

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 1453 of 2020

With

CRAN 1 of 2020

Enforcement Directorate through Dr. Rathin Biswas,

Assistant Director (PMLA)

Vs

Sri Raj Gopal Kankani.

**For the Enforcement Directorate
/Petitioner**

: Mr. Viupul Kundalia,
Mr. Anurag Roy,
Ms. Uneaza Ali.

For the Opposite Party

: None.

Hearing concluded on

: 16.01.2024

Judgment on

: 12.02.2024

Shampa Dutt (Paul), J.:

1. The present revision has been preferred by the Enforcement Directorate challenging the order dated 03.10.2019 passed by the Spl Judge (C.B.I.) Court No. 3, Calcutta and Spl Judge PMLA Calcutta in ML Case no. 02 of 2017 discharging the accused Sri Raj Gopal Kankani from the case upon allowing the petition under Section 227 of the Code of the Criminal Procedure, 1973.

FACTS:-

2. The petitioner's case is that a Telephonic information was received by the Accounts Section of Tinsukia Division of N.F Railway in early January 2009 that one MICR Cheque bearing No. 100008 of Reserve Bank of India, Kolkata pertaining to Divisional Accounts Officer, Tinsukia was required to be cleared and advise was solicited in this regard whether the Bank Branch can clear the cheque amounting to Rs. 12,28,750/- in favour of one Rantu Sharmah through his account in SBI, Dispur Branch. On checking it was found that no such cheque had been issued by the Accounts Section. On further checking it was found that a fraud had been committed and the Railway Authority immediately advised Reserve Bank of India to stop payment of all cheques bearing numbers from 100001 to 100050.
3. A complaint No Z/vig/Estt/2009 dated 13.01.2009 was lodged by the Chief Vigilance officer, N.F Railways, Maligaon and on that basis the

Central Bureau of Investigation, ACO, Guwahati registered a case vide FIR No. 0172009A001 dated 20.01.2009 against 6 (Six) accused persons including the opposite party **under Sections 120B, 409, 467, 471 of IPC and Section 13(2) read with 13(1)(c) & (d) of Prevention of Corruption Act 1988** for fraudulent encashment of Railway cheques against the accused persons.

4. The C.B.I., ACB, Guwahati submitted Charge sheet No. RC 0172009 A0001 (RC-1 (A) 2009- GWH) dt 25.09.2010 before the Ld. Court of 3rd Spl Judge (CBI), Bankshall, Kolkata on 25.09.2010 and **forwarded a copy of the charge sheet issued against the accused persons to the Assistant Director, Directorate of Enforcement, Sub-Zonal Office, Guwahati vide letter dated 07.02.2011.**
5. **An investigation was then launched** under the Prevention of Money Laundering Act by the Guwahati Sub-Zonal office of the Enforcement Directorate and an Enforcement Case Information Report (ECIR) bearing no. ECIR/03/2009/GAU/PMLA considering the fact that **the offences under Sections 120B, 420, 467, 471 of the Indian Penal Code and Section 13 of the Prevention of Corruption Act 1988 are scheduled offence as mentioned in section 2(1)(Y) of the Prevention of Money Laundering Act 2002 (as amended).** Since the charge sheet was filed before the Ld Court at Calcutta, the case was transferred to the Kolkata Zonal Office and a fresh ECIR bearing No. ECIR/05/KOL/PMLA dated 23.05.2011 was registered.

- 6.** It is stated by the petitioner that upon scrutiny of various available records, documents, including the charge sheet filed by the C.B.I. and the statements of various persons as above, it transpired that Sri K.L. Roy (Accused No. 4 of M.L Case No. 2 of 2017) in connivance with other associate persons dishonestly and fraudulently took out original R.B.I (MICR) cheque leaves from unused stock of Cheque Book consisting serial no. 100001-100050, from N.F Railway, Tinsukia Division, forged the cheques and had fraudulently withdrawn a total amount of Rs.1,32.82.341/- (Rupees One Crore Thirty Two Lacs Eighty Two Thousand Three Hundred Forty One) only through the accounts maintained by the accused persons of the said M.L Case No. 2 of 2017 at different Banks in Kolkata and ultimately the money was laundered for their personal benefits.
- 7.** It is submitted that K.L.Roy and other six accused persons, viz Sri Deepak Marda, Raj Gopal Kankani, Biswanath Saha, Putul Gogoi, Md Tazuddin Ahmed and Baharuddin Ahmed allegedly committed offences under Sections 420, 467, 471, 120B of the Indian Penal Code and Section 13 of Prevention of Corruption Act and acquired proceeds of crime. That Sri K.L Roy in collusion with other associated accused laundered the proceed of crime by investing the same in different properties and diverting those to unknown places.
- 8.** The Assistant Director, Directorate of Enforcement, Kolkata filed complaint u/s 45 of the before the Spl Court under the PMLA against 7

