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

Reserved on: December 06, 2017
Pronounced on: January 11, 2018

\+ **W.P. (C) 5320/2017**

J SEKAR ..... Petitioner

Through:Mr.Vikram Chaudhary, Sr. Advocate with Mr.Abdul Saleem, Mr.S.Elambharathi, Mr.Harshit Sethi and Mr.Rishi Sehgal, Advocates

versus

UNION OF INDIA & ORS .....Respondents

Through: Mr.Amit Mahajan, CGSC for UOI with Mr.Sanjeev Narula, CGSC, Mr.Kunal Dutt, Mr.Abhishek Ghai and Ms.Anumita Chandra, Advocates

\+ **W.P. (C) 5323/2017**

S RAMACHANDRAN .....Petitioner

Through:Mr.Vikram Chaudhary, Sr. Advocate with Mr.Abdul Saleem, Mr.S.Elambharathi, Mr.Harshit Sethi and Mr.Rishi Sehgal, Advocates

versus

UNION OF INDIA & ORS ..... Respondents

Through:Mr.Amit Mahajan, CGSC for UOI with Mr.Sanjeev Narula, CGSC, Mr.Kunal Dutt, Mr.Abhishek Ghaiand and Ms.Anumita Chandra, Advocates

\+ **W.P.(C) 5326/2017**

K RETHINAM ...Petitioner

Through: Mr.Vikram Chaudhary, Sr. Advocate with Mr.Abdul Saleem, Mr.S.Elambharathi, Mr.Harshit Sethi and Mr.Rishi Sehgal, Advocates

versus

UNION OF INDIA & ORS ...Respondents

Through:Mr.Amit Mahajan, CGSC for UOI with Mr.Sanjeev Narula,CGSC, Mr.Kunal Dutt, Mr.Abhishek Ghai and Ms.Anumita Chandra, Advocates

\+ **W.P.(C) 6920/2017**

SRS MINING ...Petitioner

Through:Mr.Vikram Chaudhary, Sr. Advocate with Mr. Abdul Saleem, Mr.S.Elambharathi, Mr.Harshit Sethi and Mr.Rishi Sehgal, Advocates

versus

UNION OF INDIA & ORS. ...Respondents

Through: Mr.Vinod Diwakar, CGSC with Mr.Sanjay Pal and Mr.Akshaya Agarwal, Advocates

\+ **W.P.(C) 7015/2017**

T. VINAYAK RAVI REDDY ...Petitioner

Through: Mr.Naveen Malhotra, Advocate

versus

UNION OF INDIA & ORS ...Respondents

Through: Mr.Amit Mahajan, CGSC for UOI with Mr.Sanjeev Narula, CGSC, Mr.Kunal Dutt, Mr.Abhishek Ghai and Ms.Anumita Chandra, Advocates

\+ **W.P.(C) 8100/2017**

J SEKAR ...Petitioner

Through: Mr.Vikram Chaudhary, Sr. Advocate with Mr.Abdul Saleem, Mr.S.Elambharathi, Mr.Harshit Sethi and Mr.Rishi Sehgal, Advocates

UNION OF INDIA AND ORS ...Respondents

Through:Mr.Amit Mahajan, CGSC for UOI with Mr.Sanjeev Narula, CGSC, Mr.Kunal Dutt, Mr.Abhishek Ghai and Ms.Anumita Chandra, Advocates

\+ **W.P.(C) 8112/2017**

SRS MINING ...Petitioner

Through: Mr.Vikram Chaudhary, Sr. Advocate with Mr.Abdul Saleem, Mr.S.Elambharathi, Mr.Harshit Sethi and Mr.Rishi Sehgal, Advocates

versus

UNION OF INDIA AND ORS ...Respondents

Through: Mr.Amit Mahajan, CGSC for UOI with Mr.Sanjeev Narula, CGSC, Mr.Kunal Dutt, Mr.Abhishek Ghai and Ms.Anumita Chandra, Advocates

\+ **W.P.(C) 8113/2017**

S RAMACHANDRAN ...Petitioner

Through: Mr.Vikram Chaudhary, Sr. Advocate with Mr.Abdul Saleem, Mr.S.Elambharathi, Mr.Harshit Sethi and Mr.Rishi Sehgal, Advocates

versus

UNION OF INDIA AND ORS ...Respondents

Through: Mr.Amit Mahajan, CGSC for UOI with Mr.Sanjeev Narula, CGSC Mr.Kunal Dutt, Mr.Abhishek Ghai and Ms.Anumita Chandra, Advocates

\+ **W.P.(C) 8114/2017**

K. RETHINAM ...Petitioner

Through: Mr.Vikram Chaudhary, Sr. Advocate with Mr.Abdul Saleem, Mr.S.Elambharathi, Mr.Harshit Sethi and Mr.Rishi Sehgal, Advocates

versus

+ UNION OF INDIA & ORS ...Respondents

Through: Mr.Amit Mahajan, CGSC for UOI with Mr.Sanjeev Narula, CGSC, Mr.Kunal Dutt, Mr.Abhishek Ghai and Ms.Anumita Chandra, Advocates

+ **W.P.(C) 8115/2017**

K. RETHINARM ...Petitioner

Through: Mr.Vikram Chaudhary, Sr. Advocate with Mr.Abdul Saleem, Mr.S.Elambharathi, Mr.Harshit Sethi and Mr.Rishi Sehgal, Advocates

versus

UNION OF INDIA AND ORS. ...Respondents

Through: Mr.Amit Mahajan, CGSC for UOI with Mr.Sanjeev Narula, CGSC, Mr.Kunal Dutt, Mr.Abhishek Ghai and Ms.Anumita Chandra, Advocates

+ **W.P.(C) 8116/2017**

S. RAMACHANDRAN ...Petitioner

Through: Mr.Vikram Chaudhary, Sr. Advocate with Mr.Abdul Saleem, Mr.S.Elambharathi, Mr.Harshit Sethi and Mr.Rishi Sehgal, Advocates

versus

UNION OF INDIA & ORS ...Respondents

Through: Mr.Amit Mahajan, CGSC for UOI with Mr.Sanjeev Narula, CGSC, Mr.Kunal Dutt, Mr.Abhishek Ghai and Ms.Anumita Chandra, Advocates

+ **W.P.(C) 8117/2017**

SRS MINING ...Petitioner

Through: Mr.Vikram Chaudhary, Sr. Advocate with Mr.Abdul Saleem,Mr.S.Elambharathi, Mr.Harshit

Sethi and Mr.Rishi Sehgal, Advocates

versus

UNION OF INDIA AND ORS. ...Respondents
Through: Mr.Amit Mahajan, CGSC for UOI with Mr.Sanjeev Narula, CGSC, Mr.Kunal Dutt, Mr.Abhishek Ghai and Ms.Anumita Chandra, Advocates

\+ **W.P.(C) 8118/2017**

J. SEKAR ...Petitioner
Through: Mr.Vikram Chaudhary, Sr. Advocate with Mr.Abdul Saleem, Mr.S.Elambharathi, Mr.Harshit Sethi and Mr.Rishi Sehgal, Advocates

versus

UNION OF INDIA & ORS ...Respondents
Through: Mr.Amit Mahajan, CGSC for UOI with Mr.Sanjeev Narula, CGSC, Mr .Kunal Dutt, Mr . Abhishek Ghai and Ms.Anumita Chandra, Advocates

\+ **W.P.(C) 8521/2017**

SURENDRA KUMAR JAIN AND ORS ...Petitioners
Through: Mr.Vikram Chaudhary, Sr. Advocate with Mr.Harshit Sethi, Ms.Aakriti Mathur, Mr.Faraz Khan and Mr.Rishi Sehgal, Advocates

versus

UNION OF INDIA AND ORS ...Respondents
Through: Mr.Ajay Digpaul, CGSC with Ms.Mohita Srivastava, Advocate for UOI

