THE HON'BLE THE CHIEF JUSTICE UJJAL BHUYAN

AND

THE HON'BLE SRI JUSTICE N. TUKARAMJI

+ WRIT PETITION No.35434 of 2022

% Date: 06.07.2023

Pradeep Kumar and others

... Petitioners

v.

$ Deputy Director,
Directorate of Enforcement,
Hyderabad Zonal Office,
3rd Floor, Shakar Bhawan,
Basheerbagh, Hyderabad – 500 004,
and another.

... Respondents

! Counsel for the petitioners : Mr. T.Niranjan Reddy,
Learned Senior Counsel representing Mr. E.Venkata Siddhartha

^ Counsel for the respondents: Mr. V.Ram Krishna Reddy
Learned Standing Counsel for Enforcement Directorate

< GIST:

➢ HEAD NOTE**:**

? CASES REFERRED:

1. (2018) 2 SCC 372
2. 2022 SCC OnLine SC 929
3. AIR 1970 SC 940
4. 2009 SCC OnLine Guj 9965
5. AIR 1961 SC 373
6. AIR 1967 SC 523
7. (1972) 3 SCC 234
8. (1976) 3 SCC 757 : AIR 1976 SC 1753 : (1976) 103 ITR 437
9. (2015) 11 SCC 628 : (2015) 320 ELT 45
10. 2018 SCC OnLine Del 6523
11. MANU/TL/0570/2023

THE HON'BLE THE CHIEF JUSTICE UJJAL BHUYAN

AND

THE HON'BLE SRI JUSTICE N. TUKARAMJI

WRIT PETITION No.35434 of 2022

ORDER: *(Per the Hon'ble the Chief Justice Ujjal Bhuyan)*

Heard Mr. T.Niranjan Reddy, learned Senior Counsel representing E.Venkata Siddhartha, learned counsel for the petitioners; and Mr. V.Ram Krishna Reddy, learned Standing Counsel for Enforcement Directorate representing the respondents.

2. By filing this petition under Article 226 of the Constitution of India petitioners have prayed for the following reliefs: i) to set aside and quash the order dated 25.07.2022 passed by the Adjudicating Authority in O.A.No.590 of 2021 and consequently to direct defreezing of the bank accounts of the petitioners besides return of documents/records; ii) to declare Section 6(5)(b) of the Prevention of Money Laundering Act, 2002 (hereinafter referred to as, 'PMLA') as unconstitutional or alternatively to read down the said provision by holding that the Bench

of the Adjudicating Authority may be constituted by the Chairperson with two or more Members including one Judicial Member; and iii) to declare Section 6(7) of PMLA as unconstitutional or in the alternatively to read down the said provision to mean that if at any stage of the hearing of any case or matter it appears to the Chairperson or a Member that the case or matter is of such a nature that it ought to be heard by a Bench consisting of more than two Members, the case or matter may be transferred by the Chairperson or, as the case may be, referred to him for transfer to such Bench as the Chairperson may deem fit.

3. However, at the time of hearing, learned Senior Counsel for the petitioners confined his arguments to prayer No. (i) above, that too, on two grounds which we will advert to in the course of the judgment.

4. At the outset, it would be apposite to briefly mention the facts as pleaded in the writ affidavit by the petitioners.

5. Officials of the Directorate of Revenue Intelligence (DRI), Hyderabad on 03.05.2019 conducted a search at the

premises of M/s. Sri Krishna Exim LLP, Hyderabad (petitioner No.2) and M/s. Sri Krishna Jewellers Private Limited (petitioner No.3). In the course of the search, DRI officials seized certain gold bars, currency, documents etc.

5.1. Pursuant to the search and seizure action by DRI, a show cause notice dated 26.06.2020 was issued by the Additional Director General of DRI under Section 124 of the Customs Act, 1962 (briefly, 'the Customs Act' hereinafter) calling upon petitioner No.2 to show cause as to why the goods and currency seized should not be confiscated and as to why penalty should not be imposed under Sections 112(a)(b) and 117 of the Customs Act read with the provisions of the Special Economic Zones Act, 2005, and the Special Economic Zones Rules, 2006. Similar show cause notice under Section 124 of the Customs Act was issued on 27.06.2020 by the Additional Director General of DRI to petitioner No.3 to show cause as to why the 195 gold bars of 100 grams each weighing 19500 grams and valued at Rs.6,33,75,000.00 seized under panchanama dated 3/4.05.2019 should not be

confiscated under Section 111(d) and (o) of the Customs Act and besides imposition of penalty under Sections 112(a) and (b) and 117 of the Customs Act.

5.2. According to the petitioners, the show cause notices dated 26.06.2020 and 27.06.2020 were transferred to the call book on 16.04.2021 by the Principal Commissioner of Customs, Hyderabad, in terms of Section 28(9-A)(c) of the Customs Act. It is further stated the said show cause notices are pending adjudication before the Principal Commissioner of Customs, Hyderabad.

5.3. Petitioners have further stated that the substance of the allegation against the petitioners is misdeclaration of exports and diversion of imported gold from Special Economic Zone by petitioner No.2 and seizure of 195 gold bars of foreign origin weighing 19500 grams valued at Rs.6,33,75,000.00 from the business premises of petitioner No.3.

5.4. On the basis of the aforesaid investigation by DRI, Enforcement Directorate initiated investigation under

PMLA and lodged Enforcement Case Information Report i.e., ECIR/HYZO/27/2020 on 13.10.2020.

5.5. On 07.10.2021 respondent No.1 conducted search under PMLA at the business premises of petitioners No.2 and 3 as well as their partners and directors and seized certain documents and property. Following the same, respondent No.1 passed a freezing/debit freeze order dated 11.10.2021 under Section 17(1A) of PMLA, thus freezing all the bank accounts of the petitioners.

5.6. Petitioners have alleged that copy of the freezing order dated 11.10.2021 was not served upon them. They became aware of the freezing order only when they tried to operate their bank accounts for regular business operations. However, petitioners were communicated the freezing order by respondent No.1 only on 21.10.2021.

5.7. Be that as it may, on 27.10.2021 respondent No.1 filed original application under Section 17(4) of PMLA before the Adjudicating Authority seeking retention of the

record and property seized and continuation of the freezing order dated 11.10.2021.

5.8. Petitioners have stated that in the meanwhile, W.P.Nos.26535 of 2021 and 26543 of 2021 were filed before this court wherein this court had passed a common order on 29.10.2021 directing the Enforcement Directorate to defreeze all the bank accounts of the Sri Krishna Group of Companies for the purpose of payment of salaries to its employees and other liabilities. Petitioners were permitted by this court to operate the bank accounts with respect to the amounts deposited on or after 12.10.2021.

5.9. Again W.P.Nos.29508 of 2021 and 29531 of 2021 were filed before this Court wherein an order dated 19.11.2021 was passed staying the show cause notices dated 26.06.2020 and 27.06.2020 issued by DRI under Section 124 of the Customs Act to petitioner No.2 and petitioner No.3 respectively.

5.10. Adjudicating Authority issued a show cause notice under Section 8(1) of PMLA dated 10.12.2021 to the

petitioners in O.A.No.590 of 2021. In response thereto, petitioners had filed reply. However, Adjudicating Authority passed the impugned order dated 25.07.2022 allowing further retention of the seized properties and continuation of the freezing order passed by respondent No.1.

5.11. Aggrieved thereby, the present writ petition has been filed seeking the reliefs as indicated above.

6. In support of the prayers made, petitioners have raised various grounds. It is contended that retention and/or freezing of property under Section 20(2) of PMLA cannot be permitted beyond the period of 180 days. Seizure under Section 17 of PMLA was made on 07.10.2021, whereafter the freezing order under Section 17(1A) of PMLA was passed on 11.10.2021. The statutory limitation of 180 days for retention of property seized under Section 17 of PMLA had expired on 07.04.2022, whereas the statutory limitation of 180 days for continuation of freezing order under Section 17(1A) of

PMLA had expired on 11.04.2022. The impugned adjudication order under Section 8 of PMLA was passed on 25.07.2022 which is well beyond the statutory period of 180 days.

6.1. Respondent No.1 had not passed an order for retention or continuation of freezing of property as per the mandate of Section 20(2) of PMLA. This has vitiated continuation of proceedings under PMLA, including the order passed under Section 8 thereof.

6.2. Another ground urged by the petitioners is that order under Section 8 of PMLA was passed by the Adjudicating Authority consisting of a Bench of single Member (Finance Member). In this connection reference has been made to Sections 6(2) and 6(5) of PMLA to contend that there was no quorum of Adjudicating Authority and therefore the order passed under Section 8 of PMLA is void. Further reference has been made to Regulation 26 of the Adjudicating Authority (Procedure) Regulations, 2013.

6.3. Petitioners have also questioned the *vires* of Sections 6(5)(b) and Section 6(7) of PMLA being contrary to Section 6(2) of PMLA as well as being arbitrary, as it is contended that those two provisions are violative of Article 14 of the Constitution of India. It is incomprehensible that when the Adjudicating Authority discharges *quasi* judicial functions, it can comprise of only a single Member, that too a technical member deciding intricate questions of law.

6.4. Petitioners have further contended that the requirements of Sections 17(1) and 17(1A) of PMLA are not satisfied. Therefore, respondents could not have taken action under the aforesaid provisions.

6.5. Relatable to the above ground is the contention that there was no reason to believe for invoking power under Section 17 of PMLA.

6.6. It is also contended that there was no material on record to draw an inference that petitioners had derived any property as a result of criminal activity relating to a scheduled offence.

6.7. Additionally, it is contended that show cause notice under Section 8(1) of PMLA was issued by the Adjudicating Authority without any application of mind. Adjudicating Authority had not considered the fact that respondent No.1 did not forward the reasons recorded for action under Section 17 of PMLA and also did not pass an order under sub section (2) of Section 20 of PMLA.

6.8. Petitioners have contended that their challenge to the order dated 25.07.2022 is on the ground of jurisdiction. Adjudicating Authority had no jurisdiction to pass the said order. That apart, *vires* of Section 6(5)(b) of PMLA and Section 6(7) of PMLA have been assailed. Therefore, availability of alternative remedy provided by the statute i.e., PMLA, would be no ground to question maintainability of the writ petition. In other words, notwithstanding availability of alternative remedy, the writ petition is maintainable when the impugned PMLA proceedings are *ex facie* without jurisdiction.

7. Notice in this case was issued on 13.09.2022. In the proceedings held on 27.04.2023, learned Senior Counsel for the petitioners had pressed for an interim order for return of original documents after retaining photocopies thereof and for defreezing of the bank accounts of the petitioners. This court observed that despite notice, respondents No.1 and 2 had not filed any counter affidavit. The said respondents were directed to file counter affidavit and it was further observed that the matter would be taken up for consideration of the interim prayer.