(Seven) accused persons namely Sri K.L Roy, Sri Deepak Marda, Sri Raj Gopal kankani, Sri Putul Gogoi, Sri Biswajit Saha, Md Tazimuddin Ahmed and Md Baharuddin Ahmed highlighting the role of each and all of them in committing the offence under the Prevention of Money Laundering Act. The Ld. Spl Court took cognizance of the offences alleged in the said complaint.

9. While the prosecution was in progress, the opposite party filed an application before the Ld. Spl Court under Section 239 of the Code of Criminal Procedure praying for discharge of the accused.
10. The Enforcement Directorate filed written objection against the discharge application stating the reasons therein.
11. **The Ld Special (C.B.I.) Court No. 3 being the Spl Court PMLA, Calcutta while passing the impugned Order dated 03.10.2019 has observed that:-**

*“..... in so far allegation against Raj Gopal Kankani is concerned, I find that it is the admission of the prosecution that he has been made **approver in the CBI case**. No doubt that CBI case is the base point of the present case when in the original case from which the present case has been initiated and where the accused Raj Gopal Kankani has been made approver in the earlier case, rather when the prosecuting agency took help of the present accused to prove the CBI case, the E.D. should not implicate him as an accused of the present case.....”*

12. The Ld. Special Court relying upon **G.K Ralhan -Vs- State of Delhi**, as well as **State of Delhi -Vs- Jagjit Sing** has observed that:-

*When the accused Raj Gopal Kankani has been made approver in CBI Case by the prosecuting agency and **the present case has been initiated from the charge***

sheet of CBI case and as the present case is a Complaint under Section 45 of the PMLA Act, the accused Sri Raj Gopal Kankani should not be made an accused basing on his statement so recorded by E.D. on 13.08.2013. An approver can be the helper of the prosecution case for the trial and if that be so as in the C.B.I. case, if the accused Raj Gopal Kankani be made witness of the PMLA case, it should be more beneficial for the E.D.

13. The Court was then pleased to discharge the opposite party.

- 14.** It is submitted by the petitioner that the Ld. Spl Court while passing the impugned order failed to consider that the two proceedings were independent of each other and dependent on two separate enquiry and complaint under two separate offence having separate effects and it has no binding with other proceedings.
- 15.** It is further stated that the Ld. Spl Court while passing the impugned order paid no heed to the facts and findings of the investigation, wherefrom the delinquent intent of the accused is proven to be crystalline.
- 16.** That the Ld. Spl Court while pronouncing the impugned order failed to consider that it is not a fact that the accused has been implicated in the case on the basis of suspicion. The petitioner in prosecution complaint clearly disclosed that Sri Raj Gopal Kankani received a cheque of Rs.9,82,675/- from Sri Putul Gogoi (Accused No.4) sometime in December 2008 at his Gauhati residence.
- 17.** The said cheque was endorsed in favour of M/S Sri Salasar Engineering Enterprises, in which Sri Deepak Marda (accused No.2) was the proprietor. Sri Kankani got the assurance from accused no. 4 for 10%

commission for fraudulent encashment of the said cheque without supply of materials. As such offence u/s 3 of the Prevention of Money Laundering Act and punishable u/s 4 of the said Act is clearly made out.

- 18.** The Ld. Spl Court also failed to appreciate that in course of investigation it came to light that the proceeds of crime had been handled and converted to their use by the accused by encashment of the cheques fraudulently as referred above.
- 19.** The Ld. Spl Court also failed to notice, that Sri Raj Gopal Kankani received and deposited a cheque bearing no. 100002 dated 27.10.2008 of Rs. 9, 82, 675 in IDBI Brabourne Road Branch in the name of Sri Salasar Engineering Enterprise without any Railway purchase order and without supply of any materials against the said cheque and the amount of the Cheque was withdrawn by him through cheque no. 612795 (Rs.5,00,000) and Cheque No. 612796 (Rs. 4,80,000) on 30.10.2008.
- 20.** The Spl Court also failed to consider that the accused was being investigated pursuant to filing of ECIR/05/kol/PMLA/2011 dated 23.05.2011 by the E.D. against all 7 (Seven) accused including Sri Raj Gopal Kankani and the Ld Court has taken cognizance against each and all accused persons and as such, all accused persons ought to be tried under the PMLA. Mere declaration of becoming an approver in CBI cases does not indicate that of he should make such true disclosure of facts which would be helpful for prosecution in E.D. case.

