

\$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 26th May, 2017
Pronounced on: 03rd July, 2017

+ W.P.(CRL) 856/2016 & Crl.M.A. Nos. 4702/2016,
4704/2016, 10527/2016, 12181/2016

VIRBHADRA SINGH & ANR Petitioners
Through: Mr. Dayan Krishnan, Sr.
Advocate with Mr. Mayank Jain, Mr.
Madhur Jain and Mr. Parmatma Singh,
Advocates
versus

ENFORCEMENT DIRECTORATE & ANR..... Respondents
Through: Mr. Sanjay Jain, ASG with
Mr. Amit Mahajan, CGSC, Mr. Kunal
Dutt, Ms. Karnika Singh and Mr. Vignaraj
Pasayat, Advs.

+ W.P.(CRL) 2044/2016 & Crl.MA. Nos.10657-58/2016
CHUNNI LAL CHAUHAN Petitioner
Through: Mr. Dayan Krishnan, Sr.
Advocate with Mr. Mayank Jain, Mr.
Madhur Jain and Mr. Parmatma Singh,
Advocates
versus

ASSISTANT DIRECTOR, ENFORCEMENT
DIRECTORATE & ANR. Respondents
Through: Mr. Sanjay Jain, ASG with
Mr. Amit Mahajan, CGSC, Mr. Kunal
Dutt, Ms. Karnika Singh and Mr. Vignaraj
Pasayat, Advs.

+ W.P.(CRL) 2862/2016 & Crl.M.A. Nos. 15292/2016.
18677/2016

VIKRAMADITYA SINGH

..... Petitioner

Through: Mr. Dayan Krishnan, Sr.
Advocate with Mr. Mayank Jain, Mr.
Madhur Jain and Mr. Parmatma Singh,
Advocates

Versus

ASSISTANT DIRECTOR, ENFORCEMENT
DIRECTORATE

..... Respondent

Through: Mr. Sanjay Jain, ASG with
Mr. Amit Mahajan, CGSC, Mr. Kunal
Dutt, Ms. Karnika Singh and Mr. Vignaraj
Pasayat, Advs.

+ W.P.(CRL) 245/2016 and Crl.M.A.1336/2016

PICHESWAR GADDE

..... Petitioner

Through: Mr. Kirti Uppal, Sr.
Advocate with Mr. L.M. Asthana, Mr.
Siddhant Asthana, Ms.Sahiba Pantel, Mr.
Raksh Kumar Bhardawaj and Mr.
Chhetarpal Singh, Advocates

versus

ENFORCEMENT DIRECTORATE MINISTRY OF
FINANCE & ORS

..... Respondents

Through: Mr. Sanjay Jain, ASG with
Mr. Anurag Ahluwalia, CGSC, Ms.
Karnika Singh, Mr. Vignaraj Pasayat and
Ms. Aastha Jain, Advocates

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

1. These writ petitions have raised common questions of law of general interest involving provisions of Prevention of Money Laundering Act, 2002 (for short, “PMLA”) in the context of a case under investigation with Enforcement Directorate of Ministry of Finance in the Government of India (Headquarters Investigation), it having been described as Enforcement Case Information Report No.ECIR/HQ/02/HIU/2015 registered on 27.10.2015 (for short, “ECIR”) and, therefore, have been heard together and are being decided through this common judgment.

THE PETITIONS

2. It may be mentioned at the outset that the first petitioner (Shri Virbhadra Singh) in the first above captioned petition (the first petition or case) has been in active political and public life for last several decades, having been a member of the Union legislature or the legislature of the State of Himachal Pradesh from where he hails, and during such period having served as a Minister of the Union of India or Minister in the cabinet in the Government of Himachal Pradesh, he presently being the Chief Minister. The second petitioner (Smt. Pratibha Singh) of the said first petition is his wife.

3. The names of the other three petitioners (Shri Chunni Lal Chauhan, Shri Vikramaditya Singh and Picheswar Gadde) in the above captioned matters are stated to have figured during the course of investigation, amongst others, into the ECIR thereby giving rise to issuance of summons to them under Section 50(2) and (3) of

PMLA for appearing before the competent officer of the Directorate of Enforcement for purposes of investigation. The petitioner (Shri Vikramaditya Singh) of the third above captioned petition (the third petition or case), it be noted, is the son of the petitioners of the first petition.

4. It is claimed in the first petition that summons were issued under Section 50(2) and (3) PMLA by the respondent on 16.11.2015 requiring presence of the petitioners for questioning. Detailed averments have been made with regard to the response of the petitioners pursuant to said summons, facts pertaining which may be elaborated a little later. For the present, it needs to be only noted that the trigger for filing the petition is indicated to be the denial of extension of time for compliance with the summons on the ground that the legislative assembly of the State of Himachal Pradesh was in session till 06.04.2016 in spite of which, through the summons issued by the respondents, it was being insisted that the petitioners appeared on 17.03.2016.

5. The first petition invoking the jurisdiction of this court under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C.) prayed for the grant of the following reliefs:

“i) pass a writ/order/direction in the nature of certiorari thereby issuing direction to quash and set aside all proceedings and actions taken pursuant to the Enforcement Case Information Report bearing number ECIR/HQ/02/HIU/2015 as the same are without jurisdiction and authority of law;

ii) pending hearing and adjudication of the subject writ petition, stay all and every proceedings initiated by respondent no.1 in pursuance of the Enforcement Case Information Report bearing number ECIR/HQ/02/HIU/2015;

iii) pending hearing and final disposal restrain the respondents from taking any coercive action against the petitioners;

iv) issue such other orders/directions as this Hon'ble Court deem fit under the circumstances of the case"

6. Going by the averments in the counter affidavit of the respondents, as submitted on the file of the first petition, the petitioner (Shri Chunni Lal Chauhan) of the second above-mentioned case (the second petition or case has been working for gain as commission agent at Parwanoo Mandi in the State of Himachal Pradesh, it being alleged that certain acts of commission or omission committed by the petitioners of the first petition constituting certain offences, *inter alia*, punishable under the Prevention of Corruption Act, 1988 (for short, "POC Act"), as also under PMLA, with his tacit help and support had necessitated investigation into his role. After the registration of the ECIR, summons were issued to this petitioner under Section 50(2) and (3) of PMLA, the validity whereof is questioned by him through the second petition pressed with the prayer for following reliefs:

"a) issue writ of certiorari or any other writ to quash the ECIR/HQ/02/HIU/2015 dated 27.10.2015 registered by the Enforcement Directorate and proceedings initiated under PMLA against the petitioner; and

b) pass such other order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.”

7. In the counter affidavit filed by the respondents in the third petition, it has been stated that the statement of second petitioner of the first petition (Smt. Pratibha Singh) was recorded on 09.08.2016 which brought out that acquisition of certain assets (which include property at Greater Kailash, New Delhi and Dera Mandi Farm House at Mehrauli, New Delhi), seemingly done using the flow of money received from certain suspect entities (including M/s. Maple Destination & Dreambuild Pvt. Ltd.) is sought to be explained as borrowings from the third petitioner, she allegedly being evasive and taking the position that the facts could be disclosed only by Sh. Vikramaditya Singh (i.e., her son), the petitioner of the third case, thereby giving rise to the need to issue summons to him in the course of ongoing investigation into the same ECIR under Section 50(2) and (3) PMLA on 23.08.2016. The petitioner of the said case claims to have sent certain replies to the said summons which, in turn, were renewed on 05.09.2016 and 19.09.2016. By his petition, he prays for the following reliefs:

“a) issue writ of certiorari or any other writ to quash the summons 23.08.2016, 05.09.2016 and 19.09.2016 issued under sub section (2) and (3) of Section 50 of the PML Act, 2002 in ECIR case no. ECIR/HQ/02/HIU/2015 against the petitioner by the respondent; and

b) direct the respondent not to take any coercive action against the petitioner;

c) declare that the officers of the Enforcement Directorate are police officers; and

d) read down the provisions contained in section 50(2) and (3) of PMLA to the effect that the statements recorded therein may not be used as an evidence to incriminate the person giving the statement; and

e) pass such other order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

8. The petitioner (Shri Picheswar Gadde) of the fourth above captioned petition (the fourth petition or case) claims to be a businessman of repute being also involved in the running of various educational institutions. From the averments made by him, it appears that he concededly was joint owner (with his wife) of the parcel of land described as farm house No.3-E, Dera Mandi, Mehrauli, New Delhi-110074 which was sold by him (and his wife) in August, 2011 to M/s. Maple Destination & Dreambuild Pvt. Ltd., an entity of the petitioner of the third case (Vikramaditya Singh), he being the son of the petitioners of the first above captioned case (Virbhadra Singh and Smt. Pratibha Singh) for the declared sale consideration of Rs.1.2 crores by Sale Deed registered in the office of Sub-Registrar Mehrauli on 27.08.2011. The said acquisition being part of the subject matter of investigation, *inter alia*, of the ECIR, summons were issued under Section 50(2) and (3) PMLA requiring his presence for purposes of investigation on 07.01.2016. Alleging that he was illegally detained and tortured so as to be coerced to write or sign certain false statements during interrogation on 07.01.2016, when he had appeared in compliance, he filed the said petition seeking the following reliefs:

"I. issue a writ of mandamus directing the respondent no.1 to supply a copy of the statements of the petitioner

recorded on 07.01.2016 so as to enable the petitioner to contest the proceedings effectively;

II. issue a writ of mandamus directing the respondents to not investigate/interrogate the petitioner without informing the reasons for such interrogation / investigation;

III. issue a writ of mandamus directing the respondents to permit the petitioner to be accompanied with his advocate or to be represented through his advocate/representative in case of any further investigation and the said investigation be undertaken in normal timings and video recording of the same be done;

IV. Award costs in favour of the petitioner; and

V. Any other relief deemed fit and proper in the circumstances of the case may be granted in favour of the petitioner.

9. The last above captioned petition was filed in January, 2016, ahead of the others they having been instituted in March, July and September, 2016 respectively. Since all the four petitions arise from the same investigative process, they were brought together for consideration of the contentions urged by both sides they necessarily overlapping each other.

BACKGROUND FACTS

10. The factual matrix of the case statedly registered for investigation in terms of PMLA, as culled out from the counter affidavits referred to above, may be summarized hereinafter.

11. The Central Bureau of Investigation (CBI) on the basis of some inputs earlier received, had registered on 17.06.2015 a Preliminary Enquiry (PE) vide no. AC-1-2015-A0002, against Shri

Virbhadra Singh, members of his family and others to inquire into certain unexplained income from assets suspected to be disproportionate and allegedly acquired during his tenure as a Union Minister in 2009 to 2012. Sh. Vikramaditya Singh, by his pleadings, refers to a public Interest Litigation (PIL) initiated by a Non-Governmental Organization (NGO) "Common Cause", it being Writ Petition (Civil) No.7240/2013 as the background of such action.

12. On the basis of facts and materials gathered during such preliminary enquiry, First Information Report (FIR) No.RC-AC-1-2015-A0004 was registered on 23.09.2015 by CBI, ACB, New Delhi for investigation into offences punishable under Section 13(2) read with Section 13(1)(e) of POC Act. Since the facts on the basis of which CBI had taken up investigation from the perspective of offences punishable under POC Act also appeared to be indicative of commission of the offence of money laundering punishable under PMLA, the matter was referred by the former agency to the Headquarter Investigation Unit (HIU) of the Directorate of Enforcement of the Department of Revenue in the Ministry of Finance, Govt. of India, New Delhi where, pursuant to the said communication, the ECIR in question was registered on 27.10.2015 for action under the provisions of PMLA.

13. The allegations forming the basis of the investigation through the ECIR have been set out in the counter-affidavits by the respondents referring, in brief, to the role of various individuals including Anand Chauhan, Joginder Singh Ghalta, Prem Raj,

Lawan Kumar Roach, Vakamulla Chandrashekar and Ram Prakash Bhatia and certain others, besides the petitioners before this court, the narration statedly revealing that in order to project the disproportionate assets as untainted they have knowingly indulged in certain transactions of money laundering. The allegations are summarized thus:

(a) Shri Virbhadra Singh was Minister of Steel from 28.05.2009 to 18.01.2011 and Minister of Micro Small and Medium Enterprises (MSME) from 19.01.2011 to 26.06.2012 in Govt. of India. Huge cash deposits were made in Bank Accounts of Shri Anand Chauhan, an LIC agent, maintained with Punjab National Bank and HDFC Bank, both located at Sanjauli, Shimla during the period 2009-12. The said cash deposits were utilized for purchasing LIC policies in the name of Shri Virbhadra Singh and members of his family for a sum of Rs.5,14,87,200/-.

(b) In the wake of assessment proceedings initiated by the Income Tax authorities against Shri Anand Chauhan, allegedly as a cover-up to justify the source of money utilized for purchase of LIC policies, Shri Virbhadra Singh (HUF) filed, on 02-03-2012, revised returns of income for three years they being the Assessment Years (AY) 2009-10, 2010-11 and 2011-12.

(c) The income tax returns (ITR) originally filed for the above-mentioned Assessment Years (i.e. 2009-10, 2010-11 and 2011-12) had declared income from agriculture to be tune of

Rs.7,35,000/- Rs.15,00,000/- and Rs.25,00,000/- respectively. In the revised returns, the income from agriculture was declared to be to the tune of Rs.2,21,35,000/-, Rs.2,80,92,500/- and Rs.1,55,00,000/- respectively. Thus, by the revised returns of the income for the said three Assessment Years, the total income from agriculture initially declared to be Rs.47.35 lacs stood increased to Rs.6.56 crores.

(d) During the course of investigation, reliance has been placed by Shri Virbhadra Singh and others on a Memorandum of Understanding (MOU) dated 15.06.2008 whereby he (Shri Virbhadra Singh) is stated to have entrusted unto the said Anand Chauhan, an LIC agent, the responsibility of management of Shrikhand Orchard at Village Damrali, Rampur Bushar and for proceeds from the sale of apples to be invested in LIC policies. It is stated that the investigation conducted thus far has revealed that the said MOU prepared on four sheets of paper (stamp papers one non-judicial and the other three judicial, all of 2008) was ante-dated. The entry at serial no.1284 dated 11.06.2008 in the register of the stamp vendor respecting one of the said four stamp papers in the name of Anand Chauhan was forged. Similarly, the entry nos. 1283 and 1284 in the register of the stamp vendor would reveal corresponding sale of original stamp papers to have been made to one Laiq Ram, a resident of Kotkhai, Shimla who utilized the same for obtaining agricultural loans.

(e) The petitioner Shri Chunni Lal Chauhan, has been working for gain as a commission agent at Parwanoo Mandi, Himachal Pradesh. The income from sale of apples of Shri Virbhadra Singh's Shrikhand orchard, Damrali in the year 2013, as declared in the revised returns filed by him is sought to be substantiated by sale invoices connected to this petitioner (Chunni Lal Chauhan). The said invoices have been found to be fake, Chuni Lal Chauhan having assisted in and been instrumental for their preparation. It is stated that the vehicle numbers mentioned in the said documents were either non-existent or not suitable for transporting such cargo (apples), they being oil tanker, two-wheeler, open tipper or car.

(f) According to the assessment of the Director of Horticulture of the State of Himachal Pradesh, the yield of apple crop from the orchard admeasuring 105 *bighas* of land during the financial years corresponding to the AYs mentioned above would be approximately 112.812 metric tonnes, 55.860 metric tonnes and 191.604 metric tonnes which would translate to 5500, 2700 and 9300 number of boxes of the fruit. The total assessed harvest of apples during the relevant period was much lower than what was claimed by inflated figures reflected in the revised ITRs, the claim being false based on fake sale proceeds vouchers provided by the petitioner Chuni Lal Chauhan.

