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

% **Judgment reserved on: 03 June 2022**
Judgment pronounced on: 19 July 2022

\+ W.P.(C) 14999/2021, CM Nos. 47329/2021, 553/2022, 10949/2022 M/S PRAKASH INDUSTRIES LTD. & ANR. ..... Petitioners

Through: Mr. Kapil Sibal, Senior Advocate with Mr.Ankur Chawla, Mr.Vijay Aggarwal, Mr. Gurpreet Singh, Mr. C.B. Bansal, Mr. Aamir Khan, Ms. Aparajita Jamwal and Mr. Bakul Jain, Advocates.

versus

DIRECTORATE OF ENFORECEMENT ..... Respondent

Through: Mr. S.V. Raju, ASG with Mr. Zoheb Hossain, Mr. Anshuman Singh, Mr.Ankit Bhatia and Mr. Harsh Paul Singh, Advocates.

\+ W.P.(C) 15000/2021, CM Nos.47331/2021, 547/2022, 10952/2022 M/S HI-TECH MERCANTILE INDIA PVT. LTD & ORS.

..... Petitioners

Through: Mr. Kapil Sibal, Senior Advocate with Mr.Ankur Chawla, Mr.Vijay Aggarwal, Mr. Gurpreet Singh, Mr. C.B. Bansal, Mr. Aamir Khan, Ms. Aparajita Jamwal and Mr. Bakul Jain, Advocates.

versus

DIRECTORATE OF ENFORCEMENT ..... Respondent

Through: Mr. S.V. Raju, ASG with Mr. Zoheb Hossain, Mr.Anshuman Singh, Mr.Ankit Bhatia and Mr. Harsh Paul Singh, Advocates.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

J U D G M E N T

1. For the purposes of ease of reference, this decision has been divided under the following categories: -

A. INTRODUCTION
B. WHETHER PROCEEDINGS LIABLE TO BE DEFERRED
C. PRELIMINARY OBJECTION
D. THE BACKGROUND
E. SUBMISSIONS
F. MONEY LAUNDERING – A STAND ALONE OFFENSE
G. THE ARTICLE 20(1) ARGUMENT
H. AXIS BANK VS. SEEMA GARG
I. WHETHER ALLOCATION OF COAL IS PROCEEDS OF CRIME
J. THE IMPACT OF QUASHING OF THE FIRST CHARGESHEET
K. WHETHER ARTICLE 20(1) IN FACT VIOLATED
L. IMPUGNED ATTACHMENT AND EQUIVALENT VALUE
M. CONCLUSIONS
N. OPERATIVE DIRECTIONS

A. INTRODUCTION

2. These two writ petitions challenge proceedings initiated by the Directorate of Enforcement, the respondents herein, under the provisions of the **Prevention of Money Laundering Act, 2002**[1]. The leading writ petition had come to be

[1] The Act

preferred at a time when a provisional order of attachment came to be made under the Act. The Court, by its order of 06 January 2022, entertained the writ petition and called upon the respondents to file their replies. On 03 March 2022, this Court took notice of the proceedings initiated by the Adjudicating Authority before whom the matter came to be placed for the purposes of confirmation of the provisional order of attachment. Taking note of the rival submissions, this Court on that date allowed the amendments proposed and passed the following detailed order: -

> "**CM APPL. 10948/2022 (for amendment of petition) in W.P.(C) 14999/2021**
> **CM APPL. 10951/2022 (for amendment of petition) in W.P.(C) 15000/2021**
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> The record reflects that the present petition was instituted at a stage when a Provisional Order of Attachment had come to be made in terms of the provisions of Section 5 of the Prevention of Money Laundering Act, 2002 [PMLA]. The submissions of respective parties were noticed in some detail in the order of 06 January 2022. Pursuant to that order, parties were directed to exchange pleadings. Counter and rejoinder affidavits have subsequently come to be filed. By way of the present application for amendment, the petitioners lay challenge to the notices issued under Section 8 of the PMLA by the Adjudicating Authority.
>
> Learned counsel appearing for the Enforcement Directorate has, at the outset, submitted that in the fitness of things, the petitioners should be called upon to file their replies to the show-cause notices leaving it open to the Adjudicating Authority to decide all contentions which are urged before this Court.
>
> While ordinarily that may have sufficed, this Court notes that, by the order of 06 January 2022, the challenge to the initiation of proceedings under the PMLA on jurisdictional grounds was duly entertained. The Court had taken notice of the challenge mounted on the ground that the offenses which are alleged to have been committed, were not enumerated as a "scheduled offense" at the relevant point of time. In that view of the matter and since the Court has already taken note of the challenge raised, it would be inappropriate to grant liberty to the Adjudicating Authority to independently rule on the questions which are raised here.
>
> The amendments essentially assail further proceedings and steps taken pursuant to the Provisional Order of Attachment. In view of the aforesaid, the

amendments as proposed by way of the present application are allowed.

The Court notes that the amended writ petition already exists on the record.

The application shall stand disposed of.

W.P.(C) 14999/2021 & CM APPLs. 47329/2021, 553/2022, 10949/2022
W.P.(C) 15000/2021 & CM APPLs. 47331/2021, 547/2022, 10952/2022

Learned counsel representing the Enforcement Directorate prays for and is granted time to file reply to the added pleadings taken.

For the purpose of considering the prayer for interim relief, the Court takes note of the contentions recorded in the earlier order of 06 January 2022 as well as the submission of Mr. Sibal, learned Senior Counsel appearing for the petitioners, who submits that the offences of which the petitioners are charged did not even form part of scheduled offences as contemplated under the PMLA. Additionally, the Court notes that the recordal of satisfaction by the Adjudicating Authority, *prima facie*, does not appear to satisfy the requirements of Section 8 of the PMLA. The matter requires consideration.

Till the next date of listing, there shall be stay of further proceedings before the Adjudicating Authority.

Let this matter be posted again on 31.03.2022."

3. The aforesaid order was taken in appeal by the respondents in terms of LPA Nos. 179/2022 and 180/2022 which were dismissed by the Court on 22 March 2022 in the following terms: -

"1. Aggrieved by the order dated 3rd March 2022 passed by the learned Single Judge in W.P.(C) Nos. 1499/2021 and 1500/2021, staying the proceedings before the adjudicating authority, the appellant has preferred the present appeals.

2. After some arguments, learned counsel for the appellant, on instructions, confines his relief only to the extent of the observations made in para 3 of the order dated 3rd March 2022 as the apprehension of the appellant is that this direction will be treated as a precedent in all other cases and wherever there is a challenge to the order of the adjudicating authority, it would be deemed to be inappropriate that the adjudicating authority adjudicates the matter.

3. Relevant portion of the impugned order passed by the learned Single Judge is as under:-

".....In that view of the matter and since the Court has already taken note of the challenge raised, it would be inappropriate to grant liberty to the Adjudicating Authority to independently rule on the questions which are raised here".

> 4. A perusal of the sentence used in the impugned order clearly shows that the same was passed in view of the grounds urged by the respondents and the particular facts of the case in view and it is an issue to be decided by the Court, it would not be proper to grant liberty to the adjudicating authority to independently rule on the questions which was raised before this Court. It is thus evident that the directions have been passed clearly in the facts of the present cases.
>
> 5. With the observations above, learned counsel for the appellant does not press the appeals any further.
>
> 6. Appeals and applications are disposed of.
>
> 7. Order be uploaded on the website of this Court."

4. Subsequently and upon parties exchanging pleadings, these two writ petitions with consent were put down for final hearing. Before proceeding to the merits of the questions which fall for consideration and since the respondents have raised certain preliminary objections to the maintainability of the writ petitions as well as of the Court proceeding further, it would be apposite to notice the following salient facts.

5. Proceedings under the Act emanate from an allocation of the Chotia coal block in favour of Prakash Industries Limited, the petitioners in the lead matter[2]. The aforesaid allocation came to be made in its favour on 04 September 2003. The allocation as made ultimately came to be cancelled in terms of the judgment of the Supreme Court in **Manohar Lal Sharma vs. Principal Secretary**[3]. However, and much before that verdict came to be rendered, CBI on 07 April 2010 registered FIR No. RC/AC2/2010/A0001 alleging misrepresentation by PIL in order to obtain the coal allocation as well as diversion of coal extracted from

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[2] PIL

[3] (2014) 9 SCC 614

the said block. The Special Judge CBI taking cognizance of the chargesheet which was submitted on conclusion of investigation, framed charges against PIL and other accused in CC No. 3/2012[4]. The aforesaid chargesheet came to be challenged by PIL before this Court which in terms of its judgment of 05 September 2014 quashed the FIR as well as the consequential chargesheet which was submitted. That judgment rendered by this Court presently forms subject matter of challenge before the Supreme Court in SLP (Crl.) 2576/2015. Although that special leave petition remains pending on the board of the Supreme Court as on date, the judgment of this Court has neither been stayed nor placed in abeyance.

6. The record further reflects that subsequent to the allocation of the coal block in favour of PIL coming to be cancelled in terms of the directions issued in **Manohar Lal Sharma**, a second FIR came to be registered by CBI on 02 December 2016 numbered as RC No.221/2016/E0035. On conclusion of investigation, CBI proceeded to file a chargesheet numbered as 1/2022[5] before the competent court on 23 January 2020 alleging commission of offence under Section 120B read with Section 420 of the Indian Penal Code[6]. The allegation in the second chargesheet essentially is that PIL submitted false and forged documents in order to obtain the allocation of the coal block in question, misrepresented facts pertaining to proceedings pending before the Board for Industrial and Financial Reconstruction and thus fraudulently and dishonestly

[4] First Chargesheet

[5] Second Chargesheet

[6] Penal Code

obtained the coal allocation. Upon the competent court taking cognizance on the aforesaid chargesheet, PIL instituted Special Leave to Appeal (Crl.) No. 656-657/2022 on which the Supreme Court by an order of 06 May 2022 has stayed further proceedings before the Trial Court. It is on submission of the second chargesheet that the impugned proceedings came to be initiated by the respondents.

B. WHETHER PROCEEDINGS LIABLE TO BE DEFERRED

7. Mr. Raju, learned ASG, has firstly submitted that proceedings on the present writ petitions be stayed and / or deferred till such time as the Supreme Court which is seized of a batch of matters pertaining to the validity of various provisions of the Act renders judgment. The Court was referred to the order dated 15 March 2022 passed on Special Leave to Appeal (Crl.) No. 4634/2014 and other connected matters. Mr. Raju has submitted that judgment on the aforesaid batch of matters has already been reserved and consequently till such time as the aforesaid batch is decided, further proceedings on the present writ petitions may be deferred. Mr. Raju has, in support of the aforesaid submission, drawn the Court's attention to the various questions which stand raised before the Supreme Court on behalf of respective parties and submits that since the issues which are being considered by the Supreme Court are identical to those which are raised here, judicial propriety would warrant these writ petitions being called for consideration only after judgment has been rendered by the Supreme Court. Mr. Raju has also invited the attention of the Court to the written submissions submitted by him before the Supreme Court as well as the principal issues which

were drafted and submitted by the learned Solicitor General of India in those proceedings.

8. The learned ASG in support of his submissions has also relied upon certain decisions to contend that in similar situations, courts have deferred proceedings awaiting a final verdict being handed down by the Supreme Court. Those decisions are noticed hereinafter. The decision in **D.K. Trivedi & Sons Vs. State of Gujarat**[7] was dealing with a case where the High Court had dismissed writ petitions challenging the constitutional validity of a particular statutory provision while an identical challenge was pending before the Supreme Court. It was in that backdrop that the Supreme Court observed that since an identical question was engaging the attention of that Court, the High Court should have deferred hearing on the writ petitions rather than dismissing the same and directing parties to approach the Supreme Court. The order of **Deepak Talwar**[8] which was cited pertained to a matter where prayers (b) and (c) and the challenge to the vires of a provision was identical to a challenge pending before the Supreme Court. In **Asst. Director, Directorate of Enforcement**[9] again the Court found that the proposed issues which were filed in proceedings before the Supreme Court were identical to those which arose in the appeals laid before this Court.

9. Having conferred its thoughtful consideration on the aforesaid contention, the Court finds itself unable to accede to the submission of Mr. Raju for the

[7] 1986 Supp. SCC 20

[8] W.P. (Crl) 385/2019

[9] CRL.M.C. 1455/2021

following reasons. It may, at the outset, be noted that the prayer for deferral of proceedings on the present writ petitions was raised for the first time in terms of the counter affidavit which came to be filed by respondents on 16 April 2022. When the amendment application came to be allowed by the Court in terms of its order of 03 March 2022, parties had agreed for the matter being placed for final disposal after exchange of pleadings. It was on the aforesaid understanding that the writ petitions were placed for final arguments on 25 April 2022 at 3.30 pm. However and notwithstanding the above, in order to evaluate the correctness of submission raised by Mr. Raju it would be appropriate to briefly note the principal arguments which were addressed by Mr. Sibal, learned Senior Counsel appearing for the writ petitioners, and compare the same with the issues which are raised before the Supreme Court in the pending batch.

10. The Court notes at the outset that the batch of matters which are pending before the Supreme Court essentially question the validity of the various provisions of the Act. It is not disputed by learned counsels appearing for respective parties that the aforesaid batch of matters essentially call in question the vires of various provisions of the Act. The Court however finds that neither the constitutional validity of the Act nor any of its provisions is called in question in these two writ petitions.

11. Mr. Sibal has principally addressed the following submissions. It was contended that undisputedly the second chargesheet relates to events extending only upto the date of allocation of the coal block and thus restricted upto 04 September 2003. This according to Mr. Sibal is manifest from a reading of paragraphs 16.57 and 16.59 of the second chargesheet. Mr. Sibal has urged that

the allocation of the coal block cannot fall within the ambit of the expression "*proceeds of crime*" as defined in Section 2(1)(u) of the Act. Learned Senior Counsel further contended that the allocation cannot possibly be considered or understood as representing property derived or obtained as a result of criminal activity relating to a schedule offence. In view of the aforesaid, it was the submission of Mr. Sibal that the proceedings initiated under the Act are wholly without jurisdiction. It was further contended that activities undertaken by the petitioners post 04 September 2003 including the extraction of coal and its alleged diversion were activities and events which formed subject matter of the first chargesheet. It was in the aforesaid backdrop that Mr. Sibal argued that once that chargesheet had come to be quashed, no proceedings could have been validly initiated under the Act. In any case and without prejudice to the above, Mr. Sibal submitted that since undisputedly the impugned proceedings emanate from the second chargesheet and stand restricted to events upto 04 September 2003 only, and since the allocation of coal cannot constitute proceeds of crime, the writ petitions are liable to be allowed on this short ground alone. It was further urged by Mr. Sibal that admittedly the coal block had came to be allocated on 04 September 2003. It was pointed out that the Act itself came to be enforced subsequently on 01 July 2005. The provisions of Section 120B and 420 of the Indian Penal Code[10] came to be included as scheduled offences only on 01 June 2009. In view of the aforesaid facts, Mr. Sibal, learned Senior Counsel, as well as Mr. Chawla, learned counsel, appearing in the connected writ petition contended that any penal action or attachment under the Act for acts of alleged money

[10] Penal Code

laundering which occurred prior to 01 July 2005 would be wholly illegal and violative of Article 20(1) of the Constitution. Mr. Chawla, learned counsel, also urged that since the provisions of Section 120B and 420 of the Penal Code came to be included in the Schedule only on 01 June 2009, those properties which were acquired prior to that date cannot be subjected to attachment or confiscation under the Act. It was additionally argued that, in any case, since the alleged criminal activities which occurred post 04 September 2003 cannot form the basis for any action under the Act consequent to the first chargesheet having been quashed, properties which had been purchased post 04 September 2003 also cannot be attached or confiscated. Mr. Chawla additionally also addressed submissions in the backdrop of the decision rendered by a Division Bench of the Punjab and Haryana High Court in **Seema Garg Vs. Deputy Director**[11].

12. The aforesaid submissions may be contrasted with the issues which were argued and are pending consideration before the Supreme Court. The submissions of the learned Solicitor General of India who in his note has formulated the issues which arise in that batch are extracted hereinbelow:-

> "**1.** Whether the offence under the PMLA is a cognizable or a non cognizable offence particularly in view of the Explanation inserted in 2019?
>
> **2.** Whether the procedure contemplated under all provisions of Chapter XII of the Code of Criminal Procedure, 1973 is required to be followed while commencing and continuing investigation under the Prevention on Money Laundering Act, 2002?
>
> **3.** Whether the twin conditions for grant of bail as provided for in Section 45 of the Prevention of Money Laundering Act, 2002, as it stands amended, is

[11] 2020 SCC Online P&H 738

unconstitutional? Whether the amendment takes away the basis of the judgment in (2018) 11 SCC 1 and revives the twin conditions for grant of bail?

4. In case it is held that the twin conditions stand revived, whether the judgment in (2018) 11 SCC 1, holding that the twin conditions cannot apply to anticipatory bails, lays down the correct proposition of law?

5. Whether the provisions concerning the burden of proof under PMLA violate fundamental rights of the accused persons?

6. What are the contours of the offence under Section 3 of the PMLA? Does the Explanation to Section 3 of PMLA (added by an amendment in 2019) expand the meaning of the offence under Section 3 [as it stood prior to the amendment] and if so, is it permissible to do so?

7. Whether the filing of a chargesheet/complaint/FIR in the predicate offence is a prerequisite for an exercise of power of arrest under the PMLA? Can money laundering not be a standalone offence in the context of Section 3 read with Section 2(u) of the PMLA?

8. Whether the reliance on the statements recorded by the officers of the Enforcement Directorate during the investigation in judicial proceedings, violate Article 20[3] of the Constitution and are inadmissible in light of section 25 of the Evidence Act?

9. Whether the provisions concerning attachment of property under the PMLA violates the right to property under Article 300A?

10. Whether the PMLA can be applied to acts which occurred prior to the addition of offence under the Schedule to the said Act?

11. Whether a writ court can grant blanket no coercive steps order without any factual foundation being pleaded/being examined merely because constitutional validity of certain provisions has been challenged?

12. Whether the Sections 17 and 18 of PMLA, as amended, relating to search and seizure are unconstitutional and void?

13. Is the power of arrest conferred under Section 19 of PMLA violative of Articles 14 and 21 of the Constitution?

14. Whether the offence of money laundering can continue after the predicate offence has taken place? Can the offence of money laundering be committed even if the predicate or scheduled offence was not a scheduled offence on the date when the scheduled offence was committed?"

13. Mr. Raju in his written submissions tendered before the Supreme Court has essentially dealt with the challenge laid by the petitioners there to the provisions of the Act contending that it is an *ex post facto* legislation and thus violative of Article 20 of the Constitution. Those written submissions also allude to the contention of the Directorate that the offense created under the Act is in the nature of a "continuing offence" and thus the Act cannot be said to have retrospective application. It is in the aforesaid backdrop that it was urged that if the basis for proceedings be a scheduled offence which is committed before the enactment of the Act or before its addition as an offence in the Schedule thereto, that would not mean that the Act operates retrospectively.

14. As this Court evaluates the written submissions tendered by Mr. Raju before the Supreme Court as well as the issues formulated by the learned Solicitor General of India and compares it with the principal arguments which were addressed on these two writ petitions, it finds that there is no commonality between the issues which are raised here and the challenge to the constitutional validity of the provisions of the Act. Whether an allocation of coal can be viewed as "*proceeds of crime*" is not a question which can be said to be even remotely engaging the attention of the Supreme Court. Similarly, the question whether the allocation could be treated as property derived or obtained from criminal activity also does not appear to be an issue raised for the consideration of the Supreme Court. The impact, if any, of the second chargesheet being restricted upto 04 September 2003 on the proceedings impugned in these two writ petitions is again an issue which would have to be adjudged on the facts obtaining in these two writ petitions. A decision on that issue cannot possibly be contended to be connected

in any manner with the submissions addressed either by Mr. Raju or the learned Solicitor General of India before the Supreme Court. The arguments addressed by Mr. Sibal as well as Mr. Chawla essentially turn and rest on the facts leading to the filing of the present petitions, the past history of litigation *inter partes* and the jurisdiction of the Adjudicating Authority to proceed under the Act. In fact the submissions advanced at the behest of the petitioners proceeded on the assumption that the provisions of the Act were valid.

15. As noted hereinabove, these writ petitions do not call in question the constitutional validity of any provision of the Act. The writ petitions as well as the submissions addressed thereon proceed on the basis of the submission that an allocation of a coal block cannot constitute proceeds of crime and that the proceedings impugned here are wholly illegal and arbitrary in light of the facts noticed hereinabove as well as the quashing of the first chargesheet. For the aforesaid reasons, the submission as addressed by Mr. Raju in this respect is negatived.

C. PRELIMINARY OBJECTION

16. The respondents then raised a further preliminary objection and contended that since the writ petitions only assail a show-cause notice issued under the Act, the High Court should refrain from entertaining that challenge leaving it open to the petitioners to raise all objections before the Adjudicating Authority. Mr. Raju urged that courts have consistently taken the view that a challenge at the stage of a show-cause notice should not be entertained by High Courts while exercising their

powers under Article 226 of the Constitution. It was further contended that the Act creates a comprehensive statutory mechanism for adjudication of all questions that are raised here before the Adjudicating Authority. Those provisions according to Mr. Raju lay in place an efficacious statutory alternative remedy and thus the writ petitioners should be relegated to follow the procedure as prescribed under the Act. Mr. Raju in support of his submissions has drawn the attention of the Court to the following decisions and submits that the writ petitions are liable to be dismissed and the petitioners directed to raise all available challenges before the Adjudicating Authority. To buttress the aforesaid submission, learned ASG placed reliance on the following decisions, which are as follows:-

In **Special Director v. Mohd. Ghulam Ghouse**[12]on the question of maintainability of a writ petition against a show cause notice, the Supreme Court held as follows:

> "5.This Court in a large number of cases has deprecated the practice of the High Courts entertaining writ petitions questioning legality of the show-cause notices stalling enquiries as proposed and retarding investigative process to find actual facts with the participation and in the presence of the parties. Unless the High Court is satisfied that the show-cause notice was totally non est in the eye of the law for absolute want of jurisdiction of the authority to even investigate into facts, writ petitions should not be entertained for the mere asking and as a matter of routine, and the writ petitioner should invariably be directed to respond to the show-cause notice and take all stands highlighted in the writ petition. Whether the show-cause notice was founded on any legal premises, is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially, before the aggrieved could approach the court. Further, when the court passes an interim order it should be careful to see that the statutory functionaries specially and

[12](2004) 3 SCC 440

specifically constituted for the purpose are not denuded of powers and authority to initially decide the matter and ensure that ultimate relief which may or may not be finally granted in the writ petition is not accorded to the writ petitioner even at the threshold by the interim protection granted.

6. In the instant case, the High Court has not indicated any reason while giving interim protection. Though, while passing interim orders, it is not necessary to elaborately deal with the merits, it is certainly desirable and proper for the High Court to indicate the reasons which have weighed with it in granting such an extraordinary relief in the form of an interim protection. This, admittedly, has not been done in the case at hand.

7.While issuing notice on 7-7-2003, this Court had granted interim stay of the impugned interim order. The respondent had entered appearance and we have heard the learned Senior Counsel on either side. In the fitness of things, taking into account the above circumstances, we dispose of the appeal with a direction that the proceedings emanating from the show-cause notice shall be continued, but the final order passed pursuant thereto shall not be communicated to Respondent 1 (writ petitioner) without leave or further orders of the High Court. The writ petition shall be disposed of on merits in accordance with law. Any observation made in this appeal shall not be construed to be expression of any opinion on the merits of the matter pending before the High Court. Since the controversy is of a very limited as well as serious nature, the High Court may explore the possibility of early disposal of the writ petition. The appeal is allowed to the extent indicated with no order as to costs."

Learned ASG then referred to the decision of **Farida Begum Biswas vs. Union of India**[13]where a similar view was taken, and more particularly to the following passages of that decision:-

"14. In the instant case, the petitioners have received show cause notice dated 19.06.2015 under Section 8 of the PMLA in O.C. No. 501/2015 and the provisional attachment order dated 21.05.2015 under Section 5 of the PMLA issued by the respondent No. 2. The action of coming to this Court is premature and therefore, this Court is of the view that since the petitioners have effective and efficacious remedy under PMLA, necessitating institution of the petition by invoking extraordinary jurisdiction of this Court is not appropriate at this stage.

[13]2015 SCC OnLine Del 11834

> If this Court were to enter into the merits of this case at this stage, it would amount to scuttling the statutorily engrafted mechanism i.e. PMLA."

Mr. Raju then relied upon **M/s SRJ Infratech Pvt Ltd and Ors vs. Director Directorate of Enforcement** [14]where the Supreme Court observed as under:-

> "6. In the opinion of this Court, mixed questions of fact and law are involved in the present case. Moreover, as a show cause notice has already been issued as to why the provisional attachment order be not confirmed, this Court is of the view that the ends of justice would be met if the petitioners are permitted to take all their pleas and defences in the adjudication proceedings, which are pending under Section 8 of the PML Act."

17. While it is true that Courts have on more than one occasion refrained from entertaining a writ petition at the stage of issuance of a show cause notice, the principle enunciated in the various judgments rendered on the question is that a challenge at the stage of the issuance of a show-cause notice should not "ordinarily" be entertained. However, those very decisions have also carved out the exceptions in which such a challenge would be sustainable. The Court takes note of the following principles as were enunciated in the celebrated and oft cited decision of the Supreme Court in **Whirlpool Corporation Vs. Registrar of Trademarks**[15]**:-**

> "14**.** The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose.

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[14]2016 SCC OnLine Del 221

[15] (1998) 8 SCC 1

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

16. *Rashid Ahmed* v. *Municipal Board, Kairana* [AIR 1950 SC 163 : 1950 SCR 566] laid down that existence of an adequate legal remedy was a factor to be taken into consideration in the matter of granting writs. This was followed by another Rashid case, namely, *K.S. Rashid & Son* v. *Income Tax Investigation Commission* [AIR 1954 SC 207 : (1954) 25 ITR 167] which reiterated the above proposition and held that where alternative remedy existed, it would be a sound exercise of discretion to refuse to interfere in a petition under Article 226. This proposition was, however, qualified by the significant words, "*unless there are good grounds therefor*", which indicated that alternative remedy would not operate as an absolute bar and that writ petition under Article 226 could still be entertained in exceptional circumstances.

17. A specific and clear rule was laid down in *State of U.P.* v. *Mohd. Nooh* [AIR 1958 SC 86 : 1958 SCR 595] as under:

> "But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies."

18. This proposition was considered by a Constitution Bench of this Court in *A.V. Venkateswaran, Collector of Customs* v. *Ramchand Sobhraj Wadhwani* [AIR 1961 SC 1506 : (1962) 1 SCR 753] and was affirmed and followed in the following words:

> "The passages in the judgments of this Court we have extracted would indicate (*1*) that the two exceptions which the learned Solicitor General formulated to the normal rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive, and (*2*) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general

> principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the Court."

