16.12.2022
Court No.42
Item-8

CRR/4363/2022

Anubrata Mondal@Kesto
-Vs-
The Directorate of Enforcement

For the petitioner: Mr. Kapil Sibal, Sr. Adv.,
Mr. S. Ganguly, Sr. Adv.,
Mr. Ankur Chawla, Adv.,
Mr. Mudit Jain, Adv.,
Mr. S. Chowdhury, Adv.,
Mr. Karan Dudhewala, Adv.,
Mr. Aparajita Jamwal, Adv.,
Mr. Shivam Tondon, Adv.,
Mr. D. Dan, Adv.

For the Directorate of Enforcement:
Mr. S.V Raju, Ld. A.S.G.,
Mr. Samrat Goswami, Adv.,
Mr. Ankit Bhaita, Adv.,
Mr. Harsh Paul Singh, Adv.,
Mr. Hitarth Raja, Adv.

The petitioner has invoked the jurisdiction of this Court under Article 227 of the Constitution of India read with Section 482 of the Code of Criminal Procedure praying for setting aside the order dated 11th November, 2022 passed by the learned Judge, Special (CBI) Court, Asansol, Paschim Burdwan in Special CBI Case No.1 of 2021 thereby allowing the Enforcement Directorate (E.D) to interrogate the petitioner in connection with a case instituted on complaint being numbered as ECIR/KLZO/41/2020 and all subsequent proceeding undertaken by the E.D in terms of the said order dated 11th November, 2022.

Mr. Kapil Sibal, learned Senior Counsel on behalf of the petitioner submits that the petitioner was arrested by CBI in connection with Special CBI case No.1 of 2021 and presently is in judicial custody. That on 11th

October, 2022 E.D through its Assistant Director filed a petition before the Special (CBI) Court at Asansol seeking permission to record statement of Anubrata Mondal, petitioner herein under the provision of Section 50 of the Prevention of Money Laundering Act, 2002 (hereafter described as PML Act for short).

It is pointed out by the learned Senior Counsel on behalf of the petitioner that the said Anubrata Mondal was depicted as an accused person in the petition filed by the E.D.

The learned Judge, Special (CBI) Court at Asansol vide order dated 11th November, 2022 permitted E.D to interrogate the "accused person" Anubrata Mondal at Asansol correctional home without violating the Fundamental Rights of the accused person and complying with necessary legal formalities.

Taking me to the aforesaid petition and the order dated 11th November, 2022 it is submitted by Mr. Sibal, learned Senior Counsel that from the cause title of the said petition it is clear that the E.D stated the status of the petitioner as an accused in ECIR/KLZO/41/2020 dated 25/09/2020. The learned Special Judge in the impugned order also described the petitioner as an accused in respect of the case instituted on complaint by the "E.D".

On such background, Mr. Sibal draws my attention to paragraph 431 of the decision of the Hon'ble Supreme Court in **Vijay Madanlal Chaudhary vs. Union of India** reported in **(2022) SCC OnLine SC 929**. Paragraph 431 of the **Vijay Madanlal Chaudhary** (supra) reads thus:-

> "**431.** In the context of the 2002 Act, it must be remembered that the summon is issued by the Authority under Section 50 in connection with the inquiry regarding proceeds of crime which may have been attached and pending adjudication

