THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extraordinary Jurisdiction)

DATED : 29th AUGUST, 2017

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

WP(C) No.23 of 2015

Petitioner : Smt. Usha Agarwal,
W/o Shri Ashok Agarwala,
aged about 70 years,
R/o 1/A Cornfield Road,
Kolkata – 700019,
West Bengal.

versus

Respondents :

1. Union of India
through the Secretary,
Ministry of Finance,
Department of Revenue,
Government of India,
New Delhi.

2. The Assistant Director,
Directorate of Enforcement,
6th Floor, CGO Complex,
DR Block, Salt Lake,
Kolkata – 700 064.

3. The Directorate of Enforcement
through its Director,
6th Floor, Lok Nayak Bhawan,
Khan Market,
New Delhi – 110 003.

Petition under Articles 226/227
of the Constitution of India

Appearance

Mr. Shakeel Ahmed and Mr. Yogesh Kumar Sharma, Advocates for the Petitioner.

Mr. Karma Thinlay, Central Government Counsel with Mr. Thinlay Dorjee Bhutia, Advocate for the Respondents.

J U D G M E N T

Meenakshi Madan Rai, J.

1. This Writ Petition under Articles 226/227 of the Constitution of India, challenges the constitutional validity and legality of the provisions of Sections 2(u), 3, 4, 5, 8, 13, 24, 45 and 50 of the Prevention of Money-Laundering Act, 2002 (for brevity "the Act"). The prayer that follows is that, the provisions be declared *ultra vires*, illegal, unconstitutional and violative of the fundamental rights of citizens, especially Article 14 and Articles 19 to 22 of the Constitution of India. A further prayer is made for quashing the Enforcement Case Information Report (ECIR), lodged against the Petitioner on 19-02-2014.

2. Although mindful that the Act is a path breaking enactment, based on the United Nations Resolutions to globally root out the use of illegal money, acquired via trade in drugs, illegal armaments, acts of terror and misuse of public office and is therefore, the need of the hour, the Petitioner is aggrieved by the indiscriminate application of the provisions of the Act at the whims and fancies of the Officers of the Respondent No.3, who it is alleged, in the absence of a mechanism of proper checks and balances is clothed with unbridled powers, under various sections, leading to possibilities of misuse of the law for personal, political and business vendetta. It is suggested that effective implementation of the Act can be achieved by evolving a mechanism consisting of a retired Judge, Ombudsman or Lok Ayukta, to examine cases in which the

Act can be attracted, by affording an opportunity of hearing to the alleged offender. Agreeing that Sections 420, 467, 471, 120B of the Indian Penal Code (for short "IPC") have rightly been inserted in the Schedule of the Act and that a First Information Report (FIR) can be filed by any Police Station and brought under the Act to book those committing such heinous crimes, the Petitioner's concern is also with the alleged irrationality and procedural impropriety with regard to the implementation of the Act.

3. The facts leading to the instant Petition are that the Eastern Institute for Integrated Learning in Management University (henceforth 'EIILMU'), a State self-financed Private University, was established by the "Eastern Institute for Integrated Learning in Management, University, Sikkim Act, 2006 (hereinafter "Act of 2006"), duly approved by the University Grants Commission (for brevity 'UGC'), in July 2008, enumerating Courses and Disciplines which the University was authorized to offer. Vide a letter dated 12-04-2009, the EIILMU was permitted to open admission/counselling centres in different parts of the Country. As per the Petitioner, on 01-09-2012, a suo-motu FIR, being Case No.51/2012, under Sections 406/420/467/120B/34 of the IPC, was registered by the Station House Officer (for short 'SHO'), Jorethang, Police Station, South Sikkim, making various allegations against the Management of the EIILMU, regarding opening of various Study Centres outside the State of Sikkim and offering Courses without approval of the Distance Education Council (for short 'DEC'). However, neither the

UGC nor the DEC or any student has lodged any FIR in this context. On completion of investigation and submission of Charge-Sheet, the Learned Chief Judicial Magistrate took cognizance and summoned the persons named in the Charge-Sheet on 06-05-2013. On the same set of allegations, the Sadar Police Station, Gangtok, registered another FIR, bearing No.92/2013, against the Management of EIILMU, which was quashed vide an Order of this Court dated 04-06-2013, in Criminal Misc. Case No.12 of 2013. A Supplementary Charge-Sheet in FIR No.51/2012, falsely reflected one Mandeep Kaur to be a regular student of the University, when she was a long distance student, neither had she obtained a government job, as alleged, on the strength of a degree issued by the University, but was employed in a Private College. Based on the FIR, the Respondents No. 2 and 3 without conducting any preliminary inquiry, registered an ECIR on 19-02-2014. The Joint Director of the Respondent No.3, vide Order dated 28-10-2014, provisionally attached nine different Bank Accounts of the EIILMU. A Complaint dated 25-11-2014 was then lodged by the Joint Director before the Adjudicating Authority, seeking confirmation of its Provisional Attachment Order. The Adjudicating Authority issued Show Cause Notice to the EIILMU and confirmed the Provisional Attachment, vide Order dated 03-03-2015, assuming that the fees collected from students were "proceeds of crime". On 09-01-2015, the Joint Director of the Respondent No.3, provisionally attached immovable properties referred to in the Notice and lodged a Complaint dated 02-02-2015, before the Adjudicating Authority for

confirmation of the Provisional Attachment Order, who in turn issued Show Cause Notice to the EIILMU. That, FIRs for Scheduled offences covered under the Act cannot be called money-laundering or the amounts involved as "proceeds of crime". Thus, due to baseless inclusion of the Petitioner in the impugned ECIR by the Respondents No. 2 and 3, she has been defamed and her fundamental rights seriously prejudiced due to allegations of money-laundering.

4. The Respondents chose not to file Counter-Affidavit submitting that the questions raised were confined to legal propositions.

5. While reiterating the averments in the pleadings, Learned Counsel for the Petitioner would contend that the definition of "proceeds of crime" under Section 2(u) of the Act, not only grossly offends Articles 14, 20, 21 and 300A of the Constitution of India, making no distinction between an innocent person and a culprit, but is flawed as it fails to distinguish between a genuine business transaction or a criminal case, as in the Petitioner's case where the FIR No.51/2012 does not disclose any offence, except violations of provisions of DEC, but the Act was invoked merely on account of the FIR. The definition being absurdly expansive seeks to penalise even an innocent, with no knowledge of the offence and gives wide powers to the Authorities under Section 5 to attach property, in the absence of a mechanism to verify whether a scheduled offence attracts the penalty provided by the Act. If the definition is adopted then every case concerning companies where

an FIR is filed, whether it makes out a criminal offence or not, would give rise to the offence of money-laundering. That, there is an inherent arbitrariness in Section 2(u) read with Section 3 of the Act, as there is no connection with the definition and the object sought to be achieved by the Act. The "proceeds of crime", thus, necessarily includes a guilty intention or *mens rea* to commit the offence of money-laundering. Hence, the provisions of the Act are open to application in every case where any predicate offence is alleged to be committed, which could not have been the intention of the Legislation.

6. Learned Counsel for the Petitioner further canvassed that Section 3 of the Act read with the Schedule has no link with the purpose sought to be achieved by the Act, as the Section makes no distinction between cases pertaining to money-laundering from criminal acts, which it seeks to control, as it applies generally to all offences involving property. The provisions of Section 2(u), 3 and 5 give un-canalised powers to the Officers of the Respondent No.3 to prosecute under the Act and attach property, and are open to misuse and abuse, resulting in victimisation, deprivation of liberty and property of the alleged offenders. Apart from which Sections 2(u), 5 and 6 leads to double jeopardy and prosecution of a person twice for the same offence. Although, proceedings under the Act may start with the registration of an FIR or filing of the report by the Police, under Section 173 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C."), but proceedings under the Act do not culminate

under the IPC as the Authorities have discretionary powers to continue under the Act and invoke all stringent provisions, including denial of bail and trial before a Special Court, thereby subjecting an offender to penalty before trial.

7. The provisions of Section 5 of the Act were assailed as violative of Articles 14, 19 and 300A of the Constitution of India as it bypasses the acclaimed principle of an offender's innocence until proven guilty. The provision can be invoked by the Respondent No.3 on "reason to believe", which is devoid of criteria, to freeze Bank Accounts, thereby jeopardizing the business of the Petitioner or claims could arise in favour of a third party and against the accused. The alleged offender would have to suffer the attachment order, before conviction, as steps against the accused are taken by attachment order or confiscation without even being charged of any offence. No opportunity of being heard is afforded to the Respondent before recording the reasons of such belief. Thus, Section 5 is unfair, unreasonable and open to misuse besides being violative of the principles of natural justice, equity and fair play.

