REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1340 2019
(Arising out of SLP(Crl.) No.7523 of 2019)

P. CHIDAMBARAM ...Appellant

VERSUS

DIRECTORATE OF ENFORCEMENT …Respondent

J U D G M E N T

R. BANUMATHI, J.

Leave granted.

2. This appeal relates to the alleged irregularities in Foreign Investment Promotion Board (FIPB) clearance given to the INX Media for receiving foreign investment to the tune of Rs.305 crores against approved inflow of Rs.4.62 crores. The High Court of Delhi rejected the appellant's plea for anticipatory bail in the case registered by Central Bureau of Investigation (CBI) being RC No.220/2017-E-0011 under Section 120B IPC read with Section 420 IPC, Section 8 and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988. By the impugned order dated

20.08.2019, the High Court also refused to grant anticipatory bail in the case registered by the Enforcement Directorate in ECIR No.07/HIU/2017 punishable under Sections 3 and 4 of the Prevention of Money-Laundering Act, 2002.

3. Grievance of the appellant is that against the impugned order of the High Court, the appellant tried to get the matter listed in the Supreme Court on 21.08.2019; but the appellant could not get an urgent hearing in the Supreme Court seeking stay of the impugned order of the High Court. The appellant was arrested by the CBI on the night of 21.08.2019. Since the appellant was arrested and remanded to custody in CBI case, in view of the judgment of the Constitution Bench in *Shri Gurbaksh Singh Sibbia and others v. State of Punjab* **(1980) 2 SCC 565**, the appellant cannot seek anticipatory bail after he is arrested. Accordingly, SLP(Crl.) No.7525 of 2019 preferred by the appellant qua the CBI case was dismissed as infructuous vide order dated 26.08.2019 on the ground that the appellant has already been arrested and remanded to custody. This Court granted liberty to the appellant to work out his remedy in accordance with law.

4. On 15.05.2017, CBI registered FIR in RC No.220/2017-E-0011 under Section 120B IPC read with Section 420 IPC, Section 8 and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 against the accused viz. (i) INX Media through its Director Indrani

Mukherjea; (ii) INX News through its Director Sh. Pratim Mukherjea @ Peter Mukherjea and others; (iii) Sh. Karti P. Chidambaram; (iv) Chess Management Services through its Director Sh. Karti P. Chidambaram and others; (v) Advantage Strategic Consulting through its Director Ms. Padma Vishwanathan @ Padma Bhaskararaman and others; (vi) unknown officers/officials of Ministry of Finance, Govt. of India; and (vii) other unknown persons for the alleged irregularities in giving FIPB's clearance to INX Media to receive overseas funds of Rs.305 crores against approved Foreign Direct Investment (FDI) of Rs.4.62 crores.

5. Case of the prosecution in the predicate offence is that in 2007, INX Media Pvt. Ltd. approached ***Foreign Investment Promotion Board (FIPB)*** seeking approval for FDI upto 46.216 per cent of the issued equity capital. While sending the proposal by INX Media to be placed before the FIPB, INX Media had clearly mentioned in it the inflow of FDI to the extent of Rs.4,62,16,000/- taking the proposed issue at its face value. The FIPB in its meeting held on 18.05.2007 recommended the proposal of INX Media subject to the approval of the Finance Minister-the appellant. In the meeting, the Board did not approve the downstream investment by INX Media in INX News. In violation of the conditions of the approval, the recommendation of FIPB:- (i) INX Media deliberately made a downstream investment to the extent of 26% in the capital of INX News Ltd. without

specific approval of FIPB which included indirect foreign investment by the same Foreign Investors; (ii) generated more than Rs.305 crores FDI in INX Media which is in clear violation of the approved foreign flow of Rs.4.62 crores by issuing shares to the foreign investors at a premium of more than Rs.800/- per share.

6. Upon receipt of a complaint on the basis of a cheque for an amount of Rs.10,00,000/- made in favour of M/s Advantage Strategic Consulting Private Limited (ASCPL) by INX Media, the investigation wing of the Income Tax Department proceeded to investigate the matter and the relevant information was sought from the FIPB, which in turn, vide its letter dated 26.05.2008 sought clarification from the INX Media which justified its action saying that the downstream investment has been authorised and that the same was made in accordance with the approval of FIPB. It is alleged by the prosecution that in order to get out of the situation without any penal provision, INX Media entered into a criminal conspiracy with Sh. Karti Chidambaram, Promoter Director, Chess Management Services Pvt. Ltd. and the appellant-the then Finance Minister of India. INX Media through the letter dated 26.06.2008 tried to justify their action stating that the downstream investment has been approved and the same was made in accordance with approval.

7. The FIR further alleges that for the services rendered by Sh. Karti

Chidambaram to INX Media through Chess Management Services in getting the issues scuttled by influencing the public servants of FIPB unit of the Ministry of Finance, consideration in the form of payments were received against invoices raised on INX Media by ASCPL. It is alleged in the FIR that the very reason for getting the invoices raised in the name of ASCPL for the services rendered by Chess Management Services was with a view to conceal the identity of Sh. Karti Chidambaram inasmuch as on the day when the invoices were raised and payment was received. It is stated that Sh. Karti Chidambaram was the Promoter, Director of Chess Management Services whereas ASCPL was being controlled by him indirectly. It is alleged that the invoices approximately for an amount of Rs.3.50 crores were falsely got raised in favour of INX Media in the name of other companies in which Sh. Karti Chidambaram was having sustainable interest either directly or indirectly. It is alleged that such invoices were falsely got raised for creation of acquisition of media content, consultancy in respect of market research, acquisition of content of various genre of Audio-Video etc. It is alleged that INX Media Group in his record has clearly mentioned the purpose of payment of Rs.10,00,000/- to ASCPL as towards “management consultancy charges towards FIPB notification and clarification”. Alleging that the above acts of omission and commission prima facie disclose commission of offence, CBI has registered FIR in RC No.220/2017-E-0011 on 15.05.2017 under Section 120B read with Section

420 IPC, Section 8 and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 against the aforesaid accused.

8. On the basis of the said FIR registered by CBI, the Enforcement Directorate registered a case in ECIR No.07/HIU/2017 against the aforesaid accused persons for allegedly committing the offence punishable under Sections 3 and 4 of the Prevention of Money-Laundering Act, 2002 (PMLA). Ever since the registration of the cases in 2017, there were various proceedings seeking bail and number of other proceedings pending filed by Sh. Karti Chidambaram and other accused. Finally, the Delhi High Court granted bail to Sh. Karti Chidambaram in INX Media case filed by CBI on 23.03.2018. Thereafter, the appellant moved Delhi High Court seeking anticipatory bail both in CBI case and also in money-laundering case filed by Enforcement Directorate. On 25.07.2018, the Delhi High Court granted the appellant interim protection from arrest in both the cases and the same was extended till 20.08.2019 – the date on which the High Court dismissed the appellant's petition refusing to grant anticipatory bail.

9. The High Court dismissed the application refusing to grant anticipatory bail to the appellant by holding that "*it is a classic case of money-laundering*". The High Court observed that "*it is a clear case of money-laundering*". The learned Single Judge dismissed the application for anticipatory bail by holding "*that the alleged irregularities committed by the*

appellant makes out a prima facie case for refusing pre-arrest bail to the appellant". The learned Single Judge also held that "*considering the gravity of the offence and the evasive reply given by the appellant to the questions put to him while he was under the protective cover extended to him by the court are the twin factors which weigh to deny the pre-arrest bail to the appellant*". Being aggrieved, the appellant has preferred this appeal.

10. Lengthy arguments were heard on number of hearings stretched over for long time. Learned Senior counsel appearing for the appellant Mr. Kapil Sibal and Mr. Abhishek Manu Singhvi made meticulous submissions on the concept of life and liberty enshrined in Article 21 of the Constitution of India to urge that the appellant is entitled to the privilege of anticipatory bail. Arguments were also advanced on various aspects – whether the court can look into the materials produced by the respondent-Enforcement Directorate to seek custody of the appellant when the appellant was not confronted with those documents on the three dates of interrogation of the appellant conducted on 19.12.2018, 01.01.2019 and 21.01.2019. Interlocutory application was filed by the appellant to produce the transcripts of the questions put to the appellant and the answers given by the appellant, recorded by Enforcement Directorate. Countering the above submissions, Mr. Tushar Mehta, learned Solicitor General made the submissions that grant of anticipatory bail is not part of Article 21 of the

Constitution of India. Mr. Tushar Mehta urged that having regard to the materials collected by the respondent-Enforcement Directorate and the specific inputs and in view of the provisions of the special enactment-PMLA, custodial interrogation of the appellant is required and the appellant is not entitled to the privilege of anticipatory bail.