\+ **W.P.(C) 8726/2017**

M/S SWASTIK CEMENT PRODUCTS PVT LTD. & ORS ...Petitioners
Through:Mr.Ajit Kumar Sinha, Sr. Advocate with

Ms.Priyanka Sinha and Mr.Srijan Sinha, Advocates

versus

UNION OF INDIA & ORS ...Respondents

Through: Mr.Amit Mahajan, CGSC for UOI with Mr.Sanjeev Narula, CGSC, Mr.Kunal Dutt, Mr.Abhishek Ghai and Ms.Anumita Chandra, Advocates

\+ **W.P.(C) 9808/2017 & CM APPL.39897/2017**

M/S DHAWAN CREATIVE PRINTS PVT. LTD. AND ANR ...Petitioners

Through: Mr.Vikram Chaudhary, Sr. Advocate with Mr.Harshit Sethi, Mr.Sangram S Saron and Mr.Rishi Sehgal, Advocates

versus

UNION OF INDIA AND ORS ...Respondents

Through: Mr.Vinod Diwakar, CGSC with Mr.Sanjay Pal and Mr. Akshaya Agarwal, Advocates

\+ **W.P.(C) 3008/2016**

APARAJITA KUMARI & ANR ...Petitioners

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

versus

JOINT DIRECTOR, ENFORCEMENT DIRECTORATE & ANR ...Respondents

Through: Mr.Amit Mahajan, CGSC for UOI with Mr.Sanjeev Narula, CGSC, Mr.Kunal Dutt, Mr.Abhishek Ghai and Ms.Anumita Chandra,Advocates

+ **W.P.(C) 4228/2016 & CM APPL.45944/2016**

PRATIBHA SINGH & ANR ...Petitioners

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

versus

JOINT DIRECTOR, ENFORCEMENT DIRECTORATE & ANR ...Respondents

Through:Mr.Amit Mahajan, CGSC for UOI with Mr.Sanjeev Narula, CGSC, Mr.Kunal Dutt, Mr.Abhishek Ghai and Ms.Anumita Chandra, Advocates

+ **W.P.(C) 3909/2017 & CM APPL.17256/2017**

APRAJIT A SINGH AND ORS ...Petitioners

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

versus

JOINT DIRECTOR, DIRECTORATE OF ...Respondents

Mr.Amit Mahajan, CGSC for UOI with Mr.Sanjeev Narula, CGSC, Mr.Kunal Dutt, Mr.Abhishek Ghai and Ms.Anumita Chandra, Advocates

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE I.S. MEHTA

% **JUDGMENT**

Dr. S. Muralidhar, J.:

Introduction

1. In all these writ petitions under Article 226 of the Constitution of India, one prayer is for a declaration that the second proviso to Section 5 (1) of the

Prevention of Money-laundering Act, 2002 (PMLA) is *ultra vires* Article 14 of the Constitution of India.

2. All the Petitioners are facing proceedings under the PMLA as a result of an Enforcement Case Information Report (ECIR) filed under Sections 3 and 4 PMLA leading to the filing of original complaints (OC) under Section 5 (5) PMLA. Consequently, provisional attachment orders have been issued under Section 5 (1) PMLA against the Petitioners. The Adjudicating Authority (AA) has served them with show cause notices (SCNs) under Section 8 PMLA. The challenge in these petitions is also, therefore, to the OCs, the SCNs, the provisional attachment orders and to all further proceedings in the aforementioned ECIR.

3. Although the above prayers in the petitions (other than the prayer concerning the challenge to the constitutional validity of the second proviso to Section 5 (1) PMLA) are to be dealt with by learned Single Judges of this Court, since the first prayer concerns the constitutional validity of a statutory provision, these writ petitions have been consolidated before this Division Bench.

4. It may be noticed that there are interim orders in each of the petitions to the effect that further proceedings pursuant to the provisional attachment order including proceedings under Section 8 PMLA for confirmation of the provisional attachment shall remain stayed even while the attachment itself would continue. The said interim orders have been made absolute during the pendency of the writ petitions.

Scope of the proceedings before the DB

5. Consequently, this Division Bench, as clarified by the order dated 6th December 2017, will not be examining the merits of the ECIRs, the OCs, provisional attachment orders or the merits of the individual SCNs challenged in the writ petitions. The scope of the present proceedings before the Division Bench is, therefore, confined to examining:

a. The maintainability of the writ petitions (which has been raised as a preliminary objection by Union of India in some of the matters);
b. The constitutional validity of the second proviso to Section 5 (1) PMLA
c. Whether a Single Member of the AA can exercise powers and conduct proceedings under Section 8 PMLA?
d. If the answer to (c) is in the affirmative, does such Single Member necessarily have to be a Judicial Member?

6. This Court has heard the submissions of Mr. Vikram Chaudhary, Mr. Ajit Kumar Sinha, Mr. Dayan Krishnan, Senior counsel and Mr. Nikhil Jain, Ms. Priyanka Sinha, Mr. Mayank Jain and Ms. Madhu Jain, learned counsel appearing for the Petitioners. On behalf of the Union of India, the submissions of Mr. Amit Mahajan, Mr. Sanjeev Narula, Mr. Ajay Digpaul, all Central Government Standing Counsel, have been heard.

Background to the PMLA

7. Before proceeding to note the submissions of counsel for the parties, it is necessary to understand the background to the enactment of the PMLA. The Statement of Objects and Reasons (SOR) of the PMLA (which was passed as an Act of Parliament and notified on 17th January 2003 and came into

force on 1st July 2005) acknowledged that there was an urgent need for a comprehensive legislation to prevent money-laundering and connected activities, confiscation of proceeds of crime and setting up of agencies and mechanisms for coordinating measures to combat money-laundering. The SOR also acknowledged the initiatives taken by the international community to counter the threat posed by money-laundering to financial systems as well as to the territorial integrity and sovereignty of nations. This included the United Nations' Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, to which India is a party. The said Convention calls for the prevention of laundering of the proceeds of drug crime and other connected activities and confiscation of proceeds derived from such offences.

8. The SOR further noted that the Basel Statement of Principles, enunciated in 1989, outlined basic policies and procedures that banks should follow in order to assist law enforcement agencies in tackling the problem of money-laundering. It also considered the recommendations of the Financial Action Task Force established at the 1989 G7 summit held in Paris from 14th to 16th July 1989 which *inter alia* recommended that a comprehensive legislation be enacted to combat money-laundering.

9. The SOR also noted that initially a Bill was introduced in the Lok Sabha on 4th August 1988 as the Prevention of Money-laundering Bill (PMLB) which came to be referred to the Standing Committee on Finance, which in turn gave its report on 4th March 1989 to the Lok Sabha. Those recommendations were accepted by the Central Government and thereafter

the PMLB, with its changes, was passed by both the Houses of Parliament. It received the assent of the President on 17th January 2003.

10. Since its coming into force on 1st July 2005, the PMLA has undergone amendments in 2005, 2009 and 2012. The Finance Act (FA) 2015, the FA 2016 and the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act 2015 (the Black Money Act) have made further changes to the PMLA.

Key provisions of the PMLA

11. The offence of money-laundering is defined under Section 3 PMLA. The punishment therefor is under Section 4 PMLA. The said provisions read as under:

> "**3.** ***Offence of money-laundering.***—Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime and projecting it as untainted property shall be guilty of offence of money-laundering.
>
> **4.** ***Punishment for money-laundering.***—Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine which may extend to five lakh rupees:
>
> Provided that where the proceeds of crime involved in money-laundering relates to any offence specified under paragraph 2 of Part A of the Scheduled, 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."