18. The jurisdictional grounds on which the writ petitions were initially entertained were noticed in the orders of 06 January 2022 and 03 March 2022. It becomes pertinent to note that the writ petition was originally entertained at a time when a provisional order of attachment had come to be issued. It was at that stage that the Court had issued notice and called upon the parties to exchange pleadings. The amendment applications additionally laid challenge to the notice issued by the Adjudicating Authority initiating proceedings under Section 8 of the Act. The challenge to the initiation of those proceedings by the Adjudicating Authority was duly noticed by the Court in its order of 03 March 2022. The objection of the respondents addressed on identical lines was duly noticed and negatived. It becomes further relevant to note that the order of 03 March 2022 was challenged by the respondents in terms of LPA No. 179-180/2022 which came to be dismissed by a Division Bench of the Court in terms of its order dated 22 March 2022.

19. The Court has already detailed the challenge raised on jurisdictional grounds by the petitioners against the proceedings initiated under the Act. In its order of 03 March 2022, the Court has recorded reasons which justified the writ petition being entertained notwithstanding the objection of the respondents that the petitioners should be relegated before the Adjudicating Authority and for

those questions being left for its decision in the first instance. The aforesaid order has undisputedly attained finality consequent to the letters patent appeal coming to be dismissed. In view of the aforesaid, the objection noticed above is also rejected.

D. THE BACKGROUND

20. Before proceeding to deal with the merits of the matter, the following salient facts may be noticed. PIL is stated to have applied for the grant of a mining lease on 25 May 1992. Its application is stated to have been taken up for consideration by the Screening Committee while dealing with other proposals relating to captive mining by power generating companies in its meeting held on 14 July 1993. According to the petitioners, PIL installed a Sponge Iron Plant at Chotia in the State of Chhattisgarh with a production capacity of 1.5 LTPA on 01 November 1993. On 30 September 1996, the Ministry of Coal is stated to have apprised PIL of its decision to permit it to explore the Hasdeo-Arand coal block for captive development. Pursuant to the aforesaid communication, PIL is stated to have apprised the Ministry of Coal of it having undertaken preparatory steps for exploration of the Chotia block falling within the Hasdeo-Arand and Panchvahini coalfields. The application for allocation of the Chotia coal block remained pending for consideration till it was allocated to PIL on 04 September 2003. On 07 April 2010, the first FIR came to be registered. That FIR alluded to acts of PIL which were alleged to amount to a misrepresentation with respect to its captive activity, submission of false and incorrect information in order to obtain allotment of the coal block and diversion of coal extracted from that block in the open market. In terms of that first FIR and chargesheet, PIL was alleged to have

diverted 2,27,000 tons of coal in the open market and thus earned illegal profits amounting to Rs. 22.7 crores. The allegations forming subject matter of the first chargesheet were succinctly noticed by the Court in its judgment of 05 September 2014 as follows:-

> "3. During the course of hearing, the facts adverted to by learned Senior Counsel for petitioners as culled out from the charge-sheet are as under:
>
> *I. M/s. Prakash Industries Ltd. (PIL) referred to as AccusedNo.4 installed a sponge iron plant in the year 1993 with an annual production capacity of 1,50,000 MT per annum with one functioning kiln. (Para-17.3 of the Charge-Sheet at page-l46 of Vol.I refers)*
>
> *II. In the year 1996, accused No.4-PIL added another kiln increasing the annual production capacity to 2,50,000 MT per annum. Therefore, in the year 1996, the production capacity of Accused No.4-PIL was 4,00,000MTper annum.*
>
> *III. The third kiln having an annual production capacity 0f 2,00,000 MT per annum was installed* in the year *2009. So, the total capacity of accused No.4-PIL in the year 2009 was 6,00,000 MT per annum.*
>
> *IV. For the purpose of expansion of sponge iron capacity from 4,00,000 MT per annum to 8,00,000 MT per annum, the Ministry of Coal in the year 2003 allotted Chotia Coal Block to accused No.4-PIL for developing third and fourth kiln. Infact, the kiln No.3 was set up in March 2009 and Kiln No.4 was set by April 2010.*
>
> *V. While the capacity of accused No.4-PIL was being enhanced, PIL was getting linkage coal which was stopped in January 2007 on its request.*
>
> *VI. In the year 2006, Ministry of Coal, advertised for allocation of 38 coal blocks for captive use. PIL applied for allocation of Utkan Coal Block and Vijay Central Coal Block (Para-17.4 of the Charge Sheet at Page-147 refers). The application is of January 12, 2007. (at Page 210 in Vol. II).*
>
> *VII. The document dated 08.10.2009 of the office of the Coal Controller specifically states that Chotia Coal Block was allotted to PIL on September 4,2003 to meet the additional coal requirement for expansion of annual capacity of sponge iron project at Champa from the existing 4,00,000 MT P.A. to 8,00,000 MT P.A. i.e. additional 4,00,000 MT P.A. capacity. (Para-I at page - 367 of Vol.II) [document D-46 (Annexure P-20) refers].*

VIII. The afore-referred application reflects that PIL at that point of time i.e. in the year 2006 had an annual production capacity of 4, 00, 000 MT P.A. but had been allocated coal for the increased capacity upto 8,00,000 MT P.A. (at pages-215 and 216 of Vol.II)

IX The aforesaid Application which seeks allocations of Vijay Central beyond the capacity of 8,00,000 MT P.A. clearly states that the capacity in the year 2006 was only 4,00,000 MT P.A. whereas the application also stipulates that its capacity had already been increased to 8, 00, 000 MT P.A. for which coal allocation had already been done from Chotia Coal Block.

X. The above-said Application was forwarded to the Ministry of Steel for examination and recommendation. (Para-17.4 at page-147 of Charge-Sheet refers).

XI. Ministry of Steel vide OM dated December 6, 2007recommended allocation in favour of PIL for Vijay Central Coal Block showing its existing capacity as of 8, 00, 000 MTPA for the proposed additional 12,00,000MTPAfor an over all capacity of 20,00,000 MTPA (Para-17.5 at page-147 of Charge-Sheet refers).

XII. The Screening Committee in meetings of 7th & 8th December, 2008 requested applicants to make individual presentations and on July 3, 2008 met to finalize all recommendations pending with them. The recommendation for allocation of additional 12,00,000 MT P.A. by Ministry of Steel in favour of PIL from Vijay Central Coal Block was cleared. (Para-17.6 atpage-147 of Charge-sheet refers).

XIII. However, before the final orders of allocation were made, M/s. SKS Ispat Power Ltd (SKS) on July 7, 2008 questioned the capacity of PIL as disclosed and accused PIL of inflated capacity and production figures to Secretary Coal. This representation was forwarded· in July 8, 2008 to Ministry of Steel. [Para-17.8 of Charge-sheet on page-148 and D-7(Annexure P-9) at page 250 refers].

XIV. On July 9, 2008 Ministry of Steel sought fresh production figures from PIL for the last 6 months in respect of its sponge iron plant at Champa. (Para-17. 9 at page 148 of Charge-Sheet at page 254 refers).

XV. That PIL responded by letter dated 10.07.2008 under the alleged signatures of Accused No.3-A. K. Chaturvedi, petitioner No. I herein giving excess production figures of sponge iron. Alongwith this letter ER Forms, Surveyors Report and CA's certificates were purportedly enclosed. The Ministry of Steel after examining the representation of SKS forwarded it to the Ministry of Coal. (Para-17.9 on page 148 of Charge-Sheet refers).

XVI. The Forensic Report (at page 340) revealed this document of 1O' July, 2008 does not bear the signatures of A.K. Chaturvedi. However, the Forensic Report states that documents dated 10.07.2008 and 23.07.2008 are on the Letter Head of PIL and the source of origin of the Paper in the two letters is the same. (Para-17.12 on page 150 of Charge-Sheet refers).
XVII.Another representation dated 16.07.2008 was received by Ministry of Steel from SKS and the Steel Ministry sought comments from the Ministry of Coal.

XVIII. On 23.07.2008 PIL responded under the signatures of A.K. Chaturvedi and forwarded copies of ER Forms which showed the production figures at page 153 in Vol.I as reflected in Column II of the table set out therein. (Para-17.11 on page 150 of charge-sheet refers).

XIX. That pursuant to the complaints of SKS and the documents of July 10 and July 23, 2008 the Ministry of Coal and Ministry of Steel held a meeting on July 25,2008, the Minutes of which dated September 1, 2008 were forwarded to the Ministry of Steel by way of furnishing clarifications. Ministry of Coal decided to undertake a spot verification of the production capacity of PIL and directed G.K. Basak Executive Secretary JPC on September 2, 2008 to visit the Factory Premises of PIL and assess its production capacity and forward a report to the Ministry of Steel. (Para-17.13 on page 150 of charge-sheet refers).

XX. A spot Inspection at PIL site was conducted by accused-Mr. G.K. Basak and Mr. Soumen Chatterjee on September 4, 2008. They submitted a verification report on September 5, 2008 and forwarded it to the Ministry of Steel. The Inspection Report indicated that the PIL had four kilns and annual installed capacity of sponge iron at 7.2 lacs MT P.A. The visits and the report of G.K. Basak and Soumen Chatterjee Accused No.1 & 2 are not disputed. (Para-17.14 on page 150 of Charge-Sheet refers).

XXI. The minutes of the joint meeting dated July 25, 2008 (at page 348 in Vol.II), reflect that in the year 2008, both the Ministry of Steel and Ministry of Coal were aware that the then current capacity for production of sponge iron was 6, 00, 000 MT P.A. and that the allege false representation of capacity by PIL is not substantiated. (at Para 6 page 349 in Vol. II refers).

XXII. On further complaints, clarification was sought from AccusedNo.1 &2 on the contents of their spot verification report and they substantially reiterated their position on production capacity of PIL.

XXIII. The crux of the prosecution is that the quantities of sponge iron manufactured by PIL as reflected in the attested copies of ER-1 Forms and in the

report of Basak and Soumen Chatterjee on September 5, 2008 are inconsistent with the data forwarded by PIL along with ER-1 Forms in their letter dated July 23, 2008. In fact, according to the charge-sheet, there are no ER-1 forms in original as copies thereof were submitted to the Ministry of Steel along with the alleged communication of 10th July, 2008. The original ER-I Forms are in fact submitted to the Ministry of Steel by PIL on 23rd July, 2008. This fact is admitted by the prosecution Pg 150 of paper book refers).”

The prosecution case on conspiracy angle qua petitioners is based on the following two elements: -

• That the report of accused-G.K. Basak and Soumen Chatterjee submitted on September 5, 2008 reflecting production figures of PIL substantially tallied with the data of production figures provided in the alleged letter of 10 July, 2008 to the Ministry of Steel.
• That on 4th and 5th September, 2008, at the time of inspection by Accused No. I & 2, petitioners A.K. Chaturvedi (Accused No.3) was also present.””

21. The learned Judge after considering the submission(s) as addressed at the behest of respective parties proceeded to record the following conclusions: -

“12. Both the sides were heard at length to find out as to whether a prima facie case is made out against petitioners to put them on trial. The charge-sheet as well as the documents, which are part of the chargesheet, have been duly considered. Thereupon, a prima facie conclusion arrived at is that the material on record which forms the part of the charge-sheet is not sufficient to support the conclusion arrived at by trial court. To say the least, trial court was not justified to put petitioners on trial, merely because there is confusion about the production capacity of the operating kilns. Trial court in the impugned order has noted that the incriminating letter of 10" July, 2008 does not bear the signatures of petitioner-A.K. Chaturvedi, but has not adverted to any circumstances or material on record to jump to a conclusion that the aforesaid letter has been fabricated.
13. It has to be kept in mind that petitioners are sought to be prosecuted with the aid of Section 120-B of IPC. No doubt, direct evidence of conspiracy need not be there but circumstances justifying inference of criminal conspiracy ought to be there. During the course of hearing, attention of this Court was not drawn to any such circumstance, to enable this Court to prima facie infer that petitioners had conspired with their co-accused to commit the offences in question. Trial court was not at all justified in observing that the stand of petitioners relates to facts in issue. At this stage, it would be pertinent to refer to petitioners’ communication of 23rd July, 2008 and the documents accompanying it

(Annexure P-14) which is part of the charge-sheet. Undisputedly, aforesaid communication *(Annexure P-I4)* reflects the correct factual position and in the face of aforesaid undisputed document, there remains no justification to put petitioners on trial in this case.

14. It would be worthwhile to note that the correct factual position was disclosed bypetitioners, not only in its communication of 23rd July, 2008 (Annexure P-14), but atthe earliest opportunity i.e. in petitioners' application of 12th January, 2007 for allotment of captive coal blocks, which is also a document (D-55) forming part of the charge-sheet. On behalf of respondent-CBI, it was much emphasized that petitioners' communication of 29 January, 2007 (Annexure P-5) disclosing the correct factual position is not part of the charge-sheet. This is true, but it appears from bare perusal of petitioners' communication of 29 January, 2007 (Annexure P-5) that it is a reiteration of petitioners' earlier communication of 12th January, 2007 (Annexure P-4) which infact is part of the charge-sheet and therein it is clearly disclosed that the existing capacity of the plant in question is 4 LTPA. No doubt, the sanctioned capacity of theexisting plant in question was 8 lac metric tonnes per annum. Thus, there is no confusion about the existing capacity of the plant in question.

15. During the course of hearing, attention of this Court was not drawn to any material on record to show that incriminating letter of 10 July, 2008 was fabricated by petitioners. Nor it can be said that petitioners' communication of 12" January, 2007 (reflecting the correct existing position) is a fact in issue as the aforesaid communication is part of the charge-sheet and as it remains uncontroverted. So it is not required to be proved in evidence. Thus, on both these counts, impugned order isrendered unsustainable."

22. The petition ultimately came to be allowed in the following terms: -

> "19. By applying the parameters reiterated in Rajiv Thapper (supra) to the facts of the instant case and in the face of undisputed documentary evidence [Annexures P-4, P-14, P-20 & P-24], impugned order putting petitioners on trial is rendered unsustainable qua petitioners only and is accordingly quashed to the extent it relates to them.
>
> 20. This petition and the application are disposed of while making it clear that any observation made in this order will not have any bearing on the prosecution case qua co-accused of petitioners who are facing trial for the substantive offences in this case, on the basis of spot Inspection Report (Annexure P-16) prepared by them…"

23. From the disclosures made in the counter affidavit which has been filed in these proceedings, the Court takes note of the allegation that PIL mined coal in a

wrongful manner between 2006-2015 and extracted coal valued at Rs.951.77 crores. It is further alleged that based on the revenues generated as a result of the said criminal activity, various properties were purchased by PIL acting through its related and sister concerns. However, and as noticed in the introductory part of this judgment, the impugned proceedings rest upon the allegations which form part of the second chargesheet. That chargesheet takes due notice of the fact that the original FIR as well as the first chargesheet already stands quashed. It is perhaps in that background that the said chargesheet restricts itself to activities and events which transpired up to the allocation of the coal block itself on 04 September 2003. This is evident from the following recitals as appearing in the second chargesheet: -

> "16.57 A case RC AC2 2010 A0001 was registered by CB I, AC-I, -New Delhi on 07 .04.201 0 against Mis Prakash Industries Limited and others. The matters related to post allocation and diversion aspects in "respect of Chotia coal block were investigated in the said case and Charge-sheet and Supplementary Chargesheets were filed. Since, the post allocation aspect has already been investigated, the investigation in the present case is limited upto allocation stage only.
>
> 16.59. From the above facts, it is evident that Sh. V. P. Agarwal and Sh. A. K. Chaturvedi misrepresented before Ministry of Coal/Screening Committee and Ministry of Steel at many occasions on existing capacity of sponge iron, ISO-9002 certification, existing capacity of induction furnaces (steel making capacity), existing capacity of fluidised .Bed Boiler and BIFR matter. . Sh. V. P. Agarwal also submitted forged CA's Certificate to Ministry of Coal and the Ministry of Steel. The accused persons Sh. V. P. Agarwal, Sh. A. K. Chaturvedi and the Company M/s Prakash industries Limited conspired with each other and thus got the Chotia coal block allocated fraudulently and dishonestly from the Ministry of Coal. Hence, the said accused persons committed the offences punishable under section 120-B r/w 420 and 471 of IPC and substantive offences thereof. It is, therefore, most respectfully prayed that the above named accused persons, may kindly be summoned, tried and punished in accordance with law, in the interest of justice."

24. The Court notes that while the second chargesheet restricts itself to events which occurred up to 04 September 2003 only, the provisional order of attachment takes cognizance of acquisition of properties which occurred prior to as well as after the allocation of the coal block itself. It is in the aforesaid backdrop that petitioners have laid a challenge to the initiation of proceedings. Post the submission of the second chargesheet, the Trial Court took cognizance of the same. Those proceedings as noticed hereinbefore form subject matter of challenge in S.L.P (Crl.) Nos. 656-657/2022 in which further proceedings before the Trial Judge have been stayed.

25. On 1 December 2021 the respondents passed the impugned provisional order of attachment. It was this order which was placed for confirmation before the Adjudicating Authority which issued notice calling upon the petitioners to submit their explanation. It was those proceedings initiated by the Adjudicating Authority which were assailed by means of the amendment application which has come to be allowed. Insofar as connected writ petition No. 15000/2021 is concerned, the petitioner Nos. 1 to 9 are stated to be associate companies of PIL. The properties which have come to be provisionally attached stand registered and recorded in their names. It is the provisional order of attachment which has constrained those petitioners to approach this Court challenging the validity of the proceedings initiated on lines similar to those urged on behalf of PIL.

E. SUBMISSIONS

26. Mr. Sibal, learned Senior Counsel appearing in the main writ petition being W.P.(C) 14999/2021 has assailed the initiation of proceedings under the Act on

the following jurisdictional grounds. Mr. Sibal contended that the allocation of coal cannot be construed as being proceeds of crime since it clearly does not represent property which may be said to be derived or obtained as a result of criminal activity relating to a scheduled offence. It was submitted that the allocation of coal in itself cannot possibly be understood as being proceeds of crime since it only conferred upon the petitioner the right to apply for the grant of a mining lease. It was submitted that the entire allegation levelled against PIL is of having obtained that allocation by way of misrepresentation and fraudulent conduct. According to Mr. Sibal it was only monies and profits that may have been generated by the utilisation of that allocation which could have possibly fallen within the scope of the expression "*proceeds of crime*" as defined in Section 2(1)(u**)** of the Act. Mr. Sibal then submitted that the allocation of coal would also not fall within the ambit of Section 3 since that also proceeds on the basis of a party being involved in any process or activity connected with proceeds of crime and which process or activity may include the concealment, possession, acquisition or use of property along with conduct which may amount to projecting or claiming it to be untainted property. Mr. Sibal submitted that the allocation of coal was made by the Union Government and it cannot possibly be alleged that it was property which was concealed, possessed, acquired or used nor can it be alleged that the same was projected or claimed as untainted property. It was submitted that the allocation of coal was made by a public act of a competent authority in the Union Government and existed as such till it was ultimately quashed and set aside in **Manohar Lal Sharma**. In view of the above, it was contended that the coal allocation cannot possibly be construed as falling within

the contours of Section 3 and thus evidencing the commission of an offence of money laundering.

27. It was then submitted that it is only proceeds of crime that may have been obtained as a result of criminal activity and which is then utilized for acquisition of property which may be claimed or projected as untainted which can form the subject matter of proceedings under the Act. According to Mr. Sibal, both on account of the fact that the allocation cannot amount to proceeds of crime and secondly since it would not fall within Section 3 of the Act, the impugned proceedings are rendered wholly without jurisdiction and are liable to be quashed. Mr. Sibal further laid emphasis on the fact that any proceeds that may have been generated by utilization of the allocation formed subject matter of the first chargesheet. Mr. Sibal underlined the fact that the second chargesheet stood restricted up to events which had occurred till 04 September 2003 that is the date when the coal block came to be allocated. According to Mr. Sibal since those proceeds formed subject matter of the first chargesheet alone and fall outside the purview of the second chargesheet, those facts and events cannot possibly be countenanced to sustain the impugned proceedings.

28. Reverting then to the particular facts of the main writ petition, it was submitted that undisputedly the allocation of coal was made on 04 September 2003 and thus evidently at a time when neither the Act was in force nor an offence of money laundering in existence. It was pointed out that the Act itself came to be promulgated on 01 July 2005. Mr. Sibal also drew the Court's attention to the fact that Sections 120B and 420 of the Penal Code came to be included as scheduled offences only on 1 June 2009. According to Mr. Sibal,

bearing in mind the fact that the allocation of coal was made on 04 September 2003, the invocation of the provisions of the Act would clearly amount to violation of Article 20(1) of the Constitution. According to Mr. Sibal, the impugned proceedings essentially seek to penalize the petitioners for the commission of an offence which was not even in existence on 04 September 2003. It was also pointed out that the impugned proceedings lay no allegation of any offence of money laundering having been committed by the petitioners after the Act had come into force. For the purposes of explaining the extent of the guarantee enshrined in Article 20(1) of the Constitution, Mr. Sibal placed reliance upon the decision of the Supreme Court in **Mahipal Singh vs. CBI**[16] and more particularly to the following paragraphs which are extracted hereunder: -

> "14. We have given our most anxious consideration to the rival submissions and in the light of what we have observed above, the submissions advanced by Mr Subramanium commend us. It is trite that to bring an accused within the mischief of the penal provision, ingredients of the offence have to be satisfied on the date the offence was committed. Article 20(1) of the Constitution of India permits conviction of a person for an offence for violation of law in force at the time of commission of the act charged as an offence. In the case in hand, examinations alleged to have been rigged had taken place in January 2010, June 2010, November 2010 and January 2011 and the date on which the first information reports were registered, more than one charge-sheets were not filed against the accused for the offence of specified nature within the preceding period of ten years and further, the court had not taken cognizance in such number of cases. As observed earlier, for punishment for the offence of organised crime under Section 3 of MCOCA, the accused is required to be involved in continuing unlawful activity which inter alia provides that more than one charge-sheets have been filed before a competent court within the preceding period of ten years and the court had taken cognizance of such offence. Therefore, in the case in hand, on the date of commission of the offence, all the ingredients to bring the act within Section 3 of MCOCA have not been satisfied. We are conscious of the fact that there may be a case in which on the date of registration of the case, one may not be aware of the fact of charge-sheet and

[16] (2014) 11 SCC 282

cognizance being taken in more than one case in respect of the offence of specified nature within the preceding period of ten years, but during the course of investigation, if it transpires that such charge-sheets and cognizance have been taken, Section 3 of MCOCA can be invoked. There may be a case in which the investigating agency does not know exactly the date on which the crime was committed; in our opinion, in such a case the date on which the offence comes to the notice of the investigating agency, the ingredients constituting the offence have to be satisfied. In our opinion, an act which is not an offence on the date of its commission or the date on which it came to be known, cannot be treated as an offence because of certain events taking place later on. We may hasten to add here that there may not be any impediment in complying with the procedural requirement later on in case the ingredients of the offence are satisfied, but satisfying the requirement later on to bring the act within the mischief of penal provision is not permissible. In other words, procedural requirement for prosecution of a person for an offence can later on be satisfied but ingredients constituting the offence must exist on the date the crime is committed or detected. Submission of charge-sheets in more than one case and taking cognizance in such number of cases are ingredients of the offence and have to be satisfied on the date the crime was committed or came to be known.

15. Now we proceed to apply the principle aforesaid to the facts of the present case. We find that on the date the offence was committed or came to be known, one of the ingredients of the offence i.e. submission of charge-sheet and cognizance of offence of specified nature in more than one case within the preceding period of ten years, has not been satisfied. Therefore, we have no other option than to hold that the accused cannot be prosecuted for the offence under Section 3 of MCOCA."

Reliance was also placed on the judgment of the Supreme Court in **State of Maharashtra vs. Kaliar Koil Subramaniam**[17] and to the following principles which were laid down therein: -

"6. It appears that the Legislature thereafter thought it proper to do away with the rule of evidence provided by sub-section (3) of Section 5 and inserted the new clause (*e*) in sub-section (1) of Section 5 as one more category of the offence of criminal misconduct. But it cannot be gainsaid that the new offence, under the newly inserted clause (*e*), became an offence on and from December 18, 1964 by virtue of Section 6 of the Amending Act 40 of 1964. In this view of the matter, the High Court rightly held that "in the absence of any evidence on record to show that

[17] (1977) 3 SCC 525

the appellant acquired or was found to be in possession of pecuniary resources or property disproportionate to his known sources of income after the coming into force of the Amending Act", he was entitled to the protection of clause (1) of Article 20 of the Constitution which provides as follows:

> "20. (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."

So when there was no law in force at the time when the accused was found in possession of disproportionate, assets by the search which was made on May 17, 1964, under which his possession could be said to constitute an offence, he was entitled to the protection of clause (1) of Article 20 and it was not permissible for the trial court to convict him of an offence under clause (*e*) of sub-section (1) of Section 5 as no such clause was in existence at the relevant time. The accused could not therefore be said to have committed an offence under clause (*e*) of sub-section (1) of Section 5 read with sub-section (2) of that section."

29. Mr. Sibal submitted that the facts of the present writ petition would reveal that at the time when the allocation was made neither the Act was in existence nor were Sections 420 and 120B of the Penal Code enlisted as scheduled offences. It is in the aforesaid backdrop that learned Senior Counsel contended that the proceedings as initiated are not only without jurisdiction but also violative of the constitutional guarantee enshrined in Article 20(1) of the Constitution. Mr. Sibal also raised the issue of the Explanation to Section 3 not only expanding but going beyond the contours of the main provision itself. According to learned senior counsel, an Explanation cannot travel beyond the ambit of the principal provision itself. In support of the aforesaid contention, learned senior counsel referred the Court to the decision in **S. Sundaraman Pillai Vs. V.R. Pattabiraman**[18].

[18] (1985) 1 SCC 591

30. Mr. Chawla, learned counsel appearing for the petitioners in the connected petition, while adopting the aforesaid submissions has additionally contended that the provisional order of attachment fails to record any satisfaction or "reason to believe" that the petitioners are in possession of proceeds of crime and which is a *sine qua non* for exercise of powers under Sections 5 and 8 of the Act. Referring to the order passed by the Adjudicating Authority while issuing notice to the petitioners, it was pointed out that the Adjudicating Authority has failed to record any independent reasons which may have led to the formation of a reasonable belief that the properties which were subjected to provisional attachment were in fact proceeds of crime. It was further urged that the Adjudicating Authority has only expressed his agreement with the prima facie opinion which had been formed by the Deputy Director and which had led to the order of provisional attachment having coming to be passed. According to learned counsel, the impugned order would ex facie establish an abject failure by the Adjudicating Authority to record reasons. It was submitted that this clearly evidenced a non-application of mind.

