

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**CRWP No. 595 of 2016 (O&M)
DATE OF DECISION :- 11.5.2016**

Gorav Kathuria

...Petitioner

Versus

Union of India and others.

...Respondent.

CORAM: HON'BLE MR.JUSTICE M.JEYAPPAUL

HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present:- Mr. Gorav Kathuria-petitioner in person.

Mr. Ravindra Singh, Advocate
for Mr. Puneet Gupta, Advocate
for respondent no.1-Union of India.

Mr. Rajiv Sharma, Advocate for respondent no. 2.

Mr. Sunish Budhish, Advocate for respondent no. 3.

1. Whether Reporters of local papers may be allowed to see the judgment? Yes/No
2. To be referred to the Reporters or not? Yes/No
3. Whether the judgment should be reported in the digest? **Yes**

M.JEYAPPAUL, J.

1. The petitioner is an Advocate and it is his claim that he is desirous of instituting Criminal case alleging duty evasion in

import of Heavy Melting Scrap classifiable under Customs Tariff Heading 7204 4900 at ICD Ludhiana and laundering by the offender of the proceeds of crime so generated. According to him the imports are being made by mis-declaring the relevant particulars to evade duty and prohibition. He also apprehends that there is active connivance of some customs officials in such mis-declared imports. However, for the limited purpose of the instant petition, any detailed elaboration of the allegations and particulars is not necessary. According to him the allegations would construe offences mainly under Section 132 of the Customs Act, 1962, which is a Scheduled Offence specified in Part B of the Schedule to Prevention of Money-Laundering Act (for short PMLA). He further contends that laundering of the proceeds of crime relating to this Scheduled Offence would attract offence under Section 3 of PMLA, which would be punishable under Section 4 thereof.

2. The instant petition challenges the vires of firstly Section 2(y)(ii) of PMLA as amended vide section 145(ii) of the Finance Act, 2015 enhancing the monetary threshold for the offences specified under Part B of the Schedule from the total value involved in such offences from “Rs. 30 lakhs or more” to “Rs. One crore or more”, and secondly the insertion of Section 132 of Customs Act, 1962 in Part-B of the Schedule in PMLA, vide section 151 of the said Finance Act, 2015. These impugned amendments, which are applicable with effect from 14.05.2015, are claimed by him as

unconstitutional and ultra vires, unless read down so as to make them constitutional, stringent and harmonious with the objects of PMLA. According to him presently these impugned provisions are contrary to the objects of PMLA, which warrant stringent conditions for grant of bail in criminal cases under PMLA. He submits that ends of justice would be met, if these impugned provisions are interpreted and read down in such manner so that the stringent provisions under Section 45(1) of PMLA imposing limitations for grant of bail shall necessarily apply in the matters of money laundering in respect of the said Scheduled offence under Section 132 of Customs Act, 1962, which has been erroneously placed under Part B of the Schedule to PMLA. To suggest that the legislative intent is to put limitations in grant of bail in an offence under PMLA, he referred to two judgments of the Hon'ble Supreme Court in the matter of Union of India v. Hassan Ali, (2011) 10 SCC 235 and Gautam Kundu v. Manoj Kumar, AIR 2016 SCC 106. According to him the impugned provisions are therefore required to be read down so as to make them constitutional, stringent and harmonious with the objects of PMLA, which warrant stringent conditions for grant of bail in criminal cases under PMLA.

3. The petitioner has annexed a copy of the Prevention of Money-Laundering (Amendment) Bill, 2011, which vide clause 33 proposed amendment in the Schedule to PMLA. For the then existing Part A, a new Part A was proposed to be substituted, while

omitting paragraphs 1 to 25 in the then existing Part B. Consequently, all those offences which were under these paragraphs 1 to 25 of Part B, and all heinous offences which were under the then existing Part A, were proposed to be put together in the new proposed Part A. As per the petitioner, consequent to the said amendment the pre-requisite for grant of bail to any person arrested under PMLA as mentioned in sub-section (1) of section 45 was now made applicable in respect of allegation of laundering of proceeds of crime relating to all Scheduled offences, irrespective of their gravity and magnitude, as even all earlier Part-B offences were now incorporated in Part-A of the Schedule. According to him this amendment was obviously made to make the provisions of bail more stringent in all matters of money laundering irrespective of the magnitude or gravity of the scheduled offence.

4. The petitioner has argued that he intends to apply before the Jurisdictional Magistrate for issuance of directions to the Respondent no. 2 and 3 for commencing investigations into these criminal offences and prosecuting the accused for commission of these offences. However, according to him he would not be permitted to set the criminal law into motion by approaching the jurisdictional Magistrate as prescribed in the Code of Criminal Procedure, because the Customs Act, 1962 as well as PMLA are considered as complete Code in themselves and the provisions of Code such as Section 156(3) or Section 155(2) of the Code of

Criminal Procedure may not have any application in the field occupied by these special statutes.

5. He has referred to a judgment by the Division Bench of this Court in the matter of **Sunil Gupta vs. Union of India reported in 2000 (118) ELT 8 (P&H)**. As per the said judgment notwithstanding Section 155 of the Code, in exercise of powers under Section 13 of Central Excise Act, 1944, a Central Excise officer can arrest a person without a warrant, despite the offence being a non-cognizable offence. It was held that a Central Excise Officer cannot be equated with a 'police officer' for the purpose of section 155 of the Code for investigating a non-cognizable offence punishable under Central Excise Act, 1944. He has also placed on record a copy of the judgment of Hon'ble Constitution Bench of the Apex Court in **Ramesh Chandra Mehta vs. State of W.B., AIR 1970 SC 940** to show that an officer of Customs is not considered as a 'police officer'. The Customs Act, 1962 is pari materia with the Central Excise Act, 1944. He therefore submitted that both these Acts are thus considered as complete Code in themselves and it may be futile exercise to first approach the jurisdictional Magistrate as Code of Criminal Procedure may not have application as per the ratio laid down in **Sunil Gupta** (supra). He submits that the same view can also be inferred from the judgment of the Hon'ble Supreme Court in **Guatam Kundu** (supra), wherein it has been held in the light of Section 65 and 71 of PMLA that the provisions of

PMLA have overriding effect on the provisions of the Code. He also referred to the non-obstante clause in Section 104(4) of the Customs Act, 1962, which coupled with the view already taken in **Sunil Gupta** (supra), according to the Petitioner may come in his way for filing a private criminal complaint against the accused person for setting the criminal law into motion in respect of commission of the offences under Customs Act, 1962 and PMLA, involving duty evasion in import and laundering of the proceeds of crime.

6. He submitted that in **Om Parkash v. Union of India (2011) 14 SCC 1**, the then existing provisions of Customs Act, 1962 vis a vis provisions of the Code were considered, and it was held that all offences under the Customs Act, 1962, besides being non-cognizable were also 'bailable'. Thereafter, with effect from 28.05.2012 sub-sections (4) and (5) were inserted by substitution for the earlier sub-section(4), in Section 104 of the Customs Act, 1962. He submitted that as per the consistent view of the Respondents, although several decisions concerning the issue of applicability or otherwise of the provisions of Code were referred in the said judgment, however, the only issue decided was that the offences under the Central Excise Act, 1944 and Customs Act, 1962 were 'bailable'.

7. He submitted that therefore it would be in the interest of justice, if the Court would also hold that such private complaint

under the provisions of the Code can be filed by the petitioner before the Magistrate to set the criminal law into motion for investigating offence under PMLA and Customs Act, 1962, pending grant of requisite sanction under Section 137(1) of Customs Act, 1962 for launching prosecution and filing of complaint by appropriate authority under second proviso to section 45(1) of the PMLA, both of which otherwise stipulate a bar on taking of 'cognizance'. He relied upon the judgment of Hon'ble Supreme Court in **Narayandas Bhagwandas Madhavdas vs. State of West Bengal, 1999 (110) ELT 85 (SC)** to buttress his argument that Courts do not take 'cognizance' while ordering investigations either under Section 156(3) or Section 155(2) of the Code.

8. A compilation of judgments has been submitted by the petitioner in support of his submissions. The following prayers are made by him in the instant petition :-

- i) Issue appropriate writ, order or direction in the Petitioner's challenge to the vires qua criminal cases, of firstly the sub-clause (ii) of clause (y) of section 2 of PMLA, and secondly, the insertion of Part-B in the Schedule in PMLA, as amended vide section 145(ii) and section 151 of the Finance Act, 2015, with effect from 14.05.2015, for declaring these provisions of PMLA as unconstitutional and ultra vires as the same are contrary to the objects

of PMLA warranting stringent conditions for grant of bail vide Section 45(1) in criminal cases under PMLA, and are unconstitutional and/or

- ii) to issue appropriate writ, order or directions while reading down these provisions for criminal cases, so as to make them constitutional by construing criminal offence under Part B of the Schedule inserted in PMLA w.e.f. 14.5.2015, to be amongst the offences listed in Part-A of the Schedule, so as to apply the stringent pre-conditions for grant of bail vide Section 45(1) in the matters of money laundering irrespective of the magnitude of gravity of the said scheduled offences;
- iii) to hold that a private criminal complaint by the petitioner would be maintainable for setting the criminal law into motion and to seek any direction for investigation of offence under Section 3 r/w 4 of PMLA along with the offence under Part B of the Schedule inserted in PMLA w.e.f. 14.05.2015, either under Section 156(3) or under Section 155 (2) of the Code of Criminal Procedure, as the case may be, pending grant of sanction requisite for taking 'cognizance' in said Scheduled Offence or under PMLA,

iv) issue any other writ, order or directions, which this Hon'ble Court may deem just and fit.”

9. The Respondents opposed the reliefs sought in the petition.

10. The submissions advanced by both sides have been carefully considered by us.

12.1 We find that the challenge to vires is regarding the following amendments carried out vide the Finance Act, 2015 (No. 20 of 2015) w.e.f. 14.5.2015 :-

(i) Section 2(y)(ii) of PMLA as amended vide section 145 (ii) of the Finance Act, 2015-

“(y) Scheduled offence” means-

- (i)
- (ii) the offence specified under Part B of the Schedule if the total value involved in such offences is one crore rupees or more. or
- (iii)

And,

(ii) Insertion of Section 132 of Customs Act, 1962 in Part-B of the Schedule in PMLA, vide Section 151 of the said Finance Act, 2015.

12.2. This challenge by the petitioner is mainly on the basis of his contention that the two limitations in grant of bail imposed under Section 45(1) of PMLA are applicable in respect of all offence now

falling under Part A of the Schedule to PMLA, after the amendment carried out in 2013 pursuant to proposal contained in Clause 33 of the Prevention of Money-Laundering (Amendment) Bill, 2011 whereby for the then existing Part A, a new Part A was proposed to be substituted, while omitting paragraphs 1 to 25 in the then existing Part B. Consequently, all those offences which were earlier under these paragraphs 1 to 25 of Part B and all heinous offences which were under the then existing Part A, were proposed to be put together in the new proposed Part A.

12.3 For deciding the issues raised by him, we have perused the Objects and Reasons, Preamble of PMLA, various definitions and provisions as well as Rules framed under PMLA.

(i) Section 4 of PMLA-

“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 extent to seven years and shall also be liable to fine.

Provided that where the proceeds of crime involved in money-laundering relates to any offence specified under paragraph 2 of Part A of the Schedule, the provisions of this section shall have effect as if for the words “which may extent to

seven years”, the words “which may extend to ten years” had been substituted”.