12. The expression "proceeds of crime" forms the heart of the offence of money-laundering under Section 3 of the Act. Any person who is involved in any "process or activity connected with proceeds of crime", including its concealment, possession, acquisition, use or projecting or claiming the proceeds of crime as untainted property, would be guilty of committing the offence of money-laundering.

13. The definition of the expression 'proceeds of crime' occurring in Section 3 PMLA is set out under Section 2 (1) (u) PMLA as under:

> "(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;"

14. Further, the word 'property' has a wide meaning and has been defined in Section 2(1) (v) PMLA as under:

> "(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;"

15. It may be noticed that the definition of 'proceeds of crime' in Section 2 (1) (u) PMLA requires the property to be derived or obtained "as a result of criminal activity relating to a scheduled offence".

16. The expression 'scheduled offence' is defined under Section 2(1) (y) PMLA as under:

> "(y) "scheduled offence" means--
>
> (i) the offences specified under Part A of the Scheduled; or
>
> (ii) the offences specified under Part B of the Scheduled 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;"

17. The Schedule to the PMLA specifies a whole range of offences which include offences under the IPC (Para 1, Part A), the Narcotic Drugs and Psychotropic Substances Act 1985 (NDPS Act) (Para 2, Part A), the Explosive Substances Act 1908 (Para 3, Part A), the Unlawful Activities (Prevention) Act 1967 (Para 4, Part A), the Arms Act 1959 (Para 5, Part A), the Wildlife (Protection) Act 1972 (Para 6, Part A), the Immoral Traffic (Prevention) Act 1956 (Para 7, Part A), the Prevention of Corruption Act 1988 (Para 8, Part A), the Explosives Act 1884 (Para 9, Part A) and as many as 19 more such enactments with some of the specific provisions of such enactments being expressly specified in the Schedule. Part B specifies the offence under Section 132 of the Customs Act 1962, i.e. making a false declaration or using false documents etc., where the total value involved in the offences is Rs. 1 crore or above. Part C lists out offences having "cross border implications" and is specified in Part A, in offences against property under Chapter XVII IPC, or the offence of wilful attempt to evade any tax, penalty or interest under Section 51 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act 2015.

18. The punishment for the offence of money-laundering is rigorous imprisonment (RI) for a minimum period of three years which may extend to seven years plus fine. However, where the offence is that specified in Para 2, Part A of the Schedule, i.e. an offence under the NDPS Act, the outer period of RI could extend to 10 years.

Provisions regarding departmental proceedings

19. While the trial for the offence under Sections 3 and 4 PMLA would be conducted before the concerned criminal court, the enactment also provides for departmental proceedings by the authorities specified under the PMLA itself. Chapter III of the PMLA is entitled 'Attachment, Adjudication and Confiscation'. Under Section 5 (1) PMLA, if a Director or any other officer not below the rank of Deputy Director (who is authorised by the Director for the purposes of the said provision) has reason to believe (the reason for such belief to be recorded in writing) on the basis of material in his possession that-

> "(a) any person is in possession of any proceeds of crime; and
>
> (b) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under this Chapter,
>
> he may, by order in writing, provisionally attach such property for a period not exceeding one hundred and eighty days from the date of the order, in such manner as may be prescribed."

20. Under Section 5 (5) PMLA, the Director or any other officer who provisionally attaches any property under Section 5 (1) PMLA must mandatorily file, within a period of thirty days from such attachment, a

complaint before the AA stating the facts of such attachment. This effectively means that, within thirty days of the order of provisional attachment, the matter has to proceed before the AA.

21. There are two provisos to Section 5 (1) PMLA. Under the first proviso, no order for provisional attachment under that provision shall be made unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under Section 173 of the Code of Criminal Procedure 1973 (CrPC) or a complaint has been filed by a person, authorised to investigate the offence mentioned in that Schedule, before a Magistrate or a Court for taking cognizance of the scheduled offence, or a similar report or complaint has been made or filed under the corresponding law of any other country.

22. The first proviso to Section 5 (1), therefore, envisages the provisional attachment happening simultaneously with the filing of the *challan* in the criminal court for the offences under Sections 3 and 4 PMLA. In other words, the adjudication process under Chapter III and attachment of the proceeds of crime pending such adjudication process was not meant to commence earlier than the filing of a charge sheet/*challan* in the criminal case under Sections 3 and 4 PMLA.

23. The second proviso to Section 5 (1) PMLA was inserted by the FA 2015. It must be noted at this stage that prior to its substitution by Act 2 of 2013 with effect from 15th February 2013, Section 5(1) had been amended by Act 21 of 2009 with effect from 1st June 2009 and that provision read as under:

> "(1) Where the Director, or any other officer not below the rank of

Deputy Director authorised by him for the purposes of this section, has reason to believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that—

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

(b) such person has been charged for having committed a scheduled offence; and

(c) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under this Chapter, he may, by order in writing, provisionally attach such property for a period not exceeding (one hundred and fifty days) from the date of the order, in such manner provided in the Second Scheduled to the Income Tax Act, 1961 (43 of 1961) and the Director or the other officer so authorized by him, as the case may be, shall be deemed to be an officer under sub-rule (e) of rule 1 of that Scheduled;

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

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

any proceeding under this Act."

24. Therefore, under Section 5(1), as it stood prior to the amendment effective from 15th February 2013, the charging of a person whose property is sought to be attached for having committed a scheduled offence was one of the prerequisites. This changed with effect from 15th February 2013 by the amended Section 5 (1) wherein the second proviso read as under:

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

25. The second proviso begins with a non-obstante clause and in effect makes it a proviso to the first proviso. The second proviso is intended to override the first proviso, subject to the conditions set out therein. The authorised officer must reach a satisfaction, to be recorded in writing, that there is a reason to believe that if the property involved in money-laundering is not attached immediately, such non-attachment is likely to frustrate proceedings under the PMLA. In other words, even pending the filing of the charge-sheet/challan under Section 173 Cr PC before the criminal court, a provisional attachment can be ordered under the second proviso to Section 5 (1) PMLA subject to the fulfilment of the conditions precedent. It is this second proviso that faces the challenge as to its constitutionality in all these petitions.

Judicial Review of the provisional attachment order

26. To complete the scheme of the PMLA, after the provisional attachment order is passed under Section 5(1) PMLA, the officer making such order will immediately forward a copy thereof to the AA in a sealed envelope, as stipulated under Section 5(2) PMLA.

27. Section 5 (3) PMLA states that the provisional attachment order shall cease to have effect on the expiry of the period specified in Section 5 (1) or on the date when the AA makes an order under Section 8 (2) PMLA, whichever is earlier. As already noted, under Section 5(5) PMLA, the officer making such order must file a complaint before the AA within 30 days of the order of provisional attachment being made.

28. As far as the AA is concerned, under Section 8(1), once such a complaint is received and if the AA "has a reason to believe that any person has committed an offence under section 3 or is in possession of the proceeds of crime", the AA may serve a notice (SCN) of not less than 30 days on such person calling upon him to indicate the sources of his income, earning or assets or by means of which he has acquired the property attached under Section 5(1) PMLA or seized or frozen under Sections 17 or 18 PMLA.

29. The above SCN would require the noticee to produce evidence on which he relies and other relevant information and particulars to show cause why all or any of the property "should not be declared to be the properties involved in money-laundering and confiscated by the Central Government".