8. It was thereafter that counter affidavit was filed by the respondents.

9. It is stated that DRI officials of Hyderabad Zonal Unit had received an intelligence report that on 03.05.2019 certain quantity of gold bullion imported for Special Economic Zone (SEZ) operation was being fraudulently diverted into the local market and certain quantity of fake gold jewellery were sought to be exported from the SEZ unit. DRI officials having reason to believe that 10 kgs of

foreign market gold bars having market value of Rs.3.25 crores were liable for confiscation under the Customs Act, seized the same from one Battula Venkatesh while he was carrying the goods in a green coloured duffle bag in a Honda City car bearing registration No.AP 09 CH 8676 to be handed over to the security person of M/s. Sri Krishna Jewellers Private Limited without any supporting documents. A search was conducted at the premises of M/s. Sri Krishna Jewellers Private Limited by the DRI officers. The search revealed that the consignment was meant for export to M/s. Krishe Hong Kong; the gold content declared was 19,374 grams, whereas the government approved valuer's report said that it was just 565 grams. The weight of semi-precious stones declared in the invoice was 2,060 grams, whereas the actual weight of the semi-precious stones was 20,850 grams. Thus, Sri Krishna Group was exporting bogus ornaments mostly made of semi-precious and coloured stones with very little gold by declaring them as 'studded gold jewellery' and the misdeclaration of value was to the tune of Rs.5.23 crores

which was to evade duty chargeable under the Customs Act. Further, it was revealed that petitioner No.2 and M/s. Krishe Hong Kong were involved in large scale hawala operations. Therefore, petitioner No.1, being the Vice Chairman and Managing Director of M/s. Sri Krishna Jewellers Private Limited, was arrested for an offence committed under Section 135 of the Customs Act read with the Special Economic Zones Act, 2005, whereafter he was sent to judicial custody by the Special Judge for Economic Offences, Nampally, Hyderabad.

9.1. During the course of the search, nineteen kilo bars of 995 purity gold were found lying in stock, though as per the stock statement, there were no gold bars lying in stock. These gold bars had foreign marks. While the stock statement had shown 25903.220 grams of 22 kt manufactured gold lying in stock, only 1904.281 grams was physically found to be in stock; besides 25126.358 grams of crudely made jewellery of semi-precious stones was found in stock, though not declared in the stock statement. It is stated that DRI had filed a preliminary

investigation report with the Principal Director General, DRI, under Section 135 of the Customs Act. As per preliminary estimates of DRI, around 1800 kgs of imported duty-free gold was diverted and sold in the domestic market leading to an evasion of customs duty to the extent of Rs.70.00 crores.

9.2. The other major incriminating evidence found by DRI was the valuation report of gold jewellery consignments. Three boxes that were packed for export vide invoice dated 03.05.2019 and shipping bill dated 03.05.2019 declared as 0.916 gold jewellery studded with semi-precious stones, were produced before the Specified Officer, SEZ. The government approved valuer examined the above export consignments as per DRI records.

9.3. In the said invoice, the gold content in the export consignment was declared as 19374.210 grams, whereas the actual gold content found was 565 grams only. Further, the weight of semi-precious stones as per the declaration in the invoice was 2060.900 grams. Total value

of the goods to be exported as per the shipping bill dated 03.05.2019 was declared at Rs.5,45,83,373.71, while as per the valuer's report, the actual value was only Rs.22,16,250.00.

9.4. On the basis of DRI investigation, an ECIR bearing No.ECIR/HYZO/27/2020 was recorded. Since the offences alleged to have been committed by petitioners No.2 and 3 and their subsidiaries are scheduled offences as defined under Section 2(y) of PMLA, investigation was initiated against petitioners No.2 and 3, their subsidiaries and directors.

9.5. According to the respondents, Sri Krishna Group of Companies and entities had diverted duty-free gold, smuggled the same into the domestic area and sold the same to earn massive illicit profit. It is alleged that Sri Krishna Group of Companies had indulged in international hawala operations to shift hundreds of crores abroad and then rotated back part of the illegal proceeds in the form of fake export earnings. Thus, they are *prima facie*

responsible for creation of proceeds of crime, their layering and concealment. They had transferred their illegal gains into real estate business and tried to project it as untainted assets. Enforcement Directorate is investigating the fund trail and tracing the proceeds of crime which are liable to be attached under Section 5 of PMLA. In this connection, Enforcement Directorate had conducted searches at various places relating to Sri Krishna Group of Companies and its directors. Searches were also conducted at the residential premises of employees of petitioner No.2 and their statements were recorded on 07.10.2021 under Section 17(1)(iv)(f) of PMLA. The documents etc. that were seized/frozen during the course of the search on 07.10.2021 and 08.10.2021 contained substantial evidence which would assist in tracing further proceeds of crime. Respondent No.1 filed application, being O.A.No.590 of 2021, on 27.10.2021 before the Adjudicating Authority wherein it was prayed for retention of the seized materials and continuation of freezing order. Adjudicating Authority passed an order on 25.07.2022 in O.A.No.590 of 2021

ordering continued retention and freezing of the seized goods.

9.6. As a matter of fact, respondent No.1 issued the freezing order under Section 17(1A) of PMLA on 11.10.2021 and thereafter filed O.A.No.590 of 2021 before the Adjudicating Authority on 27.10.2021. Respondent No.1 had received notice dated 10.12.2021 issued by the Adjudicating Authority under Section 8(1) of PMLA. On the point of issuance of the confirmation order within 180 days, reliance has been placed on the order of the Supreme Court dated 10.01.2022 which directed that the period from 15.03.2020 till 28.02.2022 should be excluded for the purpose of limitation as may be prescribed under any general or special laws in respect of all judicial or *quasi* judicial proceedings. Excluding the aforesaid period, it is stated that the period between the date of search and filing of original application comes to 16 days (from 11.10.2021 to 27.10.2021) and the period from 01.03.2022 to the date of passing of confirmation order (25.07.2022) comes to 147 days. According to respondent No.1, the confirmation

order was passed by the Adjudicating Authority within 163 days (16 + 147) days which is within the limitation of 180 days.

9.7. Referring to Rule 3(2)(c) of the Prevention of Money-Laundering (Forms, Search and Seizure or Freezing and the Manner of Forwarding the Reasons and Material to the Adjudicating Authority, Impounding and Custody of Records and the Period of Retention) Rules, 2005, it is contended that no law was violated at the time of retention or order of freezing of the records or the goods. Averments have been made to contend that there is no infirmity or incongruity in Sections 6(5)(a) and 6(7) of PMLA. In this connection, reliance has been placed on various decisions of the Supreme Court and various other High Courts.

9.8. It is reiterated by respondent No.1 that search proceedings were conducted on 07.10.2021 and based on the material seized and upon their scrutiny, freezing order dated 11.10.2021 was passed by the Deputy Director, Enforcement Directorate, Hyderabad. After passing the

freezing order, the same was served on the petitioners. Thus, there were no lapses on the part of the Enforcement Directorate while carrying out the exercise under Section 17 of PMLA.

9.9. It is also contended that after recording the reasons based on the record available, searches were conducted at the premises of the petitioners and reasons recorded were supplied to the Adjudicating Authority. Based on such reasons, prayer for continuation of freezing order was made in the original application. Contention of the petitioners that *reasons to believe* as required under Section 17 of PMLA could not have been formed in the facts of the present case as there was no scheduled offence, has been denied. It is stated that petitioner No.1 along with others is accused of committing scheduled offence under Section 135 of the Customs Act as has been clearly mentioned in the arrest memo served upon him by DRI. Existence of the *reasons to believe* is ultimately a question of fact to be decided on evidence and cannot be subject matter of a writ petition.

9.10. It is asserted that proceedings under PMLA are standalone and independent. Enforcement Directorate is still in the process of identifying the quantum of proceeds of crime. However, considering the huge amount of gold smuggled and involvement of hawala transactions, it can be assumed that proceeds of crime would be more than Rs.50.00 crores.

9.11. Respondent No.1 has justified the freezing of bank accounts of the petitioners. It is stated that merely because a number of employees are dependent on the petitioners for salary, that would not absolve them from the consequences of their action. Referring to a Supreme Court decision in the case of **Teesta Atul Setalvad v. State of Gujarat**[1], it is submitted that when the entire accounts are in serious doubt, freezing of the accounts can be the only remedy available with the investigating agency, though it may cause some inconvenience to the accused or others.

[1] (2018) 2 SCC 372

9.12. It is further submitted that merely because this court has granted stay on the show cause notices issued under the Customs Act, it would not extricate the petitioners from the PMLA proceedings or that the materials available would lose their evidentiary value.

9.13. Finally, respondent No.1 has raised the ground of availability of alternative remedy under PMLA. Not availing the alternative remedy of filing appeal and instead approaching the High Court by way of a writ petition is unacceptable.

9.14. Adjudicating Authority has followed the due procedure and thereafter passed the order dated 25.07.2022. If the petitioners are aggrieved by the said order, they can very well file an appeal under Section 26 of PMLA.

9.15. In the circumstances, respondent No.1 seeks dismissal of the writ petition.

10. In the hearing held on 07.06.2023, Mr. T.Niranjan Reddy, learned Senior Counsel for the petitioners submitted that he would confine his challenge to invocation of PMLA against the petitioners. Even insofar invocation of PMLA proceedings against the petitioners are concerned, he has assailed the same primarily on two grounds. Firstly, he contends that there is no scheduled offence against the petitioners, more particularly no proceedings under Section 135 of the Customs Act. Therefore, in the absence of any scheduled offence, proceedings under PMLA cannot continue as a standalone offence. Secondly, he would contend that after the search and seizure carried out by respondent No.1 under Section 17 of PMLA, respondent No.1 or for that matter any officer authorised by the Director of Enforcement Directorate had not passed any order under sub-section (2) of Section 20 thereof, thereby vitiating retention of the seized property.

11. After hearing the matter, this Court directed learned Standing Counsel for respondent No.1 to produce the

relevant record in original before the court on the next date.

12. On the next date of hearing i.e., on 09.06.2023, Mr. V.Ram Krishna Reddy, learned Standing Counsel, Enforcement Directorate produced the record in a sealed cover which we had opened in the court. After perusal of the same, the record was re-sealed.

13. Learned Standing Counsel submits that Sri Pradeep Kumar, Managing Partner of M/s.Sri Krishna Jewellers Private Limited, was arrested by the competent customs officer under Section 135 of the Customs Act. Therefore, it would be wrong to say that there is no scheduled offence involving the petitioners for invocation of the provisions of PMLA. In this connection, he referred to paragraphs 311, 313 and 314 of the decision of the Supreme Court in **Vijay Madanlal Choudhary v. Union of India**[2].

13.1. Insofar the submission of learned Senior Counsel for the petitioners regarding the requirement of passing of an

[2] 2022 SCC OnLine SC 929

independent order under sub-section (2) of Section 20 of PMLA, learned Standing Counsel submits that the order referred to in sub-section (2) of Section 20 is relatable to the order passed under Section 17 of PMLA and therefore, no separate order is required. Referring to Sections 17 and 8 of PMLA, he submits that after the search and seizure carried out by respondent No.1, respondent No.1 made necessary application under Section 8(1) of PMLA within reasonable time before the Adjudicating Authority, whereafter Adjudicating Authority passed the impugned order dated 25.07.2022.

13.2. Adverting to various provisions of PMLA, he submits that petitioners have got an adequate and efficacious alternative remedy in the form of filing appeal under Section 26 before the Appellate Tribunal. If the petitioners continue to remain aggrieved thereafter, they have the remedy to file further appeal to the High Court under Section 42 of PMLA.

13.3. Without availing the alternative remedy as provided under the statute, petitioners have rushed to the High Court by filing a writ petition. Since there is an adequate and efficacious alternative remedy available to the petitioners, this court may relegate the petitioners to the forum of alternative remedy.