(g) On the basis, *inter alia*, of the statements of Ram Prakash Bhatia and Vineet Mishra former HDFC Manager,

recorded under Section 50 of PMLA, it is stated that huge cash amounts belonging to Shri Virbhadra Singh were adjusted with various unrelated entities (entry operators), transferred to the personal accounts of one Vakamulla Chandrashekar, Promoter Tarini Group of Companies and subsequently transferred to the accounts of Shri Virbhadra Singh, his wife Smt. Pratibha Singh and son Sh. Vikramaditya Singh. The amounts of Rs.2.4 crores and Rs.1.5 crores were shown as loans advanced by Shri Vakamulla Chandrashekar to Sh. Virbahdra Singh and to his wife Smt. Pratibha Singh respectively. Further, Rs.2 crore was passed on to Shri Vikramaditya Singh and shown as remittance towards business collaboration with him. The source of said total Rs.5.9 crores deposited in bank account of Vakamulla Chandrashekar was through various entry operators and even a fake bank account. Major entries were given to Shri Vakamulla Chandrashekar by companies of Sh. Ram Prakash Bhatia. i.e. Jai Durga Impex, Prakash Foods, Punjab Foods & Shiva Store. Shri Vakamulla obtained fake sale proceed invoices of agricultural products sold to Sh. Ram Prakash Bhatia.

(h) It is stated that the amounts invested in twelve LIC policies were out of laundered money. Five of the LIC policies were prematurely surrendered, and the proceeds deposited in the account of Vikramaditya Singh. According to the respondents, the evidence gathered shows that the unaccounted money in the accounts of Vikramaditya Singh found its way into an immovable property and various bank accounts.

(i) A Provisional Attachment order No.1/16 dated 23.03.2016 was issued under second proviso of Section 5(1) of PMLA attaching movable and immovable assets valued at Rs.7,93,21,984/- of Shri Virbhadra Singh and his family members. This included a immovable property at Greater Kailash in name of Smt. Pratibha Singh. The Adjudicating Authority, PMLA has confirmed the said attachment.

(j) An amount of Rs.90 lakhs from out of Rs.2.4 crores alleged loan given to Shri Virbhadra Singh was utilized by Shri Vikramaditya Singh to purchase a farm house at Dera Mandi, New Delhi in the name of his company M/s. Maple Destinations & Dreambuild Pvt. Ltd. for the purchase of the said farm house. Another Rs.30 lakhs was paid by two Cheques of Rs.15 lakh each given by a firm M/s. Jai Durga Impex which has statedly been found to be indulging in providing accommodation entries.

14. It is the case of the petitioners that the investigation carried out by CBI in the above mentioned case under POC Act, and the present investigation under PMLA, are actuated by political motives and founded on false allegations and averments. The petitioners themselves referred to the previous proceedings in the courts primarily commencing with Writ Petition (Civil) No.4063 of 2015, filed on 29.09.2015, before the High Court of Himachal Pradesh in the wake of search and seizure operation conducted by CBI on 26.09.2015 wherein "interim protection" was granted to Shri Virbhadra Singh and Smt. Pratibha Singh (the petitioners in the

first case). The said writ petition was transferred from the High Court of Himachal Pradesh to this court, in terms of order dated 05.11.2015, by the Supreme Court of India on Transfer Petition (Crl.) No.425 of 2015 and appears to have been registered in this court as Writ Petition (Civil) No.2757/2015. The said writ petition came up before a learned Single Judge of this Court on 06.04.2016 when directions were given to the petitioners to join investigation, though taking note of the assurance held out earlier that they would not be arrested when they so appear before the investigating agency at that stage.

15. It appears that in response to the summons under PMLA issued to Shri Virbhadra Singh and Smt. Pratibha Singh on 16.11.2015, by a reply dated 30.11.2015, request was made to CBI for copies of documents seized during the searches to be made available so that the same could be provided to the respondent in the context of investigation under PMLA. Correspondingly, on 02.12.2015, when the representative of Shri Virbhadra Singh and Smt. Pratibha Singh appeared before the Enforcement Directorate, extended time for providing the documents was granted. On the other hand, the representative of the respondent, in the course of proceedings before the Adjudicating Authority under Section 17(4), had sought liberty of retention of the documents and properties seized. Against this backdrop, the first petitioner filed W.P.(Crl.) No.3107/2015 before this Court which was disposed of by order dated 07.01.2016 with direction for copy of ECIR to be supplied.

16. On 23.03.2016, the Adjudicating Authority under PMLA passed Provisional Attachment order No.01/2016 under Section 5 PMLA against the petitioners and certain others, on the reference made for such action on the basis primarily of above-noted facts, circumstances and materials. The said Provisional Attachment Order was challenged by Shri Virbhadra Singh and Smt. Pratibha Singh by Writ Petition (Civil) No.4228/2016. Similarly, Shri Vikramaditya Singh and Ms. Aparajita Kumari have also assailed the adjudication proceedings resulting in provisional attachment by W.P.(Civil) No.3008/2016. Both the said writ petitions are pending in this court and interim orders granting some protection have been issued.

17. It may be added that, as per the submissions of the respondents, another Provisional Attachment order No.1/2017 was passed by the competent authority on 31.03.2017 under Section 5(1) PMLA in respect of the farm house at Dera Mandi at Mehrauli. The legality and validity of the said provisional attachment order has been challenged by another W.P.(Civil) No. 3909/2017 which is also pending in this court.

18. When the petitions at hand came up for hearing, questions were raised initially as to the overlap of the contentions urged and the prayers made in the above-mentioned three other pending writ petitions, they also having been filed by the petitioners, they being Writ Petition (Civil) No.4228/2016, Writ Petition (Civil) No.3008/2016 and Writ Petition (Civil) No.3909/2017. It was however, fairly conceded by the learned senior counsel appearing

for the petitioners that the challenge in the said other writ petitions is from the perspective of the application primarily of Section 5 of PMLA which is distinct from the investigative process taken up under the ECIR as is statedly intended by the respondents to lead to criminal prosecution, possibly of the petitioners, for offence under Section 4 of PMLA, the questions raised in the present proceedings being entirely distinct.

19. Shri Picheswar Gadde, in his pleadings, refers to certain assessment proceedings of 2014-2015 by the authorities under the Income Tax Act and Wealth Tax Act, 1957 leading, *inter alia*, to writ proceedings taken out in this court in such context, his contention also being that the dragging of his name in the present case under investigation into suspected offence under PMLA allegedly committed by the other petitioners is motivated, the design being to coerce him into making false statements.

THE CONTENTIONS

20. The document in the nature of Enforcement Case Information Report (ECIR) is concededly not prescribed by law contained in PMLA or rules framed there under. The respondents, however, seek to refer to it as "an internal document of Directorate of Enforcement for proper identification of a particular case" . It was submitted at the hearing that this document is official report of the Enforcement Directorate setting the process of investigation under the special law into motion. From this perspective, it appears, though not so described explicitly or required under the law, to be akin to a First Information Report (FIR) that is ordinarily registered by the police

respecting a cognizable offence under Section 154 Cr.P.C. or a non-cognizable offence under Section 155 Cr.P.C.

21. For the present, it only needs to be noted that PMLA deals, as criminal law, with a new offence thereby provided, it being the "offence of Money-Laundering", defined by Section 3 as under:-

"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 (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."

22. The offence of money-laundering, defined in Section 3 quoted above, if proved to have been committed leads to punishment which is provided by Section 4, the trial for such purposes to be held in the court of Sessions which is designated, in terms of Section 43 PMLA, as a Special Court, the procedure thereof being regulated generally by the Code of Criminal Procedure, 1973 (Cr.P.C.), as per Section 46, with certain improvements or modifications in terms of Sections 44 and 45 PMLA, the remedies in the nature of appeal and revision being guided by Section 47. As would be discussed at length later, the conjoint effect of Sections 44 and 45 PMLA is that the Special Court is empowered to take cognizance of the offence under Section 3 PMLA without the accused being committed to the said court for trial but this is conditional upon a complaint in writing being made for such action by the "Director" (of Enforcement) or any other officer of the Central or State Government specially

authorized in this behalf, such authority, as would eventually have the competence in law to institute a criminal complaint seeking prosecution, also having been authorized and conferred with the jurisdiction and requisite power to undertake the investigation into the offence of money laundering, the police officers having been specially excluded from such role unless there is a specific authorization by general or special order to that effect. It also needs to be flagged here that the law confers, by Section 19 PMLA, on the Director (or some other functionaries specified in the provision) the power to arrest any person if on the basis of material in his possession there is reason to believe that such person is guilty of the offence of money-laundering.

23. These petitions were filed raising a number of contentions but have been pressed primarily on the submission that the offence of money-laundering, defined in Section 3 and made punishable under Section 4 PMLA, is a "non-cognizable offence" and, therefore, there cannot be an investigation undertaken without there being an order of a court competent to try such case authorizing such investigation. It is the contention of the petitioners that since the Special Court under PMLA cannot take cognizance, except upon a complaint in writing by the authority specified in the law, there being no complaint submitted till date, adoption of "coercive measures" under PMLA, merely on the basis of ECIR, was not permissible in law, it being designed to circumvent the complaint procedure mandatorily required to be followed for Section 45. It has been argued that the general law contained in the Code of Criminal Procedure, 1973 would not apply for purposes of

proceedings in the Special Court under PMLA, or investigative process anterior thereto, and in absence of formal authorization by the Special Court *vis-a-vis* a particular person, the authorities under PMLA cannot proceed to cause arrest without warrant. The submission, in nutshell, essentially is that the respondents under the purported exercise of carrying out investigation of the offence under PMLA have no power to issue summons, or to compel appearance so as to record statement or the petitioners, as has been insisted upon by the impugned processes, the obligation of the petitioners thereunder being contingent only upon cognizance being taken by the Special Court.

24. The submissions of the petitioners to above effect primarily arise from amendment of the Prevention of Money-Laundering Act, 2002 by the Prevention of Money-Laundering (Amendment) Act, 2005 (Act 20 of 2005), particularly of the provision contained in Section 45. Prior to the said amendment Section 45 (1)(a) declared that every offence punishable under the law (PMLA) "shall be cognizable". The amendment of 2005 brought in force *w.e.f.* 01.07.2005 deleted the said clause of Section 45(1) declaring the offence, *inter alia*, of money laundering, to be cognizable. The prime submission of the petitioners is that this amendment was clearly indicative of the intention of the legislature to take away the power of arrest and consequently to make the offence of money-laundering "non-cognizable".

25. Arguing that the intention of the proceedings taken out by the respondents is *void-ab-initio*, it having been done without following

the due procedure of law founded, as it were, on a document (ECIR) not contemplated by the statute, the curtailment of the rights and liberty of the petitioners being impermissible except through due process established by law and in line with the spirit of Article 21 of the Constitution of India, the reliefs as noted earlier are pressed for.

26. *Per contra*, it is the submission of the respondents that these petitions, brought at early stages of the investigation by the authorities under PMLA, are abuse of the judicial process, designed to stall the probe and to defeat the objectives of the special law and, therefore, deserve outright rejection. It has been submitted that the authorities under the PMLA, represented by the respondents, have embarked upon the investigation bearing in mind the circumspection within which they are expected under the law to conduct themselves and that the arguments questioning the investigative process are misconceived, there being no legal requirement of authorization from the Special Court to be taken as a condition precedent, the questioning of the validity of ECIR being premature, the role of the Special Court to take over the criminal action upon cognizance being taken in the event of complaint being filed. It is the submission of the respondents that the offence of money laundering continues to be a cognizable offence, even after amendment of 2005, the only change thereby brought about being the clarity that police officers cannot, unless specially authorized for such purposes, cause an investigation into the offences under PMLA nor have the power to arrest any person for such offence, such power of arrest being restricted to the authorities specified by

the statute under Section 19. Taking this submission further, it was argued that there is no requirement for the statutory authorities under PMLA to take prior permission from the Special Court for taking up an investigation. It was submitted that the intention of the petitioners by raising these contentions is primarily to evade the legal action envisaged under PMLA.

CRIMINAL LAW

27. The general criminal law in our country is codified, the Indian Penal Code, 1860 (IPC) providing primarily the offences, commission of which is proscribed and, if committed, attracts the punishments thereby provided, the procedure for bringing to book the offenders being laid down elaborately in the Code of Criminal Procedure, 1973 (Cr.P.C.). The substantive law (IPC) deals with major crimes including offence against human body, offences against the property, offences against the State, offences against public peace and tranquility, offences related to marriage, etc. The procedural law (Cr.P.C.) lays down extensive and elaborate provisions covering almost the entire spectrum of the action required to be taken right from the stage of reporting of a crime through the process of investigation leading to trial, if the offender and the evidence supporting the accusations against him have been found, till the stage of his guilt (or innocence) being determined with consequences, *inter alia*, in the form of punishment, flowing therefrom besides, of course, the remedies in the nature of revision or appeal and post-conviction processes. Having regard to the nature of offences specified in the general law (IPC), the procedural

law (Cr.P.C.) is designed generally with the thought that the crime would ordinarily be reported to, and taken note of by, the police which, given the nature of offence would embark upon investigation - either within its own jurisdiction under the law or with appropriate authorization by the competent criminal court. Further, keeping in view their nature and effect on the individual victim or the society at large or, to put it simply, bearing in mind the gravity, the offences are also categorized so as to regulate the power of (or amenability to) arrest, as indeed the right (if any) to be released on bail, with or without conditions, and the circumspection within which the investigating police officer would be obliged to conduct, or continue, with the investigation (particularly, post-arrest). Some offences, having regard to the gravity (e.g., culpable homicide), when committed, have a deep impact on the general feeling of well-being in the society at large, in addition to the serious repercussions they have on the victim and his kin. In contrast, some offences affect primarily the individual victim (e.g. in the offence of cheating), he being, at times, open to forgive and forget, inclined to bury the hatchet if suitable amends were to be made. From these perspectives, the offences under IPC are classified variously: cognizance or non-cognizable; bailable or non-bailable; compoundable or non-compoundable, etc.

28. Under the general procedural law (Cr.P.C.), the police is duty bound to initiate action, in the event of information related to commission of a cognizable offence being made to it in terms of Section 154 Cr.P.C. The police registers the First Information Report (FIR) and is, thereafter, obliged in law to take up

investigation which must eventually culminate in report under Section 173 Cr.P.C. being submitted. If the information about the cognizable offence is substantiated by the evidence gathered during investigation, such report under Section 173 Cr.P.C. may possibly take the shape of a charge sheet wherein the persons who are found to have committed the offence are properly identified and brought before the court with the request for they to be tried. Conversely, if the information reported under Section 154 Cr.P.C. is found to be false, or if evidence were not to be forthcoming, or if the offenders cannot possibly be identified or traced, such report under Section 173 Cr.P.C. may take the shape of a cancellation report or a closure report, as the case may be. Need it be added that, the Magistrate, before whom such report under Section 173 Cr.P.C. is to be submitted (it being the court of cognizance under the general law), is not bound by the conclusions reached by the police in its report under Section 173 Cr.P.C. All course are open to the Magistrate (the court of cognizance). He may take cognizance in exercise of his power under Section 190 (1) (b) Cr.P.C. and issue process under Section 204 Cr.P.C. against the persons mentioned in the police report, or against others, if the evidence submitted by the police justifies such action to be taken. The Magistrate may approve the report and cancel or close the case. Or, the magistrate may record reasons for not being satisfied with the investigation carried out and issue necessary directions including for further investigation. [see *Chandra Babu v. State* (2015) 8 SCC 774; *Moti Lal Songara v. Prem Prakash* (2013) 9 SCC 199; *Dharmatma Singh v. Harinder Singh* (2011) 6 SCC 102; *Uma Shankar Singh v. State of*

Bihar(2010) 9 SCC 479; *Minu Kumari v. State of Bihar* (2006) 4 SCC 359; *Gangadhar Janardan Mhatre v. State of Maharashtra* (2004) 7 SCC 768; *Jagdish Ram v. State of Rajasthan* (2004) 4 SCC 432; *State of Orissa v. Habibullah Khan* (2003) 12 SCC 129; *State of Maharashtra v. Sharadchandra Vinayak Dongre* (1995) 1 SCC 42; *H.S. Bains v State* (1980) 4 SCC 631; *Abhinandan Jha v. Dinesh Mishra* (1967) 3 SCR 668 : AIR 1968 SC 117]

29. But, the above is the procedure, generally speaking, in relation to the cognizable offences (say, those provided in IPC) where there are no restrictions to taking of cognizance, including such as those provided in the provisions contained in Section 195 (Prosecution for contempt of lawful authority of public servants for offences against public justice and for offences relating to documents given in evidence) Cr.P.C., Section 196 (Prosecution for offences against the State and for criminal conspiracy to commit such offence) Cr.P.C., Section 197 (Prosecution of Judges and Public Servants) Cr.P.C, etc.