30. Section 8 (2) requires the AA to consider the reply to the SCN issued under Section 8(1) PMLA; to hear the aggrieved person as well as the officer issuing the order of provisional attachment and also taken to account "all relevant materials placed on record before the AA". After following the above procedure, the AA will record its finding whether all the properties referred to in the SCN are involved in money-laundering.

31. If the AA is satisfied that any such property is in fact involved in money-laundering the AA will confirm the attachment of such property and record a finding to that effect. Thereupon, the attachment of such property will continue during the pendency of the criminal proceedings. It will become final after an order of confiscation is passed either under Section 8(5) or 8(7) PMLA, or Section 58B PMLA or Section 60(2A) PMLA by the special court constituted for trial of the offences under the PMLA. Under Section 8 (4) PMLA, upon confirmation of the order of provisional attachment, the Director or other officer authorized by him shall "forthwith take the possession of property attached".

32. Section 8 (5) PMLA states that upon conclusion of the trial where the special court finds that the offence of money-laundering has been committed, it shall order that the property involved in money-laundering shall stand confiscated to the Central Government. If it finds to the contrary, then under Section 8 (6) it shall order the release of the property to the person entitled to receive it.

33. The order of the AA is subject to appeal before the Appellate Tribunal

(AT) constituted under Section 25 of the PMLA. Thus, the AA is not the final authority under the PMLA as far as the attachment of proceeds of crime is concerned. Appeals can be filed to the AT both by the Director and by the person aggrieved by the order of the AA. The limitation for filing such an appeal under Section 26(3) PMLA is 45 days from the date on which a copy of the order of the AA is received. Section 26(4) envisages the AT giving a hearing to the parties and passing orders either "confirming, modifying or setting aside" the order of the AA.

34. Against the order of the AT, there is yet another appeal provided for which is to be made before the High Court under Section 42 PMLA. This appeal would be on "any question of law or fact" arising out of the order of the AT.

35. Chapter VII separately deals with the Special Courts constituted to try the offences under the PMLA. The order of the Special Court is subject to appeal and revision by the High Court under Section 47 of the PMLA read with the corresponding provisions of Chapters 29 and 30 of the CrPC, as the case may be.

36. There are, therefore, two parallel streams – (i) criminal proceedings before the Special Court for trial of the offences under Section 3 read with Section 4 PMLA and; (ii) the departmental proceedings before the authorities instituted under the PMLA, i.e. the Director, the AA, and the AT, the orders of which are subject to appeal before the High Court.

37. This overall scheme has to be borne in mind before proceeding to examine the specific submissions in the present matters.

Maintainability of the petitions

38. There is a preliminary objection raised by the Union of India in some of these petitions as to their maintainability on the ground that no cause of action has arisen within the jurisdiction of this Court.

39. The Court does not agree with the Union of India on this aspect because of the judgment of five Judges of this Court in ***Sterling Agro Industries v. Union of India 2011 (124) DRJ 633.*** In that decision, the five-judge Bench of this Court affirmed the Full Bench decision in ***New India Assurance Company Limited v. Union of India AIR 2010 Del 43 (FB)*** after noting that the Full Bench had held that: "...as the appellate authority is situate in New Delhi, the Delhi High Court has the jurisdiction under Article 226 of the Constitution of India and, therefore, there was no occasion for the learned Single Judge to apply the principle of *forum non conveniens* to refuse exercise of jurisdiction".

40. The five-judge Bench in ***Sterling Agro Industries v. Union of India*** (*supra*), *inter alia*, held:

> "(b) Even if a miniscule part of cause of action arises within the jurisdiction of this court, a writ petition would be maintainable before this Court, however, the cause of action has to be understood as per the ratio laid down in the case of *Alchemist Ltd. v. State Bank of Sikkim (2007) 11 SCC 335*.
>
> (c) An order of the appellate authority constitutes a part of cause of action to make the writ petition maintainable in the High Court within

whose jurisdiction the appellate authority is situated. Yet, the same may not be the singular factor to compel the High Court to decide the matter on merits. **The High Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of *forum conveniens***." (emphasis supplied)

41. In the present cases, with the AA being located in New Delhi, it cannot be said that no part of the cause of action has arisen within the jurisdiction of this Court. Therefore, the Court disagrees with the Union of India as regards the above submission. Moreover, as far as the scope of the present proceedings is concerned, since it involves pure questions of law that arise in all of these petitions, in some of which the Union of India has not raised any preliminary objection as to maintainability, this Court is of the view that the preliminary objection should not come in the way of the Court deciding those questions of law.

42. This conclusion however, is not to be construed as an expression of opinion on the maintainability of some of these writ petitions on other grounds, particularly on the existence of an alternative efficacious remedy of appeal before the High Court under Section 42 PMLA. That, however, will be decided by the learned Single Judge in accordance with law, independent of this decision.

Submissions of the Petitioners on constitutional validity of second proviso to Section 5(1) PMLA

43. The submissions on behalf of the Petitioners as regards the challenge to the constitutional validity of the second proviso to Section 5(1) PMLA are as under:

(i) Section 5(1) contemplates an attachment of the property only where a person is found to be in possession of proceeds of crime and where such proceeds of crime are likely to be concealed, transferred or dealt with, resulting in frustration of the proceedings under the PMLA relating to confiscation.

(ii) The legislative intent, therefore, is that the exercise of the power of attachment should only be made in exceptional cases and not as a matter of routine. Confiscation will be resorted to only where the trial Court finds offences to have been committed after the conclusion of the trial and, under Section 8(5) PMLA, such criminal court may order the property "involved in money-laundering" or used for the commission of money-laundering to stand confiscated to the Central Government. Therefore, only in exceptional circumstances can resort be had to attachment pending trial under the PMLA.

(iii) The attachment pending conclusion of the trial has to be only upon recording of "reason to believe" that:

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

  (b) The proceeds of crime are likely to be concealed, resulting in frustration of proceedings relating to confiscation.

(iv) The first proviso to Section 5(1) PMLA erects a threshold bar to the exercise of the power of attachment pending conclusion of the trial. This mandates that the final report should have been forwarded to the Magistrate under Section 173 Cr PC.

(v) The second proviso to Section 5(1) PMLA cannot be interpreted in the manner that negates the safeguard contemplated under the first proviso to Section 5(1) PMLA. The expression "any property of any

person" occurring in the second proviso must necessarily be read as a person in possession of any proceeds of crime. Likewise, the phrase "any property" has to meet the higher threshold contemplated in the latter part of the second proviso, i.e. it has to be "involved in money-laundering". Further, the requirement under Section 5(1)(b) that the proceeds of crime are likely to be "concealed, transferred or dealt with" so as to frustrate the confiscation cannot be given a go-by even for invocation of the second proviso.

(vi) Unless there are strong and compelling reasons to believe that the property is "involved in money-laundering", resort cannot be had to the second proviso to attach such property. Reliance is placed on the decision of the Supreme Court in ***Nikesh Tarachand Shah v. Union of India 2017 (13) SCALE 609***. If the second proviso is not read down in the above manner, it will be an instrument of oppression, misuse and arbitrariness clothing officers with uncanalised, draconian and arbitrary powers thereby rendering the second proviso itself violative of Article 14 of the Constitution.

(vii) It cannot be the *ipse dixit* of the officer to decide when to invoke the first proviso and when to invoke the second. Unless sufficient safeguards are read into the second proviso as regards the exercise of the powers contained therein, the entire provision will be rendered arbitrary and violative of the Article 14 of the Constitution. Reliance is placed on the decision in ***Union of India v. Dilip Kumar (2015) 4 SCC 421***.