13.4. Insofar the two grounds urged by learned Senior Counsel for the petitioners while assailing invocation of PMLA against the petitioners, contention of learned Standing Counsel is that the two grounds have not been pleaded in the writ petition. Therefore, it is not open to the petitioners to raise such grounds in the hearing.

13.5. He, therefore, submits that both on the point of alternative remedy as well as on merit, the writ petition should be dismissed.

14. In his reply submissions, Mr. T.Niranjan Reddy, learned Senior Counsel for the petitioners submits that insofar the first ground of challenge is concerned, a ground has been taken in paragraph 53 of the writ affidavit,

though he admits on a query by the Court that the said ground requires a little more elaboration. Nonetheless in para 53, it is specifically pleaded that from the original application filed by respondent No.1 before the Adjudicating Authority, there are no materials to infer that petitioners have derived any property as a result of criminal activity relating to a scheduled offence.

14.1. As to the second ground of challenge, learned Senior Counsel has drawn the attention of the court to paragraph 24 of the writ affidavit, wherein it is specifically pleaded that respondent No.1 had neither passed an order for retention or continuation of freezing of property nor forwarded the same to the Adjudicating Authority as mandated under Section 20(2) of PMLA. Thus, proceedings initiated pursuant to filing of application under Section 17 of PMLA before the Adjudicating Authority are *void ab initio*.

14.2. Learned Senior Counsel in reiteration of his submissions once again referred to relevant provisions of

the Customs Act and PMLA. He submits that mere arrest of a person by a customs officer would not make him an accused in a criminal proceeding. In this connection, he has referred to a Constitution Bench decision of the Supreme Court in **Ramesh Chandra Mehta v. State of West Bengal**[3], more particularly to paragraphs 26 and 27 thereof. He also referred to a decision of the Gujarat High Court in **Bhavin Impex Private Limited v. State of Gujarat**[4], in which Gujarat High Court applied the decision of the Supreme Court in **Ramesh Chandra Mehta** (supra).

14.3. Adverting to Section 20 of PMLA, he submits that legislature has used the expression "*reason to believe*" in different sections of PMLA including in Sections 17 and 20. "*Reason to believe*" in Section 17 of PMLA cannot be the same while passing a retention order under Section 20.

14.4. Learned Senior Counsel, therefore, contends that on both grounds proceedings under PMLA against the petitioners cannot be sustained and those are liable to be

[3] AIR 1970 SC 940
[4] 2009 SCC OnLine Guj 9965

quashed including the order of the Adjudicating Authority dated 25.07.2022.

14.5 Insofar submission of learned Standing Counsel that there is alternative remedy available to the petitioners under the statute and since the petitioners had not availed such remedy, the writ petition should be dismissed, he submits that law is well settled and needs no reiteration that when a challenge is made to the action of an authority as being without jurisdiction, such a challenge is maintainable in a proceeding under Article 226 of the Constitution of India notwithstanding the availability of an alternative remedy.

14.6. Learned Senior Counsel for the petitioners submits that it is evident that there is no proceeding against the petitioners under Section 135 of the Customs Act as on date. However, adverting to Section 66 of PMLA, he submits that it is open to the Director or any other authority specified by him to furnish or cause to be furnished any information required or obtained in the

performance of their functions under PMLA to such officer, as by law provided to enable such officer to perform his functions under that law. Materials on record do not disclose that such information has been furnished by the Enforcement Directorate to the customs authorities. In this connection, he has also referred to Section 65 of PMLA which says that provisions of the Code of Criminal Procedure, 1973 (Cr.P.C) would apply to proceedings under PMLA in matters relating to arrest, search and seizure, attachment, confiscation, investigation, prosecution and such other proceedings under PMLA. His submission is that no cognizance of any offence under Section 135 of the Customs Act has been taken by the concerned Magistrate under Section 190 of Cr.P.C. In a case of this nature, there is no scope for action under Section 154 Cr.P.C. Therefore, the only option open to the customs authorities for initiating proceedings under Section 135 of the Customs Act is by filing a complaint under Section 200 Cr.P.C. However, he submits that before filing such a complaint, previous sanction of the Principal Commissioner of

Customs or Commissioner of Customs would have to be obtained under Section 137 of the Customs Act. No such previous sanction has been obtained in the present case. He further submits that offence under Section 135 is a compoundable one by the Principal Chief Commissioner of Customs or Chief Commissioner of Customs and if it is compounded, then there can be no prosecution for an offence under Section 135 of the Customs Act. Since the matter is at the stage of issuance of show cause notice under Section 124 of the Customs Act, it can only lead to confiscation of the goods or imposition of penalty. Therefore, question of a proceeding under Section 135 of the Customs Act against the petitioners does not arise. He submits that it is not open to the Enforcement Directorate to assume jurisdiction merely on the assumption that petitioners had committed a scheduled offence or that there is a scheduled offence. Adverting to the decision of the Supreme Court in paragraph 253 of **Vijay Madanlal Choudhary** (supra), he submits that the said decision

would have to be read in conjunction with paragraph 27 of **Ramesh Chandra Mehta** (supra).

15. Submissions made by learned counsel for the parties have received the due consideration of the court.

16. Facts lie within a very narrow compass. However, for better appreciation, it would be apposite to recapitulate the factual narrative.

16.1. DRI conducted a search and seizure operation at the premises of petitioners No.2 and 3 on 03.05.2019 in the course of which 195 gold bars of 100 grams each in all weighing 19500 grams and valued at Rs.6,33,75,000.00 were seized.

16.2. Pursuant to such search and seizure, a show cause notice dated 26.06.2020 was issued to petitioner No.2 under Section 124 of the Customs Act to show cause as to why the goods and currency seized should not be confiscated and as to why penalty should not be imposed under Section 112(a) and (b) and Section 117 of the

Customs Act. Similar show cause notice dated 27.06.2020 was issued by the Additional Director General of DRI to petitioner No.3 to show cause as to why the gold bars should not be seized besides imposition of penalty.

16.3. It is the case of the petitioners that the above two show cause notices were transferred to the call book on 16.04.2021 by the Principal Commissioner of Customs, Hyderabad.

16.4. In the meanwhile, based on the aforesaid investigation by DRI, Enforcement Directorate initiated investigation under PMLA on 13.10.2020 whereafter respondent No.1 conducted search in the business premises of petitioners No.2 and 3 on 07.10.2021 following which certain documents and property were seized. Thereafter, respondent No.1 passed a freezing order dated 11.10.2021 under Section 17(1A) of PMLA freezing all the bank accounts of the petitioners. According to the petitioners, they were communicated the freezing order by respondent No.1 only on 21.10.2021.

16.5. On 27.10.2021, respondent No.1 filed original application under Section 17(4) of PMLA before the Adjudicating Authority seeking retention of the record and property seized besides continuation of the freezing order dated 11.10.2021.

16.6. In W.P.Nos.26535 of 2021 and 26543 of 2021 this court had passed an order on 29.10.2021 directing the Enforcement Directorate to defreeze all the bank accounts of the Sri Krishna Group of Companies of which petitioners No.2 and 3 are part, for the purpose of payment of salary to employees and other liabilities, besides petitioners were permitted by the court to operate the bank accounts with respect to the amounts deposited on or after 12.10.2021.

16.7. In W.P.Nos.29508 of 2021 and 29531 of 2021 this court had passed an order dated 19.11.2021 staying the show cause notices dated 26.06.2020 and 27.06.2020 issued by DRI to petitioners No.2 and 3.

16.8. Original application filed by respondent No.1 before the Adjudicating Authority was registered as O.A.No.590 of 2021. Adjudicating Authority issued show cause notice dated 10.12.2021 to the petitioners under Section 8(1) of PMLA in O.A.No.590 of 2021. In response thereto, petitioners had submitted reply. Following the adjudication proceedings, Adjudicating Authority passed the impugned order dated 25.07.2022 allowing further retention of the seized properties and continuation of the freezing order passed by respondent No.1.

16.9. At this stage, it may be mentioned that according to respondent No.1, petitioner No.1 being the Vice Chairman and Managing Director of petitioner No.3 was arrested for the offence under Section 135 of the Customs Act whereafter he was sent to judicial custody by the Special Judge.

17. Having noticed the factual backdrop, we may now briefly summarise the relevant legal provisions.

18. The Prevention of Money Laundering Act, 2002 (already referred to as 'PMLA' hereinabove) is an Act to prevent money laundering and to provide for confiscation of property derived from, or involved in, money laundering and for matters connected therewith or incidental thereto.

18.1. As per Section 2(1)(p), "money-laundering" has the meaning assigned to it in Section 3.

18.2. Before adverting to Section 3, we may refer to the expression "proceeds of crime" which is defined in Section 2(1)(u) to mean 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 to Section 2(1)(u) clarifies that "proceeds of crime" would include 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 which is defined in Section 2(1)(y) to mean the offences specified under Parts A, B and C of the Schedule to PMLA.

18.3. Pausing here for a moment, what the definition of the expression "proceeds of crime" says is that it means any property which is derived or obtained directly or indirectly as a result of criminal activity relating to a scheduled offence and if the property is taken or held outside the country then the value of such property or the property equivalent in value held within the country or abroad. Proceeds of crime not only includes property 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 scheduled offence. Thus, the expression "proceeds of crime" has a live nexus to criminal activity relatable to a scheduled offence.

18.4. We have noticed above that the expression "money-laundering" has the meaning assigned to it in Section 3.

Section 3 is the provision which defines the offence of money laundering. In other words, the offence of money laundering would be committed if the ingredients referred to Section 3 are fulfilled. Section 3 says that whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of the offence of money laundering. Therefore, to attract the offence of money laundering one must directly or indirectly attempt to indulge or knowingly assist or is a party or is actually involved in any process or activity connected with the proceeds of crime including its concealment etc., or use and project or claim it as untainted property would be guilty of committing the offence of money laundering. As we have seen in Section 2(1)(u), proceeds of crime is property derived or obtained as a result of criminal activity relatable to a scheduled offence. Thus, a person would be guilty of committing an

offence of money laundering under Section 3 of PMLA if he directly or indirectly or knowingly attempts to indulge or assist or is a party or is involved in any process or activity connected with such proceeds of crime including its concealment etc., and projecting it as untainted money. Explanation below Section 3 clarifies two things. Firstly, it clarifies that a person shall be guilty of the offence of money laundering if such person is found to have directly or indirectly attempted to indulge in or knowingly assisted or knowingly is party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely – a) concealment; or b) possession; or c) acquisition; or d) use; or e) projecting it as untainted property; or f) claiming as untainted property, in any manner whatsoever. Secondly, the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or

projecting it as untainted property or claiming it as untainted property in any manner whatsoever.

18.5. Before we deal with Section 8 of PMLA, it would be relevant to refer to Section 5 since it has some relevance, though the present is not a case of attachment of property under Section 5.

18.6. Section 5 deals with attachment of property involved in money laundering. Sub-section (1) thereof says that where the Director or any other officer not below the rank of Deputy Director authorised by the Director for the purposes of Section 5 has *reason to believe*, the reason for such belief to be recorded in writing, on the basis of material in his possession that – a) any person is in possession of any proceeds of crime; and b) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under Chapter III which deals with attachment, adjudication and confiscation, he may by order in writing

provisionally attach such property for a period not exceeding 180 days from the date of such order. Thus, sub-section (1) of Section 5 empowers the Director or any other officer not below the rank of Deputy Director authorised by the Director to provisionally attach property for a period not exceeding 180 days if he has *reason to believe* which has to be recorded in writing on the basis of material in his possession that any person is in possession of any proceeds of crime and such proceeds of crime are likely to be concealed etc., which may frustrate any proceeding for confiscation of such proceeds of crime.