- 21.** That Sri Kankani admitted his fraudulent act of encashment of Railway Cheques in his statement under Sections 50 of PMLA before the Assistant Director, Enforcement Directorate on 13.08.2013.

FINDINGS:-

22. Section 3 of PMLA enumerates that:-

"whosoever directly or indirectly attempts to indulge or knowingly assist or knowingly is a party or is actually involve in any process of activity connected (Proceeds of Crime including concealment, possession, acquisition, or use or projecting or claiming) untainted property shall be guilty of an offence under money laundering."

Section 4 of PMLA specified that "whoever commit 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 extended for seven years (substituted to 10 years) and also be liable to fine".

- 23. Supplementary affidavit** has been filed by the petitioner along with a copy of the FIR dated 20.01.2009 and charge sheet dated 25.09.2010 in the CBI case.

- 24.** In spite of due service there is no representation on behalf of the opposite party.

- 25. From the order under challenge passed by the learned Trial Judge, it appears:-**

- i) That the opposite party's (herein) case **before the Trial Court** was that he has been falsely implicated in the instant case on the basis of suspicion. On the basis of suspicion no charge could be framed. During investigation if no prima facie material against the accused

persons be found, no charge should be framed against any person.

In the instant case (PMLA) there is an allegation against the accused that he is involved in the laundering of money and he was involved in the proceeds of crime as it has been depicted from the charge sheet submitted by the CBI where the present petitioner has been made a witness. That the instant case has

been filed by the E.D on the basis of the charge sheet in the CBI case and the prosecuting agency did not make any endeavor to apprise the Ld. Court with the fact that **the accused/petitioner**

has been given pardon in CBI case and that he has been made approver. In ***G.K. Ralhan -Vs- State, 1984 Cr.L.J page 1538,***

the Hon'ble High Court has held that the subject matter being same, recipient in pardon in police report case can be treated as

approver in complaint case. Since the present case is a complaint case made u/s 45 of PMLA Act, in view of the judgment, the accused should not be implicated in this case since he is assisting the CBI, the case from which the present case has been developed.

So the accused prayed for discharge from the present case on the said ground.

- ii) The petitioner's (herein) case in their objection against the said prayer for discharge was that both the accused persons were highly involved in the offence of laundering money and that they

were actively involved in the process of fraudulent encashment of cheque which was lost from the custody of accused K.L.Roy.

iii) **The Trial Judge held:-**

“..... In so far the allegation against Raj Gopal Kankani is concerned I find that it is the admission of the prosecution that he has been made approver in the CBI case. No doubt the CBI case is the base point of the proceeding of the present case. When in the original case from which the present case has been initiated and where the accused Raj Gopal Kankani has been made approver of the earlier case rather when the prosecuting agency took help the present accused to prove the CBI case, the E.D should not implicate him as an accused of the present case. Going through the reported case G.K. Ralhan -Vs- State of Delhi, 1984 Cr.L.J page 1538 as well as State of Delhi -Vs-Jagjit Singh, AIR 1989 SC page 598 I find that the Hon'ble Court has opined that the subject matter of two proceeding one the Police Case and another the complaint case being the same, recipient of pardon in Police report case can be treated as approver in a complaint case. If that be the position when the accused Raj Gopal Kankani has been made approver in CBI case by the prosecuting agency and the present case has been initiated from the charge sheet of CBI case and the present case is a complaint case u/s 45 of PML Act, the accused Raj Gopal Kankani should not be made an accused basing on his statement so recorded by the E.D on 13.8.2013. An approver can be the helper of the prosecution case for the trial and if that be so likewise the CBI case if the accused Raj Gopal Kankani be made the witness of the PML Case, it should be more beneficial for the E.D.

Considering all these aspects I think that the accused Raj Gopal Kankani should not be made an accused for the present case rather he should be cited as a witness in the present case. If that be so whatever prayer made by the accused Raj Gopal Kankani for discharge which is very much pertinent for the present case and his prayer should be allowed.....”

26. Learned counsel for the petitioner has relied upon Section 2(u) of the Prevention of Money laundering Act, 2002 which defines,

“Proceeds of crime”:-

“Section 2(u):- *"proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property [or where such property is taken or held outside the country, then the property equivalent in value held within the country] [or abroad];*

[Explanation.- For the removal of doubts, it is hereby clarified that "proceeds of crime" including property not only derived or obtained from the scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence;].”

