

(2021) 10 DEL CK 0174

In the Delhi High Court

Case No : Civil Writ Petition No. 5235, 5424, 5643, 5657, 5671, 5713, 5797, 5855, 6499, 7034, 7210, 7801, 7835, 9384 Of 2020, 2331, 9922 Of 2021 & CM APPLs. 18868, 19579, 20442, 20476, 20656, 20969, 21152, 22801, 23978, 24370, 25677, 25731, 30224, 31384 Of 2020, 41

J K Tyre And Industries Ltd

APPELLANT

Vs

Directorate Of Enforcement

RESPONDENT

Date of Decision : 27-10-2021

Acts Referred:

Constitution Of India, 1950 — Article 226
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 — Rule 2(f), 5, 6, 8, 8(1), 8(7)
Adjudicating Authority (Procedure) Regulations, 2013 — Rule 6
Prevention Of Money Laundering Act, 2002 — Section 3, 5(1), 8, 8(1), 11, 11(3), 17, 17(1), 17(1A), 17(2), 17(4), 20(1), 20(2), 55(a), 58, 60, 60(2), 60(4), 60(6), 65, 73
Code Of Criminal Procedure, 1973 — Section 102
Indian Penal Code, 1860 — Section 26
Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 42, 43
Customs Act, 1962 — Section 110
Insolvency And Bankruptcy Code, 2016 — Section 32A
Adjudicating Authority (Procedure) Regulations, 2013 — Regulation 13, 13(2), 16, 17, 18, 21, 22, 23, 24, 25

Citation : (2021) 10 DEL CK 0174

Hon'ble Judges : Prathiba M. Singh, J

Bench : Single Bench

Advocate : Sidharth Luthra, Alina Arora, Nimrah Sameen Alvi, Parth Singh, Sheezan Hashmi, Anmol Kheta, Ravi Prakash, Shruti Shiv Kumar, Varun Agarwal

Judgement

Prathiba M. Singh, J

1. This judgment has been pronounced through video conferencing.
2. These are a batch of writ petitions filed under Article 226 of the Constitution of

India, challenging freezing orders passed by the Directorate of Enforcement (hereinafter "ED") wherein the bank accounts of the Petitioners were ordered to be frozen.

3. The genesis of these disputes is a communication dated 26th September 2018 received from the Office of the Prosecutor General, Rio De Janeiro, Brazil. The said communication was termed as a 'Request for legal assistance' in a criminal matter involving a former Governor of Brazil, Sergio Cabral, against whom allegations of corruption and money laundering were levelled. The diversion was assessed by the Brazilian Authorities to be more than a 100 Million Dollars. According to the Brazilian Authorities, a sophisticated system of compensation was indulged in by the former Governor. As per the said allegations, more than 3000 companies from 53 countries were stated to be involved. The specific allegation in respect of Indian companies was qua a sum of 13.24 Million Dollars. The Prosecutor General relied upon the United Nations Convention against Transnational Organized Crime, 2000, also known as the Palermo Convention, to make various requests to the Indian authorities in respect of the companies alleged to have been involved in money laundering in relation to the case against the former Brazilian Governor. The Prosecutor General from Brazil sought freezing/seizure of the bank accounts of the Companies stated to be involved, as also digital copies of all the documents relating to the identified bank accounts. A letter of Request was sent to the Indian ED by the Prosecutor General on 26th September 2018.

4. Pursuant to this Letter of Request, the ED passed freezing orders under Section 17(1A) of the Prevention of Money Laundering Act, 2002 (hereinafter, "Act"), in July 2020, freezing various bank accounts of the Petitioners and other companies in India, and also commenced proceedings under the Act against all the 66 companies.

5. The matter was referred by the ED to the Adjudicating Authority (hereinafter, "AA") under section 17(4) the Act, pursuant to which, the AA issued notices to the Petitioner under Section 8(1) of the Act to show-cause as why their properties seized or frozen should not be retained as involved in Money Laundering under the Act. These notices were issued to the Petitioners in September 2020. The AA directed the Petitioners herein to file replies to the show cause notice, based on the 'Relied Upon Documents'

(hereinafter, "RUDs") that were supplied to them (Panchnamas). A hearing was then called for by the AA. During the hearings, as has been submitted by the Petitioners, each of them were afforded a mere 2-3 minutes to make their oral submissions before the AA. The fact that the hearings were so brief is not disputed by the Respondents.

6. In the meanwhile, the present writ petitions were filed before this Court praying to quash and set-aside the freezing orders passed by the ED, against these Petitioners'. The stand of the ED supporting the said freezing orders has

been that they executed the freezing orders under Section 17(1A) of the PMLA, in accordance with the mandate of Section 60(6) of the PMLA, on the basis of the Letter of Request received from the Government of Brazil.

7. The Petitioners at the interim stage, contended that the request, if any, ought to be, only qua the particular amounts and the carte blanche freezing of the bank accounts in their entirety was not warranted, when the dispute was pending before the AA.

8. Thereafter, interim orders were passed in all these petitions directing the Petitioners to secure the amounts qua which the allegations of money laundering pertained, in a fixed deposit/ bank guarantee or by depositing the said amounts in their bank accounts in question at all times. The order of the ED, freezing the bank accounts were stayed, subject to the said amounts being maintained. The said interim order, was initially passed in WP(C) 5235/2020, on 26th August 2020, and was reiterated in all the connected petitions, reads as under:

"3. It is the case of the petitioner(s) that the Impugned Orders freezing their bank accounts do not disclose any 'reason to believe' that the money lying in the credit of the said bank accounts are, in any manner, involved in 'money laundering' or are 'proceeds of crime'. They further submit that the due process as required under Section 17 and Section 60 of the Prevention of Money Laundering Act, 2002 (PMLA) has not been followed. They further submit that the order may also have been passed coram non judice by an officer who is not authorized in law to pass such order.

4. On the other hand, the learned counsel for the respondent submits that the Impugned action has been taken on the request received from the Government of Brazil under Section 60(6) of the Act.

5. In WP (C) 5235/2020, the learned counsel for the respondent has also filed on record, the application under Section 17(4) of the Act, filed by the respondent before the Adjudicating Authority. A perusal of the said application would reveal that the allegation against the petitioner(s) can, at best, be attributed to specific amounts as mentioned in paragraph 2.8 of the said application. Therefore, the action of freezing the entire bank accounts of the petitioner(s), prima facie, appears to be unreasonable and not authorized by law.