18.7. As per the first proviso, no such order of attachment shall be made unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under Section 173 Cr.P.C or a complaint has been filed by a person authorised to investigate the offence mentioned in that schedule before a Magistrate or court for taking cognizance of the scheduled offence. The second proviso says that notwithstanding anything contained in the first proviso, any property of any person may be attached under Section

5 if the Director or the authorised officer not below the rank of Deputy Director has *reason to believe* which must be recorded in writing on the basis of material in his possession that if such property involved in money laundering is not attached immediately the non-attachment of the property is likely to frustrate any proceeding under PMLA.

18.8. The Director or the authorised officer shall immediately after attachment forward a copy of the order of attachment along with relevant materials in his possession to the Adjudicating Authority under sub-section (2) of Section 5 which shall be retained by the Adjudicating Authority. Sub-section (3) thereof says that every order of attachment made under sub-section (1) shall cease to have effect after expiry of the period specified in that sub-section or on the date of an order made under sub-section (3) of Section 8 whichever is earlier; in other words, either on expiry of 180 days or on passing of an order under Section 8(3) of PMLA whichever is earlier. Sub-section (5) mandates the Director or the authorised officer who had

provisionally attached the property under sub-section (1) to file a complaint stating the facts of such attachment before the Adjudicating Authority within a period of thirty days from attachment.

18.9. We may now deal with search and seizure which is provided for in Section 17. In fact, the present case is one under Section 17.

18.10. Sub-section (1) of Section 17 says that where the Director or any other officer not below the rank of Deputy Director and authorised by him for the purpose of Section 17 on the basis of information in his possession has *reason to believe* which must be recorded in writing that any person – i) has committed any act which constitutes money laundering; or ii) is in possession of any proceeds of crime involved in money laundering; or iii) is in possession of any records relating to money laundering; or iv) is in possession of any property related to crime; then he may authorise any officer subordinate to him to – a) enter and search any building, place, vessel etc., where he has

reason to suspect that such records or proceeds of crime are kept; b) break open the lock of any door etc., for exercising the powers conferred by clause (a) where the keys thereof are not available; c) seize any record or property found as a result of such search; d) place marks of identification on such record or property or make or cause to be made extracts or copies therefrom; e) make a note or an inventory of such record or property; f) examine on oath any person who has found to be in possession or control of any record or property relevant for the purpose of investigation under PMLA. Pausing here for a moment, we find that there is a distinct difference in the *reason to believe* appearing in Section 17 and the *reason to believe* in respect of Section 5. While the *reason to believe* is for the purpose of attachment under Section 5(1), the *reason to believe* is for the purpose of search and seizure under sub-section (1) of Section 17. The *reason to believe* in Section 5(1) is that a person must be in possession of any proceeds of crime and such proceeds of crime are likely to be concealed etc., thereby frustrating any proceeding for

confiscation then the Director or the authorised officer may provisionally attach such property. On the other hand, the *reason to believe* in Section 17(1) should be that the person has committed an act of money laundering or is in possession of any proceeds of crime involved in money laundering or is in possession of any proceeds relating to money laundering or is in possession of any property related to crime then he may cause search of such property. Thus, the requirement or the standard of *reason to believe* in Section 17(1) is on a higher plane than in Section 5(1) inasmuch as the Director or the authorised officer must have *reason to believe* that the person concerned has committed the offence of money laundering or is in possession of any proceeds of crime involved in money laundering etc., instead of being in possession of any proceeds of crime etc.

18.11. Considering its centrality we shall revert back to Section 17 of PMLA again a little later.

18.12. We may now advert to sub-section (1A) of Section 17. As per sub-section (1A), where it is not practicable to make seizure of the record or property, the authorised officer under sub-section (1) may make an order to freeze such property whereupon the property shall not be transferred or otherwise dealt with except with the prior permission of the officer making such order. Such order shall be served upon the person concerned.

18.13. Sub-section (2) of Section 17 says that the authority who has been authorised under sub-section (1) shall immediately after search and seizure or upon issuance of the freezing order forward a copy of the reasons so recorded along with the material in his possession to the Adjudicating Authority in a sealed envelope which shall be retained by the Adjudicating Authority. Sub-section (4) mandates that the authority seizing any record or property under sub-section (1) or freezing any record or property under sub-section (1A) shall within a period of thirty days from such seizure or freezing, as the case may be, file an application before the Adjudicating Authority for retention

of such record or property seized or for continuation of the order of freezing.

18.14. Section 20 deals with retention of property. Sub-section (1) says that where any property has been seized under Section 17 or Section 18 or frozen under sub-section (1A) of Section 17 and the officer authorised by the Director in this behalf, on the basis of material in his possession, has *reason to believe* which must be recorded by him in writing that such property is required to be retained for the purposes of adjudication under Section 8, such property may, if seized, be retained or if frozen may continue to remain frozen for a period not existing 180 days from the date on which such property was seized or frozen, as the case may be.

18.15. That brings us to sub-section (2) of Section 20. The officer authorised by the Director shall, immediately after he has passed an order for retention or continuation of freezing of the property for the purposes of adjudication under Section 8, forward a copy of the order along with the

material in his possession referred to in sub-section (1) to the Adjudicating Authority in a sealed envelope in the manner as may be prescribed and Adjudicating Authority shall keep such order and material for such period as may be prescribed.

18.16. As per sub-section (3) of Section 20, on expiry of the period specified in sub-section (1) the seized property or the frozen property, as the case may be, shall be returned to the person from whom such property was seized or whose property was ordered to be frozen unless Adjudicating Authority permits retention or continuation of freezing of such property beyond the said period.

18.17. Requirement of sub-section (4) of Section 20 is that Adjudicating Authority before authorising retention or continuation of freezing of such property beyond the period specified in sub-section (1) shall satisfy himself that the property is *prima facie* involved in money laundering and that the property is required for the purposes of adjudication under Section 8.

18.18. Section 65 of PMLA provides that provisions of Cr.P.C. shall apply insofar as they are not inconsistent with the provisions of PMLA to arrest, search and seizure, attachment, confiscation, investigation, prosecution and all other proceedings under PMLA.

18.19. As per sub-section (1) of Section 66, the Director or any other authority specified by him by a general or special order may furnish or cause to be furnished to i) any officer, authority or body performing any functions under any law relating to imposition of any tax, duty or cess or dealing in foreign exchange or prevention of illicit traffic in narcotic drug and psychotropic substances under the Narcotic Drugs and Psychotropic Substances Act, 1985; or ii) such other officer, authority or body performing functions under any other law as the Central Government may, if in its opinion it is necessary so to do in the public interest, specify by notification in the official gazette any information received or obtained by such Director or any other authority specified by him in the performance of their

functions under PMLA, as may, in the opinion of the Director or the other authority, so specified by him, be necessary for the purpose of the officer, authority or body specified in clause (i) or clause (ii) to perform his or its functions under that law. Sub-section (2) mandates that if the Director or other authority specified under sub-section (1) is of the opinion, on the basis of information or material in his possession, that the provisions of any other law for the time being in force are contravened, then the Director or such other authority shall share the information with the concerned agency for necessary action.

18.20. Schedule to PMLA defines or mentions the "scheduled offence" referred to in Section 2(1)(u) read with Section 2(1)(y) of PMLA. Paragraph 12 of Part A mentions the scheduled offences under the Customs Act. Section 135 of the Customs Act which is evasion of duty or prohibitions is a scheduled offence under the Customs Act.

19. Before we proceed to the decision of the Supreme Court in **Vijay Madanlal Choudhary** (supra), it would be

apposite to briefly analyse the expression "*reason to believe*" and how this expression has different connotations when it is employed in different sections of PMLA.

20. The expression "*reason to believe*" has been subjected to numerous judicial pronouncements. It is an expression of considerable import and finds place in a number of statutes. However, the expression "*reason to believe*" is not defined in PMLA.

20.1. This expression finds place in Section 26 of the Indian Penal Code, 1860 (IPC). As per Section 26 of IPC, a person may be said to have *reason to believe* if he has sufficient cause to believe that thing but not otherwise.

20.2. In the context of the Customs Act, the expression "*reason to believe*" confers jurisdiction upon the proper officer to seize goods liable to confiscation under sub-section (1) of Section 110 of the said Act.

20.3. The expression "*reason to believe*" found place in the old Income Tax Act. Under Section 34 of the Indian

Income Tax Act, 1922, if the Income Tax Officer had *reason to believe* that by reason of the omission or failure on the part of an assessee to make a return of his income or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax had escaped assessment for that year, the Income Tax Officer could initiate a process for reopening of assessment. Supreme Court explained in **Calcutta Discount Company Limited v. Income Tax Officer**[5] that the expression "*reason to believe"* postulates belief and the existence of reasons for that belief. The belief must be held in good faith. It cannot be merely a pretence. The expression does not mean a purely subjective satisfaction of the Income Tax Officer. The Income Tax Officer must on information at his disposal believe that income has been under-assessed by reason of failure to fully and truly disclose all material facts necessary for assessment. Such a belief may not be based on mere suspicion; it must be founded upon information. Supreme Court reiterated the above proposition expounded

[5] AIR 1961 SC 373

in **Calcutta Discount Company Limited** (supra) in **S.Narayanappa v. Commissioner of Income Tax**[6] and thereafter held that it would be open to the court to examine the question as to whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief. In **Sheo Nath Singh v. Appellate Assistant Commissioner**[7], Supreme Court held that there can be no manner of doubt that the words "*reasons to believe*" suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the Income Tax Officer may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. The Income Tax Officer would be acting without jurisdiction if the reason for his belief that the conditions are satisfied does not exist or is not material or relevant to the belief. Court can always examine this aspect though sufficiency of the reasons for the belief cannot be investigated by the court. Elaborating upon this proposition, Supreme Court in **Income Tax Officer v.**

[6] AIR 1967 SC 523
[7] (1972) 3 SCC 234

Lakhmani Mewal Das[8], held that it is open to a court to examine whether the reasons for the formation of the belief have a rational connection with or a relevant bearing on the formation of the belief. Elaborating further, Supreme Court held that rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income Tax Officer and the formation of his belief that there has been escapement of income from assessment in that particular year. Supreme Court sounded a note of caution by observing that though the powers of the Income Tax Officer to re-open assessment are wide, those are not plenary; the words of the statute are '*reason to believe*' and not 'reason to suspect'.

20.4. Again in the context of Section 110 of the Customs Act, Supreme Court examined the meaning of the expression "*reason to believe"* in **Tata Chemicals Limited v. Commissioner of Customs (Preventive), Jamnagar**[9]**.** Supreme Court opined that the said expression does not

[8] (1976) 3 SCC 757 : AIR 1976 SC 1753 : (1976) 103 ITR 437
[9] (2015) 11 SCC 628 : (2015) 320 ELT 45

connote the subjective satisfaction of the officer concerned. Such a power given to the officer concerned is not an arbitrary power and has to be exercised in accordance with the restraints imposed by law; the belief must be that of an honest and reasonable person based upon reasonable grounds. If the authority acts without jurisdiction or there is no existence of any material or conditions leading to the belief, it would be open to the court to examine the same though sufficiency of the reasons for the belief cannot be investigated.