before the Adjudicating Authority. In respect of such action, the designated officials have been empowered to summon any person for collection of information and evidence to be presented before the Adjudicating Authority. It is not necessarily for initiating a prosecution against the noticee as such. The power entrusted to the designated officials under this Act, though couched as investigation in real sense, is to undertake inquiry to ascertain relevant facts to facilitate initiation of or pursuing with an action regarding proceeds of crime, if the situation so warrants and for being presented before the Adjudicating Authority. It is a different matter that the information and evidence so collated during the inquiry made, may disclose commission of offence of money-laundering and the involvement of the person, who has been summoned for making disclosures pursuant to the summons issued by the Authority. At this stage, there would be no formal document indicative of likelihood of involvement of such person as an accused of offence of money-laundering. If the statement made by him reveals the offence of money-laundering or the existence of proceeds of crime, that becomes actionable under the Act itself. To put it differently, at the stage of recording of statement for the purpose of inquiring into the relevant facts in connection with the property being proceeds of crime is, in that sense, not an investigation for prosecution as such; and in any case, there would be no formal accusation against the noticee. Such summons can be issued even to witnesses in the inquiry so conducted by the authorised officials. However, after further inquiry on the basis of other material and evidence, the involvement of such person (noticee) is revealed, the authorised officials can certainly proceed against him for his acts of commission or omission. In such a situation, at the stage of issue of summons, the person cannot claim protection under Article 20(3) of the Constitution. However, if his/her statement is recorded after a formal arrest by the ED official, the consequences of Article 20(3) or Section 25 of the Evidence Act may come into play to urge that the same being in the nature of confession, shall not be proved against him. Further, it would not preclude the prosecution from proceeding against such a person including for consequences under Section 63 of the 2002 Act on the basis of other tangible material to

> indicate the falsity of his claim. That would be a matter of rule of evidence."

It is urged by Mr. Sibal that Section 50(2) of the PML Act empowers the Director, Additional Director, Joint Director, Deputy Director or Assistant Director to summon any person whose attendance he considers necessary whether to give evidence or to produce any records during the course of any investigation or proceeding under this Act. Under the aforesaid provision, a person may be summoned to give evidence, not necessarily for initiating a prosecution against him. "If the statement made by him reveals the offence of money laundering or the existence of proceeds of crime, that becomes actionable under the Act itself." However, it is made absolutely clear in the concluding observations in paragraph 431 of the **Vijay Madanlal Chaudhary's** Case that if a statement of an accused is recorded, the consequences of Article 20(3) or Section 25 of the Evidence Act will come into play and such statement being in the nature of confession made by an accused shall not be proved against him.

It is further submitted that the learned Special Judge knowing fully well that the petitioner is an accused and in the judicial custody of the learned Special Judge, CBI Court at Asansol acting illegally and with material irregularity permitted the E.D to record the statement of the petitioner.

Alternatively, it is argued by Mr. Sibal, learned Senior Counsel on behalf of the petitioner that the E.D in its petition seeking permission to record statement of the petitioner under Section 50 of the PML Act described him as an accused. The impugned order dated 11th November, 2022 was passed mentioning the petitioner as an accused. At present E.D cannot say that he was not an accused on the date of recording the statement of the petitioner under PML Act.

Mr. S. V. Raju, learned Additional Solicitor General, on the other hand submits that the instant revision becomes infructuous because the petitioner has already been interrogated on being permitted by the Special Judge, CBI Court, Asansol vide order dated 11th November, 2022. It is also submitted that at the time of interrogation, the petitioner was not arrested in connection with the complaint case instituted by the E.D. After the interrogation, on the basis of his statement he was shown arrested in connection with the ECIR case under the PML Act. It is also submitted by Mr. Raju that the petitioner cannot take advantage of his description made by the E.D in its petition seeking permission for interrogation under Section 50 of the PML Act. A person may be wrongly described as an accused but he becomes an accused when formal acquisation is made against him. Formal acquisation against the petitioner stating his involvement in committing offence under the PML Act was made by the E.D subsequent to his recording statement under Section 50(2) of the PML Act.

It is further contended by the learned Additional Solicitor General that the revisional court has no jurisdiction to consider as to whether the petitioner made any self inculpatory statement or not. This Court has also no jurisdiction to consider as to whether the statement of the petitioner recorded by the E.D violates the provision of Section 25 of the Indian Evidence Act and/or Article 20(3) of the Constitution of India.