Contention of Mr. Kapil Sibal, learned Senior counsel:-

11. Mr. Kapil Sibal, learned Senior counsel appearing on behalf of the appellant submitted that the clearance for INX FDI was approved by Foreign Investment Promotion Board (FIPB) consisting of six Secretaries and the appellant as the then Finance Minister granted approval in the normal course of official business. The learned Senior counsel submitted that the crux of the allegation is that the appellant's son Sh. Karti Chidambaram tried to influence the officials of FIPB for granting ex-post facto approval for downstream investment by INX Media to INX News; whereas neither the Board members of FIPB nor the officials of FIPB have stated anything about the appellant's son Sh. Karti Chidambaram that he approached and influenced them for ex-post facto approval. The learned Senior counsel contended that the entire case alleges about money paid to ASCPL and Sh. Karti Chidambaram is neither the share-holder nor a Director in the said ASCPL; but the Enforcement Directorate has falsely alleged that Sh. Karti Chidambaram has been controlling the company-

ASCPL. It was submitted that the appellant has nothing to do with the said ASCPL to whom money has been paid by INX Media.

12. Taking us through the impugned judgment and the note said to have been submitted by the Enforcement Directorate before the High Court, the learned Senior counsel submitted that the learned Single Judge has "copied and pasted" paragraphs after paragraphs of the note given by the respondent in the court. It was urged that there was no basis for the allegations contained in the said note to substantiate the alleged transactions/transfer of money as stated in the tabular column given in the impugned order.

13. So far as the sealed cover containing the materials sought to be handed over by the Enforcement Directorate, the learned Senior counsel raised strong objections and submitted that the Enforcement Directorate cannot randomly produce the documents in the court "behind the back" of the appellant for seeking custody of the appellant. Strong objections were raised for the plea of Enforcement Directorate requesting the court to receive the sealed cover and for looking into the documents/material collected during the investigation allegedly showing the trail of money in the name of companies and the money-laundering.

14. The appellant was interrogated by the respondent on three dates viz. 19.12.2018, 01.01.2019 and 21.01.2019. So far as the observation of the

High Court that the appellant was “evasive” during interrogation, the learned Senior counsel submitted that the appellant has well cooperated with the respondent and the respondent cannot allege that the appellant was “non-cooperative”. On behalf of the appellant, an application has also been filed seeking direction to the respondent to produce the transcripts of the questioning conducted on 19.12.2018, 01.01.2019 and 21.01.2019. The learned Senior counsel submitted that the transcripts will show whether the appellant was “evasive” or not during his questioning as alleged by the respondent.

15. Learned Senior counsel submitted that the provision for anticipatory bail i.e. Section 438 Cr.P.C. has to be interpreted in a fair and reasonable manner and while so, the High Court has mechanically rejected the anticipatory bail. It was further submitted that in case of offences of the nature alleged, everything is borne out by the records and there is no question of the appellant being “evasive”. The learned Senior counsel also submitted that co-accused Sh. Karti Chidambaram and Padma Bhaskararaman were granted bail and the other accused Indrani Mukherjea and Sh. Pratim Mukherjea @ Peter Mukherjea are on statutory bail and the appellant is entitled to bail on parity also.

Contention of Mr. Abhishek Manu Singhvi, learned Senior counsel:-

16. Reiterating the submission of Mr. Kapil Sibal, Mr. Abhishek Manu

Singhvi, learned Senior counsel submitted that the Enforcement Directorate cannot say that the appellant was “non-cooperative” and “evasive”. Mr. Singhvi also urged for production of transcripts i.e. questions put to the appellant and the answers which would show whether the appellant has properly responded to the questions or not. Placing reliance upon *Additional District Magistrate, Jabalpur v. Shivakant Shukla* **(1976) 2 SCC 521**, the learned Senior counsel submitted that the respondent cannot rely upon the documents without furnishing those documents to the appellant or without questioning the appellant about the materials collected during the investigation. Reiterating the submission of Mr. Sibal, Mr. Singhvi contended that the High Court has denied anticipatory bail to the appellant on the basis of materials produced by the respondent in the cover before the court which were never shown to the appellant nor was the appellant confronted with the same. The learned Senior counsel submitted that the alleged occurrence was of the year 2007-08 and Sections 420 IPC and 120B IPC and Section 13 of the Prevention of Corruption Act were not part of the “scheduled offence” of Prevention of Money-Laundering Act in 2008 and were introduced by a notification dated 01.06.2009 and in view of the protection given under Article 20(1) of the Constitution of India, there can never be a retrospective operation of a criminal/penal statute. Placing reliance upon *Rao Shiv Bahadur Singh and another v. State of Vindhya Pradesh* **AIR 1953 SC 394**, it was contended that the appellant has to

substantiate the contention that the acts charged as offences were offences "at the time of commission of the offence". The learned Senior counsel urged that in 2007-2008 when the alleged acts of commission and omission were committed, they were not "scheduled offences" and hence prosecution under Prevention of Money-Laundering Act, 2002 is not maintainable.

17. The learned Senior counsel has taken strong exception to the two factors stated by the High Court in the impugned order for denying pre-arrest bail i.e. (i) gravity of the offence; and (ii) the appellant was "evasive" to deny the anticipatory bail. The learned Senior counsel submitted that the "gravity of the offence" cannot be the perception of the individual or the court and the test for "gravity of the offence" should be the punishment prescribed by the statute for the offence committed. Insofar as the finding of the High Court that "the appellant was evasive to the questions", the learned Senior counsel submitted that the investigating agency-Enforcement Directorate cannot expect an accused to give answers in the manner they want and that the accused is entitled to protection under Article 20(3) of the Constitution of India. Reliance was placed upon *Santosh s/o Dwarkadas Fafat v. State of Maharashtra* **(2017) 9 SCC 714.**

<u>Contention of Mr. Tushar Mehta, learned Solicitor General:-</u>

18. Taking us through the *Statement of Objects and Reasons* and salient

features of the PMLA, the learned Solicitor General submitted that India is a part of the global community having responsibility to crackdown on money-laundering with an effective legislation and PMLA is a result of the joint initiatives taken by several nations. Taking us through the various provisions of the PMLA, the learned Solicitor General submitted that money-laundering poses a serious threat to the financial system and financial integrity of the nation and has to be sternly dealt with. It was submitted that PMLA offence has two dimensions – predicate offence and money-laundering. Money-laundering is a separate and independent offence punishable under Section 4 read with Section 3 of the PMLA.

19. Learned Solicitor General submitted that under Section 19 of PMLA, specified officers, on the basis of material in possession, having reason to believe which is to be recorded in writing that the person has been guilty of the offence under the Act, have power to arrest. It was urged that the power to arrest and necessary safeguards are enshrined under Section 19 of the Act. It was submitted that since respondent has collected cogent materials to show that it is a case of money-laundering and the Enforcement Directorate has issued Letter rogatory and if the Court intervenes by granting anticipatory bail, the authority cannot exercise the statutory right of arrest and interrogate the appellant.

20. The learned Solicitor General submitted that they have obtained

specific inputs from overseas banks and also about the companies and properties and it is a clear case of money-laundering. The learned Solicitor General submitted that the Court has power to look into the materials so collected by the Enforcement Directorate and the same cannot be shared with the appellant at this initial stage when the Court is considering the matter for grant of pre-arrest bail. Relying upon number of judgments, the learned Solicitor General has submitted that as a matter of practice, Courts have always perused the case diaries produced by the prosecution and receive and peruse the materials/documents to satisfy its judicial conscience. In support of his contention, learned Solicitor General placed reliance upon *Romila Thapar and Others v. Union of India and Others* **(2018) 10 SCC 753,** *Jai Prakash Singh v. State of Bihar and Another* **(2012) 4 SCC 379** and *Directorate of Enforcement and Another v. P.V. Prabhakar Rao* **(1997) 6 SCC 647** and other judgments and requested the Court to peruse the materials produced by the Enforcement Directorate in the sealed cover.

21. Opposing the grant of anticipatory bail, the learned Solicitor General submitted that the Enforcement Directorate has cogent evidence to prove that it is a case of money-laundering and there is a need of custodial interrogation of the appellant. The learned Solicitor General submitted that the economic offences stand as a class apart and custodial interrogation is

required for the Enforcement Directorate to trace the trail of money and prayed for dismissal of the appeal.