27. The judgment of the Supreme Court in *Vijay Madanlal Choudhary & Ors. vs Union of India & Ors.*, (2022 SCC OnLine SC 929), on July 27, 2022, has been relied upon by the petitioner (Para 269, 467(v)(d)):-

“269. *From the bare language of Section 3 of the 2002 Act, it is amply clear that the offence of money-laundering is an independent offence regarding the process or activity connected with the proceeds of crime which had been derived or obtained as a result of criminal activity relating to or in relation to a scheduled offence. The process or activity can be in any form — be it one of concealment, possession, acquisition, use of proceeds of crime as much as projecting it as untainted property or claiming it to be so. Thus, involvement in any one of such process or activity connected with the proceeds of crime would constitute offence of money-laundering. This offence otherwise has nothing to do with the criminal activity relating to a scheduled offence — **except the proceeds of crime derived or obtained as a result of that crime.***

467. *In light of the above analysis, we now proceed to summarise our conclusion on seminal points in issue in the following terms:—*

(v) (a)

(b)

(c)

(d) The offence under Section 3 of the 2002 Act is dependent on illegal gain of property as a result of criminal activity relating to a scheduled offence. It is concerning the process or activity connected with such property, which constitutes the offence of money-laundering. *The Authorities under the 2002 Act cannot prosecute any person on notional basis or on the assumption that a scheduled offence has been committed, unless it is so registered with the jurisdictional police and/or pending enquiry/trial including by way of criminal complaint before the competent forum. If the person is finally discharged/acquitted of the scheduled offence or the criminal case against him is quashed by the Court of competent jurisdiction, there can be no offence of money-laundering against him or any one claiming such property being the property linked to stated scheduled offence through him.”*

28. Section 306 of Cr.P.C., lays down:-

“306. Tender of pardon to accomplice:- (1) *With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the first class inquiring into or trying the offence, at any stage of the inquiry or trial, may tender a pardon to such person on condition of his making full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.*

(2) This section applies to –

(a) any offence triable exclusively by the Court of Session or by the Court of a Special Judge appointed under the Criminal Law Amendment Act, 1952 (46 of 1952);

(b) any offence punishable with imprisonment which may extend to seven years or with a more severe sentence.

(3) Every Magistrate who tenders a pardon under sub-section (1) shall record –

(a) his reasons for so doing;

(b) whether the tender was or was not accepted by the person to whom it was made, and shall, on application made by the accused, furnish him with a copy of such record free of cost.

(4) Every person accepting a tender of pardon made under sub-section (1)–

(a) shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any;

(b) shall, unless he is already on bail, be detained in custody until the termination of the trial.

(5) Where a person has accepted a tender of pardon made under sub-section (1) and has been examined under sub-section (4), the Magistrate taking cognizance of the offence shall, without making any further inquiry in the case, -

(a) commit it for trial –

(i) to the Court of Session if the offence is triable exclusively by that Court or if the Magistrate taking cognizance is the Chief Judicial Magistrate;

(ii) to a Court of Special Judge appointed under the Criminal Law Amendment Act, 1952 (46 of 1952), if the offence is triable exclusively by that Court;

(b) in any other case, make over the case to the Chief Judicial Magistrate who shall try the case himself.”

29. The case herein is pending before the learned Special Judge.

30. Section 132 of the Evidence Act, lays down:-

“132. Witness not excused from answering on ground that answer will criminate.- A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind:

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or

prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.”

31. In ***R. Dineshkumar @ Deena vs State Rep. by Inspector of Police & Ors., in Criminal Appeal No. 454 of 2015 (arising out of SLP (Criminal) No. 9928 of 2014)***, on 16 March, 2015, the Supreme Court held:-

“55. In the light of the above two decisions, the proposition whether the prosecution has a liberty to examine any person as a witness in a criminal prosecution notwithstanding that there is some material available to the prosecuting agency to indicate that such a person is also involved in the commission of the crime for which the other accused are being tried requires a deeper examination.

56. Unfortunately before us, except asserting the proposition no clear submissions are made in this regard. In the circumstances, we do not propose to examine the proposition in the present case. However, in view of the fact Section 307 Cr.P.C. authorizes even a Court conducting trial to tender pardon to such a person, we believe that the ends of justice in this case would be met by directing the trial Court to grant pardon in favour of PW64 after following the appropriate procedure of law and record his evidence afresh.”

32. Relying upon Para 269 of the judgment in ***Vijay Madanlal Choudhary & Ors. vs Union of India & Ors. (Supra)***, it has been submitted by the learned counsel for the petitioner that, Section 3 of the 2002 Act of PLMA is makes it clear that the offence of money-laundering is an independent offence regarding the process or activity connected with the proceeds of

crime which had been derived or obtained as a result of criminal activity relating to or in relation to a scheduled offence.