21. Having analysed the expression "*reason to believe*" appearing in different statutes, we may now examine the implication of the same in the context of its application in different provisions of PMLA.

22. The expression "*reason to believe*" as appearing in Section 5(1) of PMLA is relatable to the formation of belief based on materials in his possession of any proceeds of crime and that such proceeds of crime are likely to be concealed etc., which may frustrate any proceedings for

confiscation of such proceeds of crime then the director or the authorised officer would have the jurisdiction to provisionally attach such property for a period not exceeding 180 days.

22.1. A Division Bench of the Delhi High Court in **J.Sekhar v. Union of India**[10] in the context of challenge to *vires* of Section 5(1) of PMLA held that *reason to believe* cannot be a rubber stamping of the opinion already formed by someone else. The officer who is supposed to write down his *reason to believe* has to independently apply his mind. It cannot be a mechanical reproduction of the words in the statute. When an authority judicially reviewing such a decision peruses such *reason to believe*, it must be apparent that the officer penning the reasons had applied his mind to the materials available on record and has on that basis arrived at his *reason to believe*; the process of thinking of the officer must be discernible. The reasons have to be made explicit. It is only the reasons that can

[10] 2018 SCC OnLine Del 6523

enable the reviewing authority to discern how the officer formed his *reason to believe*.

22.2. Similarly, the expression "*reason to believe"* as appearing in the second proviso below sub-section (1) of Section 5 is relatable to formation of the belief on the basis of materials in possession of the Director or the authorised officer that a property is involved in money laundering and if such property is not attached immediately non-attachment of the property would frustrate any proceeding under PMLA.

22.3. Before we advert to Section 8 of PMLA, it would be apposite to examine the scope of the expression "*reason to believe"* as appearing in sub-section (1) of Section 17. The expression "*reason to believe*" that finds place in sub-section (1) of Section 17 is relatable to the action of search and seizure. Sub-section (1) has two parts: as per the first part, if the Director or the authorised officer has *reason to believe* on the basis of information in his possession that any person has committed any act which constitutes

money laundering etc., then the second part comes into play as per which he may authorise any subordinate officer to enter into and search any building etc., where he has reason to suspect that records or proceeds of crime are kept, with the authority to seize such records or property etc. This aspect was gone into by this court in **Additional Director v. M/s. Musaddilal Gems and Jewels (India) Private Limited**[11] (W.A.No.145 of 2023 decided on 04.04.2023). It has been held as follows:

> 24. Pausing here for a moment, we find that sub-section (1) of Section 17 of PMLA deals with two stages: one is at the stage of pre-authorisation and the next is the stage of post-authorisation.
>
> 24.1. In the first stage, the Director or any other officer authorised by him not below the rank of Deputy Director must have in his possession certain information; on the basis of such information in his possession, he must form *reason to believe* which must be recorded in writing that any person has committed any act of money laundering etc. Therefore, the information in his possession must have a causal relation with the recording of reasons which in turn must be the basis for forming the belief that any person has committed an act

[11] MANU/TL/0570/2023

which constitutes money laundering. Therefore, possession of information, derivation of reason from such information and thereafter formation of belief on the basis of the reasons that any person has committed an act which constitutes money laundering etc., are the *sine qua non* or conditions precedent for invoking the power under sub-section (1) of Section 17 of PMLA.

24.2. Insofar the second stage is concerned, once the Director or the authorised officer has come to the above conclusion, he may authorise any officer subordinate to him to enter and search any building etc., where he has reason to suspect that records or proceeds of crime are kept; break open the lock of any door etc; seize any record or property found as a result of such search etc. Insofar the second stage is concerned, the authorised officer must have reason to suspect that in any building etc., records relating to money laundering or proceeds of crime are kept etc.; he can enter and search such building and seize any record or property found as a result of such search. As opposed to recording of *reasons to believe* by the Director or by the subordinate officer whereafter he can authorise any subordinate officer to enter into and search any building, search any record or property etc., provided he has reason to suspect that in such building records or proceeds of crime are kept. Reason to suspect is not equivalent to reason to believe. While in the case of reason to believe, there must be objectivity, reason to suspect is subjective.

22.4. Thus, while in the first part, the Director or the authorised officer must have *reason to believe* that the concerned person has committed an act of money laundering etc., in the second part, based on such *reason to believe* he may authorise any subordinate officer to enter into and search any building etc., if he has reason to suspect that record relating to money laundering or proceeds of crime are kept there.

22.5. When we come to sub-section (1) of Section 20, the expression "*reason to believe*" as appearing in the said provision is relatable to retention of the seized or frozen property. The *reason to believe* must indicate that retention of the property seized or frozen is required to be continued for the purpose of adjudication under Section 8.

22.6. Since we are in Section 20 of PMLA, we may refer to sub-section (2) thereof, since one of the grounds of challenge made by the petitioners to the proceedings under PMLA is that as per sub-section (2), the authorised officer is under a mandate to pass an order for retention or

continuation of freezing of the property for the purpose of adjudication under Section 8 which shall immediately be forwarded to the Adjudicating Authority. Sub-section (2) of Section 20 of PMLA reads as follows:

> (2) The officer authorised by the Director shall, immediately after he has passed an order for retention or continuation of freezing of the property for purposes of adjudication under section 8, forward a copy of the order along with the material in his possession, referred to in sub-section (1), 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.

22.7. A careful reading of sub-section (2) of Section 20 of PMLA would indicate that the officer authorised by the Director is required to pass an order for retention or continuation of freezing of the property. The word "*shall*" employed in sub-section (2) of Section 20 reflects the obligatory nature of the mandate. The reason for this is not difficult to fathom. Seizure or freezing of property is a serious matter. It is not only an infringement of the right to property of a person but is also an intrusion into his

right to privacy. Therefore, the need to retain the property or continue with the freezing of the property for the purpose of adjudication under Section 8 must be reflected in the *reason to believe* of the authorised officer which must be based on the materials in his possession. Therefore, the order referred to in sub-section (2) of Section 20 is referable to sub-section (1) of Section 20. It is the contention of the petitioners that no such order was passed by the authorised officer. This contention we will examine from the materials on record including the record produced by the learned Standing Counsel. But the submission advanced on behalf of the learned Standing Counsel that the order mentioned in sub-section (2) of Section 20 is referable to sub-section (1) of Section 17 is erroneous and thus unsustainable.

22.8. Finally, the expression "*reason to believe*" as appearing in Section 8 of PMLA has an altogether different connotation. The *reason to believe* as appearing in Section 8 must be that of the Adjudicating Authority. What sub-section (1) of Section 8 contemplates is that on receipt of a

complaint under sub-section (5) of Section 5 or an application made under sub-section (4) of Section 17 etc., if the Adjudicating Authority has *reason to believe* that any person has committed an offence under Section 3 i.e., the offence of money laundering or is in possession of proceeds of crime he may serve a notice on such person within the period mentioned therein to indicate the sources of his income etc., out of which or by means of which he has acquired the property attached under sub-section (1) of Section 5 or seized or frozen under Section 17 etc., the evidence on which he relies etc. Thus, before issuing notice to the concerned person, the Adjudicating Authority must satisfy itself on the basis of *reason to believe* that the noticee had committed an offence of money laundering or is in possession of proceeds of crime. This *reason to believe* of the Adjudicating Authority must be of the Adjudicating Authority independent of the *reason to believe* of the Director or the authorised officer at the time of attachment of the property under sub-section (1) of Section 5 or at the time of search and seizure or freezing of

property under Section 17(1) or under sub-section (1) of Section 20.

23. In **Vijay Madanlal Choudhary** (supra), Supreme Court was examining challenge to validity of certain provisions of PMLA and the procedure followed by the Enforcement Directorate while enquiring into or investigating offences under PMLA. In the said decision, Supreme Court examined the expression "money laundering" as defined in Section 3 of PMLA. In this connection Supreme Court also examined the definition of "proceeds of crime" as appearing in Section 2(1)(u) of PMLA and thereafter held as follows:

> **249.** Coming to the next relevant definition is expression "money-laundering", it has the meaning assigned to it in Section 3 of the Act. We would dilate on this aspect while dealing with the purport of Section 3 of the Act a little later.
>
> **250.** The other relevant definition is "proceeds of crime" in Section 2(1)(u) of the 2002 Act. This definition is common to all actions under the Act, namely, attachment, adjudication and confiscation being civil in nature as well as prosecution or criminal action. The

original provision prior to amendment vide Finance Act, 2015 and Finance (No. 2) Act, 2019, took within its sweep any property (mentioned in Section 2(1)(v) of the Act) derived or obtained, directly or indirectly, by any person "as a result of" criminal activity "relating to" a scheduled offence (mentioned in Section 2(1)(y) read with Schedule to the Act) or the value of any such property. Vide Finance Act, 2015, it further included such property (being proceeds of crime) which is taken or held outside the country, then the property equivalent in value held within the country and by further amendment vide Act 13 of 2018, it also added property which is abroad. By further amendment vide Finance (No. 2) Act, 2019, Explanation has been added which is obviously a clarificatory amendment. That is evident from the plain language of the inserted Explanation itself. The fact that it also includes any property which may, directly or indirectly, be derived as a result of any criminal activity relatable to scheduled offence does not transcend beyond the original provision. In that, the word "relating to" (associated with/has to do with) used in the main provision is a present participle of word "relate" and the word "relatable" is only an adjective. The thrust of the original provision itself is to indicate that any property is derived or obtained, directly or indirectly, as a result of criminal activity concerning the scheduled offence, the same be regarded as proceeds of crime. In other words, property in whatever form mentioned in Section 2(1)(v), is or can be linked to criminal activity relating to or relatable to scheduled offence, must be regarded as proceeds of crime for the purpose of the 2002 Act. It must

follow that the Explanation inserted in 2019 is merely clarificatory and restatement of the position emerging from the principal provision [i.e., Section 2(1)(u)].

251. The "proceeds of crime" being the core of the ingredients constituting the offence of money-laundering, that expression needs to be construed strictly. In that, all properties recovered or attached by the investigating agency in connection with the criminal activity relating to a scheduled offence under the general law cannot be regarded as proceeds of crime. There may be cases where the property involved in the commission of scheduled offence attached by the investigating agency dealing with that offence, cannot be wholly or partly regarded as proceeds of crime within the meaning of Section 2(1)(u) of the 2002 Act — so long as the whole or some portion of the property has been derived or obtained by any person "as a result of" criminal activity relating to the stated scheduled offence. To be proceeds of crime, therefore, the property must be derived or obtained, directly or indirectly, "as a result of" criminal activity relating to a scheduled offence. To put it differently, the vehicle used in commission of scheduled offence may be attached as property in the concerned case (crime), it may still not be proceeds of crime within the meaning of Section 2(1)(u) of the 2002 Act. Similarly, possession of unaccounted property acquired by legal means may be actionable for tax violation and yet, will not be regarded as proceeds of crime unless the concerned tax legislation prescribes such violation as an offence and such offence is included in the Schedule of the 2002 Act. For being regarded as

proceeds of crime, the property associated with the scheduled offence must have been derived or obtained by a person "as a result of" criminal activity relating to the concerned scheduled offence. This distinction must be borne in mind while reckoning any property referred to in the scheduled offence as proceeds of crime for the purpose of the 2002 Act. Dealing with proceeds of crime by way of any process or activity constitutes offence of money-laundering under Section 3 of the Act.