(viii) The second proviso to Section 5(1) PMLA, as it presently stands, is 'manifestly arbitrary' as explained by the Supreme Court in ***State of***

Bombay v F.N. Balsara (1951) 2 SCR 682 and later expostulated in ***Shreya Singhal v. Union of India (2015) 5 SCC 1*** and ***Shayara Bano v. Union of India (2017) 9 SCC 1***. Reliance is also placed on the decision in ***Maniklal Chotalal v. M.G. Makwana AIR 1967 SC 1373***. It is contended that the 'right to property' being a human right, as explained in ***P.T. Munichikkanna Reddy v. Revamma (2007) 6 SCC 59***, there can be numerous instances where resort need not be had to the powers of attachment when in fact there is no real basis, material or apprehension that the property would be concealed, transferred or dealt with in a manner that frustrates its confiscation. In other words, resort to the second proviso should be had in the rarest of rare cases.

(ix) Since the amendment is not merely procedural, but affects the substantive right of the Petitioners, it should be applied only prospectively. Reliance is placed on the decisions in ***K.S. Paripoornan v. State of Kerala (1994) 5 SCC 593***, ***State of M.P. v. G.S. Dal & Flour Mills (1992) Suppl. 1 SCC 105*** and ***Hitendra Vishnu Thakur v. State of Maharashtra (1994) 4 SCC 602***.

Submissions of the Union of India on constitutional validity of second proviso to Section 5 (1) PMLA

44. In this context, the submissions of the learned counsel for the Union of India are as under:

(i) The mere possibility of abuse of power is not a ground to strike down the provision on the basis that it is *ultra vires* or unconstitutional. In such case, the decisions in individual cases can be the subject matter of judicial review. Reliance is placed on the decisions in ***Sushil***

Kumar Sharma v. Union of India (2005) 6 SCC 281, ***Collector of Customs v. Nathella Sampathu Chetty (1961) 3 SCR 786*** and ***State of Rajasthan v. Union of India (1978) 1 SCR 1***.

(ii) There are sufficient safeguards in the second proviso to Section 5(1) PMLA which in no way obliterates the first proviso thereto. The second proviso kicks in only where there is urgency and the officer believes that the property involved in money-laundering should be immediately attached and the failure to attach it "is likely to frustrate any proceedings under the Act". Since the reasons for such belief has to be recorded in writing, "on the basis of material in his possession", there are sufficient safeguards inasmuch as there cannot be any arbitrary and whimsical exercise of powers.

(iii) The second proviso has been inserted for a very specific purpose which is in consonance with the objects of the PMLA. The offence under the PMLA is a 'conduct-based offence' and the experience of the enforcement agencies is that the proceeds of such crime are "susceptible to stealth and clandestine movement" which, if not seized immediately upon detection, can vanish forever. It is added that in the world of internet and wire transfers, it is very difficult to have a trail of the money or property constituting the proceeds of crime or value of such property. It is submitted that the very definition of proceeds of crime under Section 2(1)(u) PMLA, which incidentally has not been challenged by the Petitioners, permits any property involved in money-laundering to be attached and not necessarily the proceeds of crime of the persons facing trial under Section 3 PMLA.

(iv) Recourse to the second proviso to Section 5(1) is for a limited period

of 180 days. The entire proceedings are taken over by the AA after 30 days of the provisional attachment order. There is a second tier of safeguard since the AA will again have to apply its mind before issuing an SCN regarding such continued provisional attachment. The confirmation of the provisional attachment is preceded by a hearing and the application of mind by the AA to all the facts and circumstances.

(v) A third level of safeguard is that the order of the AA is further subject to review by the AT and then again by the High Court. With there being so many levels of judicial review, there can be very little scope for arbitrary or whimsical decision-making in the matter. The second proviso does not render otiose the first proviso nor does it provide for exercise of unbridled or arbitrary powers by the authorities under the PMLA. Reliance is placed on the decisions in ***B. Ramaraju v. Union of India (2011) 164 Company Cases 149 (AP)***, ***Dr. V.M. Ganeshan v. Joint Director (2015) 1 MLJ 870***, ***Usha Aggarwal v. Union of India (2017) SCC-Online (Sikkim) 146***, ***Radhey Mohan Lakhotia v. Deputy Director 2010 (5) BomCR 625***, ***Gautam Khaitan v. Union of India 218 (2015) DLT 183***.

Decision on constitutional validity of the second proviso to Section 5(1)

45. The Court first would like dwell on the definition of 'proceeds of crime' under Section 2 (1) (u) of the PMLA. It is defined to mean:

a) any property derived or obtained, directly or indirectly, by any person; as a result of criminal activity relating to a scheduled offence, or

b) the value of any such property, or

c) where such property is taken or held outside the country, then the property equivalent in value held within the country.

46. It was sought to be contended by the Petitioners that the latter portion of (c) viz., that it could also be a property equivalent in value held within the country should also apply to the situation in (b). In other words, for (b) to be the subject matter of 'proceeds of crime', the property which is the proceeds of crime should be taken out of or held outside the country and not be available in the country.

47. The above submissions ignore the important disjunctive 'or' occurring between the expression 'the value of any such property' in (b) above and the expression in (c) "where such a property is taken or held outside the country". On the contrary, the qualifying word 'such' in (b) refers to the earlier portion in (a) viz., property derived or obtained, directly or indirectly, by 'any person' as a result of criminal activity relating to a scheduled offence.

48. The above definition is to be read with Section 2(1)(b) which defines 'property' to mean any property or assets "of every description, whether corporeal or incorporeal, moveable or immoveable, tangible or intangible" including title to or interest in such a property and their assets, wherever located. The Explanation to Section 2(1)(b) defines property to mean property of any kind used in the commission of an offence under the PMLA itself or of any scheduled offence. Therefore, the expression 'value of any such property' would be a value equivalent to the value of a property derived or obtained directly or indirectly by any person as a result of

criminal activity. The property itself may no longer be available but the equivalent value of such a property, whether held in cash, etc., would be available for attachment.

49. The wide definition of the phrase 'proceeds of crime' has to be borne in mind while examining the scope of the power of attachment of such proceeds of crime.

50. What attracts Section 5(1) PMLA is the person being in possession of any proceeds of crime. That person who is in possession of proceeds of crime need not be the person who is being tried for the scheduled offences or even PMLA offences. Or he may be a person accused of a PMLA offence as described under Section 3 PMLA. That is because, under Section 3 PMLA, any person who attempts to indulge or knowingly assists or knowingly is a part of or actually involved in concealment, possession, acquisition or use and projecting a claim the property constituting a proceeds of crime as an untainted property "shall be guilty of the offence of money-laundering". While the element of *mens rea* is not dispensed with, it is possible that a person who commits the offence under Section 3 PMLA is not himself or herself facing trial for any scheduled offence.

51. The first proviso to Section 5(1), seeks to restrict the applicability of Section 5(1) only to such persons who are facing trial for a scheduled offence. In case of such persons, until a *challan*/charge-sheet/final report is filed in the criminal court under Section 173 CrPC or cognizance is taken of the scheduled offence by a Magistrate before whom a complaint was filed, no provisional order of attachment can be made under Section 5(1) PMLA.

52. However, the second proviso deals with "any property of any person". This "any person" could be a person in possession of proceeds of crime, which is likely to be "concealed, transferred or dealt with" in a manner that would frustrate the proceedings relating to confiscation. The second proviso, therefore, is consistent with Section 5(1) PMLA insofar as the person in possession of the proceeds of crime may not be a person who is facing trial for a scheduled offence.