22. As noted earlier, the predicate offences are under Sections 120B IPC and 420 IPC, Section 8 and Section 13(2) read with Section 13(1)(d) of Prevention of Corruption Act. Case is registered against the appellant and others under Sections 3 and 4 of PMLA. The main point falling for consideration is whether the appellant is entitled to the privilege of anticipatory bail. In order to consider whether the appellant is to be granted the privilege of anticipatory bail, it is necessary to consider the salient features of the special enactment – Prevention of Money-Laundering Act, 2002.

23. **Prevention of Money-laundering Act, 2002 – Special Enactment:-** Money-laundering is the process of concealing illicit sources of money and the launderer transforming the money proceeds derived from criminal activity into funds and moved to other institution or transformed into legitimate asset. It is realised world around that money laundering poses a serious threat not only to the financial systems of the countries but also to their integrity and sovereignty. The Prevention of Money-laundering Act, 2002 was enacted in pursuance of the Political Declaration adopted by the Special Session of the United Nations General Assembly held in June 1998, calling upon the Member States to adopt national money-laundering

legislation and programme, primarily with a view to meet out the serious threat posed by money laundering to the financial system of the countries and to their integrity and sovereignty.

24. **Statement of Objects and Reasons** to the Prevention of Money-laundering Act, 2002 recognises that money laundering poses a serious threat not only to the financial systems of the countries but also to their integrity and sovereignty. PMLA is a special enactment containing the provisions with adequate safeguards with a view to prevent money-laundering. The Preamble to the Prevention of Money-Laundering Act, 2002 states that "*An Act to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto.*"

25. Chapter II of PMLA contains provisions relating to the offences of money-laundering. Section 2(1)(p) of PMLA defines "**money-laundering**" that it has the same meaning assigned to it in Section 3. Section 2(1)(ra) of PMLA defines "offence of cross border implications". To prevent offences of "cross border implications", PMLA contains Sections 55 to 61 dealing with reciprocal arrangement for assistance in certain matters and procedure for attachment and confiscation of property between the contracting States with regard to the offences of money-laundering and predicate offences.

Section 2(1)(y) of PMLA defines “scheduled offence” which reads as under:-

> “**2. Definitions –**
>
> (1)……
>
> (y) “scheduled offence” means –
>
> (i) the offences specified under Part A of the Scheduled; 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.”

“Scheduled Offence” is a *sine qua non* for the offence of money-laundering which would generate the money that is being laundered. PMLA contains Schedules which originally contained three parts namely Part A, Part B and Part C. Part A contains various paragraphs which enumerate offences under the Indian Penal Code, Narcotic Drugs and Psychotropic Substances Act, 1985, offences under the Explosives Substances Act, 1908 and the offences under the Prevention of Corruption Act, 1988 **(paragraph 8)** etc. The Schedule was amended by Act 21 of 2009 (w.e.f. 01.06.2009). Section 13 of Prevention of Corruption Act was inserted in the Part A of the Schedule to PMLA by the Amendment Act, 16 of 2018 (w.e.f. 26.07.2018).

26. Section 3 of PMLA stipulates “money-laundering” to be an offence. Section 3 of PMLA states that 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 the crime and

projecting it as untainted property shall be guilty of the offences of money laundering. The provisions of the PMLA including Section 3 have undergone various amendments. The words in Section 3 "*with the proceeds of crime and projecting*" has been amended as "*proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming*" by the Amendment Act 2 of 2013 (w.e.f. 15.02.2013).

27. Section 4 of PMLA deals with punishment for money laundering. Prior to Amendment Act 2 of 2013, Section 4 provided punishment with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and the fine which may extend to Rs.5,00,000/-. By Amendment Act 2 of 2013, Section 4 is amended w.e.f. 15.02.2013 vide S.O. 343(E) dated 08.02.2013. Now, the punishment prescribed under Section 4 of PMLA to the offender is rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and the offender is also liable to pay fine. The limit of fine has been done away with and now after the amendment, appropriate fine even above Rs.5,00,000/- can be imposed against the offender.

28. Section 5 of PMLA which provides for attachment of property involved in money laundering, states that where the Director or any other officer not below the rank of Deputy Director authorised by the Director for the purposes of this Section, has "**reason to believe**" (**the reason for such**

belief to be recorded in writing), on the basis of material in his possession, that (a) any person is in possession of any proceeds of crime; and (b) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under Chapter III, 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 as may be prescribed. Section 5 provides that no such order of attachment shall be made unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under Section 173 of the Code of Criminal Procedure, 1973 (2 of 1974), or a complaint has been filed by a person authorised to investigate the offence mentioned in that Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be.

29. The term "**reason to believe**" is not defined in PMLA. The expression "**reason to believe**" has been defined in Section 26 of IPC. As per the definition in Section 26 IPC, a person is said to have "**reason to believe**" a thing, if he has sufficient cause to believe that thing but not otherwise. The specified officer must have "**reason to believe**" on the basis of material in his possession that the property sought to be attached is likely to be concealed, transferred or dealt with in a manner which may result in

frustrating any proceedings for confiscation of their property under the Act. It is stated that in the present case, exercising power under Section 5 of the PMLA, the Adjudicating Authority had attached some of the properties of the appellant. Challenging the attachment, the appellant and others are said to have preferred appeal before the Appellate Tribunal and stay has been granted by the Appellate Authority and the said appeal is stated to be pending.

30. As rightly submitted by the learned Solicitor General, sufficient safeguards are provided under the provisions of PMLA. Under Section 5 of PMLA, the Director or any other officer not below the rank of Deputy Director authorised by the Director for the purposes of Section 5 who passed the impugned order is required to have "**reason to believe**" that the properties sought to be attached would be transferred or dealt with in a manner which would frustrate the proceedings relating to confiscation of such properties. Further, the officer who passed the order of attachment is required to record the reasons for such belief. The provisions of the PMLA and the Rules also provide for manner of forwarding a copy of the order of provisional attachment of property along with material under sub-section (2) of Section 5 of PMLA to the Adjudicating Authority.

31. In order to ensure the safeguards, in exercise of power under Section 73 of PMLA, the Central Government has framed *"The Prevention of*

Money-Laundering (The Manner of Forwarding a Copy of the Order of Provisional Attachment of Property along with the Material, and Copy of the Reasons along with the Material in respect of Survey, to the Adjudicating Authority and its period of Retention) Rules, 2005". Rule 3 of the said Rules provides for manner of forwarding a copy of the order of provisional attachment of property along with the material under sub-section (2) of Section 5 of the Act to the Adjudicating Authority. Rule 3 stipulates various safeguards as to the confidentiality of the sealed envelope sent to the Adjudicating Authority.

32. Section 17 of PMLA deals with the search and seizure. Section 17 which deals with search and seizure states that where the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section on the basis of the information in his possession has "**reason to believe**" (**reason for such belief to be recorded in writing**) that any person has committed an offence which constitutes the money laundering or is in possession of any proceeds of crime involved in money laundering etc. may search building, place and seize any record or property found as a result of such search. Section 17 of PMLA also uses the expression "**reason to believe**" and "**reason for such belief to be recorded in writing**". Here again, the authorised officer shall immediately on search and seizure or upon issuance of freezing order forward a copy of

the reasons so recorded along with the material in his possession to the Adjudicating Authority in a "**sealed envelope**" in the manner as may be prescribed and such Adjudicating Authority shall keep such reasons and material for such period as may be prescribed. In order to ensure the sanctity of the search and seizure and to ensure the safeguards, in exercise of power under Section 73 of PMLA, the Central Government has framed *"The Prevention of Money-Laundering (Forms, Search and Seizure or Freezing and the Manner of Forwarding the Reasons and Material to the Adjudicating Authority, Impounding and Custody of Records and the period of Retention) Rules, 2005".*

33. Section 19 of PMLA deals with the power of the specified officer to arrest. Under sub-section (1) of Section 19 of PMLA, the specified officer viz. the Director, the Deputy Director, Assistant Director or any other officer authorised in this behalf by the Central Government by general or special order, on the basis of the material in possession, having "**reason to believe**" and "**reasons for such belief be recorded in writing"** that the person has been guilty of offence punishable under the PMLA, has power to arrest such person. The authorised officer is required to inform the accused the grounds for such arrest at the earliest and in terms of sub-section (3) of Section 19 of the Act, the arrested person is required to be produced to the jurisdictional Judicial Magistrate or Metropolitan Magistrate

within 24 hours excluding the journey time from the place of arrest to the Magistrate's Court. In order to ensure the safeguards, in exercise of power under Section 73 of the Act, the Central Government has framed *"The Prevention of Money-Laundering (The Forms and the Manner of Forwarding a Copy of Order of Arrest of a Person along with the Material to the Adjudicating Authority and its Period of Retention) Rules, 2005".* Rule 3 of the said Rules requires the arresting officer to forward a copy of order of arrest and the material to the Adjudicating Authority in a sealed cover marked "confidential" and Rule 3 provides for the manner in maintaining the confidentiality of the contents.

