of the gratuity based on trust. Colleges that do not exist are those without any buildings or that have a building, but it is empty. At times, inspection teams are taken to an entirely different building so they do not see an empty space. These colleges are able to function because of an exchange of money. That is, the institutions pay a significant amount of money to the authorities to gain the license to operate. Once they receive their initial permits, they then turn to paying visiting teams
in order to provide a positive report.

Conclusion

The challenge in India, or for any country facing systemic corruption, is that a cultural ethos pervades individual actions. If a student cheats on an exam and the institution condemns cheating, the process of rectifying aberrant behavior is clear. However, reform is more difficult in a culture where "everyone does it." If black money is the norm rather than the exception, there is little incentive to change. The casual use of phrases such as "non-attending student" underscores a system that is rigged so that individuals can pay for degrees. When individuals get paid for no work—or receive payment for providing a particular score on a site visit or exam—corruption is endemic.
The first step in systemic reform is recognizing that a problem exists. India has a storied history of excellence in higher education. The world's first residential university was an Indian institution—Nalanda in the fifth century. India has generated eight Nobel Prize winners and a literary tradition that extends over thousands of years. To overcome the corruption that impairs confidence and quality, India's epic history should serve as an archetype for a postsecondary system that promotes research and workforce development. At

the moment, the ethical base underpinning India's educational system is being eroded, undermining the very basis of mutual trust and educational standards.

Broad Typology of Corruption in Educational Field

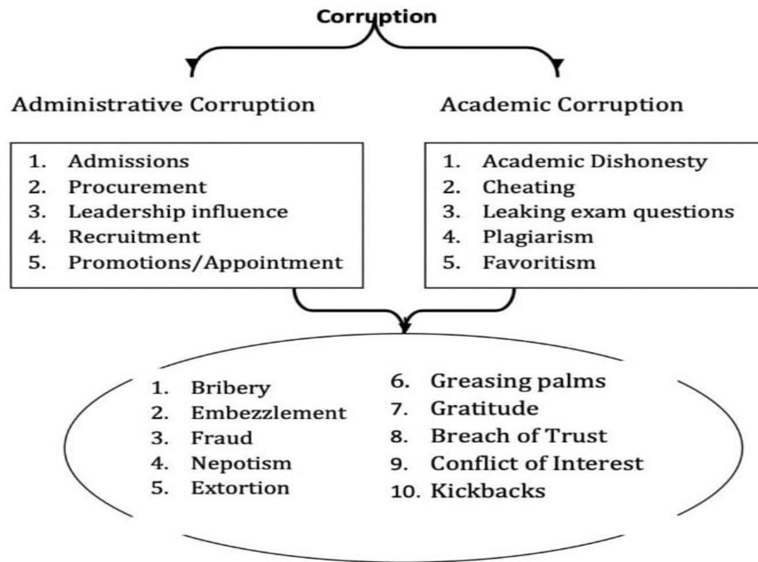


Figure 1. Manifestation Processes of Corruption in Higher Education. Source: Fieldwork 2015.

(II) Different Forms of Corrupt Practices in Education Sector

Excerpt from Corrupt Schools, Corrupt Universities: What can be done?- Jacques Hallak and Muriel Poisson

Forms of corruption include: embezzlement; bribery; fraud; extortion; and favouritism.

1) Embezzlement: the theft of public resources by public officials. One example in the education sector is the use of funds aimed at school construction for the financing of political parties or political campaigns.
2) Bribery: payment (in money or in kind) given or taken in a corrupt relationship. One illustration of it is the payment of bribes to be recruited as a teacher, including when the person does not have the appropriate credentials to be appointed.
3) Fraud: economic crime that involves some kind of trickery, swindling or deceit. One manifestation in the education sector is the creation of paper or diploma mills, whereby a person can buy a fake diploma directly from the World Wide Web; another is the existence of ghost teachers on payrolls.
4) Extortion: money and other resources extracted by the use of coercion, violence or threats to use force. There may be fewer examples of violence or threats to use violence in the education sector compared to other sectors. However, sexual harassment of pupils or the obligation for parents to pay illegal or unauthorized fees if they want their child to be admitted to school can be classified as extortion.
5) Favouritism: mechanism of power abuse implying 'privatization' and a highly biased distribution of state resources. This includes cases of

Major opportunities for corruption by areas of education

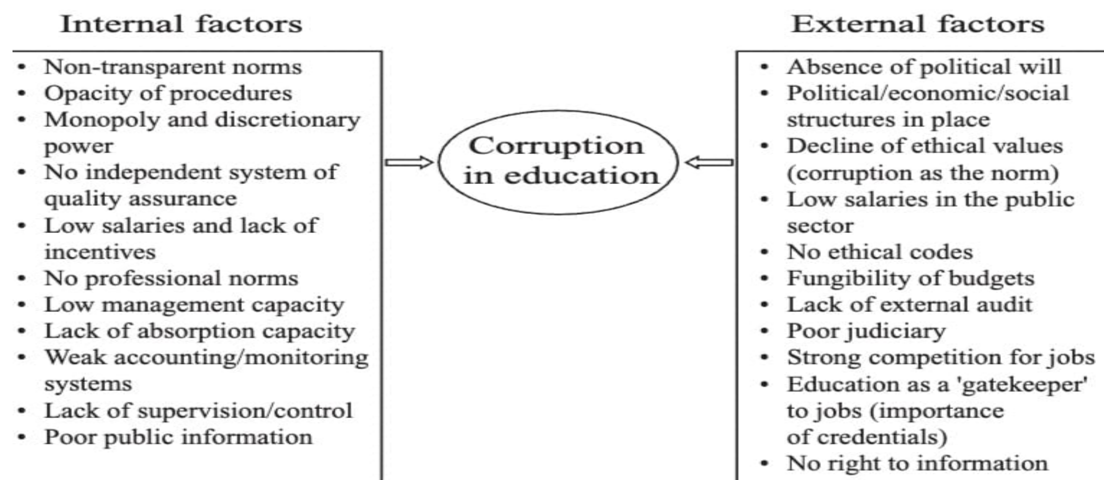
Extracted from Jacques Hallak and Muriel Poisson, CORRUPT SCHOOLS, CORRUPT UNIVERSITIES: WHAT CAN BE DONE?, International Institute for Educational Planning, UNESCO Publishing (2007) pp. 63-64

Areas	**Major opportunities for corrupt practices**
Finance	▪ Transgressing rules and procedures / bypass of criteria ▪ Inflation of costs and activities ▪ Embezzlement
Allocation of specific allowances (fellowships, subsidies, etc.)	▪ Favouritism / nepotism ▪ Bribes ▪ Bypass of criteria ▪ Discrimination (political, social, ethnic)