31. Turning then to the facts relating to the properties which had been provisionally attached, it was contended that they had been purchased prior to Sections 420 and 120B being included as scheduled offences and therefore cannot be related even remotely to proceeds of crime emanating from an alleged scheduled offence having been committed. Additionally, Mr. Chawla placed reliance on the decision rendered by a Division Bench of the Punjab and Haryana

High Court in **Seema Garg vs. Deputy Director, Directorate of Enforcement**[19] to submit that the orders passed by the respondents fail to allude to any material or evidence which may have linked the attached properties, directly or indirectly, to proceeds of crime. Mr. Chalwa in support of his submissions has placed reliance upon the following observations as entered by the Division Bench of that High Court in **Seema Garg**:-

> "13. Having scrutinized record of the case and heard arguments of both sides, we find that it would be appropriate to look into the scheme of the PMLA before adjudication of issues involved. The Phrase 'proceeds of crime' has been defined under Section 2(1)(u) of the PMLA and the same is reproduced as under:
>
> Section 2(1)(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 or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad. Explanation-For the removal of doubts, it is hereby clarified that "proceeds of crime" include property not only derived or obtained from the scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence.
>
> There are three limbs of Section 2(1)(u) of the PMLA namely:
>
> i) Any property derived or obtained directly or indirectly as a result of criminal activity relating to scheduled offence;
>
> ii) Value of property derived or obtained from criminal activity;
>
> iii) Property equivalent in value held in India or outside where property obtained or derived from criminal activity is taken or held outside the country.
>
> **14.** The first limb deals with property directly or indirectly obtained from criminal activity. The third limb is applicable where property obtained from criminal activity is held or taken outside India. In case property derived/obtained from criminal activity is held or taken outside India, property of equivalent value held in India or abroad would be proceeds of crime. The second limb, which is the core issue

[19] 2020 SCC OnLine P&H 738

involved in present appeals covers 'value of property' derived/obtained from criminal activity.

15. The phrase 'property' has been defined under Section 2(1)(v) of the PMLA which is reproduced as under:

> Section 2(1)(v) "property" means any property or assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and includes deeds and instruments evidencing title to, or interest in, such property or assets, wherever located.
>
> Explanation-For the removal of doubts, it is hereby clarified that the term "property" includes property of any kind used in the commission of an offence under this Act or any of the scheduled offences.

16. As per above Sub-Section; property includes movable, immovable, tangible, intangible, deeds and instruments evidencing title/interest in assets or property. Patent, copyright, goodwill are best example of incorporeal/intangible assets.

xxxx xxxx xxxx

20. As per scheme of the PMLA, after recording of ECIR, two sets of proceedings are initiated in case of commission of offence of money laundering, namely provisional attachment of property at the end of Enforcement Department and criminal trial before Special Court. Section 3 defines offence of money laundering and Section 4 prescribes punishment for money laundering. Section 3 and 4 of PMLA are extracted below:

Section 3. Offence of money-laundering. - Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering.

Explanation - For the removal of doubts, it is hereby clarified that, -

(i) a person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely:—

(a) concealment; or

(b) possession; or

(c) acquisition; or

(d) use; or

(e) projecting as untainted property; or

(f) claiming as untainted property, in any manner whatsoever;

(ii) the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever.

Section 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.

xxxx xxxx xxxx

34. We deem it appropriate to examine contention of Respondents from another angle i.e. offence of money laundering as defined under Section 3 of the PMLA. As per Section 3 of the PMLA, any person who has directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is involved in concealment, possession, acquisition or use or projecting as untainted property or claiming as untainted property shall be guilty of an offence. If property purchased prior to commission of alleged offence or property not derived or obtained from commission of scheduled offence is declared as proceeds of crime, every person who is concerned with sale, purchase, possession or use of said property would be guilty of offence of money laundering. A person who is not connected with commission of scheduled offence as well property derived from said offence but had dealt with any other property of a person, who had committed scheduled offence, would fall within the ambit of Section 3 of the PMLA, which cannot be countenanced in law. There would be total chaos and uncertainty. The authorities would get unguided and unbridled powers and may implicate any person even though he has no direct or indirect connection with scheduled offence and property derived from thereon but has dealt with any other property (not involved in scheduled offence) of the person who has derived or obtained property from scheduled offence. It would amount to violation of Article 20 and 21 of Constitution of India.

35. In our considered opinion, to understand true meaning of second limb of definition of 'proceeds of crime', it must be read in conjunction with Section 3 and 8 of the PMLA. If all these sections are read together, phrase 'value of such property' does not mean and include any property which has no link direct or

> indirect with the property derived or obtained from commission of scheduled offence i.e. the alleged criminal activity. 'Value of such property' means property which has been converted into another property or has been obtained on the basis of property derived from commission of scheduled offence e.g. cash is received as bribe and invested in purchase of some house. House is value of property derived from scheduled offence. Cash in the hands of an accused of offence under Prevention of Corruption Act, 1988 is property directly derived from scheduled offence, however if some movable or immovable property is purchased against said cash, the movable or immovable property would be 'value of property' derived from commission of scheduled offence. If a person gets some land or building by committing cheating (Section 420 of IPC) which is a scheduled offence and said building or land is sold prior to registration of FIR or ECIR, the property derived from scheduled offence would not be available, however money generated from sale or transfer of said property in the form of cash or any other form of property may be available. The cash or any other form of property movable or immovable, tangible or intangible would be 'value of property' derived from commission of scheduled offence.

32. Controverting the aforesaid submissions, Mr. Raju, learned ASG, has addressed the following submissions. It was firstly contended that merely because Sections 420 and 120B came to be included as scheduled offences on 1 June 2009, it cannot be said that the provisions of the Act have been accorded retroactive application. Mr. Raju submitted that the Act essentially targets the offence of money laundering. The learned ASG submitted that merely because the predicate offence may have been committed prior to the enforcement of the Act, that would not invalidate the proceedings initiated by the respondents. Mr. Raju drawing the attention of the Court to the written submissions submitted by the learned ASG in proceedings before the Supreme Court has contended that it is well settled that merely because a part of the requisite for action initiated under a statute is drawn from a point prior to the enforcement of the Act that does not make the Act retrospective. Learned ASG has referred to the decision of the U.S.

Supreme Court in **Samuels vs. Mc Curdy, Sheriff of Dekalb County, Georgia**[20] where the following observations were made: -

> "Three grounds are urged for reversal. First, the 1917 law under which liquor lawfully acquired can be seized and destroyed is an ex post facto law. Second, the law in punishing the owner for possessing liquor he had lawfully acquired before its enactment deprives him of his property without due process. Third, it violates the due process requirement by the seizure and destruction of the liquor without giving the possessor his day in court. First, the law is not ex post facto law. It does not provide a punishment for a past offense. It does not fix a penalty for the owner for having become possessed of the liquor. The penalty it imposes is for continuing to possess the liquor after the enactment of the law. It is quite the same question as that presented in Chicago & Alton R.R. Co v Tranbarger, 238 U.S. 67. There a Missouri statute required railroads to construct water - outlets across their rights of way. The railroad company had constructed a solid embankment twelve years before the passage of the Act. The railroad was penalized for non - compliance with the statute."

33. Mr. Raju then drew the attention of the Court to the decision of the Supreme Court in **Mohan Lal vs. State of Rajasthan**[21]. It was submitted that Article 20(1) cannot come to the aid of the petitioner since all that it prohibits is a conviction or sentence under an *ex post facto* law. On the basis of the submissions noticed and the principles enunciated in **Mohan Lal,** it was urged that the date of coming into force of the Act as well as the date of the predicate offences having been committed was irrelevant. Mr. Raju submitted that if a scheduled offence is committed even before the enactment of the Act or a particular offence as specified in the Penal Code comes to be added in the Schedule subsequently, that in itself cannot mean that the invocation of the penal provisions of the Act would amount to its retrospective application. It was submitted that the Act penalizes a

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[20] 1925 SCC online US SC 42

[21] (2015) 6 SCC 222

separate and distinct offence of money laundering and it is therefore this offence alone which would determine the validity of proceedings. It was additionally submitted that the principles laid down in **Seema Garg** are clearly contrary to the judgment rendered by this Court in **Deputy Director, Directorate of Enforcement vs. Axis Bank**[22] and therefore it is the principles laid down in the latter which would bind and apply. According to the learned ASG, **Axis Bank** has clearly held that the Act empowers the respondents not only to proceed against properties which may be directly linked to proceeds of crime but also against properties which would be equivalent in value thereof. It was submitted that in the present case the properties which have been provisionally attached are equivalent in value to the quantification of proceeds of crime and therefore the action as initiated by the respondents cannot be faulted. According to Mr. Raju even though the associate or sister companies may not have been directly charged with the commission of the predicate office, they can still be proceeded against if it is found that they are in possession of properties which were acquired or are the fruits of proceeds of crime.

34. Mr. Raju controverting the submissions of Mr. Sibal with respect to the validity of the Explanation as appended to Section 3 submitted that in the absence of any challenge to the validity of that provision formally by the writ petitioners, the submissions in that respect are not liable to be countenanced. According to Mr. Raju the Explanation clarifies that the offence of money laundering would be evidenced if it is found that a person is involved in one or more of the activities

[22] 2019 SCC OnLine Del 7854

specified in the principal Section namely of concealment, possession, acquisition or use of proceeds of crime or projecting the same as untainted property or claiming it to be untainted in any manner whatsoever. According to the learned ASG, the Explanation only clarifies the provisions of Section 3 and consequently the submissions to the contrary are liable to be rejected.

35. It may be noted that while Mr. Sibal did address submissions touching upon the validity of the Explanation as introduced in Section 3, the Court finds no justification to rule or comment upon the same since and as was recorded hereinbefore, the validity of the provisions of the Act are not questioned in these writ petitions. Therefore, there does not exist any justification to render any finding with respect to the aforesaid contention.

F. MONEY LAUNDERING- A STAND ALONE OFFENSE

36. The first issue which merits consideration is the question of the provisions of the Act being interpreted as creating a stand-alone and independent offence. This issue assumes significance in the facts of the present case especially since the proceedings relating to the first chargesheet stand quashed. As this Court construes the provisions of the Act it is manifest that an offence of money laundering is founded on the commission of a predicate offence. The issue which arises is what would be the consequential impact, if any, of a predicate offence and proceedings in relation thereto coming to be quashed or even compounded and the accused discharged. In the considered opinion of this Court once it is found by the competent authority that a predicate offence is either not evidenced or on facts it is held that no offence at all was committed, proceedings under the

Act would necessarily have to fall or be brought to a close. The Court bears in mind the language of Section 3 of the Act which links the activities and processes of money laundering to proceeds of crime. Section 2(1)(u) creates an indelible link between property derived or obtained and criminal activity relating to a scheduled offence. It is only when it is found that a person has derived property as a result of criminal activity that the offence of money laundering can be said to have been committed. Absent the element of criminal activity, the provisions of the Act itself would not be attracted. The offence of money laundering is essentially aimed at depriving persons of the fruits and benefits that may have been derived or obtained from criminal activity. However, once it is found that a criminal offence does not stand evidenced, the question of any property being derived or obtained therefrom or its confiscation or attachment would not arise at all and in any case, proceedings if initiated under the Act would be wholly without jurisdiction or authority. The Court notes that the issue of whether proceedings under the Act would survive even after the acquittal of a person in proceedings relating to the predicate offence was duly answered by a learned Judge of the Court in **Rajiv Chanana vs. Dy. Director, Directorate of Enforcement** [23]. The relevant paragraphs are extracted hereinbelow: -

> "18. The suggestion of the learned ASG that an attachment order under Section 5 of the PMLA would survive an acquittal of the concerned person for the alleged crime, is unsustainable. It was argued by the learned ASG that acquittal of the person after trial of a scheduled office would not release the order of attachment under PMLA till the trial for an offence under Section 3 of the PMLA is completed. This contention is based on an erroneous assumption that a trial for an offence of "money laundering" under the PMLA would survive. One is hard pressed to

[23] 2014 SCC OnLine Del 4889

imagine how a trial for an offence of money laundering can continue where the fundamental basis - the commission of a schedule offence - in this case offence under Section 307 IPC - has been found to be disproved.

19. It necessarily follows that the attachment of a property is liable to be vacated if the existence of a scheduled offence is negated. Clearly, attachment of proceeds of crime cannot continue if the alleged scheduled offence is not established after trial. Given the scheme of the PMLA, attachment of property (proceeds of crime) must be lifted if it is found that the scheduled offence, on the basis of which attachment was effected, does not exist. In absence of a scheduled offence, the question of existence of any proceeds thereof, do not arise."

37. The Court also takes note of the following pertinent observations as entered in **M/s. Mahanivesh Oils & Foods Pvt. Ltd. vs. Directorate of Enforcement**[24]**:-**

"26. Thus, plainly, the occurrence of a scheduled offence is the substratal condition for giving rise to any proceeds of crime and consequently, the application of Section 5(1) of the Act. A commission of a scheduled offence is the fundamental pre-condition for any proceeding under the Act as without a scheduled offence being committed, the question of proceeds of crime coming into existence does not arise.

27. In view of the above, the contention that the Act is completely independent of the principal crime (scheduled offence) giving rise to proceeds of crime is unmerited. It is necessary to bear in mind that the substratal subject of the Act is to prevent money-laundering and confiscate the proceeds of crime. In that perspective, there is an inextricable link between the Act and the occurrence of a crime. It cannot be disputed that the offence of money-laundering is a separate offence under section 3 of the Act, which is punishable under Section 4 of the Act. However as stated earlier, the offence of money-laundering relates to the proceeds of crime, the genesis of which is a scheduled offence. In the aforesaid circumstances, before initiation of any proceeding under Section 5 of the Act, it would be necessary for the concerned authorities to identify the scheduled crime. The First Proviso to Section 5 also indicates that no order of attachment shall be made unless in relation to a schedule offence a report has been forwarded to a Magistrate under Section 173 of the Code of Criminal Procedure, 1973 or a complaint has been filed by a person authorised to investigate the scheduled offence before a Magistrate or Court for taking cognizance of the scheduled offence. Thus, in cases where the scheduled offence is itself negated, the fundamental premise of continuing any proceedings under the Act also vanishes. Such cases where it is conclusively held that a

[24] 2016 SCC OnLine Del 475

commission of a scheduled offence is not established and such decision has attained finality pose no difficulty; in such cases, the proceedings under the Act would fail.

28. It was contended by Mr. Bhardwaj that, in terms of Section 8(5) of the Act, the attachment would continue till the conclusion of a trial of an offence under the Act before the Special Court irrespective of whether the person accused of the scheduled crime has been acquitted. In my view, this contention is also not acceptable. If the crime, which has allegedly resulted in the proceeds attached under the Act, is not established, the basis of the attachment would cease to exist and the question of proceeding further under the Act would not arise. The trial for an offence of money-laundering is also predicated on commission of a scheduled crime and would have to be terminated. It is only in cases where it is found that a scheduled crime has been committed that the question of determining whether an offence of money-laundering is made out would survive. Thus, in cases where the persons accused of a scheduled offence are acquitted, the fundamental premise that any proceeds have been derived or obtained from any activity relating to a scheduled offence by either the persons accused or any other person linked to them would also not hold good and, therefore, any proceeding initiated under the Act would have to be terminated."

38. The Court notes that the decision in **Mahanivesh Oils** forms subject matter of challenge in LPA 144/2016 where the following interim order came to be passed: -

> **"**Re-notify on 16.03.2017 under the same caption for hearing.
>
> We have observed that while allowing the writ petition by the order under appeal, certain findings were recorded by the learned Single Judge with regard to the enforcement of the Prevention of Money Laundering Act, 2002 on interpretation of the provisions of the said Act.
>
> We make it clear that the findings so recorded by the learned Single Judge shall not be construed as conclusive and binding precedent until further orders."

39. Before proceeding ahead, it would be pertinent to record that the Court has noticed the decision of Mahanivesh Oils in different sections of this decision. However conscious of the interim order passed on the LPA, it may only be

observed that the said decision has not been treated as a binding precedent by the Court. While certain conclusions upon which the Court has ultimately reached independently may appear to be in line with what was held in that decision, that is not liable to be understood as an outcome of this Court adhering to precedent. The Court has deemed it apposite to refer to **Mahanivesh Oil** for the completeness of the record and to essentially record the views that have been expressed on the questions posited in the decisions handed down by this Court as well as other High Courts.

40. Reverting then to the issue at hand, the Court observes that a similar view was expressed by the Allahabad High Court in **Sushil Kumar Katiyar vs. Union of India, Thru Dir. and Another**[25] as would be evident from paragraph 38 of that decision which is extracted hereinbelow: -

> **"38.** In view of what has been discussed above, I am of the view that the petitioner has been able to make out a good case for quashing of the summoning order for the simple reason that from the allegations made in the complaint, no offence under section 3 of the Money-Laundering Act is made out against the petitioner in view of the fact that the petitioner has been discharged from the scheduled offences and except the present complaint in which the impugned summoning order has been passed, no case is pending against him. The learned Sessions Judge while passing the impugned summoning order has not taken into account this fact that the petitioner has already been discharged of all the scheduled offences. The properties which were allegedly acquired by the petitioner during crime period, were also not acquired during the offence period, except the one of which sufficient explanation has been given by the petitioner. There was, thus, no sufficient ground to have summoned the petitioner for facing trial under section 3 of the Prevention of Money-Laundering Act. It is a settled law that summoning of a person to face trial in respect of an offence, is a serious matter and the court should examine in detail and record a finding that a person, prima facie, is guilty of an offence. A serious responsibility rests upon the courts before passing of the summoning order and the

[25] 2016 SCC OnLine All 2632

court must be satisfied that there is sufficient material to proceed against the accused person. In the present case, the opposite parties concealed the material fact in the complaint that the petitioner had already been discharged from the scheduled offence and no trial was pending against him. The impugned summoning order was passed by the learned Sessions Judge assuming that the trial in respect of the schedule offence was pending against him while as a matter of fact, no such trial was pending on the date when the complaint was filed and the summoning order was passed. The impugned summoning order therefore suffers from manifest error of law and is liable to be quashed."

41. More recently a learned Judge of the Court in **Directorate of Enforcement vs. Gagandeep Singh & Ors.**[26] laid down the following principles: -

> **"30.** The offence of money laundering, however, is not to be appreciated in isolation but is to be read with the complementary provisions, that is, the offences enlisted in the Schedule of the Act. The bare perusal of the abovementioned provisions of the PMLA establishes the pre-requisite relation between the commission of scheduled offences under the PMLA and the subsequent offence of money laundering. The language of Section 3 clearly implies that the money involved in the offence of money laundering is necessarily the proceeds of crime, arising out of a criminal activity in relation to the scheduled offences enlisted in the Schedule of the Act. Hence, the essential ingredients for the offence of Section 3 of the PMLA become, first, the proceeds of crime, second, proceeds of crime arising out of the offences specified in the Schedule of the Act and third, the factum of knowledge while commission of the offence of money laundering. In the present matter, at the initial stage of proceedings, the Respondents were charged for offences under Section 21/25/29 of the NDPS Act and 420/468/471/120B of the IPC, however, the learned Additional Sessions Judge, Amritsar, observed that material produced before the Court as well as the allegations made against the Respondents were largely made upon suspicion. Though certain material, properties and cash, were recovered and attached/seized but the fact that such properties were obtained through proceeds of crime of drug trafficking could not be established.
>
> **31.** In view of the observation that the no scheduled offence was made out against the Respondents, this Court finds that an investigation and proceedings into the PMLA could not have been established against them at the first instance.
>
> **41.** Keeping in view the facts of the case, the submissions made, documents on record, judgments cited and the contents of the impugned Order, this Court finds

[26] 2022 SCC OnLine Del 514

> force in the argument that since no offences were made out against the Respondents as specified in the Schedule of the PMLA, the offence under Section 3/4 of the PMLA also, do not arise as the involvement in a scheduled offence is a pre-requisite to the offence of money laundering. The Petitioner was not able to establish the allegations against the Respondents and as such the material produced was not sufficient to find guilt against them. Further, at the stage of framing of charges, the learned Additional Sessions Judge, had to only satisfy itself of the apprehension that whether the accused persons had committed the offences based on the material before it, without going into the extensive appreciation of the evidence. Since there was no material on record that casted a shadow of doubt over the Respondents, they were rightly discharged of the offences. Therefore, there is no apparent error, gross illegality or impropriety found in the Order of the learned Additional Sessions Judge."

42. Both **Rajiv Chanana** and **Gagandeep Singh** were dealing with situations where persons had either been acquitted or discharged of the predicate offence. It was in the aforesaid backdrop that the Court held that once the predicate offence has ceased to exist, proceedings under the Act would neither survive nor sustain. There are however certain decisions of different High Courts which appear to have entered certain observations which may be construed as laying down a principle contrary to what was held in **Rajiv Chanana** and **Gagandeep Singh**. Those decisions would merit notice.

43. The Madras High Court in **VGN Developers P. Ltd., Represented by its Managing Director Shri D. Pratish and Another vs. Deputy Director, Directorate of Enforcement**[27] was called upon to rule on the continuance of proceedings under the Act even after proceedings in relation to the predicate offence as initiated by CBI had been brought to a close. Dealing with the submission that consequent to closure of the criminal proceedings, action taken

[27] 2019 SCC OnLine Mad 13270

under the Act would also be liable to be brought to a close, the Division Bench held as follows: -

> **"14.** As we do not have any quibble over the facts narrated, let us go into the issues raised. As rightly submitted by the learned Additional Solicitor General, the definition of "proceeds of crime" under Section 2(u) of the Act is very exhaustive and elaborate. It speaks of any property derived or obtained, directly or indirectly, by any person. It is no doubt true that the complaint has been made by the respondent only in pursuant to the scheduled offence. However, the object, rationale and the scope enshrined under the Prevention of Money Laundering Act, 2002, being a special statute is distinct and different from the one enshrined under the Penal Code, 1860 and the Prevention of Corruption Act. Though the facts may be overlapping the nature of investigation differs. Therefore, it cannot be stated that a mere closure by the Central Bureau of Investigation would provide a death knell to the proceedings of the respondent. In a given case, the complaint may emanate from a registration of a case involving scheduled offence. But the fate of the investigation in the said scheduled offence cannot have bearing to the proceedings under the Prevention of Money Laundering Act, 2002. Section 2(u) of the Act merely speaks of a criminal activity relating to a scheduled offence. Therefore, we are concerned with the criminal activity qua a scheduled offence. Section 3 deals with the offence on money laundering. Once the respondent is of the view that a person is involved in any process of activity connected with the "proceeds of crime", which definition is very wide then he gets the power to investigate further. When such an investigation gets completed and found that there indeed was a money laundering, then the matter will have to be proceeded with before the jurisdictional Court, on a complaint being taken on file. Hence, there is no difficulty in holding that both the investigations can go on using the same channel while their waters need not mix all the time**."**

44. It would be pertinent to note that **VGN Developers** has duly noticed the decision of this Court in **Mahanivesh Oils**. It has further taken into consideration the orders passed by the Division Bench in the Letters Patent Appeal taken against the said judgment to hold that the view expressed therein cannot be construed as conclusive or binding. This Court however notes that in **VGN Developers**, the Madras High Court was principally concerned with a situation where proceedings relating to the predicate offence had come to be settled pursuant to proceedings

undertaken by the secured creditors under the **Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act**, 2002 [SARFAESI]. The proceedings under the Act related to an alleged criminal conspiracy entered into between the petitioner before that High Court and the members of the consortium of Banks. It was in the aforesaid backdrop that it was observed that a closure report submitted by CBI would not result in curtains being brought down on proceedings initiated under the Act.

45. More recently a learned Judge of the Bombay High Court in **Babulal Verma and Another vs. Enforcement Directorate and Another**[28] observed as follows: -

> **"28.** It is thus absolutely clear that, for initiation/registration of a crime under the PMLA, the only necessity is registration of a Predicate/Scheduled Offence as prescribed in various Paragraphs of the Schedule appended to the Act and nothing more than it. In other words, for initiating or setting the criminal law in motion under the PMLA, it is only that requirement of having a predicate/Scheduled crime registered prior to it. Once an offence under the PMLA is registered on the basis of a Scheduled Offence, then it stands on its own and it thereafter does not require support of Predicate/Scheduled Offence. It further does not depend upon the ultimate result of the Predicate/Scheduled Offence. Even if the Predicate/Scheduled Offence is compromised, compounded, quashed or the accused therein is/are acquitted, the investigation of ED under PMLA does not get affected, wiped away or ceased to continue. It may continue till the ED concludes investigation and either files complaint or closure report before the Court of competent jurisdiction.
>
> **29.** The language of Sections 3 and 4 of PMLA, makes it absolutely clear that, the investigation of an offence under Section 3, which is punishable under Section 4, is not dependent upon the ultimate result of the Predicate/Scheduled Offence. In other words, it is a totally independent investigation as defined and contemplated under Section 2(na), of an offence committed under Section 3 of the said Act.
>
> **30.** PMLA is a special statute enacted with a specific object i.e. to track and investigate cases of money-laundering. Therefore, after lodgment of

[28] 2021 SCC OnLine Bom 392

Predicate/Scheduled Offence, its ultimate result will not have any bearing on the lodgment/investigation of a crime under the PMLA and the offence under the PMLA will survive and stand alone on its own. A Predicate/Scheduled Offence is necessary only for registration of crime/launching prosecution under PMLA and once a crime is registered under the PMLA, then the ED has to take it to its logical end, as contemplated under Section 44 of the Act.

31. The PMLA itself, does not provide for any contingency like the case in hand and argued by the learned counsel for the Applicants. Section 44(b) only provides for filing of a complaint or submission of a closure report by the Investigating Agency under PMLA and none else.

32. If the contention of the learned counsel for the Applicants that, once the foundation is removed, the structure/work thereon falls is accepted, then it will have frustrating effect on the intention of Legislature in enacting the PMLA. The observations of the Hon'ble Supreme Court in the case of *State of Punjab* v. *Davinder Pal Singh Bhullar*, (supra) in paragraph No. 107 and *Sanjaysingh Ramrao Chavan* (Supra) in para No. 17 are in context of the facts of the said case and pertaining to the offences under the provisions of IPC and P.C. Act and therefore, the same cannot be applied to the case in hand which arises out of a special statute namely PMLA enacted by the Legislature with an avowed object.

33. Hypothetically, 'an accused' in a Predicate/Scheduled Offence is highly influential either monetarily or by muscle power and by use of his influence gets the base offence, compromised or compounded to avoid further investigation by ED i.e. money laundering or the trail of proceeds of crime by him, either in the Predicate/Scheduled Offence or any of the activities revealed therefrom. And, if the aforestated contention of the learned counsel for the Applicants is accepted, it will put to an end to the independent investigation of ED i.e. certainly not the intention of Legislature in enacting the PMLA. Therefore, if the contention of the learned counsel for the Applicants is accepted, in that event, it would be easiest mode for the accused in a case under PMLA to scuttle and/or put an end to the investigation under the PMLA. Therefore, the said contention needs to be rejected.

34. In view of the aforesaid discussion, it is clear that, even if the Investigating Agency investigating a Scheduled Offence has filed closure report in it and the Court of competent jurisdiction has accepted it, it will not wipe out or cease to continue the investigation of Respondent No. 1 (ED) in the offence of money-laundering being investigated by it. The investigation of Respondent No. 1 will continue on its own till it reaches the stage as contemplated under Section 44 of the PMLA."