(ii) Section 45 of PMLA-

“45. Offences to be cognizable and non-bailable (1)

Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence punishable for a term of imprisonment of more than three years **under Part A of the Schedule** shall be released on bail or on his own bond unless-

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

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

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

Provided further that the Special Court shall not take cognizance of any offence punishable under

Section 4 except upon a complaint in writing made by-

- (i) the Director, or
- (ii) any officer of the Central Government or State Government authorized in writing in this behalf by the Central Government by a general or a special order made in this behalf by that Government.

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

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

12.4 There is no controversy as to whether the offences under PMLA are bailable or not. It is beyond any doubt and is an undisputed position that all offences under PMLA are non-bailable.

The challenge to vires revolves only around the applicability or otherwise, of the twin conditions/limitations imposed vide Section 45 (1) on grant of bail in all cases of PMLA.

12.5 We have perused the Part A and Part B of the Schedule existing prior to the amendment proposed vide Prevention of Money-Laundering (Amendment) Bill, 2011, which was carried out in 2013. Under the then existing Part A of the Schedule, before it's substitution, the following scheduled offences were listed-

PART A
PARAGRAPH 1
OFFENCES UNDER THE INDIAN PENAL CODE

Section	Description of offence
121.	Waging, or attempting to wage war or abetting waging of war, against the Government of India.
121A	Conspiracy to commit offences punishable by Section 121 against the State.
489A	Counterfeiting currency notes or bank notes.
489-B	Using as genuine, forged or counterfeit currency notes or bank notes.

PARAGRAPH 2
OFFENCES UNDER THE NARCOTIC DRUGS AND
PHYSHOTROPIC SUBSTANCES ACT, 1985.

Section	Description of offence
15	Contravention in relation to poppy straw.
16	Contravention in relation to coca plant and coca leaves.
17	Contravention in relation to prepared opium.
18	Contravention in relation to opium poppy and opium.
19	Embezzlement of opium by cultivator.
20	Contravention in relation to cannabis plant and cannabis
21.	Contravention in relation to manufactured drugs and preparations.
22.	Contravention in relation to psychotropic substances.
23.	Illegal import into India, export from India or transhipment of narcotic drugs and psychotropic substances.
24.	External dealings in narcotic drugs and psychotropic substances in contravention of Section 12 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

- 25-A Contravention of orders made under Section 9-A of the Narcotic Drugs and Psychotropic Substances Act, 1985.
 27-A Financing illicit traffic and harbouring offenders.
 29 Abetment and criminal conspiracy.

PARAGRAPH 3
OFFENCES UNDER THE EXPLOSIVE SUBSTANCES ACT, 1908

Section	Description of offence
3	Causing explosion likely to endanger life or property.
4	Attempt to cause explosion, or for making or keeping explosives with intent to endanger life or property.
5	Making or possessing explosives under suspicious circumstances.

PARAGRAPH 4
OFFENCES UNDER THE UNLAWFUL ACTIVITIES (PREVENTION) ACT, 1967

Section	Description of offence
10 read with Section 3	Penalty for being member of an unlawful association, etc.
11 read with Sections 3 and 7	Penalty for dealing with funds of an unlawful association.
13 read with Section 3	Punishment for unlawful activities.
16 read with Section 15	Punishment for terrorist act.
16-A	Punishment for making demands of radioactive substances, nuclear devises, etc.
17	Punishment for raising fund for terrorist act.
18	Punishment for conspiracy, etc.
18-A	Punishment for organising of terrorist camps.
18-B	Punishment for recruiting of any person or persons for terrorist act.
19	Punishment for harbouring etc.
20	Punishment for being member of terrorist gang or organisation.
21	Punishment for holding proceeds of terrorism.
38	Offence relating to membership of a terrorist organisation.
39	Offence relating to support given to a terrorist organisation.
40	Offence of raising fund for a terrorist organisation.

Apparently all these offences under the aforesaid Part A are grave and heinous crimes.

12.6. In **Part B** of the Schedule, before its omission, other offences

under Indian Penal Code, Prevention of Corruption Act, Customs Act, Copyrights Act, Environment Protection Act, Passport Act, etc were listed, which are much less in gravity and magnitude as compared to the aforesaid Part A offences. These offences under **Part B** included even those which were compoundable and / or bailable.

12.7 It is thus beyond any doubt that there existed an intelligible differentia in the classification which distinguished the offenders thus grouped together in Part A from those left out of that group and grouped together in Part B. The said classification therefore was reasonable for the purpose of Section 45(1) of the PMLA. This observation is supported by the following observations of a Constitution Bench of Hon'ble Supreme Court in *Asgarali Nazarali Singaporewalia vs. State of Bombay*, AIR 1957 SC 503-

“16. The first question which we have to address to ourselves is whether there is in the impugned Act a reasonable classification for the purposes of legislation. If we look to the provisions of the impugned Act closely it would appear that the legislature classified the offences punishable under section 161, 165 or 165-A of the Indian Penal Code or sub-section (2) of Section 5 of the Prevention of Corruption Act, 1947 in one group or category. They were offences relating to bribery or corruption by public servants and were thus

appropriately classified in one group or category. The classification was founded on an intelligible differentia which distinguished the offenders thus grouped together from those left out of the group. The persons who committed these offences of bribery or corruption would form a class by themselves quite distinct from those offenders who could be dealt with by the normal provisions contained in the Indian Penal Code or the Code of Criminal Procedure, 1898 and if the offenders falling within this group or category were thus singled out for special treatment, there would be no question of any discriminatory treatment being meted out to them as compared with other offenders who did not fall within the same group or category and who continued to be treated under the normal procedure.”

12.8. Relevant extract of Section 45 of PMLA which existed prior to the said 2013 amendment (and continues even thereafter without any change), is as under:-

“45. Offences to be cognizable and non-bailable (1)

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

- (i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and
- (ii) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail'

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

.....

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

Thus, Section 45(1) of PMLA, imposed embargo on grant of bail to a person accused of any heinous offence falling under Part A of the Schedule to PMLA, if such Scheduled Offence is punishable for a term of imprisonment of more than three years. As per Section 45 (2), this limitation on granting of bail is in addition to the limitations under the Code or any other law for the time being in force. In view

of Section 71 of PMLA, the said limitations under section 45(1) has overriding effect on the general provisions of bail under the Code of Criminal Procedure under Sections 438 and 439. These limitations were not applicable in relation to any persons accused of any offence under Part B of the schedule. The legislative intent was that the persons who committed any scheduled offence under Part A would form a class by themselves quite distinct from those offenders who could be dealt with by the normal provisions for bail contained in the Code, and if the offenders falling within this group or category were thus singled out for special treatment by imposing stringent twin conditions contained in section 45(1), there would be no question of any discriminatory treatment being meted out to them as compared with other offenders accused of offences under Part B who did not fall within the same group or category i.e. Part A and who continued to be treated under the normal procedure. Thus, the intelligible differentia in such classification was absolutely reasonable prior to the said 2013 amendment in Schedule.

12.9 We have also perused the Prevention of Money laundering Bill, 1999. In the said Bill, the Schedule was proposed in Section 2 (t). The proposed Schedule consisted of five parts namely -Part I- Offences under Indian Penal Code namely sections 121, 121A, 302, 304, 307, 308, 328, 327, 329, 364A, 384 to 389, 393 to 402, 467, 489A, 489B; Part II-Offences under the Immoral Traffic (Prevention) Act, 1956 namely Sections 5, 6, 8 and 9. Part III-

Offences under the Arms Act, 1959 namely Sections 25 to 30; Part IV-Offences under the Narcotics Drugs and Psychotropic Substances Act, 1985 and Part V- Offences under the Prevention of Corruption Act, 1988 namely sections 7 to 10. Sub-clause (1) of Clause 44 of the Bill of 1999 which corresponds to section 45(1) proposed as follows-

“44. (1) Notwithstanding anything contained in the Code of Criminal Procedure 1973,-

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

(b) no person accused of an offence punishable for a term of imprisonment of more than three years under this Act shall be released on bail or on his own bond unless-.....”

Thus, in clause 44(1) in the said Bill of 1999, firstly a non-obstante clause was proposed to override the contrary provisions contained in Part II of the Schedule I and Sections 438 & 439 of the Code, secondly every offence was made 'cognizable' irrespective of the Part II of the Schedule I of the Code, and thirdly the twin limitations on grant of bail were proposed qua every person accused of an offence under PMLA, and not on a particular class of such persons only.

12.10 However, when the PMLA came in force in 2005, the said proposal was not accepted as such and not only considerable amendments were made in the Schedule, but even Section 45(1) was introduced with major changes in the said proposal contained

in Clause 44(1). In Section 45(1) firstly the words “every offence punishable under this Act shall be cognizable” were omitted, secondly the applicability of the twin limitations on grant of bail was shifted from 'every person accused of an offence under the Act' to only qua 'person' accused of an offence under Part A of the Schedule'. We are satisfied that legislative intent was to create a reasonable intelligible differentia in the classification which distinguished the offenders thus grouped together in Part A from those left out of that group and grouped together in Part B for the purpose of applicability of twin conditions in grant of bail under Section 45(1) of the PMLA.

12.11 So far as the effect of the omission in Section 45(1) of words “every offence punishable under this Act shall be cognizable” is concerned, we do not find it necessary to go into that issue at this stage.

12.12. The judgment of the Hon'ble Supreme Court in **Union of India vs. Hassan Ali Khan, (2011) 10 SCC 235**, on which reliance is placed by the petitioner, was for cancellation of bail granted by the Hon'ble Bombay High Court in a case under PMLA in the circumstances peculiar to that case and the Hon'ble Supreme Court found it appropriate to treat the said case a little differently from other cases of similar nature by observing as under-

“34. Having carefully considered the submissions made on behalf of the respective parties and the enormous amounts of

money which Respondent 1 had been handling through his various bank accounts and the contents of the note signed by Respondent 1 and notarised in London, **this case has to be treated a little differently from other cases of similar nature.....**

39. Lastly, the manner in which Respondent 1 had procured three different passports in his name, after his original passport was directed to be deposited, lends support to the apprehension that, if released on bail, Respondent 1 may abscond.

41. Taking a different view of the circumstances which are peculiar to this case and in the light of what has been indicated hereinabove, we are of the view that the order of the High Court needs to be interfered with.....”

Evidently, in the said case, which pertains to a period prior to 2013 amendment in PMLA, the accused was having three different passports in his name, after his original passport was directed to be deposited. Obviously therefore there was a reasonable apprehension that he would abscond if released on bail. The said judgment given in facts peculiar to that case, therefore, in our opinion do not lay down the ratio as is being canvassed by the petitioner that in every case under PMLA, there is embargo on grant of bail in view of section 45(1).

12.13 We have carefully scanned the “Statement of Objects and

Reasons” as incorporated in the Prevention of Money-Laundering (Amendment) Bill, 2011, more specifically paragraph 3(j). It is seen that the limited object and reason behind the said proposed amendment was recorded as follows-

“3. The Prevention of Money-Laundering (Amendment) Bill, 2011, inter alia, seeks to-

(i) putting all the offences listed in Part A and Part B of the Schedule to the aforesaid Act into Part A of that Schedule instead of keeping them in two parts so that the provision of monetary threshold does not apply to the offences.

4. The Bill seeks to achieve the above objects.

New Delhi;

PRANAB MUKHERJEE

The 16th December, 2011”

12.14. All the offences were thus proposed to be put together in the newly proposed Part-A, irrespective of the magnitude or gravity of the scheduled offence. **Entire Part B was thus effectively omitted vide the Bill of 2011.**

12.15 We have seen that then existing Section 2(y) of the PMLA imposed monetary threshold of Rs.30 lakhs for invocation of PMLA in respect of the offences listed in Part B of the Schedule. Evidently therefore, as clearly recorded in the “Statement of Objects And Reasons” as incorporated in Para 3(j) in the Prevention of Money-

Laundrying (Amendment) Bill, 2011, the only object for the amendment carried out in 2013 in the Schedule to PMLA was to overcome this monetary threshold limit of Rs. 30 Lakhs so that for invocation of PMLA in respect of the laundering of proceeds of crime involved in offences earlier listed under Part B of the Schedule, there is no embargo of minimum value of Rs. 30 Lacs.