Construction, maintenance and school repairs	▪ Fraud in public tendering (payoffs, gifts, favouritism) ▪ Collusion among suppliers ▪ Embezzlement ▪ Manipulating data ▪ Bypass of school mapping ▪ Ghost deliveries
Distribution of equipment, furniture and materials (including transport, boarding, textbooks, canteens and school meals)	▪ Fraud in public tendering (payoffs, gifts, favouritism)• Collusion among suppliers ▪ Siphoning of school supplies ▪ Purchase of unnecessary equipment ▪ Manipulating data ▪ Bypass of allocation criteria ▪ Ghost deliveries
Writing of textbooks	▪ Fraud in the selection of authors (favouritism, bribes, gifts) ▪ Bypass of copyright law ▪ Students forced to purchase materials copyrighted by instructors
Teacher appointment, management (transfer, promotion), payment and training	▪ Fraud in the appointment and deployment of teachers (favouritism, bribes, gifts) ▪ Discrimination (political, social, ethnic) ▪ Falsification of credentials/use of fake diplomas Bypass of criteria ▪ Pay delay, sometimes with unauthorized deductions
Teacher behaviour (professional misconduct)	▪ Ghost teachers ▪ Absenteeism ▪ Illegal fees (for school entrance, exams, assessment, private tutoring, etc.) ▪ Favouritism/nepotism/acceptance of gifts ▪ Discrimination (political, social, ethnic)• Private tutoring (including use of schools for private purpose) ▪ Sexual harassment or exploitation ▪ Bribes or favours during inspector visits

Information systems	▪ Manipulating data ▪ Selecting/suppressing information ▪ Irregularity in producing and publishing information ▪ Payment for information that should be provided free
Examinations	▪ Selling information ▪ Examination fraud (impersonation, cheating, favouritism, gifts) ▪ Bribes (for high marks, grades, selection to specialized programmes, diplomas, admission to universities) ▪ Diploma mills and false credentials ▪ Fraudulent research, plagiarism
Institution accreditation	▪ Fraud in the accreditation process (favouritism, bribes, gifts)

Internal and external factors contributing to corruption in the education sector



Source: Jacques Hallak and Muriel Poisson, CORRUPT SCHOOLS, CORRUPT UNIVERSITIES: WHAT CAN BE DONE?, International Institute for Educational Planning, UNESCO Publishing (2007) p. 66

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TOPIC 4: 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.

1. 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.
2. 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/-.
3. 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.

4. 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.

5. 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.

6. 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.

7. 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. 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. 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.

Section 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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TOPIC 5: THE PREVENTION OF MONEY-LAUNDERING ACT, 2002

Ram Jethmalani & Ors.* v. *Union of India

2011 (10) SCALE 691
Hon'ble Judges/Coram: B. Sudershan Reddy and S.S. Nijjar, JJ.

B. SUDERSHAN REDDY, J. 1. 'Follow the money' was the short and simple advice given by the secret informant, within the American Government, to Bob Woodward, the journalist from Washington Post, in aid of his investigations of the Watergate break in. Money has often been claimed, by economists, to only be a veil that covers the real value and the economy. As a medium of exchange, money is vital for the smooth functioning of exchange in the market place. However, increasing monetization of most social transactions has been viewed as potentially problematic for the social order, in as much as it signifies a move to evaluating value, and ethical desirability, of most areas of social interaction only in terms of price obtained in the market place.

2. Price based notions of value and values, as propounded by some extreme neo-liberal doctrines, implies that the values that ought to be promoted, in societies, are the ones for which people are willing to pay a price for. Values, and social actions, for which an effective demand is not expressed in the market, are neglected, even if lip service is paid to their essentiality. However, it cannot be denied that not everything that can be, and is transacted, in the market for a price is necessarily good, and enhances social welfare. Moreover, some activities, even if costly and without being directly measurable in terms of exchange value, are to be rightly viewed as essential. It is a well established proposition, of political economy, and of statecraft, that the State has a necessary interest in determining, and influencing, the kinds of transactions, and social actions that occur within a legal order. From prevention of certain kinds of harmful activities, that may range from outright crimes, to regulating or controlling, and consequently mitigating, socially harmful modes of social and economic production to promotion of activities that are deemed to be of higher priority, than other activities which may have a lower priority, howsoever evaluated in terms of social utility, are all the responsibilities of the State. Whether such activities by the State result in directly measurable benefits or not is often not the most important factor in determining their desirability; their absence, or their substantial evisceration, are to be viewed as socially destructive.

3. The scrutiny, and control, of activities, whether in the economic, social or political contexts, by the State, in the public interest as posited by modern constitutionalism, is substantially effectuated by the State 'following the money'. In modern societies very little gets accomplished without transfer of money. The incidence of crime, petty and

grand, like any other social phenomena is often linked to transfers of monies, small or large. Money, in that sense, can both power, and also reward, crime. As noted by many scholars, with increasing globalization, an ideological and social construct, in which transactions across borders are accomplished with little or no control over the quantum, and mode of transfers of money in exchange for various services and value rendered, both legal and illegal, nation-states also have begun to confront complex problems of cross-border crimes of all kinds. Whether this complex web of flows of funds, instantaneously, and in large sums is good or bad, from the perspective of lawful and desired transactions is not at issue in the context of the matters before this Court.

4. The worries of this Court that arise, in the context of the matters placed before us, are with respect to transfers of monies, and accumulation of monies, which are unaccounted for by many individuals and other legal entities in the country, in foreign banks. The worries of this Court relate not merely to the quantum of monies said to have been secreted away in foreign banks, but also the manner in which they may have been taken away from the country, and with the nature of activities that may have engendered the accumulation of such monies. The worries of this Court are also with regard to the nature of activities that such monies may engender, both in terms of the concentration of economic power, and also the fact that such monies may be transferred to groups and individuals who may use them for unlawful activities that are extremely dangerous to the nation, including actions against the State. The worries of this Court also relate to whether the activities of engendering such unaccounted monies, transferring them abroad, and the routing them back to India may not actually be creating a culture that extols the virtue of such cycles, and the activities that engender such cycles are viewed as desirable modes of individual and group action. The worries of this court also relate to the manner, and the extent to which such cycles are damaging to both national and international attempts to combat the extent, nature and intensity of cross-border criminal activity. Finally, the worries of this Court are also with respect to the extent of incapacities, system wide, in terms of institutional resources, skills, and knowledge, as well as about incapacities of ethical nature, in keeping an account of the monies generated by various facets of social action in the country, and thereby developing effective mechanisms of control. These incapacities go to the very heart of constitutional imperatives of governance. Whether such incapacities are on account of not having devoted enough resources towards building such capacities, or on account of a broader culture of venality in the wider spheres of social and political action, they run afoul of constitutional imperatives.

5. Large amounts of unaccounted monies, stashed away in banks located in jurisdictions that thrive on strong privacy laws protecting bearers of those accounts to avoid scrutiny, raise each and every worry delineated above. First and foremost, such large monies stashed abroad, and unaccounted for by individuals and entities of a

country, would suggest the necessity of suspecting that they have been generated in activities that have been deemed to be unlawful. In addition, such large amounts of unaccounted monies would also lead to a natural suspicion that they have been transferred out of the country in order to evade payment of taxes, thereby depleting the capacity of the nation to undertake many tasks that are in public interest.