46. It becomes pertinent to note that in **Babulal Verma** a closure report came to be submitted in proceedings relating to the predicate offence since the dispute between the complainant and the accused developer had come to be settled. However, there were serious allegations levelled against the developer of having diverted huge sums of monies obtained as loans from various financial institutions. Those allegations did not form part of the settlement nor had they been compounded. The refusal therefore by that High Court to accord closure to proceedings initiated under the Act would have to be understood and appreciated in that backdrop.

47. In **Jagati Publication Ltd. vs. Enforcement Directorate**[29], a learned Judge of the Telangana High Court observed as follows: -

> "12. By way of amendment to Section 44 of PML Act in the year 2013, it has been explicitly brought out that the proceedings in both the offences, i.e., scheduled offence and money laundering offence are to be tried by the Special Court constituted under PML Act, if the same is connected to Sections 3 & 4 of PML Act. Further, by way of Finance (No. 2) Act, 2019 (23 of 2019), dated 01.08.2019, Section 44 of PML Act has been amended by inserting an explanation to clause (d) of sub-section (1), which reads as follows:
>
> "Explanation--For the removal of doubts, it is clarified that,--(i) the jurisdiction of the Special Court while dealing with the offence under this Act, during investigation, enquiry or trial under this Act, shall not be dependent upon any orders passed in respect of the scheduled offence, and the trial of both sets of offences by the same court shall not be construed as joint trial."
>
> The above explanation sets out in clear terms that trial of money laundering offence is independent trial and it is governed by its own provisions and it need not get interfered with the trial of scheduled offence. The PML Act, being a special enactment, contemplates a distinct procedure at the initial stage and thereafter provides for initiation of prosecution, in order to achieve the special purpose

[29] MANU/TL/0588/2021

envisaged under the Act and as such, it cannot be construed that proceedings under the PML Act are to be equated with prosecution initiated under the criminal proceedings for predicate/scheduled offences. Thus, initiation of action under the PML Act cannot have any implication or impact in respect of registration of other cases, either under the Indian Penal Code or any other penal laws. The offence of money laundering contemplated under Section 3 of the PML Act is an independent offence. A reference to criminal activity relating to offence under PML Act has a wider connotation, and it may extend to a person, who is connected with criminal activity relating to scheduled offence, but may not be the offender of scheduled offence. It is in this background that it has to be necessarily held that offence under PML Act is a stand-alone offence. Keeping in view the same, if we look at sub-section (b) of Section 44 of the PML Act, it would clearly indicate that the Special Court may take cognizance of the offence upon a complaint by authorized signatory, which means that cognizance would be taken of an offence, which is separate and independent. Even in case of a person who is initially not booked for a scheduled offence but booked later, and subsequently acquitted of the said scheduled offence, still such person can be proceeded under PML Act. It is not necessary that a person has to be prosecuted under the PML Act, only in the event of such person having committed scheduled offence. Prosecution can be independently initiated under PML Act only for the offence of money laundering.

15. A careful perusal of Section 2(1)(u) of PML Act and the explanation thereof makes it clear that a wider definition is given to 'proceeds of crime' including property not only derived or obtained from the scheduled offence, but also any property which may directly or indirectly be derived or obtained as a result of criminal activity relatable to a scheduled offence. Section 3 of PML Act further clarifies that a person shall be guilty of offence of money laundering, if such person is found to have directly or indirectly attempted to indulge or knowingly assists or knowingly is a party or is actually involved in concealment, possession, acquisition, use, projecting as untainted property, claiming as untainted property and the process or activity connected with the proceeds of crime is a continuing activity, which itself shows the offence of money laundering is a continuing offence. Thus, a bare reading of Sections 2(1)(u), 3 and 44(1)(d) of PML Act along with explanations thereof makes it clear that the offence of money laundering is a stand-alone offence and the trial proceedings are completely different to that of the scheduled offence. Trial of money laundering offence is independent trial and it is governed by its own provisions, it will not meddle with the trial of scheduled offence.

16. Similar question came up for consideration before the Hon'ble High Court of Madras in Smt. Soodamani Dorai Vs. Joint Directorate of Enforcement's case (supra) relied by the respondents, wherein, it was held that adjudication,

prosecution and trial under PML Act is independent of scheduled offence. It was held as follows:

"In respect of the question whether criminal proceedings initiated by the police is a bar for proceedings under the Prevention of Money Laundering Act, the provisions of PMLA, 2002 are independent and having self-contained code. Before Amendment Act, 2012, the proceedings of PMLA, 2002 were fully depending upon the scheduled offence. However, after Amendment Act, 2012, with effect from 15.2.2013, the amendments were made in Sections 5(1), 8(3), 8(5), 8(6), 8(7) and 8(8) of the Act, which are very well evident that the proceedings are independent from scheduled offence proceedings. It would not be out of place to humbly submit herein that the provision of Section 5(1)(b) that "such person has been charged of having committed a scheduled offence and" was deleted by the Amendment Act, 2012, with effect from 15.2.2013. In the case of Samsuddin v. Union of India, it has been held that the offence of money laundering is independent of scheduled offences and it has been further held that the time of commission of the scheduled offence is not relevant to the context of the prosecution under the Act.

The offence of money laundering is not covered under any other provisions of law. Section 3 enacted by 2002 Act is a new offence and stands by itself. Section 44(1)(c) of the Prevention of Money Laundering Act, 2002, it is: provided that if the Court which takes cognizance of the scheduled offences is other than the Special Court under the PMLA, the Authority should move an application for transfer of the scheduled offence to the Special Court and the Special Court, on receipt of such case, proceed to deal with it from the stage at which it is committed. Therefore, it is clear from the provisions of the Act that the offence of money laundering stands by itself. As evident from Section 8(6) of the Act, the Court will release the property only if it is found on the conclusion of trial under PMLA that the offence of money laundering has not taken place or if the property is not involved in money laundering. Therefore, adjudication, prosecution, trial under PMLA is independent of scheduled offence. This is also clear in view of Section 24 of the PMLA, 2002, which deals with burden of proof as it clearly stated that the burden of proof relating to proceeds of crime involved in money laundering is on the accused whereas the burden of proof in the scheduled offences is on the prosecution. Therefore, though the ECIR may have been registered following a scheduled offence, the property in possession of the person, against whom allegations are made, is found to be involved in money laundering, then he can be punished independently of the scheduled offence. Therefore, mere stay of the predicate offence is not a ground for preventing the Directorate of Enforcement from proceeding under the PMLA, 2002.
17. Further, a reading of the provisions of PML Act makes it clear that though the commission of scheduled offence is a fundamental pre-requisite for initiating

proceedings under the PML Act, the offence of money laundering is independent of the scheduled offences. The scheme of the PML Act indicates that it deals only with laundering of money acquired by committing the scheduled offence. In other words, the PML Act deals only with the process or activity of proceeds of crime, including its concealment, possession, acquisition or use and it has nothing to do with the launch of prosecution for scheduled offence and continuation thereof. As stated above, the explanation to Section 44 of PML Act clearly indicates that the Special Court, while dealing with the offence under the PML Act, shall not be dependent upon any orders passed, in respect of the scheduled offence. It is apt to observe that money laundering, being an economic offence, poses a serious threat to the national economy and national interest and is committed with cool calculation and deliberate design and with motive of personal gain, regardless of the consequences to the society. Thus, it is absolutely clear that for initiation/registration of a crime under the PML Act, the necessity is registration of a crime for predicate/scheduled offence and nothing more. To put it differently, for initiating or setting the criminal law in motion under the PML Act, the requirement is prior registration of a crime under predicate/scheduled offence. Once an offence under the PML Act is registered on the basis of a predicate/scheduled offence, then it stands on its own and it does not require support of predicate/scheduled offence. As per the scheme of the PML Act, it does not depend upon the ultimate result of the predicate/scheduled offence. Even if the predicate/scheduled offence is compromised, compounded, quashed or the accused therein is/are acquitted, the investigation under PML Act does not get affected, ceased or wiped out. It may continue till the Enforcement Directorate concludes investigation and either files complaint or closure report before the Special Court. PML Act is a special statute enacted with a specific object to track and investigate cases of money-laundering. Therefore, if the contention of the learned senior counsel for the petitioners that when the foundation (predicate/scheduled offence) is removed, the structure/frame work thereon (offence under PML Act) falls is accepted, it will have frustrating effect on the intention of Legislature in enacting the PML Act, so also on its enforcement.

19. Further, if an accused in a predicate/scheduled offence is highly influential, either monetarily or by muscle power, and by use of his influence he/she gets the predicate/scheduled offence compromised or compounded to avoid further investigation in the offence under PML Act, it will put to an end to the independent investigation of Enforcement Directorate, which is certainly not the intention of Legislature in enacting the PML Act. Therefore, if the contention of the learned senior counsel for the petitioners that offence under PML Act necessarily depend upon the predicate/scheduled offence and the fate of offence under PML Act depends upon the fate of predicate/scheduled offence is accepted, probably it would be the easiest mode to the accused to put an end to the investigation and trial of offences under PML Act, as the case may be.

> 21. Further, it is needless to state that oral and documentary evidence is the backbone to prove the guilt or innocence of the accused in a criminal trial. The trial in all criminal cases including money laundering offences is required to be conducted expeditiously. If the trial is delayed, it would result in impairment of the complainant to prove the case and also impairment of ability of the accused himself to defend his case. The factors like death, disappearance and non-availability of witnesses would also hamper the criminal administration of justice. Therefore, invariably, oral and documentary evidence is required to be placed on record expeditiously, to arrive at a just conclusion, Therefore, it is too early to say that the accused persons are likely to get acquittal in the scheduled offences. There are instances where conviction was recorded by the trial Court and the appellate Court had set aside the said conviction. In the instant case, mere apprehension that the Court below is going to record conviction against the accused persons under PML Act and they are likely to get acquittal in the predicate/scheduled offences would not be a ground to stall the proceedings. In the given facts and circumstances of the case, it is difficult to state the result of the case of predicate/scheduled offence and its bearing over the proceedings or decision rendered in the subject offence under PML Act. Therefore, the contention raised that without proving the guilt of the accused in predicate/scheduled offences, trial of offences under PML Act cannot be proceeded with, is unsustainable. In view of the above observations, It cannot be held that unless proceeds of crime are established by putting the accused on thal, any prosecution of the person under PML Act would be premature and would be fuble exercise. Since the offence under PML Act is a stand-alone offence and not dependent on predicate/scheduled offences, it can be proceeded with independently without awaiting the outcome of result of scheduled offences or commencement of trial In the predicate/scheduled offences. Further, there is no requirement under law to conduct trials of both category of cases simultaneously. Therefore, the contention that Money Laundering offence starts at the end of predicate offence and commencement of trial in offence under PML Act shall not precede trial of predicate/scheduled offence, is unsustainable."

48. It would be pertinent to note that in **Jagati Publication**, the learned Judge was evaluating the merits of a challenge laid to an order passed by the Trial Judge which had refused to accede to the prayer made by the petitioner there for deferral of proceedings relating to allegations of money laundering till the conclusion of trial relating to a schedule offence. It was in the aforesaid backdrop that the decision in **Jagati Publication** referred to the Explanation appended to Section 44. As is evident from a reading of that Explanation, the jurisdiction of the

Special Court while dealing with offences under the Act is mandated not to be dependent upon any orders passed in proceedings relating to a scheduled offence. Section 44 and the Explanation appended thereto thus enables the Special Court to proceed with the trial of offences relating to money laundering unhindered by the pendency of proceedings relating to trial of a scheduled offence. While this Court is in agreement with the view expressed in **Jagati Publication** to the aforesaid extent, it with respect observes that Section 44 cannot be interpreted to mean that proceedings under the Act would remain unaffected by an acquittal or quashing of proceedings relating to a predicate offence.

49. The Telangana High Court in **V. Vijay Sai Reddy vs. Enforcement Directorate**[30], held thus: -

> "17. Further, a reading of the provisions of PML Act makes it clear that though the commission of scheduled offence is a fundamental pre-requisite for initiating proceedings under the PML Act, the offence of money laundering is independent of the scheduled offences. The scheme of the PML Act indicates that it deals only with laundering of money acquired by committing the scheduled offence. In other words, the PML Act deals only with the process or activity of proceeds of crime, including its concealment, possession, acquisition or use and it has nothing to do with the launch of prosecution for scheduled offence and continuation thereof. As stated above, the explanation to Section 44 of PML Act clearly indicates that the Special Court, while dealing with the offence under the PML Act, shall not be dependent upon any orders passed, in respect of the scheduled offence. It is apt to observe that money laundering, being an economic offence, poses a serious threat to the national economy and national interest and is committed with cool calculation and deliberate design and with motive of personal gain, regardless of the consequences to the society. Thus, it is absolutely clear that for initiation/registration of a crime under the PML Act, the necessity is registration of a crime for predicate/scheduled offence and nothing more. To put it differently, for Initiating or setting the criminal law in motion under the PML Act, the requirement is prior registration of a crime under predicate/scheduled offence. Once an offence

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under the PML Act is registered on the basis of a predicate/scheduled offence, then it stands on its own and it does not require support of predicate/scheduled offence. As per the scheme of the PML Act, it does not depend upon the ultimate result of the predicate/scheduled offence. Even if the predicate/scheduled offence is compromised, compounded, quashed or the accused therein is/are acquitted, the investigation under PML Act does not get affected, ceased or wiped out. It may continue till the Enforcement Directorate concludes investigation and either files complaint or closure report before the Special Court. PML Act is a special statute enacted with a specific object to track and investigate cases of money-laundering. Therefore, if the contention of the learned senior counsel for the petitioners that when the foundation (predicate/scheduled offence) is removed, the structure/frame work thereon (offence under PML Act) falls is accepted, it will have frustrating effect on the intention of Legislature in enacting the PML Act, so also on its enforcement.

18. Further, the burden of proof in the predicate/Scheduled offences and the offence under PML Act is different. Section 24 of the PML Act reads as follows:

> 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.

In view of the aforesaid mandate, the requisite burden of proof in both the cases is different. Further, Section 71 of PML Act mandates that the provisions of PML Act have overriding effect on any other law for the time being in force.

19. Further, if an accused in a predicate/scheduled offence is highly influential, either monetarily or by muscle power, and by use of his influence he/she gets the predicate/scheduled offence compromised or compounded to avoid further investigation in the offence under PML Act, it will put to an end to the independent investigation of Enforcement Directorate, which, is certainly not the intention of Legislature in enacting the PML Act. Therefore, if the contention of the learned senior counsel for the petitioners that offence under PML Act necessarily depend upon the predicate/scheduled offence and the fate of offence under PML Act depends upon the fate of predicate/scheduled offence is accepted, probably it would

be the easiest mode to the accused to put an end to the investigation and trial of offences under PML Act, as the case may be.

21. Further, it is needless to state that oral and documentary evidence is the backbone to prove the guilt or innocence of the accused in a criminal trial. The trial in all criminal cases including money laundering offences is required to be conducted expeditiously. If the trial is delayed, it would result in impairment of the complainant to prove the case and also impairment of ability of the accused himself to defend his case. The factors like death, disappearance and non-availability of witnesses would also hamper the criminal administration of justice. Therefore, invariably, oral and documentary evidence is required to be placed on record expeditiously, to arrive at a just conclusion. Therefore, it is too early to say that the accused persons are likely to get acquittal in the scheduled offences. There are instances where conviction was recorded by the trial Court and the appellate Court had set aside the said conviction. In the instant case, mere apprehension that the Court below lis going to record conviction against the accused persons under PML Act and they are likely to get acquittal in the predicate/scheduled offences would not be a ground to stall the proceedings. In the given facts and circumstances of the case, it is difficult to state the result of the case of predicate/scheduled offence and its bearing over the proceedings or decision rendered in the subject offence under PML Act. Therefore, the contention raised that without proving the guilt of the accused in predicate/scheduled offences, trial of offences under PML Act cannot be proceeded with, is unsustainable. In view of the above observations, it cannot be held that unless proceeds of crime are established by putting the accused on trial, any prosecution of the person under PML Act would be premature and would be futile exercise. Since the offence under PML Act is a stand-alone offence and not dependent on predicate/scheduled offences, it can be proceeded with independently without awaiting the outcome of result of scheduled offences or commencement of trial in the predicate/scheduled offences. Further, there is no requirement under law to conduct trials of both category of cases simultaneously. Therefore, the contention that Money Laundering offence starts at the end of predicate offence and commencement of trial in offence under PML Act shall not precede trial of predicate/scheduled offence, is unsustainable."

50. As is evident from a reading of the aforesaid extracts, that decision too principally proceeded on the basis of the provisions of Section 44 of the Act. All that this Court deems apposite to observe is that the observation that proceedings under the Act would not be wiped out even if the predicate offence is compromised, compounded or quashed would not be the correct view to take in

light of the provisions of the Act. In any case the judgments rendered by this Court in **Rajiv Chanana** and **Gagandeep Singh** clearly bind and would thus operate on the question.

51. This Court thus comes to the definite conclusion, that while the offense of money laundering may have been correctly described as a stand-alone offense in the sense of being a condition precedent for an allegation of money laundering being raised, that in itself would not infuse jurisdiction in proceedings that may be initiated under the Act even after a competent court has come to hold that no criminal offense stands committed or situations where the primary accused is discharged of the offense or proceedings quashed. When the offense of money laundering is described as a stand-alone offense, all that is sought to be conveyed is that it is to be tried separately in accordance with the procedure prescribed under the Act. It is evident from a reading of the Act that while the commission of a predicate offense constitutes the trigger for initiation of proceedings under the Act, the offense of money laundering must be tried and established separately. However, the Court finds itself unable to hold that a charge of money laundering would survive even after the charges in respect of the predicate offense are quashed or the accused is discharged upon the competent court finding that no offense is made out. The predicate offense does not merely represent the trigger for a charge of money laundering being raised but constitutes the very foundation on which that charge is laid. The entire edifice of a charge of money laundering is raised on an allegation of a predicate offense having been committed, proceeds of crime generated from such activity and a projection of the tainted property as untainted. However, once it is found on merits that the accused had not indulged

in any criminal activity, the property cannot legally be treated as proceeds of crime or be viewed as property derived or obtained from criminal activity.

G. THE ARTICLE 20(1) QUESTION

52. In the present petitions, the challenge raised on the anvil of Article 20(1) of the Constitution is premised on the following facts. It was the submission of Mr. Sibal that since the allocation was made on 04 September 2003 and thus evidently before the promulgation of the Act coupled with the fact that even Sections 420 and 120B of the Penal Code were not scheduled offenses on that date, any action initiated under the Act would clearly violate the constitutional guarantee conferred by Article 20(1). Mr. Chawla learned counsel addressing submissions on behalf of the petitioners in the connected writ petition additionally argued that since the aforenoted two provisions of the Penal Code were included in the Schedule only on 01 June 2009 and the properties provisionally attached had been purchased prior thereto, even on this score the proceedings impugned are rendered without jurisdiction and authority of law. Mr. Chawla argued that since these provisions came to be included as scheduled offenses only in 2009, any action initiated under the Act founded on a predicate offense which came to be included and recognised by inclusion in the Schedule subsequently would be violative of Article 20(1) of the Constitution.

53. On a fundamental plane, Article 20(1) raises a constitutional injunction or bar in respect of penal action against a person for an act which was not an offense at the relevant time. It is to this extent that the provisions of penal statutes are constitutionally barred from operating retrospectively. The guiding expressions of

Article 20(1) are *"violation of a law in force"* and *"at the time of the commission of the act charged…."*. The Constitution thus constructs a negative command against penal action and conviction except for an offense created by a law which was in force at the time of commission of the act. The spirit of Article 20(1) was lucidly explained by the Supreme Court in **Rao Shiv Bahadur Singh vs. State of V.P.**[31] in the following words: -

> **"8.** Article 20(1) of the Constitution is as follows:
>
> "No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."
>
> This article in its broad import has been enacted to prohibit convictions and sentences under ex post facto laws. The principle underlying such prohibition has been very elaborately discussed and pointed out in the very learned judgment of Justice Willes in the well-known case of *Phillips* v. *Eyre* [(1870) 6 QBD 1, at 23 and 25] and also by the Supreme Court of U.S.A. in *Calder* v. *Bull* [3 Dallas 386 : 1 Law Edition 648 at 649] . In the English case it is explained that *ex post facto* laws are laws which voided and punished what had been lawful when done. There can be no doubt as to the paramount importance of the principle that such ex post facto laws, which retrospectively create offences and punish them are bad as being highly inequitable and unjust. In the English system of jurisprudence repugnance of such laws to universal notions of fairness and justice is treated as a ground *not* for invalidating the law itself but as compelling a beneficent construction thereof where the language of the statute by any means permits it. In the American system, however, such ex post facto laws are themselves rendered invalid by virtue of Article 1, Sections 9 and 10 of its Constitution. It is contended by the learned Attorney-General that Article 20 of the Constitution was meant to bring about nothing more than the invalidity of such *ex post facto* laws in the post-Constitution period but that the validity of the pre-Constitution laws in this behalf was not intended to be affected in any way. The case in *Keshavan Madhavan Menon* v. *State of Bombay* [1951 SCR 228] has been relied on to show that the fundamental rights guaranteed under the Constitution have no retrospective

[31] 1953 SCR 1188

operation, and that the invalidity of laws brought about by Article 13(1) of the Constitution relates only to the future operation of the pre-Constitution laws which are in violation of the fundamental rights. On this footing it was argued that even on the assumption of the convictions in this case being in respect of new offences created by Ordinance 48 of 1949 after the commission of the offences charged, the fundamental right guaranteed under Article 20 is not attracted thereto so as to invalidate such convictions. This contention, however, cannot be upheld. On a careful consideration of the respective articles, one is struck by the marked difference in language used in the Indian and American Constitutions. Sections 9(3) and 10 of Article 1 of the American Constitution merely say that "No *ex post facto* law shall be *passed*…." and "No State shall *pass ex post facto* law…". But in Article 20 of the Indian Constitution the language used is in much wider terms, and what is prohibited is the conviction of a person or his subjection to a penalty under *ex post facto* laws. The prohibition under the article is not confined to the passing or the validity of the law, but extends to the conviction or the sentence and is based on its character as an *ex post facto* law. The fullest effect must therefore be given to the actual words used in the article. Nor does such a construction of Article 20 result in giving retrospective operation to the fundamental right thereby recognised. All that it amounts to is that the future operation of the fundamental right declared in Article 20 may also in certain cases result from acts and situations which had their commencement in the pre-Constitution period. In *Queen* v. *St. Mary Whitechapel* [116 ER 811 at 814] Lord Denman, C.J. pointed out that a statute which in its direct operation is prospective cannot properly be called a retrospective statute because *a part* of the requisites for its action is drawn from a time antecedent to its passing. The general principle therefore that the fundamental rights, have no retrospective operation is not in any way affected by giving the fullest effect to the wording of Article 20. This article must accordingly be taken to prohibit all convictions or subjections to penalty after the Constitution in respect of *ex post facto* laws whether the same was a post-Constitution law or a pre-Constitution law. That such is the intendment of the wording used in Article 20(1) is confirmed by the similar wording used in Articles 20(2) and 20(3). Under Article 20(2), for instance, it cannot be reasonably urged that the prohibition of double jeopardy applies only when *both* the occasions therefor arise after the Constitution. Similarly, under Article 20(3) it cannot be suggested that a person accused before the Constitution can be compelled to be a witness against himself, if after the Constitution the case is pending."

54. More importantly, their Lordships further went on to pertinently observe that the phrase "law in force" must be understood as being the law in fact in

existence and in operation at the time of commission of the act. This is evident from paragraph 10 of the report which is extracted hereinbelow: -

> **"10.** In this connection our attention has been drawn to the fact that the Vindhya Pradesh Ordinance 48 of 1949, though enacted on 11th September, 1949 i.e. after the alleged offences were committed, was in terms made retrospective by Section 2 of the said Ordinance which says that the Act "shall be deemed to have been in force in Vindhya Pradesh from the 9th day of August, 1948," a date long prior to the date of the commission of the offences. It was accordingly suggested that since such a law at the time when it was passed was a valid law and since this law had the effect of bringing this Ordinance into. force from 9th August, 1949, it cannot be said that the convictions are not in respect of "a law in force" at the time when the offences were committed. This, however, would be to import a somewhat technical meaning into the phrase "law in force" as used in Article 20. "Law in force" referred to therein must be taken to relate not to a law "deemed" to be in force and thus brought into force but the law factually in operation at the time or what may be called the then existing law. Otherwise, it is clear that the whole purpose of Article 20 would be completely defeated in its application even to *ex post facto* laws passed after the Constitution. Every such *ex post facto* law can be made retrospective, as it must be, if it is to regulate acts committed before the actual passing of the Act, and it can well be urged that by such retrospective operation it becomes the law in force at the time of the commencement of the Act. It is obvious that such a construction which nullifies Article 20 cannot possibly be adopted. It cannot therefore be doubted that the phrase "law in force" as used in Article 20 must be understood in its natural sense as being the law in fact in existence and in operation at the time of the commission of the offence as distinct from the law "deemed" to have become operative by virtue of the power of legislature to pass retrospective laws. It follows that if the appellants are able to substantiate their contention that the acts charged as offences in this case have become such only by virtue of Ordinance 48 of 1949 which has admittedly been passed subsequent to the commission thereof, then they would be entitled to the benefit of Article 20 of Constitution and to have their convictions set aside. This leads to an examination of the relevant pre-existing law."

55. However, an equally well settled principle relating to the retroactive application of penal provisions is that merely because a requisite or facet for initiation of action pertains to a period prior to the enforcement of the statute, that would not be sufficient to characterize the statute as being retrospective. Mr. Raju the learned ASG has rightly submitted that merely because the predicate offense, even though it forms the originating trigger for an offense of money laundering, may have been committed prior to the commencement of the Act, a person who launders proceeds of crime after its enforcement would still be liable to be tried for that offense.

56. While evaluating the challenge addressed on the bedrock of Article 20(1) in the facts of the present case, the Court also bears in mind the fact that the Act with which we are concerned, penalises acts of money laundering. It does not create a separate punishment for a crime chronicled or prescribed under the Penal Code. The Act does not penalise the predicate offense. That offense merely constitutes the substratum for a charge of money laundering being raised. Undisputedly, the offense of money laundering rests on the commission of a predicate offense which in turn may have resulted in a pecuniary benefit being obtained and derived. It fundamentally aims at confiscation of benefits that may be derived as a result of criminal activity and the commission of a scheduled offense. It is aimed at countering and penalising the malaise of wealth and assets acquired as a result of criminal activity. Accordingly, while the commission of the predicate offense may be described as the sine qua non for an allegation of money laundering being laid against a person, it is an offense created independently owing its genesis to the Act which came to be promulgated on 01 July 2005. It would also be pertinent to note that while the punishment in respect of various crimes created under different statutes and which are included in the Schedule did exist prior to 01 July 2005, the crime of money laundering as set out in Section 3 came into being only on that date. Prior to 01 July 2005, there was undisputedly no law in force which constructed or statutorily prescribed an offense for money laundering and empowered the respondents to attach and confiscate proceeds of crime derived from criminal activity.