*“269. From the bare language of Section 3 of the 2002 Act, it is amply clear that the offence of money-laundering is an independent offence regarding the process or activity connected with the proceeds of crime which had been derived or obtained as a result of criminal activity relating to or in relation to a scheduled offence. The process or activity can be in any form — be it one of concealment, possession, acquisition, use of proceeds of crime as much as projecting it as untainted property or claiming it to be so. **Thus, involvement in any one of such process or activity connected with the proceeds of crime would constitute offence of money-laundering. This offence otherwise has nothing to do with the criminal activity relating to a scheduled offence — except the proceeds of crime derived or obtained as a result of that crime.**”*

33. It is further submitted that on plain reading it appears that the view of the Court is that an offence under Section 3 of the Act is only in respect of the proceeds of crime derived or obtained as a result of that crime and **has nothing to do with** the criminal activity relating to a scheduled offence.

34. Paragraph 467(v)(d) in **Vijay Madanlal Choudhary & Ors. vs Union of India & Ors. (Supra)** relied upon by the petitioner is **very relevant:-**

“467. In light of the above analysis, we now proceed to summarise our conclusion on seminal points in issue in the following terms:—

(v) (a)

(b)

(c)

(d) The offence under Section 3 of the 2002 Act is dependent on illegal gain of property as a result of

criminal activity relating to a scheduled offence. It is concerning the process or activity connected with such property, which constitutes the offence of money-laundering. The Authorities under the 2002 Act cannot prosecute any person on notional basis or on the assumption that a scheduled offence has been committed, unless it is so registered with the jurisdictional police and/or pending enquiry/trial including by way of criminal complaint before the competent forum. If the person is finally discharged/acquitted of the scheduled offence or the criminal case against him is quashed by the Court of competent jurisdiction, there can be no offence of money-laundering against him or any one claiming such property being the property linked to stated scheduled offence through him.”

- 35. It is thus clear that an offence under Section 3 of the PMLA 2002 Act is dependent on the process or activity in a scheduled offence, and thus directly connected.**
- 36. Though the proceeds of crime may be an independent offence, the total case under Section 3 of the PLMA Act rests on the case registered in respect of a scheduled offence in which the opposite party turned approver. If the case for a scheduled offence fails, the case under PLMA Act also fails, as the case under PLMA Act has been prima facie made out of the materials and evidence on record in the case in respect of a scheduled offence (herein registered by the CBI).**
- 37. Admittedly in this case, the opposite party, an accused in the case registered by CBI turned an approver thus helping the prosecution prove the case related to a scheduled offence. It was on his evidence as a witness for the prosecution that helped the CBI in the case registered for**

a scheduled offence and it is from this evidence that the case under PLMA Act has been registered against the accused, which is totally dependent on the materials and evidence in the case registered by CBI in respect of the scheduled offences and which has been provided by the opposite party herein as approver. **Without the evidence provided by the opposite party as an approver, the case under PLMA would have not been made out and thus the opposite party is entitled to the relief provided under the law to an approver, not only in the case registered in respect of a scheduled offence but also in respect of all cases which are dependent on the materials and evidence in the case registered in respect of a scheduled offence, in which the accused has turned approver.**

38. The opposite party also gets the benefit of Section 132 Evidence Act on turning an approver.

39. In *R. Dineshkumar @ Deena vs State Rep. by Inspector of Police & Ors. (Supra)*, the Court further held:-

“31. The High Court on an elaborate consideration of the various authorities and the legal position came to the conclusion;

"63. In view of all the above discussions, I hold that the evidence of the 2nd respondent, as a prosecution witness before the trial court, and the incriminating answers given by him amount to compelled testimony falling within the sweep of Section 132 of the Evidence Act and thus, he is protected by the proviso to Section 132 of the Evidence Act."