6. As an interim measure, therefore, on the petitioner(s) securing the amount as mentioned in paragraph 2.8 of the said application, copy whereof shall be supplied by the learned counsel for the respondent to the counsels appearing in the other petitions as well, by way of a Bank Guarantee/Fixed Deposit or by maintaining a deposit of an equivalent amount in their bank accounts in question, the operation of the Impugned action of the respondent of freezing their bank accounts shall remain stayed, till the next date of hearing.

7. The learned counsels for the petitioner(s) further prayed that the proceedings before the Adjudicating Authority be stayed. At present this Court is not inclined

to pass such order."

The above interim order was not given effect to by the Banks, and therefore, fresh directions were sought by the Petitioners. Thereafter, the ED sought clarifications from the Central Authority in Brazil. Upon receiving clarifications, in November 2020, the freezing orders have been amended and restricted to the actual amounts which were mentioned in the request letters.

9. Parallely, after hearing the parties, the AA passed a lengthy order on 28th December 2020, confirming the freezing orders passed by the ED, in respect of the amounts mentioned therein, which was restricted to the actual amounts mentioned in the request letters.

10. Accordingly, the interim orders passed by the Court were amended in terms of the amounts mentioned in the order of the AA dated 28th December 2020 and were made applicable during the pendency of these petitions. Owing to the nature of legal issues raised and owing to the fact that the PMLA Appellate Tribunal is not currently functioning, the limitation period for challenging the orders of the AA was also suspended during the pendency of these petitions. The said order dated, dated 4th February 2021, amending the previous interim orders reads as under:

3. In the meantime, it is noted that vide order dated 16th August 2020 in W.P.(C) 5235/2020, the Petitioner was allowed to transact in their bank account by making deposit of money, to the extent of the amount involved in the dispute or alleged to have been laundered, in the same and withdrawing/ transferring the amount so deposited. Similarly, vide order dated 27th August in W.P.(C) 5235/2020, the Petitioner was given the option of either depositing the money mentioned in the application for amendment filed by the ED before the Adjudicating Authority, or of securing the same by way of a Bank Guarantee or a fixed deposit of equivalent amount in their bank accounts in question. Subject to the said deposit, the order freezing the bank account of the Petitioners has been stayed by this Court. Similar interim orders have been passed on different dates in all these writ petitions wherein the freezing of amounts had been limited in terms of the application for amendment of the attachment order filed by the ED before the Adjudicating Authority.

4. In the meantime, vide order dated 28th December 2020, the Adjudicating Authority has passed an order on the said application of the ED, continuing the freezing order with respect to the amounts mentioned in the application, subject to the orders of this court.

5. However, it is the grievance of the Petitioners that since the Enforcement Directorate has not written any further communications limiting the extent to which the Petitioners' bank accounts are frozen and hence the banks are not lifting the said freezing order.

6. Since there is no dispute that the initial freezing orders stand amended and

limited the Petitioners in these cases are permitted to approach the banks with the present order, in order to ensure that their bank accounts are duly de-frozen, so long as the amounts, as contained in the amendment of attachment order dated 28th December 2020, are maintained either by way of a deposit or a bank guarantee or in any other manner.

7. The limitation period for challenging the order of the Adjudicating Authority shall remain suspended during the pendency of the present writ petitions.

11. Thereafter, these matters have been heard from time to time and all parties have made their submissions.

Submissions of the Parties:

12. Submissions have been made by various counsels in these matters, and Mr. Luthra, Id. Senior Counsel appearing in WP(C) 5713/2020 has led the submissions on behalf of the Petitioners in these matters. On behalf of the Respondents, Mr. Amit Mahajan, Id. CGSC and Mr. Ravi Prakash, Id. CGSC appearing for the ED in W.Ps.(C) 5235/2020, 5671/2020, 5713/2020, 7210/2020 & 9384/2020 have addressed submissions.

On behalf of the Petitioners:

Submissions of Mr. Siddharth Luthra, Id. Senior Counsel

13. Mr. Luthra, Id. Senior counsel appearing in WP(C) 5713/2020 has made the following submissions:

? That the Petitioner J.K. Tyres is a listed company with a net sales turnover of over Rs 6134.52 crores. as on March 2021. When the freezing order took place, the company was not even informed as to the reason for freezing its various bank accounts.

? A reading of Section 60, sub-section (2) and sub-section (6) of the PMLA shows that whenever any request is received from a foreign country which is a convention country, the procedure which has to be followed has to be as per Chapter III and Chapter V of the said Act.

? That without complying with the requisite procedures and safeguards provided under the said section of the Act, freezing of the bank accounts of the Petitioners could not have been undertaken by the authorities.

? That the initial show cause notice which was issued by the Adjudicating Authority did not have the 'Relied Upon Documents' (RUDs), which ought to have been supplied as a matter of right. Reliance is placed upon Rules 2(f), Rule 5 and Rule 6 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, to argue that any material which forms the basis of the reasons which are recorded ought to be supplied to the party concerned, which is

also clear from the reading of the Rules 5 & 6 which require the retention of the reasons and the material by the Adjudicating Authority.

? Reliance is also placed upon the Adjudicating Authority (Procedure) Regulations of 2013, which sets out a detailed procedure for receipt of papers, stamping of papers and retention of papers, etc.

? That the manner in which inspection of records is given under Regulations 16 & 17 makes it extremely onerous for the requesting party, inasmuch as hourly charges are levied for inspection. The fee for photocopy is also extremely high and without going through this, the entire procedure of inspection and depositing of fee for copying, if the material is not supplied, reduces the efficiency of the process inasmuch as the recipient of the notice is unable to file a reply till the copies are obtained which itself is a very complicated process.

? Reliance is placed upon the judgment of the Supreme Court in *In Re: To Issue Certain Guidelines Regarding Inadequacies And Deficiencies In Criminal Trials*, (Suo Moto Writ (Crl) No.(S) 1/2017), to argue that a similar parallel ought to be drawn, as held by the Supreme Court in the said judgment, to give all the material which are relied upon by the authority as also by the ED.