12.16 In our opinion the presumption of the petitioner that rigors in grant of Bail contained in Section 45(1) of PMLA extends to all the offences mentioned in such amended Part A is neither logical nor intended by the legislation. The offences which were in the earlier Part A of the Schedule (prior to 2013 Amendment) are evidently heinous offences such as waging war against the country, offences under NDPS Act and Terrorist activities etc. Other scheduled offences, which prior to 2013 amendment were under Part B of the Schedule, cannot be equated with such heinous offences in the context of Section 45(1) of PMLA.

12.17 Despite the above substantive amendment in the Schedule, we find no corresponding amendment simultaneously carried out in 2013, in Section 45(1), in respect of application of the limitations in grant of bail to person accused of Schedule offences earlier falling under Part B of the Schedule. We do not find any legislative intent from the perusal of the aforesaid “Statement of Objects and Reasons” as incorporated in the Prevention of Money-Laundering (Amendment) Bill, 2011 to apply such stringent limitations in grant

of bail to person accused of Scheduled offences earlier falling under Part B of the Schedule, but now existing in Part A thereof. On the contrary, the only object sought to be achieved by the said 2013 amendment in Schedule was to overcome this monetary threshold limit of Rs. 30 lakhs so that for invocation of PMLA in respect of the laundering of proceeds of crime involved in offences earlier falling under Part B of the Schedule, there is no embargo of minimum value of Rs. 30 lacs. This 2013 amendment in Schedule carried out as proposed vide the Prevention of Money-Laundering (Amendment) Bill, 2011 was not intended to introduce a substantive amendment for creating an embargo on grant of bail to a person arrested under PMLA in respect of offences earlier falling under Part B of the Schedule. After having perused the "Statement of Objects and Reasons" as incorporated in the Prevention of Money-Laundering (Amendment) Bill, 2011 which led to 2013 amendment in Schedule, we are unable to agree with the petitioner that by necessary corollary of the aforesaid 2013 amendment, the stringent limitations in grant of bail were now made applicable to all scheduled offences which are punishable for more than three years and were put together in the new Part-A. If that interpretation as sought to be given by the petitioner, which is devoid of any support from the objects and reasons available on record in the Prevention of Money-Laundering (Amendment) Bill, 2011, is accepted by us, the provision of Section 45(1) would become unreasonable, harsh,

oppressive and unconstitutional. We cannot lose sight of the fact that the offences which were in Part B and were shifted in Part A by 2013 amendment also include offences which are compoundable and bailable. The framers of PMLA therefore had placed the offences in two different parts Part A and Part B. We see no legislative intent to apply twin limitations in grant of bail under Section 45(1) of PMLA qua all persons arrested on accusation of commission of even such Scheduled Offences which were earlier listed in Part B.

12.18. Therefore, in our opinion the reference to the offences under Part A of the Schedule in the context of Section 45 (1) requires to read down to apply only to those scheduled offences, which existed under the Part A of the Schedule prior to the said 2013 amendment in Schedule. Having arrived at the said opinion, we have also given our anxious consideration to the issue whether we can simply fold our hands and blame the draftsman, or whether we are duty bound to work on the constructive task of finding the intention of Parliament and to iron out the creases to harmonise the law with the prevailing objects sought to be achieved, reasons and concepts and to make it an effective instrument for delivery of justice eschewing the construction which will lead to absurdity. The Hon'ble Constitution Bench in **S.P. Gupta v. Union of India, 1981 Supp SCC 87** had observed as follows :

“63.....The interpretation of every statutory provision

must keep pace with changing concepts and values and it must, to the extent to which its language permits or rather does not prohibit, suffer adjustments through judicial interpretation so as to accord with the requirements of the fast changing society which is undergoing rapid social and economic transformation. The language of a statutory provision is not a static vehicle of ideas and concepts and as ideas and concepts change, as they are bound to do in a country like ours with the establishment of a democratic structure based on egalitarian values and aggressive developmental strategies, so must the meaning and content of the statutory provision undergo a change. It is elementary that law does not operate in a vacuum. It is not an antique to be taken down, dusted, admired and put back on the shelf, but rather it is a powerful instrument fashioned by society for the purpose of adjusting conflicts and tensions which arise by reason of clash between conflicting interests. It is therefore intended to serve a social purpose and it cannot be interpreted without taking into account the social, economic and political setting in which it is intended to operate. It is here that the Judge is called upon to perform a creative function. He has to inject flesh and blood in the dry skeleton provided by the legislature and by a process of dynamic interpretation, invest it with a meaning which will harmonise the law with the

prevailing concepts and values and make it an effective instrument for delivery of justice. We need not therefore be obsessed with the fact that Section 123 is a statutory provision of old vintage or that it has been interpreted in a particular manner some two decades ago. It is not as if it has once spoken and then turned into muted silence. It is an instrument which can speak again and in a different voice in the content of a different milieu. Let us therefore try to understand what voice this statutory provision speaks today in a democratic society wedded to the basic values enshrined in the Constitution”

12.19. In Directorate of Enforcement v. Deepak Mahajan, (1994)

3 SCC 440 the Hon'ble Supreme Court while interpreting the provisions of Section 167 of the Code for its application in the matters of FERA and Customs Act, 1962 was pleased to observe on similar lines as under-

“**24.** The concerned relevant provisions of the Acts with which we are concerned, no doubt, pose some difficulty in resolving the question with regard to the jurisdiction of the Magistrate authorising detention and subsequent extension of the same when the provisions of those Acts are narrowly and literally interpreted. Though the function of the Courts is only to expound the law and not to legislate, nonetheless the legislature cannot be asked to sit to resolve the difficulties in

the implementation of its intention and the spirit of the law. In such circumstances, it is the duty of the court to mould or creatively interpret the legislation by liberally interpreting the statue.

25. In Maxwell on interpretation of Statutes, Tenth Edn. at page 229, the following passage is found :

“Where the language of a statute, in its ordinary meaning and grammatical construction, lead to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence.Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used.”

26. In Seaford Court Estates Ltd. v. Asher Denning. L.J said:

“When a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament.....and then he must supplement the written word so as to give 'force and life' to the intention of the

legislature. A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases.”

27. Though the above observations of Lord Denning were disapproved in appeal by the House of Lords in *Magor and St.Mellons vs. Newport Corpon.*, Sarkar, J. speaking for the Constitution Bench in *M. Pentiah vs. Muddala Veeramallapa* adopted that reasoning of Lord Denning. Subsequently also, Beg. C.J. in *Bangalore Water Supply and Sewerage Board v. A. Rajappa* approved the observations of Lord Denning statinig thus :(SCC p. 285, para 148)

“Perhaps, with the passage of time, what may be described as the extension of a method resembling the 'arm-chair rule' in the construction of wills, Judges can more frankly step into the shoes of the legislature where an enactment leaves its own intentions in much too nebulous or uncertain a state.”

28. It will be befitting, in this context, to recall the view expressed by Judge Frank in *Guisseppi vs. Walling*-which read thus:

“The necessary generality in the wordings of many statutes, and ineptness of drafting in others frequently compels the court, as best as they can, to fill in the gaps, an activity which no matter how one may label it, is in part legislative. Thus the courts in their way, as administrators perform the task of supplementing statutes. In the case of courts, we call it 'interpretation' or 'filling in the gaps', in the case of administrators we call it 'delegation' or authority to supply the details.”

29. Subba Rao, C.J. speaking for the Bench in Chandra Mohan v. State of U.P. has pointed out that the fundamental rule of interpretation is that in construing the provisions of the Constitution or the Act of Parliament, the Court “will have to find out the express intention from the words of the Constitution or the Act, as the case may be.....” and eschew the construction which will lead to absurdity and give rise to practical inconvenience or make the provisions of the existing law nugatory.

A.P. Sen, J. in *Organo Chemical Industries v. Union of India* has stated thus: (SCR p. 586, para 23)

“A bare mechanical interpretation of the words 'devoid of concept or purpose' will reduce most of legislation to futility. It is a salutary rule, well established, that the intention of the legislature must be found by reading the

statute as a whole.”

30. Krishna Iyer, J. has pointed out in his inimitable style in Chairman, Board of Mining Examination and Chief Inspector of Mines vs. Ramjee: “To be literal in meaning is to see the skin and miss the soul of the Regulation.”

31. True, normally courts should be slow to pronounce the legislature to have been mistaken in its constantly manifested opinion upon a matter resting wholly within its will and take its plain ordinary grammatical meaning of the words of the enactment as affording the best guide, but to winch up the legislative intent, it is permissible for courts to take into account of the ostensible purpose and object and the real legislative intent. Otherwise, a bare mechanical interpretation of the words and application of the legislative intent devoid of concept of purpose and object will render the legislature inane.”

12.20 Guided by the aforesaid principles laid down by the Hon'ble Supreme Court regarding statutory interpretation and the duty of the Court to secure the ends of justice, we have no hesitation in holding that in 2013, Part B of the Schedule was omitted and the Scheduled Offences falling thereunder were incorporated in Part A with the sole object to overcome the monetary threshold limit of Rs.30 lakhs for invocation of PMLA in respect of the laundering of proceeds of crime involved in those offences. No substantive amendment was

proposed with express intention to apply limitations on grant of bail as contained in Section 45(1) in respect of persons accused of such offences which were earlier listed in Part B. Therefore, twin limitations in grant of bail contained in Section 45(1) as it stands today, are not applicable qua a person accused of such offences which were earlier listed in Part B.

12.21 We find another reason in support of our conclusion. The Finance Act, 2015 (No. 20 of 2015) received the assent of the Hon'ble President and was published in Official Gazette on 14.5.2015 incorporating amongst others the following two amendments in PMLA vide Section 145 and 151 of the Finance Act, 2015-

PART VI

AMENDMENTS TO THE PREVENTION OF MONEY LAUNDERING ACT, 2002

“145. In the Prevention of Money Laundering Act, 2002 (herein referred to as the Money laundering Act), in Section 2, in sub-

section (1),-

(i).....,

(ii) in clause (y), in sub-clause (ii), for the words 'thirty lakh rupees', the words “one crore rupees” shall be substituted.”

AND

Amendment 151. In the Schedule to the Money Laundering Act, after Part of Schedule A, the following Part

shall be inserted, namely:-
“PART B”

OFFENCES UNDER THE CUSTOMS ACT, 1962

Section	Description of offence
132	False declaration, false documents etc.”