Coming to the territorial jurisdiction of the learned Special Judge, CBI Court at Asansol permitting the Assistant Director, E.D to record statement under

Section 50(2) of the PML Act it is submitted on behalf of the E.D the Section 50 does not postulate obtaining permission of a court before recording statement of any person by the authorized officer of the E.D. Since the petitioner was in judicial custody in connection with Special Case No.1 of 2021, E.D took permission of the learned Judge, CBI Court for recording statement of the petitioner. Therefore, impugned order is not bad in law. It is also submitted by the learned Additional Solicitor General that Section 460 of the Code of Criminal Procedure talks about irregularities which do not vitiate proceedings, whereas Section 461 speaks about irregularities which vitiate a criminal proceeding. In the present case the impugned order does not fall under Clauses (a)–(q) of Section 461 of the Code of Criminal Procedure.

Learned Additional Solicitor General next refers to a decision of the Hon'ble Supreme Court in **Fartico Marketing and Investment Pvt Ltd. & Ors Vs. Central Bureau of Investigation & Anr.** reported in **(2021) 2 SCC 525** and submits that the petitioner never pleaded in the instant application any case of prejudice or miscarriage of justice due to recording of his statement under Section 50(2) of the PML Act. In the above report it is held by the Hon'ble Supreme Court that illegality in investigation may have a bearing on the question of prejudice or miscarriage of justice, but the invalidity of the investigation has no relation to the competence of the court.

In the present case, there are no pleadings by the petitioner with regard to the prejudice caused to him on account of the steps taken by the E.D before, in course and after recording the statement of the petitioner under Section 50(2) of the PML Act. At this stage when the statement has been recorded and on the basis of the said statement, the accused was arrested in connection with the case under PML Act, petitioner's application praying for setting aside of the order dated 11th November, 2022 cannot render any fruit as the impugned order has already been carried out.

Last but not the least Mr. Raju, learned Additional Solicitor General has urged that the impugned order is purely interlocutory in nature and is not revisable. Hence the instant revision being devoid of any merit, he invites the court to dismiss the same summarily.

In reply, Mr. Sibal refers to Section 19 of the PML Act. The said provision runs thus:-

> *"**19. Power to arrest.—*** (1) *If the Director, Deputy Director, Assistant Director, or any other officer authorised in this behalf by the Central Government by general or special order, has on the basis of material in his possession reason to believe (the reason for such belief to be recorded in writing) that any person has been guilty of an offence punishable under this Act, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.*
>
> (2) *The Director, Deputy Director, Assistant Director or any other officer shall, immediately after arrest of such person under sub-section (1), forward a copy of the order, along with the material in his possession, referred to in that sub-section, to the Adjudicating Authority, in a sealed envelope, in the manner, as may be prescribed and such Adjudicating Authority shall keep such order and material for such period, as may be prescribed.*
>
> (3) *Every person arrested under sub-section (1) shall within twenty-four hours, be taken to a Judicial Magistrate or a Metropolitan Magistrate, as the case may be, having jurisdiction: Provided that the period of twenty-four hours shall exclude the time necessary for the journey from the place of arrest to the Magistrate's Court."*

It is submitted by Mr. Sibal that the competent officer authorized by the Central Government is empowered to arrest a person only on the basis of material in his possession when he has reason to believe, which is to be recorded in writing, that any person sought to be arrested has been guilty of offence punishable under the PML Act. Thus, under the PML Act a person cannot be arrested only on the basis of a reasonable complaint, or credible information or a reasonable suspicion of having committed a cognizable offence as provided in Section 41(b) of the Code of Criminal Procedure. There must be a subjective satisfaction of the arresting officer that the person has been guilty of an offence punishable under the PML Act. It is further submitted by him that since the PML Act contains provisions of self incrimination and presumption of guilt, it is the duty of the Constitutional Court to ensure personal liberty of the citizens.