57. Having outlined the contours of Article 20(1) of the Constitution and the underlying spirit of the Act, it must be held that any act of money laundering as

defined in Section 3 which may have been committed and completed prior to the enforcement of the Act cannot be subjected to action under the Act. However, and at the same time it must also be held that an offense of money laundering that may be committed post 01 July 2005 would still be subject to the rigours of the Act notwithstanding the predicate offense having been committed prior to that date. As noted hereinabove, Section 3 creates an offense for money laundering. Neither that provision nor the Act is concerned with the trial of the predicate offense. Thus, any activity or process that may be undertaken by a person post 01 July 2005 in terms of which proceeds of crime are acquired, possessed or used and/or projected as untainted property would still be subject to the provisions of the Act. This because it is the act of money laundering committed after the enforcement of the Act which is being targeted and not the predicate offense. The Court also bears in mind the Explanation (ii) to Section 3 which clarifies that money laundering is a continuing activity and continues till such time as the person is directly or indirectly *"enjoying"* the proceeds of crime by its concealment, possession, acquisition or use and/or projecting it as untainted property. The word *"enjoying"* clearly appears to have been consciously used in order to impress and convey its usage in its present and continuous form. Therefore, from a reading of Explanation (ii) also it is evident that the action that may be initiated under the Act is aimed at the offense of laundering of criminally acquired gains and profits and such activities and processes answering the description of money laundering which may occur or be indulged in after the Act has come into force. Accordingly, it must be held that while the commission of a predicate offense would constitute the bedrock for initiation of action, the date on which such an

offense may have been committed would be of little relevance provided an act of money laundering is alleged to have been committed after the Act had come into force.

58. The view taken by this Court finds resonance in the following observations as appearing in **Mahanivesh Oils: -**

> "32. The central issue in the present case is not on whether the scheduled offence was committed, but whether the attachment under Section 5 of the Act can be sustained where the principal offence as well as the offence of using its proceeds is alleged to have been committed prior to the Act coming into force.
>
> 33. As stated hereinbefore, the scope of the offence of money-laundering was widened by virtue of the Prevention of Money-Laundering (Amendment) Act, 2012 and the rigor of Section 3 of the Act also extends to any person who assists or is a party or is involved in any process or activity connected with concealment, possession, acquisition or use of proceeds of crime. However, the subject of the offence continues to be the proceeds of crime and its involvement in money-laundering. This again draws one to the central controversy in this petition, that is, whether any property of any person could be attached as allegedly involved in money-laundering prior to the enactment of the Act or acquired as a result of a crime, committed prior to the Act coming into effect.
>
> 34. The Act is a penal statute and, therefore, can have no retrospective or retroactive operation. Article 20(1) of the Constitution of India expressly forbids that no person can be convicted of any offence except for the violation of a law in force at the time of the commission of the act charged as an offence. Further, no person can be inflicted a penalty greater than what could have been inflicted under the law at the time when the offence was committed. Clearly, no proceedings under the Act can be initiated or sustained in respect of an offence, which has been committed prior to the Act coming into force. However, the subject matter of the Act is not a scheduled offence but the offence of money-laundering. Strictly speaking, it cannot be contended that the Act has a retrospective operation because it now enacts that laundering of proceeds of crime committed earlier as an offence. In *The Queen* v. *The Inhabitants of St. Mary, Whitechapel* (1848) 12 QB 120, the Court pointed out that "*The Statute which in its direct operation of prospective cannot be properly be called a retrospective statute because a part of the requisites for that action is drawn from the time antecedent to its passing*". Thus, with effect from 1st June, 2009 laundering proceeds of crime under Section 420 of the IPC is enacted as an offence of money-laundering punishable under

Section 4 of the Act. It is important to note that the punishment under Section 4 of the Act is not for commission of a scheduled offence but for laundering proceeds of a scheduled crime. The fact that the scheduled crime may have been committed prior to the Act coming into force would not render the Act a retrospective statute as only the offence of money-laundering committed after the enforcement of the Act can be proceeded against under the Act.

35. The respondent's contention that the relevant date would be the date of offence of money-laundering and not that of the commission of the scheduled offence is merited and the impugned order cannot be set aside only on the ground that it has been issued in respect of proceeds of a scheduled crime which was allegedly committed prior to 1st July, 2005.

36. The next contention to be considered is whether in the given facts and circumstances, any offence or money-laundering had been made out to warrant an issuance of the impugned order. It is alleged that on 10th February, 2005, MIL through its Director issued cheques aggregating Rs. 1.5 crores in favour of its holding companies, namely, M/s. Duoroyale Enterprises Ltd. and M/s. Shri Radhey Trading Pvt. Ltd. and these companies in turn issued two cheques of Rs. 75 lacs each in favour of the petitioner. It is suggested that these amounts were proceeds of crime received by the petitioner as a result of a criminal activity and bulk of these funds were utilized by the petitioner for paying the consideration for acquiring the property in question. It was argued that all actions of integrating the money by purchase of immovable property would fall within the definition of 'money-laundering'. In this respect it is relevant to note that the sale deed in respect of the property was executed on 18.03.2005. Thus, even if the allegations made by the respondent are assumed to be correct, the proceeds of crime had been used by the petitioner for acquisition of the property much prior to the Act coming into force. The process of activity of utilising the proceeds of crime, if any, thus, stood concluded prior to the Act coming into force. Even if it is assumed that the funds received from M/s. Duoroyale Enterprises Ltd. and M/s. Shri Radhey Trading Pvt. Ltd. were proceeds of crime and were properties involved in money-laundering, such funds had come into possession of the petitioner prior to the Act coming into force. Thus, funds were already projected as untainted funds unconnected with the crime for which Mr. Homi Rajvansh and other persons are accused. The funds had, thus, been laundered at a time when money-laundering was not an offence and proceedings under the Act cannot be initiated.

37. Although, the Respondent has not contended so in clear terms, it appears that the respondents are proceeding on the basis that an offence under Section 3 of the Act is a continuing offence. According to the respondent, the possession of any property linked to a scheduled offense irrespective of when it was acquired would itself constitute the offence of money-laundering. It is important to understand the

import of such interpretation. This would mean that a person who has committed a scheduled crime; acquired proceeds therefrom; and thereafter, projected it as untainted money, prior to the Act coming into force, would nonetheless be guilty of the offence of money-laundering only for the reason that he is in possession of some property. This is so because the definition of proceeds of crime also includes the value of any property derived or obtained as a result of criminal activity relating to a scheduled crime. Further any such property - even in the hands of a person not accused of the scheduled crime or offense of money-laundering - would also be subject to the proceedings under the Act. Thus, practically, a person guilty of a scheduled offence who has acquired any benefit in relation to the scheduled offence would in effect also be guilty of the offence of money-laundering immediately on the Act coming into force. If such an interpretation is sought to be provided, the grievance of the petitioner that a penal provision is sought to be given a retrospective operation would be justified and this would clearly offend Article 20(1) of the Constitution of India as an offender of a scheduled crime would now be visited with a greater punitive measure than as could be inflicted at the time when the scheduled offence was committed. Given the wide definition of "proceeds of crime" it would be contended that irrespective of how far back in the past a scheduled offence was committed, the authorities could nonetheless try persons for an offence of money-laundering as well as confiscate the value of the property alleged to have been derived or obtained by criminal activity relating to the scheduled offence. This would be notwithstanding that the proceeds derived from a scheduled offence have undergone significant changes and have been integrated in legitimate economic activity. The properties could also be traced in the hands of persons unconnected with the scheduled offence. There is no indication from the express language of the Act, that the Legislature intended the Act to be retroactive or operative with retrospective effect.

38. The Act was enacted as the international community recognised the threat of money-laundering whereby money generated from illegal activities such as trafficking and drugs etc. was finding its way into the economic system of a country and funding further criminal activity. The expression money-laundering would ordinarily imply the conversion and infusion of tainted money into the main stream of economy as legitimate wealth. According to the respondent, there are three stages to a transaction of money-laundering : The first stage is Placement, where the criminals place the proceeds of the crime into normal financial system. The second stage is Layering, where money introduced into the normal financial system is layered or spread into various transactions within the financial system so that any link with the origin of the wealth is lost. And, the third stage is Integration, where the benefit or proceeds of crime are available with the criminals as untainted money. There is much merit in this description of money-laundering and this also indicates that, by its nature, the offence of money-

laundering has to be constituted by determinate actions and the process or activity of money-laundering is over once the third stage of integration is complete. Thus, unless such acts have been committed after the Act came into force, an offence of money-laundering punishable under Section 4 would not be made out. The 2013 Amendment to Section 3 of the Act by virtue of which the words "process or activity connected with proceeds of crime and projecting it as untainted property" were substituted by the words "any process or activity connected with proceeds of crime including concealment, possession, acquisition or use and projecting or claiming it as untainted property". The words "concealment, possession, acquisition or use" must be read in the context of the process or activity of money-laundering and this is over once the money is laundered and integrated into the economy. Thus, a person concealing or coming into possession or bringing proceeds of crime to use would have committed the offence of money-laundering when he came into possession or concealed or used the proceeds of crime. For any offence of money-laundering to be alleged, such acts must have been done after the Act was brought in force. The proceeds of crime which had come into possession and projected and claimed as untainted prior to the Act coming into force, would be outside the sweep of the Act.

39. In the circumstances, it cannot be readily accepted that any offence of money-laundering had been committed after the Act coming into force. This Act cannot be read as to empower the authorities to initiate proceedings in respect of money-laundering offences done prior to 01.07.2005 or prior to the related crime being included as a scheduled offence under the Act.

40. Learned counsel for the respondent has contended that Article 20 of the Constitution of India prohibited conviction or sentence under an ex-post facto law but not the trial thereof. He relied on the decision of the Andhra Pradesh High Court in *V. Suryanarayhana Prabhakara Gupta* v. *Union of India (UOI)* : W.P. No. 27898 of 2010, decided on 25.08.2011 in support of the aforesaid contention and drew attention of this Court to the following passage.

> "From the abovementioned Judgment, the principle that can be deducted is that, Article 20 prohibits only conviction or sentence under an "ex post facto" law and not the trial thereof and such trial cannot "ipso facto" be held to be unconstitutional. In view of this undisputed principle, the resistance offered by the petitioners to the impugned orders, is totally misconceived and unacceptable. The present one is not the stage for securing protection under Article 20 of our Constitution.""

59. In **A.K. Samsuddin**, the Kerala High Court made the following pertinent observations: -

> "6. It is evident from the aforesaid provisions in the Act that though the commission of a scheduled offence is a fundamental pre-condition for initiating proceedings under the Act, the offence of money laundering is independent of the scheduled offences. The scheme of the Act indicates that it deals only with laundering of money acquired by committing the scheduled offences. In other words, the Act deals only with the process or activity with the proceeds of the crime including its concealment, possession, acquisition or use. Article 20(1) of the Constitution prohibits conviction except for violation of a law in force at the time of the commission of the offence. In other words, there cannot be any prosecution under the Act for laundering of money acquired by committing the scheduled offences prior to the introduction of the Act. The time of commission of the scheduled offences is therefore not relevant in the context of the prosecution under the Act. What is relevant in the context of the prosecution is the time of commission of the act of money laundering. There is, therefore, no substance in the argument that the investigation commenced as per Ext.P2 is hit by Article 20(1) of the Constitution."

60. The Allahabad High Court in **Hari Narayan Rai**, dealing with an identical question made the following succinct observations: -

> "5. Thus in substance, the argument is that the money alleged to have been acquired will not fall within the definition of "proceeds of crime" because the acts leading to its generation were not among the offences listed in the Schedule, as it stood on the date when those acts were committed.
>
> 6. The argument is misconceived. The reason is that what is being targeted by Section 3 and other provisions of the Act is the "laundering of money" acquired by committing the scheduled crimes and, therefore, it would be the date of "laundering" which would be relevant. The "laundering" as used in Section 3 comprises of involvement in any process or activity by which the illicit money is being projected as untainted.
>
> 7. Thus, the relevant date is not the date of acquisition of illicit money but the dates on which such money is being processed for projecting it untainted."

61. In **Katta Subramanium Naidu vs. Deputy Director, Ministry of Finance, Bangalore**[32], the Karnataka High Court negatived a submission that

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since the properties were acquired prior to the Schedule being amended on 01 June 2009, proceedings under the Act would be invalidated, holding thus:-

> "44. Petitioners appear to have put forward the plea of post facto law on the premise that the acts constituting the offences alleged against them were perpetrated prior to the amendment of the schedule to the PML Act and therefore, the action initiated against them falls within the mischief of Article 20(1) of the Constitution of India. This contention, in my view, in the factual setting of the case, is totally misplaced and misconceived and appears to have been canvassed by misconstruing the provisions of sections 3, 2(1)(u) and the Schedule appended to the PML Act. No-doubt, it is true that the Schedule to the PML Act was amended by Act 21 of 2009 and the various offences specified therein came to be included therein with effect from 1.06.2009. Nonetheless, in the instant cases, as on the date of initiation of action against petitioners, be it under section 3 or under section 5 of the PML Act, these provisions were very much there in the statute book. As already stated above, in all the cases, the prosecution under section 3 of the PML Act and adjudication proceedings under section 5 of the PML Act have been initiated against the petitioners subsequent to 1.06.2009. Therefore, the contention urged by learned counsel appearing for the petitioners that the petitioners are sought to be prosecuted on the basis of ex post facto laws is factually incorrect.
>
> 48. From the plain reading of section 3 read with section 2(1)(u) of the PML Act, it is clear that what is made punishable under section 3 is the activity connected with the proceeds of crime either by getting oneself involved in the process or activity connected thereto or directly or indirectly attempting to indulge or knowingly assist or knowingly be a party to the alleged activities and projecting it as untainted property, whereas the components of the offences under section 13 of the PC Act and Sections 120-B, 419, 420 and other IPC offences are entirely different. The prosecution under section 3 of the PML Act, by no stretch of imagination, could be equated with the prosecution under section 13 of the PC Act or other offences specified in the Schedule namely IPC or other laws. They are distinct and separate offences. Prosecution under section 3 of PML Act is not based on the outcome of the trial of the offenders under section 13 of the PC Act. A reading of section 3 of PML Act in unamended form would clearly indicate that even without there being any conviction of the accused in a predicate offence and even if the offender under section 3 of the PML Act is not a party to the predicate offence, still the prosecution could be launched against him if the offender is found involved in any process or activity connected with the 'proceeds of crime'. What is necessary to constitute the offence of money laundering is the existence of proceeds of crime and not the pendency of predicate offence as vehemently

contended by the learned counsel appearing for the petitioners. This Court as well as various other Courts have analysed this provision and have consistently held that the offences under section 3 of the PML Act is an independent and stand alone offence. Therefore, the argument of learned counsel for petitioners that without the existence of predicate offence and without there being any conviction of the petitioners for the predicate offence, their prosecution for the offence of money-laundering cannot be sustained being contrary to the language of section 3 of the PML Act and the intendment of the Legislature in enacting section 3 of the PML Act and the allied provisions is liable to be rejected and is accordingly rejected.

49. This Court in K. Sowbhagya v. Union of India, Ministry of Finance, North Block, Department of Revenue and others, had an opportunity to examine the various provisions of PML Act while deciding the constitutionality or validity of the sections 2(1) (u), 3, 5, 8, 9, 17, 18, 19, 23, 24 and 44 of the PML Act 2002(as amended from time to time) and held that:-

> "Money laundering is a stand alone offence. A person who has not committed a scheduled offence could be prosecuted for an offence of money laundering. In such a situation, the prosecution need not wait for the scheduled offence to be established. It can independently prosecute and lay material to show that he had knowingly assisted or was responsible for laundering of the illicit wealth. In such a situation, the property would then stand attached and the person who is being prosecuted for money laundering has to show the Court that he is not guilty of money laundering. The same would work to his advantage as to whether a scheduled offence has been committed or not. He could show that the property in question has not come in his possession and that he has not knowingly appropriated the same. In such a situation, if the offence is not established, the property would revert back to him.
>
> The changes that were brought about to Sections 5 and 8 synchronize with other provisions contained in the Act. Section 44, which now stands amended contemplates trial of both, the scheduled offence and the offence of money laundering by the same Special Court. In these circumstances, there is no likelihood of conflict of orders relating to the said offences."

51. The correlation between possession and acquisition of the subject matter of a crime which is made an offence post facto has been considered by the Hon'ble Apex Court in Mohan Lal v. State of Rajasthan, MANU/SC/0465/2015 : (2015) 6 SCC 222 : (AIR 2015 SC 2098), in the context of possession of contraband substance under NDPS Act. In the said case, the appellant/accused therein was

convicted and punished under section 18 of the NDPS Act when admittedly the theft of contraband substance was committed prior to coming into force of NDPS Act. The FIR was registered against the appellant/accused therein prior to coming into force of NDPS Act and therefore a contention was taken before the Court that the possession of contraband substance having commenced prior to coming into force of the NDPS Act i.e., when the theft was committed on the intervening night of 12/13-11-1985 whereas the NDPS Act came into force on 14.11.1985, the accused cannot be subjected to an offence under a new Act which was not in force on the date of theft and possession of the contraband articles. Analyzing the concept of possession in the context of section 18 of the NDPS Act, the Hon'ble Supreme Court considered the aspect of conscious possession as well as mens rea and animus to possess contraband substance and came to the conclusion that the animus and mental intent which is the primary and significant element to show and establish possession could be established from the personal knowledge as to the existence of the 'chattel', that is the illegal substance at a particular location of site, at a relevant time and the intention based upon the knowledge, would constitute the unique relationship and manifest possession. The Hon'ble Supreme Court further went on to hold that "in such a situation, presence and existence of possession could be justified for the intention is to exercise right over the substance of chattel and to act as the owner to the exclusion of others."

52 . After dealing with the concept of 'possession', the Hon'ble Supreme Court considered the issue as to whether the appellant could be convicted and sentenced under the Opium Act, as that was the law in force at the time of commission of an offence and if he is convicted under section 18 of the NDPS Act, whether it would tantamount to retrospective operation of law imposing penalty which is prohibited, under Article 20(1) of the Constitution of India. The Hon'ble Supreme Court held as under:-

Article 20(1) gets attracted only when any penal law penalises with retrospective effect i.e. when an act was not an offence when it was committed and additionally the persons cannot be subjected to penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence. The Article prohibits application of ex post facto law. In Rao Shiv Bahadur Singh and Anr. v. State of Vindhya Pradesh [MANU/SC/0010/1955 : AIR 1955 SC 446], while dealing with the import under Article 20(1) of the Constitution of India, the Court stated what has been prohibited under the said Article is the conviction and sentence in a criminal proceeding under ex post facto law and not the trial thereof. The Constitution Bench has held that:-

> "9. ... what is prohibited under Article 20 is only conviction or sentence under an 'ex post facto' law and not the trial thereof. Such trial under a procedure different from what obtained at the time of the commission

of the offence or by a Court different from that which had competence at the time cannot 'ipso facto' be held to be unconstitutional. A person accused of the commission of a particular Court or by a particular procedure, except in so far as any constitutional objection by way of discrimination or the violation of any other fundamental right may be involved."

In the instant case, Article 20(1) would have no application. The actus of possession is not punishable with retrospective affect. No offence is created under Section 18 of the NDPS Act with retrospective effect. What is punishable is possession of the prohibited article on or after a particular date when the statute was enacted, creating the offence or enhancing the punishment. Therefore, if a person is in possession of the banned substance on the date when the NDPS Act was enforced, he would commit the offence, for on the said date he would have both the 'corpus' and 'animus' necessary in law."

(underlining supplied)

53. The above principle, in my view, applies with full force to the facts of this case. As already held above, petitioners are not prosecuted for the offence which is added in the schedule subsequent to the petitioners coming in possession of the tainted property, rather the prosecution is initiated under section 3 of the PML Act which deals with an independent offence of laundering of money or property held by the petitioners with the knowledge that it was tainted property, acquired through commission of an offence which is punishable under law. The reference to "scheduled offence" under section 2(1) (y) of the PML Act is only an indicator or a pointer that the properties laundered by the offenders had their origin or source in any of the offence or crime specified in the schedule and therefore the offenders are liable to answer the charge under section 3 punishable under section 4 of the PML Act. In the light of this legal and factual position, I am unable to accept the submission of learned counsel for petitioners that they are the victims of ex post facto laws offending the constitutional protection granted to them under Article 20(1) of the Constitution of India."

62. Again, in **Dyani Antony Paul & Ors. vs. Union of India & Ors.**[33], the Karnataka High Court held that it is the date of laundering of proceeds of crime which is relevant and determinative as would be evident from the following extracts of that decision: -

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"76. The expression "schedule offence" is defined under Section 2(y), which means-(i) the offences specified in 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 one crore rupees or more; or (iii) the offences specified under Part-C of the Schedule. Section 5 relates to attachment of the property involved in money laundering. Thus, it is evident from the aforesaid provision of the PML Act that commission of a schedule offence is not a fundamental precondition for initiating proceedings under the PML Act, since the offence of money laundering is independent of schedule offence. From a plain reading of the PML Act or on a conjoint reading of the provisions of the PML Act, it would leave no manner of doubt that it deals only with laundering of money acquired by committing the scheduled offence. To put it differently, the PML Act deals only with the process or activity with the proceeds of crime including its concealment, possession or use. The PML Act has been enacted to prevent money laundering and to provide for confiscation of property derived from or involved in, money laundering.

77. Article 20 of the Constitution prohibits conviction except for violation of a law in force at the time of commission of an offence. In other words, there cannot be prosecution under the PML Act for laundering of money acquired by committing the schedule offences prior to the introduction of the PML Act. Therefore, the time of commission of scheduled offences would not be relevant in the context of the prosecution under the PML Act. What would be relevant in the context of prosecution is the time of commission of the act of money laundering. The question would be, whether a person involved in money laundering as provided under Section 3 of the PML Act has indulged in the said act or not has to be decided by the competent authority. What is the date of laundering of money will have to be decided on facts of each case and there cannot be any prescribed straight jacket formula.

This is an important fact which the authority will have to examine and it is a mixed question of law and fact.

80. What is targeted by Section 3 is 'laundering of money' and therefore, the date of 'laundering' would be relevant. The expression 'laundering' as found in Section 3 comprises of involvement in any process or activity by which the illicit money is being projected as untainted. Thus, the relevant date is not the date of acquisition of illicit money but the dates on which such money is being processed by projecting it as untainted."

63. The only disagreement that this Court expresses is with respect to the following observations as made in paragraph 82 of the report: -

> "82. In the light of aforestated analysis, this Court is of the considered view that existence of a predicate offence for initiation of proceedings under the PML Act is not a condition precedent or in other words, the offence under Section 3 of the PML Act is a stand alone offence. Hence, the presence of a schedule offence as prescribed under the PML Act would not be condition precedent for proceeding against such person under the PML Act. The reasons which have weighed with this Court to hold to the contrary have been duly spelt out in the preceding paragraphs of this decision and are therefore not being repeated."

64. The Court thus holds that the fact that the predicate offense which gave rise to proceeds of crime was committed prior to 01 July 2005 or that it came to be included in the Schedule on 01 June 2009 would clearly not be determinative and in any case an action under the Act founded on the commission of that offense provided the act of money laundering is alleged to have been committed after the coming into force of the Act cannot be held or understood to be a violation of Article 20(1) of the Constitution. As long as the act of money laundering is alleged to have been committed post the enforcement of the Act, proceedings initiated in respect thereof would clearly be sustainable.

65. As stated hereinabove, the Act is aimed at the offense of money laundering. While the commission of a predicate offense may be a condition precedent for an allegation of money laundering being laid, it is the activities of money laundering alone which would determine the validity of proceedings initiated under the Act. Consequently, it must be held that the mere fact that the offenses of Sections 420 and 120 B of the Penal Code came to be included in the Schedule on 01 June 2009, that factor would not detract from the jurisdiction of the respondents to initiate action in respect of acts of money laundering that may have taken place or continue post the enforcement of the Act itself.

H. AXIS BANK VS. SEEMA GARG

66. The Court had while recording the submissions addressed by the respective counsels for parties noted the reliance placed by Mr. Chawla on the decision rendered by a Division Bench of the Punjab and Haryana High Court in **Seema Garg**. The decision in **Seema Garg** ex facie holds contrary to what was laid down by this Court in **Axis Bank**. Post the decision rendered in **Seema Garg**, various other High Courts have also followed the dictum laid down therein. Notwithstanding the above and the Court conscious that the decision in **Axis Bank** would bind, it would be apposite to briefly dilate on this issue in order to appreciate the submission addressed by Mr. Chawla on this score and turning on the decisions in **Axis Bank** and **Seema Garg**.

67. In order to appreciate the issue which arises the Court reproduces hereinbelow a chart which may indicate how the provisions of Section 2(1)(u), 2(1)(y) and Section 3 of the Act have transformed post the promulgation of the enactment on 1 July 2005. That chart is reproduced hereinbelow: -

Section	**2009 Amendment**	**2015 Amendment**	**2013 Amendment**	**2018 Amendment**	**2019 Amendment**
Section 2(1)(u) "proceeds of crime, means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to the		"proceeds of crime, means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to the scheduled offence or the value of any such property, **[or where such**		proceeds of crime, means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to the scheduled offence or the	"proceeds of crime, means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to the scheduled offence or the value of any such property, or where such property is taken or held outside the country, then the property equivalent in

scheduled offence or the value of any such property		**property is taken or held outside the country, then the property equivalent in value held within the country**]"		value of any such property, or where such property is taken or held outside the country, then the property equivalent in value held within the country **[or abroad]**	value held within the country or abroad. **Explanation- For removal of doubts, it is hereby clarified that "proceeds of crime" including property not only derived or obtained from the scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence**
Section 2(1)(y)- "**Scheduled offence" means-** *(i)* **the offences specified under Part A of the schedule**	**Section 2(1)(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	***Section 2(1)(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*** *one crore rupees or more; or*			

	thirty lakh rupees or more; or (iii*) the offences specified under Part C of the Schedule*	(iii) ***the offences specified under Part C of the Schedule***			
Section 3 Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime it as untainted property shall be guilty of offence of money-laundering.			Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime **includi ng its concealment, possession, acquisition or use and projecting or claiming** it as untainted property shall be guilty of offence of money-laundering.		***Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime* including its concealment, possession, acquisition or use and projecting or claiming *it as untainted property shall be guilty of offence of money-laundering.*** *'Explanation.—For the removal of doubts, it is hereby clarified that,—* *(ii) a person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly*

					attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely:— *a) concealment; or* *(b) possession; or* *(c) acquisition; or* *(d) use; or* *(e) projecting as untainted property; or* *(f) claiming as untainted property,* *In any manner whatsoever;* ***(ii)* the process or activity connected with proceeds of crime is a continuing activity and continues till such time** a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or

					acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever.”