12.22 Vide Section 145(ii) and Section 151 of the Finance Act, 2015 with effect from 14.05.2015, in sub-clause (ii) of section 2(y) of PMLA, for the words “thirty lakh rupees”, the words “one crore rupees” were substituted. Moreover, in the Schedule of PMLA after Part-A, Section 132 of the Customs Act, 1962 was inserted in Part-B. The amendment of 2015, increasing the monetary threshold from Rs. Thirty Lakhs to Rs. One Crore for invocation of PMLA, now shows further shift and liberalisation in the earlier legislative intent of removing the monetary threshold for invoking PMLA. If it is construed that the limitation imposed by Section 45(1) on granting bail would apply to the persons arrested on accusation of offences which were earlier listed under Part B, but not to a person arrested on accusation of offence punishable under Section 132 of the Customs Act, 1962 which is now in Part B, the same would be unreasonable and in violation of Article 14 and 21 of the Constitution of India. We find that the intelligible differentia in classification of offences in Part A and Part B in the context of Section 45(1) was absolutely reasonable prior to the said 2013 amendment in Schedule. However, it would not be so in respect of

all those offences later shifted from Part B to Part A, which was for a limited purpose stated in the “Statement of Objects and Reasons” as incorporated in the Prevention of Money-Laundering (Amendment) Bill, 2011. In this context we may rely on the following observations of the Constitution Bench of the Hon'ble Supreme Court in *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569-

“222. As pointed out supra, the persons who are to be tried for offences specified under the provisions of TADA Act are a distinct class of persons and the procedure prescribed for trying them for the aggravated and incensed nature of offences are under different classification distinguishable from the ordinary criminals and procedure. This distinction and classification of grouping of the accused and the offences to be tried under TADA are to achieve the meaningful purpose and object of the Act as reflected from the preamble as well as the 'Statement of Objects and Reasons' about which we have elaborately dealt with in the preceding part of this judgment.”

“244. Therefore, the complaint of incorporation of invidious discrimination in the Act has to be turned down. All that the court has to see is whether the power is used for any extraneous purpose i.e. to say not for achieving the object for which the power is granted and whether the Act (TADA) has been made on grounds which are not

germane or relevant to the policy and purpose of this Act and whether it is discriminatory so as to offend Article 14. In our considered opinion, the classification have rational nexus with the object sought to be achieved by the TADA Acts and Special Courts Act and consequently there is no violation of Article 14 of the Constitution.”

If limitations in grant of bail under Section 45(1) of PMLA are sought to be applied to all those offences under the amended Part A which were earlier listed in Part B, it would offend Article 14 and 21 and would be contrary to the Statement of Objects and Reasons of the 2013 amendment in Schedule as incorporated in the Prevention of Money-Laundering (Amendment) Bill, 2011.

12.23 We, therefore, in light of the “Statement of Objects and Reasons” as incorporated in the Prevention of Money-Laundering (Amendment) Bill, 2011 and the above discussion and findings, have no hesitation in holding that the reference to the offences under Part A of the Schedule in the context of Section 45(1) has to be necessarily read down to apply only to those persons who are arrested under Section 19 of PMLA on accusation of money laundering, who are accused of commission of scheduled offences which were listed under the Part A of the Schedule existing prior to 2013 amendment. In other words, the limitations in grant of bail under Section 45(1) of PMLA are not applicable to those persons who are arrested under PMLA on accusation of commission of such

scheduled offences which were earlier listed under Part B of the Schedule (prior to amendment in Schedule carried out in 2013).

12.24. Consequently, the provisions containing twin limitations in grant of bail under Section 45(1) would override the normal principles governing bail under Sections 438 and 439 qua the persons arrested on accusation of commission of such Scheduled Offences which were earlier listed under Part A of the Schedule. However, only the normal principles governing bail under Section 438 or 439 of the Code would apply in relation to a person arrested under PMLA on accusation of commission of such scheduled offences, which were earlier listed under Part B of the Schedule. In respect of such persons of latter category, the following observations of the Hon'ble Constitution Bench in *Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565, may apply with full force:

“27.It is, however, interesting that as long back as in 1924 it was held by the High Court of Calcutta in *Nagendra v. King-Emperor* that the object of bail is to secure the attendance of the accused at the trial, that the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial and that it is indisputable that bail is not to be withheld as a punishment. In two other cases which, significantly, are the 'Merrut Conspiracy cases'

observations are to be found regarding the right to bail which deserve a special mention. In K.N. Joglekar v. Emperor it was observed, while dealing with Section 498 which corresponds to the present Section 439 of the Code, that it conferred upon the Sessions Judge or the High Court wide powers to grant bail which were not handicapped by the restrictions in the preceding Section 497 which corresponds to the present Section 437. It was observed by the court that there was no hard and fast rule and no inflexible principle governing the exercise of the discretion conferred by Section 498 and that the only principle which was established was that the discretion should be exercised judiciously. In Emperor v. Hutchinson it was said that it was very unwise to make an attempt to lay down any particular rules which will bind the High Court, having regard to the fact that the legislature itself left the discretion of the court unfettered. According to the High Court, the variety of cases that may arise from time to time cannot be safely classified and it is dangerous to make an attempt to classify the cases and to say that in particular classes a bail may be granted but not in other classes. It was observed that the principle to be deduced from the various sections in the Criminal Procedure Code was that grant of bail is the rule and refusal is the exception. An accused person who enjoys freedom in a much better position to look after his

case and to properly defend himself than if he were in custody.

30. In AMERICAN JURISPRUDENCE (2nd, Volume 8, p. 806, para 39), it is stated:

“Where the granting of bail lies within the discretion of the Court, the granting or denial is regulated, to a large extent, by the facts and circumstances of each particular case. Since the object of the detention or imprisonment of the accused is to secure his appearance and submission to the jurisdiction and the judgment of the court, the primary inquiry is whether a recognizance or bond would effect that end.”

12.25 Consequently, we find that the basis on which vires of the 2015 amendments has been challenged do not have any merit and the first two prayers in this regard are accordingly rejected.

13 The petitioner has also raised another important issue. He intends to file a composite private complaint to seek an order for investigating the alleged schedule offence punishable under the Customs Act, 1962 and also the offence under PMLA.

14 After perusing both the Acts, we do not find any specific provision which completely overrides in this regard the provisions of Sections 200, 156(3) and 155(2) of the Code. Both the Acts however create a bar on taking cognizance vide section 137(1) of the

Customs Act, 1962 and second proviso to Section 45(1) of PMLA.

15.1 The sub-section (4) of Section 104 of Customs Act, 1962 commences with a non-obstante clause-”notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974).....”. This sub-section provides as to which offences under Customs Act, 1962 would be cognizable. It is therefore clear that the purpose of non-obstante clause in Section 104(4) is to override the Part II of the Schedule-I of the Code of Criminal Procedure. Being a Special Statute, the said provision under Section 104(4) would thus override whatever is stipulated to the contrary in the Part II of the First Schedule of the Code. Whether offence under Customs Act, 1962 is 'cognizable' or 'non-cognizable' would thus be governed only by Sections 104(4) and 104(5) of the said Act. However, in view of Section 4(2) of the Code, this non-obstante clause in Section 104(4) would not come in the way of other procedures prescribed in the Code, if there is no overriding procedure prescribed under the Customs Act, 1962 or Rules made thereunder.

15.2 We have carefully perused the compilation of judgments tendered by the petitioner. He has referred to the judgment of the Division Bench of this Court in the matter of **Sunil Gupta vs. Union of India, 2000 (118) ELT 8 (P&H)**. In the said judgment, it was held that a Central Excise officer can arrest a person without a warrant in exercise of powers under Section 13, despite the offence being a

non-cognizable offence and Section 155 of the Code stipulating to the contrary. He was thus not considered at par with the “police officer” for the purpose of Section 155 of the Code for investigating a non-cognizable offence punishable under central Excise Act, 1944. It is not in dispute that the Customs Act, 1962 is pari materia with the Central Excise Act, 1944. As per the petitioner, both these Acts are thus considered as complete Code in themselves and Code of Criminal Procedure has no application as per the ratio laid down in the said judgment rendered by the Division Bench in **Sunil Gupta (supra)**. The following paragraphs from the said judgment are extracted below :-

“1. Is a Central Excise Officer debarred from arresting a person without a warrant despite the fact that he has reasons to believe that the person is liable to be punished under the Central Excise Act, 1944? This is the short question that arises for consideration in these two writ petitions.

“24. Counsel for the respondents had referred to certain decisions to indicate that a police officer and an officer of the Central Excise belong to a different categories. On behalf of the petitioners, it was contended that persons of the Central Excise are vitally different from those under the Railway Property (Unlawful Possession) Act, 1966. It may be so. We do not consider it

necessary to go into the different provisions of different Acts.

25. In view of the above, we hold that the contention of the counsel for the petitioners that no arrest can be made without a warrant cannot be accepted.

Consequently, it is rejected.

15.3 Sub-sections (4) and (5) of Section 104 of the Customs Act, 1962 were inserted by substitution vide sections 126 of Act 23 of 2012 for the earlier sub-section (4) with effect from 28.05.2012. The sub-section (4) prior to the substitution stood as under -

“(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), any offence under this Act shall not be cognizable.”

Similarly in the case of the Central Excise Act, 1944 in view of Section 9-A, all offences under the said Act were also made non-cognizable. The judgment in the case of Sunil Gupta (supra) was rendered prior to the aforesaid amendments carried out to make two categories of offences, namely 'cognizable' and 'non-cognizable'. The only issue involved therein was whether or not a Central Excise Officer was debarred from arresting a person without a warrant in the non-cognizable offence under Central Excise Act, 1944.

15.4 The very same issue came up for consideration before the Hon'ble Supreme Court in a batch of Writ Petitions filed under

Article 32 of the Constitution of India. After considering the provisions of the Code, Customs Act, 1962, the Central Excise Act, 1944, and also the said judgment of this Court in Sunil Gupta (supra) and various other decisions, the Hon'ble Supreme Court in the matter of **Om Parkash vs. Union of India, (2011) 14 SCC 1**, was pleased to observe as follows -

“11. Since the question of arrest is in issue in these sets of cases, Mr. Rohatgi then referred to the provisions of Section 13 of the 1944 Act, which deals with the power to arrest in the following terms:

“13. Power to arrest-(1) Any Central Excise Officer not below the rank of Inspector of Central Excise may, with the prior approval of the Commissioner of Central Excise, arrest any person whom he has reason to believe to be liable to punishment under this Act or the Rules made thereunder.”

16. As has been indicated hereinbefore in this judgment.....However, in the case of the 1944 Act, in view of Section 9-A, all offences under the Act have been made non-cognizable and having regard to the provisions of Section 155, neither could any investigation be commenced in such cases, nor could a person be arrested in respect of such offence, without a warrant for such arrest.

26. Mr.Parasaran pointed out that the Preamble to the 1944 Act states that it is expedient to consolidate and amend the law relating to Central Excise duty on goods manufactured or produced in certain parts of India.....”

27. It was also urged that the officers under the said Act are not police officers and that the said question is no longer res integra. Consequently, in Ramesh Chandra Mehta v. State of W.B., a Constitution Bench of this Court held that since a Customs Officer is not a police officer, as would also be the case in respect of an officer under the Excise Act, submissions made before him would not be covered under Section 25 of the Evidence Act.

28. Mr. Parsaran submitted that the High Court had also made a distinction on the basis that while Section 13 of the 1944 Act refers to a “person” and not to an “accused” or “accused person”, the power under the Central Excise Act is for arrest of any person who is suspected of having committed an offence and is not an accused, but is a person who would become an accused after the filing of a complaint or lodging of an FIR, as was held by this Court in **Directorate of Enforcement v. Deepak Mahajan**.

30. Mr.Parasaran also urged that the power to arrest

must necessarily be vested in the officer concerned under the 1944 Act for the efficient discharge of his functions and duties, inter alia, in order to prevent and tackle the menace of black money and money-laundering. Mr. Parasaran submitted that in **Union of India v. Padam Narain Aggarwal**, this Court has held that even though personal liberty is taken away, there are norms and guidelines providing safeguards, so that such a power is not abused, but is exercised on objective facts with regard to commission of any offence.

31. Reference was also made to the decision of the Punjab and Haryana High Court in **Sunil Gupta v.**

Union of India and Bhavin Impex (P) Ltd. v. State of Gujarat, in which the issue, which is exactly in issue in the present case, was considered and, as submitted by the learned ASG, it has been held that the FIR or complaint or warrant is not a necessary precondition for an officer under the Act to exercise powers of arrest.....”