? Reliance is also placed upon the judgment of the Supreme Court dated 3rd February 2021, in *Opto Circuit India Ltd. v. Axis Bank and Ors.* (Criminal Appeal No. 102/ 2021) to submit that the procedure required under the PMLA has to be followed and cannot be given a gone by.

? Finally, the ED did not provide the 'reasons to believe', under the PMLA. In addition, even the Adjudicating Authority, while issuing the show cause did not provide its 'reason to believe', RUDs, the documents attached with the letter of request and the details of the suspect transactions, to be able to reply to the same. Mr. Luthra urges that inspite of the same having not been provided, the Petitioners bank accounts were frozen en masse which is not sustainable.

Mr. Sushmit Pushkar, Id. Counsel appearing in W.P.(C) 6499/2020:

14. Mr. Pushkar, Id. Counsel, submits:

? That insofar as his client is concerned, it has no transactions with respect to any entity in Brazil. It is a company engaged in German jewellery exports. He submits that without furnishing the documents in respect of the transactions, the bank accounts of the Petitioner - Company were seized.

? Reliance is placed on the UN Convention Against Corruption, 2003, also known as the Merida Convention, to argue that under Articles 55(4), 55(9) and 46(19) of the said Convention, there are sufficient safeguards provided especially, in respect of bona fide third parties as also in respect of the information and evidence that can be disclosed by the requested country. Moreover, the said Convention also, under Article 55(4), provides that the domestic law would have precedence in such matters.

? The investigating authorities in the present case, i.e., the ED, has not followed the provisions of the Act and the requisite safeguards provided therein.

Mr. Awanish Kumar, Id. Counsel, appearing in W.P.(C) 5855/2020

15. Mr. Awanish Kumar, Id. Counsel, submits that under Section 17 of the Act, any action taken under the Act, can only be taken by an officer who is the Director, or someone who is not below the rank of a Deputy Director, duly authorized by the Director. In the present case, the Assistant Director has passed the freezing orders, and thus this would be contrary to the mandate of Section 17(1) of the PMLA. He submits that in view of this violation of Section 17(1) of the Act, the freezing order itself is non est and is liable to be quashed by this court.

On behalf of the Respondent- ED:

Mr. Ravi Prakash, Id. CGSC appearing for the ED

16. Mr. Ravi Prakash, Id. CGSC, appearing for the ED has made the following submissions:

? There is a two-level procedure which is to be followed and it cannot be that in all cases the 'reasons to believe', which has been recorded by the Enforcement Directorate for freezing of assets, has to be supplied to the parties.

? There is a distinction between the meaning of 'reasons to believe' under Sections 17, and 'reason to believe' under Section 8 which is the Adjudicating Authority's domain. Relying upon Section 17 of the PMLA and 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 submitted that the ED is expected to record the reasons in terms of Section 17 and along with the material in possession, the same is to be transmitted to the AA in a sealed cover. Rule 8 of the said Rules, on the other hand, is a detailed Rule which stipulates various conditions as to the manner in which the documents are to be transmitted by the ED to the AA.

? Accordingly, there is a distinction between the 'reasons to believe' as recorded under Section 17 and the 'reason to believe' recorded under Section 8 which the AA has to arrive at. He submits that same standards cannot be applied to both these documents and both the authorities concerned.

? That if there is an application under Section 17(4) even then, the evidence which the Adjudicating Authority relies upon, can be given at that stage.

? Thus, there are two issues which are being raised here i.e. whether 'reasons to believe' are to be given at both stages, or whether at only one stage. Relying on this scheme of the Act, it is only at the stage when the Adjudicating Authority has perused the 'reasons to believe' submitted by the Director/Deputy Director and relies upon it as evidence, only then the said documents and the other

relevant information and particulars are to be supplied to the party concerned under Section 8 of the Act.

? Reliance is placed upon the judgment of the Division Bench in *J. Sekar v. Union of India & Ors.* 2018 SCC Online Del (6523), specifically paragraphs 74 to 77, to argue that the supply of the 'reasons to believe' cannot be made mandatory at both stages as the said judgment which mandates the same, has been stayed by the Supreme Court vide order dated 4th July 2018, in Special Leave to Appeal (C) No. 12865/2018.

? Reliance is also placed on *Biswanath Bhattacharya v. Union of India and Ors.* (2014) 4 SCC 392, specifically paragraphs 10 to 16, to argue that there is no principle that 'reasons to believe' have to be supplied at every stage so long as there are safeguards including, that a copy of the said reasons, are given at a later stage. The Petitioners cannot argue that the 'reasons to believe' have to compulsorily be given by the authority, when finding is given at the stage of section 17 of the PMLA.

Proceedings before the Court post the submissions of the parties:

17. During the hearings in these matters, this Court, vide order dated 13th August 2021, had directed Id. Counsels for the ED to seek instructions as to whether the following documents were provided to the Petitioners:

"

i. The 'reasons to believe' submitted by the ED to the Adjudicating Authority under Section 17 of the PMLA;

ii. The 'reason to believe' recorded by the adjudicating authority under Section 8(1) of the PMLA;

iii. Copy of the application filed by the Brazilian Investigation Agency before the 7th Federal Criminal Court, and the order passed by the said Court on 2nd October 2018;

iv. Specific details of the suspect transactions qua each of the Petitioners;

v. Copy of the ECIR or the equivalent documents of the investigating agency in Brazil;

vi. Any other documents which are in the possession of the ED which form the basis of the 'reasons to believe' for the ED or of the Adjudicating Authority;

vii. Order passed under Section 20(2) of PMLA for continuation of the freezing, if any."

The Court had also asked Id. Counsels for the ED to furnish the said documents in a sealed cover before this Court.

18. Pursuant to the said order, the documents, as mentioned above, were

produced before the Court in a sealed cover. The said documents have been perused by the Court.