6. Many schools of thought exist with regard to the primary functions of the State, and the normative expectations of what the role of the State ought to be. The questions regarding which of those schools provide the absolutely correct view cannot be the criteria to choose or reject any specific school of thought as an aid in constitutional adjudication. Charged with the responsibility of having to make decisions in the present, within the constraints of epistemic frailties of human knowledge, constitutional adjudicators willy-nilly are compelled to choose those that seem to provide a reasoned basis for framing of questions relevant, both with respect to law, and to facts. Institutional economics gives one such perspective which may be a useful guide for us here. Viewed from a functional perspective, the State, and governments, may be seen as coming into existence in order to solve, what institutional economists have come to refer to as, the coordination problems in providing public goods, and prevent the disutility that emerges from the moral hazard of a short run utility maximizer, who may desire the benefits of goods and services that are to be provided in common to the public, and yet have the interest of not paying for their production.

7. Security of the nation, infrastructure of governance, including those that relate to law making and law keeping functions, crime prevention, detection and punishment, coordination of the economy, and ensuring minimal levels of material, and cultural goods for those who may not be in a position to fend for themselves or who have been left by the wayside by the operation of the economy and society, may all be cited as some examples of the kinds of public goods that the State is expected to provide for, or enable the provision of. In as much as the market is primarily expected to cater to purely self centered activities of individuals and groups, markets and the domain of purely private social action significantly fail to provide such goods. Consequently, the State, and government, emerges to rectify the coordination problem, and provide the public goods.

8. Unaccounted monies, especially large sums held by nationals and entities with a legal presence in the nation, in banks abroad, especially in tax havens or in jurisdictions with a known history of silence about sources of monies, clearly indicate a compromise of the ability of the State to manage its affairs in consonance with what is required from a constitutional perspective. This is so in two respects. The quantum of such monies by itself, along with the numbers of individuals or other legal entities who hold such monies, may indicate in the first instance that a large volume of activities, in the social and the economic spheres within the country are unlawful and

causing great social damage, both at the individual and the collective levels. Secondly, large quanta of monies stashed abroad, would also indicate a substantial weakness in the capacity of the State in collection of taxes on incomes generated by individuals and other legal entities within the country. The generation of such revenues is essential for the State to undertake the various public goods and services that it is constitutionally mandated, and normatively expected by its citizenry, to provide. A substantial degree of incapacity, in the above respect, would be an indicia of the degree of failure of the State; and beyond a particular point, the State may spin into a vicious cycle of declining moral authority, thereby causing the incidence of unlawful activities in which wealth is sought to be generated, as well as instances of tax evasion, to increase in volume and in intensity.

9. Consequently, the issue of unaccounted monies held by nationals, and other legal entities, in foreign banks, is of primordial importance to the welfare of the citizens. The quantum of such monies may be rough indicators of the weakness of the State, in terms of both crime prevention, and also of tax collection. Depending on the volume of such monies, and the number of incidents through which such monies are generated and secreted away, it may very well reveal the degree of 'softness of the State'.

10. 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.

11. When a catchall word like 'crimes' is used, it is common for people, and the popular culture to assume that it is 'petty crime', or crimes of passion committed by individuals. That would be a gross mischaracterization of the seriousness of the issues involved. Far more dangerous are the crimes that threaten national security, and national interest. For instance, with globalization, nation states are also confronted by the dark worlds of international arms dealers, drug peddlers, and various kinds of criminal networks, including networks of terror. International criminal networks that extend support to home-grown terror or extremist groups, or those that have been nurtured and sustained in hostile countries, depend on networks of formal and informal, lawful and unlawful mechanisms of transfer of monies across boundaries of nation-states. They work in the interstices of the micro-structures of financial transfers across the globe, and thrive in the lacunae, the gaps in law and of effort. The loosening of control over those mechanisms of transfers, guided by an extreme neo-liberal thirst to create a global market that is free of the friction of law and its enforcement, by nation-states, may have also contributed to an increase in the volume, extent and intensity of activities by criminal and terror networks across the globe.

12. Increasingly, on account of ‘greed is good’ culture that has been promoted by neo-liberal ideologues, many countries face the situation where the model of capitalism that the State is compelled to institute, and the markets it spawns, is predatory in nature. From mining mafias to political operators who, all too willingly, bend policies of the State to suit particular individuals or groups in the social and economic sphere, the raison d'etre for weakening the capacities and intent to enforce the laws is the lure of the lucre. Even as the State provides violent support to those who benefit from such predatory capitalism, often violating the human rights of its citizens, particularly it's poor, the market begins to function like a bureaucratic machine dominated by big business; and the State begins to function like the market, where everything is available for sale at a price.

13. The paradigm of governance that has emerged, over the past three decades, prioritizes the market, and its natural course, over any degree of control of it by the State. The role for the State is visualized by votaries of the neo- liberal paradigm as that of a night watchman; and moreover it is also expected to take its hands out of the till of the wealth generating machinery. Based on the theories of Arthur Laffer, and pushed by the Washington Consensus, the prevailing wisdom of the elite, and of the policy makers, is that reduction of tax rates, thereby making tax regimes regressive, would incentivise the supposed genius of entrepreneurial souls of individuals, actuated by pursuit of self-interest and desire to accumulate great economic power. It was expected that this would enable the generation of more wealth, at a more rapid pace, thereby enabling the State to generate appropriate tax revenues even with lowered tax rates. Further, benefits were also expected in moral terms- that the lowering of tax rates would reduce the incentives of wealth generators to hide their monies, thereby saving them from the guilt of tax evasion. Whether that is an appropriate model of social organization or not, and from the perspective of constitutional adjudication, whether it meets the requirements of constitutionalism as embedded in the texts of various constitutions, is not a question that we want to enter in this matter.

14. Nevertheless, it would be necessary to note that there is a fly in the ointment of the above story of friction free markets that would always clear, and always work to the benefit of the society. The strength of tax collection machinery can, and ought to be, expected to have a direct bearing on the revenues collected by the State. If the machinery is weak, understaffed, ideologically motivated to look the other way, or the agents motivated by not so salubrious motives, the amount of revenue collected by the State would decline, stagnate, or may not generate the revenue for the State that is consonant with its responsibilities. From within the neo-liberal paradigm, also emerged the under-girding current of thought that revenues for the State implies a big government, and hence a strong tax collecting machinery itself would be undesirable. Where the elite lose out in democratic politics of achieving ever decreasing tax rates,

it would appear that state machineries in the hands of the executive, all too willing to promote the extreme versions of the neo- liberal paradigm and co-opt itself in the enterprises of the elite, may also become all too willing to not develop substantial capacities to monitor and follow the money, collect the lawfully mandated taxes, and even look the other way. The results, as may be expected, have been disastrous across many nations.