252. Be it noted that the definition clause includes any property derived or obtained "indirectly" as well. This would include property derived or obtained from the sale proceeds or in a given case in lieu of or in exchange of the "property" which had been directly derived or obtained as a result of criminal activity relating to a scheduled offence. In the context of Explanation added in 2019 to the definition of expression "proceeds of crime", it would inevitably include other property which may not have been derived or obtained as a result of any criminal activity relatable to the scheduled offence. As noticed from the definition, it essentially refers to "any property" including abroad derived or obtained directly or indirectly. The Explanation added in 2019 in no way travels beyond that intent of tracking and reaching upto the property derived or obtained directly or indirectly as a result of criminal activity relating to a scheduled offence. Therefore, the Explanation is in the nature of clarification and not to increase the width of the main definition "proceeds of crime". The definition of "property" also contains Explanation which is for the removal of doubts

and to clarify that the term property includes property of any kind used in the commission of an offence under the 2002 Act or any of the scheduled offences. In the earlier part of this judgment, we have already noted that every crime property need not be termed as proceeds of crime but the converse may be true. Additionally, some other property is purchased or derived from the proceeds of crime even such subsequently acquired property must be regarded as tainted property and actionable under the Act. For, it would become property for the purpose of taking action under the 2002 Act which is being used in the commission of offence of money-laundering. Such purposive interpretation would be necessary to uphold the purposes and objects for enactment of 2002 Act.

253. Tersely put, it is only such property which is derived or obtained, directly or indirectly, as a result of criminal activity relating to a scheduled offence can be regarded as proceeds of crime. The authorities under the 2002 Act cannot resort to action against any person for money-laundering on an assumption that the property recovered by them must be proceeds of crime and that a scheduled offence has been committed, unless the same is registered with the jurisdictional police or pending inquiry by way of complaint before the competent forum. For, the expression "derived or obtained" is indicative of criminal activity relating to a scheduled offence already accomplished. Similarly, in the event the person named in the criminal activity relating to a scheduled offence is finally absolved by a Court of competent jurisdiction owing to an order of discharge, acquittal or because of

> quashing of the criminal case (scheduled offence) against him/her, there can be no action for money-laundering against such a person or person claiming through him in relation to the property linked to the stated scheduled offence. This interpretation alone can be countenanced on the basis of the provisions of the 2002 Act, in particular Section 2(1)(u) read with Section 3. Taking any other view would be rewriting of these provisions and disregarding the express language of definition clause "proceeds of crime", as it obtains as of now.

23.1. Supreme Court held that any property which is derived or obtained directly or indirectly as a result of criminal activity concerning the scheduled offence has to be regarded as proceeds of crime. In other words, property in whatever form which is or can be linked to criminal activity relating to or relatable to scheduled offence must be regarded as proceeds of crime for the purpose of PMLA. The expression "proceeds of crime" being the core of the ingredients constituting the offence of money laundering, has to be construed strictly. To be proceeds of crime, the property must be derived or obtained directly or indirectly as a result of criminal activity relating to a scheduled offence. It is only such property which is derived or

obtained directly or indirectly as a result of criminal activity relating to a scheduled offence which can be regarded as proceeds of crime. Authorities under PMLA cannot resort to action against any person for money laundering on an assumption that the property recovered by them must be proceeds of crime and that a scheduled offence has been committed, unless the same is registered with the jurisdictional police or pending enquiry by way of complaint before the competent forum. Thus, it has been clarified by the Supreme Court that no action under PMLA is permissible merely on an assumption that the property recovered is a proceed of crime and that a scheduled offence has been committed unless the scheduled offence is registered before the jurisdictional police or pending enquiry by way of complaint before the competent forum. Explaining further, Supreme Court clarified that in the event the person named in the criminal activity relating to a scheduled offence is finally absolved by a court of competent jurisdiction owing to an order of discharge, acquittal or because of quashing of the criminal case

(scheduled offence) against the person, there can be no action for money laundering against such person or a person claiming through him in relation to the property linked to the stated scheduled offence. After analysing the definition of money laundering as per Section 3 of PMLA, Supreme Court held that from the bare language of Section 3, 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 has been derived or obtained as a result of criminal activity relating to or in relation to a scheduled offence. Such process or activity can be indulged in only after the property is derived or obtained as a result of criminal activity relatable to a scheduled offence. In other words, what the Supreme Court has explained is that the offence of money laundering is an independent offence. Once committed, it is an offence separate from the scheduled offence but for the offence to be committed it must be regarding the process or activity connected with the proceeds of crime

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

23.2. After saying so, Supreme Court posed the next question as to whether the offence under Section 3 is a standalone offence. While answering this question, Supreme Court held as follows:

> **281.** The next question is : whether the offence under Section 3 is a standalone offence? Indeed, it is dependent on the wrongful and illegal gain of property as a result of criminal activity relating to a scheduled offence. Nevertheless, it is concerning the process or activity connected with such property, which constitutes offence of money-laundering. The property must qualify the definition of "proceeds of crime" under Section 2(1)(u) of the 2002 Act. As observed earlier, all or whole of the crime property linked to scheduled offence need not be regarded as proceeds of crime, but all properties qualifying the definition of "proceeds of crime" under Section 2(1)(u) will necessarily be crime properties. Indeed, in the event of acquittal of the person concerned or being absolved from allegation of criminal activity relating to scheduled offence, and if it is established in the court of law that the crime property in the concerned case has been rightfully owned and possessed by him, such a property by no stretch of imagination can be termed as crime property and *ex-consequenti* proceeds of crime within the meaning of

Section 2(1)(u) as it stands today. On the other hand, in the trial in connection with the scheduled offence, the Court would be obliged to direct return of such property as belonging to him. It would be then paradoxical to still regard such property as proceeds of crime despite such adjudication by a Court of competent jurisdiction. It is well within the jurisdiction of the concerned Court trying the scheduled offence to pronounce on that matter.

282. Be it noted that the authority of the Authorised Officer under the 2002 Act to prosecute any person for offence of money-laundering gets triggered only if there exists proceeds of crime within the meaning of Section 2(1)(u) of the 2002 Act and further it is involved in any process or activity. Not even in a case of existence of undisclosed income and irrespective of its volume, the definition of "proceeds of crime" under Section 2(1)(u) will get attracted, unless the property has been derived or obtained as a result of criminal activity relating to a scheduled offence. It is possible that in a given case after the discovery of huge volume of undisclosed property, the authorised officer may be advised to send information to the jurisdictional police (under Section 66(2) of the 2002 Act) for registration of a scheduled offence contemporaneously, including for further investigation in a pending case, if any. On receipt of such information, the jurisdictional police would be obliged to register the case by way of FIR if it is a cognizable offence or as a non-cognizable offence (NC case), as the case may be. If the offence so reported is a scheduled offence, only in that eventuality, the property recovered by the authorised

officer would partake the colour of proceeds of crime under Section 2(1)(u) of the 2002 Act, enabling him to take further action under the Act in that regard.

283. Even though, the 2002 Act is a complete Code in itself, it is only in respect of matters connected with offence of money-laundering, and for that, existence of proceeds of crime within the meaning of Section 2(1)(u) of the Act is quintessential. Absent existence of proceeds of crime, as aforesaid, the authorities under the 2002 Act cannot step in or initiate any prosecution.

284. In other words, the Authority under the 2002 Act, is to prosecute a person for offence of money-laundering only if it has reason to believe, which is required to be recorded in writing that the person is in possession of "proceeds of crime". Only if that belief is further supported by tangible and credible evidence indicative of involvement of the person concerned in any process or activity connected with the proceeds of crime, action under the Act can be taken forward for attachment and confiscation of proceeds of crime and until vesting thereof in the Central Government, such process initiated would be a standalone process.

23.3. Thus, Supreme Court has clarified that the offence of money laundering under Section 3 of PMLA is dependent on the wrongful and illegal gain of property as a result of criminal activity relating to a scheduled offence. The

property must satisfy the definition of proceeds of crime under Section 2(1)(u) of PMLA.

23.4. As we have already discussed above, "proceeds of crime" has been defined to mean any property derived or obtained directly or indirectly by any person as a result of criminal activity relating to a scheduled offence. The explanation also clarifies that the proceeds of crime would include any 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. Thus, the definition of "proceeds of crime" is intrinsically related to property derived or obtained directly or indirectly as a result of any criminal activity relatable to the scheduled offence.

23.5. Supreme Court reiterated that if the offence so reported is a scheduled offence, only in that eventuality, the property recovered by the authorised officer would partake the colour of proceeds of crime under Section

2(1)(u) of PMLA. Proceedings under PMLA gets triggered only if there exists proceeds of crime within the meaning of Section 2(1)(u). Supreme Court has clarified that not even in a case of existence of undisclosed income and irrespective of its volume, the definition of "proceeds of crime" under Section 2(1)(u) will get attracted, unless the property has been derived or obtained as a result of criminal activity relating to a scheduled offence.

23.6. Supreme Court then examined the scenario where after discovery of huge volume of undisclosed property, the authorised officer may be advised to send information to the jurisdictional police under Section 66(2) of PMLA for registration of a scheduled offence contemporaneously, including for further investigation in a pending case. On receipt of such information, the jurisdictional police would be obliged to register the case by way of FIR. If the offence so reported is a scheduled offence, then only the property recovered would partake the colour of proceeds of crime within the meaning of Section 2(1)(u) of PMLA.

24. Learned Standing Counsel has referred to paragraphs 311, 313 and 314 of **Vijay Madanlal Choudhary** (supra). In the aforesaid paragraphs, Supreme Court has observed that PMLA is a special self-contained law. Section 17 thereof is a provision specifically dealing with matters concerning search and seizure in connection with the offence of money-laundering. Supreme Court has clarified that before resorting to action of provisional attachment, registration of scheduled offence or complaint filed in that regard, is not a precondition. The authorised officer can still invoke power of issuing order of provisional attachment and contemporaneously send information to the jurisdictional police about the commission of scheduled offence and generation of property as a result of criminal activity relating to a scheduled offence, which is being made subject matter of provisional attachment. Supreme Court further observed that such power can be exercised by the Director or by the authorised officer in the matter of search and seizure.

24.1. The process of search and seizure under PMLA is not only for the purpose of inquiring into the offence of money laundering, but also for the purpose of prevention of money laundering. This is markedly distinct from the process of investigating into a scheduled offence.

25. We may now advert to relevant provisions of the Customs Act. As we have noticed, show cause notices dated 26.06.2020 and 27.06.2020 were issued to the petitioners by respondent No.1 under Section 124 of the Customs Act. Heading of Section 124 of the Customs Act is "*issue of show cause notice before confiscation of goods, etc*". As per Section 124, no order confiscating any goods or imposing any penalty on any person shall be made unless the owner of the goods or such person from whom the goods have been seized is given a notice and hearing.