34. As rightly submitted by Mr. Tushar Mehta, the procedure under PMLA for arrest ensures sufficient safeguards viz.:- (i) only the specified officers are authorised to arrest; (ii) based on "**reasons to believe**" that an offence punishable under the Act has been committed; (iii) the reasons for such belief to be recorded in writing; (iv) evidence and the material submitted to the Adjudicating Authority in sealed envelope in the manner as may be prescribed ensuring the safeguards in maintaining the confidentiality; and (v) every person arrested under PMLA to be produced before the Judicial Magistrate or Metropolitan Magistrate within 24 hours. Section 19 of PMLA provides for the power to arrest to the specified officer on the basis of material in his possession and has "**reason to believe**" and the **"reasons**

for such belief to be recorded in writing" that any person has been guilty of an offence punishable under PMLA. The statutory power has been vested upon the specified officers of higher rank to arrest the person whom the officer has **"reason to believe"** that such person has been guilty of an offence punishable under PMLA. In cases of PMLA, in exercising the power to grant anticipatory bail would be to scuttle the statutory power of the specified officers to arrest which is enshrined in the statute with sufficient safeguards.

35. Section 71 of PMLA gives overriding effect to the provisions of PMLA. Section 71 of PMLA states that the provisions of the Act would have overriding effect on the provisions of all other Acts applicable. The provisions of PMLA shall prevail over the contrary provisions of the other Acts. Section 65 of PMLA states that the provisions of Code of Criminal Procedure, 1973 shall apply to the provisions under the Act insofar as they are not inconsistent with the provisions of PMLA.

36. Insofar as the issue of grant of bail is concerned, Section 45 of PMLA starts with *non-obstante* clause. Section 45 imposes two conditions for grant of bail to any person accused of any offence punishable for a term of imprisonment of more than three years under Part-A of the Schedule of the Act viz., (i) that the prosecutor must be given an opportunity to oppose the application for such bail; (ii) that the court must be satisfied that there are

reasonable grounds for believing that the accused persons is not guilty of such offence and that he is not likely to commit any offence while on bail.

37. The twin conditions under Section 45(1) for the offences classified thereunder in Part-A of the Schedule was held arbitrary and discriminatory and invalid in *Nikesh Tarachand Shah v. Union of India and another* **(2018) 11 SCC 1**. Insofar as the twin conditions for release of accused on bail under Section 45 of the Act, the Supreme Court held the same to be unconstitutional as it violates Articles 14 and 21 of the Constitution of India. Subsequently, Section 45 has been amended by Amendment Act 13 of 2008. The words *"imprisonment for a term of imprisonment of more than three years under Part A of the Schedule"* has been substituted with *"accused of an offence under this Act…..".* Section 45 prior to *Nikesh Tarachand* and post *Nikesh Tarachand* reads as under:-

Section 45 - Prior to Nikesh Tarachand Shah	**Section 45 - Post Nikesh Tarachand Shah**
Section 45. Offence to be cognizable and non-bailable. **(1)** Notwithstanding contained in the Code of Criminal Procedure, 1973 (2 of 1974), **no person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule shall be released on bail or on his own bond unless-** (i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail; Provided that a person, who, is under the age of	Section 45. Offences to be cognizable and non-bailable. **(2)** Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), **no person accused of an offence under this Act shall be released on bail or on his own bond unless-** (i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail; Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, or is accused either on his own or along with other co-accused of money laundering a sum of **less than one crore rupees may be released on bail, if the Special court so directs:**

sixteen years, or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs:

38. The occurrence was of the year 2007-2008. CBI registered the case against Sh. Karti Chidambaram, the appellant and others on 15.05.2017 under Sections 120-B IPC read with Section 420 IPC and under Section 8 and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act. Learned Senior counsel for the appellant, Mr. A.M. Singhvi has submitted that there could not have been 'reasons to believe' that the appellant has committed the offence under Section 3 of PMLA, since in 2007-2008 the time of commission of alleged offence, Sections 120-B IPC and 420 IPC and Section 13 of the Prevention of Corruption Act were not there in Part 'A' of the Schedule to PMLA and were included in Part 'A' of the Schedule only by Amendment Act 21 of 2009 w.e.f. 01.06.2009 and w.e.f. 26.07.2018 respectively and therefore, no prima-facie case of commission of offence by the appellant under PMLA is made out. It was urged that under Article 20 of the Constitution, no person shall be convicted of any offence except for violation of law in force at the time of the commission of that act charged as offence. When Section 120B IPC and Section 420 IPC and Section 13 of Prevention of Corruption Act were not then included in Part A of the Schedule, in 2007-2008, then the appellant and others cannot be said to have committed the offence under PMLA. Insofar as Section 8 of the Prevention of Corruption Act is concerned, it was

submitted that Section 8 of the Prevention of Corruption Act is not attracted against the appellant as there are no allegations in the FIR that the appellant accepted or agreed to accept any gratification as a motive or reward for inducing any public servant and hence, the accusation under Section 8 of the Prevention of Corruption Act does not apply to the appellant. It was further submitted that even assuming Section 8 of the Prevention of Corruption Act is made out, the amount allegedly paid to ASCPL was only Rs.10,00,000/- whereas, Rs.30,00,000/- was the amount then stipulated to attract Section 8 to be the Scheduled offence under Part A of the Schedule to the Act and therefore, there was no basis for offence against the appellant and in such view of the matter, the appellant is entitled for anticipatory bail.

39. Section 45 of the PMLA makes the offence of money laundering cognizable and non-bailable and no person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule shall be released on bail unless the twin conditions thereon are satisfied. Section 120-B IPC – *Criminal Conspiracy* and Section 420 IPC - *Cheating and dishonestly inducing delivery of property* were included in Part A of the Schedule to PMLA by way of Amendment Act 21 of 2009 w.e.f. 01.06.2009 and by way of Amendment Act 2 of 2013 w.e.f. 15.02.2013. Likewise, Section 13 of the Prevention of Corruption Act has

been introduced to Part A of the Schedule **(Paragraph 8)** by way of Amendment Act 16 of 2018 w.e.f. 26.07.2018. As pointed out earlier, the FIR was registered by CBI under Section 8 of the Prevention of Corruption Act also which was then in Part A of the Schedule at the time of alleged commission of offence.

40. Learned Senior counsel submitted that since the offence under Sections 120-B IPC and 420 IPC and under Section 13 of Prevention of Corruption Act were included in the Schedule only w.e.f. 01.06.2009 and w.e.f. 26.07.2018 respectively and there can never be a retrospective operation of a criminal/penal statue and the test is not whether the proceeds are retained by the person; but the test as laid down by the Constitution Bench of this Court is, the test of the acts constituting the offence at the time of the commission of the offence and the appellant cannot be proceeded with prosecution under PMLA in violation of constitutional protection under Article 20(1) of the Constitution of India.

41. Under Article 20(1) of the Constitution, no person shall be convicted of any offence except for violation of law in force at the time of commission of that act charged as an offence. FIR for the predicate offence has been registered by CBI under Section 120B IPC, 420 IPC and Section 13 of the Prevention of Corruption Act and also under Section 8 of the Prevention of Corruption Act. As discussed earlier, Section 120B IPC and Section 420

IPC were included in Part A of the Schedule only by Amendment Act 21 of 2009 w.e.f. 01.06.2009. Section 13 of the Prevention of Corruption Act was included in Part A of the Schedule by Amendment Act 16 of 2018 w.e.f. 26.07.2018. Section 8 of the Prevention of Corruption Act is punishable with imprisonment extending upto seven years. Section 8 of the Prevention of Corruption Act was very much available in Part A of the Schedule of PMLA at the time of alleged commission of offence in 2007-2008. It cannot therefore be said that the appellant is proceeded against in violation of Article 20(1) of the Constitution of India for the alleged commission of the acts which was not an offence as per law then in existence. The merits of the contention that Section 8 of the Prevention of Corruption Act cannot be the predicate offence qua the appellant, cannot be gone into at this stage when this Court is only considering the prayer for anticipatory bail.