53. As pointed out rightly by the Madras High Court in ***Dr. V.M. Ganeshan v. Joint Director*** (*supra*), there are three categories of persons who come within the ambit of the second proviso to Section 5(1) PMLA**:**

> "(i) person who is not accused of any offence, but who was merely come to possess, under fortunate or unfortunate circumstances, a property that represents the proceeds of crime;
>
> (ii) person against whom a complaint is lodged, but the investigation is not yet complete and a final report under Section 173 of the Code of Criminal Procedure not yet filed; or
>
> (iii) a person who is accused of committing an offence and against whom a final report has been filed under Section 173 of the Code of Criminal Procedure before the competent Court."

54. The person under the category (i) above is the person envisaged under the second proviso to Section 5(1) PMLA. Therefore, the ambit of the second proviso to Section 5(1) PMLA is certainly wider than the ambit of the first proviso Section 5(1) PMLA. This explains why the second proviso has been expressly made a *non-obstante* clause. This is to draw a clear distinction between persons facing trial for a scheduled offence in respect of whom the investigation is complete and where a report is to be filed on the

one hand and the other persons on the other hand.

55. The second proviso to Section 5(1) PMLA would also cover a situation where, although a person has been suspected of committing the offence under Section 3 PMLA, the investigation is still in progress and the investigating agency has not reached a stage where it can file a report/charge-sheet under Section 173 CrPC. Such a person would also be covered by the second proviso to Section 5(1) of the PMLA.

56. There is a good reason for the introduction of the second proviso to Section 5(1) PMLA. The main portion of Section 5(1) itself does not restrict its applicability to only such persons who are involved in the commission of a scheduled offence. It covers "any person in possession of any proceeds of crime". Consequently, the Court is unable to agree with the submissions of learned counsel for the Petitioners that the second proviso to Section 5(1) PMLA completely obliterates and renders redundant all the safeguards in the first proviso to Section 5(1) PMLA. Such a submission proceeds on an incorrect interpretation of the entire scheme of Section 5(1) PMLA which has been further fleshed out by the introduction of the second proviso to Section 5(1) PMLA.

57. The main ground of attack on the second proviso to Section 5(1) of the PMLA is its alleged manifest arbitrariness. The Court is, however, not persuaded to agree with the above submission of the Petitioners for more than one reason. First, as rightly pointed out by the learned counsel for the Union of India, the mere possibility that a provision may be abused is not a

ground to strike it down under Article 14 of the Constitution. The law in this regard has been explained in a number of decisions. Illustratively, reference may be made to ***Sushil Kumar Sharma v. Union of India*** (*supra*) where it was observed as under:

> "In Mafatlal Industries Ltd. and Ors. v. Union of India and Ors., [1997] 5 SCC 536, a Bench of 9 Judges observed that mere possibility of abuse of a provision by those in charge of administering it cannot be a ground for holding a provision procedurally or substantively unreasonable. In Collector of Customs v. Nathella Sampathu Chetty, [1962] 3 SCR 786 this Court observed:
>
> > "The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity." It was said in State of Rajasthan v. Union of India, [1977] 3 SCC 592 "it must be remembered that merely because power may sometimes be abused, it is no ground for denying the existence of power. The wisdom of man has not yet been able to conceive of a Government with power sufficient to answer all its legitimate needs and at the same time incapable of mischief."'"

58. A Court examining the constitutional validity of a provision, particularly on the ground of possible abuse of the powers thereunder, has to be satisfied that there are sufficient safeguards in the provision itself as introduced by the legislature. In that regard, if the second proviso to Section 5(1) PMLA is carefully perused, it will be noticed that there are several conditionalities that will have to be satisfied before the power thereunder can be exercised:

(i) The power of provisional attachment can be exercised only by an officer of the rank not below the rank of a Deputy Director and such a Deputy Director or equivalent has to be authorized by the Director to exercise the powers.

(ii) The officer has to record the reasons to believe that the property is (a)

involved in money-laundering; (ii) if not attached immediately, the proceedings of confiscation under the PMLA will be frustrated; and (iii) such belief as in (ii) above has to be formed "on the basis of the material in his possession".

59. The fact that the Director will, therefore, have to first apply his mind to the materials on record before recording in writing his reasons to believe is certainly a sufficient safeguard to the impulsive invocation of the powers under the second proviso to Section 5(1) PMLA.

60. The word "immediately" also imports a sense of urgency into the situation that warrants exercise of the powers. The reasons to believe, as recorded by the officer must reflect this sense of immediacy which impels the officer to invoke the power. The Court is in agreement that the second proviso to Section 5(1) has to be certainly read with the main provision itself. As pointed out by learned counsel for the Petitioners, a proviso cannot be interpreted in a manner to render redundant the main provision itself. As explained in ***Dwarka Prasad v. Dwarka Das Saraf (1976) 1 SCC 128***:

> "18. We may mention fairness to counsel that the following, among other decisions, were cited at the bar bearing on the uses of provisos in statutes: *Commissioner of Income-tax v. Indo-Mercantile Bank Ltd. AIR 1959 SC 713*; *M/s. Ram Narain Sons Ltd. v. Asst. Commissioner of Sales Tax AIR 1955 SC 765*(2); *Thompson v. Dibdin (1912) AC 533*; *Rex v. Dibdin 1910 Pro Div 57 (4) and Tahsildar Singh v. State of U.P AIR 1959 SC 1012*. The law is trite. A proviso must be limited to the subject matter of the enacting clause. It is a settled rule of construction that a proviso must prima facie be read and considered in relation to the principal matter to which it is a proviso. It is not a separate or independent enactment. 'Words are dependent on the principal enacting words, to which they are tacked as a proviso. They

> cannot be read as divorced from their context". (*Thompson v. Dibdin)*. If the rule of construction is that prima facie a proviso should be limited in its operation to the subject matter of the enacting clause, the stand we have taken is sound. To expand the` enacting clause, inflated by the proviso, sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. A proviso ordinarily is but a proviso, although the golden rule is to read the whole section, inclusive of the proviso, in such manner that they mutually throw light on each other and result in a harmonious construction."

61. Later, in ***Union of India v. Dilip Kumar*** (*supra*), the Supreme Court reiterated, "it is settled law that a proviso does not travel beyond the provision to which it is a proviso." Therefore, there has to be a satisfaction that the 'proceeds of crime' are likely to be concealed, transferred or dealt with in a manner that might frustrate the confiscation proceedings under the PMLA. This is, therefore, another safeguard as far as the second proviso to Section 5(1) PMLA is concerned.

62. The further safeguards are that the order of attachment by the Director or the Deputy Director, as the case maybe, is only for a period of 180 days to begin with. Further, within a period of 30 days after the passing of such order, the AA takes over under Section 8(1) PMLA. Even under Section 8(1) PMLA, the AA is not supposed to mechanically issue an SCN. The AA has to apply its mind and again record the its reasons to believe that any person has committed an offence under Section 3 PMLA or is in possession of proceeds of crime. Here again, two kinds of persons are envisaged: (i) a person who has committed an offence under Section 3 PMLA; and (ii) A person who happens to be in possession of proceeds of crime.

63. The proceedings before the AA commence within 30 days from the date on which the AA receives the complaint under Section 5(5) PMLA, Section 17(4) PMLA or Section 18(10) PMLA. It is implicit in Section 5(10) PMLA that if, within 30 days, the Director does not file a complaint before the AA, then the provisional attachment would come to an end.

64. This has to also be read in the context of Section 5(3) PMLA read with Section 8(2) PMLA. Under Section 8(2) PMLA, the AA has to: (i) consider the reply to the SCN; (ii) hear the aggrieved person as well as the Director/ Deputy Director/ Authorized Officer; and (iii) take into account all the relevant materials placed on record. This is, therefore, an adjudicatory exercise which is the additional safeguard available to the person who is aggrieved by an order of provisional attachment.