25.1. Going back, we find that as per Section 110 of the Customs Act, if the proper officer has *reason to believe* that any goods are liable to confiscation under the said Act, he may seize such goods. Once such goods are seized, notice

is required to be given under Section 124 of the Customs Act, consequences of which are confiscation and imposition of penalty. Confiscation of improperly imported goods is provided for in Section 111 whereas penalty for improper importation is provided for in Section 112. On the other hand, confiscation of goods attempted to be improperly exported etc., is provided in Section 113 and penalty in this regard is provided in Section 114.

25.2. Section 135 finds place in Chapter XVI of the Customs Act which deals with offences and prosecutions. Section 135 deals with evasion of duty or prohibitions. As per sub-section (1), without prejudice to any action that may be taken under the Customs Act, if any person makes a misdeclaration of value or fraudulently evades or attempt to evade customs duty in respect to such goods knowingly; or acquires possession of or is in any way concerned in carrying, removing etc., of the goods which he knows or has *reason to believe* are liable to confiscation under Section 111 or Section 113 as the case may be; or attempts to export any goods which he knows or has *reason to*

believe are liable to confiscation under Section 113; or fraudulently avails of or attempts to avail of drawback or any exemption from duty provided under the Customs Act in connection with export of goods; or obtains an instrument from any authority by fraud, collusion, wilful misstatement or suppression of facts and such instrument has been utilised by such person or any other person, he shall be punishable, in the case of an offence relating to the situations mentioned in clauses A to E thereof, with imprisonment for a term which may extend to seven years and with fine. The proviso clarifies that in the absence of special and adequate reasons to the contrary, such imprisonment shall not be for less than one year. In any other case, he shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

25.3. Section 137 deals with cognizance of offences. As per sub-section (1), no court shall take cognizance of any offence under the sections mentioned therein including Section 135 except with the previous sanction of the

Principal Commissioner of Customs or Commissioner of Customs.

25.4. Learned Senior Counsel for the petitioners in the course of his arguments highlighted this aspect that no cognizance can be taken by any court under Section 135 without the previous sanction of the Principal Commissioner of Customs or Commissioner of Customs. He has asserted that there is no such previous sanction in the present case. Therefore, question of any cognizance being taken by any court of the offence under Section 135 of the Customs Act would not arise. We will deal with this submission a little later.

25.5. For the moment, we may refer to sub-section (3) of Section 137 of the Customs Act. Sub-section (3) says that any offence under Chapter XVI may either before or after the institution of prosecution, be compounded by the Principal Chief Commissioner of Customs or 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. However, as per the proviso, this provision would not apply to a person who has been allowed to compound once earlier in respect of an offence under Sections 135.

25.6. It is the contention of learned Senior Counsel for the petitioners that firstly, no previous sanction has been accorded by the Principal Commissioner of Customs or Commissioner of Customs for prosecuting the petitioners under Section 135 of the Customs Act. Therefore, no cognizance can be taken by any court. Secondly, Section 135 is a compoundable offence and may be compounded by the Principal Chief Commissioner of Customs or Chief Commissioner of Customs either before or after institution of prosecution on payment by the accused of the compounding amount. His contention is that even before institution of prosecution, with regard to the present position of the petitioners the offence under Section 135 can be compounded.

25.7. We may mention that as already noticed above, Section 135 of the Customs Act is a scheduled offence under PMLA.

25.8. Finally we may have a look at Section 104 of the Customs Act which confers power of arrest upon a customs officer. As per sub-section (1) of Section 104, if an officer of customs empowered in this behalf by a general or special order of the Principal Commissioner of Customs or Commissioner of Customs has *reason to believe* that any person has committed an offence punishable amongst others under Section 135, he may arrest such person and shall, as soon as may be, inform him of the grounds of such arrest. Sub-sections (2) to (7) lay down the procedure following such arrest.

26. In **Ramesh Chandra Mehta** (supra) a Constitution Bench of the Supreme Court opined that the customs officer under the Customs Act is not a police officer within the meaning of Section 25 of the Indian Evidence Act, 1872 (briefly, 'the Evidence Act' hereinafter) and that the

statements made before him by a person who is arrested or against whom an enquiry is made are not covered by Section 25 of the Evidence Act. In that context, it was argued that arrest of a person who is guilty of the offence punishable under Section 135 and the information to be given to him amounts to a formal accusation of an offence and in any case the person who has been arrested and who has been informed of the nature of the infraction committed by him stands in the character of an accused person. Supreme Court did not agree to such a contention. Referring to Section 104 of the Customs Act, Supreme Court held that the said provision only prescribes the conditions in which the power of arrest may be exercised. The officer must have *reason to believe* that a person has committed an offence punishable under Section 135, otherwise he cannot arrest such person. But, by informing such person of the grounds of his arrest, the customs officer does not formally accuse him with the commission of an offence. Such arrest and detention are only for the purpose of holding an inquiry for confiscation of seized

goods and for imposition of penalty. After adjudging penalty and confiscation of goods or without doing so, if the customs officer forms an opinion that the offender should be prosecuted he may prefer a complaint in the manner provided under Section 137 with the sanction of the Collector of Customs and until a complaint is so filed the person against whom an inquiry is commenced under the Customs Act does not stand in the character of a person accused of an offence under Section 135. Supreme Court held as follows:

> **26.** It was strenuously urged that under Section 104 of the Customs Act, 1962, the Customs Officer may arrest a person only if he has reason to believe that any person in India or within the Indian Customs waters has been guilty of an offence punishable under Section 135 and not otherwise and he is bound to inform such person of the grounds of his arrest. Arrest of the person who is guilty of the offence punishable under Section 135 and information to be given to him amount, it was contended, to a formal accusation of an offence and in any case the person who has been arrested and who has been informed of the nature of the infraction committed by him stands in the character of an accused person. We are unable to agree with that contention. Section 104(1) only prescribes the conditions in which the power of arrest may be exercised.

> The officer must have reason to believe that a person has been guilty of an offence punishable under Section 135, otherwise he cannot arrest such person. But by informing such person of the grounds of his arrest the Customs Officer does not formally accuse him with the commission of an offence. Arrest and detention are only for the purpose of holding effectively an inquiry under Sections 107 and 108 of the Act with a view to adjudging confiscation of dutiable or prohibited goods and imposing penalties. At that stage there is no question of the offender against the Customs Act being charged before a Magistrate. Ordinarily after adjudging penalty and confiscation of goods or without doing so, if the Customs Officer forms an opinion that the offender should be prosecuted he may prefer a complaint in the manner provided under Section 137 with the sanction of the Collector of Customs and until a complaint is so filed the person against whom an inquiry is commenced under the Customs Act does not stand in the character of a person accused of an offence under Section 135.

26.1. Elaborating further, Supreme Court held that a customs officer under the Customs Act continues to remain a revenue officer primarily concerned with the detection of smuggling and enforcement and levy of proper duties and prevention of entry into India of dutiable goods without payment of duty and of goods of which the entry is prohibited. He does not on that account become a police

officer nor does the information conveyed by him, when the person guilty of an infraction of the law is arrested, amount to making of an accusation of an offence against the person so guilty of infraction. Even under the Customs Act, a formal accusation can only be deemed to be made when a complaint is filed before a Magistrate competent to try the person guilty of the infraction amongst others under Section 135 of the Customs Act. This is what the Supreme Court clarified in paragraph 27, relevant portion of which reads as under:

> 27. .....He does not on that account become either a police officer, nor does the information conveyed by him, when the person guilty of an infraction of the law is arrested, amount to making of an accusation of an offence against the person so guilty of infraction. Even under the Act of 1962 formal accusation can only be deemed to be made when a complaint is made before a Magistrate competent to try the person guilty of the infraction under Sections 132, 133, 134 and 135 of the Act.

27. This decision of the Supreme Court has been followed by the Gujarat High Court in **Bhavin Impex Private Limited** (supra). In that case, the question which was considered

by the Gujarat High Court was whether the authorities under the Central Excise Act, 1944, had the power to arrest a person under Section 13 of the said Act without a warrant and without filing an FIR or lodging a complaint before a court of competent jurisdiction. After referring to a number of judicial precedents, Gujarat High Court culled out the legal principles as under:

> i. The main purpose of the provisions of Sections 9, 13, 18 and 19 of the Central Excise Act is to levy and collect excise duties and Central Excise Officers have been appointed thereunder for this main purpose. In order that they may carry out their duties in this behalf, powers have been conferred on them to see that duty is not evaded and persons guilty of evasion of duty are brought to book.
>
> ii. Mere conferment of powers of investigation into criminal offences under Section 9 of the Act does not make the Central Excise Officer a police officer.
>
> iii. A Customs Officer is not a member of the police force. He is not entrusted with the duty of maintaining law and order. He is entrusted with powers that specifically relate to the collection of customs duty and prevention of smuggling. The power to arrest, the power to detain, the power to search or obtain a search warrant and the power to collect evidence are vested in the Customs Officer for

enforcing compliance of the provisions of the Sea Customs Act. The Customs Officer does not exercise, when enquiring into a suspected infringement of the Sea Customs Act, powers of investigation which a police officer may in investigating the commission of an offence. He is invested with the power to enquire into infringements of the Act primarily for the purpose of adjudicating forfeiture and penalty. He has no power to investigate an offence triable by a Magistrate, nor has he the power to submit a report under Section 173 of the Code of Criminal Procedure. He can only make a complaint in writing before the competent Magistrate.

iv. The expression "any person" includes a person who is suspected or believed to be concerned in the smuggling of goods. But a person arrested by a Customs Officer because he is found in possession of smuggled goods or on suspicion that he is concerned in smuggling goods is not when called upon by the Customs Officer to make a statement or to produce a document or thing, a person accused of an offence within the meaning of Article 20(3) of the Constitution. The steps taken by the Customs Officer are for the purpose of holding an enquiry under the Customs Act and for adjudging confiscation of goods dutiable or prohibited and imposing penalties. The Customs Officer does not at that stage accuse the person suspected of infringing the provision of the Customs Act with the commission of any offence. His primary duty is to prevent smuggling and to recover duties of customs: when collecting evidence in respect of smuggling against a person suspected of infringing the provisions of the

Customs Act, he is not accusing the person of any offence punishable at a trial before a Magistrate.

v. Where a Customs Officer arrests a person and informs that person of the grounds of his arrest (which he is bound to do under Article 22(1) of the Constitution) for the purposes of holding an enquiry into the infringement of the provisions of the Customs Act which he has reason to believe has taken place, there is no formal accusation of an offence. In case of an offence by infringement of the Customs Act and punishable at the trial before a Magistrate there is an accusation when a complaint is lodged by an officer competent in that behalf before the Magistrate.

vi. Arrest and detention are only for the purpose of holding effectively an inquiry under Sections 107 and 108 of the Customs Act with a view to adjudging confiscation of dutiable or prohibited goods and imposing penalty. At that stage there is no question of the offender against the Customs Act being charged before a Magistrate. Ordinarily, after adjudging penalty and confiscation of goods or without doing so, if the Customs Officer forms an opinion that the offender should be prosecuted, he may prefer a complaint in the manner provided under Section 137 with the sanction of the Collector of Customs and until a complaint is so filed, the person against whom an inquiry is commenced under the Customs Act does not stand in the character of a person accused of an offence under Section 135.

vii. The Customs Officer is a revenue officer primarily concerned with the detection of smuggling and enforcement and levy of proper duties and prevention of entry into India of dutiable goods without payment of duty and of goods of which the entry is prohibited.

viii. A person arrested under Section 104(1) of the Customs Act would fall within the ambit of the expression "suspected of the commission of any non-bailable offence". A person arrested by a Customs Officer under Section 104 would be a person suspected of the commission of such an offence inasmuch as the arrest itself is made when the officer of customs has reason to believe that such person has been guilty of an offence punishable under Section 135 of the Customs Act.

ix. The police is the instrument for the prevention and detection of crime which can be said to be the main object of having the police. The powers of the customs officers are really not for such purpose and are meant for checking the smuggling of goods and due realization of customs duties and determining the action to be taken in the interest of the revenue of the country by way of confiscation of goods of which no duty has been paid and by imposing penalties and fine.