(emphasis supplied)

32. *The learned counsel for the appellant argued that PW64 is not entitled to the benefit of the immunity provided under the proviso to Section 132 of the Evidence Act as such evidence of PW64 is evidence voluntarily given by him before the Court and not evidence which PW64 was "compelled to give". The learned counsel submitted that having regard to the language of the proviso, it is only those answers (whose content is incriminatory) which a witness is compelled to give that cannot be proved against such witness in any criminal proceeding. But, if such incriminatory statements are made by a witness at the trial of a civil or criminal proceeding voluntarily without there being any compulsion, then the protection under the proviso to Section 132 is not available to such a person. The learned counsel placed heavy reliance on a decision in the case of *The Queen v. Gopal Doss & Another*, ILR 3 Mad. 271 and other judgments of the various High Courts which either followed or are in tune with *Gopal Doss* (supra) in support of his submission.*

33. *The scope of Section 132 of the Evidence Act fell for the consideration of Madras High Court as early as in 1881 in the case of *Gopal Doss*.*

39. *The scope of Section 132 of the Evidence Act fell for consideration of this Court in *Laxmipat Choraria & Others v. State of Maharashtra*, (1968) 2 SCR 624. Three appellants (brothers) were convicted for the offence under Section 120-B of the Indian Penal Code and Section 167(81) of the Sea Customs Act, 1878. Briefly stated the facts are that the three appellants before this Court were part of an international gold smuggling organization. The kingpin of the organization was a Chinese citizen living in Hong Kong. One Ethyl Wong, an Air Hostess of Air India was also a member of the abovementioned organization and carried gold on "several occasions". She was examined as a prosecution witness in the case. "She gave a graphic account of the conspiracy and the parts played by the accused and her own share in the transaction. Her testimony was clearly that of an accomplice."*

40. *Before this Court, the main argument was that "Ethyl Wong could not be examined as a witness because (a) no oath could be administered to her as she was an accused person since Section 5 of the Indian Oaths Act bars such a course and (b) it was the duty of the prosecution and/or the Magistrate to have tried Ethyl Wong jointly with the appellants. The breach of the last obligation vitiated the trial and the action was discriminatory. In the alternative, even if the trial was not vitiated as a whole, Ethyl Wong's testimony must be excluded from consideration and the appeal reheard on facts here or in the High Court".*

41. *Dealing with the question whether Ethyl Wong should have been prosecuted along with other accused, this Court opined:*

"The prosecution was not bound to prosecute her, if they thought that her evidence was necessary to break a smugglers' ring. Ethyl Wong was protected by s. 132 (proviso) of the Indian Evidence Act even if she gave evidence incriminating herself. She was a competent witness...."

42. *Dealing with the immunity conferred under Section 132, this Court held thus:*

*"Now there can be no doubt that Ethyl Wong was a competent witness. Under Section 118 of the Indian Evidence Act all persons are competent to testify unless the court considers that they are prevented from understanding the questions put to them for reasons indicated in that section. Under Section 132 a witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any criminal proceeding (among others) upon the ground that the answer to such question will incriminate or may tend directly or indirectly to expose him to a penalty or forfeiture of any kind. **The safeguard to this compulsion is that no such answer which the witness is compelled to give exposes him to any arrest or prosecution or can it be proved against him in any criminal proceeding except a prosecution for giving false evidence by such answer.** In other words, if the customs authorities treated Ethyl Wong as a witness and produced her in court, Ethyl Wong was bound to answer all questions and*

could not be prosecuted for her answers. Mr. Jethmalani's argument that the Magistrate should have promptly put her in the dock because of her incriminating answers overlooks Section 132 (proviso). In India the privilege of refusing to answer has been removed so that temptation to tell a lie may be avoided but it was necessary to give this protection. **The protection is further fortified by Article 20(3) which says that no person accused of any offence shall be compelled to be a witness against himself. This article protects a person who is accused of an offence and not those questioned as witnesses.** A person who voluntarily answer questions from the witness box waives the privilege which is against being compelled to be a witness against himself, because he is then not a witness against himself but against others. Section 132 of the Indian Evidence Act sufficiently protects him since his testimony does not go against himself. In this respect the witness is in no worse position than the accused who volunteers to give evidence on his own behalf or on behalf of a co-accused. There too the accused waives the privilege conferred on him by the article since he is subjected to cross-examination and may be asked questions incriminating him."

[emphasis supplied]

43. In substance, this Court held that once the prosecution chose to examine Ethyl Wong as a witness she was bound to answer every question put to her. In the process, if the answers given by Ethyl Wong are self-incriminatory apart from being evidence of the guilt of the others she could not be prosecuted on the basis of her deposition in view of the proviso to Section 132 of the Evidence Act. This Court's conclusions that "in India the privilege of refusing to answer has been removed" and that "the safeguard to this compulsion" in our opinion, are clearly in tune with the dissenting opinion expressed by Ayyar, J. in Gopal Doss's case. **This Court opined that the proviso to Section 132 of the Evidence Act is a necessary corollary to the principle enshrined under Article 20(3) of the Constitution of India which confers a fundamental right that "no person accused of any offence shall be compelled to be a witness against himself." Though such a fundamental right is available only**

to a person who is an accused of an offence, the proviso to Section 132 of the Evidence Act creates a statutory immunity in favour of a witness who in the process of giving evidence in any suit or in any civil or criminal proceeding makes a statement which criminales himself. Without such an immunity, a witness who is giving evidence before a Court to enable the Court to reach a just conclusion (and thus assisting the process of law) would be in a worse position than an accused in a criminal case.