Mr. Sibal reiterates his submission that E.D cannot deny the status of the petition as an accused on the date of filing of the petition seeking permission to record the statement of the petitioner. It is submitted by him that to be an accused formal arrest of a person is not the test. In support of his contention he refers to a Three Judges' Bench decision of the Hon'ble Supreme Court in **Selvi & ors vs. State of Karnataka** reported in **(2010) 7 SCC 263** . Paragraph 120-122 is of the aforesaid report is pressed upon by the learned Senior Counsel on behalf of the petitioner and the same is reproduced below:-

> "***Who can invoke the protection of Article 20(3)?***
>
> ***120.*** *The decision in Nandini Satpathy case [(1978) 2 SCC 424 p: 1978 SCC (Cri) 236] also touched on the question of who is an "accused" for the purpose of invoking Article 20(3). This question had been left open in M.P.*

Sharma case [AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077] . Subsequently, it was addressed in Kathi Kalu Oghad [AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10] at SCR p. 37: (AIR p. 1817, para 16)

"16. (7) To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made."

121. *While there is a requirement of formal accusation for a person to invoke Article 20(3) it must be noted that the protection contemplated by Section 161(2) CrPC is wider. Section 161(2) read with 161(1) protects "any person supposed to be acquainted with the facts and circumstances of the case" in the course of examination by the police. The language of this provision is as follows:*

"161. Examination of witnesses by police.—(1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records."

122. *Therefore the "right against self-incrimination" protects persons who have been formally accused as well as those who are examined* *as suspects in criminal cases. It also extends to cover witnesses who apprehend that their answers could expose them to criminal charges in the ongoing investigation or even in cases other than the one being investigated. Krishna Iyer, J. clarified this position: (Nandini Satpathy case [(1978) 2 SCC 424 : 1978 SCC (Cri) 236] , SCC p. 435, para 21)*

> *"21. … The learned Advocate General, influenced by American decisions rightly agreed that in expression Section 161(2) of the Code might cover not merely accusations already registered in police stations but those which are likely to be the basis for exposing a person to a criminal charge. Indeed, this wider construction, if applicable to Article 20(3), approximates the constitutional clause to the explicit statement of the prohibition in Section 161(2). This latter provision meaningfully uses the expression 'expose himself to a criminal charge'. Obviously, these words mean, not only cases where the person is already exposed to a criminal charge but also instances which will imminently expose him to criminal charges."*

It was further observed: (SCC pp. 451-52, para 50)

> *"50. … 'To be witness against oneself' is not confined to particular offence regarding which the questioning is made but extends to other offences about which the accused has reasonable apprehension of implication from his answer. This conclusion also flows from 'tendency to be exposed to a criminal charge'. A 'criminal charge' covers any criminal charge then under investigation or trial or which imminently threatens the accused."*

Thus, it is submitted by Mr. Sibal that it is immaterial as to whether any person is arrested or not. To be an accused formal arrest is immaterial. "Right against self-incrimination" protects persons who have been formally accused as well as those who are examined as suspects in criminal cases.

In the instant case even if the petitioner's statement is recorded as a suspect such statement cannot be acted upon in view of Section 25 of the Indian Evidence Act and Article 20(3) of the Constitution of India. On the same issue he also refers to another Five Judges Bench decision of the Hon'ble Supreme Court in **Ramanlal Bhogilal Shah & Anr. vs. D.K. Guha & Ors.** reported in **(1973) 1 SCC 696**.

Indisputably petitioner was arrested in connection with CBI case No.1 of 2021 on 11th August, 2022 and is currently in judicial custody. In the said case CBI has filed final report in the form of charge-sheet before the learned Judge, Special (CBI) Court, Asansol on 6th October, 2022 under Section 120(b) of the IPC read with Sections 7/11/12 of the Prevention of Corruption Act.