42. Yet another contention advanced on behalf of the appellant is that minimum threshold for the Enforcement Directorate to acquire jurisdiction at the relevant time was Rs.30 lakhs whereas, in the present case, there is no material to show any payment apart from the sum of Rs.10 lakhs (approximately) allegedly paid by INX Media to ASCPL with which the appellant is said to be having no connection whatsoever. The merits of the contention that Section 8 of the Prevention of Corruption Act (then included in Schedule A of the PMLA in 2007-08) whether attracted or not and whether the Enforcement Directorate had the threshold to acquire

jurisdiction under PMLA cannot be considered at this stage while this Court is considering only the prayer for anticipatory bail.

43. In terms of Section 4 of the PMLA, the offence of money-laundering is punishable with rigorous imprisonment for a term not less than three years extending to seven years and with fine. The Second Schedule to the Criminal Procedure Code relates to classification of offences against other laws and in terms of the Second Schedule of the Code, an offence which is punishable with imprisonment for three years and upward but not more than seven years is a cognizable and non-bailable offence. Thus, Section 4 of the Act read with the Second Schedule of the Code makes it clear that the offences under the PMLA are cognizable offences. As pointed out earlier, Section 8 of the Prevention of Corruption Act was then found a mention in Part 'A' of the Schedule **(Paragraph 8)**. Section 8 of the Prevention of Corruption Act is punishable for a term extending to seven years. Thus, the essential requirement of Section 45 of PMLA "accused of an offence punishable for a term of imprisonment of more than three years under Part 'A' of the Schedule" is satisfied making the offence under PMLA. There is no merit in the contention of the appellant that very registration of the FIR against the appellant under PMLA is not maintainable.

Whether Court can look into the documents/materials collected during investigation

44. During the course of lengthy hearing, much arguments were advanced mainly on the question whether the court can look into the documents and materials produced by the prosecution before the court without first confronting the accused with those materials.

45. The learned Solicitor General submitted that during investigation, the Enforcement Directorate has collected materials and overseas banks have given specific inputs regarding the companies and properties that money has been parked in the name of shell companies and the said money has been used to make legitimate assets and that custodial interrogation is necessary with regard to the materials so collected. The learned Solicitor General sought to produce the materials so collected in the sealed cover and requested the court to peruse the documents and the materials to satisfy the conscience of the court as to the necessity for the custodial interrogation.

46. Contention of learned Solicitor General requesting the court to peruse the documents produced in the sealed cover was strongly objected by the appellant on the grounds :– (i) that the Enforcement Directorate cannot randomly place the documents in the court behind the back of the accused to seek custody of the accused; (ii) the materials so collected by Enforcement Directorate during investigation cannot be placed before the court unless the accused has been confronted with such materials.

47. Mr. Kapil Sibal, learned Senior counsel submitted that the statements recorded under Section 161 Cr.P.C. are part of the case diary and the case diary must reflect day to day movement of the investigation based on which the investigating agency came to the conclusion that the crime has been committed so that a final report can be filed before the court. The learned Senior counsel submitted that during the course of such investigation, the investigating officer may discover several documents which may have a bearing on the crime committed; however the documents themselves can never be the part of the case diary and the documents would be a piece of documentary evidence during trial which would be required to be proved in accordance with the provisions of the Evidence Act before such documents can be relied upon for the purpose of supporting the case of prosecution. Enforcement Directorate does not maintain a case diary; but maintain the file with paginated pages. It was urged that even assuming that there is a case diary maintained by the respondent in conformity with Section 172 Cr.P.C., the opinion of the investigating officer for the conclusion reached by the authorised officer under PMLA, can never be relied upon for the purposes of consideration of anticipatory bail.

48. Having regard to the submissions, two points arise for consideration – (i) whether the court can/cannot look into the documents/materials produced before the court unless the accused was earlier confronted with those documents/materials?; and (ii) whether the court is called upon to

hold a mini inquiry during the intermediary stages of investigation by examining whether the questions put to the accused are ‘satisfactory’ or ‘evasive’, etc.?

49. Sub-section (2) of Section 172 Cr.P.C. permits any court to send for case diary to use them in the trial. Section 172(3) Cr.P.C. specifically provides that neither the accused nor his agents shall be entitled to call for case diary nor shall he or they be entitled to see them merely because they are referred to by the court. But if they are used by the police officer who made them to refresh his memory or if the court uses them for the purpose of contradicting the such police officer, the provisions of Section 161 Crl.P.C. or the provision of Section 145 of the Evidence Act shall be complied with. In this regard, the learned Solicitor General placed reliance upon *Balakram v. State of Uttarakhand and others* **(2017) 7 SCC 668**. Observing that the confidentiality is always kept in the matter of investigation and it is not desirable to make available the police diary to the accused on his demand, in *Balakram*, the Supreme Court held as under:-

> **“15.** The police diary is only a record of day-to-day investigation made by the investigating officer. Neither the accused nor his agent is entitled to call for such case diary and also are not entitled to see them during the course of inquiry or trial. The unfettered power conferred by the statute under Section 172(2) CrPC on the court to examine the entries of the police diary would not allow the accused to claim similar unfettered right to inspect the case diary.
>
> **...**.....

17. From the aforementioned, it is clear that the denial of right to the accused to inspect the case diary cannot be characterised as unreasonable or arbitrary. The confidentiality is always kept in the matter of investigation and it is not desirable to make available the police diary to the accused on his demand."

50. Reiterating the same principles in *Sidharth and others v. State of Bihar* **(2005) 12 SCC 545,** the Supreme Court held as under:-

"27. Lastly, we may point out that in the present case, we have noticed that the entire case diary maintained by the police was made available to the accused. Under Section 172 of the Criminal Procedure Code, every police officer making an investigation has to record his proceedings in a diary setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him and a statement of the circumstances ascertained through his investigation. It is specifically provided in sub-clause (3) of Section 172 that neither the accused nor his agents shall be entitled to call for such diaries nor shall he or they be entitled to see them merely because they are referred to by the court, but if they are used by the police officer who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer, the provisions of Section 161 CrPC or the provisions of Section 145 of the Evidence Act shall be complied with. The court is empowered to call for such diaries not to use it as evidence but to use it as aid to find out anything that happened during the investigation of the crime. These provisions have been incorporated in the Code of Criminal Procedure to achieve certain specific objectives. The police officer who is conducting the investigation may come across a series of information which cannot be divulged to the accused. He is bound to record such facts in the case diary. <u>But if the entire case diary is made available to the accused, it may cause serious prejudice to others and even affect the safety and security of those who may have given statements to the police. The confidentiality is always kept in the matter of criminal investigation and it is not desirable to make</u>

> available the entire case diary to the accused. In the instant case, we have noticed that the entire case diary was given to the accused and the investigating officer was extensively cross-examined on many facts which were not very much relevant for the purpose of the case. The learned Sessions Judge should have been careful in seeing that the trial of the case was conducted in accordance with the provisions of CrPC." **[underlining added]**

The same position has been reiterated in *Naresh Kumar Yadav v. Ravindra Kumar and others* **(2008) 1 SCC 632** [Paras 11 to 14], *Malkiat Singh and others v. State of Punjab* **(1991) 4 SCC 341** [Para 11] and other judgments.