68. Both **Axis Bank** as well as **Seema Garg** have recognised that the definition of “*proceeds of crime*” as contained in Section 2(1)(u) comprises of three limbs. Those limbs have been described to comprise of (a) properties derived or obtained (directly or indirectly) as a result of criminal activity relating to a scheduled offence, (b) the value of any such property as above and (c) property equivalent in value whether held in India or abroad. Explaining the extent of these three limbs which constitute proceeds of crime, the learned Judge in **Axis Bank** has held thus:-

> “**103.** The special legislation against money-laundering (PMLA) seeks to enforce the sanction of confiscation (initiated by attachment) against ill-gotten assets expecting to ensnare them in a net wider than under most of the existing laws germane to the issue of economic well-being, security and integrity of India as a sovereign State. The expansive definition of the targeted property, described as “*proceeds of crime*”, as given in Section 2(1)(u) is as under:
>
> *“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 or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad;*
>
> (emphasis supplied)
>
> **104.** The above definition may be deconstructed into three parts: —

(i). property derived or obtained (directly or indirectly) as a result of criminal activity relating to scheduled offence; or

(ii). the value of any such property as above; or

(iii). if the property of the nature first above mentioned has been "*taken or held*" abroad, any other property "*equivalent in value*" whether held in India or abroad.

105. It is vivid that the legislature has made provision for "*provisional attachment*" bearing in mind the possibility of circumstances of urgency that might necessitate such power to be resorted to. A person engaged in criminal activity intending to convert the proceeds of crime into assets that can be projected as legitimate (or untainted) would generally be in a hurry to render the same unavailable. The entire contours of the crime may not be known when it comes to light and the enforcement authority embarks upon a probe. The crime of such nature is generally executed in stealth and secrecy, multiple transactions (seemingly legitimate) creating a web lifting the veil whereof is not an easy task. The truth of the matter is expected to be uncovered by a detailed probe which may take long time to undertake and conclude. The total wrongful gain from the criminal activity cannot be computed till the investigation is completed. The authority for "*provisional*" attachment of suspect assets is to ensure that the same remain within the reach of the law.

106. Among the three kinds of attachable properties mentioned above, the first may be referred to, for sake of convenience, as "*tainted property*" in as much as there would assumably be evidence to *prima facie* show that the source of (or consideration for) its acquisition is the product of specified crime, the essence of "*money-laundering*" being its projection as "*untainted property*" (Section 3). This would include such property as may have been obtained or acquired by using the tainted property as the consideration (directly or indirectly). To illustrate, bribe or illegal gratification received by a public servant in form of money (cash) being undue advantage and dishonestly gained, is tainted property acquired "*directly*" by a scheduled offence and consequently "*proceeds of crime*". Any other property acquired using such bribe as consideration is also "*proceeds of crime*", it having been obtained "*indirectly*" from a prohibited criminal activity within the meaning of first limb of the definition.

107. In contrast, the second and third kinds of properties mentioned above would ordinarily be "*untainted property*" that may have been acquired by the suspect legitimately without any connection with criminal activity or its result. The

same, however, are intended to fall in the net because their owner is involved in the proscribed criminality and the tainted assets held by him are not traceable, or cannot be reached, or those found are not sufficient to fully account for the pecuniary advantage thereby gained. This is why for such untainted properties (held in India or abroad) to be taken away, the rider put by law insists on equivalence in value. From this perspective, it is essential that, before the order of attachment is confirmed, there must be some assessment (even if tentative one) as to the value of wrongful gain made by the specified criminal activity unless it be not possible to do so by such stage, given the peculiar features or complexities of the case. The confiscation to be eventually ordered, however, must be restricted to the value of illicit gains from the crime. For the sake of convenience, the properties covered by the second and third categories may be referred to as "*the alternative attachable property*" or "*deemed tainted property*".

108. Generally, there would be no difficulty in proceeding with the attachment or confiscation of a tainted property respecting which there is material available to show that the same was derived or obtained as a result of criminal activity of specified nature, so long as such property is found held by the person who had indulged in such criminal activity, it amounting to money-laundering, as indeed those who may have aided or abetted such acts. Dispute, however, is likely to arise in relation to attachment or confiscation upon questions being raised at the instance of the person suspected of money-laundering (or his abettor) as to sufficiency of the material or reasons to believe for such action, as indeed of the fairness or propriety of the procedure followed. Dispute may also arise in such context if the property has been transferred to another person, after it had been acquired by the transaction relatable to money-laundering and before its attachment under PMLA. The third party may have a claim to agitate that it had been acquired by it *bonafide* and for lawful and adequate consideration.

109. The inclusive definition of "*proceeds of crime*" respecting property of the second above-mentioned nature - i.e. "*the value of any such property*" - gives rise (as it has done so in these five appeals) to potential multi-layered conflicts between the person suspected of money-laundering (the accused), a third party (with whom such accused may have entered into some transaction vis-a-vis the property in question) and the enforcement authority (the State). Since the second of the above species of "*proceeds of crime*" uses the expression "*such property*", the qualifying word being "*such*", it is vivid that the "*property*" referred to here is equivalent to the one indicated by the first kind. The only difference is that it

is not the same property as of the first kind, it having been picked up from among other properties of the accused, the intent of the legislature being that it must be of the same "*value*" as the former. The third kind does use the qualifying words "*equivalent in value*". Though these words are not used in the second category, it is clear that the said kind also has to be understood in the same sense.

110. Thus, it must be observed that, in the opinion of this court, if the enforcement authority under PMLA has not been able to trace the "*tainted property*" which was acquired or obtained by criminal activity relating to the scheduled offence for money-laundering, it can legitimately proceed to attach some other property of the accused, by tapping the second (or third) above-mentioned kind provided that it is of value near or equivalent to the proceeds of crime. But, for this to be a fair exercise, the empowered enforcement officer must assess (even if tentatively), and re-evaluate, as the investigation into the case progresses, the quantum of "*proceeds of crime*" derived or obtained from the criminal activity so that proceeds or other assets of equivalent value of the offender of money-laundering (or his abettor) are subjected to attachment to such extent, the eventual order of confiscation being always restricted to take over by the Government of illicit gains of crime, the burden of proving facts to the contrary being on the person who so contends.

111. If such other property as above (*the alternative attachable property* or *deemed tainted property*) is owned by, or held in the name of, the accused, objections to attachment (or confiscation) would generally concern the material on which reasons to believe about money-laundering and acquisition of proceeds of crime are founded or the value of the property which has been attached. Again, the possibility of conflict involving interest of a third party comes in for which the *bonafides* of the acts through which such third party may have acquired interest in the targeted property, as indeed of the lawfulness and adequacy of consideration for such acquisition, would need scrutiny."

69. **Axis Bank** has taken the view that the first limb would comprise of tainted property and which would essentially be property in respect of which there would, at least prima facie, be evidence to establish that the source of its acquisition was the product of a specified crime. **Axis Bank** then proceeds to hold that this nature of property would also include that asset which may have been obtained or

acquired by using the tainted property as its consideration whether directly or indirectly. The second kind of property which **Axis Bank** has recognised as falling within the ambit of Section 2(1)(u) was described to be untainted property and was explained to be that which may have been acquired *"by the suspect legitimately without any connection with criminal activity or its result"*. According to the learned Judge, such property would also fall within the scope of the Act since the person holding an interest in such property is found involved in the proscribed criminal activity and in a situation where the tainted assets held by him are either not traceable or cannot be reached. These properties were described in **Axis Bank** to be *"alternative attachable property"* or *"deemed tainted property"*. **Axis Bank** appears to take note of an exigency where an asset or property which may be directly or indirectly connected to criminal activity may not be traceable. It is in the aforesaid backdrop that the learned Judge appears to have interpreted the phrase "*or the value of any such property*" and thus enabling the Directorate to proceed even against such property in which the accused may have had an interest notwithstanding the fact that the same may not have a direct or indirect relationship with the criminal activity itself. This was explained by the learned Judge in **Axis Bank** as is evident from paragraphs 109 to 110 extracted hereinabove.

70. **Axis Bank** also takes note of a contingency where a third-party interest may stand created in the deemed tainted property and the conflict which may arise in case such property comes to be attached under the Act. Dealing with the issue of a bona fide third party right claimed in such property, the Court held thus: -

"148. In view of the conclusions reached as above, rejecting the argument of prevalence of RDBA, SARFAESI Act and Insolvency Code over PMLA, the said laws (or similar other laws, some referred to above) must co-exist, each to be construed and enforced in harmony, without one being in derogation of the other, with regard to assets respecting which there is material available to show the same to have been "*derived or obtained*" as a result of "*criminal activity relating to a scheduled offence*" rendering the same "*proceeds of crime*", within the mischief of PMLA. The PMLA, declares, by virtue of Section 71, that it has over-riding effect over other existing laws, such provision containing non-obstante clause with regard to inconsistency apparently to be construed as referable to the dealings in "*money-laundering*" and "*proceeds of crime*" relating thereto.

149. An order of attachment under PMLA, if it meets with the statutory pre-requisites, is as lawful as an action initiated by a bank or financial institution, or a *secured creditor*, for recovery of dues legitimately claimed or for enforcement of *secured interest* in accordance with RDBA or SARFAESI Act. An order of attachment under PMLA is not rendered illegal only because a *secured creditor* has a prior *secured interest* (charge) in the subject property. Conversely, mere issuance of an order of attachment under PMLA cannot, by itself, render illegal the prior charge or encumbrance of a *secured creditor*, this subject to such claim of the third party (*secured creditor*) being *bonafide*. In these conflicting claims, a balance has to be struck. On account of exercise of the prerogative of the State under PMLA, the lawful interest of a third party which may have acted *bonafide*, and with due diligence, cannot be put in jeopardy. The claim of *bonafide third party claimant* cannot be sacrificed or defeated. A contrary view would be unfair and unjust and, consequently, not the intention of the legislature. The legislative scheme itself justifies this view. To illustrate, reference may be made to sub-section (8) of Section 8 PMLA where-under a power is conferred on the special court to direct the Central Government to "*restore*" a property to the claimant with a legitimate interest even after an order of confiscation has been passed.

150. The legislation on money-laundering, as is the case of similarly placed other legislations providing for forfeiture or confiscation of illegally acquired assets, contains sufficient safeguards to protect the interest of such third parties as may have acted *bonafide*. Such safeguards and rights to secure their lawful interest in the property subjected to attachment (with intent to take it to confiscation) have already been noticed at length with reference to the statutory provisions. To recapitulate, and by way of illustration, reference may be made to the opportunity afforded by law (Section 8) to a person claiming "*a legitimate interest*" to approach the adjudicating authority and the appellate tribunal, as indeed the court, to prove that he had "*acted in good faith*", taking "*all reasonable precautions*", himself not being involved in money-laundering, to seek its "*release*" or "*restoration*". In this context, however, as also earlier noted, the presumptions that can be drawn in terms of Sections 23 and 24 of PMLA are to be borne in mind, the burden of proving facts contrary to the case of money-laundering being on the person claiming to have acted *bonafide*."

71. Proceeding then to the issue of balancing of competing interests in a deemed tainted property, the Court held as follows: -

> **"159.** As noted earlier, there are three parts of the definition of the expression "*proceeds of crime*", the first clearly referring to a property respecting which there is material to show the same to have been "*derived or obtained*", directly or indirectly, by a person "*as a result of criminal activity* (of specified nature)". In case such property is held by the person who is "*charged with the offence of money-laundering*", there is a statutory presumption under Section 24(a) PMLA, using the expression "*shall presume*", about it being proceeds of crime involved in such money-laundering. It is a rebuttable presumption, the onus to prove facts to the contrary being on the person accused of such offence. If the acquisition of such property by such accused has involved more than one "*inter-connected transactions*", one of such transactions being proved to be involving money-laundering, a statutory presumption is raised under Section 23 PMLA that the other transactions form part of the former, the burden to prove facts to the contrary being again on the person claiming otherwise.
>
> **160.** But, in cases where the enforcement authority seeks to attach other properties, suspecting them to be "*proceeds of crime*", not on the basis of fact that they are actually "*derived or obtained*" from criminal activity but because they are of equivalent "*value*" as to the proceeds of crime which cannot be traced, it is essential that there be some *nexus* or *link* between such property on one hand and the person accused of or charged with the offence of money-laundering on the other. In cases of this nature, the person accused of money-laundering must have had an interest in such property at least till the time of engagement in the proscribed criminal activity from which he is stated to have derived or obtained pecuniary benefit which is to be taken away by attachment or confiscation. It is with this view that PMLA provides for a possible presumption to be drawn, under Section 24(b) using the expression "*may presume*", about a property being "*involved in money-laundering*" in the case of person other than the one who is charged with the offence of money-laundering. There is no doubt that such presumption, if drawn, may also be rebutted by evidence showing facts to the contrary.
>
> **161.** The law conceives of possibility of third party interest in property of a person accused of money-laundering being created legitimately or, conversely, with ulterior motive "*to frustrate*" or "*to defeat*" the objective of law against money-laundering. In case of *tainted asset* - that is to say a property acquired or obtained as a result of criminal activity - the interest acquired by a third party from person accused of money-laundering, even if *bona fide*, for lawful and adequate consideration, cannot result in the same being released from attachment, or escaping confiscation, since the law intends it to "*vest absolutely in the Central Government free from all encumbrances*", the right of such third party being restricted to sue the wrong-doer for damages, the encumbrance, if created with the objective of defeating the law, being treated as void (Section 9).

162. But, in case an otherwise untainted asset (i.e. *deemed tainted property*) is targeted by the enforcement authority for attachment under the second or third part of the definition of "*proceeds of crime*", for the reason that such asset is equivalent in value to the tainted asset that was derived or obtained by criminal activity but which cannot be traced, the third party having a legitimate interest may approach the adjudicating authority to seek its release by showing that the interest in such property was acquired *bona fide* and for lawful (and adequate) consideration, there being no intent, while acquiring such interest or charge, to defeat or frustrate the law, neither the said property nor the person claiming such interest having any connection with or being privy to the offence of money-laundering.

163. Having regard to the above scheme of the law in PMLA, it is clear that if a *bonafide* third party claimant had acquired interest in the property which is being subjected to attachment at a time anterior to the commission of the criminal activity, the product whereof is suspected as proceeds of crime, the acquisition of such interest in such property (otherwise assumably untainted) by such third party cannot conceivably be on account of intent to defeat or frustrate this law. In this view, it can be concluded that the date or period of the commission of criminal activity which is the basis of such action under PMLA can be safely treated as the cut-off. From this, it naturally follows that an interest in the property of an accused, vesting in a third party acting *bona fide*, for lawful and adequate consideration, acquired prior to the commission of the proscribed offence evincing illicit pecuniary benefit to the former, cannot be defeated or frustrated by attachment of such property to such extent by the enforcement authority in exercise of its power under Section 8 PMLA.

164. Though the sequitur to the above conclusion is that the *bonafide third party claimant* has a legitimate right to proceed ahead with enforcement of its claim in accordance with law, notwithstanding the order of attachment under PMLA, the latter action is not rendered irrelevant or unenforceable. To put it clearly, in such situations as above (third party interest being prior to criminal activity) the order of attachment under PMLA would remain valid and operative, even though the charge or encumbrance of such third party subsists but the State action would be restricted to such part of the value of the property as exceeds the claim of the third party.

165. Situation may also arise, as seems to be the factual matrix of some of the cases at hand, wherein a *secured creditor*, it being a *bonafide third party claimant* vis-a-vis the *alternative attachable property* (or *deemed tainted property*) has initiated action in accordance with law for enforcement of such interest prior to the order of attachment under PMLA, the initiation of the latter action unwittingly having the effect of frustrating the former. Since both actions are in accord with law, in order to co-exist and be in harmony with each other, following the preceding prescription, it would be appropriate that the PMLA attachment, though remaining valid and operative, takes a back-seat allowing the secured creditor *bonafide third party claimant* to enforce its claim by disposal of the subject property, the remainder of its value, if any, thereafter to be made available for purposes of PMLA."

72. From a reading of the aforesaid passages of **Axis Bank**, it is evident that the learned Judge took into consideration bona fide third-party interests that may come to be created or exist in deemed tainted property. **Axis Bank** while dealing with third party interests has also taken into consideration both secured as well as unsecured interests in such deemed tainted properties. The learned Judge while proceeding to notice the aforesaid conflicts which may arise also culled out certain salutary safeguards with respect to such interests. **Axis Bank** holds that in order to recognise a right inhering in the respondents to proceed against such property, it must be established that there was "*some nexus or link between such property on one hand and the person accused or charged of money laundering on the other*". It further held that in such cases it would have to be found that the person accused of money laundering had an interest in such property at least till the time of engagement in the proscribed criminal activity from which a pecuniary interest had been derived or obtained. It was on a construction of the provisions of the Act as such as well as the intent of the legislation itself that the learned Judge recognised and held that property equivalent to the tainted asset which had been derived or obtained from criminal activity may also be subject to attachment and confiscation under the Act notwithstanding a legitimate third-party interest existing in the same. It also held that such a third party claiming an interest in that property would always have the right to approach the Adjudicating Authority and establish that the property had been acquired bona fide, for lawful consideration and absent any intent of the acquisition being aimed at defeating or frustrating the objectives of the Act itself. It also pertinently held that interest acquired in deemed tainted property prior to the period during which the criminal

activity was undertaken would be free from the rigours and penal provisions of the Act. It accordingly proceeded to propound the rule that the date or period of commission of criminal activity would be liable to be treated and recognised as the "cut off". On arriving at the aforesaid conclusion, the learned Judge held that any interest in the property of an accused vesting in a third party which had acquired the same for lawful and adequate consideration prior to the commission of the scheduled offence would not stand defeated or frustrated by attachment.

73. Proceeding then to deal with secured interests that may have been validly created and may be found to exist, Axis Bank holds that an order of attachment under the Act is not rendered unenforceable merely because a valid third-party encumbrance or charge exists in such property. The learned Judge explained the legal position and held that since action taken either by a secured creditor or the Directorate under the Act are both steps taken in accordance with law, harmoniously interpreted it must be held that though an attachment under the Act would remain valid and operative it would have to take "a back seat" and thus permit the secured creditor to enforce its rights on the subject property and only "remainder of its value" if any, be available for the purposes of the Act. The aforesaid conclusion appears to have been drawn bearing in mind the fact that undisputedly an attachment or confiscation under the Act is not akin to the enforcement of a debt due in law.

74. Insofar as **Seema Garg** is concerned, it would be apposite at the outset to note that the challenge in those proceedings was with respect to the attachment of properties purchased prior to the period of commission of the scheduled offence and in some instances before the enforcement of the Act itself. The Division

Bench in **Seema Garg** formulated the questions which arose for consideration in paragraph 26 of the report which is reproduced hereinbelow: -

> "26. From the conceded position and arguments of both sides, we find that following questions arise for our adjudication:
>
> i) Whether provisional attachment of property is sustainable after the expiry of 90 or 365 days from the date of order passed by adjudicating authority?
>
> ii) Whether property acquired prior to enactment of PMLA i.e. prior to 1.7.2005 can be provisionally attached under Section 5 of the PMLA?
>
> iii) Whether phrase 'value of such property' occurring in definition of 'proceeds of property' includes any property of any person irrespective of source of property?
>
> iv) Whether officer attaching property is required to record reason that property is likely to be concealed, transferred or dealt with in any manner which may frustrate proceedings relating to confiscation?"

75. Insofar as we are concerned, it would be questions (ii) and (iii) alone which would be relevant. **Seema Garg** while interpreting Section 2(1)(u) held as follows: -

> "31. Property purchased prior to commission of scheduled offence leaving aside date of enactment of PMLA, does not fall within ambit of first limb of definition of 'proceeds of crime', however it certainly falls within purview and ambit of third limb of the definition. Counsel for both sides have cited judgment of Delhi High Court in the case of *Abdullah Ali Balsharaf* v. *Directorate of Enforcement* (2019) 3 RCR (Cri) 798 to support their contention. As per said judgment, if property derived or obtained from scheduled offence is taken or held outside India, the property of equivalent value held in India or abroad may be attached irrespective of date of purchase. We fully subscribe to the opinion expressed by Delhi High Court. We find that third limb of definition 'proceeds of crime' covers property equivalent to property held or taken outside India, thus date of purchase of property which is equivalent to property held outside India, is irrelevant. Any property irrespective of date of purchase may be attached if property derived or obtained from scheduled offence is held or taken outside India.
>
> 32. The moot question arises that whether property of equivalent value may be attached where property derived or obtained from scheduled offence is not held

or taken outside India. If any property is permitted or held liable to be attached irrespective of its date of purchase, it would amount to declaring second and third limb of definition of 'proceeds of crime' one and same. As pointed out by counsel for Appellants, the third limb of definition clause was inserted by Act 20 of 2015. The aforesaid 3rd limb has been further amended w.e.f. 19.04.2018 enlarging the scope. The question arises that if phrases 'value of such property' and 'property equivalent in value held within the country or abroad' are of same connotation and carry same meaning, there was no need to insert third limb in the definition of 'proceeds of crime'. The amendment made by legislature cannot be meaningless or without reasons. Use of different words and insertion of third limb in the definition cannot be ignored or interpreted casually. Every word chosen by legislature deserves to be given full meaning and effect. Accordingly, words 'value of such property' and 'property equivalent in value held within the country or abroad' cannot be given same meaning and effect. Had there been intention of legislature to include any property in the hands of any person within the ambit of proceeds of crime, there was no need to make three limbs of definition of proceeds of crime. It was very easy and convenient to declare that any property in the hands of a person who has directly or indirectly at any point of time had obtained or derived property from scheduled offence. There was even no need to declare property derived or obtained from scheduled offence as proceeds of crime. The legislature w.e.f. 01.08.2019 has inserted explanation in Section 2(1)(u) of the PMLA. As per Mr. Mittal, counsel for the Respondents, the said explanation enlarges scope of first limb of definition 'proceeds of crime' and does not affect second limb of definition. We find some substance in the contention of Respondents, however it is trite law that entire scheme of the Act must be read as a whole/in its entirety and every provision should be read in such a manner that it makes other provisions and scheme of Act coherent and meaningful. A provision cannot be read in isolation. The definition part does not create rights and liabilities, thus it should be examined in the light of other sections which create rights and liabilities. As per Section 8(1) of the PMLA, the Adjudicating Authority has to serve notice calling upon the person to indicate the source of his income, earning or assets out of which or by means of which he has acquired the property attached under Section 5 of the PMLA. Seeking explanation about source of property and furnishing explanation is meaningless if property inspite of genuine and explained source may be attached. As per Section 24 of the PMLA, burden to prove that property is not involved in money laundering is upon the person whose property is attached. There is no sense on the part of any person to discharge burden qua source of property if any property may be attached, irrespective of its source.

33. As per Section 8(6) of the PMLA, where the Special Court finds that offence of money laundering has not taken place or property is not involved in

money laundering, it shall release such property. If contention of Respondent is upheld, there would be no need of recording findings by Special Court with respect to property attached being proceeds of crime, no sooner it is held that offence of money laundering has been committed, then the Special Court would be bound to confiscate every attached property because every property in the hand of a person, who had obtained or derived property from scheduled offence, would be proceeds of crime.

34. We deem it appropriate to examine contention of Respondents from another angle i.e. offence of money laundering as defined under Section 3 of the PMLA. As per Section 3 of the PMLA, any person who has directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is involved in concealment, possession, acquisition or use or projecting as untainted property or claiming as untainted property shall be guilty of an offence. If property purchased prior to commission of alleged offence or property not derived or obtained from commission of scheduled offence is declared as proceeds of crime, every person who is concerned with sale, purchase, possession or use of said property would be guilty of offence of money laundering. A person who is not connected with commission of scheduled offence as well property derived from said offence but had dealt with any other property of a person, who had committed scheduled offence, would fall within the ambit of Section 3 of the PMLA, which cannot be countenanced in law. There would be total chaos and uncertainty. The authorities would get unguided and unbridled powers and may implicate any person even though he has no direct or indirect connection with scheduled offence and property derived from thereon but has dealt with any other property (not involved in scheduled offence) of the person who has derived or obtained property from scheduled offence. It would amount to violation of Article 20 and 21 of Constitution of India.

35. In our considered opinion, to understand true meaning of second limb of definition of 'proceeds of crime', it must be read in conjunction with Section 3 and 8 of the PMLA. If all these sections are read together, phrase 'value of such property' does not mean and include any property which has no link direct or indirect with the property derived or obtained from commission of scheduled offence i.e. the alleged criminal activity. 'Value of such property' means property which has been converted into another property or has been obtained on the basis of property derived from commission of scheduled offence e.g. cash is received as bribe and invested in purchase of some house. House is value of property derived from scheduled offence. Cash in the hands of an accused of offence under Prevention of Corruption Act, 1988 is property directly derived from scheduled offence, however if some movable or immovable property is purchased against said cash, the movable or immovable

property would be 'value of property' derived from commission of scheduled offence. If a person gets some land or building by committing cheating (Section 420 of IPC) which is a scheduled offence and said building or land is sold prior to registration of FIR or ECIR, the property derived from scheduled offence would not be available, however money generated from sale or transfer of said property in the form of cash or any other form of property may be available. The cash or any other form of property movable or immovable, tangible or intangible would be 'value of property' derived from commission of scheduled offence.

36. Andhara Pradesh High Court in the case of *Satyam Computer Services* (Supra) has expressed view similar to our above expressed view, however Delhi High Court in the case of *Axis Bank* (Supra) has expressed contrary view which we do not subscribe because Delhi High Court has declared/treated words 'value of such property' and 'property equivalent in value held within country' at par which cannot be countenanced in view of scheme and object of the Act.

37. There may be a case where a person accused of commission of scheduled offence, on account of destruction or disposal of property, is having no property. Non-availability of property derived from scheduled offence does not immune an accused from offence of money laundering committed under Section 3 of the PMLA. As per scheme of the Act, there is criminal liability of an accused apart from civil liability of attachment of property, thus object of the Act is not defeated merely on the ground that property derived from crime is not available for attachment. The property derived from legitimate source cannot be attached on the ground that property derived from scheduled offence is not available. There are so many scheduled offences where property may or may not be involved because every scheduled offence is not committed for the sake of property e.g. offence relating to wild animals, waging war against Government of India, murder, attempt to murder, offences under Arms Act. There is a long list of offences under different enactments where property is normally not involved still these are scheduled offences and punishable under Section 3 & 4 of PMLA.

38. Accordingly, we find and hold that phrase 'value of such property' does not mean and include any property which has no link direct or indirect with the property derived or obtained from commission of scheduled offence i.e. the alleged criminal activity.

xxx

> 51. In view of above discussion, we summarise our findings as below:
>
> i) In case investigation is pending, filing of complaint against others is not sufficient to deprive any person from benefit of time cap of 365 days,
>
> ii) Property acquired prior to commission of scheduled offence i.e. criminal activity or introduction of PMLA cannot be attached unless property obtained or acquired from scheduled offence is held or taken outside the country.
>
> iii) Director or any other officer authorised by him is bound to record reasons which must be specific and mere reproduction of wording of Section 5 is not sufficient."