44. The sweep of Article 20 fell for consideration of this Court in *Nandini Satpathy v. P.L. Dani & Another*, (1978) 2 SCC 424. Justice V.R. Krishna Iyer spoke for the bench.

(i) It was a case where a crime under the Prevention of Corruption Act and certain other offences under the Indian Penal Code came to be registered against Nandini Satpathy, former Chief Minister of Orissa.

(ii) This Court examined the scheme of Article 20(3) and Section 161(2) and opined that ".... we are inclined to the view, terminological expansion apart, the Section 161(2) of the CrPC is a parliamentary gloss on the constitutional clause". This Court also recognised that protection afforded by Section 161(2) is wider than the protection afforded by Article 20(3) in some respects. "...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. In Article 20(3), the expression 'accused of any offence' must mean formally accused in praesenti not in futuro - not even imminently as decisions now stand."

(iii) This Court opined that there is "cluster of rules" commonly grouped under the term 'privilege against self-incrimination'. The origins of such privilege against self-incrimination are traceable to a sharp reaction to the practice of the court of Star Chamber which readily convicted persons on the basis of self-incrimination. Such a rule of the common law is embodied in Article 20(3) of the Constitution of India.

(iv) This Court opined that the protection of Article 20(3) is available not only to a person who is facing trial for an offence before a Court of law but even to a person embryonically accused by being brought into police diary. In other words, 'suspects' but 'not formally charged' are also entitled for the protection of Article 20(3).

45. The rule against self-incrimination found expression in Indian law much before advent of the Constitution of India [under Article 20(3)]. Facets of such rule are seen in (i) Section 161 Cr.P.C., 1898. Sub-section (1) authorised a police officer investigating a case to examine any person "supposed to be acquainted with the facts and circumstances of the case". Sub-section (2) exempted such person from answering the questions "which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture". Section 161 of the Cr.P.C., 1973 corresponds to Section 161 of the Cr.P.C., 1898. Sub-sections (2) of both the old and new Code are substantially identical[7].

(ii) Another facet of the rule against self-incrimination finds expression in Sections 25[8] and 26[9] of the Evidence Act which make a confession made to a police officer or a confession made while in the custody of the police inadmissible in evidence.

(iii) The proviso to Section 132 of the Evidence Act, in our opinion, embodies another facet of the rule against self-incrimination.

46. Section 132 existed on the statute book from 1872 i.e. for 78 years prior to the advent of the guarantee under Article 20 of the Constitution of India. As pointed out by Justice Muttusami Ayyar in Gopal Doss (supra), the policy under Section 132 appears to be to secure the evidence from whatever sources it is available for doing

justice in a case brought before the Court. In the process of securing such evidence, if a witness who is under obligation to state the truth because of the Oath taken by him makes any statement which will criminate or tend to expose such a witness to a "penalty or forfeiture of any kind etc.", the proviso grants immunity to such a witness by declaring that "no such answer given by the witness shall subject him to any arrest or prosecution or be proved against him in any criminal proceeding". We are in complete agreement with the view of Justice Ayyar on the interpretation of Section 132 of the Evidence Act.

47. The proviso to Section 132 of the Evidence Act is a facet of the rule against self incrimination and the same is statutory immunity against self incrimination which deserves the most liberal construction. Therefore, no prosecution can be launched against the maker of a statement falling within the sweep of Section 132 of the Evidence Act on the basis of the "answer" given by a person while deposing as a "witness" before a Court.

48. In the light of our above discussion, we are of the opinion the High Court rightly refused to summon PW64 as an accused to be tried alongwith the appellant and others.

49. Before we part with this case, we must also place on record that during the argument and in the written submission filed on behalf of the appellant, a point is sought to be made that PW64 could not have been examined as a witness without securing pardon under Section 306 Cr.PC.

52. The High Court recorded the conclusion that the examination of PW64 as a prosecution witness without securing pardon under Section 306 Cr.PC is illegal if PW64 is a party to the conspiracy alongwith A2 and A3 without assigning any reason in support of such a conclusion.