15. In addition, it would also appear that in this miasmic cultural environment in which greed is extolled, conspicuous consumption viewed as both necessary and socially valuable, and the wealthy viewed as demi-gods, the agents of the State may have also succumbed to the notions of the neo-liberal paradigm that the role of the State ought to only be an enabling one, and not exercise significant control. This attitude would have a significant impact on exercise of discretion, especially in the context of regulating economic activities, including keeping an account of the monies generated in various activities, both legal and illegal. Carried away by the ideology of neo-liberalism, it is entirely possible that the agents of the State entrusted with the task of supervising the economic and social activities may err more on the side of extreme caution, whereby signals of wrong doing may be ignored even when they are strong. Instances of the powers that be ignoring publicly visible stock market scams, or turning a blind eye to large scale illegal mining have become all too familiar, and may be readily cited. That such activities are allowed to continue to occur, with weak, or non- existent, responses from the State may, at best, be charitably ascribed to this broader culture of permissibility of all manner of private activities in search of ever more lucre. Ethical compromises, by the elite - those who wield the powers of the state, and those who fatten themselves in an ever more exploitative economic sphere- can be expected to thrive in an environment marked by such a permissive attitude, of weakened laws, and of weakened law enforcement machineries and attitudes.

16. To the above, we must also add the fragmentation of administration. Even as the range of economic, and social activities have expanded, and their sophistication increased by leaps and bounds, the response in terms of administration by the State has been to create ever more specialized agencies, and departments. To some degree this has been unavoidable. Nevertheless, it would also appear that there is a need to build internal capacities to share information across such departments, lessen the informational asymmetries between, and friction to flow of information across the boundaries of departments and agencies, and reduce the levels of consequent problems in achieving coordination. Life, and social action within which human life becomes possible, do not proceed on the basis of specialized fiefdoms of expertise. They cut across the boundaries erected as a consequence of an inherent tendency of experts to specialize. The result, often, is a system wide blindness, while yet being lured by the dazzle of ever greater specialization. Many dots of information, now collected in ever increasing volume by development of sophisticated information

technologies, get ignored on account of lack of coordination across agencies, and departments, and tendency within bureaucracy to jealously guard their own turfs. In some instances, the failure to properly investigate, or to prevent, unlawful activities could be the result of such over-specialization, frictions in sharing of information, and coordination across departmental and specialized agency boundaries.

17. If the State is soft to a large extent, especially in terms of the unholy nexus between the law makers, the law keepers, and the law breakers, the moral authority, and also the moral incentives, to exercise suitable control over the economy and the society would vanish. Large unaccounted monies are generally an indication of that. In a recent book, Prof. Rotberg states, after evaluating many failed and collapsed states over the past few decades:

> "*Failed states offer unparalleled economic opportunity- but only for a privileged few. Those around the ruler or ruling oligarchy grow richer while their less fortunate brethren starve. Immense profits are available from an awareness of regulatory advantages and currency speculation and arbitrage. But the privilege of making real money when everything else is deteriorating is confined to clients of the ruling elite.... The nation- state's responsibility to maximize the well-being and prosperity of all its citizens is conspicuously absent, if it ever existed.... Corruption flourishes in many states, but in failed states it often does so on an unusually destructive scale. There is widespread petty or lubricating corruption as a matter of course, but escalating levels of venal corruption mark failed states*."[4]

18. India finds itself in a peculiar situation. Often celebrated, in popular culture, as an emerging economy that is rapidly growing, and expected to be a future economic and political giant on the global stage, it is also popularly perceived, and apparently even in some responsible and scholarly circles, and official quarters, that some of its nationals and other legal entities have stashed the largest quantum of unaccounted monies in foreign banks, especially in tax havens, and in other jurisdictions with strong laws of secrecy. There are also apparently reports, and analyses, generated by Government of India itself, which place the amounts of such unaccounted monies at astronomical levels.

19. We do not wish to engage in any speculation as to what such analyses, reports, and factuality imply with respect to the state of the nation. The citizens of our country can make, and ought to be making, rational assessments of the situation. We fervently hope that it leads to responsible, reasoned and reasonable debate, thereby exerting the appropriate democratic pressure on the State, and its agents, within the constitutional

[4] "The Failure and Collapse of Nation-States - Breakdown, Prevention and Repair" in "WHEN STATES FAIL: CAUSES AND CONSEQUENCES", Rotberg, Robert I., Ed. Princeton University Press (2004).

framework, to bring about the necessary changes without sacrificing cherished, and inherently invaluable social goals and values enshrined in the Constitution. The failures are discernible when viewed against the vision of the constitutional project, and as forewarned by Dr. Ambedkar, have been on account of the fact that man has been vile, and not the defects of a Constitution forged in the fires of wisdom gathered over eons of human experience. If the politico-bureaucratic, power wielding, and business classes bear a large part of the blame, at least some part of blame ought to be apportioned to those portions of the citizenry that is well informed, or is expected to be informed. Much of that citizenry has disengaged itself with the political process, and with the masses. Informed by contempt for the poor and the downtrodden, the elite classes that have benefited the most, or expects to benefit substantially from the neo- liberal policies that would wish away the hordes, has also chosen to forget that constitutional mandate is as much the responsibility of the citizenry, and through their constant vigilance, of all the organs of the state, and national institutions including political parties. To not be engaged in the process, is to ensure the evisceration of constitutional content.

20. These matters before us relate to issues of large sums of unaccounted monies, allegedly held by certain named individuals, and loose associations of them; consequently we have to express our serious concerns from a constitutional perspective. The amount of unaccounted monies, as alleged by the Government of India itself is massive. The show cause notices were issued a substantial length of time ago. The named individuals were very much present in the country. Yet, for unknown, and possibly unknowable, though easily surmisable, reasons the investigations into the matter proceeded at a laggardly pace. Even the named individuals had not yet been questioned with any degree of seriousness. These are serious lapses, especially when viewed from the perspective of larger issues of security, both internal and external, of the country.

21. It is in light of the above, that we heard some significant elements of the instant writ petitions filed in this Court, and at this stage it is necessary that appropriate orders be issued. There are two issues we deal with below: (i) the appointment of a Special Investigation Team; and (ii) disclosure, to the Petitioners, of certain documents relied upon by the Union of India in its response.

II

22. The instant writ petition was filed, in 2009, by Shri. Ram Jethmalani, Shri. Gopal Sharman, Smt. Jalbala Vaidya, Shri. K.P.S. Gill, Prof. B.B. Dutta, and Shri. Subhash Kashyap, all well known professionals, social activists, former bureaucrats or those who have held responsible positions in the society. They have also formed an organization called Citizen India, the stated objective of which is said to be to bring about changes and betterment in the quality of governance, and functioning of all public institutions.

23.The Petitioners state that there have been a slew of reports, in the media, and also in scholarly publications that various individuals, mostly citizens, but may also include non-citizens, and other entities with presence in India, have generated, and secreted away large sums of monies, through their activities in India or relating to India, in various foreign banks, especially in tax havens, and jurisdictions that have strong secrecy laws with respect to the contents of bank accounts and the identities of individuals holding such accounts. The Petitioners allege that most of such monies are unaccounted, and in all probability have been generated through unlawful activities, whether in India or outside India, but relating to India. Further, the Petitioners also allege that a large part of such monies may have been generated within India, and have been taken away from India, breaking various laws, including but not limited to evasion of taxes.