39. This lead us to the next question as to meaning of the expression “**non cognizable**”.

41. In our view, the definition of “non-cognizable offence” in Section 2(l) of the Code makes it clear that

non-cognizable offence is an offence for which a police officer has no authority to arrest without warrant. As we have also noticed hereinbefore, the expression “cognizable offence” in Section 2(c) of the Code means an offence for which a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant. In other words, on a construction of the definitions of the different expressions used in the Code and also in connected enactments in respect of a non-cognizable offence, a police officer, and, in the instant case an Excise Officer, will have no authority to make an arrest without obtaining a warrant for the said purpose.....”

45. The decisions which have been cited by Mr.

Parasaran deal mainly with powers of arrest under the Customs Act. The only cited decision which deals with the provisions of the Central Excise Act is the decision of the Division Bench of the Punjab and Haryana High Court in **Sunil Gupta v. Union of India**. In the said case also, the emphasis is on search and arrest and the learned Judges in para 22 of the judgment specifically indicated that the basic issue before the Bench was whether arrest without warrant was barred under the provisions of the 1944 Act and the Court had no

occasion to look into the aspect as to whether the offences under the said Act were bailable or not.

46. In the circumstances, we are inclined to agree with Mr. Rohtagi that in view of the provisions of Sections 9 and 9-A read with Section 20 of the 1944 Act, offences under the Central Excise Act, 1944, besides being non-cognizable are also bailable, though not on the logic that all non-cognizable offences are bailable, but in view of the aforesaid provisions of the 1944 Act, which indicate that offences under the said Act are bailable in nature.

47. Consequently, this batch of the writ petitions in regard to the Central Excise Act, 1944, must succeed and are, accordingly, allowed in terms of the determination herein above, and we hold that the offences under the Central Excise Act, 1944, are bailable.

48. The remaining writ petitions which deal with offences under Customs Act, 1962, namely, WP (Cri) No. 74 of 2010, Choith Nanikram Harchandani v. Union of India, which has been heard as the lead case, and WPs (Cri) Nos. 36, 37, 51, 76 and 84 of 2011 and Cri. MP No. 10673 of 2011 in WP (Cri) No. 76 of 2011, all deal with offences under the Customs Act, though the issues are exactly the same as those canvassed in the cases

relating to the provisions of the Central Excise Act, 1944.

52. It was further pointed out that as in the case of Section 20 of the Central excise Act, 1944, under sub-section (3) of Section 104 of the customs Act, an officer of Customs has been vested with the same power and is subject to the same provisions as an officer in charge of a police station has under the Code of Criminal Procedure, for the purpose of releasing the arrested person on bail or otherwise. Mr. Rohatgi submitted that as in the case of Section 20 of the 1944 Act, the provisions of sub-section (3) of Section 104 of the Customs Act, 1962, indicate that offences under the Customs Act would not only be non-cognizable, but would also be bailable.

62. The learned AAG submitted that while in a cognizable case a police officer could arrest without warrant in non-cognizable cases he could not, the offences under the Excise Act, Customs Act or Foreign Exchange Regulation Act, 1973, are offences under special Acts which deal with the evasion of excise, customs and foreign exchange. According to the learned ASG, in such matters, the police officers have been restrained from investigating into the offences and

arresting without warrant, but the Customs, Excise, Foreign Exchange, Food Authorities concerned, are not police officers within the meaning of the Code, and, they could, accordingly arrest such persons for the purposes of the investigation, their interrogation and for finding out the manner and extent of evasion of the excise duty, customs duty and foreign exchange, etc.

65. The submissions advanced by Mr. Rohtagi and the learned ASG, Mr. Malhotra, with regard to the question of bailability of offences under the Customs Act, 1962, are identical to those involving the provisions of the Central Excise Act, 1944. The provisions of the two above mentioned enactments on the issue whether offences under both the said Acts are bailable, are not only similar, but the provisions of the two enactments are also in pari materia in respect thereof.

66. The provisions of Section 104(3) of the Customs Act, 1962 and Section 13 of the Central Excise Act, 1944, vest the Customs Officers and Excise Officers with the same powers as that of a police officer in charge of a police station, which include the power to release on bail upon arrest in respect of the offences committed under the two enactments which are uniformly non-cognizable. Both Section 9-A of the 1944 Act and Section 104(4) of

the Customs Act, 1962, provide that notwithstanding anything contained in the Code of Criminal Procedure, offences under both the Acts would be non-cognizable.

67. The arguments advanced on behalf of the respective parties in *Om Parkash v. Union of India* [WP (Cri) No. 66 of 2011] and other similar cases under the Central Excise Act, 1944 are equally applicable in *Choith Nanikram Harchandani v. Union of India* [WP (Cri) No. 74 of 2010] and the other connected writ petitions in respect of the Customs Act, 1962.

68. Accordingly, on the same reasoning, the offences under the Customs Act, 1962 must also be held to be bailable and the writ petitioners must, therefore, succeed. The same are, accordingly, allowed.....”

15.5 From a perusal of the above extracts from the said binding precedent of a 3-Judge Bench decision of the Hon'ble Supreme Court, it is clear that the Hon'ble Supreme Court held the question earlier decided in **Sunil Gupta** (supra) to the contrary, and thus the decision in **Sunil Gupta** (supra) stands over-ruled by the Hon'ble Supreme Court. Similarly, the decision of the Hon'ble Gujarat High Court in *Bhavin Impex Pvt. Ltd. v. State of Gujarat*, 2010 (260) E.L.T. 526 (Guj.) which followed the view taken in *Sunil Gupta* (supra) on the same question of law was also over-ruled in *Om Parkash* (supra). The relevant extract of **Bhavin Impex Pvt. Ltd.**

(supra) is as follows -

“1. The key question that arises for consideration in this writ petition is as to whether the authorities under the Central Excise Act, 1944 (hereinafter referred to as 'the Act') have the power to arrest a person under Section 13 of the Act without a warrant and without filing an FIR or lodging a complaint before a Court of competent jurisdiction.

“36. This Court is in agreement with the view taken by the **Punjab and Haryana High Court**, viz. A Central Excise Officer, (satisfying the conditions laid down under Section 13) is not debarred from arresting a person without a warrant when he has reason to believe that the person is liable to punishment under the Act or the rules made thereunder.”

Neither the said two judgments in **Sunil Gupta** (supra) or **Bhavin Impex** (supra), nor the judgment of 2 Judge Bench of the Hon'ble Supreme Court in **Padam Narain Agarwal** (supra) can therefore have any precedent value in preference to the said binding precedent of a 3-Judge bench of the Hon'ble Supreme Court in **Om Parkash** (supra). We therefore do not find any merit in reliance placed by the petitioner on the judgment of a co-ordinate bench of this Court in **Sunil Gupta** (supra).

15.6 The Hon'ble Constitution Bench of the Supreme Court in **Ramesh Chandra Mehta v. State of W. B., AIR 1970 SC 940**

observed that-

“8. In **Badku Joti Savant v. State of Mysore** this Court held that the officer empowered under the Central Excise and Salt Act 1 of 1944 and when making enquiries for purposes of that Act invested with powers of an officer-in-charge of a police station investigating a cognizable offence, is not a police officer within the meaning of Section 25 of the Indian Evidence Act, and the statement of an accused person recorded by him is not hit by that section. The Court in that case distinguished the decision in Raja Ram Jaiswal case and observed that a Central Excise Officer was invested with powers of an officer-in-charge of a police station when investigating a cognizable offence, but he had no power to submit a report under Section 173 of the Code of Criminal Procedure, and on that account he was not a police officer within the meaning of Section 25 of the Evidence Act.

24.....But these additional powers with which the Customs Officer is invested under the Act of 1962 do not, in our judgment, make him a police officer within the meaning of Section 25 of the Evidence Act.”

25. For reasons set out in the judgment in Criminal Appeal No. 27 of 1967 and the judgment of this Court in **Badku Joti Savant** case we are of the view that a Customs Officer, under the Act of 1962, is not a police officer within the meaning of

Section 25 of the Evidence Act and the statements made before him by a person who is arrested or against whom an inquiry is made are not covered by Section 25 of the Indian Evidence Act.”

Therefore, the conclusions of the Constitution Bench of Hon'ble Supreme Court that the Customs Officer is not a police officer are only in the context of Section 25 of the Indian Evidence Act or Article 20(3) of the Constitution of India, and not for the purpose of excluding applicability of the provisions of Code in those areas covered by Section 4(2) of the Code in respect of which the special statute do not have any overriding provision.

15.7 The Code of Criminal Procedure is - **“An Act to consolidate and amend the law relating to Criminal Procedure.”** The application thereof is not restricted only to Indian Penal Code. We are of the view that merely because the Code uses the expressions which are compatible with Indian Penal Code and investigations by Police Officers, the same would not come in the way of application of the provisions of the Code of Criminal Procedure in the areas mentioned in Section 4(2) of the Code in respect of special statutes. We are fortified in our view from the various judgments in the context of special statutes such as Customs Act, 1962 and FERA investigated by the officers of Customs or the Enforcement Directorate, which are mentioned

hereinafter.

15.8 In **M. K. Ayooob v. Superintendent, CIU, Cochin, 1984 CRI.**

L. J. 949 the Hon,ble Kerala High Court was pleased to observe that-

“10. Sub-Section (2) of S. 4 of the Code states that all offences under any other law (i.e. law other than the Penal Code) shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions (i.e. The provisions of the Code), but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. **This would mean that in the absence of any provision in the Act, touching any such matter as mentioned in S. 4(2) of the Code, the provisions of the Code would apply.** Remand or detention of an arrested person, not being provided by the provisions of the Act, the provisions of the Code must govern the matter. It would follow that the provisions of sub-ss. (2) and (3) of Section 167 of the Code must apply in the case of person arrested under the Customs Act and produced before a Magistrate.

11. Learned counsel for the Customs Department pointed out that sub Section(1) of Section 167 specifically refers to a person arrested and detained in custody and a case where investigation could not be completed within 24 hours fixed by

Section 57 and makes it imperative for the officer in charge of the police station or the police officer making investigation to transmit the arrested person to the nearest Magistrate with the entries in the diary prescribed under S. 172 of the code. The argument is that persons arrested by customs Officers for Customs Offences are not persons arrested under the Code, that S. 57 of the Code does not apply to those persons and the customs officers are not Officers in charge of police station or police officers making investigation and therefore sub-s.(1) will not apply. It is also pointed out that sub-s.(2) refers to the Magistrate to whom an accused person is forwarded “under this section”, that is S. 167. The argument is that therefore sub-s. (2) can apply only to cases governed by Sub-S(1), that is, to persons arrested by Police Officers under the provisions of the Code and not to persons arrested by the Customs Officers under the provisions of the Act. **This argument ignores S.4(2) of the Code. Section 4(2) of the Code makes all the differences. This provision renders the provisions of the Code applicable in areas not covered by the provisions of the Act. The code mainly purports to deal with offences under the Indian Penal Code and investigation by police officer or officers in charge of police station. That is why S.167(1) refers to S. 57 of the Code and officer in charge of police station. This cannot**

lead to the conclusion that provisions of S. 167 of the Code cannot be applied to cases under the Customs Act. In relation to matters of investigation, inquiry, trial or other matter not covered by the provisions of the Act, the parallel provisions of the code must necessarily be applied. That is the clear affect of the operation of S. 4(2) of the code. Such operation cannot be negated merely because a section in the Code uses expression which are compatible with an offence under Penal Code or with investigation being conducted by a police officer. In relation to a person arrested under the Act, the provisions of S. 167 of the Code must be read suitably, that is, reference to “officer in charge of a Police Station” must be read as “customs Officer”. This view is strengthened by the Provisions in Sub-s. (3) of S. 104 of the Act also.