19. Thereafter, on 2nd September 2021, the Registrar of the Adjudicating Authority under the PMLA as also the Deputy Director of the ED had appeared before this Court. This Court queried the officers on the procedure that was followed in these cases, to which, the following responses were received, as recorded in the order dated 2nd September 2021:

"3. Mr. Amar Singh, Registrar of the Adjudicating Authority (hereinafter, "AA") under the Prevention of Money Laundering Act (hereinafter, "PMLA"), has appeared before the Court today. Upon being queried by the Court as to the procedure being followed by the AA for serving the 'Relied Upon Documents' (hereinafter, "RUDs") on the parties concerned, he submits that the show cause notice under Section 8 of PMLA is issued to the noticee by the AA with a direction to the complainant i.e. the Enforcement Directorate (hereinafter, "ED"), in this case, to serve all the RUDs to the noticee/ Defendants, as per law. He further submits that this procedure is followed by the AA historically as a matter of practice, and the ED is expected to serve all the RUDs to the noticee within a reasonable time. He further submits that since there is a shortage of staff at the offices of the AA, the RUDs are not directly served by the AA upon the parties concerned.

4. Mr. Ravi Prakash, Id. Counsel for the ED, also points out that under Regulation 13 of the Adjudicating Authority (Procedure) Regulations, the RUDs are to be served by the Complainant or Applicant. This, in the present case, shall be the ED.

5. Mr. Deepak Chauhan, Deputy Director, ED, who has appeared before the Court today, submits that upon receiving the copy of the show-cause notice from the AA, the Application under Section 17(4) as also the RUDs from pages 19 to 107, were all supplied to all the parties. However, none of the other documents were supplied to the parties, as per his knowledge. He submits in response to a query from the Court as to whether the AA was shown the documents which were given to the Court in a sealed cover, including the order from the Brazilian court, etc., that the IO dealing with the matter is not available and since the AA has referred to these documents in its order, they may have been shown to the ED. But he would not be able to make a categorical statement in this regard, without verifying from the concerned IO."

20. After hearing the officers, the matter was again listed on 13th September 2021, when, a categorical statement was made by Mr. Deepak Chauhan, Deputy Director, ED, under instructions from the Investigating Officer, that the RUDs were shown to the Adjudicating Authority. Accordingly, this Court had directed as under, vide order dated 13th September 2021:

"11. Insofar as the query put in paragraph 5 of the last order dated 2nd September 2021 is concerned, it is submitted by Mr. Chauhan, Deputy Director,

ED, on instructions from the IO who is present in Court, that the Relied Upon Documents (RUDs) in these cases, were shown to the Adjudicating Authority. Accordingly, it is directed that an affidavit shall be specifically filed stating the stage at which the RUDs were shown to the Adjudicating Authority for its perusal. The affidavit shall specifically mention as to whether the RUDs were shown at the stage of issuance of notice to show cause dated 7th September 2020 or after replies etc. were received and at the stage of arguments before the Adjudicating Authority. The affidavit shall also specifically state as to whether the said documents were received by the Adjudicating Authority in Form 1 as per Rule 6 of The Adjudicating Authority (Procedure) Regulations, 2013."

21. Pursuant to the same, an affidavit dated 22nd September 2021, was placed on record stating that the documents, produced before the Court, in a sealed cover, were shown to the AA during the hearings. Mr. Luthra, Id. Senior Counsel, also relied upon a fresh affidavit filed by the Petitioners in WP(C) 5713/2020, as per which there is variance in the position as compared to the affidavit filed by the ED.

22. However, as recorded in the order dated 7th October 2021, both Id. CGSC's appearing for the ED, submitted that the ED would be willing to take a fresh look at the freezing orders that were passed. The said order reads as under:

"However, without going into this, it is submitted by both Id. CGSC's appearing on behalf of the ED, under instructions, that since these are one of the first set of matters that have arisen under Section 60 of the Prevention of Money Laundering Act, 2002, the ED would be willing to have a fresh look at the freezing orders dated that have been passed, and any other proceedings pursuant thereto based on the averments made in the writ petitions and in the peculiar facts and circumstances of the respective cases. The said statement is taken on record."

23. Id. Senior Counsel and Counsels appearing for the parties have submitted that the scheme of Section 60, and the procedure to be followed by ED, when requests are received from contracting states, ought to be clarified by this Court. Accordingly, before proceeding to the final directions that are to be passed in these cases, in terms of the statement made by Id. Counsels for the ED on 7th October 2021, the legal position as per the PMLA, the Rules thereof and the Conventions, is being analysed by this Court.

Analysis and Directions

24. The chronology of events in this case, as revealed from the documents, are as under:

? A letter of request was received from the Office of the Prosecutor General, State of Rio De Janeiro by the Indian Directorate of Enforcement on 26th September 2018. The said request was for rendering legal assistance in criminal matters related to breach of bank secrecy and fraudulently obtaining financial

information.

? Information was sought in respect of bank accounts of various companies, with a request that the bank accounts ought to be seized for the purposes of repatriation. The said letter of request was also for identifying the beneficiaries and for the freezing of assets of the said beneficiaries.

? Pursuant to the said letter of request, the ED registered Panchnamas against the companies mentioned, and investigation under PMLA was commenced in terms of section 60(6) of the Act.

? 'Reasons to believe' under Section 17 of the PMLA were recorded by the ED and notices for search and seizure were released on 16th July, 2020.

? The order under Section 20(1) of the PMLA was passed on 30th July, 2020, directing retention of the properties in the bank accounts which were frozen for a period of 180 days.

? An application being OA No. 396/2020 was then filed by the ED before the Adjudicating Authority, under Section 17(4) of the Act praying for retention of the properties which were frozen under Section 17(1A) of the Act.

? Along with the said application, copies of all the Panchnamas were communicated to the Adjudicating Authority.

? On the basis of the said application, filed by the ED under Section 17(4) of the Act, the Adjudicating Authority issued show cause notice dated 7th September 2020 to the Petitioners, as to why their property/records ought not to be retained for the purpose of confiscation.

? With this notice dated 7th September, 2020, the 'Relied Upon Documents' (RUDs) were not sent to the Petitioners.

? However, a copy of the notice was marked to the Assistant Director, Directorate of Enforcement with a request to send the RUDs to the parties concerned. The Panchnamas were then sent by the ED to the Petitioners.

? Thus, apart from the show cause notice sent by the AA, the Petitioners only received the application under Section 17(4) of the Act filed by the ED, and the Panchnamas, which were the RUDs with the application. None of the other documents referred to in the narration of said application were given to the Petitioners or the AA at the stage of issuance of show cause notice.

? The Petitioners, thereafter, repeatedly sought copies of the 'reasons to believe' and the further RUDs. However, no further documents were provided, and the Petitioners filed their replies before the AA, only on the basis of the documents that were provided to them.