24.The Petitioners contend: (i) that the sheer volume of such monies points to grave weaknesses in the governance of the nation, because they indicate a significant lack of control over unlawful activities through which such monies are generated, evasion of taxes, and use of unlawful means of transfer of funds; (ii) that these funds are then laundered and brought back into India, to be used in both legal and illegal activities; (iii) that the use of various unlawful modes of transfer of funds across borders, gives support to such unlawful networks of international finance; and (iv) that in as much as such unlawful networks are widely acknowledged to also effectuate transfer of funds across borders in aid of various crimes committed against persons and the State, including but not limited to activities that may be classifiable as terrorist, extremist, or unlawful narcotic trade, the prevailing situation also has very serious connotations for the security and integrity of India.

25. The Petitioners also further contend that a significant part of such large unaccounted monies include the monies of powerful persons in India, including leaders of many political parties. It was also contended that the Government of India, and its agencies, have been very lax in terms of keeping an eye on the various unlawful activities generating unaccounted monies, the consequent tax evasion; and that such laxity extends to efforts to curtail the flow of such funds out, and into, India. Further, the Petitioners also contend that the efforts to prosecute the individuals, and other entities, who have secreted such monies in foreign banks, have been weak or non- existent. It was strongly argued that the efforts at identification of such monies in various bank accounts in many jurisdictions across the globe, attempts to bring back such monies, and efforts to strengthen the governance framework to prevent further outflows of such funds, have been sorely lacking.

26.The Petitioners also made allegations about certain specific incidents and patterns of dereliction of duty, wherein the Government of India, and its various agencies, even though in possession of specific knowledge about the monies in certain bank accounts, and having estimated that such monies run into many scores of thousands of

crores, and upon issuance of show cause notices to the said individual, surprisingly have not proceeded to initiate, and carry out suitable investigations, and prosecute the individuals. The individual specifically named is one Hassan Ali Khan. The Petitioners also contended that Kashinath Tapuria, and his wife Chandrika Tapuria, are also party to the illegal activities of Hassan Ali Khan.

27.Specifically, it was alleged that Hassan Ali Khan was served with an income tax demand for Rs. 40,000.00 Crores (Rupees Forty Thousand Crores), and that the Tapurias were served an income tax demand notice of Rs. 20,580.00 Crores (Rupees Twenty Thousand and Five Hundred and Eighty Crores). The Enforcement Directorate, in 2007, disclosed that Hassan Ali Khan had "dealings amounting to 1.6 billion US dollars" in the period 2001-2005. In January 2007, upon raiding Hassan Ali's residence in Pune, certain documents and evidence had been discovered regarding deposits of 8.04 billion dollars with UBS bank in Zurich. It is the contention of the Petitioners that, even though such evidence was secured nearly four and half years ago, (i) a proper investigation had not been launched to obtain the right facts from abroad; (ii) the individuals concerned, though present in India, and subject to its jurisdiction, and easily available for its exercise, had not even been interrogated appropriately; (iii) that the Union of India, and its various departments, had even been refusing to divulge the details and information that would reveal the actual status of the investigation, whether in fact it was being conducted at all, or with any degree of seriousness; (iv) given the magnitude of amounts in question, especially of the demand notice of income tax, the laxity of investigation indicates multiple problems of serious non- governance, and weaknesses in the system, including pressure from political quarters to hinder, or scuttle, the investigation, prosecution, and ultimately securing the return of such monies; and (v) given the broadly accepted fact that within the political class corruption is rampant, ill-begotten wealth has begun to be amassed in massive quantities by many members in that class, it may be reasonable to suspect, or even conclude, that investigation was being deliberately hindered because Hassan Ali Khan, and the Tapurias, had or were continuing to handle the monies of such a class. The fact that both Income Tax department, and the Enforcement Directorate routinely, and with alacrity, seek the powers for long stretches of custodial interrogation of even those suspected of having engaged in money laundering, or evaded taxes, with respect to very small amounts, ought to raise the reasonable suspicion that inaction in the matters concerning Hassan Ali Khan, and Tapurias, was deliberately engineered, for nefarious reasons.

28. In addition, the Petitioners also state that in as much as the bank in which the monies had been stashed by Hassan Ali Khan was UBS Zurich, the needle of suspicion has to inexorably turn to high level political interference and hindrance to the investigations. The said bank, it was submitted, is the biggest or one of the biggest wealth management companies in the world. The Petitioners also narrated the mode,

and the manner, in which the United States had dealt with UBS, with respect to monies of American citizens secreted away with the said bank. It was also alleged that UBS had not cooperated with the U.S. authorities. Contrasting the relative alacrity, and vigour, with which the United States government had pursued the matters, the Petitioners contend the inaction of Union of India is shocking.

29. The Petitioners further allege that in 2007, the Reserve Bank of India had obtained some 'knowledge of the dubious character' of UBS Security India Private Limited, a branch of UBS, and consequently stopped this bank from extending its business in India by refusing to approve its takeover of Standard Chartered Mutual Funds business in India. It was also claimed by the Petitioners that the SEBI had alleged that UBS played a role in the stock market crash of 2004. The said UBS Bank has apparently applied for a retail banking license in India, which was approved in principle by RBI initially. In 2008, this license was withheld on the ground that 'investigation of its unsavoury role in the Hassan Ali Khan case was pending investigation in the Enforcement Directorate'. However, it seems that the RBI reversed its decision in 2009, and no good reasons seem to be forthcoming for the reversal of the decision of 2008.

30. The Petitioners contend that such a reversal of decision could only have been accomplished through high level intervention, and that it is further evidence of linkages between members of the political class, and possibly even members of the bureaucracy, and such banking operations, and the illegal activities of Hassan Ali Khan and the Tapurias. Hence, the Petitioners argued, in the circumstances it would have to be necessarily concluded that the investigations into the affairs of Hassan Ali Khan, and the Tapurias, would be severely compromised if the Court does not intervene, and monitor the investigative processes by appointing a special investigation team reporting directly to the Court.

31.The learned senior counsel for the Petitioners sought that this Court intervene, order proper investigations, and monitor continuously, the actions of the Union of India, and any and all governmental departments and agencies, in these matters. It was submitted that their filing of this Writ Petition under Article 32 is proper, as the inaction of the Union of India, as described above, violates the fundamental rights - to proper governance, in as much as Article 14 provides for equality before the law and equal protection of the law, and Article 21 promises dignity of life to all citizens.

32. We have heard the learned senior counsel for the Petitioners, Shri. Anil B. Divan, the learned senior counsel for interveners, Shri. K.K. Venugopal, and the learned senior counsel for the petitioners in the connected Writ Petition, Shri. Shanti Bhushan. We have also heard the learned Solicitor General, Shri. Gopal Subramaniam, on behalf of the respondents.

33. Shri Divan, specifically argued that, having regard to the nature of the investigation, its slow pace so far, and the non-seriousness on the part of the

respondents, there is a need to constitute a Special Investigation Team ('SIT') headed by a former judge or two of this court. However, this particular plea has been vociferously resisted by the Solicitor General. Relying on the status reports submitted from time to time, the learned Solicitor General stated that all possible steps were being taken to bring back the monies stashed in foreign banks, and that the investigations in cases registered were proceeding in an appropriate manner. He expressed his willingness for a Court monitored investigation. He also further submitted that the Respondents, in principle, have no objections whatsoever against the main submissions of the Petitioners.