12. I therefore, hold that provisions in Sub-ss. (2) and (3) of S. 167 of the code apply to persons arrested under S. 104(1) of the Act and produced before a Magistrate under S. 104(2) of the Act. The benefit of the proviso to S. 167(2) of the Code is available to them.

15.9 In S. I. O. DRI, Madras v. M. K. S. Abu Bucker, 1990 Cri L J 704 the Hon'ble Madras High Court was pleased to hold that-
“21.....it is in the context of Section 4(2)Cr. P. C the applicability of the provisions of Section 167(2) Cr. P. C. to the

person arrested under the Customs Act and produced before a Magistrate, will have to be considered. A reading of Section 4 (2) Cr. P. C. renders the provisions of the Code applicable in the field not covered by the provisions of the Customs Act. The Code of Criminal Procedure primarily deals with the offences under the Indian Penal Code and the investigation by Police Officers or Officers-in-charge of police station. This cannot straightway lead to the conclusion that the provision of Section 167 Cr. P. C. cannot be applied to cases under the Customs Act. Obviously, in relation to matters of investigation, inquiry, trial or dealing otherwise, not covered by the provisions of the Customs Act, the parallel provisions of the Code of Criminal Procedure necessarily will have to be applied and that is the observation of the Supreme Court extracted earlier in Antulay's case (1984 Cri LJ 647). **Such operation of Section 4 of the Code, cannot be just rejected merely because the Code uses expressions which are compatible with offences under the Indian Penal Code and investigation being conducted by a police officer.....**”

“23. The Supreme Court, while considering the position and character of a person arrested under the Sea Customs Act or Customs Act vis-a-vis Article 20(3) of the Constitution and the questions whether a Customs Officer was a police officer for the purpose of Section 25 of the Indian Evidence Act and

whether any person making a statement to a Customs Officer under Sections 107 and 108 of Customs Act can be said to be a person “accused of any offence” within the meaning of the said article, held that a person so arrested was not an accused within the meaning of Article 20(3) of the constitution and the Customs Officer acting under the Customs Act was not a police officer for the purpose of Section 25 of the Indian Evidence Act, vide **Illias v. The Collector of Customs, Madras** AIR 1970 SC 1065: (1970 Cri LJ 998) and **Ramesh Chandra Mehta v. State of West Bengal** AIR 1970 SC 940 : (1970 Cri LJ 863). In both the cases, it is nowhere mentioned that the provisions of Chapter XII of the Code and the provision of Section 167(2) thereof, would not be available when the person is detained under the Customs Act and produced before the Magistrate by the Officer appointed under the said Act.”

15.10 The said two judgments were approved by the Hon'ble Supreme Court in **Directorate of Enforcement v. Deepak Mahajan, (1994) 3 SCC 440**. It was also held that in view of Section 4(2), provisions of the Code would necessarily apply to the extent in the absence of any contrary provision in the Special Act or any special provision excluding the jurisdiction or applicability of the Code. It was held that the operation of Section 4(2) of the Code is straightaway attracted to the area of investigation, inquiry and trial of the offences under the special laws including the FERA and

Customs Act. The following observations merit reproduction-

“44. Section 167 is one of the provisions falling under Chapter XII of the Code commencing from Section 154 and ending with Section 176 under the caption “Information to the police and their powers to investigate”. Though Section 167(1) refers to the investigation by the police and the transmission of the case diary to the nearest Magistrate as prescribed under the Code etc., the main object of sub- Section (1) of Section 167 is the production of an arrestee before a Magistrate within twenty-four hours as fixed by Section 57 when the investigation cannot be completed within that period so that the Magistrate can take further course of action as contemplated under sub- Section (2) of Section 167.”

“**105.** Agreeing with the majority judgment in O. P. Gupta and with the view of the High Court of Kerala in Supdt. of Customs, C.I.U Cochin v. P. K. Ummerkutty and **M. K. Ayoob v.**

Superintendent, C. I. W., Cochin as well as of the Gujarat High Court in N. H. Dave v. Mohmed Akhtar, Arunachalam, J. of the Madras High Court in his well-reasoned judgment in **Senior Intelligence Officer v. M. K. S. Abu Bucker** has observed as follows:.....”

“**106.** In our considered opinion, the view taken in O. P. Gupta and **M. K. S. Abu Bucker and also of the Kerala High Court and Gujarat High Court is the logical and correct view and**

we approve the same for the reasons we have given in the preceding part of this judgment.....”

15.11 Further, after considering various decisions namely **M. P. Sharma v. Satish Chandra**- 1954 SCR 1077, **Raja Narayanlal Bansilal v. Maneck**- 1961 (1) SCR 417, **State of Bombay v. Kathi Kalu Oghad**- 1962 (3) SCR 10, **Nandini Satpathy v. P. L. Dani**- 1978 (2) 424, **State of Uttar Pradesh v. Deoman Upadhyaya**- 1961(1) SCR 14, **Ramesh Chandra Mehta v. State of West Bengal**- AIR 1970 SC 940, **Veera Ibrahim v. State of Maharashtra**- 1976 (2) SCC 302, **Poolpandi v. Superintendent, Central Excise**- 1992 (3) SCC 259, **Percy Rustomji Basta v. State of Maharashtra** – 1971 (1) SCC 847 and **Ramanlal Bhogilal Shah v. D. K. Guha**- 1973 (1) SCC 696, it was observed by the Hon'ble Supreme Court in the said judgment in **Deepak Mahajan** (supra) that-

“91. Though this Bench is bound by the decisions of all the above Constitution Benches yet these decisions are distinguishable since none of the above decisions relates to the interpretation of Section 167 of the Code explaining the meaning of the word 'accused' or 'accused person' limited to the purpose of Section 167. On the other hand, all those decisions are rendered only on the question of admissibility or otherwise of the statement of a person arrested under the provisions of the general Act or special Acts concerned and

recorded while in the custody of the arrester.

110. As we have pointed out in the preceding part of this judgment, Section 167(1) falls under Chapter XII relating to **“Information to the Police and their powers to investigate”**. Sub Section (1) of Section 167 speaks of the arrest by a **police officer** and the follow up investigation by him....”

111. Neither the Police Act , 1861 (Act V of 1861) nor any other statute defines the expression 'police officer'. Shortly stated, the main duties of the police are the prevention, detention and investigation of crimes. As the powers and duties of the State have increased and are increasing manifold, various Acts dealing with Customs, Excise, Forest, Taxes etc. have come to be passed and consequently the prevention, detention and investigation of offences as prescribed under those Acts have come to be entrusted to officers with different nomenclatures appropriate to the subject with reference to which they function. However, as stated supra, through the powers of customs officers and enforcement officers are not identical to those of police officers qua the investigation under Chapter XII of the Code yet the officers under the FERA and Customs Act are vested with certain powers similar to the powers of police officers.

121. Lastly, it falls for our consideration whether Section 4(2) of the Code of Criminal Procedure can be availed of for

investigating, inquiring or trying offences under any law other than the Indian Penal Code which expression includes FERA and Customs Act etc.

126. Desai, J. in **Vishwa Mitter of Vijay Bharat Cigarette Stores v. O. P. Poddar** speaking for the Bench on the import of **Section 4(2)** has stated thus: (SCC p. 704, para 4)

“... Section 190 thus confers power on any Magistrate to take cognizance of any offence upon receiving a complaint of facts which constitute such offence. It does not speak of any particular qualification for the complainant. **Generally speaking, anyone can put the criminal law in motion unless there is specific provision to the contrary.** This is specifically indicated by the provision of sub Section (2) of Section 4 which provides that all offences under any other law- meaning thereby law other than the Indian Penal Code- shall be investigated, inquired into, tried and otherwise dealt with according to the provisions in the Code of Criminal Procedure but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. It would follow as a necessary corollary that **unless** in any statute other than the Code of Criminal Procedure which prescribes an offence **and simultaneously specifies** the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences, the provisions of the Code of Criminal Procedure shall

apply in respect of such offences and they shall be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Code of Criminal Procedure.”

127. In **A. R. Antulay v. Ramdas Srinivas Nayak** a Constitution Bench of this Court while examining the similar question with regard to applicability of Section 4 with reference to the Prevention of Corruption Act has laid down the law thus: (SCR P.935: SCC P-517 para 16)

“In the absence of a specific provision made in the statute indicating that offences will have to be investigated, inquired into, tried and otherwise dealt with according to that statute, the same will have to be investigated, inquired into, tried and otherwise dealt with according to the Code of Criminal Procedure. In other words, Code of Criminal is the parent statute which provides for investigation, inquiring into and trial of cases by criminal courts of various designations.”

128. To sum up, Section 4 is comprehensive and that Section 5 is not in derogation of Section 4(2) and it only relates to the extent of application of the Code in the matter of territorial and other jurisdiction but does not nullify the effect of Section 4(2). In short, the provisions of this Code would be applicable to the extent in the absence of any contrary provision in the Special Act or any special provision excluding the jurisdiction or applicability of the

Code. In fact, the second limb of Section 4(2) itself limits the application of the provisions of the Code reading, “.. but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.”

131. The submission that as there is no investigation within the terms of the Code in the field of FERA or Customs Act, Section 4(2) of the Code can have no part to play, has to be rejected for the reasons given by us while disposing of the contention “What investigation means and is” in the preceding part of this judgment.

132. For the aforementioned reasons, **we hold that the operation of Section 4(2) of the Code is straightaway attracted to the area of investigation, inquiry and trial of the offences under the special laws including the FERA and Customs Act** and consequently Section 167 of the Code can be made applicable during the investigation or inquiry of an offence under the special Acts also inasmuch as there is no specific provision contrary to that excluding the operation of Section 167.

136. In the result, we hold that sub-Sections (1) and (2) of Section 167 are squarely applicable with regard to the production and detention of a person arrested under the provisions of Section 35 of FERA and Section 104 of Customs Act and that the Magistrate has jurisdiction under

Section 167(2) to authorise detention of a person arrested by any authorised officer of the Enforcement under FERA and taken to the Magistrate in compliance of Section 35(2) of FERA.”

15.12 We find that in para 128 of the decision in **Deepak Mahajan** (supra), it has been held that Section 4 is comprehensive and that Section 5 is not in derogation of Section 4(2) and it only relates to the extent of application of the Code in the matter of territorial and other jurisdiction but does not nullify the effect of Section 4(2). The Hon'ble Supreme Court held in **Deepak Mahajan** (supra) that the provisions of this code would be applicable to the extent in the absence of any contrary provision in the Special Act or any special provision excluding the jurisdiction or applicability of the Code. Therefore, if any special procedure is prescribed under any provision of PMLA or Customs Act, 1962 which is in conflict with the provisions of the Code, such provision of PMLA or Customs Act, 1962 would have overriding effect on the conflicting provision of the Code. If there is no such overriding provision in these special statutes, the provisions contained in the Code would surely apply in view of section 4(2) read with section 5 of the Code.

15.13 All the aforesaid judgments in the context of Customs Act, 1962 or Central Excise Act, 1944 are in respect of “*non-cognizable*” offences under these Acts. After the judgment in **Om Parkash** (supra) amendments were carried out and now some of

the offences specified under these Acts are made 'cognizable' and rest remain 'non-cognizable' After substitution of sub-section (4) with effect from 28.05.2012, sub-section (4) and (5) of section 104 of the Customs Act read as under --

“(4) Notwithstanding anything contained in the Code of Criminal Procedure. 1973 (2 of 1974), any offence relating to -

(a) Prohibited goods: or

(b) Evasion or attempted evasion of duty exceeding fifty lakh rupees, **shall be cognizable**

(5) Save as otherwise provided in sub-section (4), **all other offences under the Act shall be non-cognizable.**”

15.14 Therefore, the Customs Act now prescribes 2 categories of offences, first being offences falling under sub-section (4) which are 'cognizable', and second being all offences other than those falling under sub-section (4), which shall be non-cognizable in terms of sub-section (5).