? Notice for final hearing was given to the Petitioners and the ED by the AA on 2nd December 2020.

? On the date of the hearing i.e., 18th December 2020, within a span of about 3 hours, the counsels for the 66 Companies/entities in the proceedings whose accounts were seized/frozen, were heard for merely two-three minutes each.

? The final order dated 28th December 2020 was then passed by the Adjudicating Authority under the PMLA, and the freezing of accounts was ordered to be continued in the interest of the investigation. The application of the ED under Section 17(4) of the PMLA was allowed by the AA.

25. As has been unravelled before this Court during the course of submissions, the various documents which were received from the Brazilian Authorities, forming the basis of the 'reasons to believe' of the ED and the 'reason to believe' of the AA in its final order, which were placed in sealed cover before this Court, were not supplied to the Petitioners. The same were not even shown to the AA at the stage of issuance of show cause notice under 8(1) of the PMLA. These documents include the following:

? Copy of the Letter of Request received from the Central Authority of Brazil;

? Plea Bargain Agreement referring to Annex 2 of Claudio Barboza;

? Plea Bargain Agreement referring to Annex 46 of Vinicus Claret;

? Digital Media (CD) with the bank account identified, with their number, bank, transaction amount and transaction dates;

? Details of bank accounts of Petitioners viz. Bank account Statement, KYC, FIRC etc. obtained for verification of alleged transaction from concerned bank/branch;

? Order passed under Section 20(2) of the PMLA for continuance of freezing, if any.

26. The above said documents are however claimed to have been shown to the AA, during the course of hearing as per the affidavit dated 22nd September 2021, recently filed before this Court. This fact is disputed by Mr. Luthra, Id. Senior counsel, who has argued that during the course of hearing, none of these documents were perused by the AA or were shown to the AA by the ED. Thus, according to him it is inexplicable as to how these documents could have formed part of the AA's order, or its reasoning, on record. Id. Senior Counsel for the Petitioners has also argued that if these documents were a part of the record, the Petitioners ought to have been given copies of the same. The same were not given, which according to Id. Senior Counsel, would clearly be a breach of the Principles of Natural Justice, and a violation of the express provisions in Sections 8, 20(2) of the Act and Regulation 13 of The Adjudicating Authority (Procedure) Regulations 2013.

27. Thus, there are various questions that arise in this matter, in respect of the procedure followed by the ED as also the AA. These are:

i) What is the procedure to be followed by the ED when letters of request are

received under Section 60 of the Act from a contracting state?

ii) Whether the ED is duty bound to provide the 'reasons to believe' while passing orders under Section 17 of the PMLA, to the concerned parties?

iii) What is the procedure to be followed by the ED while forwarding the 'reasons to believe' and the application under Section 17(4) of the PMLA to the Adjudicating Authority seeking continuation of the freezing orders and confiscation?

iv) Whether the ED ought to transmit all the documents, which are in its possession, to the Adjudicating Authority while sending the same in a sealed cover under Rule 8 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?

v) What is the procedure to be followed by the Adjudicating Authority, upon receipt of the application under Section 17(4) of the PMLA?

vi) What is the level of satisfaction to be recorded by the Adjudicating Authority prior to issuance of show cause notice under section 8(1) of the PMLA?

vii) Whether while issuing the show cause notice, all the 'Relied Upon Documents' have to be supplied to the parties concerned?

viii) What is the procedure to be followed for providing inspection of records, and for giving a reasonable hearing to the parties, prior to passing of orders by the Adjudicating Authority under the PMLA?

I. Procedure to be followed upon receiving letters of requests from a contracting state, under Section 60 of the PMLA

28. Chapter IX of the PMLA, titled 'Reciprocal Arrangements for Assistance in Certain Matters and Procedure for Attachment and Confiscation of Property' deals with reciprocal arrangements with a contracting state. The term 'contracting state' is defined under Section 55(a) as under:

S.55 Definitions- In this Chapter, unless the context otherwise requires, -

(a) "contracting State" means any country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such country through a treaty or otherwise;

Thus, every country with whom arrangements have been entered into by the Central Government, through treaty or otherwise, would be a contracting state. The two International Conventions/Treaties to which India is a party are:

(a) United Nations Convention Against Corruption (Decree No. 5687/2006) also known as the 'Merida Convention' and

(b) United Nations Convention against Transnational Organized Crime (Decree No. 5015/2004), and Protocols thereto, also known as the 'Palermo Convention'.

29. The purpose of these Conventions is to create a mechanism for international cooperation and technical assistance in matters related to international crime. The purpose of these Conventions is also to prevent and combat corruption more efficiently with cooperation between nations and to promote integrity and accountability in the management of public affairs and public property.

UN Convention against Corruption (Merida Convention)

30. This Convention sets out provisions w.r.t international collaboration for combating corruption. The Convention was signed on 9th December 2003, and has been effective since 14th December 2005. India ratified this Convention on 9th May 2011.

31. As per Article 31(10) of this Convention, the measures under the Convention are to be defined and implemented in accordance with the provisions of the domestic law of the state party. Thus, while freezing, seizure and confiscation of alleged proceeds of crime and property is contemplated under Article 31 of the said convention, the same would have to be executed in accordance with the domestic law.

32. As per Article 46 of the Convention, the requirement to provide cooperation and assistance, by all ratifying countries, is unambiguous, so long as the said cooperation, in relation to criminal matters, is appropriate and consistent with the Indian legal system. Any information requested is to be executed only in accordance with the domestic law as per Article 46(16) and (17). The said provisions read as under:

"Article 46. Mutual Legal Assistance

xxx

16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.

xxx"

33. Article 46(21) provides for when mutual legal assistance may be refused. The same reads as under:

"Article 46. Mutual Legal Assistance

xxx

21. Mutual legal assistance may be refused:

- (a) If the request is not made in conformity with the provisions of this article;
- (b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;
- (c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;
- (d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

xxx"

34. A perusal of the above provisions clearly shows that all action pursuant to a Request by a Contracting State is to be executed in accordance with domestic law of the requested country. Thus, if any action is prohibited by the domestic law of a country, or for other reasons mentioned in Art.46(21) including prejudice to sovereignty, public policy etc., then legal assistance can even be refused.