27.1. In principle No. (iii), Gujarat High Court has clarified that a customs officer has no power to investigate an offence triable by a Magistrate, nor has he the power to

submit a report under Section 173 of Cr.P.C. He can only make a complaint in writing before the competent Magistrate. As per principle No.(iv), a person arrested by a customs officer because he is found in possession of smuggled goods or on suspicion that he is concerned in smuggling goods, when he is called upon by the customs officer to make a statement or to produce a document or thing, does not become a person accused of an offence within the meaning of Article 20(3) of the Constitution. Steps taken by the customs officer are for the purpose of holding an enquiry under the Customs Act and for adjudging confiscation of goods dutiable or prohibited and imposing penalties. The customs officer does not at that stage accuse the person suspected of infringing the provisions of the Customs Act with the commission of any offence. His primary duty is to prevent smuggling and to recover duties of customs. When collecting evidence in respect of smuggling against a person suspected of infringing the provisions of the Customs Act, he is not accusing the person of any offence punishable at a trial

before a Magistrate. Principle No.(v) further clarifies that where a customs officer arrests a person and informs that person of the grounds of his arrest for the purposes of holding an enquiry into the infringement of the provisions of the Customs Act which he has *reason to believe* has taken place, there is no formal accusation of an offence. In case of an offence by infringement of the Customs Act and punishable at the trial before a Magistrate there is an accusation when a complaint is lodged by an officer competent in that behalf before the Magistrate. Thus, it is at this stage i.e., when a complaint is lodged before the competent jurisdictional Magistrate that the arrestee becomes an accused. As explained in **Ramesh Chandra Mehta** (supra) the complaint can be filed with the sanction of the prescribed authority only.

28. We are in respectful agreement with the views expressed by the Gujarat High Court which is based on the decision of the Constitution Bench of the Supreme Court in **Ramesh Chandra Mehta** (supra).

29. We have already noted that following the search in the premises of petitioners No.2 and 3 on 03.05.2019, show cause notices dated 26.06.2020 and 27.06.2020 were issued by the Additional Director General of DRI to petitioners No.2 and 3 under Section 124 of the Customs Act as to why the seized goods and currency seized should not be confiscated and as to why penalty should not be imposed under the Customs Act. We have also noted that those two show cause notices have since been transferred to the call book on 16.04.2021 by the Principal Commissioner of Customs, Hyderabad, in terms of Section 28(9-A)(c) of the Customs Act. Since then no further steps have been taken under the Customs Act pursuant to the show cause notices.

30. From the additional material papers submitted by the learned Standing Counsel, we find that Additional Director General of DRI had informed the Principal Director General vide letter dated 08.05.2019 about the search carried out on 03.05.2019 and the seizure of jewellery and cash. It was also mentioned that four persons i.e., Battula

Venkatesh, Pradeep Kumar (petitioner No.1), Pariki Pandla Venkateshwar and Kidambi Venkata Varadarajulu were arrested. As per the intimation of arrest annexed to such letter, we find that those four persons were arrested on 04.05.2019, 05.05.2019 and 07.05.2019. As per details of offence committed by petitioner No.1, as annexed to the intimation of arrest, it was stated that petitioner No.1 was found involved in the diversion of imported foreign marked gold bars and misdeclaration of gold in shipping bill by petitioner No.2 in contravention of provisions of the Customs Act and thereby he rendered himself liable for punishment under Section 135 of the Customs Act. He was placed under arrest at 14:30 hours of 05.05.2019 in the office of DRI, Hyderabad, and on production before the Special Judge for Economic Offences, Nampally, Hyderabad, on 05.05.2019 he was remanded to judicial custody.

31. In the hearing we were informed that the arrested persons including petitioner No.1 were subsequently released on bail by the court.

32. On 03.08.2020 Additional Director, Department of Revenue (Central Economic Intelligence Bureau), Government of India, wrote to the Director of Enforcement Directorate sharing the information regarding search and issuance of show cause notices.

33. The additional material papers also contain minutes of Risk Assessment Monitoring Committee (RAMC) meeting of southern region of the Enforcement Directorate dated 12.10.2020. It may be mentioned that the meeting was held on 25.08.2020 and on 01.09.2020. Amongst various decisions taken, at serial No.59, the RAMC meeting decided to recommend recording of ECIR in the case of petitioner No.2 and others on the basis of risk management.

34. We have perused the note sheet forming part of the record submitted before the court by the learned Standing Counsel. In the note dated 11.10.2021 of the Deputy Director it was mentioned that petitioners have been booked for commission of scheduled offence under Section 135 of the Customs Act and thereby *prima facie* they

appeared to have indulged in money laundering. It was noted that it was not possible to take physical possession of the securities and bank balances of the Sri Krishna Group and their family members. However, there was every possibility that the said persons/entities may sell or transfer the above assets. Proceeding that those constituted proceeds of crime, it was ordered that the securities and bank balances should be frozen. Accordingly, the freezing order was passed.

35. The aforesaid note was styled as an order under Section 17(1A) of PMLA which was approved on that day itself with instructions to file original application before the Adjudicating Authority.

36. From the above, it is evident that respondent No.1 had proceeded on an erroneous assumption that there was a scheduled offence against the petitioner. As we have seen from the Constitution Bench decision of the Supreme Court in **Ramesh Chandra Mehta** (supra) as explained by the Gujarat High Court in **Bhavin Impex Private Limited**

(supra), mere arrest of a person by the customs officer for alleged contravention of the provisions of the Customs Act, including Section 135 thereof, would not make the arrested person an accused. No complaint has been filed against the petitioners before the competent court under Section 200 Cr.P.C read with Section 135 of the Customs Act. In the absence thereof, it cannot be said that there is any predicate offence against the petitioners; or that the petitioners are accused in a predicate offence. Despite the provisions of Section 66(2) of PMLA as explained by the Supreme Court in paragraph 282 of **Vijay Madanlal Choudhary** (supra), there is nothing on record to suggest that the Director or the authorised officer has shared the information that the petitioners have contravened the provisions of Section 135 of the Customs Act with the customs authorities to take the requisite steps under Section 137 of the Customs Act.

37. That brings us to the impugned order of the Adjudicating Authority dated 25.07.2022. This order was passed by the Adjudicating Authority on the original

application filed by the Deputy Director of Enforcement Directorate under Section 17(4) of PMLA for retention of documents/records/articles/accounts etc., seized under sub-section (1) of Section 17 of PMLA. Deputy Director mentioned that the documents/records/articles/accounts seized/frozen from different premises during the course of the search contained substantial evidence which would assist in tracing further proceeds of crime concealed by the persons and entities concerned; those would be required by the investigating officer to unearth proceeds of crime; there was reasonable belief that the suspects have committed the offence of money laundering and in order to unearth the same, search was conducted leading to seizure. On behalf of the petitioners, it was contended that the expression "*reason to believe*" appearing in Section 17 of PMLA could not have been formed in the facts of the present case as there was no scheduled offence in case of the petitioners.

37.1. Adjudicating Authority in the order dated 25.07.2022 noted that Pradeep Kumar (petitioner No.1) was arrested

for contravention of the Customs Act and liable for punishment under Section 135 of the Customs Act. Section 135 of the Customs Act is a scheduled offence under Section 2(y)(i) of PMLA. Therefore, Enforcement Directorate recorded an Enforcement Case Information Report (ECIR). Neither registration of FIR under Section 154 Cr.P.C nor filing of a complaint is mandatory under the Customs Act for initiation of proceedings under PMLA. Pradeep Kumar was arrested on 05.05.2019 by DRI and was in judicial custody for 52 days for committing the offence punishable under Section 135 of the Customs Act. He was granted bail by this court on 26.06.2019. Since Pradeep Kumar was arrested for contravention of the Customs Act and was liable for punishment under Section 135 of the Customs Act, which is a scheduled offence, Enforcement Directorate recorded ECIR. This is reiterated in the order by the Adjudicating Authority.

38. We are afraid, Adjudicating Authority overlooked the fact that on the date of passing of the order dated 25.07.2022, there was no scheduled offence against the

petitioners. While there was no bar for the Enforcement Directorate to initiate proceedings against the petitioners under PMLA without there being any scheduled offence, the moment Enforcement Directorate initiated the proceedings under PMLA, they could have shared the information with the customs authorities under Section 66(2) of PMLA and on the basis of such information, customs authorities could have resorted to the steps required under Sections 135 and 137 of the Customs Act. But, as noticed above, no such steps have been taken, including filing of a complaint. Even as on date, no complaint has been filed and there is no proceeding pending against the petitioners under Section 135 of the Customs Act.

39. Therefore, the Adjudicating Authority could not have had any *reason to believe* under sub-section (1) of Section 8 of PMLA that petitioners had committed an offence under Section 3 there being no scheduled offence. When this was pointed out by the petitioners in their reply to the notices issued under sub-section (1) of Section 8 of PMLA,

Adjudicating Authority misdirected itself and erroneously held that since petitioner No.1 was arrested by the customs officer for an offence under Section 135 of the Customs Act therefore there is a scheduled offence against the petitioners overlooking the fact that the customs authorities have not taken any steps against the petitioners under Section 137 of the Customs Act. Because of such fallacious assumption, Adjudicating Authority fell in error in not only issuing notice under sub-section (1) of Section 8 of PMLA, but in passing the impugned order dated 25.07.2022 under sub-sections (2) and (3) of Section 8 of PMLA. When there is no scheduled offence, question of continuation of proceedings under PMLA would not be justified and legally tenable. As already held above, such an order would be without jurisdiction.

40. That being the position, we have no hesitation in holding that impugned order dated 25.07.2022 is wholly without jurisdiction. It is trite law that if an order is without jurisdiction, the aggrieved party can approach the High Court under Article 226 of the Constitution of India

notwithstanding availability of alternative remedy. This settled proposition needs no elaboration.

41. Since we have come to the conclusion that the impugned order is without jurisdiction there being no scheduled offence against the petitioners, it is not necessary for us to delve into the question as to what would be the impact of not passing an order under sub-section (2) of Section 20 of PMLA on the PMLA proceedings.

42. Thus, having regard to the discussions made above, impugned order dated 25.07.2022 cannot be sustained. The same is hereby set aside and quashed.

43. We make it clear that we have not expressed any opinion on the show cause notices issued under Section 124 of the Customs Act or proceedings under the Customs Act.

44. Writ petition is accordingly allowed. Record produced is returned back to the learned Standing Counsel.

Miscellaneous applications pending, if any, shall stand closed. However, there shall be no order as to costs.

UJJAL BHUYAN, CJ

N. TUKARAMJI, J

06.07.2023

Note: LR copy to be marked.
B/o.
vs/pln