35. We must express our serious reservations about the responses of the Union of India. In the first instance, during the earlier phases of hearing before us, the attempts were clearly evasive, confused, or originating in the denial mode. It was only upon being repeatedly pressed by us did the Union of India begin to admit that indeed the investigation was proceeding very slowly. It also became clear to us that in fact the investigation had completely stalled, in as much as custodial interrogation of Hassan Ali Khan had not even been sought for, even though he was very much resident in India. Further, it also now appears that even though his passport had been impounded, he was able to secure another passport from the RPO in Patna, possibly with the help or aid of a politician.

36. During the course of the hearings the Union of India repeatedly insisted that the matter involves many jurisdictions, across the globe, and a proper investigation could be accomplished only through the concerted efforts by different law enforcement agencies, both within the Central Government, and also various State governments. However, the absence of any satisfactory explanation of the slowness of the pace of investigation, and lack of any credible answers as to why the respondents did not act with respect to those actions that were feasible, and within the ambit of powers of the Enforcement Directorate itself, such as custodial investigation, leads us to conclude that the lack of seriousness in the efforts of the respondents are contrary to the requirements of laws and constitutional obligations of the Union of India. It was only upon the insistence and intervention of this Court has the Enforcement Directorate initiated and secured custodial interrogation over Hassan Ali Khan. The Union of India has explicitly acknowledged that there was much to be desired with the manner in which the investigation had proceeded prior to the intervention of this court. From the more recent reports, it would appear that the Union of India, on account of its more recent efforts to conduct the investigation with seriousness, on account of the gravitas brought by this Court, has led to the securing of additional information, and leads, which could aid in further investigation. For instance, during the continuing interrogation of Hassan Ali Khan and the Tapurias, undertaken for the first time at the behest of this Court, many names of important persons, including leaders of some corporate giants, politically powerful people, and international arms dealers have

cropped up. So far, no significant attempt has been made to investigate and verify the same. This is a further cause for the grave concerns of this Court, and points to the need for continued, effective and day to day monitoring by a SIT constituted by this Court, and acting on behalf, behest and direction of this Court.

37. In light of the fact that the issues are complex, requiring expertise and knowledge of different departments, and the necessity of coordination of efforts across various agencies and departments, it was submitted to us that the Union of India has recently formed a High Level Committee, under the aegis of the Department of Revenue in the Ministry of Finance, which is the nodal agency responsible for all economic offences. The composition of the High Level Committee (HLC) is said to be as follows: (i) Secretary, Department of Revenue, as the Chairman; (ii) Deputy Governor, Reserve Bank of India; (iii) Director (IB); (iv) Director, Enforcement; (v) Director, CBI; (vi) Chairman, CBDT; (vii) DG, Narcotics Control Bureau; (vii) DG, Revenue Intelligence; (ix) Director, Financial Intelligence Unit; and (x) JS (FT & TR- I), CBDT. It was also submitted that the HLC may co-opt, as necessary, representation not below the rank of Joint Secretary from the Home Secretary, Foreign Secretary, Defense Secretary and the Secretary, Cabinet Secretariat. The Union of India claims that such a multi-disciplinary group and committee would now enable the conducting of an efficient and a systematic investigation into the matters concerning allegations against Hassan Ali Khan and the Tapurias; and further that such a committee would also enable the taking of appropriate steps to bring back the monies stashed in foreign banks, for which purposes a need may arise to register further cases. The Union of India also claims that the formation of such a committee indicates the seriousness with which it is viewing the entire matter.

38.While it would appear, from the Status Reports submitted to this Court, that the Enforcement Directorate has moved in some small measure, the actual facts are not comforting to an appropriate extent. In fact we are not convinced that the situation has changed to the extent that it ought to so as to accept that the investigation would now be conducted with the degree of seriousness that is warranted. According to the Union of India the HLC was formed in order to take charge of and direct the entire investigation, and subsequently, the prosecution. In the meanwhile a charge sheet has been filed against Hassan Ali Khan. Upon inquiry by us as to whether the charge-sheet had been vetted by the HLC, and its inputs secured, the counsel for Union of India were flummoxed. The fact was that the charge-sheet had not been given even for the perusal of the HLC, let alone securing its inputs, guidance and direction. We are not satisfied by the explanation offered by the Directorate of Enforcement by way of affidavit after the orders were reserved. Be it noted that a nodal agency was set up, pursuant to directions of this Court in ***Vineet Narain*** case given many years ago. Yet the same was not involved and these matters were never placed before it. Why?

39. From the status reports, it is clear that the problem is extremely complex, and many agencies and departments spread across the country have not responded with the alacrity, and urgency, that one would desire. Moreover, the Union of India has been unable to answer any of the questions regarding its past actions, and their implications, such as the slowness of the investigation, or about grant of license to conduct retail banking by UBS, by reversing the decision taken earlier to withhold such a license on the grounds that the said bank's credentials were suspect. To this latter query, the stance of the Union of India has been that entry of UBS would facilitate flow of foreign investments into India. The question that arises is whether the task of bringing foreign funds into India override all other constitutional concerns and obligations?

40. The predominant theme in the responses of Union of India before this court has been that it is doing all that it can to bring back the unaccounted monies stashed in various banks abroad. To this is added the qualifier that it is an extremely complex problem, requiring the cooperation of many different jurisdictions, and an internationally coordinated effort. Indeed they are complex. We do not wish to go into the details of arguments about whether the Union of India is, or is not, doing necessary things to achieve such goals. That is not necessary for the matters at hand.

41. What is important is that the Union of India had obtained knowledge, documents and information that indicated possible connections between Hassan Ali Khan, and his alleged co-conspirators and known international arms dealers. Further, the Union of India was also in possession of information that suggested that because the international arms dealing network, and a very prominent dealer in it, could not open a bank account even in a jurisdiction that is generally acknowledged to lay great emphasis on not asking sources of money being deposited into its banks, Hassan Ali Khan may have played a crucial role in opening an account with the branch of the same bank in another jurisdiction. The volume of alleged income taxes owed to the country, as demanded by the Union of India itself, and the volume of monies, by some accounts US $8.04 billion, and some other accounts in excess of Rs. 70,000 crores, that are said to have been routed through various bank accounts of Hassan Ali Khan, and Tapurias. Further, from all accounts it has been acknowledged that none of the named individuals have any known and lawful sources for such huge quantities of monies. All of these factors, either individually or combined, ought to have immediately raised questions regarding the sources being unlawful activities, national security, and transfer of funds into India for other illegal activities, including acts against the State. It was only at the repeated insistence by us that such matters have equal, if not even greater importance than issues of tax collection, has the Union of India belatedly concluded that such aspects also ought to be investigated with thoroughness. However, there is still no evidence of a really serious investigation into these other matters from the national security perspective.