8. Challenging the vires of Section 8 of the Act as violative of Article 14 of the Constitution of India and the principles of justice, equity and fair play, it was contended that the Section leads to a pre judging of an issue by the Adjudicating Authority, which is in the jurisdiction of the Special Court, causing prejudice to the person prosecuted under the Act. The Adjudicating Authority has the trappings of a Court as it comprises of a Judicial Member of the rank

of a District Judge. The Adjudicating Authority can declare a property as being involved in money-laundering if it has "reason to believe" that the person has committed an offence under Section 3 of the Act or he is in possession of the "proceeds of crime".

9. In order to buttress his submissions, reliance was placed on ***Calcutta Discount Co. Ltd.*** vs. ***Income-tax Officer, Companies District I, Calcutta and Another***[1]; ***Olga Tellis and Others*** vs. ***Bombay Municipal Corporation and Others***[2]; ***S. L. Kapoor*** vs. ***Jagmohan and Others***[3]; ***Mohammad Jafar*** vs. ***Union of India***[4] and ***C.B. Gautam*** vs. ***Union of India and Others***[5].

10. Questioning the vires of Section 13 of the Prevention of Money-Laundering (Amendment) Act, 2009, it was contended that certain offences under the IPC is incorporated in the Schedule, sans links to the aims and objectives of the Act.

11. It was next advanced that the provisions of Section 24 are unreasonable and violative of Articles 14, 20 and 21 of the Constitution of India as it casts a negative burden on the accused which goes against the principle of presumption of innocence until proven guilty. The Section creates a fiction that the moment charges are framed, the accused is proved to be guilty in contradiction to the essence of criminal jurisprudence. Moreover, the burden of proof lies upon him who affirms and not he who denies.

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[1] AIR 1961 SC 372
[2] (1985) 3 SCC 545
[3] (1980) 4 SCC 379
[4] 1994 Supp (2) SCC 1
[5] (1993) 1 SCC 78

12. Arguing on the legality of Section 45 of the Act, it was canvassed that this provision is violative of Articles 14 and 21 of the Constitution of India, as it imposes limitations on grant of bail which is subject to the satisfaction of the Court that there are grounds that the accused is not guilty of such offence and he is not likely to commit any offence while on bail. Thus, Section 45 of the Act with its *non obstante* clause and the fiction created by Section 24 of the Act would lead to needless incarceration and punishment before conviction.

13. That, Section 50 of the Act allows any statement recorded by the authorities as admissible in evidence and is contrary to Article 20(3) of the Constitution of India. That, Section 50(4) is identical to the provisions of Section 67 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (for brevity "NDPS Act"), which is presently pending before the Hon'ble Supreme Court, attention of this Court was drawn to the decision of ***K.P. Tiwari*** vs. ***State of M.P.***[6], where it was held that a person ought not to be arrested straight away but enquiries ought to be made before such arrest and to the ratio in ***Arnesh Kumar*** vs. ***State of Bihar and Another***[7].

14. An additional Affidavit filed by the Petitioner urged that the Writ Petition is maintainable and no materials existed before the Enforcement Directorate against the Petitioner, to invoke the provisions of the Act, except the fact that she was named as an accused in the impugned Charge-sheet, despite absence of any

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[6] 1994 Supp (1) SCC 540

[7] (2014) 8 SCC 273

evidence against her. That, the Charge-Sheet or Complaint may be quashed in exercise of powers under Article 226 of the Constitution or under Section 482 of the Cr.P.C.

15. *Per contra*, the arguments forwarded by Learned Counsel for the Respondents was that, the object of the Act is to prevent money-laundering and connected activities by confiscation of "proceeds of crime" and preventing of legitimising of money earned through illegal and criminal activities by investing in movable and immovable property, often involving layering of the money generated through illegal activities. Buttressing his submission with the aid of the decision of the Divisional Bench of the Hon'ble High Court of Andhra Pradesh in ***B. Rama Raju*** vs. ***Union of India & Others***[8], it was canvassed that the ratio explains that the Act defines the expression "proceeds of crime" expansively to sub serve the broad objectives of the Act. Rebutting the arguments of the Petitioner advanced on Section 3 of the Act, it was put forth that the Petitioners contentions proceed on a misconception of the relevant provision of the Act against transactions constituting money-laundering. The provisions of the Act contemplate two sets of procedure;

(a) prosecution for the offence of money-laundering as defined in Section 3 with punishment provided in Section 4, and

(b) attachment, adjudication and confiscation in sequential steps and subject to conditions and procedures enumerated in Chapter III of the Act.

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[8] MANU/AP/0125/2011
[Writ Petition Nos.10765, 10769 and 23166 of 2010 dated 04-03-2011]

It is only on proof of guilt and conviction thereof that the penalty under Section 4 would follow, after due trial by the Special Court, as provided under Section 44 of the Act. The Prosecution, trial and conviction for offence under the Act has sanction granted by legislation, with an effort to deprive the accused of personal liberty to prevent further offences. The "proceeds of crime" as defined under Section 2(u) is targeted as any property obtained in terms of the definition and is liable for initial attachment and eventual confiscation.

16. Referring to the provisions of Section 5(1), Section 8(3) and Section 8(6) of the Act, it was contended that prosecution under the Act, attachment, as well as eventual confiscation are distinct proceedings and may be initiated against the same person if he is accused of the offence of money-laundering. Even when he not so accused, the property in his possession may be proceeded against for attachment or confiscation, on the satisfaction of the appropriate and competent Authority. That, the Hon'ble High Court of Karnataka in ***Smt. K. Sowbaghya*** vs. ***Union of India & Others***[9], has upheld the validity of Section 5 of the Act. It was contended that Section 8 cannot be said to be violative of Article 14 of the Constitution of India as the attachment, retention and the essential authority to order confiscation of the property is dependent and contingent upon proof of guilt and finality of conviction for commission of offence under Section 3. The "reason to believe" on the part of the

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[9] MANU/KA/0192/2016
[Writ Petition No.14649 of 2014 (GM-RES) connected with
Writ Petition No.19732 of 2014 (GM-RES) dated 28-01-2016]

Adjudicating Authority prior to confiscation is in the scheme of the Act, while the determination of the guilt of the accused is in the exclusive domain of the Special Court.

17. With regard to the arguments on Section 24 of the Act, reliance was again placed on ***Smt. K. Sowbaghya***[9]. Under Section 45 of the Act the contention put forth was that discretionary powers envisaged therein are not necessarily discriminatory. The mere possibility that the power may be misused or abused cannot lead to it being struck down. Moreover, the conferment of power must be regarded as having been made in furtherance to the scheme and does not attack the equality clause. His submissions were fortified with the decisions in ***Matajog Dobey*** vs. ***H. C. Bhari***[10]; ***Moti Ram Deka & Others*** vs. ***General Manager, North East Frontier Railway and Another***[11]; ***Budhan Choudhry and Others*** vs. ***State of Bihar***[12] and ***Sukumar Mukherjee*** vs. ***State of W.B. and Another***[13]. That, the submission of the Petitioner pertaining to Section 50 of the Act is wholly incorrect as conviction is not based solely on the statement made to an Officer. Pointing to the decisions of the Hon'ble Supreme Court in ***Manzoor Ali Khan*** vs. ***Union of India and Others***[14], ***Sushil Kumar Sharma*** vs. ***Union of India and Ors.***[15], ***Mehmood Alam Tariq and Others*** vs. ***State of Rajasthan and Others***[16] and ***Sanjay Dutt*** vs. ***State through C.B.I., Bombay (II)***[17] it

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[10] AIR 1956 SC 44
[11] AIR 1964 SC 600
[12] AIR 1955 SC 191
[13] (1993) 3 SCC 723
[14] (2015) 2 SCC 33
[15] (2005) 6 SCC 281
[16] (1988) 3 SCC 241
[17] (1994) 5 SCC 410

was contended that a provisions of law cannot be struck down as unconstitutional merely on apprehension of misuse.

18. In rebuttal, the attention of this Court was drawn to the decision of the Hon'ble High Court of Karnataka being ***Obulapuram Mining Company Pvt. Ltd. and Others*** vs. ***Joint Director, Directorate of Enforcement and Others***[18], wherein a Division Bench held that, once an FIR or a report is filed in the predicate offence, an ECIR can be registered and a provisional attachment order can be passed by the Enforcement Department. However, without the conviction/judicial conclusion of the trial proceedings, any order confirming the attachment and confiscation cannot be passed.

19. I have perused the pleadings of the Petitioner and heard at length the rival arguments advanced by Learned Counsel for the parties. Although, averments were made in the Petition with regard to Sections 16, 17, 18, 19, 20 and 44(1)(c) of the Act being *ultra vires* the Constitution, the Sections are not being taken up for consideration and discussion, as the Pleadings in Paragraph 40, averments in Paragraph 'D' of the Grounds and the Prayer portion in the Writ Petition are confined to assailing the vires of Sections 2(u) 3, 4, 5, 8, 13, 24, 45 and 50 of the Act. It is pertinent to point out that in the averments of the Petitioner, the challenge to Section 42 of the Act finds no place, but has been inserted only in the prayer. In the absence of averments or arguments, this Section finds no place for consideration or discussion.