30. The procedure for dealing with non-cognizable offences under the general criminal law is distinct from that of cognizable offences. Such offences (non-cognizable) may or may not be reported to the police. If information of a non-cognizable offence is given to the police it is required by Section 155 Cr.P.C. to register the same in the manner prescribed, the informant (who may or may not be the victims) being referred to the Magistrate. Section 155 (2) Cr.P.C., in clear terms, prohibits investigation into non-cognizable offence by a police officer unless there is an order of a magistrate

having the power to try or commit such case for trial. Section 155 (3) Cr.P.C. , however, makes it clear that if such direction were to be given to a police officer (by a magistrate) for investigation into a non-cognizable offence, he would exercise all such power and jurisdiction as would vest in him in law while causing investigation into a cognizable offence, except, and this is to be marked, the power to arrest without warrant.

31. The occasion for a magistrate to issue directions for investigation into a non-cognizable offence would generally not arise unless a complaint alleging such offence were to be laid before him. The expression "complaint" is defined by Section 2(d) Cr.P.C. thus:

"complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

32. It is clear from the above-said definition that a complaint need not be in writing. It may be oral but, as the procedure discussed hereinafter would show, it must eventually be formally recorded in writing by the Magistrate. The action on a criminal complaint is taken by the magistrate (as specified in law) by first taking cognizance under Section 190(1)(a) Cr.P.C., provided the conditions requisite for initiation of such proceedings (as envisaged, generally speaking, in the provisions contained in Sections 195 to Section 199 Cr.P.C.) are in position, by examining the complainant and his witnesses, if any, in terms of Section 200 Cr.P.C. - except in

certain specified category of cases, illustratively complaint lodged by a public servant acting or purporting to act in discharge of his official duty. The Magistrate, having taken cognizance on a complaint, and having proceeded to examine the complainant and such of his witnesses as are immediately present under Section 200 Cr.P.C., is generally deemed to have embarked upon a pre-summoning enquiry which is similar to the investigative process by the police post-registration of FIR in cognizance offences. The Magistrate, if he finds sufficient evidence to have come on record during pre-summoning inquiry, may proceed to issue process under Section 204 Cr.P.C. to call upon the accused to face the trial. In contrast, if the facts and circumstances or nature of the case so requires, he may postpone the issue of process and carry out further inquiry (pre-summoning) which would be under Section 202 Cr.P.C. In certain fact-situations, such further inquiry under Section 202 Cr.P.C. is mandatory. Be that as it may, it is at the stage of such further inquiry under Section 202 Cr.P.C. that the Magistrate would have the possible occasion to issue a direction to the police for carrying out an investigation into a non-cognizable offence under Section 155 (2) Cr.P.C.

33. Even the general criminal law (substantive or procedural) envisages criminal action being initiated not only by the police but also by a complaint, as indeed by a complaint or information lodged by a person other than a police officer. The simple illustration of the last mentioned category would be a complaint by a public servant respecting offence relating to contempt of lawful authority or by a court for offences relating to evidence or documents given

in evidence (Section 195 Cr.P.C.) This last category is covered by the provision contained in Section 190 (1) (c) Cr.P.C. - "own knowledge" of the Magistrate being an additional facet of the said provision - upon which a competent Magistrate "may take cognizance of any offence".

MEANING OF "COGNIZABLE OFFENCE" - GENERAL LAW

34. The expressions "cognizance" and "cognizable offence" are distinct from each other. While the word "cognizable", qualifying the word "offence", relates to the classification in which the latter would fall, the expression "cognizance" is defined to mean "jurisdiction" or "the exercise of jurisdiction" or "power to try and determine causes". [see Black's Law Dictionary]. In common parlance, it simply means "taking notice of". The word "cognizance" is generally applied with reference to the act of a court taking judicial notice of a fact or cause and, therefore, is expressed in the terms "taking cognizance". The judicial act of "taking cognizance" denotes "judicial application of mind" and, in the context of criminal law, this expression has come to be used or applied at the stage when the investigative (or inquiry) process is complete and the matter is brought before a Magistrate for initiation of judicial proceedings against the person respecting whose complicity in the alleged crime *prima facie* case is made out on the basis of evidence gathered. The expression, noticeably, occurs prominently in Section 204 Cr.P.C. leading to an opinion being formed as to whether "there is sufficient ground for proceeding" against an individual necessitating issue of process. As explained in

CREF Finance Ltd. Vs. Shree Shanthi Homes (P) Ltd., (2005) 7 SCC 467, the "taking of cognizance" is not to be confused with "issuance of process". The cognizance is taken of the offence and not of the offender.

35. The focus of discussion here is not on "taking cognizance" but on "cognizable" character of an offence.

36. It is commonly understood that if an offence is classified in law as "cognizable", it means a police officer has a right to arrest the person responsible for such offence without the need of obtaining a warrant. As the following discussion would demonstrate this common understanding or, shall we say, assumption is based on the conjoint reading of the definition of the expression "cognizable offence" and the provision in the Code of Criminal Procedure, 1973 relating to powers of police to make arrest, as they stood till a few years ago.

37. The general procedural law (Cr.P.C.) defines the expressions "cognizable offence", and "non-cognizable offence", as indeed the cases involving such offences, by Section 2(c) and Section 2(l) as under:

"(c) "cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant;

(l) "non-cognizable offence" means an offence for which, and "non-cognizable case" means a case in which, a police officer has no authority to arrest without warrant;"

38. The definition of the expression "cognizable offence" refers one to the First Schedule appended to the Code of Criminal Procedure, 1973 (Cr.P.C.), its caption "Classification of Offences" being indicative of its purpose. The First Schedule, it is of import here, is in two parts, the first relating to offences under the Indian Penal Code (for short, "the IPC offences") and the second relating to offences against other laws (say, "special law offences"). The fourth column of the tabulation indicates in the first part (IPC offences) as to which offences are cognizable or non cognizable, the fifth and sixth column indicating its nature (bailable or non-bailable) and the court by which a particular offence is to be tried respectively. The second part (Special Law Offences) of the first schedule to Cr.P.C. is general in nature. It could not conceivably refer to the offences by the name or label given to each of them by the law. Therefore, it refers to them by the gravity seen from the perspective of the punishment prescribed under the applicable law. Such special law offences are put in three categories, the one of least gravity being those punishable with imprisonment for less than three years or with fine, all such least grave special law offences having been classified as "non-cognizable", "bailable", and triable by "any Magistrate". Noticeably, all special law offences which attract imprisonment more than three years, divided further into two categories, are classified as "cognizable" and "non-bailable". To complete the narration, it may be added that such special law offences as attract punishment of death, imprisonment for life or imprisonment for more than seven years are specified to be tried by

a court of sessions, the remaining being triable by a Magistrate of the First Class.

39. Though the Code of Criminal Procedure, 1973 was conceived as the general procedural law for dealing with general penal offences, it is intended to regulate the action under the criminal law not merely for purpose of IPC offences but also *vis-a-vis* other laws (Special Laws). This is declared, in no uncertain terms, not only by such references in various provisions of Cr.P.C., including under Section 2 (c) quoted above, but primarily by Section 4 which reads thus:

"4. Trial of offences under the Indian Penal Code and other laws. - (1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provision, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

40. It is trite that the Code of Criminal Procedure, 1973 regulates the procedure for the investigation, inquiry or trial not only of the IPC offences but also of special law offences but, in the case of latter (the Special Law Offences) application of Cr.P.C. provisions is subject to specific provisions, (if any), of such special law relating to, *inter alia*, the procedure for investigation, inquiry, trial or otherwise dealing with offence thereby created. To put it simply, if a special law creates any offence, it may create not only a special

forum for purposes of its trial but also a special procedure for investigation thereinto, or the authorities vested with the power or jurisdiction to deal with such processes and, further, the nature of such special law offences (cognizable or non-cognizable, bailable or non-bailable, etc.). Illustrations on the subject are far too many to be of any doubt on this score; Official Secrets Act, 1923; Prevention of Food Adulteration Act, 1954 (since replaced by Food Safety and Standards Act, 2006); the Customs Act, 1962; Narcotics Drugs and Psychotropic Substances Act, 1985; Prevention of Corruption Act, 1988; Maharashtra Control of Organized Crime Act, 1999; Prevention of Terrorism Act, 2002 and Protection of Children from Sexual Offences Act, 2012, *etc.* Section 2(c) Cr.P.C., as extracted above, it is pertinent to highlight, therefore, refers not merely to the First Schedule of Cr.P.C. but also, if need be, to the provisions of "other law" for determining if the offence is to be construed as "cognizable" or otherwise.

41. What, however, needs to be marked for further discussion is the fact the definitions of both cognizable offence or non-cognizable offence, refer to the power or jurisdiction of a police officer "to arrest without warrant" to be the crucial test. The provisions relating to the action expected to be undertaken by the police, upon information relating to a crime reaching its notice (the starting point being the lodging of the FIR whether under Section 154 or under Section 155 Cr.P.C.) do not control the meaning or import of the expressions "cognizable" or "non-cognizable". They only guide further action in law. From the general perspective of Cr.P.C., thus, if the law confers on a police officer the power to arrest without

warrant, the offence would be treated as "cognizable" and, if not, the offence would be a "non-cognizable" one, the procedure being regulated accordingly.

42. The general procedural law (Cr.P.C.) makes detailed provisions in Chapter V, relating to "arrest of persons" , and aside from certain specific (or special) fact-situations leading to the arrest (e.g. on account of refusal to give name or residence under Section 42), the very first provision in that Chapter, Section 41, being of import, it indicating the cases or fact-situation(s) wherein a police officer "may arrest without warrant". The provision needs to be quoted *in extenso* (as it presently stands post-amendment brought into effect from 01.11.2010) as under:

"41. When police may arrest without warrant.—(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person—

(a) who commits, in the presence of a police officer, a cognizable offence;

(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:—

(i) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;

(ii) the police office is satisfied that such arrest is necessary—

(a) to prevent such person from committing any further offence; or

- (b) for proper investigation of the offence; or*
- (c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or*
- (d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or*
- (e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured,*

and the police officer shall record while making such arrest, his reasons in writing:

Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest.

- (ba) against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years whether with or without fine or with death sentence and the police officer has reason to believe on the basis of that information that such person has committed the said offence;*
- (c) who has been proclaimed as an offender either under this Code or by order of the State Government; or*
- (d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or*

- (e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or*
 - (f) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or*
 - (g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or*
 - (h) who, being a released convict, commits a breach of any rule made under sub-section (5) of Section 356; or*
 - (i) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.*
- (2) Subject to the provisions of Section 42, no person concerned in a non-cognizable offence or against whom a complaint has been made or credible information has been received or reasonable suspicion exists of his having so concerned, shall be arrested except under a warrant or order of a Magistrate."*

43. It is clear from bare reading of the various clauses of Section 41 quoted above that, even under the general law, a police officer has no blanket power or jurisdiction to arrest a person only because such offence (here, the IPC offence) is classified by the First Schedule to Cr.P.C. as a cognizable offence. The situations covered

by clauses (c) to (i) of Section 41(1) are not of routine nature and, therefore, would not assist in the present discussion. The first clause (a) of Section 41(1) also deals with a special circumstance where cognizable offence is committed "in the presence of a police officer". Thus, the remaining two clauses of Section 41(1) provide better guidance in comprehending the intention of the legislature. Broadly put, the offences have been placed in two categories, one those attracting punishment with imprisonment which may be less than seven years and the other which may attract sentence more severe than that (extending upto the sentence of death). It is in the latter category alone, covered by Section 41 (1)(ba), that the police officer has virtually a clear (unrestricted) power to arrest provided, of course, he has "reason to believe" on the basis of "credible information" about the complicity. In the crimes of lesser gravity, those covered by Section 41(1)(b), in contrast, the police officer does not have a blanket power of arrest. In order to cause arrest without warrant in such cases, he must put on record the satisfaction about the necessary criteria having been met which includes not only credible information about complicity but also the need to do so for preventing commission of further offences or for proper investigation or for preventing tampering with or destruction of evidence or influencing of witnesses or to ensure that the person in question is brought to justice.

44. It needs to be remembered that the provision contained in Section 41(1)(a) Cr.P.C. originally conferred a very wide power on the police officer giving him authority in law to arrest a person without warrant even on "reasonable suspicion" of his complicity in

the commission of a cognizable offence. The law was amended by the Code of Criminal Procedure (Amendment) Act 2008 (Act 5 of 2009), coming into effect from 1.11.2000, it having taken the shape quoted above. The broad meaning of the expression "cognizable offence", as all along understood in relation to the power or jurisdiction of a police officer to arrest "without warrant", guided further by the definitions in clauses (c) and (l) of Section 2 Cr.P.C. noted earlier can, thus, no longer hold good after the amendment of Section 41 Cr.P.C. This thought needs some elaboration.

45. An offence may attract punishment with imprisonment for term less than seven years and the pre-requisite spelt out in Section 41(1)(b)(ii) may not be available and, therefore, the police officer may not have a power to arrest without warrant and, yet, the offence involved may be "cognizable" (since so specified by the law), respecting which the police may be duty bound to register an FIR under Section 154 Cr.P.C. and embark upon investigation. This may be illustrated by reference to all such IPC offences included in the first part of the First Schedule to Cr.P.C. as attract punishment which may be imprisonment for a term less than seven years but may have been specified by the fourth column as cognizable, they including, for example, the offences punishable under Sections 129 IPC (Public Servant negligently suffering prisoner to escape); Section 133 IPC (Abetment of assault by soldier, sailor or airman on his superior officer when in execution of his office); Section 148 IPC (Rioting, armed with deadly weapon); Section 160 IPC (Punishment for committing affray); Section 212 IPC (Harbouring an offender); Section 279 IPC (Rash driving or riding on a public

way); Section 304-A IPC (causing death by rash or negligent act); Section 324 IPC (voluntarily causing hurt by dangerous weapons or means). The list can be endless.

46. In view of the above, it would be wrong, if not naive, to construe the expression "cognizable offence" so simplistically as to connote an offence where the police officer has a power to arrest without warrant. Whether or not the power vests in a police officer to arrest a person without warrant in a particular case is to be seen by the provisions of the law which regulates the investigation, inquiry or trial for the offence involved in it. Mere classification of an offence as cognizable or non-cognizable, would *ipso facto*, not confer a general or unrestricted power to arrest, particularly on a police officer.