65. There are two possibilities in this regard: (i) that the AA will confirm the order of provisional attachment, in which case again, the confirmation will last only up to the conclusion of the trial; or (ii) the AA may disagree and not confirm the provisional attachment, in which case under Section 8(6) PMLA, the property will be released to the person who is entitled to receive it.

66. This again is by an order in writing. Therefore, the first level of safeguard by way of judicial review of an order of provisional attachment under Section 5(1) PMLA is the proceeding before the AA under Section 8 PMLA. This is the further reason why it cannot be said that the powers under Section 5(1) read with the second proviso thereto are so wide and uncanalised or arbitrary as to warrant its striking down under Article 14 of

the Constitution.

67. The Court is unable to agree that there is any manifest arbitrariness vitiating the second proviso to Section 5(1) PMLA, as contended by the Petitioners. As explained in ***Shayara Bano v. Union of India*** (*supra*):

> "Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."

68. Therefore, the Court is not satisfied that the second proviso to Section 5(1) PMLA of the PMLA is so excessive and disproportionate so as to render it arbitrary.

Reasons to believe

69. What should constitute the 'reasons to believe' that are to be recorded? In this context, it must be seen that even for the exercise of power under Section 5(1), the Director/Deputy Director/Authorized Officer has to record his reasons to believe in writing. That is the expression that is used in the second proviso to Section 5(1) PMLA as well. It is the same expression that is used even as far as the powers exercised by the AA under Section 8(1) PMLA are concerned.

70. The expression 'reasons to believe' under Section 26 IPC is understood in the sense of 'sufficient cause to believe that thing but not otherwise'. In ***Phool Chand Bajrang Lal v. ITO [1993] 203 ITR 456 (SC)***, the Supreme

Court in the context of the Income Tax Act, 1961 explained the expression as under:

> "Since, the belief is that of the Income-tax Officer, the sufficiency of reasons for forming the belief, is not for the Court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non-specific information. To that limited extent, the Court may look into the conclusion arrived at by the Income-tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income-tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief."

71. In ***Income Tax Officer v. Lakhmani Mewaldas 1976 (3) SCR 956***, the Supreme Court held that there should be a "live link or close nexus" between the material before the ITO and the formation of his belief that income had escaped assessment. More recently, in ***Aslam Mohd Merchant v. Competent Authority (2008) 14 SCC 186***, the entire legal position has been explained elaborately by the Supreme Court as under:

> "28. It is, however, beyond any doubt or dispute that a proper application of mind on the part of the competent authority is imperative before a show cause notice is issued. Section 68-H of the Act provides for two statutory requirements on the part of the authority viz: (i) he has to form an opinion in regard to his `reason to believe'; and (ii) he must record reasons therefor. Both the statutory elements, namely, `reason to believe' and `recording of reasons' must be premised on the materials produced before him. Such materials must have been gathered during the investigation carried out in terms of Section 68-E or otherwise. Indisputably therefore, he must have some materials before him. If no such material had been placed before him, he cannot initiate a proceeding. He cannot issue a show cause notice on his own ipse dixit. A roving enquiry is not contemplated under the said Act as properties sought to be forfeited must have a direct nexus with the properties illegally acquired.

> 29. It is now a trite law that whenever a statute provides for `reason to believe', either the reasons should appear on the face of the notice or they must be available on the materials which had been placed before him. We have noticed hereinbefore that when the authority was called upon to disclose the reasons, it was stated that all the reasons were contained in the show cause notices themselves. They, however, in our opinion, do not contain any reason so as to satisfy the requirements of sub-section (1) of Section 68H of the Act."

72. Reasons to believe cannot be a rubber stamping of the opinion already formed by someone else. The officer who is supposed to write down his reasons to believe has to independently apply his mind. Further, and more importantly, it cannot be a mechanical reproduction of the words in the statute. When an authority judicially reviewing such a decision peruses such reasons to believe, it must be apparent to the reviewing authority that the officer penning the reasons has applied his mind to the materials available on record and has, on that basis, arrived at his reasons to believe. The process of thinking of the officer must be discernible. The reasons have to be made explicit. It is only the reasons that can enable the reviewing authority to discern how the officer formed his reasons to believe. As explained in ***Oriental Insurance Company v. Commissioner of Income Tax [2015] 378 ITR 421 (Delhi)***, "the prima facie formation of belief should be rational, coherent and not ex facie incorrect and contrary to what is on record". A rubberstamp reason can never take the character of 'reasons to believe', as explained by the Supreme Court in ***Union of India v. Mohan Lal Kapoor (1973) 2 SCC 836***. In ***Dilip N Shroff v. CIT (2007) 6 SCC 329***, the Supreme Court decried the practice of issuing notices in a standard pro forma manner "without material particulars and without deleting

inappropriate words or paragraphs".

73. In ***Kranti Associates v. Masood Ahmed Khan (2010) 9 SCC 496***, the legal position was summarized as under:

> "51. Summarizing the above discussion, this Court holds:
>
> a. In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.
>
> b. A quasi-judicial authority must record reasons in support of its conclusions.
>
> c. Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.
>
> d. Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.
>
> e. Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.
>
> f. Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.
>
> g. Reasons facilitate the process of judicial review by superior Courts.
>
> h. The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the life blood of judicial decision making justifying the principle that reason is the soul of justice. i. Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions

serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

j. Insistence on reason is a requirement for both judicial accountability and transparency.

k. If a Judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

l. Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or `rubber-stamp reasons' is not to be equated with a valid decision making process.

m. It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor (1987) 100 Harvard Law Review 731-737).

n. Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See (1994) 19 EHRR 553, at 562 para 29 and Anya vs. University of Oxford, 2001 EWCA Civ 405, wherein the Court referred to Article 6 of European Convention of Human Rights which requires, "adequate and intelligent reasons must be given for judicial decisions".

o. In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "Due Process".

74. The Court, therefore, holds as under as regards the submissions of the

learned counsel for the Petitioners with regard to the constitutionality of the second proviso to Section 5 (1) PMLA:

(i) Although the second proviso to Section 5(1) states that the property has to be 'involved in money-laundering' and Section 5(1) states that mere possession of proceeds of crime is sufficient, the Court does not see any conflict in these expressions. When the definition in Section 3 PMLA is read with Section 2(1)(v) and the Explanation thereto, it becomes clear that the property which constitutes 'proceeds of crime' is the property involved in money-laundering.

(ii) The reasons to believe at every stage must be noted down by the officer in the file.

(iii) While the reasons to believe recorded at the stage of passing the order of provisional attachment under Section 5(1) PMLA may not be forthwith at that stage communicated to the person adversely affected thereby, the reasons as recorded in the file have to accompany the complaint filed by such officer within 30 days before the AA under Section 5(5) PMLA.

(iv) A copy of such complaint accompanied by the reasons, as found in the file, must be served by the AA upon the person affected by such attachment after the AA adds its own reasons why he prima facie thinks that the provisional attachment should continue.

75. There are two reasons to believe. One recorded by the officer passing the order under Section 5(1) PMLA and the other recorded by the AA under Section 8(1) PMLA. Both these reasons to believe should be made available to the person to whom notice is issued by the AA under Section 8(1) PMLA.

The failure to disclose, right at the beginning, the aforementioned reasons to believe to the noticee under Section 8(1) PMLA would not be a mere irregularity but an illegality. A violation thereof would vitiate the entire proceedings and cause the order of provisional attachment to be rendered illegal.

76. The Court disagrees with the learned counsel for the Union of India that there is no mandatory requirement, under Section 8(1) PMLA, to communicate to the noticee the reasons to believe. On a collective reading of Section 5(1) PMLA and Section 8(1) PMLA, such an interpretation is contraindicated and cannot satisfy the requirement of what the AA is supposed to do under Section 8(2) PMLA, viz. to consider the reply of the noticee, give them and the Director a hearing and 'take into account' all relevant materials placed on record.