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[18] MANU/KA/0545/2017
[Writ Petition Nos.5962, 11442 and 11440-11441 of 2016 (GM-MM-C) dated 13-03-2017

20. The constitutional validity of the provisions of Sections 2(u), 3, 4, 5, 8, 13, 24, 45 and 50 of the Act *ultra vires* Articles 14, 19, 20, 21 and 22 of the Constitution, have been called in question herein.

21. Before embarking on a discussion on the merits, the parameters and principles laid down by judicial pronouncements, for adjudicating the constitutionality of an enactment or its provisions may be referred to.

22. In ***State of Bihar and Others, etc. etc.*** vs. ***Bihar Distillery Ltd., etc. etc.***[19], the Hon'ble Supreme Court held that while judging constitutionality of an enactment, the Court should (a) try to sustain validity of the impugned law to the extent possible, it can strike down the enactment only when it is impossible to sustain it; (b) the Court should not approach the enactment with a view to pick holes or to search for defects of drafting or for the language employed; (c) the Court should consider that the Act made by the Legislature represents the will of the people and that cannot be lightly interfered with; (d) the Court should strike down the Act only when the unconstitutionality is plainly and clearly established; (e) the Court must recognize the fundamental nature and importance of legislative process and accord due regard and deference to it.

23. In ***R.S. Raghunath*** *vs.* ***State of Karnataka and Another***[20], it was observed as follows;

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[19] AIR 1997 SC 1511
[20] AIR 1992 SC 81

> **"12.** ……..
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> "The Court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with the other parts of the law, and the setting in which the clause to be interpreted occurs."
>
> ……..**"**

24. In ***Namit Sharma*** vs. ***Union of India***[21], the Hon'ble Supreme Court held as follows;

> **"14.** A law which violates the fundamental right of a person is void. In such cases of violation, the Court has to examine as to what factors the Court should weigh while determining the constitutionality of a statute. First and the foremost, as already noticed, is the competence of the legislature to make the law. The wisdom or motive of the legislature in making it is not a relative consideration. The Court should examine the provisions of the statute in light of the provisions of the Constitution (e.g. Part III), regardless of how it is actually administered or is capable of being administered. In this regard, the Court may consider the following factors as noticed in D.D. Basu, *Shorter Constitution of India* (14th Edn., 2009):
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> "(*a*) The possibility of abuse of a statute does not impart to it any element of invalidity.
>
> (*b*) Conversely, a statute which violates the Constitution cannot be pronounced valid merely because it is being administered in a manner which might not conflict with the constitutional requirements.
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> ……**"**

25. In ***Shri Ram Krishna Dalmia and Others*** vs. ***Shri Justice S.R. Tendolkar and Others***[22] it was observed that;

> **"11.** .....
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> (a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself ;

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[21] (2013) 1 SCC 745

[22] AIR 1958 SC 538

> (b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles ;
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> (c) that it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds ;
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> (d) that the Legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest ;
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> (e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation ; and
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> (f) that while good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.
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> .....”

The aforesaid propositions, therefore, provide a guiding light while considering the matter under discussion.

26. That, having been said, it is indeed expedient to consider why it was essential to have legislative intervention to prevent money-laundering, a worldwide phenomenon, which if left unchecked can destabilize financial systems and jeopardize national security.

[23]***27(a)*** Owing to growing awareness amongst countries of the dangers of laundering of "proceeds of crime", international initiatives were taken to counter such activities under the aegis of the United Nations by way of prevention and penalty. The United Nations Political Declaration and Action Plan against Money-Laundering 1998, was the first major initiative against money-laundering. This was devoted to countering the world drug problem, upon which, a political declaration, including the action plan for countering money-laundering was adopted. The United Nations Global Programme against Money-Laundering established in 1997, had the object of strengthening the ability of the member states to implement measures against money-laundering and the financing of terrorism and in detecting, seizing and confiscating illicit proceeds. The United Nations Convention against illicit trafficking in NDPS Act, highlighted in its preamble the awareness of the parties of the Convention of the generation of large financial benefits and wealth, that enables transnational criminal organizations to penetrate, contaminate and corrupt the structure of Government, legitimate commercial business and society at all levels. The goal was to deprive persons engaged in illicit traffic of the proceeds of criminal activities and thereby eliminate the main incentive for their activities. The effort also included elimination of the root cause of the problem of abuse of narcotic drugs and psychotropic substances,

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*[23] *See* Law on Prevention of Money Laundering in India by Dr. M. C. Mehanathan, First Edition, 2014

including illicit demand for such drugs and substances and profits obtained from illicit trafficking.

(b) The initiatives under the aegis of the United Nations are;

(i) United Nations Political Declaration and Action Plan against Money-Laundering 1988;

(ii) United Nations Global Programme against Money-Laundering;

(iii) United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988;

(iv) International Convention for Suppression of the Financing of Terrorism 1999;

(v) United Nations Convention against Organised Transnational Crimes 2000 and

(vi) United Nations Convention against Corruption 2003.

(c) Inter-Governmental initiatives emerged such as the "Basel Committee on Banking Regulation and Supervisory Practices" in 1988, which exchanges information and proposes international standards for Banks, to identify customers, avoid suspicious transactions and cooperation with law enforcement agencies to deal with the problem of money-laundering. The Offshore Group of Banking system, International Organization of Securities Commissions, Common Wealth Model Laws of money-laundering are all engaged in working together on anti money-laundering in the financial sector. The Financial Action Task Force (FATF) is the international body which takes effective measures to promote the adoption of countering measures against money-laundering. The FATF has pursued the following tasks;

(i) Monitoring progress by the members in applying measures to counter money-laundering;

(ii) Reviewing money-laundering techniques and countermeasures; and

(iii) Promoting the adoption and implementation of appropriate measures by non-member countries.

(d) With the efforts of International Organization and Inter-Governmental Bodies, the global regime in preventing money-laundering has been developed over a period of time, which comprises of a Code of Conduct to be followed by the Financial Institutions and development of mechanisms, to ensure compliance of the code. The Code of Conduct comprises, *inter alia*, of three procreative measures;

(i) Customer due diligence;

(ii) Keeping of certain minimum records; and

(iii) Suspicious transaction reporting.*****

28. Realizing the threat that money-laundering poses not only to financial systems of the countries but also their integrity and sovereignty, the upshot was the essentiality of a comprehensive legislation to prevent money-laundering in our country. Consequently, the Prevention of Money-Laundering Bill, 1988, was introduced in the Lok Sabha on 04-08-1998, and was passed by both Houses of Parliament and received the assent of the President on 17-01-2003. The Act came into force on 01-07-2005. There have been amendments to the Act in 2005, 2009, 2013, 2015 and 2016. The object of the Act is to prevent money-laundering and connected

activities by confiscation of "proceeds of crime", setting up of agencies and mechanisms for combating money-laundering.

29. According to Black's Law Dictionary, Tenth Edition, 2014, 'money-laundering' means "*the act of transferring illegally obtained money through legitimate people or accounts so that its original source cannot be traced"*. The offence of money-laundering is resorted to in order to conceal its illicit origin and comprises of the following steps, i.e.,

(i) Placement; where the money obtained as "proceeds of crime" is entered into the financial system, followed by

(ii) Layering; which involves financial transactions in several layers to disguise the "proceeds of crime" from their source and

(iii) Integration; which is investment of the amount into the financial system by way of investment in real estate or other methods, to wipe away its association with crime.

30. In ***Ram Jethmalani*** vs. ***Union of India***[24], the Hon'ble Supreme Court expressed its concern in the matter as follows;

> **"5.** The worries of this Court that arise, in the context of the matters placed before us, are with respect to transfers of monies, and accumulation of monies, which are unaccounted for by many individuals and other legal entities in the country, in foreign banks. The worries of this Court relate not merely to the quantum of monies said to have been secreted away in foreign banks, but also the manner in which they may have been taken away from the country, and with the nature of activities that may have engendered the accumulation of such monies. The worries of this Court are also with regard to the nature of activities that such monies may engender, both in terms of the concentration of economic power, and also the fact that such monies may be transferred to groups and individuals who may use them for unlawful activities that are extremely dangerous to the nation, including actions against the State. The worries of this Court also

[24] (2011) 8 SCC 1

> relate to whether the activities of engendering such unaccounted monies, transferring them abroad, and then routing them back to India may not actually be creating a culture that extols the virtue of such cycles, and the activities that engender such cycles are viewed as desirable modes of individual and group action.
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> **6.** The worries of this Court also relate to the manner, and the extent to which such cycles are damaging to both national and international attempts to combat the extent, nature and intensity of cross-border criminal activity. Finally, the worries of this Court are also with respect to the extent of incapacities, system-wide, in terms of institutional resources, skills, and knowledge, as well as about incapacities of ethical nature, in keeping an account of the monies generated by various facets of social action in the country, and thereby developing effective mechanisms of control. These incapacities go to the very heart of constitutional imperatives of governance. Whether such incapacities are on account of not having devoted enough resources towards building such capacities, or on account of a broader culture of venality in the wider spheres of social and political action, they run afoul of constitutional imperatives.**"**