51. It is seen from various judgments that on several instances, court always received and perused the case diaries/materials collected by the prosecution during investigation to satisfy itself as to whether the investigation is proceeding in the right direction or for consideration of the question of grant of bail etc. In *Directorate of Enforcement and another v. P.V. Prabhakar Rao* **(1997) 6 SCC 647**, the Supreme Court perused the records to examine the correctness of the order passed by the High Court granting bail. In *R.K. Krishna Kumar v. State of Assam and others* **(1998) 1 SCC 474,** the Supreme Court received court diary maintained under Section 172 Cr.P.C. and perused the case diary to satisfy itself that the investigation has revealed that the company thereon has funded the organisation (ULFA) and that the appellants thereon had a role to play in it. While considering the question of arrest of five well known human rights activists, journalists, advocates and political workers, in *Romila Thapar and*

Others v. Union of India and Others **(2018) 10 SCC 753**, this Court perused the registers containing relevant documents and the case diary produced by the State of Maharashtra. However, the court avoided to dilate on the factual position emerging therefrom on the ground that any observation made thereon might cause prejudice to the accused or to the prosecution in any manner. Upholding the validity of Section 172(3) Crl.P.C. and observing that "there can be no better custodian or guardian of the interest of justice than the court trying the case", in *Mukund Lal v. Union of India and another* **1989 Supp. (1) SCC 622**, the Supreme Court held as under:-

> **3.** …..
>
> "So far as the other parts are concerned, the accused need not necessarily have a right of access to them because in a criminal trial or enquiry, whatever is sought to be proved against the accused, will have to be proved by the evidence other than the diary itself and the diary can only be used for a very limited purpose by the court or the police officer as stated above ..... When in the enquiry or trial, everything which may appear against the accused has to be established and brought before the court by evidence other than the diary and the accused can have the benefit of cross-examining the witnesses and the court has power to call for the diary and use it, of course not as evidence but in aid of the enquiry or trial, I am clearly of the opinion, that the provisions under Section 172(3) CrPC cannot be said to be unconstitutional."
>
> We fully endorse the reasoning of the High Court and concur with its conclusion. We are of the opinion that the provision embodied in sub-section (3) of Section 172 of the CrPC cannot be characterised as unreasonable or arbitrary. Under sub-section (2) of Section 172 CrPC the court itself has the unfettered power to examine the entries in the diaries. This is a very

important safeguard. The legislature has reposed complete trust in the court which is conducting the inquiry or the trial. It has empowered the court to call for any such relevant case diary; if there is any inconsistency or contradiction arising in the context of the case diary the court can use the entries for the purpose of contradicting the police officer as provided in sub-section (3) of Section 172 of the CrPC. Ultimately there can be no better custodian or guardian of the interest of justice than the court trying the case. No court will deny to itself the power to make use of the entries in the diary to the advantage of the accused by contradicting the police officer with reference to the contents of the diaries. In view of this safeguard, the charge of unreasonableness or arbitrariness cannot stand scrutiny..... Public interest demands that such an entry is not made available to the accused for it might endanger the safety of the informants and it might deter the informants from giving any information to assist the investigating agency, ……." [**underlining added**]

52. So far as the production of the case diary during trial and reference to the same by the court and the interdict against accused to call for case diary is governed by Section 172 Cr.P.C. As per sub-section (3) of Section 172, neither the accused nor his agent is entitled to call for such case diaries and also not entitled to see them during the course of enquiry or trial. The case diaries can be used for refreshing memory by the investigating officer and court can use it for the purpose of contradicting such police officer as per provisions of Section 161 or Section 145 of the Indian Evidence Act. Unless the investigating officer or the court so uses the case diary either to refresh the memory or for contradicting the investigating officer as previous statement under Section 161, after drawing

his attention under Section 145, the entries in case diary cannot be used by the accused as evidence (vide Section 172(3) Cr.P.C.).

53. It is well-settled that the court can peruse the case diary/materials collected during investigation by the prosecution even before the commencement of the trial inter-alia in circumstances like:- (i) to satisfy its conscience as to whether the investigation is proceeding in the right direction; (ii) to satisfy itself that the investigation has been conducted in the right lines and that there is no misuse or abuse of process in the investigation; (iii) whether regular or anticipatory bail is to be granted to the accused or not; (iv) whether any further custody of the accused is required for the prosecution; (v) to satisfy itself as to the correctness of the decision of the High Court/trial court which is under challenge. The above instances are only illustrative and not exhaustive. Where the interest of justice requires, the court has the powers, to receive the case diary/materials collected during the investigation. As held in *Mukund Lal*, ultimately there can be no better custodian or guardian of the interest of justice than the court trying the case. Needless to point out that when the Court has received and perused the documents/materials, it is only for the purpose of satisfaction of court's conscience. In the initial stages of investigation, the Court may not extract or *verbatim* refer to the materials which the Court has perused (as has been done in this case by the learned Single Judge) and make observations which might cause serious prejudice to the accused in

trial and other proceedings resulting in miscarriage of justice.

54. The Enforcement Directorate has produced the sealed cover before us containing the materials collected during investigation and the same was received. Vide order dated 29.08.2019, we have stated that the receipt of the sealed cover would be subject to our finding whether the court can peruse the materials or not. As discussed earlier, we have held that the court can receive the materials/documents collected during the investigation and peruse the same to satisfy its conscience that the investigation is proceeding in the right lines and for the purpose of consideration of grant of bail/anticipatory bail etc. In the present case, though sealed cover was received by this Court, we have consciously refrained from opening the sealed cover and perusing the documents. Lest, if we peruse the materials collected by the respondent and make some observations thereon, it might cause prejudice to the appellant and the other co-accused who are not before this court when they are to pursue the appropriate relief before various forum. Suffice to note that at present, we are only at the stage of considering the pre-arrest bail. Since according to the respondent, they have collected documents/materials for which custodial interrogation of the appellant is necessary, which we deem appropriate to accept the submission of the respondent for the limited purpose of refusing pre-arrest bail to the appellant.

55. Of course, while considering the request for anticipatory bail and while

perusing the materials/note produced by the Enforcement Directorate/CBI, the learned Single Judge could have satisfied his conscience to hold that it is not a fit case for grant of anticipatory bail. On the other hand, the learned Single Judge has *verbatim* quoted the note produced by the respondent-Enforcement Directorate. The learned Single Judge, was not right in extracting the note produced by the Enforcement Directorate/CBI which in our view, is not a correct approach for consideration of grant/refusal of anticipatory bail. But such incorrect approach of the learned Single Judge, in our view, does not affect the correctness of the conclusion in refusing to grant of anticipatory bail to the appellant in view of all other aspects considered herein.

Re: Contention:- The appellant should have been confronted with the materials collected by the Enforcement Directorate earlier, before being produced to the court.

56. On behalf of the appellant, it was contended that the materials produced by the Enforcement Directorate could have never been relied upon for the purpose of consideration of anticipatory bail unless the appellant was earlier confronted with those documents/materials. It was submitted that if the appellant's response was completely "evasive" and "non co-operative" during the three days when he was interrogated i.e. 19.12.2018, 01.01.2019 and 21.01.2019, the respondent should place before the court the materials put to the appellant and the responses

elicited from the accused to demonstrate to the court that “the accused was completely evasive and non-co-operative”.

57. Contention of the appellant that the court will have to scrutinise the questions put to the accused during interrogation and answers given by the appellant and satisfy itself whether the answers were “evasive or not”, would amount to conducting “mini trial” and substituting court’s view over the view of the investigating agency about the “cooperation” or “evasiveness” of the accused and thereafter, the court to decide the questions of grant of anticipatory bail. This contention is far-fetched and does not merit acceptance.

58. As rightly submitted by learned Solicitor General that if the accused are to be confronted with the materials which were collected by the prosecution/Enforcement Directorate with huge efforts, it would lead to devastating consequences and would defeat the very purpose of the investigation into crimes, in particular, white collar offences. If the contention of the appellant is to be accepted, the investigating agency will have to question each and every accused such materials collected during investigation and in this process, the investigating agency would be exposing the evidence collected by them with huge efforts using their men and resources and this would give a chance to the accused to tamper with the evidence and to destroy the money trail apart from paving the way for the accused to influence the witnesses. If the contention of the appellant is

to be accepted that the accused will have to be questioned with the materials and the investigating agency has to satisfy the court that the accused was “evasive” during interrogation, the court will have to undertake a “mini trial” of scrutinizing the matter at intermediary stages of investigation like interrogation of the accused and the answers elicited from the accused and to find out whether the answers given by the accused are ‘evasive’ or whether they are ‘satisfactory’ or not. This could have never been the intention of the legislature either under PMLA or any other statute.

59. Interrogation of the accused and the answers elicited from the accused and the opinion whether the answers given by the accused are “satisfactory” or “evasive”, is purely within the domain of the investigating agency and the court cannot substitute its views by conducting mini trial at various stages of the investigation.

60. The investigation of a cognizable offence and the various stages thereon including the interrogation of the accused is exclusively reserved for the investigating agency whose powers are unfettered so long as the investigating officer exercises his investigating powers well within the provisions of the law and the legal bounds. In exercise of its inherent power under Section 482 Cr.P.C., the court can interfere and issue appropriate direction only when the court is convinced that the power of the investigating officer is exercised *mala fide* or where there is abuse of power and non-compliance of the provisions of Code of Criminal Procedure.

However, this power of invoking inherent jurisdiction to issue direction and interfering with the investigation is exercised only in rare cases where there is abuse of process or non-compliance of the provisions of Criminal Procedure Code.