47. It is one thing to say that a police officer has the power of arrest and quite another to say that the power was properly or justifiably exercised. It has been the consistent view of the courts in India that power is not to be exercised merely because it exists. [see *Arnesh Kumar Vs. State of Bihar*, (2014) 8 SCC 273 and *Court on its own motion Vs. Central Bureau of Investigation*, ILR (2004) 1 Delhi 47]. By various pronouncements, guidelines have been given by the courts to the law enforcement agencies as to the manner in, or circumspection with, which a power of such import as of arrest is to be exercised. The amended provision of Section 41 Cr.P.C. incorporates some of such guidelines putting certain restrictions on the general power of police officer to arrest in the case of a cognizable offence, thereby seeking to regulate (if not minimize) its

use. The objective of the amendment brought into force by Act no.5 of 2009 referred to above was primarily to check abuse of the power of arrest vested in a police officer.

48. Thus, the power to arrest a person involved in a cognizable offence still vests in a police officer but he is inhibited by law from exercising it except in cases or situations, where he is permitted to do so by the amended provision of Section 41 Cr.P.C., though only by scrupulously following its requirements. This, however, does not mean that such offences as have been specified to be "cognizable" cease to be in that category because the police officer cannot arrest without warrant (for want of specified conditions). The classifications of each offence in terms of the general law, as reflected by the First Schedule appended to Cr.P.C., or as specified by the special law creating the offence, would continue to hold good - notwithstanding the restrictions on the power of the police officer to cause arrest.

49. In view of the above, the general meaning and import of the expression "cognizable offence" must now be re-understood in light of conjoint effect of Section 2 (c) read with amended provision of Section 41 Cr.P.C., so as to denote an offence in connection with which a police officer may arrest a person (respecting whose complicity there is credible information or reasonable suspicion) without warrant, such authority being subject to restrictions in law.

50. Since classification of the offence - cognizable or non-cognizable - has also some connection with the investigative process, it is necessary to mention here another argument of the

petitioners based on the ruling in *State of Haryana and Ors. Vs. Bhajan Lal and Ors.*, 1992 Suppl. (1) SCC 335 wherein the court had observed that "(w)here the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without order of a Magistrate as contemplated under Section 55 (2) of the Code." Similar view was taken in *Om Prakash and Anr. Vs. Union of India and Anr.*, (2011) 14 SCC 1. The submission of the petitioners is that if the contention that the offence is non-cognizable were to be upheld, any investigation without authorization from the court of Magistrate (or Special Court) would be impermissible.

51. But the fundamental error in this line of argument is that the observations in *Bhajan Lal* (supra) and other similar line of precedents are in the context of general criminal law where the investigation is in the hands of the police controlled by the Code of Criminal Procedure. These submissions may not hold good if the special law has its own dispensation vis-a-vis the investigation and cognizance by the court. As held in *Board of Muslim Wakfs, Rajasthan Vs. Radha Kishan and Ors.*, (1979) 2 SCC 468, "it is not a sound principle of construction to interpret expressions used in one Act with reference to their use in another Act, and decisions rendered with reference to construction of one Act cannot apply with reference to the provisions of another Act unless the two Acts are in *pari materia*".

52. For the foregoing reasons, comment on the issue as to whether the offence of money-laundering is cognizable or as to whether authorization from the court is a pre-requisite to investigation or arrest in its relation is presently reserved till the scheme and the provisions of the law have been properly understood. Before one proceeds in that direction, however, the meaning of "cognizable offence" in the context of some other criminal statutes may also be noted.

MEANING OF "COGNIZABLE OFFENCE" - SPECIAL LAW(S)

53. The general substantive law providing for offences punishable in India is supplemented by numerous enactments which create subject-specific offences, they including, as mentioned earlier, Official Secrets Act, 1923; Prevention of Food Adulteration Act, 1954 (since replaced by Food Safety and Standards Act, 2006); the Customs Act, 1962; Narcotics Drugs and Psychotropic Substances Act, 1985; Prevention of Corruption Act, 1988; Maharashtra Control of Organized Crime Act, 1999; Prevention of Terrorism Act, 2002 and Protection of Children from Sexual Offences Act, 2012; *et al.* This list of special laws, of course, is not exhaustive. These enactments are being referred here by way of illustration to bring out the fact that the legislature, at times, refers one to the general prescription in the First Schedule appended to Cr.P.C. to ascertain if the special law offence is cognizable or non-cognizable as also for purposes of regulating the process of inquiry or investigation and the procedure for taking of cognizance, etc.

54. To quickly expound on the above, it may be mentioned that the provisions of Prevention of Terrorism Act, 2002 (since repealed) created new offences (Sections 3, 4 and 6) which were classified by Section 49 to be cognizable and non-bailable, the forum for trial being Special Court established in terms of Section 23. Similar is the dispensation under Narcotics Drugs and Psychotropic Substances Act, 1985, Prevention of Corruption Act, 1988, Maharashtra Control of Organized Crime Act, 1999 and Protection of Children from Sexual Offences Act, 2012. Noticeably, however, the authorities vested with the power to investigate and bring the offenders to justice in all these special laws continues (or continued) to be police, the agency generally entrusted with the responsibility of investigation of crimes. By and large, the offences under these enactments have been "cognizable" and the cognizance by the specified court is upon report (under Section 173 Cr.P.C.) of the police officer on completion of investigation, as envisaged in Section 190(1)(b) Cr.P.C.

55. To the above list, one may add the special law known as Official Secrets Act, 1923. Though the offences created by this legislation (Sections 3, 5, 6) are also deemed, by virtue of the Second Part of the First Schedule appended to Cr. P.C., to be "cognizable", and consequently the police is obliged by law not only to register the crime (under Section 154 Cr.P.C.) but also to investigate - and this would eventually lead to a report (under Section 173 Cr.P.C.) being submitted - the cognizance of the offences under this law is not on police report under Section 190(1)(b) but upon a complaint of the authorized officer in terms of

Section 13(3), the cognizance in such case thus being under Section 190(1)(c) Cr.P.C. Because the offences under this special law are cognizable and since the police is empowered to investigate, there being no provision to such effect, only because the cognizance by the court would eventually be on a complaint rather than a police report it cannot be said that arrest cannot be effected without proper authorization from the court.

56. The special law on food adulteration provides a slightly different dispensation. The erstwhile enactment, the Prevention of Food Adulteration Act, 1954, was primarily a criminal law which created offences defined and provided for by various clauses of Section 16. Section 20(3) classified one of them, the one specified in Section 16(1AA), to be "cognizable" and "non-bailable", making it clear that such special stipulation was necessary because under the ordinary law governed by the Section Part of First Schedule of Cr.P.C. it would otherwise have been a non-cognizable and bailable offence, in as much as the maximum punishment would be imprisonment for a term upto two years with fine. The rest of the offences under the old law on food adulteration were clearly non-cognizable and bailable. The law conferred the power for investigation and launching of prosecution for such offences generally on the local health authorities, the cognizance by the court of Magistrate empowered to deal with such offences summarily being upon a complaint by such empowered functionaries.

57. The Prevention of Food Adulteration Act, 1954 was repealed by the Food Safety and Standards Act, 2006, some of the provisions

of which came into effect from 2007 onwards. The new law is a mixed dispensation. It seeks to meet the challenge of food adulteration by imposition of penalties (civil action) or by making certain acts penal offences (criminal action). There are authorities established for dealing with the civil action. For trial of the offenders for the penal offences (Sections 59 to 64), the court of Magistrate of the First Class is generally the forum specified (Section 73), save for graver offences punishable under Section 59 (iii) and (iv), which are to be tried by the special courts established under Section 74. The law establishes authorities responsible for enforcement of its various provisions, they including the Food Authority, at the apex, and other functionaries like Food Safety Officer, Designated Officer, Food Analyst etc. A conjoint reading of Sections 41, 42 and 47, besides others, would show that the Food Safety Officer and the Designated Officer are generally responsible for detection of crimes under this law, the investigation required in such wake and for bringing the offenders to justice and, for such purposes, they have been vested with the requisite powers of search, seizure, summoning, investigation and prosecution. The Commissioner of Food Safety is vested with the discretion, by Section 69, to supervise and control the compounding of such offences as are not punishable with imprisonment, subject to certain restrictions. Pertinent to mention here that though the Food Safety and Standards Act, 2006 does refer by its various provisions to the Code of Criminal Procedure, 1973, modifying some in its relation, it scrupulously avoids classifying any of the offences as cognizable, bailable or otherwise.

58. In above view, the question as to whether an offence under Food Safety and Standards Act, 2006 is cognizable (or bailable) or not would have to be regulated by the Second Part of the First Schedule appended to the Code of Criminal Procedure, 1973, thus guided by the maximum punishment prescribed. Generally speaking, all offences other than those prescribed in Section 59(iii) and (iv) attract punishment which falls in the least grave category of the Second Part of the First Schedule to Cr.P.C., and consequently they would have to be treated as non-cognizable and bailable. But, keeping in view the punishment prescribed (imprisonment for term which may extend to six years) therefor, the offence (manufacture, sale, distribution etc. of food articles resulting in grievous injury) under Section 59(iii) would be cognizable and non-bailable and, by virtue of Section 74 triable by the special court. In contrast, the offence (manufacture, sale, distribution etc. of food articles resulting in death) under Section 59(iv) which attracts imprisonment which shall not be less than seven years but may extend to imprisonment for life would fall in the most grave category of Second Part of the First Schedule to Cr.P.C. and thus also be cognizable and non-bailable, but triable by the special court under Section 74.

59. The Food Safety and Standards Act, 2006 does not modify the Code of Criminal Procedure, 1973 to such effect as to independently specify the classification of offences different from the general prescription or the powers of the police to investigate (or cause arrest of persons found complicit) generally in relation to the cognizable offences. What stands out, however, is the conjoint

effect of Sections 41 and 42 that confers the power to "launch prosecution" on the Food Safety Officer. In the opinion of this court, therefore, for dealing with an offence under Section 59(iii) or (iv) of the Food Safety and Standard Act, 2006, a police officer would be obliged in law not only to take note of such cognizable offence in accordance with Section 154 Cr.P.C. but also to cause arrest, if the need arises to do so, in exercise of the power regulated by Section 41 Cr.P.C. But, upon completion of investigation, the police officer would have the criminal action initiated in the court by calling upon the enforcement authorities under the special law to launch prosecution by filing a complaint before the competent court and consequently, the cognizance would be, not on the police report under Section 190(1)(b) but, on such complaint under Section 190(1)(a) Cr.P.C.

60. The Customs Act, 1962 provides a study in sharp contrast to the above mentioned special enactments but, as we shall see in due course, this law, the Customs Act, is nearest home as equivalent to the one which is the subject matter of the present proceedings, namely, the PMLA.

61. The Customs Act, 1962 was enacted to consolidate and modify the then existing law so as to sternly and expeditiously deal with smuggled goods and curb the loss to the revenue. The legislation contains detailed provisions pertaining to prohibition on importation or exportation of goods, levy of duty upon such transactions, assessment of the revenue payable, realization thereof, etc. It establishes its own machinery known as "officers of

customs", specifying the powers or functions entrusted to different classes thereof. The officers of customs have the power not only to search or seize goods which are exported or imported in contravention of the restrictions thereby imposed but also to detain any person for detection, or for questioning, for such breaches. The said authority of customs officers extends to the power of arrest (under Section 104) in cases where there is reason to believe commission of certain specified offences under the special law, such power being akin to that of a police officer and mandatorily required to be subject to the provisions of Code of Criminal Procedure, 1973. The enactment creates special offences (Sections 132 to 135-A and Section 136) and directs, by Section 138, all such offences to be triable by a Magistrate following the summary procedure. A customs officers, duly empowered or authorized, is entitled to examine any person acquainted with the facts and circumstances of the case and, for such purposes, may compel appearance by issuing summons either to give evidence or to produce documents in terms of Section 107 and 108.

62. Having regard to the overall scheme of the Customs Act the investigation carried out by the authorities under the law results in the prosecution in the court of a Magistrate, it taking cognizance, subject to appropriate sanction where required, in terms of Section 137, the nature of the smuggled goods "prohibited goods" or the value of the duty thereby evaded (Rs.50 lacs or more) controlling the classification of the offence as "cognizable" or otherwise, in terms of Section 104(4), the clause immediately following clarifying that all other offences under the Customs Act shall be

"non-cognizable". It needs to be noted for clarity that an enforcement of the Customs Act resulting in criminal prosecution is through officers of the customs and not by police. It is well settled that officers of the customs are not police officers and that the statements recorded by them in the course of inquiry or investigation undertaken in terms of this special law, particularly statements under Section 108, are not akin to the statements recorded by the police under Section 161 Cr.P.C. and, therefore, the same are not hit by the rules of admissibility of evidence, Section 138-B further clarifying the position as to their relevancy under certain circumstances.

63. In above context, reference may be made to *Ramesh Chandra Mehta v. State of W.B.*, (1969) 2 SCR 461, wherein a Constitution bench ruled thus :

"25. ... a Customs Officer is under the Act of 1962 not a police officer within the meaning of Section 25 of the Evidence Act and the statements made before him by a person who is arrested or against whom an inquiry is made are not covered by Section 25 of the Indian Evidence Act."

64. The above view was reiterated in *Illias v. Collector of Customs*, (1969) 2 SCR 613; *State of Punjab v. Barkat Ram*, (1962) 3 SCR 338; and *Om Prakash v. Union of India*, (2011) 14 SCC 1.

65. Thus, similar to the provisions of PMLA, the scheme of the Customs Act, 1962, while creating penal offences, establishes its own machinery for investigation and prosecution. The officers of the customs are empowered by the law to arrest the persons respecting whose complicity there is reason to believe. It is on the

complaint of the empowered officer that the court takes cognizance. Some of the offences are classified as cognizable, the others being non-cognizable. Obviously, therefore, there would be no power of arrest vesting in customs officers *vis-a-vis* the non-cognizable offence. This, however, does not mean that a Customs officers will have to seek authorization to exercise the power of arrest in cases where law confers on him such jurisdiction. Further, the fact that the offence is non-cognizable only means that the customs officer has no power of arrest. It does not lead to the conclusion that he has no power to investigate into a non-cognizable offence under the Customs Act, it being a special law not controlled, for such purposes by the general law relating to the powers of police to investigate, as stipulated in Chapter XII of the Code of Criminal Procedure, 1973 (Sections 154 to 176).

66. In summing up on this issue, it may be observed that the expression "cognizable" in relation to an offence cannot have a uniform or static meaning. Its connotation may differ from one law to the other. Further, only because there are restrictions regulating the power of arrest in a cognizable case, or because there are certain pre-requisites to the taking of cognizance - say, filing of a complaint - it does not necessarily lead to the inference, unless there is a statutory provision to such effect, that the empowered agency cannot investigate or arrest without authorization from the court.

67. The above conclusion emerging from the scheme and plain language of the law is reinforced by the fact that the marginal heading of Section 45 PMLA continues to remain unamended, it

declaring that the offences under this special law are cognizable. The speeches (and the intervention) of the mover(s) of the amending bill in each House of the Parliament, as one shall see in due course, also did not state that the offences were to be declared as non-cognizable. They only clarified that the amendment was necessary so as to ensure that police did not exercise the general power of arrest in such cases.