On the other hand E.D registered ECIR No. KLZO/41/2020 on the basis of the predicate offence under the Prevention of Corruption Act. Subsequently, E.D filed Complaint Case No.13 of 2022 before the learned Special Judge, Rouse Avenue, New Delhi against some other persons. As the petitioner was in judicial custody in the above mentioned CBI Case, an Assistant Director, E.D filed an application on 11th November, 2022 before the learned Judge, Special (CBI) Court, Asansol under Section 50 of the PML Act seeking permission to record statement of the petitioner. The said application was allowed by the learned Special Judge on the very date of filing of the application. On being permitted, E.D interrogated and recorded the statement of the petitioner on 17th November, 2022 and after recording his statement, he was formally arrested.

It is contended on behalf of the petitioner that before recording his statement, Anubrata Mondal was made an accused in the above mentioned ECIR case. Basis of such submission is undoubtedly the petition filed by the ED describing the petitioner as an accused in the said petition for seeking permission to record the statement of the petitioner filed before the learned Special Judge, CBI Court. E.D made reference of ECIR No.KLZO/41/2020 and the learned Special Judge in his order dated 11th November, 2022 described the petitioner as accused.

I am in agreement that the learned Senior Counsel on behalf of the petitioner that formal arrest of a person cannot be said to be a determining test to consider as to whether a person is an accused or not. The essential requirement for being an accused is formal acquisation against him. If there is a formal acquisation against a person, he is protected against any atrocious act by the investigating authority compelling him to make self incriminating statement. In the instant case there is no allegation that there was formal acquisation against the petitioner for committing offence under the penal provisions of PML Act.

It is pertinent to state that Section 44(b) empowers a Special Court to take cognizance of offence under Section 3 of the PML Act upon a complaint made by an authority authorized in this behalf. When a case is registered upon a complaint and the special court is empowered to take cognizance on the basis of such complaint, filing of complaint is to be treated as formal acquisition of offence under the PML Act made against an accused. In the instant case the E.D has not filed any complaint against the petitioner as yet. Therefore, as on this date there is no formal acquisation against the petitioner. Therefore, statement recorded under Section 50 of the PML Act by the authorized officer of the E.D on 17th November, 2022 cannot be said to be hit by Article 20(3) of the Constitution of India.

I have already held that a person can be treated as an accused only when a formal acquisation is made against him. In **M.P Sharma & Ors. vs. Satish Chandra & Ors.** reported in **AIR 1954 SC 300**, the Hon'ble Supreme Court was pleased to hold that the protection under Article 20(3) of the Constitution of India is available only when FIR is registered or recorded against the petitioner. Similarly in a complaint case a person is treated as an accused when the court take cognizance of offence against any person and issue process against him.

In **Dalmia Cement (Bharat) Ltd. & Anr. Vs. Assistant Director of E.D** reported in **(2016) SCC OnLine Hyd. 64,** it is held that summons under Section 50 of the PML Act is not violative of Article 20(3) of the Constitution, if no formal acquisation is made when summons to give evidence is issued by the competent authority under Section 50 of the PML Act.

It is trite that Section 50 is in the statute book only for the purposes of collecting evidence and thereafter if in the opinion of the competent authority a person is found to be guilty, then only complaint will be filed and he shall be treated as an accused.

In **R.C Mehta vs. State of West Bengal** reported in **AIR 1970 SC 940** it is held that normally a person would only stamped in the character of an accused when an FIR is lodged against him or a complaint is filed against that person before a Magistrate (or a Special Judge).

On careful perusal of the petition dated 11th November, 2022 filed by the Assistant Director of E.D it is ascertained that the petitioner was described as an accused before the learned Judge in CBI case. The averment made in the petition, especially in paragraph 6 and 7 do not suggest that the petitioner was made an accused by the ED in respect of ECIR/KLZO/41/2020.

In view of the above discussion, this Court comes to an irresistible conclusion that the petitioner is not entitled to get protection on the basis of observation made by the Hon'ble Supreme Court in paragraph 431 of the **Vijay Madanlal Chaudhary** (supra).

Thus, I do not find any reason to admit the instant revision and the same is summarily dismissed.

(Bibek Chaudhuri, J.)