76. **Seema Garg** principally holds that the phrase "*value of any such property*" and "*property equivalent in value held within the country or abroad*" cannot be ascribed the same meaning and effect. The learned Judges comprising the Division Bench then proceeded to hold that even if the intent of the legislature was to include any property in the hands of a person within the ambit of the expression "*proceeds of crime*", there would be no need to create "three limbs of definition of proceeds of crime".

77. Having rendered careful thought and consideration on the aforesaid observations, this Court finds itself unable to sustain the line of reasoning as adopted for the following reasons. It becomes pertinent to note [and as would be evident from the chart extracted hereinabove and which exhibits how Section 2(1)(u) came to be amended from time to time] that the expression "*or the value of any such property"* existed right from the inception of the Act itself. Section 2(1)(u) consequently as it stood originally included both property derived or obtained directly or indirectly by a person indulging in criminal activity as well as the value of any such property. The phrase "property equivalent in value" came to be introduced by virtue of the 2015 Amendment to the Act and while dealing

with a situation where property is taken or held outside the country. To deal with such a situation, the Legislature by virtue of the 2015 Amendment also empowered the Directorate in such a contingency to initiate action against property equivalent in value held within the country itself. The words "*or abroad*" came to be included in the third limb of Section 2(1)(u) by virtue of the 2018 Amendment to the Act. The Court also bears in mind the Explanation which came to be added to Section 2(1)(u) which further sheds light on the expansive sweep of Section 2(1)(u) and prescribes that proceeds of crime would also extend to "any property" which may be directly or indirectly derived or obtained as a result of any criminal activity.

78. As would be evident from the transformative journey of Section 2(1)(u) between 2005 to 2019 it is manifest that the expressions "*value of any such property*" and "*property equivalent in value*" were both used to deal with distinct contingencies. The phrase "*equivalent in value*" was placed in the provision to be read in conjunction with property taken or held outside the country. The phrase "*equivalent in value*" cannot be understood or interpreted to control the first or the second limb of Section 2(1)(u). The expression "*value of any such property"* always stood hinged to the first limb of the definition of proceeds of crime. It would therefore be incorrect to assume that the expression "*value of any such property*" was either surplusage or of no import at all.

79. Regard must also be had to the fact that the legislation itself is dealing with contingencies where proceeds of crime are layered and their origins camouflaged and masked enabling the accused to project or claim it to be untainted property. The Act clearly as does **Axis Bank** take into consideration a situation where a

person who has obtained proceeds of crime by commission of a scheduled offence has managed to ensure that a property directly or indirectly connected to criminal activity is rendered untraceable. It is to confer authority upon the Directorate to proceed further in such a situation that Section 2(1)(u) uses the expression "*or the value of any such property*". The safeguard which stands constructed in Section 2(1)(u) in such a contingency is that in case the Directorate does proceed against any other property, it must be equivalent in value to the illegal pecuniary benefit or gain that may have been obtained as a result of criminal activity.

80. In the considered opinion of this Court to tie the Directorate's power to move forward in this direction only in cases where property is taken or held outside the country would not only do violence to the plain language of Section 2(1)(u), it would clearly whittle down the scope and intent of the definition itself. It would essentially amount to erasing the expression "*value of any such property*" as appearing in Section 2(1)(u) altogether. The Court further notes that in **Seema Garg** the learned Judges themselves observed that the phrase "*value of any such property*" would not mean and include any property which has no link, direct or indirect, with property derived or obtained from commission of a scheduled offence. The Court observes that Section 2(1)(u) clearly and in unambiguous terms includes not only property derived or obtained directly or indirectly as a result of criminal activity relating to a scheduled offence but also the value of any such property. **Seema Garg** thus seems to gloss over the statutory imperatives underlying the deployment of the phrase "or the value of any such property" and the concept of deemed tainted properties enunciated in **Axis Bank.** On a plain textual interpretation of Section 2(1)(u) as well as in the

backdrop of the amendatory history of that provision, this Court finds itself unable to agree with the line of reasoning adopted in **Seema Garg**. As held hereinbefore, affirmation of **Seema Garg** would amount to virtually deleting the phrase "or the value of any such property" from Section 2(1)(u). That would not only violate the well settled tenets of statutory construction but would clearly amount to the Court rewriting the provision itself in a manner that it stands deprived of vital and purposive content. The Court further notes that **Axis Bank** had enunciated important safeguards which would apply in respect of third-party interests in deemed tainted property. Those caveats duly secure and protect bona fide third-party interests created for valid consideration. This Court, thus, reaffirms those defences as were culled out in **Axis Bank**. The Court thus reiterates the interpretation accorded to Section 2(1)(u) by this Court in the aforesaid decision. Consequently, and for all the aforesaid reasons this Court finds itself unable to agree with the principles as laid down in **Seema Garg** as well as the subsequent decisions rendered by the Andhra Pradesh High Court in **Kumar Pappu Singh Vs. Union of India**[34] and the Patna High Court in **HDFC Bank Limited Vs Government of India, Ministry of Finance**[35]. In **Kumar Pappu Singh**, the High Court held thus: -

> "24. The Division Bench held that the property derived from the offence would be proceeds of the crime and as such any property purchased or acquired before the commission of the offence would not fall within the first limb of the definition of "proceeds of crime". It also held that if such property is moved abroad, any property of the accused available within India, irrespective of the date of acquisition, can be attached as proceeds of crime, as the same would fall within

[34] 2021 SCC OnLine AP 983

[35] 2021 SCC OnLine Pat 4222

the third limb of the definition. However, the Division Bench held, on the ambit of "value of such property", that this term is not the same as the term "property equivalent in value held within the Country or abroad", which appears in the third limb, and the same meaning cannot be given to both terms. While explaining the scope of the term "value of such property", the division bench took the view that if some properties are obtained by committing an offence and are sold prior to the registration of the F.I.R. or ESIR, the money generated from sale or transfer of such property in the form of cash or any other form of property, which is available for attachment would answer the description "value of such property". I am in respectful agreement with the view taken by the Division bench of the Hon'ble High Court of Punjab and Haryana.

25. Apart from the above reasons, I would supplement with the following:

The rule in *Heydon's case* as explained by the Hon'ble Supreme Court in *Bengal Immunity Co.* v. *Stateof Bihar* is:

23. It is a sound rule of construction of a statute firmly established in England as far back as 1584 when *Heydon's case* [3 Co. Rep 7a : 76 ER 637] was decided that—

> "… for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered:
>
> 1st. What was the common law before the making of the Act.
>
> 2nd. What was the mischief and defect for which the common law did not provide.
>
> 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth, and
>
> 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privatocommodo,* and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bona publico*." In *In re Mayfair Property Company* [LR [1898] 2 Ch. 28 at p. 35] Lindley, M.R. in 1898 found the rule "as necessary now as it was when Lord Coke reported *Heydon case*". In *Eastman Photographic Material Company* v. *Comptroller General of Patents, Designs and Trade Marks* [LR [1898] A.C. 571 at 576] Earl of Halsbury reaffirmed the Rule as follows:

> "My Lords, it appears to me that to construe the Statute in question, it is not only legitimate but highly convenient to refer both to the former Act and to the ascertained evils to which the former Act had given rise, and to the later Act which provided the remedy. These three being compared I cannot doubt the conclusion." It appears to us that this rule is equally applicable to the construction of Article 286 of our Constitution. In order to properly interpret the provisions of that article it is, therefore, necessary to consider how the matter stood immediately before the Constitution came into force, what the mischief was for which the old law did not provide and the remedy which has been provided by the Constitution to cure that mischief.

30. In that view of the matter, the properties purchased before the commission of the offence, cannot fall within the definition of "proceeds of crime" and cannot be attached or confiscated under the Act. Consequently, the attachment and subsequent proceedings before the Adjudicating authority for confiscation of the properties in Table-I of the impugned order would be without jurisdiction and would have to be struck down."

In **HDFC Bank**, the Patna High Court observed as follows:-

> "18. Since no property of respondent No. 5 was found outside the country, which was "proceeds of crime", there was no question of attachment of property equivalent in value held in India. If any property of respondent No. 5 acquired from tainted money would have been found in any country outside India, then any property in India including the property-in-question to the extent of equivalent value of the property outside India could have been attached under the 3rd limb.
>
> 19. The explanation added to the definition of phrase 'proceeds of crime' widens the scope of 'proceeds of crime'. However, would be attracted only when the money launder appears to have committed any other scheduled offence also than the offence under inquiry/investigation and the property was derived as a result of the activity in the said scheduled offence.
>
> 20. Therefore, in my view, the properties-in-question cannot be termed as 'proceeds of crime". Hence, could not have been attached in exercise of power under Section 5 of the PMLA. Therefore, the act of provisional attachment of the properties of respondent No. 5 by respondent-authorities suffers from arbitrariness and in flagrant violation of mandate of Section 5 of the PML Act, 2002. A similar issue was there before a Division Bench of Punjab and Haryana High Court in *Seema Garg* v. *Deputy Director, Directorate of Enforcement* reported in 2020 SCC OnLine P&H 738. The Hon'ble High Court elaborately considered the issue and held as follows:

"31. Property purchased prior to commission of scheduled offence leaving aside date of enactment of PMLA, does not fall within ambit of first limb of definition of 'proceeds of crime', however it certainly falls within purview and ambit of third limb of the definition. Counsel for both sides have cited judgment of Delhi High Court in the case of Abdullah Ali Balsharaf v. Directorate of Enforcement (2019) 3 RCR (Cri) 798 to support their contention. As per said judgment, if property derived or obtained from scheduled offence is taken or held outside India, the property of equivalent value held in India or abroad may be attached irrespective of date of purchase. We fully subscribe to the opinion expressed by Delhi High Court. We find that third limb of definition 'proceeds of crime' covers property equivalent to property held or taken outside India, thus date of purchase of property which is equivalent to property held outside India, is irrelevant. Any property irrespective of date of purchase may be attached if property derived or obtained from scheduled offence is held or taken outside India.

32. The moot question arises that whether property of equivalent value may be attached where property derived or obtained from scheduled offence is not held or taken outside India. If any property is permitted or held liable to be attached irrespective of its date of purchase, it would amount to declaring second and third limb of definition of 'proceeds of crime' one and same. As pointed out by counsel for Appellants, the third limb of definition clause was inserted by Act 20 of 2015. The aforesaid 3rd limb has been further amended w.e.f. 19.04.2018 enlarging the scope. The question arises that if phrases 'value of such property' and 'property equivalent in value held within the country or abroad' are of same connotation and carry same meaning, there was no need to insert third limb in the definition of 'proceeds of crime'. The amendment made by legislature cannot be meaningless or without reasons. Use of different words and insertion of third limb in the definition cannot be ignored or interpreted casually. Every word chosen by legislature deserves to be given full meaning and effect. Accordingly, words 'value of such property' and 'property equivalent in value held within the country or abroad' cannot be given same meaning and effect. Had there been intention of legislature to include any property in the hands of any person within the ambit of proceeds of crime, there was no need to make three limbs of definition of proceeds of crime. It was very easy and convenient to declare that any property in the hands of a person who has directly or indirectly at any point of time had obtained or derived property from scheduled offence. There was even no need to declare property derived or obtained from scheduled offence as proceeds of crime. The legislature w.e.f. 01.08.2019 has

inserted explanation in Section 2(1)(u) of the PMLA. As per Mr. Mittal, counsel for the Respondents, the said explanation enlarges scope of first limb of definition 'proceeds of crime' and does not affect second limb of definition. We find some substance in the contention of Respondents, however it is trite law that entire scheme of the Act must be read as a whole/in its entirety and every provision should be read in such a manner that it makes other provisions and scheme of Act coherent and meaningful. A provision cannot be read in isolation. The definition part does not create rights and liabilities, thus it should be examined in the light of other sections which create rights and liabilities. As per Section 8(1) of the PMLA, the Adjudicating Authority has to serve notice calling upon the person to indicate the source of his income, earning or assets out of which or by means of which he has acquired the property attached under Section 5 of the PMLA. Seeking explanation about source of property and furnishing explanation is meaningless if property inspite of genuine and explained source may be attached. As per Section 24 of the PMLA, burden to prove that property is not involved in money laundering is upon the person whose property is attached. There is no sense on the part of any person to discharge burden qua source of property if any property may be attached, irrespective of its source.

33. As per Section 8(6) of the PMLA, where the Special Court finds that offence of money laundering has not taken place or property is not involved in money laundering, it shall release such property. If contention of Respondent is upheld, there would be no need of recording findings by Special Court with respect to property attached being proceeds of crime, no sooner it is held that offence of money laundering has been committed, then the Special Court would be bound to confiscate every attached property because every property in the hand of a person, who had obtained or derived property from scheduled offence, would be proceeds of crime.

34. We deem it appropriate to examine contention of Respondents from another angle i.e. offence of money laundering as defined under Section 3 of the PMLA. As per Section 3 of the PMLA, any person who has directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is involved in concealment, possession, acquisition or use or projecting as untainted property or claiming as untainted property shall be guilty of an offence. If property purchased prior to commission of alleged offence or property not derived or obtained from commission of scheduled offence is declared as proceeds of crime, every person who is concerned with sale, purchase, possession or use of said property would be guilty of offence of money laundering.

A person who is not connected with commission of scheduled offence as well property derived from said offence but had dealt with any other property of a person, who had committed scheduled offence, would fall within the ambit of Section 3 of the PMLA, which cannot be countenanced in law. There would be total chaos and uncertainty. The authorities would get unguided and unbridled powers and may implicate any person even though he has no direct or indirect connection with scheduled offence and property derived from thereon but has dealt with any other property (not involved in scheduled offence) of the person who has derived or obtained property from scheduled offence. It would amount to violation of Article 20 and 21 of Constitution of India.

35. In our considered opinion, to understand true meaning of second limb of definition of 'proceeds of crime', it must be read in conjunction with Section 3 and 8 of the PMLA. If all these sections are read together, phrase 'value of such property' does not mean and include any property which has no link direct or indirect with the property derived or obtained from commission of scheduled offence i.e. the alleged criminal activity. 'Value of such property' means property which has been converted into another property or has been obtained on the basis of property derived from commission of scheduled offence e.g. cash is received as bribe and invested in purchase of some house. House is value of property derived from scheduled offence. Cash in the hands of an accused of offence under Prevention of Corruption Act, 1988 is property directly derived from scheduled offence, however if some movable or immovable property is purchased against said cash, the movable or immovable property would be 'value of property' derived from commission of scheduled offence. If a person gets some land or building by committing cheating (Section 420 of IPC) which is a scheduled offence and said building or land is sold prior to registration of FIR or ECIR, the property derived from scheduled offence would not be available, however money generated from sale or transfer of said property in the form of cash or any other form of property may be available. The cash or any other form of property movable or immovable, tangible or intangible would be 'value of property' derived from commission of scheduled offence."

21. I adopt the view of the Division Bench of Punjab and Haryana High Court in preference to the single Judge judgment of Delhi High Court in *Deputy Director of Enforcement* v. *Axis Bank* relied upon by learned counsel for respondent Nos. 1 to 4 for the simple reason that the issue directly involved herein was there before the Punjab and Haryana High Court and not before the Delhi High Court. Finally, this Court finds that the phrase "value of such property" does not mean

and include any property which have no link direct or indirect with the property derived or obtained from commission of scheduled offence i.e., the alleged criminal activity."

81. The Court also takes note of the position that although SLP (Crl) No. 28906/2019 is pending before the Supreme Court against the decision rendered in **Axis Bank**, the judgement of this Court has not been stayed or placed in abeyance. The interim order of 30 August 2019 passed in the aforesaid Special Leave Petition only requires parties to maintain status quo. Insofar as the judgement of the Punjab and Haryana High Court in **Seema Garg** is concerned, although SLP (C) No.14713-14715/2020 preferred against the same came to be dismissed, while doing so the Supreme Court recorded that the petition was being rejected in the peculiar facts and circumstances of the case. The dismissal of the aforesaid Special Leave Petition cannot in any case be interpreted or understood as being an affirmation of the view as expressed by the Punjab and Haryana High Court.

I. WHETHER ALLOCATION OF COAL IS PROCEEDS OF CRIME

82. Before proceeding to deal with this question, it would be appropriate to recapitulate the essential facts. As is apparent from the recordal of facts in the introductory part of this judgment, while the facts of these two writ petitions weave through intersecting series of events, they principally arise in the backdrop of a criminal investigation undertaken by the CBI in connection with the allocation of the Chotia coal block in favour of PIL, the wrongful utilization and diversion of coal extracted pursuant to that allocation and the consequential generation of proceeds of crime. The aforesaid allocation ultimately came to be

quashed on 24 September 2014 by the Supreme Court in **Manohar Lal Sharma**. However, much before that verdict coming to be rendered, CBI on 07 April 2010 registered **FIR No. RC/AC2/2010/A0001** alleging misrepresentation by PIL in order to obtain the coal allocation as well as diversion of coal extracted from the said block. The Special Judge CBI framed charges against PIL and other accused in C.C. No. 3 of 2012. That chargesheet was challenged by PIL before this Court which on 05 September 2014 quashed the FIR as well as the consequential chargesheet which was submitted. Although that judgment of the Court forms subject matter of challenge before the Supreme Court by way of SLP (Crl.) 2576 of 2015 which is presently pending, the decision of this Court has neither been stayed nor placed in abeyance.

83. The proceedings initiated by the Enforcement Directorate and impugned in these writ petitions emanate from a second FIR registered by the CBI on 02 December 2016 and was numbered as **R.C. No. 221/2016/E0035**. Investigation undertaken in terms of the second FIR has culminated in the filing of a chargesheet numbered 1/2020 before the competent court on 23 January 2020 alleging commission of offenses under Section 120 B read with Section 420 of the Penal Code. The allegations in the second chargesheet essentially are that the petitioners submitted false and forged documents in support of their application for allocation of the coal block, misrepresented facts pertaining to proceedings pending before the BIFR and thus fraudulently and dishonestly obtained the coal allocation. As noted hereinbefore, the aforesaid chargesheet and the proceedings relating to the same form subject matter of challenge in Special Leave to Appeal (Crl.) Nos. 656-657/2022 in which by an order of 06 May 2022, further

proceedings before the Trial Court have been stayed. The impugned proceedings emanate from the second chargesheet and relate to the provisional attachment of properties held by sister concerns and entities of PIL. It becomes pertinent to highlight here that while the second chargesheet restricts itself to events which occurred upto 04 September 2003 when the coal block was allocated to PIL, the impugned show cause notices and the provisional attachment orders cover properties acquired prior to as well as post that date.

84. A reading of the second chargesheet establishes that the principal allegations levelled against the petitioners is of having submitted false and forged documents in support of their application for allocation of a coal block. It is alleged that the false, incorrect and misleading particulars were provided by them for the purposes of obtaining the allocation. The allegation of commission of offenses relatable to Section 420 and 120 B IPC is premised on the aforesaid allegations. While it is not for this Court to comment or enter any finding on whether a commission of those offenses is evidenced from the aforesaid allegations, the question which falls for determination is whether even if it were assumed that the said allegations constitute the commission of a scheduled offense and criminal activity, whether the allocation represents or can be understood as proceeds of crime as defined in Section 2(1)(u) of the Act.

85. In order to appreciate the submission of Mr. Sibal that the allocation letter would not fall within the ambit of Sections 2(1)(u) or 3 of the Act, it would be apposite to briefly advert to the system of allocation of coal blocks. In **Manohar**

Lal Sharma[36], the Supreme Court extensively reviewed the system of allocation of coal blocks by the Union Government and explained that procedure as entailing the following steps. The allocation letter enabled the recipient to apply to the appropriate State Government for grant of a prospecting license or a mining lease dependent upon whether the block had been previously explored or not. The applicant was thereafter required to have a mining plan duly approved. The State Government on receipt of that plan was required to obtain the prior consent of the Union whereafter and upon receipt of environmental clearance and other statutory permissions, a mining lease would be granted by that Government. The nature of the right conferred on the allocatee by virtue of the allocation letter was explained by the Supreme Court in **Manohar Lal Sharma** in the following terms: -

> **"75.** We are unable to accept the submission of the learned Attorney General that allocation of coal block does not amount to grant of largesse. It is true that allocation letter by itself does not authorise the allottee to win or mine the coal but nevertheless the allocation letter does confer a very important right upon the allottee to apply for grant of prospecting licence or mining lease. As a matter of fact, it is admitted by the interveners that allocation letter issued by the Central Government provides rights to the allottees for obtaining the coal mines leases for their end-use plants. The banks, financial institutions, land acquisition authorities, revenue authorities and various other entities and so also the State Governments, who ultimately grant prospecting licence or mining lease, as the case may be, act on the basis of the letter of allocation issued by the Central Government. As noticed earlier, the allocation of coal block by the Central Government results in the selection of beneficiary which entitles the beneficiary to get the prospecting licence and/or mining lease from the State Government. Obviously, allocation of a coal block amounts to grant of largesse.
>
> **76.** The learned Attorney General accepted the position that in the absence of allocation letter, even the eligible person under Section 3(3) of the CMN Act cannot apply to the State Government for grant of prospecting licence or mining lease. The right to obtain prospecting licence or mining lease of the coal mine admittedly is

[36] (2014) 9 SCC 516

> dependent upon the allocation letter. The allocation letter, therefore, confers a valuable right in favour of the allottee. Obviously, therefore, such allocation has to meet the twin constitutional tests, one, the distribution of natural resources that vest in the State is to subserve the common good and, two, the allocation is not violative of Article 14.**"**

86. The allocation letter was thus recognised to be a grant of largesse by the Government entitling the holder thereof to obtain a mining lease and consequently a right to win minerals falling in a particular block. The holder of the allocation letter thus became entitled to the grant of a lease or a permission to win minerals which always did and continued to vest in the State. The mining lease embodied the conferment of a right by the State which owned the land and the mineral deposits to enjoy that property, to extract minerals on terms and conditions specified in the lease. The position of the lessee under the provisions of the **Coal Mines (Special Provisions) Act, 2015** essentially remains the same with the ownership of the land and the mineral deposit vesting in the appropriate government and a right to obtain a lease for excavation of mineral alone being conferred and parted with. On a consideration of the procedure for allotment of coal blocks and their allotment, it is manifest that the allocation of a coal block cannot *stricto sensu* be construed either as property or conferment of a right in property. It becomes pertinent to note that the expression property is defined by Section 2(1)(v) as property or assets of every description. The allocation at best represents a right conferred by the Union enabling the holder thereof to apply to the concerned State Government for grant of a mining lease. The allocation cannot *per se* be recognised as representing proceeds of crime. It would be the subsequent and consequential utilisation of that allocation, the working of the lease that may be granted, the generation of revenues from such operations and

the investment of those wrongfully obtained monetary gains that can possibly give rise to an allegation of money laundering. It is the financial gains that may be derived and obtained or proceeds generated from such allocation which could be considered as falling within the net of Section 2(1)(u).

87. It becomes pertinent to bear in mind that money laundering as has been defined under the Act and is universally acknowledged and understood as activity relating to the layering and obfuscation of the origins of ill-gotten gains. Money laundering is concerned with the concealment of moneys obtained as a result of criminal activity, the act of cleansing criminal proceeds of their origin and its conversion into what may then be projected as untainted assets or properties. The world over the fight against crime has realigned its focus upon ensuring that the profits generated from criminal activity are forfeited and confiscated. It is this aim and intent that the Act purports to subserve. The offense of money laundering was explained by the Court of Appeals in **JSC BTA Bank Vs. Ablyazov**[37] as a "parasitic" offense predicated on the commission of another offense which yielded proceeds which then become the subject of laundering. It is essentially concerned with the concealment of the source of funds through various processes and arrangements aimed at ultimately imbuing them with legitimacy. The **Convention on Laundering, Search, Seizure, Confiscation of the Proceeds of Crime** framed by the European Council while defining laundering offenses, describes the activity of money laundering as follows: -

> "Article 6 - Laundering offences

[37] (2010) 1 WLR 976

1. Each Party shall adopt such legislative and other measures as may be necessary to establish as offences under its domestic law, when committed intentionally.

   a. the conversion or transfer of property, knowing that such property is proceeds, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of the predicate offence to evade the legal consequences of his actions;

   b. the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is proceeds;

   and, subject to its constitutional principles and the basic concepts of its legal system;

   c. the acquisition, possession or use of property, knowing, at the time of receipt, that such property was proceeds:

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

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

   a. it shall not matter whether the predicate offence was subject to the criminal jurisdiction of the Party;

   b. it may be provided that the offences set forth in that paragraph do not apply to the persons who committed the predicate offence;

   c. knowledge, intent or purpose required as an element of an offence set forth in that paragraph may be inferred from objective, factual circumstances.

3. Each Party may adopt such measures as it considers necessary to establish also as offences under its domestic law all or some of the acts referred to in paragraph 1 of this article, in any or all of the following cases where the offender:

   a. ought to have assumed that the property was proceeds:

   b. acted for the purpose of making profit;

   c. acted for the purpose of promoting the carrying on of further criminal activity.

4. Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by declaration addressed to

> the Secretary General of the Council of Europe declare that paragraph 1 of this article applies only to predicate offences or categories of such offences specified in such declaration."

88. It is therefore evident that the Act essentially seeks to confiscate properties and assets that may be obtained from criminal activity and which may then be concealed and legitimised through processes which are described as placement, layering and integration. The Act is motivated by the aim to confiscate the monetary advantage that may be obtained or derived from criminal activity. When viewed in that light, it is evident that the allocation *per se* cannot possibly be viewed or understood as representing proceeds of crime in itself. It is the illegal gains obtained and derived by the utilisation of that allocation and the concealment or conversion of those gains into assets or properties which could possibly be understood as amounting to an act of money laundering.

J. IMPACT OF ALLOCATION NOT BEING PROCEEDS OF CRIME

89. The quintessential element of money laundering is the washing of criminal proceeds and its conversion into property as defined in Section 2(1)(v). For reasons set out hereinabove, the Court has come to the definite conclusion that the allocation would not constitute proceeds of crime. If therefore the scope of enquiry were to be restricted up to this point of the sequence of events alone [and as the Court is mandated to do in light of the scope of the second chargesheet], it is apparent that an allegation of money laundering would not be sustainable at all. This since the allocation of the coal block only represented a permission to obtain rights to extract minerals. Its utilisation thereafter, the extraction of coal, the generation of moneys, the investment of the same, the acquisition of properties

are all actions which ensued thereafter and relate to the period post 04 September 2003. The chargesheet which forms the bedrock of the impugned proceedings restricts itself to activities leading up to the allocation of the coal block alone. The Court also bears in mind the undisputed fact that the allocation came to be made on 04 September 2003. Till that time and date, no allegation of proceeds of crime having been obtained or generated is laid against the petitioners.