77. Although at the stage of issuance of notice under Section 8(1) PMLA all the relevant material on record which constituted the basis for reasons to believe may not be made available, if the noticee demands to see those materials on record, the AA is bound to make available all those materials on record to them. It is most likely that without such access to such material on record, the noticee will be unable to file an effective reply. Therefore, there cannot be any denial of access to the noticee of the materials on record. If there is any sensitive material, it can probably be redacted before issuing copies thereof, after noting the reasons for such redaction in writing in the file. But even such redacted material will have to be nevertheless shown to the noticee.

78. Whether, in an individual case, the reasons to believe, as recorded by the authorities, satisfies the above requirement of law will now be examined by the learned Single Judge before whom these writ petitions will be placed for further consideration. It is, therefore, not necessary for this Division Bench to examine the individual orders of either the Director/Deputy Director under Section 5(1) PMLA or the AA under Section 8 PMLA.

Composition of the AA and AT

79. The Court next takes up the question of the composition of the AA on which extensive arguments were advanced by the learned counsel for the Petitioners. In this context, it must be noticed that under Section 6 PMLA, the AA is supposed to consist of the Chairperson and two other members – one of whom shall be a person having experience in the field of law. Section 6(3) further sets out what the qualifications for appointment as a member of an AA should be. One of those qualifications is that the person has to be qualified for appointment as a District Judge or a person in the field of law or a member of an Indian Legal Service. The other qualification is possession of a qualification in the field of finance, accountancy or administration as may be prescribed. It is, therefore, not the case that all the members of the AA should be judicial members.

80. It is seen that under Section 5 PMLA, the jurisdiction of the AA "may be exercised by the Benches thereof". Under Section 6(5)(b) PMLA, a Bench may be constituted by the Chairperson of the AA "with one or two members" as the Chairperson may deem fit. Therefore, it is possible to have single-member benches. The word 'bench' therefore does not connote

plurality. There could, even under Section 6(5)(b) PMLA, be a 'single member bench'. When Section 6(6) PMLA states that a Chairperson can transfer a member from one bench to another bench, it has to be understood in the above context of there also being single-member benches.

81. The Court is unable to agree with the submission that since the Adjudicating Authority (Procedure) Regulations 2013 requires every order-sheet to have the signatures of the Chairperson and members constituting the bench, it necessarily means that every matter has to be heard by a bench comprising the Chairperson and members. This would be an erroneous interpretation which is contrary to the main provision of the PMLA itself, viz., Section 6(5)(b) PMLA. Likewise, under Rule 3 of the Prevention of Money-laundering (Appointment and Conditions of Service of Chairperson and Members of the Adjudicating Authorities) Rules 2007, although it states that the AA should have three members, that has to be read along with Section 6(5)(b) that there can be single-member benches. A contrary interpretation would actually frustrate the working of the AA. The Court, therefore, rejects the contention of the Petitioners that there cannot be any single-member benches of the AA.

82. It was then contended on the strength of the decisions in ***L. Chandrakumar v. Union of India (1997) 3 SCC 261; Eastern Institute for Integrated Learning v. Joint Directorate 2016 Cri LJ 526***, ***Vishal Exports Overseas Ltd. v. Union of India*** (decision dated 9th March 2016 of the Gujarat High Court in SCA No.13949 of 2014) and ***Uday Navinchandra Sanghani v. Union of India*** (decision dated 1st April 2016 of the Gujarat

High Court SCA No.10076/2015) that even that Single Member has to necessarily be a Judicial Member (JM) and not an Administrative Member (AM).

83. The reliance on ***L. Chandrakumar v. Union of India*** (*supra*) is misplaced. There the question was whether the ousting the jurisdiction of the High Court and vesting the powers of the High Court in a Tribunal is constitutionally valid. That is not what is sought to be done under Section 8 PMLA. It is only to provide an internal judicial review of the orders passed by the authorities under Section 5(1) PMLA. The AA under Section 8 PMLA cannot, therefore, be equated with an Administrative Tribunal under the Administrative Tribunals Act 1985 (ATA). The Central Administrative Tribunal under the ATA was vested with the powers originally with a High Court under Article 226 of the Constitution. Those were Tribunals under Article 323-B of the Constitution of India. The AA is not that kind of a Tribunal at all. The Court is, therefore, unable to agree with judgments of the learned Single Judges of the Sikkim and Gujarat High Courts in this context.

84. There are other reasons why the Court finds that the aforementioned decisions of the learned Single Judges of the Sikkim and Gujarat High Courts cannot be concurred with. They fail to notice that under Section 25 PMLA, an appeal is provided for from the order of the AA before the AT. Even so, such an AT is not the equivalent to the High Court since an appeal against the order of the AT is provided to the High Court itself. Thus, the hierarchy of judicial review authorities under the PMLA presents a very

different scheme from what is found in other statutes, particularly the ATA.

85. Under the PMLA, however, we first have a decision by an authority under Section 5(1) PMLA. Then we have a review of that decision by the AA under Section 8 PMLA. Then we have an appeal against that decision to the AT under Section 25 PMLA. These authorities, i.e. the AA and the AT, need not be entirely manned only by JMs. They can be AMs as well.

86. No two tribunals are alike. The National Company Law Tribunal (NCLT) comprises of both JMs and AMs. The circumstances under which the Supreme Court insisted that a Bench of the NCLT should be presided over by a JM is that the NCLT seeks to exercise the powers earlier vested in a High Court. That is not the case as far as the PMLA is concerned. Neither the AA nor the AT exercises the power that would otherwise be available to a High Court. That power, in fact, remains with the High Court in an expanded capacity. Under Section 42 PMLA, an appeal is provided to the High Court, both on questions of law as well as on facts. That makes it a full-fledged appeal, the scope of which would be wider than the exercise of powers of a judicial review by a High Court under Article 226/227 of the Constitution.

Summary of conclusions

87. This Court summarizes its conclusions as under:

(i) The second proviso to Section 5(1) PMLA is not violative of Article 14 of the Constitution of India; the challenge in that regard in these petitions is hereby negatived.

(ii) The expression 'reasons to believe' has to meet the safeguards inbuilt in the second proviso to Section 5(1) PMLA read with Section 5(1) PMLA.

(iii) The expression 'reasons to believe' in Section 8(1) PMLA again has to satisfy the requirement of law as explained in this decision.

(iv) There has to be a communication of the 'reasons to believe' at every stage to the noticee under Section 8(1) PMLA.

(v) The noticee under Section 8(1) PMLA is entitled access to the materials on record that constituted the basis for 'reasons to believe' subject to redaction in the manner explained hereinbefore, for reasons to be recorded in writing.

(vi) If there is a violation of the legal requirements outlined hereinbefore, the order of the provisional attachment would be rendered illegal.

(vii) There can be single-member benches of the AA and the AT under the PMLA. Such single-member benches need not mandatorily have to be JMs and can be AMs as well.

88. As already pointed out, the challenge to the maintainability of the writ petitions on other grounds, and to the ECIR and to the OCs, the SCNs, the provisional attachment orders and to all further proceedings arising therefrom which have been challenged in the individual writ petitions, shall be decided by the learned Single Judge of this High Court. It will be open to the Respondents to raise all pleas, including that of maintainability, before the learned Single Judge. No opinion is expressed with regard thereto.

89. These writ petitions will now be placed before the learned Single Judge for directions on 6th February 2018.

S. MURALIDHAR, J.

I.S. MEHTA, J.

JANUARY 11, 2018
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