31. Focussing now on the matter at hand, the rival contentions of the parties under that Section 2(u) of the Act as already reflected hereinabove is taken up for consideration. Section 2(u) of the Act defines "proceeds of crime" and reads as follows;

> **"**(u) "proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property;**"**

Thus, the expression "proceeds of crime" covers any property derived or obtained directly or indirectly by any person, as a result of criminal activity, related to a scheduled offence or the value of such property. The expression 'property' is elucidated in Clause (v) of Section 2, as any property or assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and includes deeds and instruments evidencing title to, or interest in, such property or assets, wherever located. Section 2(u),

therefore, does not envisage either *mens rea* or knowledge that the property is a result of criminal activity. If any property, which includes value of the property, is "proceeds of crime", then any transfer in terms of Section 2(za) requires examination to verify as to whether it is by way of a money-laundering operation involving the process of placement, layering or integration. Such property could be subjected to attachment and confiscation, the Section, however, does not presuppose knowledge of the proceeds being of criminal activity. Properties apart from the "proceeds of crime" are not liable to attachment, neither is it included in the ambit of the Act. All that the Section is concerned with is the "proceeds of crime" and does not extend to property not so involved. The argument of Learned Counsel for the Petitioner that the provision necessarily includes a guilty mind, therefore, cannot be countenanced. While reading Section 2 and Section 3 of the Act in juxtaposition it is clear that only a person who is 'involved' with the "proceeds of crime" would be guilty of the offence under Section 3 and not a person who is only in 'possession' of the "proceeds of crime" sans *mens rea*. This, of course, depends on whether there is reasonable grounds for such suspicion as couched in the language of Section 5 of the Act. A conjunctive reading of Sections 2 and Section 5 reveals that the concerned Authority, can only, when he has "reason to believe" that "any person" is in possession of any "proceeds of crime" provisionally attach such property, thereby not necessarily encompassing Section 3 in its ambit.

32. The provisions of the Act are aimed at preventing the crime of money-laundering, hence, the powers exercised under the Act have to be considered at tandem with the purpose of the Act. Bearing in mind, the object of the Act, which is to shear the process of money-laundering at its very commencement, the provisions of Section 2(u) enable initiation of proceedings against the person in possession of "proceeds of crime", which may lead to attachment, confirmation and eventual confiscation of the property concerned.

33. In ***Kartar Singh*** vs. ***State of Punjab***[25] the Hon'ble Supreme Court has held that, in a criminal action, the general conditions of penal liabilities are indicated in the old maxim "*actus non facit reum, nisi mens sit rea*", i.e., the act alone does not amount to guilt, it must be accompanied by a guilty mind. But there are exceptions to this rule and the reasons for this is that the Legislature, under certain situations and circumstances, in its wisdom may think it so important, in order to prevent a particular act from being committed, to forbid or rule out the element of *mens rea* as a constituent part of a crime or of adequate proof of intention or actual knowledge. However, unless a statute either expressly or by necessary implication rules out *mens rea* in cases of this kind, the element of *mens rea* must be read into the provisions of the statute. The provisions of Section 2(u) of the Act would indicate that it implicitly rules out *mens rea* with the objective of ensuring that all property which are "proceeds of crime" derived or obtained directly or indirectly by any person as a result of criminal activity relating to

[25] 1994 SCC (Cri) 899

a scheduled offence can be attached. This is to achieve the object of the Act and has to be viewed in this context.

34. In ***Director of Enforcement*** vs. ***M/s. MCTM Corporation Pvt. Ltd. and Others***[26], a two Judge Bench while considering whether *mens rea* is an essential ingredient in the proceeding taken under Section 23(1)(a) of the Foreign Exchange Regulation Act, 1973, held that it is not an essential ingredient to establish contravention under Sections 10(1) and 23(1)(a) of that Act.

35. In ***J. K. Industries Limited and Others*** vs. ***Chief Inspector of Factories and Boilers and Others***[27] the Hon'ble Supreme Court observed that the offences under the Factories Act, 1948, are not part of general penal law but arise from the breach of a duty provided in a special beneficial social defence legislation, which creates absolute or strict liability, without proof of any *mens rea*; the offence are strict statutory offences for which establishment of *mens rea* is not an essential ingredient. The omission or commission of the statutory breach is itself the offence. Similar type of offences based on the principle of strict liability, which means liability without fault or *mens rea*, exist in many statutes relating to economic crime as well as in laws concerning the industry, food adulteration, prevention of pollution, etc. in India and abroad. Absolute offences are not criminal offences in any real sense but acts which are prohibited in the interest of welfare of the public and the prohibition

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[26] AIR 1996 SC 1100
[27] (1996) 6 SCC 665

is backed by sanction of penalty and such offences are generally known as public welfare offences.

36. Pertinently, the provisions of Section 2 are to be read with the intent of Section 5 of the Act, which provides that if the concerned Officer, mentioned therein, on the basis of materials in his possession, has "reason to believe" that any person is in possession of any "proceeds of crime", such property can provisionally be attached, irrespective of where the ownership lies, be it an offender under Section 3 or a non-offender. It suffices if the property is "proceeds of crime" and *mens rea* is not a pre-requisite. "Reason to believe" in Section 5 is qualified with the words "on the basis of material in his possession". Therefore, it is not mere subjective belief that is required, but is based on a reasoned belief, on the foundation of materials in his possession, thereby preventing any arbitrariness, for invocation of powers under Section 5 for the purposes of Section 2.

37. In any event, even if a provisional attachment under Section 5 is made, which shall be discussed in detail later, Section 8 comes into play, only, after an opportunity of hearing is afforded under Section 8(2)(b), thereby adhering to the principles of *audi alteram partem*. At this juncture, we may usefully refer to the decision of ***S. L. Kapoor***[3]. In the said matter Section 238(1) of the Punjab Municipal Act, 1911, was under discussion. The Hon'ble Supreme Court observed that natural justice may always be tailored to the situation and held, *inter alia*, that;

> **"11.** ……. Minimal natural justice, the barest notice and the 'littlest' opportunity, in the shortest time, may serve. The Authority acting under Section 238(1) is the master of its own procedure. There need be no oral hearing. It is not necessary to put every detail of the case to the committee, broad grounds sufficient to indicate the substance of the allegations may be given. ....."

However, it may be relevant to point out here that the Supreme Court hastened to observe as follows;

> **"11.** ……. We guard ourselves against being understood as laying down any proposition of universal application. Other statutes providing for speedy action to meet emergent situations may well be construed as excluding the principle audi alteram partem. All that we say is that Section 238(1) of the Punjab Municipal Act does not."

38. The object of the Act, being borne in mind, as already extracted herein above and the discussions that have ensued it is evident that the definition of "proceeds of crime" has the goal of preventing and stemming criminal activities related to money-laundering at its very inception and cannot be said to be arbitrary or absurdly expansive, or seeking to penalise even non-offenders. Thus, the provision does not suffer from any infirmity.

39. Section 3 of the Act defines the offence of money-laundering and reads as follows;

> **"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 is untainted property shall be guilty of offence of money-laundering."

While Section 4 of the Act is the penalty for such crime and provides as under;

> **"4. Punishment for money-laundering.**— Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine:
>
> Provided that where the proceeds of crime involved in money-laundering relates to any offence specified under paragraph 2 of Part A of the Schedule, the provisions of this section shall have effect as if for the words "which may extend to seven years", the words "which may extend to ten years" had been substituted.**"**

Hence, the offence of money-laundering under Section 3 of the Act, involves attempting or indulging in or knowingly assisting or knowingly being a party or being involved in any process or activity connected with the "proceeds of crime", including its concealment, possession, acquisition or use and projecting or claiming it as untainted property. It is an offence independent of the predicate offence and to launch prosecution under Section 3 of the Act, it is not necessary that a predicate offence should also have been committed. This Section criminalises the possession or the 'conversion' of the "proceeds of crime" which includes projecting or claiming the "proceeds of crime" as untainted property. The element of *mens rea* is present in the Section as against the provision of Section 2(u) thereby preventing prosecution of any innocent person. Consequently, the word 'knowingly' used in the Section inheres the intent of keeping an innocent out of the dragnet of the offence. It would conclude that only a person who knowingly attempts to indulge, assists or is a party, or involved in any process or activity connected with "proceeds of crime" would be guilty of the offence under the Act which is aimed at eliminating the crime. Section 24(a) of the Act provides that in any proceeding relating to