PREVENTION OF MONEY-LAUNDERING ACT - AN OVERVIEW

68. The malaise of money-laundering has posed a serious threat, particularly in recent times, not only to the financial systems of the civilized world but also to the integrity and sovereignty of the member States. The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances to which India is a party called for prevention of laundering of proceeds of drug crimes and other connected activities and confiscation of proceeds derived from such offences. The Basic Statement of Principles, enunciated in 1989, outlined basic policies and procedures that banks should follow in order to assist the law enforcement agencies in tackling the problem of money-laundering. In the wake of obligations emanating, *inter alia*, from the adoption of the recommendations of Financial Action Task Force established at the summit of seven major industrial nations, held in Paris from 14th to 16th July 1989, followed by the adoption of the Political Declaration and Global Programme of Action by the United Nations General Assembly through its Resolution No.S-17/2 of 23rd February 1990 and the Declaration made in June 1998 by the

United Nations in the Special Session on Countering World Drug Problem Together, on the basis of report of the Standing Committee submitted on 4th March 1999, the Parliament enacted the Prevention of Money-Laundering Act, 2002 with the avowed objective "*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 law (PMLA) has been amended several times, lastly by the Finance Act, 2016 (Act No.28 of 2016). It is a measure to deal with "money-laundering", the definition of which expression by Section 3, making it a penal offence, has already been taken note of. What is crucial is the fact that the money thereby targeted must represent "proceeds of crime", the infringing process or activity being in the nature of its concealment, possession or acquisition or leading to its use in such a manner so as to facilitate the party involved (or complicit) to be in a position to project or claim it to be an "untainted" asset. To put it simply, the money or the asset should be "tainted" (say, undeclared or result of criminal activity) but being shown as legitimate by being routed through (the impugned) transactions meant to give it the colour of legitimacy.

69. As in the case of Customs Act, PMLA seeks to deal with the scourge of money-laundering both by civil action (attachment, adjudication and confiscation) and criminal action (prosecution for the offence of money-laundering leading to punishment), the former by special machinery (Adjudicating Authorities) created for such purposes (Section 6), the remedies being available initially before

an Appellate Tribunal (established under Section 25), and the latter before the Special Courts (under Section 43).

70. Section 48 of PMLA specifies the authorities specially created for its purposes, the highest being the Director (generally known as Director of Enforcement), an appointee of the Central Government, the other authorities (Additional Director, Joint Director, Deputy Director, Assistant Director and other class of officers) being appointed by the Central Government for aiding and assisting. The said Authorities, appointed for purposes of PMLA, are conferred with the responsibility of initiating all action leading, *inter alia*, to proceedings for attachment, adjudication or confiscation of the tainted money or property or for prosecution for the offence under Section 4.

71. The procedure for attachment, adjudication and confiscation is governed by the third chapter (Sections 5 to 11), it commencing with the Director or the Deputy Director (authorized by the former) recording "in writing", the "reason to believe" that any person is in possession of any proceeds of crimes, such proceeds being likely to be concealed, transferred or dealt with in a manner as to frustrate the objectives of the law, the basis for such action being "material" in the possession of such authority. The Director, or the Deputy Director, having recorded such belief in writing is empowered, by Section 5(1), to direct provisional attachment of the suspect asset (money or property) which, it must be added, is subject to appropriate further proceedings before the Adjudicating Authority constituted under Section 6, it being a high powered body

consisting of the Chairperson and two Members, the detailed provisions conferring upon such Authority all trappings of an independent Tribunal, the orders passed thereby being amenable to appeal before the Appellate Tribunal established under Section 25.

72. The special legislation (PMLA) seeks to focus, generally speaking, on "proceeds of crime" and, particularly, on certain specified offences each being referred in the law as "scheduled offence", an expression defined in Section 2(y), taking one to the Schedule appended to the enactment. The Schedule is divided broadly into three parts, the first (Part A) including certain offences under Indian Penal Code and certain offences under special laws like Narcotic Drugs and Psychotropic Substances Act, 1985, Explosive Substances Act, 1908, Unlawful Activities (Prevention) Act, 1967, Arms Act, 1959, Prevention of Corruption Act, 1988, Customs Act, 1962, etc. The next part (Part B) of the Schedule specifies the offence under Section 132 of the Customs Act, 1962 as a scheduled offence while the last (Part C) includes some such offences as have "cross border implications".

73. The first proviso to Section 5(1) clarifies that the Director (of Enforcement) cannot proceed to order provisional attachment of a tainted property unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under Section 173 Cr.P.C. or a complaint has been filed by person duly authorized to do so under the law, the second proviso creating an exception in case the wait for the submission of such police report or filing of complaint may lead to frustration of the proceedings.

74. The Authorities under the PMLA have been vested with the powers and jurisdiction, *inter alia*, for gathering of evidence, if required by search and seizure, summoning and enforcing the attendance of any person acquainted with facts or for production of records, examination of witnesses and documents including by issuance of commission etc. While the powers of survey, seizure, search, etc. conferred on the enforcement authorities are spelt out in various provisions of the fifth chapter, some such powers (as of the civil courts) are vested in the Adjudicating Authority by Section 11. The fourth chapter creates certain obligations of Banking Companies, Financial Institutions and Intermediaries to share information, the ninth chapter dealing with reciprocal arrangement for mutual assistance requisite with authorities in foreign countries.

75. It is primarily the action that begins with recording in writing under Section 5 the reasons for belief of a person being in possession of proceeds of crime and such asset being subjected to process or activity resulting in it being in the nature of money-laundering that leads not only to the proceedings for attachment and confiscation but also the criminal action in the special court established under Section 43. It is the result of the investigative process undertaken by the same authority as leads to the two actions including, what is relevant here, the prosecution in the special court for offence under Section 4 PMLA. It is from this perspective that it is important to note that the enforcement officers are conferred by Section 19 PMLA with the power of arrest.

76. This provision must be quoted *verbatim* as under:

"19. Power to arrest.—(1) If the Director, Deputy Director, Assistant Director or any other officer authorised in this behalf by the Central Government by general or special order, has on the basis of material in his possession, reason to believe (the reason for such belief to be recorded in writing) that any person has been guilty of an offence punishable under this Act, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.

(2) The Director, Deputy Director, Assistant Director or any other officer shall, immediately after arrest of such person under sub-section (1), forward a copy of the order along with the material in his possession, referred to in that sub-section, to the Adjudicating Authority, in a sealed envelope, in the manner as may be prescribed and such Adjudicating Authority shall keep such order and material for such period, as may be prescribed.

(3) Every person arrested under sub-section (1) shall, within twenty-four hours, be taken to a Judicial Magistrate or a Metropolitan Magistrate, as the case may be, having jurisdiction:

Provided that the period of twenty-four hours shall exclude the time necessary for the journey from the place of arrest to the Magistrate's Court."

77. Pertinent to observe here that it is essential that the authorized officer of Enforcement must have in his possession such material as on the basis of which he may entertain "reason to believe" that the person being arrested is guilty of the offence of money-laundering (or some other offence under the special law, such as those provided in Section 62 and 63). The pre-requisite for a lawful arrest in terms of Section 19(1) PMLA is recording of the reasons for such belief "in writing" and after effecting arrest the person so arrested to be informed of the "grounds of such arrest".

That the two actions, one for attachment leading to confiscation of the tainted asset and the other leading to criminal prosecution, are inter-connected is brought out vividly by Section 19(2) obliging the arresting officer to forward a copy of the order (including of authorization) setting out the reasons for belief of complicity of the arrestee, along with copy of the material on the basis of which such belief was drawn, to the Adjudicating Authority which, in normal course, would be already privy to the ongoing investigation in terms of similar submission made under Section 5(2). The Adjudicating Authority is obliged by the law to keep in its safe custody and control such submission concerning the arrest during investigation under PMLA "in a sealed envelope". Both the report under Section 5(2) to the Adjudicating Authority immediately after the provisional attachment of the tainted (or suspect) property and the grounds of arrest in terms of Section 19(2), along with the material on the basis of which each such action has been taken, are safeguards put in position by the law which are similar to, but not same as, the requirement of Section 157(1) Cr.P.C. wherein a police officer makes a report to the Magistrate empowered to take cognizance of an offence before embarking on the process of investigation; one distinction here, of course, being that under the general criminal law, all investigative steps, including the arrest, search, seizure, etc. would be reported from time to time to the Magistrate with whom the report under Section 157 Cr.P.C. has already been submitted, in terms of the special law, the Adjudicating Authority, though the repository of both reports (of provisional attachment and arrest) deals eventually only with the

civil action, the authorization for detention in custody being granted by the judicial magistrate, under Section 19(3), for which purposes, a general reading of the law would confirm, Section 167 Cr.P.C. would apply.

78. The trial for the offences created by PMLA is held in the court of sessions designated as Special Court in terms of Section 43. It is necessary to take note of Section 44 in this regard, which reads thus:

"44. Offences triable by Special Courts.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

(a) an offence punishable under Section 4 and any scheduled offence connected to the offence under that section shall be triable by the Special Court constituted for the area in which the offence has been committed:

Provided that the Special Court, trying a scheduled offence before the commencement of this Act, shall continue to try such scheduled offence; or

(b) a Special Court may, upon a complaint made by an authority authorised in this behalf under this Act take cognizance of offence under Section 3, without the accused being committed to it for trial.

(c) if the court which has taken cognizance of the scheduled offence is other than the Special Court which has taken cognizance of the complaint of the offence of money-laundering under sub-clause (b), it shall, on an application by the authority authorised to file a complaint under this Act, commit the case relating to the scheduled offence to the Special Court and the Special Court shall, on receipt of such case proceed to deal with it from the stage at which it is committed.

(d) a Special Court while trying the scheduled offence or the offence of money-laundering shall hold trial in accordance with the provisions of the Code of Criminal Procedure, 1973

(2 of 1974), as it applies to a trial before a Court of Session.

(2) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under Section 439 of the Code of Criminal Procedure, 1973 (2 of 1974) and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to "Magistrate" in that section includes also a reference to a "Special Court" designated under Section 43."

79. Though Section 71 declares unequivocally that provisions of PMLA "*shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force*" which resonates what in effect is the import of Section 4(2) Cr.P.C. which has already been taken note of, at the same time it further brings out, for clarity, by Sections 46 and 65 that the provisions of the Code of Criminal Procedure, 1973 shall apply, in so far as they are not inconsistent with the provisions of this law, to the proceedings before the special court and in the matters relating to "*arrest, search and seizure, attachment, confiscation, investigation, prosecution*" and all other proceedings. Perhaps in order to allay further doubts, if any entertained in this regard, various other provisions of this special legislation make it abundantly clear that the Code of Criminal Procedure, 1973 would regulate the criminal action unless there is a special provision in PMLA to the contrary or inconsistent with the general procedural law, such clauses including Section 43(2), Section 44(1)(d), Section 44(2), Section 45(1)(1a)(2) and Section 47.

80. What merits particular note is the fact that the Special Court which is empowered to take cognizance of the offence of money-laundering under Section 4 or any scheduled offence connected thereto acts, in terms of Section 44(1)(b), upon a complaint by the competent authority (specified under Section 45), the judicial act of taking cognizance thus being under Section 190(1)(a).

81. It is apposite to add here that Section 45 (1-A) of PMLA declares in clear terms that notwithstanding anything contained in the Code of Criminal Procedure or any other provisions of PMLA "*no police officer shall investigate into an offence under this Act unless specially authorized (to do so)*", the special authorization vis-a-vis the police officer by the Central Government and subject to such conditions as may be prescribed. The PMLA, by Section 2(1)(na), defines the term "investigation" as including "*all the proceedings under this Act conducted by the Director or by an authority authorised by the Central Government under this Act for the collection of evidence.*" Noticeably, there is no reference to investigation by the police.

82. It is clear from the overview of the law thus far that the investigative process under PMLA is entrusted by the legislature in the hands of the authorities thereby created (generally speaking, the officers of the Directorate of Enforcement) and that police officers are generally inhibited from embarking upon investigations into the matters (or offences) relating to money-laundering, the only exception being where there is a special authorization. At the cost of repetition it needs to be recalled that the power of arrest in terms

of Section 19 is also conferred generally on the senior officers of Enforcement Department (Director, Deputy Director or Assistant Director), though provision is made for authorization of other officers as well.

83. The moot question raised in these proceedings is as to whether the offence of money-laundering punishable under Section 4 PMLA is cognizable or not. The law, as it presently stands amended, contains the following provision in Section 45:

"45. Offences to be cognizable and non-bailable.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence punishable for a term of imprisonment of more than three years under Part-A of the Schedule shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:

Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs:

Provided further that the Special Court shall not take cognizance of any offence punishable under Section 4 except upon a complaint in writing made by—

(i) the Director; or

(ii) any officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government by a general or special order made in this behalf by that Government.

(1-A) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or any other provision of this Act, no police officer shall investigate into an offence under this Act unless specifically authorised, by the Central Government by a general or special order, and, subject to such conditions as may be prescribed.

(2) The limitation on granting of bail specified in subsection (1) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail."

84. It was pointed out by the learned counsel for the petitioners that though the heading of Section 45 does seem to indicate the offences under this law are "cognizable", there is no provision on the statute book declaring any offence of PMLA to be cognizable. It is further pointed out that Section 45(1-A) makes it clear that police officers do not have the authority in law to investigate into PMLA offences (unless there is special authorization to such effect) and that the power of arrest in terms of Section 19 is restricted to the enforcement officers, the cognizance required to be taken by the Special Court being contingent upon a complaint in writing being made by such functionaries only. It was also pointed out that prior to the amendment of 2005, there was a clear stipulation in law, by Section 45(1)(a) that every offence under PMLA was "cognizable",

such clause having been omitted. On the basis of these submissions, it was argued that the offences under PMLA are to be treated as non-cognizable and since cognizance thereof is to be taken not on a police report but on a complaint by the Enforcement Officers, who only are empowered to investigate, any action without formal authorization from the court is incompetent.

85. The above aspect would need consideration of the effect of amendment.

CONSTRUING THE AMENDED SECTION 45 PMLA

86. The law contained in PMLA, as originally enacted, declared by Section 45 that every offence under this special enactment would be cognizable. The original provision of Section 45 (prior to amendment of 2005) must be quoted here:

"45. Offences to be cognizable and non-bailable.—

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of

such offence and that he is not likely to commit any offence while on bail:

Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs:

Provided further that the Special Court shall not take cognizance of any offence punishable under Section 4 except upon a complaint in writing made by—

(i) the Director; or

(ii) any officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government by a general or special order made in this behalf by that Government.

(2) The limitation on granting of bail specified in clause (b) of sub-section (1) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail."

(emphasis supplied)

87. By the Prevention of Money-Laundering (Amendment) Act, 2005 (Act No.20 of 2005), the clause contained in Section 45(1)(a) quoted above was deleted. The clause (b) of Section 45(1), thus, merged with the remaining phraseology employed in the existing provision so as to become Section 45(1), now a provision intended to regulate primarily the issue of release on bail and the mode of taking cognizance, the pre-requisite being a complaint in writing by the Director or other authorized officer. The existing sub-Section (2) of Section 45 quoted above, by this amendment, was

accordingly modified so as to remove reference to clause (b) of sub-Section (1). A new sub-Section (1-A) was inserted which contains the general restrictions against a police officer investigating into an offence under PMLA.

88. The submissions of the petitioners are that the legislature took a conscious decision of omitting Section 45(1)(a) and the only intendment thereof could be that the offences under PMLA are to be treated as non-cognizable. It was argued that the heading of the provision contained in Section 45 is not part of the legislation and cannot control its interpretation. It was submitted that the introductory speeches and the answers given during the debate at the time of consideration (and passage) of the amending Bill by the two Houses of Parliament confirm this to be the intention of the legislature, the insertion of sub-Section (1-A) to Section 45, as noted earlier, making it even more clear that the police officers have no connection with the investigation of the crimes under this special enactment, the necessary corollary whereof, as per the argument, would be that the offence of money-laundering under Section 4 PMLA is non-cognizable and consequently, it is urged, any arrest without authorization from the competent court, or even investigation by summoning any person under Section 50 PMLA should be taboo.