15.15 Words 'cognizable' or 'non-cognizable' offence are not defined under the Act, but are defined under the Code as follows :-

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

“2. (l) 'non-cognizable offence' means an offence for which,

and 'non-cognizable case' means a case in which, a police officer has no authority to arrest without warrant;”

15.16 By application of Section 4(2) of the Code and in view of the aforesaid binding precedents, the words 'police officer' appearing in these definitions would be read as 'officer authorized under the Customs Act, 1962'. Thus, in a 'cognizable offence' under Customs Act, 1962 the Customs Officer would have power to arrest under Section 104(1) without a warrant. He would comply with provisions of Sections 154 to 157 by recording the information and sending forthwith a copy of the Report under Section 157 to the jurisdictional Magistrate. But in a 'non-cognizable offence' under the Act, he would have to obtain from jurisdictional Magistrate permission to investigate and a warrant of arrest under Section 104(1) of the Act, as already held by the Hon'ble Supreme Court in **Om Parkash** (supra).

15.17 Unlike PMLA, there is no provision under the Customs Act, 1962 providing for filing of a Complaint for taking cognizance of the offence. Whereas in all 'non-cognizable offences' by application of the Code, after culmination of the investigations a Complaint would have to be filed, however, in respect of the offences under the Act which are now specified as 'cognizable', a report under Section 173 of the Code would have to be filed upon culmination of the investigations. In either case, in accordance with Section 137(1) and

(2) of the Customs Act, 1962 no Court shall take cognizance of any offence under the Act, except with the mandatory sanction as prescribed. Section 137 of the Customs Act, 1962 is reproduced as follows-

“137. Cognizance of offences.-(1) No Court shall take cognizance of any offence under Section 132, Section 133, Section 134 or Section 135 or Section 135-A except with the requisite sanction of the Commissioner of Customs.

(2)No Court shall take cognizance of any offence under Section 136,-

(a) where the offence is alleged to have been committed by an officer of customs not lower in rank than Assistant Commissioner of Customs, except with the previous sanction of the Central Government;

(b) where the offence is alleged to have been committed by an officer of customs lower in rank than Assistant Commissioner of Customs, except with the previous sanction of Commissioner of Customs.

(3)Any offence under this chapter may, either before or after the institution of prosecution, be compounded by the Chief Commissioner of Customs on payment, by the person accused of the offence to the Central Government, of such compounding amount and in such manner of compounding as may be specified by rules.

Provided that nothing contained in this sub-Section shall apply to-....”

15.18 In the Customs Act, 1962 the 'Chapter XIII-Searches, Seizure and Arrest', from Section 100 to 110A, uses the words “Customs officer” or “proper officer” or “adjudicating authority”. Therefore, no police officer can commence investigation, carry search, investigate, arrest , or grant provisional release of seized goods under the Customs Act, 1962, unless authorized under the Act in this behalf. In the context of the provisions of the said Chapter XIII-Searches, Seizure and Arrest', from Section 100 to 110 A, the provisions of the Code would be applicable only to the extent there is nothing inconsistent therewith in the Act. There are certain provisions under the Customs Act, 1962 which override the provisions of the Code such as Section 135-B, 137, 138 and 140A.

15.19 In the customs Act, 1962 there is nothing which bars setting of the criminal law into motion by any individual by making a complaint either to the officer authorized to investigate under Section 154 or 155 of the Code, or to the jurisdictional Magistrate for seeking directions under Section 155(2) or 156(3) of the Code for investigations by the officer authorized to investigate under the Act. We do not think that issuing directions to investigate would amount to taking 'cognizance'.

15.20 In the case of **Narayandas Bhagwandas Madhavdas vs**

State of West Bengal-1999 (110) ELT 85 (SC), this issue came up for consideration before the Hon'ble Supreme Court. One Shri Mitra was a Police Officer authorised on 11.09.1952 by RBI, who pursuant to this authorisation applied to the Additional Dist. Magistrate seeking permission to investigate and for issuance of search warrant for conducting investigations into non-cognizable offence under FERA as required under Section 155(2) of the Code. Permission was granted by the Court. Thereafter, on 27.1.1953, he was authorised under FERA to file a complaint, which was filed on 2.2.1953. The Hon'ble Supreme Court held that cognizance was taken only on 2.2.1953 and not prior thereto when investigations were permitted time to time or arrest warrant was issued. In this regard the following observations of the Hon'ble Supreme Court in **Narayandas Bhagwandas Madhavdas (supra)** merit reproduction-

“9..... It was, however, argued that when Mitra applied for a search warrant on 16.09.1952, the Additional District Magistrate had recorded an order thereon, “Permitted. Issue search warrant”. It was on this date that the Additional District Magistrate took cognizance of the offence. We cannot agree with this submission because the petition of Inspector Mitra clearly states that “As this is non-cognizable offence, I pray that you will kindly permit to investigate the case under Section 155, Criminal P.C.” That is to say that the Additional District Magistrate was not being

asked to take cognizance of the offence. He was merely requested to grant permission to the police officer to investigate a non-cognizable offence. The petition requesting the Additional District Magistrate to issue a warrant of arrest and his order directing the issue of such a warrant cannot also be regarded as orders which indicate that the Additional District Magistrate thereby took cognizance of the offence Obviously, it is only when a Magistrate applies his mind for the purpose of proceeding under Section 200 and subsequent sections of Chapter XVI of the Code of Criminal Procedure or under Section 204 of Chapter XVII of the Code that it can be positively stated that he had applied his mind and therefore had taken cognizance”.

15.21 As evident from the above observations, passing an order directing or permitting investigation or issuing a warrant of arrest under Section 155(2) would not amount to taking cognizance of the offence. It is also a settled law that 'cognizance' is not taken at the time of directing investigations under Section 156(3) of the Code for investigating any 'cognizable' offence. In **India Carat (P) Ltd. v. State of Karnataka, (1989) 2 SCC 132**, the Hon'ble Supreme Court has clearly laid down how the criminal law is set into motion as per the Code of Criminal Procedure including taking of cognizance of an offence punishable under the Indian Penal Code as follows :-

“9. Before we examine the contentions of the learned counsel for

the appellant and the second respondent, we may briefly refer to some of the provisions in Chapters XII, XIV, XV and XVI of the Code. Section 155 in Chapter XII pertains to information laid to the police regarding non-cognizable cases and sub-Section (2) lays down that no police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial. Section 156(1) confers power of an officer in charge of a police station to investigate any cognizable case without the order of a Magistrate. Section 156(3) authorises a Magistrate, empowered under Section 190 to order the police to make an investigation as provided for in Section 156(1). The other provisions in the chapter from Section 157 onwards set out the powers of investigation of the police and the procedure to be followed. Section 169 prescribes the procedure to be followed by an officer in charge of a police station if it appears to him upon investigation of a case that there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate. Section 170 prescribes the procedure to be followed by the officer in charge of police station if it appears to him upon investigation that there is sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate. Section 173(1) enjoins a police officer to complete the investigation without

unnecessary delay. Section 173(2) lays down that as soon as the investigation is completed the officer in charge of a police station should forward to a Magistrate empowered to take cognizance of an offence on a police report, a report in the prescribed form stating the various particulars mentioned in that sub-section.

10. Chapter XIV deals with the conditions requisite for initiation of proceedings and as to the powers of cognizance of a Magistrate.

For our purpose it is enough if we extract Section 190(1) alone.

“190. (1) Cognizance of offences by Magistrates.- Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.”

11. Chapter XV which contains Sections 200 to 203 deals with “Complaints to Magistrates”. A Magistrate taking cognizance of an offence on complaint is required by Section 200 to examine the complainant and the witnesses present, if any. Section 202 provides that a Magistrate taking cognizance of a case, upon

complaint, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding. Section 203 empowers the Magistrate to dismiss the complaint, if after considering the statements on oath (if any) of the complaint and of the witnesses and the result of the inquiry or investigation (if any) under Section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding.

12. Chapter XVI deals with “Commencement of Proceedings before Magistrates” and Section 204 empowers a Magistrate to issue summons or a warrant as the case may be, to secure the attendance of the accused if in the opinion of the Magistrate taking cognizance of the offence there is sufficient ground for proceeding.

13. From the provisions referred to above, it may be seen that on receipt of a complaint a Magistrate has several courses open to him. The Magistrate may take cognizance of the offence at once and proceed to record statements of the complaints and the witnesses present under Section 200. After recording those statements, if in the opinion of the Magistrate there is no sufficient ground for proceeding, he may dismiss the complaint under Section 203. On the other hand if in his opinion there is

sufficient ground for proceeding he may issue process under Section 204. If, however, the Magistrate thinks fit, he may postpone the issue of process and either inquire into the case himself or direct an investigation to be made by the police officer or such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding. He may then issue process if in his opinion there is sufficient ground for proceeding or dismiss the complaint if there is no sufficient ground for proceeding. Yet another course open to the Magistrate is that instead of taking cognizance of the offence and following the procedure laid down under section 200 or Section 202, he may order an investigation to be made by the police under Section 156(3). When such an order is made, the police will have to investigate the matter and submit a report under Section 173 (2). On receiving the police report the Magistrate may take cognizance of the offence under Section 190(1) (b) and issue process straightway to the accused. The Magistrate may exercise his powers in this behalf irrespective of the view expressed by the police in their report whether an offence has been made out or not. This is because the police report under Section 173(2) will contain the facts discovered or unearthed by the police as well as the conclusion drawn by the police therefrom. If the Magistrate is satisfied that upon the facts discovered or unearthed by the police there is sufficient material

for him to take cognizance of the offence and issue process, the Magistrate may do so without reference to the conclusion drawn by the Investigating Officer because the Magistrate is not bound by the opinion of the police officer as to whether an offence has been made out or not. Alternately the Magistrate, on receiving the police report, may without issuing process or dropping the proceeding proceed to act under Section 200 by taking cognizance of the offence on the basis of the complaint originally submitted to him and proceed to record the statement upon oath to the complainant and the witnesses present and thereafter decide whether the complaint should be dismissed or process should be issued.

16. The position is, therefore, now well settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by

the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers under Section 190 (1) (b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190 (1) (a) though it is open to him to act under Section 200 or Section 202 also. The High Court was, therefore, wrong in taking the view that the Second Additional Chief Metropolitan Magistrate was not entitled to direct the registration of a case against the second respondent and order the issue of summons to him.

17. The fact that in this case the investigation had not originated from a complaint preferred to the Magistrate but had been made pursuant to a report given to the police would not alter the situation in any manner.”

15.22 The aforesaid observations by the Hon'ble Supreme Court on the procedural aspect though relating to offences under Indian Penal Code, would also apply in relation to the investigations or trial under Customs Act, 1962 to the extent of absence of any special overriding provision to the contrary in the Act or Rules made thereunder by application of Section 4(2) read with Section 5 of the Code.

15.23 Therefore, so far as approaching a Magistrate and seeking

directions for investigations into any offence under Customs Act, 1962 by any officer authorised under the said Act is concerned, there is no bar and the Magistrate may direct such investigations under Section 155(2) or 156(3) depending upon whether the alleged offence under Customs Act, 1962 in the complaint is 'cognizable' or 'non-cognizable'. However, the Magistrate cannot take cognizance of the offence unless the conditions specified in the overriding provisions of Section 137(1) or 137(2) are satisfied. Once such directions are issued by the Court, the officer authorised under the said act will follow the procedure specified under the Customs Act, 1962, Rules made thereunder and all those provisions of the Code for which there is no inconsistent provision in the Act.