"proceeds of crime" under this Act, in the case of a person charged with the offence of money-laundering under Section 3, the Authority or Court shall, *unless the contrary is proved*, presume that such "proceeds of crime" are involved in money-laundering. Thus, the burden of proving that the "proceeds of crime" are untainted property rests on the persons alleged to have committed the offence under Section 3. Inexorably, the purpose of the Section is to ensure that the "proceeds of crime" are not subjected to money-laundering, by way of deposits made in the names of people who have not acquired it as of right, but in whose accounts the offender has introduced by way of an ulterior motive. In this context, we may refer to the ratiocination of the Constitution Bench of the Supreme Court in ***Attorney General for India and Others*** vs. ***Amratlal Prajivandas and Others***[28] which while considering the validity of the provisions of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, (for short "SAFEMA") observed that;

> **"44.** ..... The relatives and associates are brought in only for the purpose of ensuring that the illegally acquired properties of the convict or detenu, acquired or kept in their names, do not escape the net of the Act. It is a well-known fact that persons indulging in illegal activities screen the properties acquired from such illegal activity in the names of their relatives and associates. Sometimes they transfer such properties to them, may be, with an intent to transfer the ownership and title. .....
>
> **56.** .....
>
> (5) The application of SAFEMA to the relatives and associates [in clauses (*c*) and (*d*) of Section 2(2)] is equally valid and effective inasmuch as the purpose and object of bringing such persons within the net of SAFEMA is to reach the properties of the detenu or convict, as the case may be, wherever they are, howsoever they are held

[28] (1994) 5 SCC 54

> and by whomsoever they are held. They are not conceived with a view to forfeit the independent properties of such relatives and associates as explained in this judgment. ....."

40. In ***State of Maharashtra*** vs. ***Mayer Hans George***[29] while examining a question as to whether *mens rea* or actual knowledge is an essential ingredient of the offence under Section 8(1) read with Section 23(1)(a) of the Foreign Exchange Regulation Act, 1947, when it was shown that the accused in that case voluntarily brought gold into India without the permission of the Reserve Bank of India, the majority held that the Foreign Exchange Act is designed to safeguard and conserve foreign exchange which is essential to the economic life of a developing country and therefore, the provisions have to be stringent, aiming at achieving success. Ergo, in the background of the object and purpose of the legislation, if the element of *mens rea* is not by necessary implication invoked, its effectiveness as an instrument for preventing smuggling would be entirely frustrated. In Section 3 of the Act, as the word 'knowingly' is inserted thereto, the element of *mens rea* exists in the provision itself and does not have to be culled out from the act of the offender. The relevance of Section 3 would be where the acquisition of property is by illegal means and illegitimate methods coupled with the necessary guilty mind. However, an offender is afforded ample opportunity under Section 24 of the Act, which shall be discussed hereinafter, to establish that he had no *mens rea*.

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[29] AIR 1965 SC 722

41. The offence of money-laundering coupled with necessary *mens rea* meets with the penalty as provided under Section 4 which has already been extracted hereinabove. The penal provision under the Act stipulates a minimum penalty, thus while awarding sentences the discretion of the Court is fettered inasmuch as the Court has to award the minimum sentence prescribed. The imposition of penalty is largely a deterrent method with some form of relief. No specific arguments were put forth by Learned Counsel for the Petitioner on Section 4 of the Act although the constitutionality was challenged in the prayer, however, it is axiomatic that no offence decries penalty. The Court although clothed with discretion to award punishment has to exercise the discretion ensuring award of minimum penalty provided for by the Act, however, neither the minimum term nor rigorous imprisonment for an offence means that the provisions are *ultra vires*. The Hon'ble Supreme Court in ***State of Gujarat and Another*** vs. ***Hon'ble High Court of Gujarat***[30] while discussing the liability of the prisoners sentence to rigorous imprisonment, culled out the following principles;

> **"50.** .....
>
> *(1)* It is lawful to employ the prisoners sentenced to rigorous imprisonment to do hard labour whether he consents to do it or not.
>
> *(2)* It is open to the jail officials to permit other prisoners also to do any work which they choose to do provided such prisoners make a request for that purpose.

[30] (1998) 7 SCC 392

> *(3)* It is imperative that the prisoners should be paid equitable wages for the work done by them. In order to determine the quantum of equitable wages payable to prisoners, the State concerned shall constitute a wage-fixation body for making recommendations. We direct to each State to do so as early as possible.
>
> *(4)* Until the State Government takes any decision on such recommendations, every prisoner must be paid wages for the work done by him at such rates or revised rates as the Government concerned fixes in the light of the observations made above. For this purpose, we direct all the State Governments to fix the rate of such interim wages within six weeks and report to the Court of compliance of the direction.
>
> *(5)* We recommend to the State concerned to make law for setting apart a portion of the wages earned by the prisoners to be paid as compensation to deserving victims of the offence, the commission of which entailed the sentence of imprisonment to the prisoner, either directly or through a common fund to be created for this purpose or in any other feasible mode.
>
> .....
>
> **104.** ..... that putting a prisoner to hard labour while he is undergoing a sentence of rigorous imprisonment awarded to him by a court of competent jurisdiction cannot be equated with "begar" or "other similar forms of forced labour" and there is no violation of clause (1) of Article 23 of the Constitution. Clause (2) of Article 23 has no application in such a case. The Constitution, however, does not bar a State, by appropriate legislation, from granting wage (by whatever name called) to prisoners subject to hard labour under the courts' orders, for their beneficial purpose or otherwise.**"**

Even during rigorous imprisonment the offender are not deprived of their wages and other rights which accrue to them in incarceration. There appears to be nothing *ultra vires* to the Constitution of India in Section 4 of the Act.

42. Section 5 of the Act is reproduced herein below;

> **"5. Attachment of property involved in money-laundering.**—(1) Where the Director or any other officer not below the rank of Deputy Director authorised by the Director for the purposes of this section, has reason to

believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that—

(a) any person is in possession of any proceeds of crime; and

(b) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under this Chapter,

he may, by order in writing, provisionally attach such property for a period not exceeding one hundred and eighty days from the date of the order, in such manner as may be prescribed:

Provided that no such order of attachment shall be made unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, 1973 (2 of 1974), or a complaint has been filed by a person authorised to investigate the offence mentioned in that Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or a similar report or complaint has been made or filed under the corresponding law of any other country:

Provided further that, notwithstanding anything contained in clause (b), any property of any person may be attached under this section if the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section has reason to believe (the reasons for such belief to be recorded in writing), on the basis of material in his possession, that if such property involved in money-laundering is not attached immediately under this Chapter, the non-attachment of the property is likely to frustrate any proceeding under this Act.

(2) The Director, or any other officer not below the rank of Deputy Director, shall, immediately after attachment under sub-section (1), forward a copy of the order, along with the material in his possession, referred to in that sub-section, to the Adjudicating Authority, in a sealed envelope, in the manner as may be prescribed and such Adjudicating Authority shall keep such order and material for such period as may be prescribed.

(3) Every order of attachment made under sub-section (1) shall cease to have effect after the expiry of the period specified in that sub-section or on the date of an order made under sub-section (2) of section 8, whichever is earlier.

(4) Nothing in this section shall prevent the person interested in the enjoyment of the immovable property attached under sub-section (1) from such enjoyment.

Explanation.—For the purposes of this sub-section, "person interested", in relation to any immovable

> property, includes all persons claiming or entitled to claim any interest in the property.
>
> (5) The Director or any other officer who provisionally attaches any property under sub-section (1) shall, within a period of thirty days from such attachment, file a complaint stating the facts of such attachment before the Adjudicating Authority.**"**

43. This Section empowers the Officers enumerated therein, who has "reason to believe", after recording such reasons in writing, as well as on the basis of material in his possession, to provisionally attach any "proceeds of crime". Under Section 5(1)(b) where the "proceeds of crime" are likely to be concealed, transferred or dealt with in any manner which could frustrate the object of the Act, provisional attachment may be resorted to by an order in writing. Such attachment nevertheless cannot exceed one hundred and eighty days from the date of the order. This provision is followed by the Proviso that even a provisional order of attachment cannot be made in relation to a scheduled offence unless a report has been forwarded to a Magistrate under Section 173 of the Cr.P.C. or else a Complaint has been filed by the concerned Investigating Agency, before a Magistrate or Court, for taking cognizance of the scheduled offence. The second Proviso stipulates that regardless of anything in Section 5(1)(b), if the concerned Officer has "reason to believe", on the basis of material in his possession, that not attaching the property involved in money-laundering immediately, would frustrate the proceedings of this Act, he is clothed with powers to attach the property. Once attachment of property under Section 5(1) takes place the Authority is to forward a copy of the order along with relevant materials to the Adjudicating Authority, as per procedure