42. The fact remains that the Union of India has struggled in conducting a proper investigation into the affairs of Hassan Ali Khan and the Tapurias. While some individuals, whose names have come to the adverse knowledge of the Union of India, through the more recent investigations, have been interrogated, many more are yet to be investigated. This highly complex investigation has in fact just begun. It is still too early to conclude that the Union of India has indeed placed all the necessary machinery to conduct a proper investigation. The formation of the HLC was a necessary step, and may even be characterized as a welcome step. Nevertheless, it is an insufficient step.
43. In light of the above, we had proposed to the Union of India that the same HLC constituted by it be converted into a Special Investigation Team, headed by two retired judges of the Supreme Court of India. The Union of India opposes the same, but provides no principle as to why that would be undesirable, especially in light of the many lapses and lacunae in its actions in these matters spread over the past four years.
44. We are of the firm opinion that in these matters fragmentation of government, and expertise and knowledge, across many departments, agencies and across various jurisdictions, both within the country, and across the globe, is a serious impediment to the conduct of a proper investigation. We hold that it is in fact necessary to create a body that coordinates, directs, and where necessary orders timely and urgent action by various institutions of the State. We also hold that the continued involvement of this Court in these matters, in a broad oversight capacity, is necessary for upholding the rule of law, and achievement of constitutional values. However, it would be impossible for this Court to be involved in day to day investigations, or to constantly monitor each and every aspect of the investigation.
45. The resources of this court are scarce, and it is over- burdened with the task of rendering justice in well over a lakh of cases every year. Nevertheless, this Court is bound to uphold the Constitution, and its own burdens, excessive as they already are, cannot become an excuse for it to not perform that task. In a country where most of its people are uneducated and illiterate, suffering from hunger and squalor, the retraction of the monitoring of these matters by this Court would be unconscionable.
46. The issue is not merely whether the Union of India is making the necessary effort to bring back all or some significant part of the alleged monies. The fact that there is some information and knowledge that such vast amounts may have been stashed away in foreign banks, implies that the State has the primordial responsibility, under the Constitution, to make every effort to trace the sources of such monies, punish the guilty where such monies have been generated and/or taken abroad through unlawful activities, and bring back the monies owed to the Country. We do recognize that the degree of success, measured in terms of the amounts of monies brought back, is dependent on a number of factors, including aspects that relate to international

political economy and relations, which may or may not be under our control. The fact remains that with respect to those factors that were within the powers of the Union of India, such as investigation of possible criminal nexus, threats to national security etc., were not even attempted. Fealty to the Constitution is not a matter of mere material success; but, and probably more importantly from the perspective of the moral authority of the State, a matter of integrity of effort on all the dimensions that inform a problem that threatens the constitutional projects. Further, the degree of seriousness with which efforts are made with respect to those various dimensions can also be expected to bear fruit in terms of building capacities, and the development of necessary attitudes to take the law enforcement part of accounting or following the money seriously in the future.

47. The merits of vigour of investigations, and attempts at law enforcement, cannot be measured merely on the scale of what we accomplish with respect to what has happened in the past. It would necessarily also have to be appreciated from the benefits that are likely to accrue to the country in preventing such activities in the future. Our people may be poor, and may be suffering from all manner of deprivation. However, the same poor and suffering masses are rich, morally and from a humanistic point of view. Their forbearance of the many foibles and failures of those who wield power, no less in their name and behalf than of the rich and the empowered, is itself indicative of their great qualities, of humanity, trust and tolerance. That greatness can only be matched by exercise of every sinew, and every resource, in the broad goal of our constitutional project of bringing to their lives dignity. The efforts that this Court makes in this regard, and will make in this respect and these matters, can only be conceived as a small and minor, though nevertheless necessary, part. Ultimately the protection of the Constitution and striving to promote its vision and values is an elemental mode of service to our people.

49. In light of the above we herewith order:

(i) That the High Level Committee constituted by the Union of India, comprising of (i) Secretary, Department of Revenue; (ii) Deputy Governor, Reserve Bank of India; (iii) Director (IB); (iv) Director, Enforcement; (v) Director, CBI; (vi) Chairman, CBDT; (vii) DG, Narcotics Control Bureau; (vii) DG, Revenue Intelligence; (ix) Director, Financial Intelligence Unit; and (x) JS (FT & TR-I), CBDT be forthwith appointed with immediate effect as a Special Investigation Team;

(ii) That the Special Investigation Team, so constituted, also include Director, Research and Analysis Wing;

(iii) That the above Special Investigation Team, so constituted, be headed by and include the following former eminent judges of this Court:

(a) Hon'ble Mr. Justice B.P. Jeevan Reddy as Chairman; and (b) Hon'ble Mr. Justice M.B. Shah as Vice-Chairman; and that the Special Investigation Team function under their guidance and direction;

(iv) That the Special Investigation Team, so constituted, shall be charged with the responsibilities and duties of investigation, initiation of proceedings, and prosecution, whether in the context of appropriate criminal or civil proceedings of: (a) all issues relating to the matters concerning and arising from unaccounted monies of Hassan Ali Khan and the Tapurias; (b) all other investigations already commenced and are pending, or awaiting to be initiated, with respect to any other known instances of the stashing of unaccounted monies in foreign bank accounts by Indians or other entities operating in India; and (c) all other matters with respect to unaccounted monies being stashed in foreign banks by Indians or other entities operating in India that may arise in the course of such investigations and proceedings. It is clarified here that within the ambit of responsibilities described above, also lie the responsibilities to ensure that the matters are also investigated, proceedings initiated and prosecutions conducted with regard to criminality and/or unlawfulness of activities that may have been the source for such monies, as well as the criminal and/or unlawful means that are used to take such unaccounted monies out of and/or bring such monies back into the country, and use of such monies in India or abroad. The Special Investigation Team shall also be charged with the responsibility of preparing a comprehensive action plan, including the creation of necessary institutional structures that can enable and strengthen the country's battle against generation of unaccounted monies, and their stashing away in foreign banks or in various forms domestically.

(v) That the Special Investigation Team so constituted report and be responsible to this Court, and that it shall be charged with the duty to keep this Court informed of all major developments by the filing of periodic status reports, and following of any special orders that this Court may issue from time to time;

(vi) That all organs, agencies, departments and agents of the State, whether at the level of the Union of India, or the State Government, including but not limited to all statutorily formed individual bodies, and other constitutional bodies, extend all the cooperation necessary for the Special Investigation Team so constituted and functioning;

(vii) That the Union of India, and where needed even the State Governments, are directed to facilitate the conduct of the investigations, in their fullest measure, by the Special Investigation Team so constituted and functioning, by extending all the necessary financial, material, legal, diplomatic and intelligence resources, whether such investigations or portions of such investigations occur inside the country or abroad.

(viii) That the Special Investigation Team also be empowered to further investigate even where charge-sheets have been previously filed; and that the Special Investigation Team may register further cases, and conduct appropriate investigations and initiate proceedings, for the purpose of bringing back unaccounted monies unlawfully kept in bank accounts abroad.