35. Article 46(25) stipulates that if the legal assistance sought by the requesting state interferes in any ongoing investigation or prosecution or judicial proceeding in a country, the rendering of legal assistance can be postponed. The said provision reads:

"Article 46. Mutual Legal Assistance

xxx

25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

xxx"

36. Article 54 of this Convention permits the freezing and seizure of property, in order to provide mutual legal assistance to contracting states. Article 54(2) reads as under:

"Article 54. Mechanism for recovery of property through international cooperation in confiscation.

xxx

2. Each State Party, in order to provide mutual legal assistance upon a request made pursuant to paragraph 2 of article 55 of this Convention, shall, in accordance with its domestic law:

- (a) Take such measures as may be necessary to permit its competent authorities

to freeze or seize property upon a freezing or seizure order issued by a court or competent authority of a requesting State Party that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of this article;

(b) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a request that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of this article; and

(c) Consider taking additional measures to permit its competent authorities to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property."

It is clear from the above that the request for freezing or seizure of assets/property has to have a reasonable basis and there have to be sufficient grounds for taking the action. The question as to whether such a basis or grounds exist is to be determined by the authority in the requested State, i.e., in the present case the ED located in India.

37. Article 55 (3) of the Convention clearly stipulates that provisions of Article 46 of the Convention would apply in the cases of seizure and freezing of property. It also contemplates that the order which is the basis of the confiscation request, as also a detailed statements of facts and the information which may be required for the country to whom the request is sent to execute the request, has to be provided for implementing such seizure and freezing requests. The said provision reads as under:

"Article 55. International Cooperation for the purposes of confiscation.

xxx

3. The provisions of article 46 of this Convention are applicable, *mutatis mutandis*, to this article. In addition to the information specified in article 46, paragraph 15, requests made pursuant to this article shall contain:

(a) In the case of a request pertaining to paragraph 1

(a) of this article, a description of the property to be confiscated, including, to the extent possible, the location and, where relevant, the estimated value of the property and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law;

(b) In the case of a request pertaining to paragraph 1

(b) of this article, a legally admissible copy of an order of confiscation upon which the request is based issued by the requesting State Party, a statement of

the facts and information as to the extent to which execution of the order is requested, a statement specifying the measures taken by the requesting State Party to provide adequate notification to bona fide third parties and to ensure due process and a statement that the confiscation order is final;

(c) In the case of a request pertaining to paragraph 2 of this article, a statement of the facts relied upon by the requesting State Party and a description of the actions requested and, where available, a legally admissible copy of an order on which the request is based.

xxx"

38. Further, bonafide third parties and their rights are protected under the provision of Article 55(9) of the Convention, and adequate provisions have to be made for return of confiscated property if rights of bonafide third parties are affected in any manner, as stipulated in Article 57 (2) of the Convention.

UN Convention against Transnational Organised Crime and the Protocols thereto (Palermo Convention)

39. This convention deals with issues relating to transnational organised crime, trafficking of women and children, illicit manufacturing or trafficking in fire arms, illegal trafficking of migrants etc. The Convention was signed on 12th December 2000, and has been effective since 29th September 2003. India ratified this Convention on 5th May 2011.

40. As per this Convention, member countries are to carry out their obligations in a manner which is consistent with their sovereignty and integrity, and are to enact laws for the purpose of preventing money laundering and other crimes which have international repercussions.

41. Article 12 of this Convention permits confiscation and seizure of proceeds of crime, property, equipment etc., and provides for measures to be provided in domestic legislations for the said purpose.

42. Similar to the Merida Convention, international cooperation is contemplated under Article 13 of this Convention, and any request received from a member state, for cooperation, has to clearly specify the description of the property that is to be confiscated, and set out the facts in a manner so as to be sufficient to seek the confiscation/seizure order under the domestic law of the respective country.

43. As per Article 13(4), actions, pursuant to this Convention, are to be taken in accordance with, and subject to, the provisions of the domestic law. The said provision reads as under:

"Article 13. International Cooperation for the purposes of confiscation.

xxx

4. The decisions or actions provided for in paragraphs 1 and 2 of this article shall

be taken by the requested State Party in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral treaty, agreement or arrangement to which it may be bound in relation to the requesting State Party. xxx"

44. Similar to the Merida Convention, any action taken pursuant to the provisions of this Convention cannot prejudice the rights of bonafide third parties, as per Article 13(8).

45. Article 18 of this Convention requires that parties to the Convention shall provide to one another complete mutual cooperation and legal assistance in investigations, prosecution and judicial proceedings, in a reciprocal manner qua offences which are transnational in nature. The requirements of a mutual legal assistance request are provided in Article 18(15) and reads:

"Article 18. Mutual legal assistance

xxx

15. A request for mutual legal assistance shall contain:

- (a) The identity of the authority making the request;
- (b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;
- (c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;
- (d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;
- (e) Where possible, the identity, location and nationality of any person concerned; and
- (f) The purpose for which the evidence, information or action is sought.

xxx"

46. A perusal of the above provision, clearly shows that all the relevant facts qua the investigation and proceedings, have to be specified in the request.

47. The country to whom the request is sent also has the power to refuse mutual legal assistance under circumstances as contemplated under Article 18(21). Such circumstances could be if the requested State is of the opinion that the execution of the same would prejudice its sovereignty, security or ordre public, or if the execution would be contrary to the legal system and the requested state. The said provision reads:

"Article 18. Mutual legal assistance

xxx

21. Mutual legal assistance may be refused:

- (a) If the request is not made in conformity with the provisions of this article;
- (b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;
- (c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;
- (d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

xxx"

Domestic law and Section 60 of the PMLA

48. All Treaties and Conventions that are ratified by India, or which India is a member of, are subject to the municipal law. The same has categorically been settled by the Supreme Court in Bhavesh Jayanti Lakhani vs. State of Maharashtra (2009) 9 SCC 551. The Supreme Court, in the said case, held:

"45. India follows the doctrine of dualism and not monism. We may, however, hasten to add that this Court, however, at times for the purpose of interpretation of statute has taken into consideration not only the treaties in which India is a party but also declarations, covenants and resolutions passed in different International Conferences. [See M/s Entertainment Network (India) Ltd. vs. M/s Super Cassettes Industries Ltd.]