89. *Per contra*, it is the argument of the respondents that the heading of Section 45 remains un-amended and that the changes brought about by Act No.20 of 2005 have the effect only of clarifying that the investigation of PMLA offences is entrusted to

the Enforcement officers and not to the police at large which, consequently, cannot embark upon such probes or exercise their power of arrest under the general law. It is the argument of the respondents that the Parliament debates cannot be used for construing the intention of the legislature since the provisions of the law are clear and unambiguous.

Relevance of marginal head

90. The petitioners rely on *Dr. Sham Lal Narula vs. CIT*, 53 ITR 151 (SC); *Chandroji Rao vs. Commissioner of Income Tax, M.P. Nagpur*, (1970) 2 SCC 23; *Thakurain Balraj Kunwar & Anr. vs. Rae Jagatpal Singh*, 1904 Indian Appeals (Volume XXXI) 132; *Prakash Nath Khanna vs. CIT*, (2004) 9 SCC 686; *Guntaiah & Ors. vs. Hambamma & Ors.*, (2005) 6 SCC 228 ; and *Union of India & Anr. vs. National Federation of the Blind & Ors.*, (2013) 10 SCC 772 to argue that the marginal heading cannot control the interpretation of the words of the section particularly when the language of the section is clear and unambiguous. It was pointed out that in *Guntaiah* (supra) a bench of two Hon'ble Judges of the Supreme Court went to the extent of observing that the marginal notes "*are not considered as legitimate aid to construction of any section or rule*", or even further that the said "*side notes are not considered as part of the Act*".

91. The Supreme Court of South Australia in the case of *Ragless vs. District Council of Prospect*, 1922 South Australia 299, way back explained the rules of interpretation with reference to marginal heads thus:

- "1. If the language of the sections is clear and is actually inconsistent with the headings, the headings must give way.*
- 2. If the language of the section is clear, but, although more general, is not inconsistent with the headings, the sections must be read subject to the headings.*
- 3. If the language of the sections is doubtful or ambiguous, the meaning which is consistent with the headings must be adopted."*

92. In *Bhinka & Ors. vs. Charan Singh*, 1959 Supp (2) SCR 798, a bench of three Hon'ble Judges of the Supreme Court quoted, with approval, *Maxwell on Interpretation of Statutes*, (10th Edition, page 50), as under:

"The headings prefixed to sections or sets of sections in some modern statutes are regarded as preambles to those sections. They cannot control the plain words of the statute but they may explain ambiguous words."

(emphasis supplied)

93. The court in *Bhinka & Ors.* (supra) observed that *"if there is any doubt in the interpretation of the words in the section, the heading certainly helps us to resolve that doubt"*. In *K.P. Varghese vs. Income Tax Officer, Ernakulam & Anr.*, (1981) 4 SCC 173, it was similarly held that though the marginal note cannot control the interpretation, *"it prima facie furnishes some clue as to the meaning and purpose of the section"*. In *M/s. H.M. Kamaluddin Ansari and Co. vs. Union of India & Ors.*, (1983) 4 SCC 417, while enjoining upon the courts to follow the golden rule of giving effect to the meaning derivable from clear, plain and unambiguous words of a statute, it was noted as a well settled view that *"the headings or*

titles prefixed to a section or a group of sections can be referred to in determining the meaning of doubtful expressions", such headings or title of a section, however, being "very broad and general indicators of the nature of the subject matter dealt with thereunder" and consequently having "a limited role to play in the construction of statutes", as held by a bench of three Hon'ble Judges in Forage & Co. (of Ushala) vs. Municipal Corporation of Greater Bombay & Ors., (1999) 8 SCC 577 and by a Constitution Bench of the Supreme Court in Sarah Mathew vs. Institute of Cardio Vascular Diseases & Ors., (2014) 2 SCC 62.

94. The view that marginal headings of different sections of a legislation are not part of the statute has been junked over the years. In *Bhagirath vs. Delhi Administration*, (1985)2 SCC 580, it was held by a Constitution bench that "*marginal notes are now legislative and not editorial exercises*". Similar view was earlier expressed in *K.P. Varghese Vs. Income Tax Officer, Ernakulam and Anr.*, AIR 1981 SC 1922. Instances are galore of amendment Acts modifying, altering, substituting, deleting or making some changes even in the marginal headings of the existing law thereby affected. It would not be wrong to say that marginal headings are internal aids available for interpretation, should a recourse thereto become necessary in the event of some ambiguity in the language of the provisions or scheme of the law.

95. In view of the above authoritative pronouncements of the Supreme Court, including by a Constitution Bench as recently as in 2014, the arguments of the petitioners that the marginal heads of a

statutory provisions are to be ignored cannot be accepted. Undoubtedly, if the statutory provisions are clear and unambiguous, the plain meaning derived there from will have to be given effect to but the broad indication given by the heading does assist, if the need arises, to understand the true import of the statutory clause.

Relevance of deletion

96. The petitioners argument, however, also revolves around the fact that clause (a) of Section 45(1) was deleted by the Parliament while amending the law in 2005. One may recall it is the said clause which declared the offence under PMLA to be "cognizable". In the submission of the learned counsel for petitioners, the omission is indicative of the intention. Reliance is placed on *Bhagat Ram Sharma vs. Union of India & Ors.*, 1988 (Supp) SCC 30; *D.R. Fraser & Co. Ltd. vs. The Minister of National Revenue*, 1948 SCC OnLine PC 65; and *Commissioner of Central Excise, Trichy vs. Dalmia Cement (Bharat) Ltd.*, (2006) 126 DLT 597 (DB).

97. In *Bhagat Ram Sharma* (supra) it was observed that when the legislature enacts an amending law deleting the existing provision, substituting it by a new provision it has the effect of "repeal of the existing provision", the withdrawal of the existing provision being also called an amendment. In *Dalmia Cement (Bharat) Ltd.*, (supra), a division bench of this Court quoted, with approval, the observations of the Privy Council in the case of *D.R. Fraser* (supra) to the effect that "when an amending Act alters the language of the principal statute, the alteration must be taken to have been made deliberately".

98. There can be no quarrel with the above propositions of law. The amendments to an existing law by the legislature are to be accepted as a decision consciously and deliberately taken to remove, as further observed in *Dalima Cement* (supra), "*the mischief in the old law*". Thus, in order to comprehend the effect of the amendment, the court must apply the *Heydon's Mischief Rule* and find out as to what was the mischief which the legislature wants to remove by the amendment.

Relevance of legislative debate

99. The learned counsel for the petitioners relied upon the speeches of the Union Ministers who piloted the amendment Bill in the two Houses of Parliament, it being the Minister of Finance introducing the amendment Bill in the *Lok Sabha* (on 06.05.2005) and, after its passage in the said House, it being the Minister of Home Affairs in *Rajya Sabha* (on 11.05.2005). From the copies of the said speeches and the report of debates that followed, as submitted at the hearing, it appears the speeches of both the Ministers were verbatim the same. The said speeches, may be quoted (as taken from *Lok Sabha* reports) as under:

"Sir, the Money-Laundering Act was passed by this House in the year 2002, and number of steps have to be taken to implement it. Sir, two kinds of steps were required. One was to appoint an authority who will gather intelligence and information, and the other was an authority to investigate and prosecute. This Act was made to implement the political declaration adopted by the Special Session of the UN General Assembly in 1999. Section 1 (3) of the Act stipulates that the Act will

come into force on such date as the Central Government may by notification appoint. While we were examining the question of notifying the Act, I found that there was certain lacunae in the Act. I regret to say that not enough homework had been done in the definitions, and in the division of responsibility and authority. So, in consultation with the Ministry of Law, we came to the conclusion that these lacunae had to be removed. Broadly, the reasons for the amendment are the following.

Under the existing provisions in Section 45 of the Act, every offence is cognizable. If an offence is cognizable, then any police officer in India can arrest an offender without warrant. At the same time, under Section 19 of the Act, only a Director or a Deputy Director or an Assistant Director or any other officer authorised, may arrest an offender. Clearly, there was a conflict between these two provisions. Under Section 45(1)(b) of the Act, the Special Court shall not take cognizance of any offence punishable under Section 4 except upon a complaint made in writing by the Director or any other officer authorised by the Central Government. So, what would happen to an arrest made by any police officer in the case of a cognizable offence? Which is the court that will try the offence? Clearly, there were inconsistencies in these provisions.

They have now been removed. We have now enabled only the Director or an officer authorised by him to investigate offences. Of course, we would, by rule, set up a threshold; and, below that threshold, we would allow State police officers also to take action.

The second anomaly that we found was that the expression "investigation officer" and the word

"investigation" occur in a number of sections but they were not defined in the Act. Consequently, one has to go to the definition in the Criminal Procedure Code and that Code provides only "investigation by a police officer or by an officer authorised by a magistrate". So, clearly, there was a lacuna in not enabling the Director or the Assistant Director under this Act to investigate offences. That has been cured now.

The third difficulty that I found was that the Act contemplates an Appellate Tribunal under Section 25 but there might not be enough cases for a full-time Appellate Tribunal. An Appellate Tribunal means a lot of money. There are other Appellate Tribunals in similar Acts. So, we could authorise those Appellate Tribunals to function as Appellate Tribunal under this Act. After all, it is the same retired High Court Judge or a serving High Court Judge who is going to be there. So, part of the time, he would devote to dealing with appeals arising under some other Acts; and, part of the time, he would deal with appeals arising under this Act. At least in the initial years, we do not think, there would be enough work for a full-time Appellate Tribunal.

What we are doing is, we are inserting a new Section, 2 (n) (a) defining the term, 'investigation'; making an amendment to Sections 28, 29 and 30, dealing with tribunals; amending Sections 44 and 45 of the Act to make the offence non-cognizable so that only the Director could take action; and also making consequential changes in Section 73. I request hon. Members to kindly approve of these amendments so that the Act could be amended quickly and we could bring it into force."

(emphasis supplied)

100. It was further pointed out during the arguments that in the course of the debate that followed in *Lok Sabha*, in answer to a query of an Hon'ble Member, the Minister explained the amendment as under:-

"Sir, first to answer Mr. Sudhakar Reddy, Section 45(1)(a) is being omitted because, if the offence is cognizable, then any police officer in this country can arrest without a warrant. Section 19 says, only the Director or Assistant Director should investigate the offence. There is a conflict. Therefore, we are making it non-cognizable. But, investigation will be by the Director. We will authorise, up to a threshold, State police officers also to investigate offences. That is why Section 45(1) (a) is being omitted."

(emphasis supplied)

101. The petitioners rely on *Union of India & Ors. vs. Martin Lottery Agencies Limited*, (2009) 12 SCC 209, to submit that speech of the Hon'ble Ministers in the Houses of Parliament may be taken to be a valid tool for interpretation of the statute.

102. In *A.K. Gopalan vs. State of Madras*, 1950 SCR 88, it was observed thus:-

"112. ... A speech made in the course of the debate on a Bill could at best be indicative of the subjective intent of the Speaker, but it could not reflect the inarticulate mental processes lying behind the majority vote which carried the Bill. Nor is it reasonable to assume that the minds of all those legislators were in accord."

(emphasis supplied)

103. In *State of Travancore-Cochin v. Bombay Co. Ltd.* [AIR 1952 SC 366], the court ruled:

"16. ... the use made by the learned Judges below of the speeches made by the members of the Constituent Assembly in the course of the debates on the Draft Constitution is unwarranted. That this form of extrinsic aid to the interpretation of statutes is not admissible has been generally accepted in England, and the same rule has been observed in the construction of Indian statutes"

(emphasis supplied)

104. In *State of Mysore vs. R.V. Bidap*, (1974) 3 SCC 337, it was observed:

"5. Anglo-American jurisprudence, unlike other systems, has generally frowned upon the use of parliamentary debates and press discussions as throwing light upon the meaning of statutory provisions."

105. In *K.P. Varghese v. ITO*, (1981) 4 SCC 173, referring to a Minister's speech piloting a Finance Bill, it was observed:-

"8. ... Now it is true that the speeches made by the Members of the legislature on the floor of the House when a Bill for enacting a statutory provision is being debated are inadmissible for the purpose of interpreting the statutory provision but the speech made by the Mover of the Bill explaining the reason for the introduction of the Bill can certainly be referred to for the purpose of ascertaining the mischief sought to be remedied by the legislation and the object and purpose for which the legislation is enacted. This is in accord with the recent trend in juristic thought not only in western countries but also in India that interpretation of a statute being an exercise in the ascertainment of meaning, everything which is logically relevant should be admissible."

(emphasis supplied)

106. In *Kesavananda Bharati vs. State of Kerala*, (1973) 4 SCC 225, it was concluded that:

"2140. It is hazardous to rely upon Parliamentary Debates as aids to statutory construction. Different Speakers have different motives and the system of 'Party Whip' leaves no warrant for assuming that those who voted but did not speak were of identical persuasion. That assumption may be difficult to make even in regard to those who speak. The safest course is to gather the intention of the legislature from the language it uses. Therefore, parliamentary proceedings can be used only for a limited purpose as explained in Gopalan case."

107. In *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1, another Constitution Bench while holding that "*reference to Parliamentary Debates can only be made for a limited purpose*", observed:

"9.3 Thus, it is clear that debates in Parliament are not usually relevant for construction of the provisions of an Act. Even when they are relied on, it is only as a secondary means of interpretation to help remove any ambiguities; and never considered to be binding as to the true object or intent of a provision or an Act. In light of such limited importance attached to Parliamentary Debates in statutory interpretation, assailing an Act on the ground of insufficiency of Parliamentary Debates is an unheard of and unsustainable proposition in law."

(emphasis supplied)

108. Another Constitution Bench in *Supreme Court Advocates-on-Record Assn. v. Union of India*, (2016) 5 SCC 1, has reiterated the consistent view of the court observing that "*Parliamentary Debates ought not to be relied upon to interpret the provisions of*

the Constitution or the statute if there is no ambiguity in the language used", since such provisions "ought to be interpreted independently", the court not to be "unduly influenced by the speeches made", and that confirmation of the interpretation "may be sought" from "the Parliamentary Debates but not vice versa".

109. Thus, it would not be correct to say that the speeches made in the legislature at the time of consideration and passage of an enactment reflect the legislative intent. Such speeches are at best indicator of what may have been the intent behind the introduction of the Bill in the legislature that eventually became a law. If the language of the legislation is clear and unambiguous, the external tool of reference to debate in the legislature is wholly unnecessary.

110. This special law (PMLA), even as originally enacted, was not designed to confer an additional responsibility or jurisdiction on the police. The broad structure of the law clearly indicated that the legislature intended to deal with the menace of money-laundering outside the general regime for dealing with the crimes. The acts constituting money-laundering generally have the facade of ordinary business transactions. These are economic offences indulged in secrecy and stealth and their detection requires expertise and specially trained personnel. A general power of scrutiny of business transactions at large cannot be allowed to be undertaken for unearthing such activity. A probe of this nature requires due circumspection in as much as the initial suspicions may not necessarily be correct. A probe on the lines of investigative process

by the police would perhaps generally not suit the special demands of an investigation qua money-laundering.