61. In *King-Emperor v. Khwaja Nazir Ahmad* **AIR 1945 PC 18 : 1944 SCC Online PC 29**, it was held as under:-

> "…..it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry.
>
> In India as has been shown there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the Court to intervene in an appropriate case when moved under S. 491 of the Crl. P.C. …." **[underlining added]**

62. The above decision in *Khwaja Nazir Ahmad* has been quoted with approval by the Supreme Court in *Abhinandan Jha and others v. Dinesh Mishra* **AIR 1968 SC 117** and *State of Bihar and another v. J.A.C. Saldanha and others* **(1980) 1 SCC 554**. Observing that the investigation of the offence is the field exclusively reserved for the executive through the police department and the superintendence over which vests in the State

Government, in *J.A.C. Saldanha,* it was held as under:-

> "**25.** There is a clear-cut and well demarcated sphere of activity in the field of crime detection and crime punishment. Investigation of an offence is the field exclusively reserved for the executive through the police department the superintendence over which vests in the State Government. The executive which is charged with a duty to keep vigilance over law and order situation is obliged to prevent crime and if an offence is alleged to have been committed it is its bounded duty to investigate into the offence and bring the offender to book. Once it investigates and finds an offence having been committed it is its duty to collect evidence for the purpose of proving the offence. Once that is completed and the investigating officer submits report to the court requesting the court to take cognizance of the offence under Section 190 of the Code its duty comes to an end. On a cognizance of the offence being taken by the court the police function of investigation comes to an end subject to the provision contained in Section 173(8), there commences the adjudicatory function of the judiciary to determine whether an offence has been committed and if so, whether by the person or persons charged with the crime by the police in its report to the court, and to award adequate punishment according to law for the offence proved to the satisfaction of the court. There is thus a well defined and well demarcated function in the field of crime detection and its subsequent adjudication between the police and the Magistrate. This had been recognised way back in *King Emperor* v. *Khwaja Nazir Ahmad* AIR 1944 PC 18.....".

The same view was reiterated in *Dukhishyam Benupani, Asstt. Director, Enforcement Directorate (FERA) v. Arun Kumar Bajoria* **(1998) 1 SCC 52,** *M.C. Abraham and Another v. State of Maharashtra and Others* **(2003) 2 SCC 649**, *Subramanian Swamy v. Director, Central Bureau of Investigation and another* **(2014) 8 SCC 682** and *Divine Retreat Centre v. State of Kerala and Others* **(2008) 3 SCC 542.**

63. Investigation into crimes is the prerogative of the police and excepting in rare cases, the judiciary should keep out all the areas of investigation. In *State of Bihar and another v. P.P. Sharma, IAS and another* **1992 Supp. (1) 222**, it was held that "The investigating officer is an arm of the law and plays a pivotal role in the dispensation of criminal justice and maintenance of law and order. …..Enough power is therefore given to the police officer in the area of investigating process and granting them the court latitude to exercise its discretionary power to make a successful investigation…". In *Dukhishyam Benupani, Asstt. Director, Enforcement Directorate (FERA) v. Arun Kumar Bajoria* **(1998) 1 SCC 52**, this Court held that "……it is not the function of the court to monitor investigation processes so long as such investigation does not transgress any provision of law. It must be left to the investigating agency to decide the venue, the timings and the questions and the manner of putting such questions to persons involved in such offences. A blanket order fully insulating a person from arrest would make his interrogation a mere ritual."

64. As held by the Supreme Court in a catena of judgments that there is a well-defined and demarcated function in the field of investigation and its subsequent adjudication. It is not the function of the court to monitor the investigation process so long as the investigation does not violate any provision of law. It must be left to the discretion of the investigating agency to decide the course of investigation. If the court is to interfere in each and

every stage of the investigation and the interrogation of the accused, it would affect the normal course of investigation. It must be left to the investigating agency to proceed in its own manner in interrogation of the accused, nature of questions put to him and the manner of interrogation of the accused.

65. It is one thing to say that if the power of investigation has been exercised by an investigating officer *mala fide* or non-compliance of the provisions of the Criminal Procedure Code in the conduct of the investigation, it is open to the court to quash the proceedings where there is a clear case of abuse of power. It is a different matter that the High Court in exercise of its inherent power under Section 482 Cr.P.C., the court can always issue appropriate direction at the instance of an aggrieved person if the High Court is convinced that the power of investigation has been exercised by the investigating officer *mala fide* and not in accordance with the provisions of the Criminal Procedure Code. However, as pointed out earlier that power is to be exercised in rare cases where there is a clear abuse of power and non-compliance of the provisions falling under Chapter-XII of the Code of Criminal Procedure requiring the interference of the High Court. In the initial stages of investigation where the court is considering the question of grant of regular bail or pre-arrest bail, it is not for the court to enter into the demarcated function of the investigation and collection of evidence/materials for establishing the offence and

interrogation of the accused and the witnesses.

66. **Whether direction to produce the transcripts could be issued:-** Contention of the appellant is that it has not been placed before the court as to what were the questions/aspects on which the appellant was interrogated on 19.12.2018, 01.01.2019 and 21.01.2019 and the Enforcement Directorate has not been able to show as to how the answers given by the appellant are “evasive”. It was submitted that the investigating agency-Enforcement Directorate cannot expect the accused to give answers in the manner they want and the investigating agency should always keep in their mind the rights of the accused protected under Article 20(3) of the Constitution of India. Since the interrogation of the accused and the questions put to the accused and the answers given by the accused are part of the investigation which is purely within the domain of the investigation officer, unless satisfied that the police officer has improperly and illegally exercised his investigating powers in breach of any statutory provision, the court cannot interfere. In the present case, no direction could be issued to the respondent to produce the transcripts of the questions put to the appellant and answers given by the appellant.

Grant of Anticipatory bail in exceptional cases:-

67. Ordinarily, arrest is a part of procedure of the investigation to secure not only the presence of the accused but several other purposes. Power

under Section 438 Cr.P.C. is an extraordinary power and the same has to be exercised sparingly. The privilege of the pre-arrest bail should be granted only in exceptional cases. The judicial discretion conferred upon the court has to be properly exercised after application of mind as to the nature and gravity of the accusation; possibility of applicant fleeing justice and other factors to decide whether it is a fit case for grant of anticipatory bail. Grant of anticipatory bail to some extent interferes in the sphere of investigation of an offence and hence, the court must be circumspect while exercising such power for grant of anticipatory bail. Anticipatory bail is not to be granted as a matter of rule and it has to be granted only when the court is convinced that exceptional circumstances exist to resort to that extraordinary remedy.

68. On behalf of the appellant, much arguments were advanced contending that anticipatory bail is a facet of Article 21 of the Constitution of India. It was contended that unless custodial interrogation is warranted, in the facts and circumstances of the case, denial of anticipatory bail would amount to denial of the right conferred upon the appellant under Article 21 of the Constitution of India.

69. Article 21 of the Constitution of India states that no person shall be deprived of his life or personal liberty except according to procedure prescribed by law. However, the power conferred by Article 21 of the Constitution of India is not unfettered and is qualified by the later part of the

Article i.e. "*…except according to a procedure prescribed by law.*" In *State of M.P. and another v. Ram Kishna Balothia and another* **(1995) 3 SCC 221**, the Supreme Court held that the right of anticipatory bail is not a part of Article 21 of the Constitution of India and held as under:-

> "7. ……We find it difficult to accept the contention that Section 438 of the Code of Criminal Procedure is an integral part of Article 21. In the first place, there was no provision similar to Section 438 in the old Criminal Procedure Code. The Law Commission in its 41st Report recommended introduction of a provision for grant of anticipatory bail. It observed:
>
> > "We agree that this would be a useful advantage. Though we must add that it is in very exceptional cases that such power should be exercised."
>
> In the light of this recommendation, Section 438 was incorporated, for the first time, in the Criminal Procedure Code of 1973. Looking to the cautious recommendation of the Law Commission, the power to grant anticipatory bail is conferred only on a Court of Session or the High Court. Also, anticipatory bail cannot be granted as a matter of right. It is essentially a statutory right conferred long after the coming into force of the Constitution. It cannot be considered as an essential ingredient of Article 21 of the Constitution. And its non-application to a certain special category of offences cannot be considered as violative of Article 21." [**underlining added**]

70. We are conscious of the fact that the legislative intent behind the introduction of Section 438 Cr.P.C. is to safeguard the individual's personal liberty and to protect him from the possibility of being humiliated and from being subjected to unnecessary police custody. However, the court must also keep in view that a criminal offence is not just an offence against an

individual, rather the larger societal interest is at stake. Therefore, a delicate balance is required to be established between the two rights - safeguarding the personal liberty of an individual and the societal interest. It cannot be said that refusal to grant anticipatory bail would amount to denial of the rights conferred upon the appellant under Article 21 of the Constitution of India.