90. In order to uphold the invocation of the Act resting on events leading upto the allocation of the coal block on 04 September 2003 and going no further, it was incumbent upon the respondents to establish that proceeds of crime came to be acquired or obtained on that date. This they have woefully failed to do. As noted hereinabove, the gamut of allegations with respect to the generation of proceeds of crime relate to activities and events which ensued after 04 September 2003. That for reasons which stand recorded cannot be taken cognizance of for the purposes of evaluating the validity of proceedings under the Act. within the ambit of Section 2(1)(u).

91. That leads the Court to the irrefutable conclusion that once it is found that the allocation of coal would not fall within the scope of the definition of proceeds of crime, proceedings initiated based on a contrary assumption under the Act would also necessarily crumble and disintegrate. The aforesaid conclusion flows as a necessary sequitur to the Court finding that the allocation would not constitute *"proceeds of crime"*.

K. IMPACT OF QUASHING OF THE FIRST CHARGESHEET

92. It would be pertinent to recall that amongst the various charges which were levelled in the first chargesheet, it was inter alia alleged that PIL diverted 2,27,000 tons of coal to the black market and profited to the extent of Rs. 22.7 crores. It is this amongst other charges which ultimately came to be quashed and annulled by the Court in terms of its judgment dated 05 September 2014. Admittedly the first chargesheet and all proceedings relating thereto came to be quashed by the Court in terms of its judgment rendered on 05 September 2014. While that judgment does form subject matter of challenge in a pending special leave petition, no effective orders have either been passed on that petition nor has the judgment of this Court been placed in abeyance. According to Mr. Raju, as long as that special leave petition remains pending, it cannot be said that finality stands attached to the decision of this Court quashing the aforesaid chargesheet. The Court may only observe that the mere pendency of that petition before the Supreme Court cannot legally be construed as amounting to a revival or continuance of the criminal proceedings which were initiated in terms of the aforenoted chargesheet and ultimately came to be quashed by this Court. As long as the judgment quashing the first chargesheet remains intact and untouched, this Court would have to proceed on the premise that no predicate offense was evidently committed. The submission of Mr. Raju that the proceedings are thus yet to attain finality is consequentially negatived.

93. While dealing with the issue as framed, the Court is conscious of the fact that the present proceedings emanate from a chargesheet which restricts itself to events which occurred upto 04 September 2003. Ordinarily there would have been no occasion to deal with the question posited except for the reason that the

impugned show cause notice and the provisional order of attachment are based on allegations that the allocation was utilised to extract minerals, diversion of the same for the purposes of sale and the laundering of the proceeds so earned and derived through the purchase of immoveable properties. This despite the fact that the utilisation of that allocation and the consequential generation of the alleged proceeds of crime are all issues which fall beyond the realm of the second chargesheet.

94. It would be pertinent to observe that Section 2(1)(u) of the Act creates an indelible link between criminal activity relating to a scheduled offense and the laundering of proceeds obtained from the commission of those crimes. There cannot possibly be proceeds of crime in the absence of a criminal offense having been committed and which is included as a scheduled offense under the Act. In the absence of a scheduled offense having been committed, the question of laundering of proceeds of crime would not arise at all. Bearing in mind the fact that proceedings relating to the first chargesheet have come to be quashed, as a necessary corollary, it would have to be acknowledged that the Court found that the offenses as alleged to have been committed were not found to be evidenced. The decision of the Court amounted to an effacement and annulment of the criminal prosecution which was launched and initiated. The decision of this Court has the effect of a judicial declaration being entered that an offense under the Penal Code did not stand committed at all.

95. An allegation of money laundering is premised and dependent upon the commission of a criminal offense. Unless proceeds are found to have been derived or obtained from criminal activity, the question of money laundering would not

arise. Money laundering, as noted above, is concerned with the commission of an offense which may have yielded revenues or profits and which are then concealed and conferred a sheath of legitimacy. Once the charge of commission of a scheduled offense levelled against a person or entity stands annulled by virtue of a judicial declaration with the Court specifically holding that an offense could not be said to have been committed, it would be wholly impermissible to allege that the person or entity indulged in money laundering. The Court bears in mind the fact that the expression proceeds of crime has been defined under the Act itself as the acquisition of property and assets by any person as a result of "criminal activity" relating to a scheduled offense. The initiation of proceedings under the Act are predicated on the commission of an offense finding mention in the Schedule. The Court is thus of the firm view that it would be wholly illogical and irrational to hold that an allegation of money laundering would survive in the absence of an allegation that a person committed an offense mentioned in the schedule to the Act.

96. If the charge of criminal activity ceases to exist in law, a charge of money laundering would neither sustain nor survive. This was the view which was expressed by a learned Judge of this Court in **Rajiv Chanana** and **Gagandeep Singh.** The Court has already dealt with the impact of the acquittal and discharge of an accused and quashing of criminal prosecution on the proceedings under the Act in the preceding parts of this decision. On a cumulative consideration of the conclusions recorded in respect of Issues **H, I** and **J** hereinabove, the Court finds itself unable to uphold the validity of the impugned proceedings.

L. SECTION 3 AND THE ALLOCATION OF COAL

97. The legality of the proceedings initiated under the Act may then be tested in the backdrop of the language employed in Section 3. The offense under Section 3 is defined to mean indulging or assisting in any process or activity connected with the concealment, possession, acquisition or use of proceeds of crime and/or projecting it as untainted property. The activity or process in order to fall within the mischief of Section 3 must be one which is connected with proceeds of crime. The Court has already found that the allocation would not fall within the ambit of the expression "proceeds of crime" as set forth in Section 2(1)(u). The sine qua non for Section 3 coming into play is the existence of proceeds of crime. The activity or process of money laundering which constitutes an essential element of the offense under Section 3 has an enduring and ineffaceable link to proceeds of crime. Absent the commission of a criminal offense, the foundation of proceedings initiated under the Act would undoubtedly fall and self-destruct. Regard must be had to the fact that not every criminal activity falls within the ambit of Section 3. While criminal activity may represent or evidence the commission of a predicate offense under the Penal Code, it is only activity relating to the laundering of proceeds of crime which can form subject matter of proceedings under the Act. However, once it is found that the allocation would not represent or fall within the scope of the expression proceeds of crime as defined under the Act, the question of money laundering would not arise at all. In view of the aforesaid, it cannot be said that Section 3 is attracted.

98. The Court further notes that it was the revenues generated from and pursuant to the allocation and the properties derived or acquired therefrom which may have fallen within the meaning of the expression "proceeds of crime". Those

moneys generated or properties acquired when concealed, possessed or used and/or thereafter projected/claimed as untainted could be said to have fallen within the scope of Section 3. That activity or process as has been found above, does not form subject matter of the present chargesheet and in any case those allegations insofar as they stood comprised in the first chargesheet already stand quashed by this Court. The allocation of the coal block in any case on its own cannot be held to amount to money laundering.

99. Before concluding the discussion on this issue, it would be pertinent to note that there is no allegation that proceeds of crime had been generated as on 04 September 2003. The respondents have not founded the impugned proceedings on any monetary gains or benefits that may have allegedly accrued to the petitioners as on 04 September 2003. In the absence of any allegation that such gains had been derived or obtained as on that date, the Court finds itself unable to appreciate how proceedings under the Act could have been validly initiated.

M. WHETHER ARTICLE 20(1) VIOLATED

100. This Court has already held that the date of inclusion of the predicate offense in the Schedule to the Act would not be determinative of the question whether proceedings under the Act have been validly initiated. The submission proceeding along the constitutional embargo placed by Article 20(1) was given a slightly nuanced colour by Mr. Sibal while addressing submissions resting on the provisions of Article 20(1) of the Constitution. That submission proceeded along the following lines. It was contended that admittedly the allocation of the coal block was made in favour of the petitioners on 04 September 2003. It was pointed

out that at that time the Act was not in force and came to be promulgated much later on 01 July 2005. It was pointed out that Sections 420 and 120 B IPC came to be included as scheduled offenses only on 01 June 2009. In light of the above, Mr. Sibal contended that since at the time of allocation neither the Act was in existence nor Sections 420 and 120 B IPC included as scheduled offenses, the impugned action must be held to be in violation of Article 20(1) of the Constitution.

101. At the outset it may be noted that the issue of inclusion of those provisions as scheduled offenses in the Act and the question of a perceived retrospective operation of the statute resting on the date when an offense may be included in the Schedule does not appear to arise in the present case for the reason that the FIR alleging commission of the predicate offenses came to be registered as late as in 2016. On culmination of investigation, a chargesheet came to be submitted before the competent court in 2020. Thus, in the facts of the present case it is apparent that both the FIR as well as the chargesheet came to be registered and filed after the Act had come into force and subsequent to the inclusion of Sections 420 and 120B IPC as scheduled offenses therein.

102. More importantly the issue of the Act operating retroactively based on the date when a particular offense may come to be included in the schedule has already been ruled upon by the Court while dealing with Issue **"G"** where it was found that the date of inclusion of a crime as a scheduled offense would not be determinative and the issue would have to be decided bearing in mind whether an offence of money laundering stood committed after the Act had come into force. The various decisions rendered on this question have been duly considered

and noted by the Court while ruling on Issue **"G"** and is thus not being repeated for the sake of brevity. The Court while dealing with Issue **"G"** has independently found that the inclusion of an offense in the Schedule has no correlation to the invocation of the penal provisions of the Act. It has also held that the Act cannot be said to operate retroactively merely because the proceedings are based on the commission of a predicate offense which had occurred prior to its enforcement. The Court has also duly noted the judgments rendered by various other High Courts on the question and thus does not propose to reiterate the same in this part of the judgment. The Court exposits and reiterates the legal position to be that it is the date of the commission of the offense of money laundering and not the date of commission of a scheduled offense which is relevant and determinative.

103. Insofar as the additional submissions of Mr. Sibal addressed in this regard are concerned, the Court finds that there exists no necessity to rule on the same in light of the conclusions recorded by the Court under headings **I** and **J**. Since the Court has already found that the allocation would not fall within the ambit of Section 2(1)(u) or 3 coupled with the impact of the quashing of the first chargesheet discussed above, the arguments flowing from Article 20(1) as canvassed by Mr. Sibal need not be gone into or answered at all except to the extent noted above.

N. IMPUGNED ATTACHMENT AND EQUIVALENT VALUE

104. The facts of the present petitions reflect that the respondents have attached properties and assets which had been purchased prior to the allocation having been made, some which were acquired prior to the promulgation of the Act itself

and some after it came into force. Those details have been set forth in **Annexure A**[38] of the second writ petition and are not being reproduced here for the sake of brevity.

105. It would be pertinent to recall that properties which were acquired prior to the enforcement of the Act may not be completely immune from action under the Act in light of what this Court had held in **Axis Bank**. As was explained by the Court in Axis Bank, the expression proceeds of crime envisages both "tainted property" as well as "untainted property" with it being permissible to proceed against the latter provided it is being attached as equal to the *"value of any such property"* or *"property equivalent in value held within the country or abroad"*. However, both the italicised categories would be liable to be invoked in cases where the actual tainted property cannot be traced or found out. It is only where the respondents are unable to discover the tainted property that they can take the statutory recourse to move against properties which may fall within the ambit of "value of any such property" or "property equivalent in value held within the country or abroad". To the aforesaid limited extent, properties purchased prior to 01 July 2005 may also become vulnerable and subject to action under the Act. However, enforcement action against such properties would have to satisfy the tests and safeguards as propounded in **Axis Bank** with the learned Judge observing that in such a situation it would have to be established that the person accused of money laundering had an interest in such property at least till the time that he indulged in the proscribed criminal activity. The learned Judge further

[38] Pages 377 TO 412 of W.P. (C) 15000/2021

observed that bona fide rights acquired by third parties prior to the commission of the predicate offense would stand saved.

106. Reverting however to the facts of the present case, as this Court reads the impugned show cause notice, it is manifest that the respondents have not initiated action against the properties noted above on the ground that their attachment is being resorted to out of compulsion and necessity and since the tainted properties could not be discovered or traced. This the Court observes notwithstanding it having already found that the allocation did not constitute proceeds of crime, that the second chargesheet stood restricted upto 04 September 2003 and the quashing of the first chargesheet brought all allegations of criminal activity allegedly indulged in post that date to an end. In fact and to the contrary, the provisional order of attachment proceeds on the basis that the promoter/Directors of Prakash Industries indirectly exercised majority control over the entities in whose names properties were purchased. This included Hi Tech Mercantile one of the petitioners in the second writ petition. The provisional attachment order further records that by virtue of the majority shares held by the Promoter/Directors of Prakash Industries in their sister concerns, they would be deemed to be the owners of the assets detailed in Paragraph 7.1 "through themselves or through the said promoter companies/LLPs". Thus, the properties provisionally attached and mentioned in Paragraph 7.1 are asserted to be directly related to the laundering of proceeds of crime. Therefore, in the facts of the present case, the question of property of equivalent value being attached does not arise at all.

107. While much stress was laid by the respondents on the use of the expression "possession" in Section 3 to contend that even if tainted or deemed tainted

property is continued to be possessed after the promulgation of the Act, that would be sufficient to uphold the validity of the proceedings initiated against the petitioners here, the Court finds itself unable to accept that contention in the facts of the present case for the following reasons. At the cost of repetition, it may be noted that the chargesheet bids us to restrict scrutiny of events upto 04 September 2003. Thus, if at all the proceedings could have been salvaged only in respect of those properties which may have been derived from proceeds of crime obtained upto that date. However, the contention of the respondents addressed in this regard crumbles and falls for more than one reason. Firstly, the Court has already found that the allocation did not constitute "proceeds of crime". Secondly, there is no allegation levelled against the petitioners that proceeds of crime had been derived or obtained prior to the allocation. Furthermore, if the Court were to even scrutinize acquisitions made after allocation and tread down that path, it faces the undisputed specter of the first chargesheet having been quashed. The judgment of the Court quashing those proceedings compels and constrains the Court to acknowledge that no criminal activity was indulged in. Viewed from this perspective also, the Court comes to the unescapable conclusion that the submissions advanced by the respondents on this score lack merit and are liable to be rejected.

O. CONCLUSIONS

108. On an overall consideration of the issues delineated above, the Court comes to record the following conclusions: -

A. When the offense of money laundering is described as a stand-alone offense, all that is sought to be conveyed is that it represents an independent offense and is to be tried separately in accordance with the procedure prescribed under the Act. The objective of the Act is to try charges of money laundering which entails proceeds of crime being acquired, possessed or used and/or projected as untainted property. Undisputedly, the offense of money laundering rests on the commission of a predicate offense which in turn may have resulted in a pecuniary benefit being obtained and derived. It fundamentally aims at confiscation of benefits that may be derived as a result of criminal activity and the commission of a scheduled offense. It is aimed at countering and penalising the malaise of wealth and assets acquired as a result of criminal activity

B. It is evident from a reading of the Act that while the commission of a predicate offense is the precipitate step for initiation of proceedings under the Act, the offense of money laundering must be tried and established separately. It is also pertinent to observe that the predicate offense constitutes the very foundation of a charge of money laundering. The entire edifice of a charge of money laundering is raised on an allegation of a predicate offense having been committed, proceeds of crime generated from such activity and a projection of the tainted property as having been legitimately acquired.

C. However, once it is found on merits that the accused had not indulged in any criminal activity, the property cannot legally be treated as proceeds

of crime or be viewed as property derived or obtained from criminal activity. Since the offense of money laundering is itself premised and founded upon the commission of a crime created under an independent statute, it cannot possibly survive or subsist once the predicate offense is found to be not established and a declaration so made by a competent court.

D. The description of the offense of money laundering as a stand-alone offense would not in itself infuse jurisdiction in proceedings that may be initiated under the Act even after a competent court has come to hold that no criminal offense stands committed or in situations where the accused is discharged of the offense or proceedings quashed.

E. The allegation of money laundering is premised and dependent upon the commission of a criminal offence. Unless proceeds are found to have been derived or obtained from criminal activity, the question of money laundering would not arise. The Act is concerned with the commission of an offence which may have yielded revenues of profits which are then concealed and their source obfuscated. However, once the charge of commission of a scheduled offence itself comes to be annulled by virtue of a judicial declaration with a competent Court finding that an offence could not be set to have been committed it would be impermissible to assert that a person or entity has indulged in money laundering.

F. Since the offence of money laundering is essentially aimed at depriving persons of the fruits and benefits that may have been derived or obtained

from criminal activity, the charge is inextricably linked to criminal activity. However, once it is found that a criminal offence does not stand evidenced, the question of any property being derived or obtained therefrom or its confiscation or attachment would not arise at all and in any case, proceedings if initiated under the Act would be wholly without jurisdiction or authority.

G. The Court finds that the expression "proceeds of crime" creates an inextricable link between criminal activity and the acquisition of property and assets as a result thereof. If the charge of criminal activity ceases to exist in law, a charge of money laundering would neither sustain nor survive. The Court thus reiterates the conclusions as drawn and recorded in **Rajeev Chanana** and **Gagandeep Singh**. Consequently it must be held that once it is found by a competent court, authority or tribunal that a predicate offence is either not evidenced or on facts it is held that no offence at all was committed, proceedings under the Act would necessarily have to fall or be brought to a close.

H. Turning then to Section 3 of the Act, the Court finds that the said provision would come into play only if proceeds of crime are found to have been generated. As this Court reads Section 3 it finds that the offence of money laundering has an enduring and ineffaceable link to proceeds of crime. Absent the commission of a criminal offence, the foundation of proceedings initiated under the Act would undoubtedly fall and self-destruct.

I. The Court further notes that not every criminal activity falls within the ambit of Section 3. While criminal activity may represent or evidence the commission of a predicate offence under the Penal Code, it is only activity relating to the laundering of proceeds of crime which can form the subject matter of proceedings under the Act. Absent the existence of criminal activity which may have resulted in proceeds of crime having been gained or obtained, a charge under Section 3 would not sustained.

J. The Court also bears in mind the language of Section 3 of the Act which links the activities and processes of money laundering to proceeds of crime. Section 3 creates an indelible link between property derived or obtained and criminal activity relating to a scheduled offence. It is only when it is found that a person has derived property as a result of criminal activity that the offence of money laundering can be said to have been committed. Absent the element of criminal activity, the provisions of the Act itself would not be attracted.

K. On a fundamental plane, Article 20(1) raises a constitutional injunction or bar in respect of penal action against a person for an act which was not an offense at the relevant time. It is to this extent that the provisions of penal statutes are constitutionally barred from operating retrospectively. The guiding expressions of Article 20(1) are *"violation of a law in force"* and *"at the time of the commission of the act charged…."*. The Constitution thus constructs a negative command against penal action and conviction except for an offense created by a law which was in force at the time of commission of the act.

L. However, an equally well settled principle relating to the retroactive application of penal provisions is that merely because a requisite or facet for initiation of action pertains to a period prior to the enforcement of the statute, that would not be sufficient to characterize the statute as being retrospective.

M. It must be borne in mind that the Act with which we are concerned, penalises acts of money laundering. It does not create a separate punishment for a crime chronicled or prescribed under the Penal Code. The Act does not penalise the predicate offense. That offense merely constitutes the substratum for a charge of money laundering being raised. Accordingly, while the commission of the predicate offense may be described as the sine qua non for an allegation of money laundering being laid against a person, it is an offense created independently owing its genesis to the Act which came to be promulgated on 01 July 2005. While the commission of a predicate offense may be a condition precedent for an allegation of money laundering being laid, it is the activities of money laundering alone which would determine the validity of proceedings initiated under the Act.

N. The Court thus concludes that an offense of money laundering that may be committed post 01 July 2005 would still be subject to the rigours of the Act notwithstanding the predicate offense having been committed prior to that date. As noted hereinabove, Section 3 creates an offense for money laundering. Neither that provision nor the Act is concerned with the trial of the predicate offense. Thus, any activity or process that may

be undertaken by a person post 01 July 2005 in terms of which proceeds of crime are acquired, possessed or used and/or projected as untainted property would still be subject to the provisions of the Act.

O. The Court exposits and reiterates the legal position to be that it is the date of the commission of the offense of money laundering and not the date of commission of a scheduled offense which is relevant and determinative. The date of inclusion of a crime as a scheduled offense would also not be determinative and the issue would have to be decided bearing in mind whether an allegation of money laundering stood committed after the Act had come into force.

P. The conflict between Axis Bank and Seema Garg arises in the backdrop of the latter holding that the expression "value of any other property" would not empower the Directorate to proceed against properties which may have no direct or indirect link with the proceeds of crime. Both the aforenoted decisions have admittedly taken into consideration that Section 2(1)(u) comprises of 3 limbs. Axis Bank takes into consideration a situation where a property which may be said to have a direct or indirect link to proceeds to crime is untraceable. It is in that backdrop that it held that in such a situation, property equivalent in value may also be attached.

Q. The Court has found that the expression "value of any such property" existed from the inception of the Act itself and this aspect must, therefore, be accorded due consideration. The concept of equivalent

value came to be included in Section 2(1)(u) only subsequently and to deal with exigencies where proceeds of crime had been ferreted out of the country and were held overseas. There was and even today does exist a substantive distinction between the use of the expressions "value of any such property" and "property equivalent in value" as employed in Section 2(1)(u).

R. The third limb of Section 2(1)(u) which deals with property equivalent in value was always connected with an exigency where property is taken or held outside the country. If the principle enunciated in **Seema Garg** were to be followed, it would clearly amount to reading Section 2(1)(u) absent the expression "value of any such property". That would not only violate the well settled tenets of statutory construction but would clearly amount to the Court re-writing the provision itself in a manner that it stands deprived of vital and purposive content.

S. The Court while reiterating the principles laid down in **Axis Bank** also takes into consideration the nature of the malaise or mischief against which the Act purports to operate. It consequently finds no justification to read Section 2(1)(u) in a manner which may whittle down its apparent legislative intent and the extent of the power which it seeks to confer on the Directorate.

T. **Axis Bank** also culled out various salutary and significant safeguards insofar as third-party interests, secured or unsecured, that may come to exist in property and thus balancing competing interests. Those

safeguards clearly confer protection on a bona fide third-party interest that may come to exist in property acquired upon payment of due consideration. It also recognized the right of such a person to establish before the Adjudicating Authority that the acquisition of the interest was not intended to defeat the objectives of the Act and was a transfer validly made upon payment of due consideration.

U. **Axis Bank** further held that in order to uphold action that the Directorate may take against alternative attachable property was one which established a nexus or link between such properties on the one hand and the person accused of money laundering. It further propounded the test that in such a case it would have to be found that the person accused of money laundering had an interest in such property at least till the time of engagement in the proscribed criminal activity from which a pecuniary interest had been derived or obtained. It also held that the date or period of commission of criminal activity would be liable to be treated and recognized as the cut off.

V. These tests as spelt out in **Axis Bank** adequately safeguard third party interests. **Seema Garg** while proceeding to hold to the contrary appears to have brushed aside and downplay the imperative of a fair balance being struck and thus ignoring the need and criticality of empowering the Directorate to proceed against other properties in a situation where tainted property is untraceable. For the reasons recorded in the body of this judgment, the Court finds itself unable to agree with the reasoning

assigned in **Seema Garg**. The principles articulated in **Axis Bank** are reiterated.

W. An allocation of coal cannot possibly be viewed as amounting to proceeds of crime per se. That document at best enabled the holder thereof to obtain a mining lease. Viewed in that backdrop it cannot be said that the allocation of coal is property as contemplated under the Act. It is pertinent to note that the Act essentially seeks to confiscate properties and assets that may be derived or obtained from criminal activity and which may then be concealed. It is thus evident that it is only gains that may have been obtained by the utilization of the allocation which could have possibly been viewed as proceeds of crime.

X. It is the gains that may be obtained from criminal activity which are concealed or projected to be untainted that can form the subject matter of the offense under the Act. The allocation of a coal block in itself did not give rise to any monetary gains. It was only when the same was utilized that the question of illegal gains would have arisen.

Y. The impugned proceedings rest on the second chargesheet which bids us to restrict scrutiny upto 04 September 2003 when the allocation came to be made. The proceedings under the Act thus cannot travel beyond the gamut of that chargesheet. The allegations of money laundering would thus have to be cabined and fenced in upto that date. This since the offense is stated to have been committed and completed on 04 September 2003. Thus, any event or offense that may have been

allegedly committed post that date would clearly fall beyond the pale of scrutiny for the purposes of adjudging the validity of the impugned proceedings.

Z. This aspect represents a critical pinion in this case since the criminal activity on which the allegation of money laundering is constructed and raised is the allocation of the coal block. As noted above, there is no allegation that any illegal monetary gains were derived or obtained as on 04 September 2003. This coupled with the fact that the allocation itself would not represent proceeds of crime leads the Court to the unescapable conclusion that the impugned proceedings are rendered patently illegal.

AA. The Court has additionally taken into consideration the fact that the first chargesheet and which dealt with allegations of the allocation having been utilized for the purposes of extracting coal, the diversion of the mined mineral for unlawful gain, the acquisition of properties from the profits so earned and other related allegations already stands quashed. As long as that judicial declaration holds the field, the Court would have to necessarily acknowledge that no criminal activity was indulged in.

BB. The show cause notice and the provisional orders of attachment proceed on the basis that the profits derived from criminal activities post 04 September 2003 and the properties acquired directly as a result thereof are liable to be attached under the Act. However, and as this Court has found activities post 04 September 2003, cannot form the

foundation for the initiation of proceedings under the Act since the chargesheet itself stands restricted to events which occurred up to the date of allocation only. Since for reasons recorded in the body of the judgment, it has already found that the allocation would not constitute proceeds of crime and that in light of the decision of the Court of 05 September 2014, it cannot be said that the petitioner indulged in any criminal activity, the attachment is rendered unsustainable.

CC. The argument based on possession of property and the right of the Directorate to consequently attach the same is clearly rendered unsustainable when viewed in light of the fact that those properties are not treated as untainted or permissibly attachable property constituting property equivalent in value to any such tainted properties. The allegations in the show cause notice are that these properties constitute proceeds of crime in themselves and are thus tainted property. As has been found in the judgment since the chargesheet bids us to restrict scrutiny of events only up to 04 September 2003, the impugned action could have been sustained if it had been found that proceeds of crime had been derived upto that date. That is clearly not the allegation leveled. Insofar as acquisitions made post that date and the coming into force of the Act is concerned, it is faced with the specter of the first chargesheet having already been quashed. The judgment of the Court quashing those proceedings compels and constrains the Court to acknowledge that no criminal activity was indulged in. Viewed from that perspective also, the Court comes to the conclusion that the submissions advanced by the

respondents based on the aspect of continued possession is also liable to negatived.

P. OPERATIVE DIRECTIONS

109. Accordingly, and for all the aforesaid reasons, the writ petitions shall stand allowed. The impugned proceedings arising out of the order of attachment Nos.8337, 8338, 8339, 8340/2021 dated 01 December 2021 as well as the show cause notice dated 13 January 2022 and all proceedings relating to OC No.1586/2021 shall consequently stand quashed.

YASHWANT VARMA, J.

JULY 19, 2022
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