111. The provision contained in Section 45(1)(a), as appearing in the original enactment, seemingly was in conflict with the overall scheme of the law wherein the police had been kept out of the investigative process which was placed, instead, in the hands of a special machinery created by the legislation for its purposes. It appears the legislature was concerned that the layperson's perspective and understanding of the expression "cognizable offence" - which was perhaps correct in the light of the provisions of the Code of Criminal Procedure as they stood prior to the amendment of 2010 - would create confusion and might result in police also exercising jurisdiction in relation to PMLA offences by registering the same. Since this would not have fit in within the scheme of law, given the fact that PMLA requires launching of prosecution by submission of a complaint by the Director (Enforcement), it appears the legislature wanted to preclude all possibility of meddling by the police.

112. This court need not consider or decide whether the possible conflict or confusion required the above-mentioned amendment or not. The fact remains that both under the post-amendment law, as also the originally enacted PMLA, the power of arrest had been conferred not on the police but only on the authorities specially created by the law.

113. The continued use of the expression "cognizable" in relation to the offences under PMLA, in the marginal head of Section 45

cannot be wished away. It is part of the law as originally enacted and remains unamended. Of course, the marginal head cannot control the meaning of the main provisions. It is only a broad indicator of the content of each section. After the amendment, there is no clause appearing in Section 45 or, for that matter, in any other provision of PMLA, declaring the classification (cognizable or non-cognizable) of the offences created by the special statute. In this view, the continued use of the expression "cognizable" in the heading of Section 45, which cannot be unintended, will have to be comprehended and construed in the light of overall scheme of the law.

Precedents

114. This court is not the first one called upon to interpret the provisions of PMLA. There have been cases where the courts have addressed such or similar arguments in the context of the same legislation and, therefore, one has the advantage of judicial view taken in such previous cases.

115. The matter involved in *Gautam Kundu Vs. Directorate of Enforcement*, (2015) 16 SCC 1, arose out of judgment of the High Court of Calcutta declining the release on bail to the appellant, he having been arrested in a case under PMLA. The issue revolved around the application of the restrictions vis-a-vis release on bail as envisaged in Section 45. The court declined to interfere, *inter alia*, observing that PMLA is a special statute, its provisions prevailing over the general provisions of the Code of Criminal Procedure in case of any conflict, this being clear from the *non-obstante* clause

with which Section 45 begins, as further reinforced by the declaration in Sections 65 and 71, concluding that the conditions for release on bail imposed by Section 45 are "*mandatory and need to be complied with*", particularly in view of the presumption under Section 24 shifting the onus to prove to the contrary on the accused.

116. The case reported as *Hari Narayan Rai Vs. Union of India and Anr.*, 2010 SCC Online Jhar 475, is one of the early cases dealing with the subject. A complaint under PMLA had been filed in that case. The challenge against the proceedings taken out in its wake was repelled by the Jharkhand High Court, *inter alia*, observing that the right to investigate under this special law was part of its scheme, it having the overriding effect and consequently, rendering the provision contained in Section 167(2) Cr. P.C. inapplicable. Since the issues presently raised here have no connection with the effect of Section 167(2) Cr. P.C., this court refrains from making any observations on that subject. What needs to be picked up from this ruling, however, is the finding that the special law (PMLA) has its own scheme for investigation.

117. The case of *Karam Singh and Ors. Vs. Union of India and Anr.*, 2015 SCC Online P&H 19739, had come up before a division bench of the High Court of Punjab and Haryana with similar challenge to the registration of ECIR under PMLA and to the summons issued to the petitioners under Section 50(2) and (3). The court repelled the said challenge and dismissed the petitions, *inter alia*, rejecting the contentions that the offence of money-laundering is non-cognizable and therefore, investigation carried out in absence

of prior sanction by a Magistrate is not justified. Noticeably, the court concluded that the offence is cognizable bearing in mind, amongst others, the plain language of the provisions conferring the power of arrest and the punishment prescribed by the law. It rejected the other argument based on the assumption that the offence is non-cognizable holding the special law confers the jurisdiction upon the Special Court to take cognizance which by itself cannot take away the powers of the authorities to investigate and arrest. The petitioners had also argued in that case that the authorities under PMLA were not scrupulously following the prescription of Chapter XII of the Code of Criminal Procedure (relating to the information to the police and their powers to investigate) which was causing prejudice. The learned division bench noted that the special law prescribed its own procedure. It noted, *inter alia*, the various provisions of PMLA and the rules framed thereunder, particularly the Prevention of Money-Laundering (the forms and manner of forwarding a copy of order of arrest of a person alongwith the Material to the Adjudicating Authority and its period of Retention) Rules, 2005. The contentions were rejected with observations that the law has prescribed a complete procedure giving ample power to the authorities prescribing the methodology of its exercise and thereby putting in position "sufficient safeguards".

118. The case of *Mukesh Kumar Jai Kishan Sharma Vs. State of Gujarat and Ors.*, *Manu/GJ/1828/2016*, also involved persons arrested during the investigation of a case under PMLA. The investigative process having been completed, a complaint had also

been filed in the Special Court. Challenge was brought to the said proceedings primarily on the grounds that the procedure of investigation by police as contained in Chapter XII of the Code of Criminal Procedure had not been followed, particular reference in this regard being made to the provisions contained in Sections 154 and 157 relating to a cognizable offence and Section 155 relating to a non-cognizable offence (that being an argument in the alternative), as indeed the requirements of Sections 167 and 172 Cr. P.C. regarding entering of the proceedings relating to investigation in a case diary and its production at the time of seeking remand of the person arrested. A learned single judge of the High Court of Gujarat found no merit in the petitions holding, *inter alia*, that there was nothing shown on which it could be said that such procedure of investigation applicable to the police is required to be followed by the investigating agency under the special law referring in this context to the decisions of the Supreme Court in *Gautam Kundu* (supra), of Punjab and Haryana High Court in *Karam Singh* (supra) and of Jharkhand High Court in *Hari Narayan Rai* (supra), eventually concluding that PMLA is a complete code and its provisions would override the general law.

119. The case *Dalmia Cement (Bharat) Ltd. and Ors., Vs. Assistant Director of Enforcement Directorate and Ors.*, 2016 (4) ALD 47, had also come up against the backdrop of summons issued under Sections 50(2) and (3) of PMLA in an ongoing investigation. The validity of the said summons had been questioned invoking the jurisdiction of the High Court of Judicature at Hyderabad. The petitions were dismissed finding no good case made out for reading

down Section 50 of PMLA observing, *inter alia*, that mere registration of ECIR would not render any person an accused of the offence of money-laundering, the purpose of investigation being to collect evidence, issuance of summons requiring a person to appear and make a statement not being violative of the Constitutional protection and guarantee under Article 20 (3). It may be added that the court held that investigation, adjudication and criminal prosecution under PMLA were separate stages and the case was still at the initial stage of investigation, the petitioners being obliged under the law to appear in compliance with the summons.

120. The decision in *Chhagan Chandrakant Bhujbal Vs. Union of India*, 2016 SCC Online Bom 9938, was rendered by a division bench of the High Court of Bombay on a petition seeking issuance of writ of *Habeas Corpus* against the backdrop of investigation undertaken for offence of money-laundering. The petitioner had been arrested in the said case, the prime contentions raised by him being that the action taken was impermissible since the offence punishable under Section 4 PMLA is a non-cognizable offence, the arrest could not be effected without permission of the competent court, the other grounds concerning grievances that the arrest had been effected by an officer who was not duly authorised and who had not followed the procedural safeguards. The learned division bench dismissed the petition holding, *inter alia*, that PMLA is a complete Code which overrides the general law while rejecting the contention that by the amendment of 2005, the offence of money-laundering had been rendered non-cognizable. The court, in fact, also observed that there was no need to enter into the question as to

whether offences under PMLA are cognizable or non-cognizable because Section 19 clearly confers on the authorised officer the power to arrest any person, the exercise of which power would not depend upon the issue as to whether the offence is cognizable or non-cognizable, there being no restrictions placed on such power even under the amended law. It was further held that Section 19 of PMLA does not contemplate either the registration of FIR (under Section 154 Cr.P.C.) or of obtaining permission of a Magistrate (or of Court) before effecting arrest of an accused, the power of arrest in terms of Section 19 being not subject to any such restrictions. It may be added that the contentions about the authorization of the arresting officer in that case and the procedure followed by him were also rejected on the basis of material placed before the court.

121. A division bench of this court has also had the occasion to hear and form opinion vis-a-vis similar contentions in the context of PMLA in a batch of writ petitions led by *Gurucharan Singh Vs. Union of India and Ors. WP (Crl.) 307/2016* in which the applications for bail pending consideration of the main petitions were decided by order dated 27.04.2016. The learned division bench noted the contentions that the provisions of the Code of Criminal Procedure governing the investigation by police, particularly those contained in Sections 154, 155, 157, 167 and 172 had not been followed. It observed that "*prima facie ... it was mandatory*" for the respondents to do so and on the basis of such tentative conclusion the directions for release of the petitioners were issued.

122. With due deference to the learned division bench, it may be observed here that the views expressed in the order dated 27.04.2016 on the applications for bail in the aforesaid writ petitions do not bind this court for the simple reason such observations were of *prima facie* nature and only interim. It is trite that interim orders of this nature are not to be treated as binding precedents since there has to be a final decision for the precedent to be binding. One may quote the Supreme Court in *State of Assam Vs. Barak Upatyaka D.U. Karamchari Sanstha*, (2009) 5 SCC 694, as under:

"21. A precedent is a judicial decision containing a principle, which forms an authoritative element termed as *ratio decidendi*. An interim order which does not finally and conclusively decide an issue cannot be a precedent. Any reasons assigned in support of such non-final interim order containing *prima facie* findings are only tentative. Any interim directions issued on the basis of such *prima facie* findings are temporary arrangements to preserve the status quo till the matter is finally decided, to ensure that the matter does not become either infructuous or a *fait accompli* before the final hearing..."

Whether PMLA offences are cognizable?

123. It is clear from the above discussion that this court has to find from the overall scheme and plain meaning of the language employed in the law as to whether the offences under PMLA are cognizable or not and if so, to what effect.

124. It must be recapitulated here that the scheme of PMLA, as may be gathered from the plain meaning of the language of the

various provisions of the statute, is to create a machinery for investigation and enforcement outside the general system of investigation of crimes by police agencies. The police officers are explicitly kept out, unless there is a specific authorisation in their behalf. The information of a crime punishable under PMLA is taken note of by the Director (Enforcement) or the officers aiding or assisting him in the task and the investigative process taken up thereupon. If there are grounds to initiate such action, the Director (or the empowered officer) records the reasons in writing for the belief, noticing and adding thereto the material already collected, on which such belief is founded and proceeds to provisionally attach such property as, in his opinion, may be *prima facie* tainted. Further, if during the course of investigation, on the basis of material in his possession, he has reason to believe the complicity of a person in an offence under PMLA, he is authorised by the law to proceed to arrest him, after recording reasons for such belief in writing. Both recorded reasons, one leading to the attachment of the suspect property and the other leading to the arrest, are to be made over to the Adjudicating Authority with copies of the material from which inferences or conclusions had been drawn. The powers of survey, search and seizure, search of persons, retention of property or of records, to issue summons to enforce attendance of any person and compel him to give evidence or produce records, discovery or inspection, as indeed the power to arrest, as conferred by various provisions of PMLA on the investigative agency created by the law equip such agency with all the necessary tools to conduct an effective investigation without the aid or assistance of police. For

purposes of criminal prosecution, the initiative is placed in the hands of the authorities established by PMLA, the cognizance by the court mandatorily required to be on their complaint.

125. From the above, it is clear, that the Enforcement officers under PMLA do not require the powers of police for investigation as granted by the general law contained in Chapter XII of the Code of Criminal Procedure. On the contrary, to hold that the said part of Code of Criminal Procedure applies to PMLA investigations or proceedings would bring in inconsistency - in breach of the mandate of Section 65 PMLA. There is nothing in PMLA to indicate that the power to arrest conferred on the Director or the other specified officers is contingent upon formal authorisation by the court. Further, the law does not contain any clause from which it could be deduced that the authorization to the Director or other specified officers to take up the investigation or exercise any of the powers thereby conferred requires prior approval from the court in each case.

126. In view of the above, it must be concluded that notwithstanding the deletion of clause (a) of the then existing sub-section (1) of Section 45 PMLA, by the amendment of 2005, the offences under PMLA continue to be "cognizable" in the sense that a person respecting whom there is a reason to believe to be guilty for such offence may be arrested by the officer empowered by the law in terms of Section 19 without the need of obtaining warrant of arrest from the court. Thus, the use of the expression "cognizable" in relation to PMLA offences would be different from the one

applied for general law offences (say, IPC offences) and consequently, the definition of the expressions "cognizable offence" and "cognizable case" as appearing in Section 2(c) Cr. P.C. would have to be read and applied *mutatis mutandis* with suitable modification - that is to say, by substituting the words "a police officer" and instead referring to the officers mentioned in Section 19 PMLA.

SAFEGUARDS

127. As in the cases of *Karam Singh* (supra) and *Chhagan Chandrakant Bhujbal* (supra), brought before the Punjab & Haryana High Court and Bombay High Court respectively, substantial focus of arguments of the petitioners here was to bring home that the general procedural law, as contained in the Code of Criminal Procedure, and the authoritative pronouncements of the Supreme Court and various High Courts prescribe safeguards against the misuse of authority by the agencies investigating crimes, particularly in the context of possibility of abuse vis-a-vis the power of arrest and interrogation having a bearing on the fundamental rights of freedom and rule against self-incrimination. It was submitted that the procedure must be regulated according to the classification under which the PMLA offences would fall, the investigation being impermissible in absence of registration of an FIR if the nature of the crimes is taken as cognizable, such conclusion obliging the investigating agency to abide by the requirements of Chapter XII of Cr. P.C. Conversely, it was urged that if the offences are non-cognizable, the investigating agency

must take prior approval from the court (the Magistrate) before commencing the probe or exercising the power of arrest.

128. In the above context, reliance has been placed on the cases of *Madhu Limaye Vs. State of Maharashtra*, (1969) 1 SCC 292; *Bhajan Lal* (supra); *D.K. Basu Vs. State of West Bengal*, (1997) 1 SCC 416 and *Joginder Kumar Vs. State of U.P. and Ors.*, (1994) SCC 260, reference being made to the guidelines regulating the power of arrest.

129. There can be no doubt as to the fact that the law declared by the Supreme Court, and the various pronouncements of the High Courts touching upon the circumspection with which the power of arrest is to be exercised by the authorities that be, as indeed the safeguards created by the guidelines generally set out in the Code of Criminal Procedure, and supplemented by judicial dicta controls and regulates the arrest procedures and the detention that follows in such wake, irrespective of the fact whether it concerns an investigation into an IPC offence or a crime under special laws. The arrest of a person entails serious implications since it deprives him of personal liberty touching upon his fundamental rights as guaranteed under the Constitution which, it is trite, cannot be taken away except by following, and in accordance with, due procedure of law. The obligations under the relevant provisions of law as enacted by the legislature or as declared by the Constitutional courts regulate the conduct not only of police but also other investigative agencies under special legislations. This undoubtedly holds good qua the investigating machinery under PMLA as well. Nothing said

heretofore or hereinafter in this judgment, therefore, is to be construed as in any manner diluting the rights of every person guaranteed under the law of the land to the fair procedure in the matter of investigation or arrest.

130. The Code of Criminal Procedure does not define the expression "accused". The term is generally understood to connote a person suspected of having infringed the law for which he is liable to be convicted and subjected to punishment. In contrast to a person who stands convicted (upon his guilt having been proved), a person referred to as an accused is one against whom accusations have been made, the effort of the proceedings taken out being to prove and substantiate the same. It is this endeavour which is undertaken in two stages, the first being of investigation and the second, being of trial. In *H.N. Rishbud Vs. State of Delhi*, (1955) 1 SCR 1150, in the context of general criminal law, it was explained that:

"...under the Code investigation consists generally of the following steps: (1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and arrest of the suspected offender, (4) Collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places or seizure of things considered necessary for the investigation and to be produced at the trial, and (5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge-sheet under Section 173..."