71. The learned Solicitor General has submitted that depending upon the facts of each case, it is for the investigating agency to confront the accused with the material, only when the accused is in custody. It was submitted that the statutory right under Section 19 of PMLA has an in-built safeguard against arbitrary exercise of power of arrest by the investigating officer. Submitting that custodial interrogation is a recognised mode of interrogation which is not only permissible but has been held to be more effective, the learned Solicitor General placed reliance upon *State Rep. By The CBI v. Anil Sharma* **(1997) 7 SCC 187;** *Sudhir v. State of Maharashtra and Another* **(2016) 1 SCC 146;** and *Assistant Director, Directorate of Enforcement v. Hassan Ali Khan* **(2011) 12 SCC 684.**

72. Ordinarily, arrest is a part of the process of the investigation intended to secure several purposes. There may be circumstances in which the accused may provide information leading to discovery of material facts and relevant information. Grant of anticipatory bail may hamper the

investigation. Pre-arrest bail is to strike a balance between the individual's right to personal freedom and the right of the investigating agency to interrogate the accused as to the material so far collected and to collect more information which may lead to recovery of relevant information. In *State Rep. By The CBI v. Anil Sharma* **(1997) 7 SCC 187**, the Supreme Court held as under:-

> **"6.** We find force in the submission of the CBI that custodial interrogation is qualitatively more elicitation-oriented than questioning a suspect who is well ensconced with a favourable order under Section 438 of the Code. In a case like this effective interrogation of a suspected person is of tremendous advantage in disinterring many useful informations and also materials which would have been concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third-degree methods need not be countenanced, for, such an argument can be advanced by all accused in all criminal cases. The Court has to presume that responsible police officers would conduct themselves in a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders."

73. Observing that the arrest is a part of the investigation intended to secure several purposes, in *Adri Dharan Das v. State of W.B.* **(2005) 4 SCC 303**, it was held as under:-

> **"19.** Ordinarily, arrest is a part of the process of investigation intended to secure several purposes. The accused may have to be questioned in detail regarding various facets of motive, preparation, commission and aftermath of the crime and the connection of other persons, if any, in the crime. There

> may be circumstances in which the accused may provide information leading to discovery of material facts. It may be necessary to curtail his freedom in order to enable the investigation to proceed without hindrance and to protect witnesses and persons connected with the victim of the crime, to prevent his disappearance, to maintain law and order in the locality. For these or other reasons, arrest may become an inevitable part of the process of investigation. The legality of the proposed arrest cannot be gone into in an application under Section 438 of the Code. The role of the investigator is well defined and the jurisdictional scope of interference by the court in the process of investigation is limited. The court ordinarily will not interfere with the investigation of a crime or with the arrest of the accused in a cognizable offence. An interim order restraining arrest, if passed while dealing with an application under Section 438 of the Code will amount to interference in the investigation, which cannot, at any rate, be done under Section 438 of the Code."

74. In *Siddharam Satlingappa Mhetre v. State of Maharashtra and Others* **(2011) 1 SCC 694**, the Supreme Court laid down the factors and parameters to be considered while dealing with anticipatory bail. It was held that the nature and the gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made and that the court must evaluate the available material against the accused very carefully. It was also held that the court should also consider whether the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

75. After referring to *Siddharam Satlingappa Mhetre* and other judgments and observing that anticipatory bail can be granted only in exceptional

circumstances, in *Jai Prakash Singh v. State of Bihar and another* **(2012) 4 SCC 379**, the Supreme Court held as under:-

> **"19.** Parameters for grant of anticipatory bail in a serious offence are required to be satisfied and further while granting such relief, the court must record the reasons therefor. Anticipatory bail can be granted only in exceptional circumstances where the court is prima facie of the view that the applicant has falsely been enroped in the crime and would not misuse his liberty. (See *D.K. Ganesh Babu* v. *P.T. Manokaran* (2007) 4 SCC 434, *State of Maharashtra* v. *Mohd. Sajid Husain Mohd. S. Husain* (2008) 1 SCC 213 and *Union of India* v. *Padam Narain Aggarwal* (2008) 13 SCC 305.)"

Economic Offences:-

76. Power under Section 438 Cr.P.C. being an extraordinary remedy, has to be exercised sparingly; more so, in cases of economic offences. Economic offences stand as a different class as they affect the economic fabric of the society. In *Directorate of Enforcement v. Ashok Kumar Jain* **(1998) 2 SCC 105**, it was held that in economic offences, the accused is not entitled to anticipatory bail.

77. The learned Solicitor General submitted that the "Scheduled offence" and "offence of money laundering" are independent of each other and PMLA being a special enactment applicable to the offence of money laundering is not a fit case for grant of anticipatory bail. The learned Solicitor General submitted that money laundering being an economic offence committed with much planning and deliberate design poses a serious threat to the nation's economy and financial integrity and in order to

unearth the laundering and trail of money, custodial interrogation of the appellant is necessary.

78. Observing that economic offence is committed with deliberate design with an eye on personal profit regardless to the consequence to the community, in *State of Gujarat v. Mohanlal Jitamalji Porwal and others* **(1987) 2 SCC 364**, it was held as under:-

> "5. ….The entire community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the community. A disregard for the interest of the community can be manifested only at the cost of forfeiting the trust and faith of the community in the system to administer justice in an even-handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the national economy and national interest….."

79. Observing that economic offences constitute a class apart and need to be visited with different approach in the matter of bail, in *Y.S. Jagan Mohan Reddy v. CBI* **(2013) 7 SCC 439**, the Supreme Court held as under:-

> **"34.** Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.

> **35.** While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations." [**underlining added**]

80. Referring to *Dukhishyam Benupani, Assistant Director, Enforcement Directorate (FERA) v. Arun Kumar Bajoria* **(1998) 1 SCC 52**, in *Enforcement Officer, Ted, Bombay v. Bher Chand Tikaji Bora and others* **(1999) 5 SCC 720**, while hearing an appeal by the Enforcement Directorate against the order of the Single Judge of the Bombay High Court granting anticipatory bail to the respondent thereon, the Supreme Court set aside the order of the Single Judge granting anticipatory bail.

81. Grant of anticipatory bail at the stage of investigation may frustrate the investigating agency in interrogating the accused and in collecting the useful information and also the materials which might have been concealed. Success in such interrogation would elude if the accused knows that he is protected by the order of the court. Grant of anticipatory bail, particularly in economic offences would definitely hamper the effective investigation. Having regard to the materials said to have been collected by the respondent-Enforcement Directorate and considering the stage of the investigation, we are of the view that it is not a fit case to grant anticipatory

bail.

82. In a case of money-laundering where it involves many stages of “placement”, “layering i.e. funds moved to other institutions to conceal origin” and “interrogation i.e. funds used to acquire various assets”, it requires systematic and analysed investigation which would be of great advantage. As held in *Anil Sharma,* success in such interrogation would elude if the accused knows that he is protected by a pre-arrest bail order. Section 438 Cr.P.C. is to be invoked only in exceptional cases where the case alleged is frivolous or groundless. In the case in hand, there are allegations of laundering the proceeds of the crime. The Enforcement Directorate claims to have certain specific inputs from various sources, including overseas banks. Letter rogatory is also said to have been issued and some response have been received by the department. Having regard to the nature of allegations and the stage of the investigation, in our view, the investigating agency has to be given sufficient freedom in the process of investigation. Though we do not endorse the approach of the learned Single Judge in extracting the note produced by the Enforcement Directorate, we do not find any ground warranting interference with the impugned order. Considering the facts and circumstances of the case, in our view, grant of anticipatory bail to the appellant will hamper the investigation and this is not a fit case for exercise of discretion to grant

anticipatory bail to the appellant.

83. In the result, the appeal is dismissed. It is for the appellant to work out his remedy in accordance with law. As and when the application for regular bail is filed, the same shall be considered by the learned trial court on its own merits and in accordance with law without being influenced by any of the observations made in this judgment and the impugned order of the High Court.

……..J.
[R. BANUMATHI]

……..J.
[A.S. BOPANNA]

New Delhi;
September 05, 2019