46. The Act as also the treaties entered into by and between India and foreign countries are admittedly subject to our municipal law. Enforcement of a treaty is in the hands of the Executive. But such enforcement must conform to the domestic law of the country. Whenever, it is well known, a conflict arises between a treaty and the domestic law or a municipal law, the latter shall prevail."

49. India's signing of the Merida and Palermo Conventions resulted in the enactment of the Prevention of Money Laundering Act, 2002 as it stands today, as also resulted in amendments to the Prevention of Corruption Act, 1988. As noted above, India has now ratified both the abovementioned Conventions as well.

50. An analysis of the Merida Convention and the Palermo Convention, and a perusal of their provisions, clearly shows that while it is essential to provide legal assistance and extend cooperation in response to requests received from the contracting States, the same would have to be within the four corners of domestic law and cannot be beyond what is contemplated under the domestic law. It cannot result in any contradiction thereof, and in cases where

contradictions arise, it is the domestic law that prevails.

51. In the present case, a request was received from the Brazilian authority, which was based on a judgment passed by the 7th Federal Criminal Court of the Judicial Division Rio De Janeiro, Brazil. The said decision was communicated to the Indian ED with a request for legal assistance. It is trite to note that Brazil is a party to both Merida and Palermo conventions.

52. As per Chapter IX of the PMLA, Indian authorities can make requests to foreign countries, and similarly, Indian authorities can receive requests from contracting states. Whenever a letter of request is received by the Central Government from a Court or Authority in the contracting state, it is for the purposes of investigation into an offence, or proceedings under the Act. Thus, the offence contemplated is not to be an offence under the law of the Requesting foreign country but an offence under the PMLA i.e., an offence under Section 3 of the Act. Upon the receipt of the letter of request from the contracting state, the authority concerned has to satisfy itself that there could be an offence which has been committed under the Act and then forward such letter of request to the Special Court or authority concerned under Section 58 for the execution of the request. Section 58 of the Act reads as under:

"S.58. Assistance to a contracting State in certain cases-

Where a letter of request is received by the Central Government from a court or authority in a contracting State requesting for investigation into an offence or proceedings under this Act and for forwarding to such court or Authority any evidence connected therewith, the Central Government may forward such letter of request to the Special Court or to any authority under the Act as it thinks fit for execution of such request in accordance with the provisions of this Act or as the case may be, any other law for the time being in force."

53. It is relevant to note that execution of the request has to be "in accordance with the provisions of the Act or any other law for the time being in force". Thus, the assistance to the contracting state has to be rendered, however, within the legal regime that applies and operates in India.

54. Under Section 60 of the PMLA, the Director, ED upon being forwarded a letter of request by the Central Government, has to direct an authority under the PMLA (hereinafter referred to as "person authorized") to take steps necessary for tracing and identifying the property, of which freezing/seizure is sought. The person authorized has wide powers, including to inquire, investigate and survey under 60(4) of the Act. However, Section 60 (6) of the Act specifically provides that the provisions contained in Chapter V of the Act for surveys, searches and seizures would apply to all letters of request received from a contracting state. Section 60(6) of the Act reads as under:

"S.60. Attachment, seizure and confiscation etc., of property in a contracting State or India -

xxx

(6) The provisions of this Act relating to attachment, adjudication, confiscation, and vesting of property in Central Government contained in Chapter III and survey, searches and seizures contained in Chapter V shall apply to the property in respect of which letter of request is received from a court or contracting State for attachment or confiscation of property. xxx"

55. This, in effect, means that the requisite safeguards contained in the provisions of Chapters III and V of the Act, for the purpose of attachment, confiscation, search, freezing/seizure etc., would undoubtedly apply even in respect of requests received from contracting states under Section 60 of the Act. Thus, requests from contracting states cannot be treated at a higher threshold.

56. Thus, the ED/ Adjudicating Authority, would have to adhere to all the provisions in respect of recording the 'reasons to believe', supplying the 'Relied Upon Documents' etc., as is required to be done in the case of domestic enquiries, investigations, surveys, searches and seizures under the provisions of the PMLA, and the Rules and Regulations.

II. Procedure to be followed while passing orders of search and seizure under Section 17 of the PMLA, when letters of request are received under Section 60 of the PMLA

57. The procedure to be followed by the ED, for the purposes of directing search or seizure of any property, under Section 17 of the PMLA, has been the subject matter of various decisions rendered by the Supreme Court and High Courts.

58. In *P. Chidambaram v. Directorate of Enforcement* (2019) 9 SCC 24, the Supreme Court analysed the scheme of Section 17 of the PMLA and held:

"32. Section 17 of PMLA deals with the search and seizure. Section 17 which deals with search and seizure states that where the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this Section on the basis of the information in his possession has "reason to believe" (reason for such belief to be recorded in writing) that any person has committed an offence which constitutes the money laundering or is in possession of any proceeds of crime involved in money laundering etc. may search building, place and seize any record or property found as a result of such search. Section 17 of PMLA also uses the expression "reason to believe" and "reason for such belief to be recorded in writing". Here again, the authorised officer shall immediately on search and seizure or upon issuance of freezing order forward a copy of the reasons so recorded along with the material in his possession to the Adjudicating Authority in a "sealed envelope" in the manner as may be prescribed and such Adjudicating Authority shall keep such reasons and material for such period as may be prescribed. In order to ensure the sanctity of the search and seizure and to ensure the safeguards, in exercise of power Under Section 73 of PMLA, the Central Government has framed "The Prevention of

Money-Laundering (Forms, Search and Seizure or Freezing and the Manner of Forwarding the Reasons and Material to the Adjudicating Authority, Impounding and Custody of Records and the period of Retention) Rules, 2005".

59. The Division Bench of this Court in Directorate of Enforcement v. Abdullah Ali Balsharaf and Ors., 2019 (3) RCR (Criminal) 566, was dealing with an issue as to whether freezing of assets for the purposes of issues concerning money laundering could be done by exercising powers under Section 102 CrPC instead of acting under the stricter provisions of Section 17 of the PMLA. The Division Bench analysed the provisions of Section 17 of the PMLA and held as under:

The said decision was challenged before the Supreme Court in SLP(C) No. 028021/2019. Notice was issued in the matter vide order dated 25th November 2019, however no stay was granted on the judgment of the Division Bench. Vide order dated 13th February 2020, the Supreme Court disposed of the SLP, keeping the questions of law open, in light of the fact that the ED had, by then, frozen assets of the Respondent by complying with the provisions of Section 17 of the PMLA, as against only under Section 102 of the CrPC.