53. The question whether prosecution could have examined somebody as a witness against whom there is some material indicating his participation in a crime fell for the consideration of this Court on two occasions in *Laxmipat Choraria & Others v. State of*

Maharashtra, AIR 1968 SC 938 and A.R. Antulay v. R.S. Nayak & Another, (1988) 2 SCC 602.

54. *We have already taken note of the relevant facts and the decision of this Court in Choraria case. The relevant facts of A.R. Antulay case are as follows. Before the "trial Court" it was contended by Antulay that the examination of some of his alleged co-conspirators as witnesses and proposal to examine some more of them is legally not tenable and they must be arrayed as accused. Such a contention was negated by the trial Judge. Aggrieved by the same, Antulay carried the matter in appeal to this Court. Unfortunately, the majority judgment did not consider this aspect. It is only Justice Venkatachaliah, as His Lordship then was, who in his dissenting judgment considered this aspect and held as follows:*

"133. An accused person cannot assert any right to a joint trial with his co-accused. Normally it is the right of the prosecution to decide whom it prosecutes. It can decline to array a person as a co-accused and, instead, examine him as a witness for the prosecution. What weight is to be attached to that evidence, as it may smack of the testimony of a guilty partner, in crime, is a different matter. Prosecution can enter Nolle prosequere against any accused-person. It can seek to withdraw a charge against an accused person. These propositions are too well settled to require any further elaboration. Suffice it to say that the matter is concluded by the pronouncement of this Court in Laxmipat Choraria v. State of Maharashtra: 1968CriLJ1124 where Hidayathullah J referred to the argument that the accomplice, a certain Ethyl Wong in that case, had also to be arrayed as an accused and repelled it, observing:

Mr. Jethmalani's argument that the Magistrate should have promptly put her in the dock because of her incriminating answers overlooks Section 132 (proviso).

...The prosecution was not bound to prosecute her, if they thought that her evidence was necessary to break a smugglers' ring. Ethyl Wong was protected by Section 132 (proviso) of the Indian Evidence Act even if she gave evidence incriminating herself. She was a competent witness although her evidence could only be received with the caution necessary in all accomplice evidence.

134. On this point, really, appellant cannot be heard to complain. Of the so called co-conspirators some have been examined already as prosecution witnesses; some others proposed to be so examined; and two others, it would appear, had died in the interregnum. The appeal on the point has no substance and would require to be dismissed. We must now turn to the larger issue raised in the appeal."

55. In the light of the above two decisions, the proposition whether the prosecution has a liberty to examine any person as a witness in a criminal prosecution notwithstanding that there is some material available to the prosecuting agency to indicate that such a person is also involved in the commission of the crime for which the other accused are being tried requires a deeper examination.

*56. Unfortunately before us, except asserting the proposition no clear submissions are made in this regard. In the circumstances, we do not propose to examine the proposition in the present case. **However, in view of the fact Section 307 Cr.P.C. authorizes even a Court conducting trial to tender pardon to such a person, we believe that the ends of justice in this case would be met by directing the trial Court to grant pardon in favour of PW64 after following the appropriate procedure of law and record his evidence afresh."***

40. Admittedly, the opposite party herein turned an approver in the case registered by CBI in respect of scheduled offences and was **examined** by the Court under Section 306(4)(a) of Cr.P.C. **as a witness.**

41. Thus keeping with the observation of the Supreme Court in *Vijay Madanlal Choudhary & Ors. vs Union of India & Ors. (Supra)* and the materials on record in the present case, it is clear that the present case against the opposite party, under Section 3 of the PMLA 2002, Act is

dependent on the process and activity in a scheduled offence (CBI) and thus directly connected.

42. The total case under Section 3 of the PLMA Act rests on the case registered in respect of a scheduled offence in which the opposite party turned approver. If the case for a scheduled offence fails, the case under PLMA Act also fails, as the case under PLMA Act has been prima facie made out of the materials and evidence on record in the case in respect of a scheduled offence (herein registered by the CBI).

43. In view of the fact that the two cases have a direct connection, the opposite party is entitled to the benefit of Section 132 Evidence Act and Section 307 of Cr.P.C. in the present case.

CONCLUSION:-

44. Thus, the findings of the learned Trial Court in the order under revision being in accordance with law requires no interference.

45. CRR 1453 of 2020 is dismissed.

46. The order dated 03.10.2019 passed by the Spl Judge (C.B.I.) Court No. 3, Calcutta and Spl Judge PMLA Calcutta in ML Case no. 02 of 2017, **is hereby affirmed.**

47. All connected applications, if any, stand disposed of.

48. Interim order, if any, stands vacated.

49. Copy of this judgment be sent to the learned Trial Court for necessary compliance.

50. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)