prescribed. The order of attachment, made under Section 5(1), shall cease to have effect after the expiry of the period specified therein or on the date of an order made under Section 8(2), whichever is earlier. Section 8(2), to be discussed later, specifies the process that the Adjudicating Authority shall take after a reply has been filed under Sub-Section (1) of Section 8. The aggrieved person shall be heard and all relevant materials taken into consideration. Section 5(4) of the Act gives liberty to the person whose property is attached to enjoy the immovable property. Under Section 5(5), the Director or any other Officer who provisionally attaches any property under Section 5(1) shall within a period of thirty days from such provisional attachment, file a Complaint stating the facts of such attachment, before the Adjudicating Authority. A careful perusal of the provision ostensibly indicates that no arbitrary powers are afforded to the concerned Officers as the provisional attachment is to be made only on "reason to believe", on the basis of materials in possession of the Authority and the order is to be in writing. Besides the provisional attachment cannot exceed one hundred and eighty days from the date of order, under the Section. The Section also extends necessary safeguards to the offender by requiring the concerned Officer to Report to his Superior Officer his reasons for believing that any property in the possession of any person is the "proceeds of crime". The provision also expands to allow the persons in possession of any "proceeds of crime", which has been provisionally attached, to continue the enjoyment of his property. Thus the question of confiscation, immediately on attachment, is not

projected. On reading and understanding the Section, arbitrariness does not appear to colour the provision. Although the seizure appears to be the result of a unilateral decision, the provision thereby serves a dual purpose inasmuch as neither is the person deprived of enjoyment of his property at the time of such attachment, at the same time the property suspected to be either under Section 2(u) or under Section 3 of the Act is secured. Besides which number of days for such attachment and report to the Adjudicating Authority have been specified.

44. In ***Matajog Dobey***[10] while discussing the vires of Section 197 of the Cr.P.C. pertaining to prior sanction for prosecution of a Government servant, the Apex Court observed as follows;

> **"(15)** ……
>
> It has to be borne in mind that a discretionary power is not necessarily a discriminatory power and that abuse of power is not to be easily assumed where the discretion is vested in the government and not in a minor official. ……**"**

45. The Petitioner also placed reliance on ***Olga Tellis***[2], wherein the attention of this Court was drawn to the observation of the Hon'ble Supreme Court that the ordinary rule which regulates all procedure is that, persons who are likely to be affected by the proposed action must be afforded an opportunity of being heard as to why that action should not be taken. That, having been said, it may be pointed out that in the same Judgment the Supreme Court had observed that there are situations which demand the exclusion of the rules of natural justice by a reason of diverse factor, like time,

the place and the apprehended danger. It would be appropriate to extract herein the observation of the Hon'ble Supreme Court at Paragraph 42, which reads as follows;

> **"42.** Having given our anxious and solicitous consideration to this question, we are of the opinion that the procedure prescribed by Section 314 of the Bombay Municipal Corporation Act for removal of encroachments on the footpaths or pavements over which the public has the right of passage or access, cannot be regarded as unreasonable, unfair or unjust. There is no static measure of reasonableness which can be applied to all situations alike. Indeed, the question "Is this procedure reasonable?" implies and postulates the inquiry as to whether the procedure prescribed is reasonable in the circumstances of the case. In *Francis Coralie Mullin* [(1981) 1 SCC 608], Bhagwati, J., said at p. 524 : (SCC p. 615, para 4)
>
> > ... it is for the Court to decide in exercise of its constitutional power of judicial review whether the deprivation of life or personal liberty *in a given case* is by procedure, which is reasonable, fair and just or it is otherwise. (emphasis supplied)**"**

46. In ***Mohammad Jafar***[4] the challenge was to certain provisions of the Unlawful Activities Provision Act, 1967. Section 3(2) required that the Notification by which the Government declared any association as unlawful to specify the grounds on which it was issued and such other particulars, as, the central government may consider necessary. It was argued for the Union of India that the expression for "reasons to be stated in writing" did not necessarily mean that the reasons have to be stated in the Notification and would suffice if the reasons were noted on the File of the case. The Hon'ble Supreme Court disagreeing with the submissions, observed that the intention of the Legislature is that the aggrieved party must know the reasons for the grave step of banning which was taken without giving it any opportunity of being

heard. If reasons are non-existent or irrelevant, the association has the right to challenge the same by showing cause against it. The fundamental right of the citizens and the association are to be taken away even temporarily for reasons which are not known to the individual or the association. However, in the instant case, on pain of repetition, it may be pointed out that, although the decision to provisionally attach the property under Section 5 is initially unilateral, at the same time it is for a fixed number of days and opportunity to show cause is afforded. The provisional attachment does not exceed one hundred and eighty days, apart from which Section 5(4) also prescribes that nothing in the Section shall prevent the person interested in the enjoyment of the immovable property attached under Sub-Section (1) from such enjoyment. The Act, however, does not prescribe knowledge that, a property is "proceeds of crime" for the purpose of attachment and confiscation.

47. Consequently, it is clear from the provisions of the Section that initiation of any action under Section 5 is on the basis of a "reason to believe" that any person is in possession of any "proceeds of crime" and such "proceeds of crime" are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceeds relating to confiscation of such "proceeds of crime". Such action is independent from any enquiry or investigation of any predicate offence [***Binod Kumar*** vs. ***State of Jharkhand and Others***[31]], but limits the number of days of such

[31] (2011) 11 SCC 463

provisional attachment and report thereof to the Adjudicating Authority. The provisions of Section 5 while aiming to achieve the object of the Act cannot be said to be violative of Articles 14, 19 or 300A of the Constitution of India.

48. Section 8 of the Act deals with adjudication and reads as follows;

> **"8. Adjudication.**—(1) On receipt of a complaint under sub-section (5) of section 5, or applications made under sub-section (4) of section 17 or under sub-section (10) of section 18, if the Adjudicating Authority has reason to believe that any person has committed an offence under section 3 or is in possession of proceeds of crime, he may serve a notice of not less than thirty days on such person calling upon him to indicate the sources of his income, earning or assets, out of which or by means of which he has acquired the property attached under sub-section (1) of section 5, or, seized or frozen under section 17 or section 18, the evidence on which he relies and other relevant information and particulars, and to show cause why all or any of such properties should not be declared to be the properties involved in money-laundering and confiscated by the Central Government:
>
> Provided that where a notice under this sub-section specifies any property as being held by a person on behalf of any other person, a copy of such notice shall also be served upon such other person:
>
> Provided further that where such property is held jointly by more than one person, such notice shall be served to all persons holding such property.
>
> (2) The Adjudicating Authority shall, after—
>
> (a) considering the reply, if any, to the notice issued under sub-section (1);
>
> (b) hearing the aggrieved person and the Director or any other officer authorised by him in this behalf; and
>
> (c) taking into account all relevant materials placed on record before him,
>
> by an order, record a finding whether all or any of the properties referred to in the notice issued under sub-section (1) are involved in money-laundering:
>
> Provided that if the property is claimed by a person, other than a person to whom the notice had been issued, such person shall also be given an opportunity of

being heard to prove that the property is not involved in money-laundering.

(3) Where the Adjudicating Authority decides under sub-section (2) that any property is involved in money-laundering, he shall, by an order in writing, confirm the attachment of the property made under sub-section (1) of section 5 or retention of property or record seized or frozen under section 17 or section 18 and record a finding to that effect, whereupon such attachment or retention or freezing of the seized or frozen property or record shall—

(a) continue during the pendency of the proceedings relating to any offence under this Act before a court or under the corresponding law of any other country, before the competent court of criminal jurisdiction outside India, as the case may be; and

(b) become final after an order of confiscation is passed under sub-section (5) or sub-section (7) of section 8 or section 58B or sub-section (2A) of section 60 by the Adjudicating Authority.

(4) Where the provisional order of attachment made under sub-section (1) of section 5 has been confirmed under sub-section (3), the Director or any other officer authorised by him in this behalf shall forthwith take the possession of the property attached under section 5 or frozen under sub-section (1A) of section 17, in such manner as may be prescribed:

Provided that if it is not practicable to take possession of a property frozen under sub-section (1A) of section 17, the order of confiscation shall have the same effect as if the property had been taken possession of.

(5) Where on conclusion of a trial of an offence under this Act, the Special Court finds that the offence of money-laundering has been committed, it shall order that such property involved in the money-laundering or which has been used for commission of the offence of money-laundering shall stand confiscated to the Central Government.

(6) Where on conclusion of a trial under this Act, the Special Court finds that the offence of money-laundering has not taken place or the property is not involved in money-laundering, it shall order release of such property to the person entitled to receive it.

(7) Where the trial under this Act cannot be conducted by reason of the death of the accused or the accused being declared a proclaimed offender or for any other reason or having commenced but could not be concluded, the Special Court shall, on an application moved by the Director or a person claiming to be entitled

> to possession of a property in respect of which an order has been passed under sub-section (3) of section 8, pass appropriate orders regarding confiscation or release of the property, as the case may be, involved in the offence of money-laundering after having regard to the material before it.**"**

This Section, therefore, provides for adjudication by an Adjudicating Authority in two phases;

(a) Confirmation by the adjudicating authority of the order of attachment/ retention/forging of property or record during the pendency of the proceedings relating to the scheduled offence; and

(b) Recording or finding whether all or any of the property referred to in the notice issued under Sub-Section of Section 8 are involved in money-laundering.