131. The above observations hold good qua all criminal investigations though, it must be added in the context of special law offences the same will have to be read *mutatis mutandis*. Thus, in special legislations if the cognizance is to be taken not on a police report but on a complaint, there would be no occasion for filing of chargesheet under Section 173 Cr. PC. Necessarily, the same would apply to a prosecution even for IPC offence, if initiated through the complaint mechanism.

132. Article 20 of the Constitution of India guarantees certain protections in respect of conviction for offences including against double jeopardy. Article 20(3) guarantees that "*(n)o person accused of any offence shall be compelled to be a witness against himself*". These fundamental rights including against self-incrimination are available to all persons facing criminal charge, whether under the general law represented by IPC or under the special statutes. But, it is well settled that to claim protection of Article 20(3), the person should be an accused of an offence. Formal accusation of a person is generally necessary to make him an accused. Whether or not a person is an accused depends on the facts and circumstances of the case and the stage of the process of investigation or the law governing the same.

133. In *Ramesh Chandra Mehta (supra)*, decided by a Constitution bench, the case pertained to offences, *inter alia*, punishable under Sea Customs Act, 1878 which was later repealed and replaced by the Customs Act, 1962. Under some provisions similar to those of the Customs Act, certain statements had been

recorded by the Customs officer which were sought to be tendered in evidence in the court, their admissibility having been questioned on the ground the officer of customs was a police officer within the meaning of Section 25 of the Evidence Act, rendering such statement to be unavailable. The contentions were rejected with the observations that the Customs officer was not a police officer nor was he empowered to do or had undertaken investigation into an offence, the purpose of inquiry embarked upon by him being to prevent smuggling and at the stage of collecting evidence in the course of such probe he was not accusing the person of any offence. It is on this reasoning that the statement recorded by such officer of the Customs was held to be admissible on the ground that the law permitted him to examine "any person" who is suspected or believed to be concerned in such activity. Reference has already been made to the cases reported as *Illias* (supra); *State of Punjab v. Barkat Ram* (supra); and *Om Prakash v. Union of India* (supra) where similar views were taken.

134. The decision in *Poolpandi and Ors. Vs. Superintendent, Central Excise and Ors.*, (1992) 3 SCC 259, rendered by a bench of three Hon'ble Judges concerned investigation undertaken in terms of the provisions of the Customs Act, 1962 and the Foreign Exchange Regulation Act, 1973 ("FERA"), the last legislation having since been repealed and replaced by Foreign Exchange Management Act, 1999 ("FEMA"). Questions were raised concerning violation of Constitutional protection under Article 20(3) vis-a-vis the mandate in Section 108(3) of the Customs Act. The court rejected the contentions in the light of decisions in

Ramesh Chandra Mehta (supra), Illias (supra) and Nandini Satpathy Vs. P. L. Dani, (1978) 2 SCC 424. It was observed that the protection against self-incrimination in Article 20(3) would not inure vis-a-vis a "hypothetical person who may in the future be discovered to have been guilty of some offence".

135. Noticeably, in *Poolbandi* (supra) exception was also taken to the summoning of a person by the Customs officer for recording his statement during the inquiry under the law, the contention being that this was violative of the Constitutional right guaranteed under Article 21 and amounted to mental torture. Similar submissions have been made by the petitioners before this court on the ground they apprehend harassment or unlawful detention. Rejecting the plea that the petitioner at the time of his appearance for statement before the Customs officer be given the liberty of having company of his choice during questioning, the court observed thus:

"...The purpose of the enquiry under the Customs Act and the other similar statutes will be completely frustrated if the whims of the persons in possession of useful information for the departments are allowed to prevail. For achieving the object of such an enquiry if the appropriate authorities be of the view that such persons should be dissociated from the atmosphere and the company of persons who provide encouragement to them in adopting a non-cooperative attitude to the machineries of law, there cannot be any legitimate objection in depriving them of such company. The relevant provisions of the Constitution in this regard have to be construed in the spirit they were made and the benefits thereunder should not be "expanded" to favour exploiters engaged in tax evasion at the cost of public exchequer. Applying the 'just, fair and

reasonable test' we hold that there is no merit in the stand of appellant before us."

136. In *Central Bureau of Investigation Vs. State of Rajasthan and Ors.*, (1996) 9 SCC 735, the prime contentions were that the offence under FERA which was subject matter of investigation was non-cognizable and there was a need for formal permission under Section 155(2) Cr.P.C. to be obtained from the court of Magistrate. This contention and request having been rejected by the Chief Judicial Magistrate, a view upheld by the High Court in the challenge brought before it, was reiterated before the Supreme Court. While dismissing the appeal, the court ruled thus:

"28. FERA is a special legislation relating to regulation of foreign exchange. FERA is also a Central legislation enacted at a later point of time than the DSPE Act which was enacted in 1946. In our view, Sections 4 and 5 of the Code of Criminal Procedure will not come in aid of the investigation of the offences under FERA by a member of police force like an officer of DSPE in accordance of the Criminal Procedure Code. Sections 4 and 5 of the Code of Criminal Procedure provide that in the absence of any provision regulating investigation, inquiry or trial of non-IPC offences i.e. offences under any other law, the investigation, inquiry and trial shall be in accordance with the Code of Criminal Procedure. But FERA is a self-contained code containing comprehensive provisions of investigation, inquiry and trial for the offences under that Act. The provisions under FERA gives power to the officers of the Directorate of Enforcement or other officers duly authorised by the Central Government under FERA to search, confiscate, recover, arrest, record statements of witnesses, etc. FERA contains provisions for trial of the offences under FERA and imposition of punishment for such offences. FERA, being a special law, containing provisions for investigation, enquiry, search, seizure,

trial and imposition of punishment for offences under FERA, Section 5 of the Code of Criminal Procedure is not applicable in respect of offences under FERA..."

137. The decision in *Directorate of Enforcement Vs. Deepak Mahajan and Anr.*, (1994) 3 SCC 440, also concerned the procedure governing a person arrested under Section 35(1) FERA which was in *pari materia* with Section 104(1) of the Customs Act. The court noted that the scheme of both the legislations was more or less the same, the provisions relating to arrest and production of the arrestee before Magistrate identical. It was observed that the "proper officer" referred in various provisions of the Customs Act denoted an officer of the Customs assigned to perform the functions under the law and would not include officers of the police and, therefore, the police officers had no independent role to play in exercise of powers under the Customs Act as in Sections 45 and 46 of FERA. While observing that "*conclusions (had) to be drawn which are in the tenor of the law though not within the letter of the law*" and for this the matter required to be considered "*by ascertaining the purposeful meaning of the language deployed, the spirit and sense which the legislature has aimed and intended to convey*", and while rejecting the argument of possible breach of fundamental right under Article 20(3), this with reference to decisions in *Ramesh Chandra Mehta* (supra), *Poolbandi* (supra) and *Veera Ibrahim Vs. State of Maharashtra*, 1976 CrL. L.J. 860, it was held that the procedural requirements of the Code of Criminal Procedure particularly under Section 167 (2) or under Section 173 Cr.P.C were not applicable and that, under the provisions of the said special laws "*it cannot be said that either the Officer of Enforcement or the*

Customs Officer is not empowered with the power of investigation though not with the power of filing a final report as in the case of a police officer".

138. The case of *Nandini Satpathy* (supra) referred to in the decision of *Poolbandi* (supra) is *locus classicus* in which the expression "any person" as appearing in Section 161 Cr. P.C. came to be construed, in the context, *inter alia*, of the guarantee under Article 20(3) against self-incrimination. The procedural law, by Section 160 Cr. P.C., empowers a police officer making an investigation, to require the attendance of any such person as appears to be acquainted with the facts and circumstances of the case making it obligatory for such person to attend upon being so required. Section 161 Cr. P.C. which falls in the Chapter XII of Cr. P.C. relating to the powers of police to investigate reads, to the extent relevant here, as under:

"161. Examination of witnesses by police - (1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case".

139. The moot question considered by the court was as to whether the police have the power under Sections 160 and 161 Cr. P.C. "to question a person who, then was or, in the future may incarnate as, an accused person". Referring to earlier decisions reported as *Pakala Narayana Swami Vs. Emperor*, AIR 1939 PC 47 and

Mahabir Mandal Vs. State of Bihar, (1972) 1 SCC 748, the court ruled thus:

"36. ... We hold that "any person supposed to be acquainted with the facts and circumstances of the case" includes an accused person who fills that role because the police suppose him to have committed the crime and must, therefore, be familiar with the facts. The supposition may later prove a fiction but that does not repel the section. ... Moreover, the suppositions accused figures functionally as a witness. "To be a witness", from a functional angle, is to impart knowledge in respect of a relevant fact, and that is precisely the purpose of questioning the accused under Section 161 CrPC. The dichotomy between "witnesses" and "accused" used as terms of art, does not hold good here ... The appellant squarely fell within the interrogational ring. To hold otherwise is to hold up investigative exercise, since questioning suspects is desirable for detection of crime and even protection of the accused. Extreme positions may boomerang in law as in politics."

(emphasis supplied)

140. It is not correct to contend that investigation under PMLA *dehors* the procedure prescribed for police investigation under the general criminal law (Chapter XII of Cr.P.C.) would denude the process of crucial safeguards rendering it unfair or prone to misuse. References made particularly to the need for registration of FIR (under Section 154 in the case of cognizable offence and under Section 155 in case of non-cognizable offence), communication of copy of FIR to the Magistrate (under Section 157) or obtaining of his authorization for investigation (under Section 155), besides mandatory maintenance of investigation file (case diary) in the prescribed format and its production at the time of seeking remand of a person arrested (under Section 167) with filing of a formal

report on completion of investigation (under Section 173) are irrelevant in the case of investigation by empowered officers under PMLA. Same is the case of provisions contained in Section 162 Cr.P.C. or Section 25 of the Evidence Act generally prohibiting use as evidence of statements made by an accused (or a suspect) to the police.

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

investigation to be read appropriately modified in relation to officers empowered by PMLA to investigate.

142. There are safeguards available under this special law (PMLA) which correspond in equal measure to the safeguards under the general law some of which are represented by the above quoted provisions of Cr.P.C. Some of the safeguards under PMLA may be highlighted as under:

- (i) No action affecting the rights of any person to property may be initiated on unfounded suspicion. The Director (or Deputy Director) must have "*material in his possession*" and must record reasons "*in writing*" for forming belief about a person having in his possession proceeds of crime or about their possible use or retention before he can lawfully proceed to have such property attached for adjudication or confiscation. [Section 5 (1)]
- (ii) A provisional attachment order of property cannot generally be ordered in case it is suspected to be proceeds of a scheduled offence unless the police investigation in such regard has been concluded and a report already submitted. [first proviso to Section 5(1)]
- (iii) The officer directing provisional attachment of a property is obliged by the law to report the fact to a superior independent statutory authority (Adjudicating Authority) by making over to it, in confidence, copy of the material, the recorded reasons and connected proceedings, such authority, in turn, being obliged by law to retain the said record in its safe custody,

the procedure and period prescribed by the Rules being such as to ensure transparency and accountability. [Section 5(2) read with corresponding Rules]

- (iv) No action affecting the rights of any person to personal liberty may be initiated on unfounded suspicion. Before making arrest of any person, the Director (or other specified officer) must have "*material in his possession*" and must record reasons "*in writing*" for forming belief about such person being guilty of an offence under PMLA. [Section 19(1)]
- (v) The fundamental right guaranteed by Article 22(1) is ensured as the person arrested under PMLA investigation is entitled in law to be informed of "*the grounds for such arrest*". [Section 19(1)]
- (vi) The arresting officer is obliged by the law to report the fact to the superior independent statutory authority (Adjudicating Authority) by making over to it, in confidence, copy of the material, the recorded reasons and connected proceedings, such authority, in turn, being obliged by law to retain the said record in its safe custody, the procedure and period prescribed by the Rules being such as to ensure transparency and accountability. [Section 19(2) read with corresponding Rules]
- (vii) The fundamental right guaranteed by Article 22(2) is ensured since the arresting officer is obliged by the law not to detain the arrestee for more than twenty-four hours, that being the

period within which he must be taken before the jurisdictional Judicial Magistrate. [Section 19(3)]

- (viii) The proceedings before the Judicial Magistrate upon the arrestee being produced in terms of Section 19(3) place the issue of continued detention beyond twenty-four hours, or entitlement to release on bail, in the hands of a judicial authority, such proceedings being guided generally by Section 167 Cr.P.C., to be applied to the extent not inconsistent with PMLA, and the restrictions against such release on bail. [Sections 19(3) & 45(1)]
- (ix) It is inherent in what has been last observed above that while applying mind to the justification for continued detention, and consequent denial of release on bail, the judicial authority would have regard to the considerations on which such further detention is permitted under the general criminal procedure, such scrutiny including the issue as to whether "*the accusation or information is well founded*" and "*adequate grounds exist*" for authorizing such continued detention for completion of investigation, satisfaction in such regard being upon perusal of the record of investigation, it always being mandatory for the person arrested to be physically brought before such Magistrate. [Section 167 Cr.P.C.]

CONCLUSIONS

143. It is clear from the above discussion that the Prevention of Money-Laundering Act, 2002 is a complete Code which overrides the general criminal law to the extent of inconsistency. This law

establishes its own enforcement machinery and other authorities with adjudicatory powers and jurisdiction. The enforcement machinery is conferred with the power and jurisdiction for investigation, such powers being quite exhaustive to assure effective investigation and with built-in safeguards to ensure fairness, transparency and accountability at all stages. The powers conferred on the enforcement officers for purposes of complete and effective investigation include the power to summon and examine "any person". The law declares that every such person who is summoned is bound to state the truth. At the time of such investigative process, the person summoned is not an accused. Mere registration of ECIR does not make a person an accused. He may eventually turn out to be an accused upon being arrested or upon being prosecuted. No person is entitled in law to evade the command of the summons issued under Section 50 PMLA on the ground that there is a possibility that he may be prosecuted in the future. The law declared in *Nandini Satpathy* (supra) concerning the statements under Section 161 Cr.P.C. recorded by the police, and in other pronouncements concerning similar powers of officers of the Customs Department, as noted earlier, provide a complete answer to the apprehensions that have been expressed.

144. There is no requirement in law that an officer empowered by PMLA may not take up investigation of a PMLA offence or may not arrest any person as permitted by its provisions without obtaining authorization from the court. Such inhibitions cannot be read into the law by the court.

145. The prime argument of the petitioners is of political vendetta. This argument is not supported by any material. These proceedings are not the appropriate forum for the court to examine such plea which, in the interest of the petitioners themselves, must be left for it to be pressed, if they were so advised and if they have material to substantiate the same, at some appropriate stage in future. Suffice it to observe in this context, and at this stage, that those in public life are expected to be open to probity. Higher the position in life (or polity), higher the obligation (moral, if not legal) to be accountable. Endeavours to stall investigation into their affairs by the law enforcement agencies, particularly on technical grounds, have the potency of giving the impression that there is something to hide.

146. There is nothing shown to the court from which it could be inferred that the issuance of summons by the respondents to the petitioners for investigation into the ECIR, in exercise of statutory powers, has caused, or has the effect of causing, any prejudice to any of them.

147. The petitions are found devoid of substance and, consequently, dismissed with all pending applications.

(R.K. GAUBA)
JUDGE

JULY 03, 2017

vk/yg