50. We accordingly direct the Union of India to issue appropriate notification and publish the same forthwith. It is needless to clarify that the former judges of this Court so appointed to supervise the Special Investigation Team are entitled to their remuneration, allowances, perks, facilities as that of the judges of the Supreme Court. The Ministry of Finance, Union of India, shall be responsible for creating the appropriate infrastructure and other facilities for proper and effective functioning of the Special Investigation Team at once.

III

77. The revelation of details of bank accounts of individuals, without establishment of prima facie grounds to accuse them of wrong doing, would be a violation of their rights to privacy. Details of bank accounts can be used by those who want to harass, or otherwise cause damage, to individuals. We cannot remain blind to such possibilities, and indeed experience reveals that public dissemination of banking details, or availability to unauthorized persons, has led to abuse. The mere fact that a citizen has a bank account in a bank located in a particular jurisdiction cannot be a ground for revelation of details of his or her account that the State has acquired. Innocent citizens, including those actively working towards the betterment of the society and the nation, could fall prey to the machinations of those who might wish to damage the prospects of smooth functioning of society. Whether the State itself can access details of citizen's bank accounts is a separate matter. However, the State cannot compel citizens to reveal, or itself reveal details of their bank accounts to the public at large, either to receive benefits from the State or to facilitate investigations, and prosecutions of such individuals, unless the State itself has, through properly conducted investigations, within the four corners of constitutional permissibility, been able to establish prima facie grounds to accuse the individuals of wrong doing. It is only after the State has been able to arrive at a prima facie conclusion of wrong doing, based on material evidence, would the rights of others in the nation to be informed, enter the picture. In the event citizens, other persons and entities have credible information that a wrong doing could be associated with a bank account, it is needless to state that they have the right, and in fact the moral duty, to inform the State, and consequently the State would have the obligation to investigate the same, within the boundaries of constitutional permissibility. If the State fails to do so, the appropriate courts can always intervene.

78. The major problem, in the matters before us, has been the inaction of the State. This is so, both with regard to the specific instances of Hassan Ali Khan and the Tapurias, and also with respect to the issues regarding parallel economy, generation of black money etc. The failure is not of the Constitutional values or of the powers available to the State; the failure has been of human agency. The response cannot be the promotion of vigilantism, and thereby violate other constitutional values. The response has to necessarily be a more emphatic assertion of those values, both in

terms of protection of an individual's right to privacy and also the protection of individual's right to petition this Court, under Clause (1) of Article 32, to protect fundamental rights from evisceration of content because of failures of the State. The balancing leads only to one conclusion: strengthening of the machinery of investigations, and vigil by broader citizenry in ensuring that the agents of State do not weaken such machinery.

79. In light of the above we order that:

(i) The Union of India shall forthwith disclose to the Petitioners all those documents and information which they have secured from Germany, in connection with the matters discussed above, subject to the conditions specified in (ii) below;

(ii) That the Union of India is exempted from revealing the names of those individuals who have accounts in banks of Liechtenstein, and revealed to it by Germany, with respect of who investigations/enquiries are still in progress and no information or evidence of wrongdoing is yet available;

(iii) That the names of those individuals with bank accounts in Liechtenstein, as revealed by Germany, with respect of whom investigations have been concluded, either partially or wholly, and show cause notices issued and proceedings initiated may be disclosed; and

(iv) That the Special Investigation Team, constituted pursuant to the orders of today by this Court, shall take over the matter of investigation of the individuals whose names have been disclosed by Germany as having accounts in banks in Liechtenstein, and expeditiously conduct the same. The Special Investigation Team shall review the concluded matters also in this regard to assess whether investigations have been thoroughly and properly conducted or not, and on coming to the conclusion that there is a need for further investigation shall proceed further in the matter. After conclusion of such investigations by the Special Investigation Team, the Respondents may disclose the names with regard to whom show cause notices have been issued and proceedings initiated.

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

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

DALVEER BHANDARI, J. 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 vs. Union of India (UOI), Ministry of Finance, Department of Revenue and 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 subparagraph (a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;

(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 epartment, (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 l~aw 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; Bilabeti 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 targetted 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 targetted for eventual confiscation as a multi-national 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.

128. 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.

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.

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 & Ors*. [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 publics 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.
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> 175.Although recently an increased focus on the ML aspect and use of the ML provisions is to be acknowledged, there are still some important and often long-standing legal issues to be resolved. To that end following measures should be taken:
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> - The monetary threshold limitation of INR 3 million for the Schedule Part B predicate offences should be abolished.

- The section 3 PMLA definition of the ML offence should be brought in line with the Vienna and Palermo Conventions so as to also fully cover the physical concealment and the sole acquisition, possession and use of all relevant proceeds of crime.

- The present strict and formalistic interpretation of the evidentiary requirements in respect of the proof of the predicate offence should be put to the test of the courts to develop case law and receive direction on this fundamental legal issue.

- The level of the maximum fine imposable on legal persons should be raised or left at the discretion of the court to ensure a more dissuasive effect.

- The practice of making a conviction of legal persons contingent on the concurrent prosecution/conviction of a (responsible) natural person should be abandoned.

- Consider the abolishment of the redundant section 8A NDPS Act drug-related ML offence or, if maintained, bring the sanctions at a level comparable to that of the PMLA offence.

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233.Confiscation under Chapter III of the PMLA is only possible when it relates to "proceeds of crime" as defined in s. 2(1)*(u)*, i.e. resulting from a scheduled offence, and when there is a conviction of such scheduled (predicate) offence. In addition, in such cases, only proceeds of the predicate offence can be confiscated and not the proceeds of the ML offence itself.

234.The predicate offence conviction condition creates fundamental difficulties when trying to confiscate the proceeds of crime in the absence of a conviction of a predicate offence, particularly in a stand-alone ML case, where the laundered assets become the corpus delicti and should be forfeitable as such. In the international context, the predicate conviction requirement also seriously affects the capacity to recover criminal assets where the predicate offence has occurred outside India and the proceeds are subsequently laundered in India (see also comments in Section 2.1 above).

235. The definition of proceeds of crime and property in the PMLA are broad enough to allow for confiscation of property derived directly or indirectly from proceeds of crime relating to a scheduled (predicate) offence, including income, profits and other benefits from the proceeds of crime. These definitions also allow for value confiscation, regardless of whether the property is held or owned by a criminal or a third party. As section 65 of the PMLA refers to the rules in CrPC, instrumentalities and intended instrumentalities can be confiscated in accordance with section 102 and 451 of the CrPC. However, there is no case law in this respect.

236. Also, the procedural provisions of Chapter III make confiscation of the proceeds of crime contingent on a prior seizure of attachment of the property by the Adjudicating Authority, and consequently substantially limit the possibilities for confiscation under the PMLA.

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:
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> [***]

(2) The authority, who has been authorised under sub- section (1) shall, immediately after search and seizure, forward a copy of the reasons so recorded along with material in his possession, referred to in that sub- section, to the Adjudicating Authority in a sealed envelope, in the manner, as may be prescribed and such Adjudicating Authority shall keep such reasons and material for such period, as may be prescribed.

(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:

(i) that there are reasonable grounds for believing that he is not guilty of such offence; and

(ii) that he is not likely to commit any offence while on bail.

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.

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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