49. The wheels of adjudication are set in motion on receipt of a Complaint under Section 5(5) by the Adjudicating Authority from the Authority who makes the provisional attachment, or an application made under Sub-Section (4) of Section 17 or application under Sub-Section (10) of Section 18. If the Adjudicating Authority has "reason to believe" that any person has committed an offence under Section 3 of the Act or is in possession of the "proceeds of crime", necessary steps as provided in Section 8 commences, with the Adjudicating Authority serving a notice, bestowing not less than thirty days to the offender/non-offender to indicate his sources of income, earning or assets out of which or by means of which he has acquired the property attached by the Authority concerned, or seized under Sections 17 or 18. He is not prohibited from furnishing the evidence on which he relies and other relevant information and

particulars. He is rendered the opportunity of showing cause as to why all or any of such properties should not be declared to be the properties involved in money-laundering and confiscated by the Central Government.

50. In other words, Section 8(1) to Section 8(3) affords adequate opportunity to the concerned individual to produce relevant materials and evidence to satisfy the Adjudicating Authority at the stage of confirmation of provisional attachment or retention of the seized property, that the property attached under Sub-Section (1) of Section 5 or seized under Section 17 or Section 18 has been acquired by him from his legal/known sources of income. Any attachment of the value of any property can also be explained by the concerned accused by production of necessary materials an evidence to establish his *bona fides*. Once such material has been furnished, the Adjudicating Authority is required to consider the reply and after giving an opportunity to the person of being heard, may either confirm the attachment of the property, or else as a natural corollary release such property, by demurring to pass an order of confirmation to the property attached provisionally or part of it.

51. The rights of the offender or any person in possession of "proceeds of crime" are clearly protected by reading the provisions of Section 5 and Section 8 cumulatively, inasmuch as the provisional attachment can be confirmed only after the Adjudicating Authority affords an opportunity to the offender or any person holding the

property to establish his sources of income. The Director is also given the opportunity of being heard at that stage. Should it be found that the property held is from legitimate sources then the question of confirmation of order of provisional attachment does not arise. In any event, the provisions of Section 5(4) continue to hold sway when the provisional attachment obtains and the accused is not prevented from enjoyment of the immovable property attached under Section 5(1) of the Act. Hence, there is no reason to hold that the provisions of Section 8 is either arbitrary or violative of fundamental rights. After hearing the persons the Adjudicating Authority under Section 8(3) can confirm the attachment of the property or retention of the property by an order in writing. The property suffers no destruction and on conclusion of trial should the proof of guilt of the offender be established in the Court, the property involved in the money-laundering or which has been used for the commission of the offence under Section 3, shall stand confiscated to the Government. On the contrary, as already stated, should there be no proof, the property so attached is to be released on the order of the Special Court. The law makes further provision for release of the property under Section 8(7) where the trial is truncated on the death of the accused or when the accused is a proclaimed offender or for any other reason as enumerated in the Section. The Special Court has been clothed with powers to pass appropriate orders in regard to the property either by way of confiscation or release of the property involved in money-laundering on an application moved by the Director.

52. In ***C.B. Gautam***[5] wherein the argument was that the order for compulsory purchase under Section 269UD(1) of the Income Tax Act, 1961, was served on the Petitioner without any show-cause notice being served and without the Petitioner or other affected parties being given an opportunity of showing cause, against an order for compulsory purchase, nor were the reasons for the said order set out in the order or communicated to the concerned parties. The Hon'ble Supreme Court found that, the order for compulsory purchase under Section 269UD(1) of the Income Tax Act, which was served on the Petitioner in the night of 15-12-1986, had been made without any show-cause notice being served on the Petitioner and without the Petitioner or other affected parties having been given any opportunity to show cause against an order for compulsory purchase, nor were the reasons for the said order set out in the order or communicated to the Petitioner or other concerned parties. It was held that the order is clearly bad in law and it is set aside. This aforestated ratio is clearly distinguishable from the case at hand, the statute under consideration does not want in stipulating the opportunity of showing cause, before the order is confirmed.

53. In ***Sushil Kumar Sharma***[15] while discussing the vires on a plea to declare Section 498A of the IPC as unconstitutional and *ultra vires*, it was held that;

> **"12.** It is well settled that mere possibility of abuse of a provision of law does not per se invalidate a legislation. It must be presumed, unless the contrary is proved, that administration and application of a particular law would be done "not with an evil eye and unequal

> hand". (See *A. Thangal Kunju Musaliar* v. *M. Venkatichalam Potti*) [AIR 1956SC 246]

54. On the same question, reference may also be made to the following ratio;

(i) In ***Mafatlal Industries Ltd. and Others*** vs. ***Union of India and Others***[32] a Bench of nine Judges observed that mere possibility of abuse of a provision by those in charge of administering it cannot be a ground for holding a provision procedurally or substantively unreasonable.

(ii) In ***The Collector of Customs, Madras and Another*** vs. ***Nathella Sampathu Chetty and Another***[33] it was observed that;

> **"**(33) ……..
>
> The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. ……..……..**"**

(iii) In ***State of Rajasthan and Others*** vs. ***Union of India and Others***[34] it was held that;

> **"147.** …… It must be remembered that merely because power may sometimes be abused, it is no ground for denying the existence of power. The wisdom of man has not yet been able to conceive of a Government with power sufficient to answer all its legitimate needs and at the same time incapable of mischief. ……..**"**

(iv) In ***Maulavi Hussein Haji Abraham Umarji*** vs. ***State of Gujarat and Another***[35], ***Unique Butyle Tube Industries (P) Ltd.*** vs. ***U.P. Financial Corporation and Others***[36] and ***Padma Sundara Rao (Dead) and Others*** vs.

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[32] (1997) 5 SCC 536
[33] 1961 (1) Cri.L.J. 364
[34] (1977) 3 SCC 592
[35] (2004) 6 SCC 672
[36] (2003) 2 SCC 455

State of T.N. and Others[37] it was observed that while interpreting a provision, the Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of the process of law, it is for the Legislature to amend, modify or repeal it, if deemed necessary.

55. Section 13 of the Prevention of Money-Laundering (Amendment) Act, 2009 (No.21 of 2009), has been called in question as *ultra vires* the Constitution having incorporated certain offences under the Indian Penal Code, in the Schedule of the PMLA.

56. "Scheduled offence" is defined under Section 2(y) of the Act and reads as follows;

> **"**(y) "scheduled offence" means—
>
> (i) the offences specified under Part A of the Schedule; or
>
> (ii) the offences specified under Part B of the Schedule if the total value involved in such offences is thirty lakh rupees or more; or
>
> (iii) the offences specified under Part C of the Schedule;**"**

As already reflected in the foregoing discussions the offence under the Act is also a stand alone offence. In other words, a person need not necessarily be booked of a scheduled offence, but if he is booked and subsequently acquitted, he can still be prosecuted for an offence under the Act. Under Section 5 and Section 8 of the Act, proceedings can be against persons who are accused of a scheduled offence or against persons who are accused of having

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[37] (2002) 3 SCC 533

committed an offence of money-laundering or persons who are found to be in possession of the "proceeds of crime". It is not necessary that a person has to be prosecuted for an offence under the Act only if he has committed a scheduled offence. The prosecution can be independently only for the offence of money-laundering as defined in Section 3 and Section 2(p) which provides that "money-laundering" has the meaning assigned to it in Section 3.

57. The argument forwarded by Learned Counsel for the Petitioner is that, by including certain offences under the IPC in the Schedule of the Act, such inclusion does not subserve the aim and objective of the Act. It may be highlighted here that the "offences under the Indian Penal Code" had been incorporated in Part B, in the Schedule, by Section 13 of the Prevention of Money-Laundering (Amendment) Act, 2009 (No.21 of 2009), however, it was omitted from Part B, in the Schedule, by Section 30 of the Prevention of Money-Laundering (Amendment) Act, 2012 (No.2 of 2013), and incorporated into Part A, in the Schedule. The object of the Act as already pointed out in elaborate discussions under Section 2(u), is to abort the process of money-laundering at its inception. Thus, the wisdom of the Legislature cannot be questioned, when such inclusion has been made, as there may be circumstances where the predicate offence and the offence under Section 3 are intertwined.