16. In PMLA, the position would be slightly different than Customs Act, 1962, although the principles governing the application of the procedure prescribed under the Code would remain the same. The offence of Money Laundering punishable under Section 4 is defined in Section 3. As per the said Section 3, the offence of money laundering necessarily requires “knowingly projecting or claiming” any “proceeds of crime” as untainted property. The property covered under the term “proceeds of crime” is defined in section 2(u) of PMLA, and the accused person shall necessarily derive or obtain such property, directly or indirectly as a result of criminal activity relating to such offence which is specified in the Schedule to PMLA. Therefore,

any property derived or obtained, directly or indirectly as a result of any criminal activity relating only to such offence which is not specified in the Schedule to PMLA, would not be covered under the term “proceeds of crime” for the purpose of PMLA. Consequently, for invocation of section 3 against any person it is necessary that firstly there shall be such “proceeds of crime”, and secondly such person shall knowingly project or claim such “proceeds of crime” as untainted property. For conducting search or seizure under Section 17 or 18 of PMLA, the first proviso to sub-Section (1) of Section 17 and also of Section 18, create an embargo and bars such search unless in relation to the 'Scheduled Offence, either a report under Section 157 of the Code is forwarded to a Magistrate, or a complaint has been filed for taking cognizance by an officer authorised to investigate Scheduled Offence or other conditions specified are fulfilled.

16.1 Second proviso of section 45(1) of the PMLA reads as under-

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

(i) the Director; or

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

Government.”

16.2 Therefore, so far as PMLA is concerned there is a bar on taking cognizance of any offence punishable under Section 4 except upon a complaint in writing, that too, by the specified officers only. In PMLA there is no question of filing a report under Section 173 for proceeding against the accused, and only if no case is made out after investigations, a closure report would have to be filed under Section 173.

16.3 Merely on receipt of a complaint of money laundering from a private individual, the investigations cannot be directed by a Court or commenced by an authority under PMLA, unless the Scheduled Offence is registered under Section 154 and a report thereof is sent under Section 157 of the Code to the Magistrate, or, a complaint is filed for taking cognizance of a Scheduled Offence by an officer authorised to investigate Scheduled Offence. Further, cognizance of offence under PMLA can be taken only by a Special Court notified and designated under Section 43 for the specified area, and trial shall be in accordance with Section 44 read with Section 46 of PMLA. Section 46 of PMLA specifies that save as otherwise provided under PMLA, the provisions of Code, including the provisions of bails or bond, shall apply to the proceedings before a Special Court. Section 65 of PMLA provides that-

65. Code of Criminal Procedure, 1973 to apply. The

provisions of the Code of Criminal Procedure, 1973(2 of 1974) shall apply, in so far as they are not inconsistent with the provisions of this Act, to arrest, search and seizure, attachment, confiscation, investigation, prosecution and all other proceedings under this Act.”

16.4 Under PMLA, various notifications have been issued by the Central Government notifying the procedural rules in respect of the procedures required to be complied with for different purposes such as - provisional attachment, receipt and management of confiscated properties, maintenance of records by the banking companies, financial institutions and intermediaries, forms for summons or authorization for search, seizure, freezing etc., forms of arrest order or acknowledgment slips for various matters and the manner of forwarding the same to the adjudicating authority, the manner of receiving the records authenticated outside India, Appeals to the Appellate Tribunal, adjudicating authority, issuance of provisional attachment orders, and taking possession of attached or frozen properties confirmed by the adjudicating authority. Similarly notifications have been issued for designating Special Courts for trial of offences punishable under PMLA for specified areas.

16.5 To the extent any of these Rules or any provision of PMLA is inconsistent with the provisions of the Code it will have overriding effect, and would have to be complied with. All other

provisions of the Code, for which there is no inconsistent provision in PMLA or Rules made thereunder, however, would necessarily apply with full force. For example- In the matter of arrest under Section 19 of PMLA, the Rules notified by Central Government vide G. S. R. 446(E) dated 01.07.2005 would have overriding effect on the provisions of the Code of Criminal Procedure, 1973 to the extent anything inconsistent contained therein. Subject to any such inconsistent overriding procedure under PMLA, by application of Section 4(2) of the Code read with Section 65 of PMLA, the provisions contained in the Code relating to arrest would necessarily apply in the matter of any arrest under Section 19 of PMLA.

16.6 Accordingly, subject to the overriding provisions of PMLA and Rules made thereunder, the provisions of Code of Criminal Procedure would necessarily apply to arrest, search and seizure, attachment, confiscation, investigation, prosecution and all other proceedings under PMLA. This is also in consonance with Section 4(2) read with Section 5 of the Code. The Hon'ble Supreme Court in the case of **Gautam Kundu vs. Manoj Kumar, Assistant Director- AIR 2016 SC 106**, while declining to interfere with the order passed by High Court rejecting bail application of an accused arrested in connection with the offence under Section 3 of the PMLA observed as follows-

“28. Before dealing with the application for bail on merit,

it is to be considered whether the provisions of Section 45 of the PMLA are binding on the High Court while considering the application for bail under Section 439 of the Code of Criminal Procedure. There is no doubt that PMLA deals with the offence of money laundering and the Parliament has enacted this law as per commitment of the country to the United Nations General Assembly.

PMLA is a special statute enacted by the Parliament for dealing with money laundering. Section 5 of the Code of Criminal Procedure, 1973 clearly lays down that the provisions of the Code of Criminal Procedure will not affect any special statute or any local law. In other words, the provisions of any special statute will prevail over the general provisions of the Code of Criminal Procedure in case of any conflict.

29. Section 45 of the PMLA starts with a non obstante clause which indicates that the provisions laid down in Section 45 of the PMLA will have overriding effect on the general provisions of the Code of Criminal Procedure in case of conflict between them. Section 45 of the PMLA imposes following two conditions for grant of bail to any person accused of an offence punishable for a term of

imprisonment of more than three years under Part-A of the Schedule of the PMLA: (i) That the prosecutor must be given an opportunity to oppose the application for bail; and (ii) That the Court must be satisfied that there are reasonable grounds for believing that the accused person is not guilty of such offence and that he is not likely to commit any offence while on bail.

30.The conditions specified under Section 45 of the PMLA are mandatory and needs to be complied with which is further strengthened by the provisions of Section 65 and also Section 71 of the PMLA. **Section 65 requires that the provisions of Cr. P. C. shall apply in so far as they are not inconsistent with the provisions of this Act and Section 71 provides that the provisions of the PMLA shall have overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. PMLA has an overriding effect and the provisions of Cr. P. C. would apply only if they are not inconsistent with the provisions of this Act.....”**

33..... We have noted that Section 45 of the PMLA will have overriding effect on the general provisions of the Code of Criminal Procedure in

case of conflict between them....”.

16.7. It is therefore evident from the above observations of the Hon'ble Supreme Court that the provisions of the Code of Criminal Procedure would apply, but if there is any inconsistent provision under PMLA or Rules made thereunder, the same will have overriding effect on the provisions of the Code in view of Section 4(2) and 5 of the Code read with Section 65 and 71 of PMLA.

16.8 We find that subject to compliance with the overriding provisions contained in PMLA and the Rules made thereunder, even in PMLA, there is nothing which bars setting of the criminal law into motion by any private individual by making a complaint either-

- (i) to the authority under PMLA with prayer to commence investigations by registering the case under the provisions of the Code, or
- (ii) to the jurisdictional Magistrate for seeking directions to the authority under PMLA for investigations.

16.9 Any such directions by a Court to the authority under PMLA to investigate an offence under PMLA would not amount to taking 'cognizance'. However, for taking cognizance under PMLA specific bar contained in the second proviso to Section 45(1) would necessarily be applicable and the Special Court cannot take cognizance of any offence punishable under Section 4

except upon a complaint in writing made by the officer specified therein.

17. Now, in view of the above, we would have to consider the following prayer made by the petitioner :

“iii) to hold that a private criminal complaint by the petitioner would be maintainable for setting the criminal law into motion and to seek any direction for investigation of offence under Section 3 r/w 4 of PMLA along with the offence under Part B of the Schedule inserted in PMLA w.e.f. 14.05.2015, either under Section 156(3) or under Section 155(2) of the Code of Criminal Procedure, as the case may be, pending grant of sanction requisite for taking 'cognizance' in said Scheduled Offence or under PMLA”

18. In the instant case, admittedly, as of now for the alleged Scheduled Offence under the Customs Act, 1962 neither any case is registered under Section 154 by the Customs Authorities for investigating any cognizable offence under the said Act, nor is there any report in respect of the same forwarded under Section 157 of the Code. There is no complaint for taking cognizance filed in Court by any officer authorized to investigate any non-cognizable offence under Customs Act, 1962. Therefore, at this stage, the prayer of the petitioner so far as PMLA is concerned is premature. Unless as indicated above the alleged Scheduled Offence under Customs

Act, 1962 is registered under Section 154 and a report thereof is sent under Section 157 of the Code to the Magistrate, or, a complaint is filed for taking cognizance of the Scheduled Offence by an officer authorized to investigate the said Scheduled Offence, the petitioner cannot seek from the jurisdictional Magistrate any directions under the Code for investigations by the authority under PMLA.

19. Strict compliance with the safeguards inbuilt in the criminal procedures prescribed under the Code read with those under the Special Statute, is essence of Article 21 of the Constitution of India. The importance of compliance with the procedural safeguards has been elaborately explained by the Hon'ble Constitution Bench of the Supreme Court in **Lalita Kumari v. State of U. P.-2014(2) SCC 1.**

20. In view of the above findings, we hold that such composite prayer seeking direction for investigation of offence under Section 3 r/w 4 of PMA along with the offence under Customs Act, 1962, would not be maintainable. Therefore, in our view, the writ petition is liable to be dismissed.

21. The petitioner made oral prayer for issuance of certificate under Article 134-A in the nature referred to in Article 134(1)(c) of the Constitution of India for appeal to the Hon'ble Supreme Court. We are of the opinion that we have not come across any precedent where the following two issues concerning

fundamental rights guaranteed under the Constitution under Article 14 and 21 have been decided by the Hon'ble Supreme Court. Therefore, we are inclined to issue the Certificate as prayed for by the petitioner and grant leave to appeal on the following substantial questions of law of general importance.-

a) Whether it would be unreasonable and in violation of Article 14 and 21 of the Constitution of India, if the twin limitations in grant of bail stipulated under Section 45(1) of PMLA would be applied even to those persons arrested under PMLA on accusation of commission of only such scheduled offences, which were listed under **Part B** of the Schedule omitted in 2013 but only for the limited purpose as specified in the “Statement of Objects and Reasons” in the Prevention of Money-Laundering(Amendment) Bill, 2011.

b) Whether as per the provisions of the Code of Criminal Procedure, 1973 read with the provisions of the PMLA and Rules made thereunder, a private individual can set the criminal law into motion by either seeking registration of case for investigation by the authority under PMLA or by directly approaching the jurisdictional Magistrate for issuance of directions for investigations to the

authority under PMLA, when there is neither any report of commission of any Scheduled offence sent under Section 157 of the Code to the Magistrate nor any complaint for taking cognizance of a Scheduled Offence by an officer authorized to investigate such Scheduled Offence.

22. The Writ Petition is accordingly dismissed with no cost.

**(M. JEYAPPAUL)
JUDGE**

**(RAJ MOHAN SINGH)
JUDGE**

May 11, 2016

p.singh