58. While discussing the vires of Section 24 of the Act, the proceedings under the Act commences with provisional attachment

under Section 5, on a suspicion of an offence under Section 3 being committed. Section 24 is being extracted here under for clarity;

> **"24. Burden of proof.**—In any proceeding relating to proceeds of crime under this Act,—
>
> (a) in the case of a person charged with the offence of money-laundering under section 3, the Authority or Court shall, unless the contrary is proved, presume that such proceeds of crime are involved in money-laundering; and
>
> (b) in the case of any other person the Authority or Court, may presume that such proceeds of crime are involved in money-laundering.**"**

59. The Section clearly indicates that it is a rebuttable presumption, affording the Petitioner sufficient opportunity of establishing that the property in his possession or the value of any such property, has been acquired by legal means and is not the result of any illegal methods, which would comprise of an offence under Section 3. The insertion of this provision obviously takes us back to the object of the Act, being to prevent money-laundering, which itself comprises of a series of illegal acts. Once the offender is able to explain the source of the property, which is in his possession, then the prosecution is required to discharge its burden. In this context, we may usefully notice the provisions of Sections 101 and 102 of the Indian Evidence Act, 1872, which reads as follows;

> **"101. Burden of proof.**—Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
>
> **102. On whom burden of proof lies.**—The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.**"**

Infact by shifting the onus to the accused, it affords him an opportunity of establishing his innocence and clarifying to the prosecution the source of his property and therefore, contains a safeguard for the accused. Consequently, it cannot be said that the provision is unconstitutional. Thus, when considering the Acts the object has to be given primary importance and the provision thereof cannot be said to be *ultra vires* when the end goal is to be achieved. Section 24 unequivocally extends an opportunity to the offender to establish the source of his property, which if legitimate can be fully justified by the Petitioner.

60. Section 45 of the Act has next been challenged, *inter alia*, on the ground that, imposing limitations on bail is violative of Articles 14 and 21 of the Constitution of India, as the grant of bail is subjected to specifications, viz., grounds for believing that the accused is not guilty of such offence and he is not likely to commit any while offence on bail.

61. To examine the aforesaid submissions, we may extract the relevant provision of the Act;

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

> Provided that a person, who is under the age of sixteen years or is a woman or is sick or infirm, may be released on bail, if the special court so directs:
>
> Provided further that the Special Court shall not take cognizance of any offence punishable under section 4 except upon a complaint in writing made by—
>
> (i) the Director; or
>
> (ii) any officer of the Central Government or State Government authorised in writing in this behalf by the Central Government by a general or special order made in this behalf by that Government.
>
> (1A) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or any other provision of this Act, no police officer shall investigate into an offence under this Act unless specifically authorised, by the Central Government by a general or special order, and, subject to such conditions as may be prescribed.
>
> (2) The limitation on granting of bail specified in sub-section (1) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.**"**

Thus, it is clear that under Section 45(ii) of the Act discretion vests with the Court to enlarge the Petitioner on bail or to refuse such bail. It emanates, from the provision that even when there is an objection to the bail by the Public Prosecutor, if the Court is satisfied that there are reasonable grounds for believing the offender is (i) not guilty of such offence; and (ii) not likely to commit any offence while on bail, he can be enlarged on bail. I hasten to add that a discussion on the merits and de-merits of the case is not at that stage, expected to ensue, nevertheless, the order of refusal or permitting bail cannot be bereft of cogent reasons. Obviously the gravity of the offence, the status of the victim, likelihood of fleeing from justice are paramount considerations while granting such bail. Section 45(2) of the Act prescribes that the

limitation on granting of bail under Sub-Section (1) is in addition to the limitations under the Cr.P.C. or any other Law for the time being in force on granting of bail. Hence, the Court has to take in consideration the relevant factors which are considered in a Bail Petition under Sections 437 and 439 of the Cr.P.C. when an application under Section 45 of the Act filed. Conditions stipulated in Section 437 of the Cr.P.C. may also be imposed as the import of the accused remaining at large, the impact on society by his enlargement on bail or whether such bail would thwart the ends of justice, all merit consideration. Thus, the evidence before the Court must be worthwhile under Section 45(ii) of the Act, to persuade the Court to conclude that, if rebutted, the accused might be convicted. Evidence "beyond reasonable doubt" is not envisaged at this stage. In my considered opinion, the limitations are not unfounded or arbitrary. The Legislature has evidently used the words "reasonable grounds for believing", in Section 45(1)(ii) to enable the Court dealing with the bail, to justifiably hold, as to whether there is indeed a genuine case against the accused and whether the prosecution is able to produce *prima facie* evidence in support of the charge and the evidence so furnished if unrebutted could lead to a conviction. Apprehension of repetition of the crime is another consideration in refusing bail, as also the antecedents of an accused person. The prosecution has not been given arbitrary or wide amplitude under Section 45, as the provision with clarity lays down that the matter for consideration falls within the discretion of the Court, who, after extending an opportunity to the Public Prosecutor,

in matters where the person is accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule, is to be satisfied subjectively. It is only subject to the satisfaction of the Court that the bail is to be granted or declined. There is evidently no infirmity in the provision and cannot be said to offend Articles 14 and 21 of the Constitution of India.

62. So far as Section 50 of the Act is concerned, it would be appropriate to refer of I.A. No. 2 of 2016 dated 24-09-2016, arising out of this Writ Petition, wherein this Court was apprised that Section 50 of the Act and Section 67 of the NDPS Act are similar provisions and the issue whether the statement recorded by the Investigating Officer under Section 67 of the NDPS Act can be treated as confessional statement or not has been referred to the larger Bench of the Hon'ble Supreme Court. Reliance was placed on ***Tofan Singh*** vs. ***State of Tamil Nadu***[38]. It is informed that the matter is now likely to be listed before a larger Bench of the Hon'ble Supreme Court. That, no decision till date has been taken on the said matter.

63. While considering this submission, we may briefly peruse the decision of the Hon'ble Supreme Court in ***Chikkamma and Anr.*** vs. ***Parvathamma and Anr.***[39] where the issue, *inter alia*, before the Hon'ble Supreme Court was on the quantum of compensation that should be awarded to the Appellants, who were the Claimants in a proceeding under the Motor Vehicles Act, 1988. The Counsel for the

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[38] (2013) 16 SCC 31

[39] MANU/SC/0728/2017
[Civil Appeal No.3409 of 2017 dated 28-02-2017]

Appellants urged that some amounts on account of Future Prospects should also be awarded while determining the entitlement of the Appellants for the enhancement of the compensation. The said bench taking note of the fact that the question of awarding Future Prospects to a self-employed person was pending before a larger Bench of the Supreme Court, observed as follows;

> **"**9. Taking into account the fact that the deceased was a self employed person and also as the question with regard to award of future prospects of a self employed person is presently pending before a larger Bench of this Court and as some enhancement of compensation has already been made by us, we are of the view that in the facts of the present case, the claim for future prospects ought not to be gone into by us. The said claim, therefore, is refused.**"**

64. Toeing the line of the above observation, it would be apposite to hold here that as the matter of constitutionality of Section 67 of the NDPS Act, which bears a similarity to Section 50 of the Act is pending consideration before the Hon'ble Supreme Court, it would be in the correctness of things not to enter into a discussion of the matter where a decision is awaited.

65. The Petitioner also sought quashing of the ECIR dated 19-02-2014. No separate application under Section 482 of the Cr.P.C. was filed. While dealing with this issue, we may refer to the decision of the Hon'ble Supreme Court in ***Girish Kumar Suneja*** vs. ***C.B.I.***[40] wherein the Supreme Court discussed the ambit of Section 482 of the Cr.P.C. and Articles 226 and 227 of the Constitution of India. The relevant portion is extracted below;

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[40] 2017 SCC OnLine SC 766
[Criminal Appeal No.1317 of 2017 dated 17-07-2017]

> **"43.** ..... The power under Section 482 of the Cr.P.C. is to be exercised only in respect of interlocutory orders to give effect to an order passed under the Cr.P.C. or to prevent abuse of the process of any Court or otherwise to serve the ends of justice. As indicated above, this power has to be exercised only in the rarest of rare cases and not otherwise. If that is the position, and we are of the view that it is so, resort to Articles 226 and 227 of the Constitution would be permissible perhaps only in the most extraordinary case. To invoke the constitutional jurisdiction of the High Court when the Cr.P.C. restricts it in the interest of a fair and expeditious trial for the benefit of the accused person, we find it difficult to accept the proposition that since Articles 226 and 227 of the Constitution are available to an accused person, these provisions should be resorted to in cases that are not the rarest of rare but for trifling issues.**"**

The decision being lucid requires no further illumination the Petitioner herein seeks quashing of the ECIR by resorting to Articles 226 and 227 of the Constitution of India, when the correct procedure to have been adopted was to file a Petition under Section 482 of the Cr.P.C. In such a circumstance, on the bedrock of the aforecited case, the prayer can neither be considered nor allowed.

66. In conclusion, bearing in mind the object of the Act and the detailed discussions which have ensued hereinabove, being bereft of merit, this Writ Petition stands dismissed.

67. No order as to costs.

Sd/-
(Meenakshi Madan Rai)
Judge
29-08-2017

Approved for reporting : **Yes**

Internet : **Yes**

ds/bp