"13. On a plain reading of the foregoing provisions, the following aspects emerge: firstly, the provisions of CrPC relating inter alia to seizure and attachment apply to proceedings under the PMLA but only insofar as they are not inconsistent with the provisions of the PMLA; secondly, the power conferred on an officer under section 17 of the PMLA inter alia for seizure of property must be exercised on the basis of information in the possession of the officer, if founded on such information the officer has reason to believe that a person has committed any of the acts specified in the provision; with the reason for such belief to be recorded in writing. Section 17 also mandates that upon seizure or upon issuance of a 'freeze' order, a copy of the reasons recorded by the officer alongwith material in his possession is required to be forwarded to the Adjudicating Authority in a sealed envelope.

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24. As noted in the impugned order, a single Judge of the Gujarat High Court has taken a contrary view on the issue in a case titled Paresha G. Shah vs. State of Gujarat & Ors. reported as 2016 GLH(1) 329 holding that it may happen that initially the authority may be in possession of some material, which may create some doubt or suspicion but not adequate material sufficient to record reasons to believe that an offence under PMLA has been committed. In this view of the matter, the Gujarat High Court holds that the authorities are empowered to issue appropriate directions for attachment or freezing of a bank account in exercise of power under section 102 CrPC by virtue of provisions of section 65 of PMLA. We however, are not persuaded to concur in this view. Our difference of opinion with the view taken by the single Judge of the Gujarat High Court arises from noticing the emphasis and clarity with which the essential conditions for search and seizure are specified in section 17 of PMLA, as evident from the following extract

of the provision:

"17. Search and seizure.-(1) Where the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section, on the basis of information in his possession, has reason to believe (the reason for such belief to be recorded in writing) that any person..."

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27. In fact in *Noor Aga vs. State of Punjab* reported as (2008) 16 SCC 417, the Supreme Court referred to the definition of 'reason to believe' as contained in section 26 of the IPC in the context of sections 42 and 43 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) as also Section 110 of the Customs Act, 1962 (Customs Act) which provisions concern powers of entry, search, seizure and arrest; and in which the requirement of reason to believe has been incorporated by the legislature. In the context inter-alia of the power of seizure under the NDPS Act and the Customs Act, the Supreme Court had this to say in *Noor Aga's* case:

"37. It is the consistent view of this Court that "reason to believe", as provided in several provisions of the Act and as defined in Section 26 of the Penal Code, 1860 on the part of the officer concerned is essentially a question of fact. The procedures laid down under the Act being stringent in nature, however, must be strictly complied with."

It is therefore clear that where there is a requirement that an action may be taken by an officer only when there is reason to believe, especially in the context of a statute where stringent procedures are laid down, the requirement of having reason to believe must be strictly complied with. PMLA is exactly such a statute where stringent procedures have been laid down.

28. We see no reason why the essence of the definition contained in section 26 of the IPC should not inform the interpretation of the same phrase in section 17 of the PMLA. It is noteworthy that the phrase 'reason to believe' has a specific connotation in criminal jurisprudence and is not merely an ordinary and colloquial phrase.

29. Besides, we must never forget the venerated principle of law laid down by the Privy Council in the case of *Nazir Ahmad vs. Emperor* reported as AIR 1936 PC 253, that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all; and other methods of performance are necessarily forbidden. In our view this principle must a fortiori apply to a special statute such as PMLA.

30. In light of the above discussion, we find no infirmity in the impugned judgment on the issue. We hold that ingredients of section 17 of PMLA must be scrupulously complied with and it is impermissible for seizure to be made by relying instead upon the provisions of section 102 of the CrPC."

60. In a recent judgement titled *OPTO Circuit India Ltd. v. Axis Bank and Ors.* AIR 2021 SC 753, the Supreme Court while dealing with a freezing order passed by the ED under section 17(1A), has taken a similar view as in *Abdullah Ali Balsharaf* (supra) and held that the authorities are bound to follow the procedure as laid down in the provisions strictly and not violate the same in any manner. The Supreme Court has analysed the Section 17 of the Act and held:

"9. A perusal of the above provision would indicate that the prerequisite is that the Director or such other Authorised Officer in order to exercise the power under Section 17 of PMLA, should on the basis of information in his possession, have reason to believe that such person has committed acts relating to money laundering and there is need to seize any record or property found in the search. Such belief of the officer should be recorded in writing. Subsection (1A) to Section 17 of PMLA provides that the Officer Authorised under subsection (1) may make an order to freeze such record or property where it is not practicable to seize such record or property. Subsection (2) provides that after search and seizure or upon issuance of a freezing order the Authorised Officer shall forward a copy of the reasons recorded along with material in his possession to the Adjudicating Authority in a sealed envelope. Subsection (4) provides that the Authority seizing or freezing any record or property under subsection (1) or (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 requesting for retention of such record or properties seized.

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11. The scheme of the PMLA is well intended. While it seeks to achieve the object of preventing money laundering and bring to book the offenders, it also safeguards the rights of the persons who would be proceeded against under the Act by ensuring fairness in procedure. Hence a procedure, including timeline is provided so as to ensure that power is exercised for the purpose to which the officer is vested with such power and the Adjudicating Authority is also kept in the loop. In the instant case, the procedure contemplated under Section 17 of PMLA to which reference is made above has not been followed by the Officer Authorised. Except issuing the impugned communication dated 15.05.2020 to AML Officer to seek freezing, no other procedure contemplated in law is followed. In fact, the impugned communication does not even refer to the belief of the Authorised Officer even if the same was recorded separately. It only states that the Officer is investigating the case and seeks for relevant documents, but in the tabular column abruptly states that the accounts have to be 'debit freeze/stop operations'. It certainly is not the requirement that the communication addressed to the Bank itself should contain all the details. But what is necessary is an order in the file recording the belief as provided under Section 17(1) of PMLA before the communication is issued and thereafter the requirement of Section 17(2) of PMLA after the freezing is made is complied. There is no other material placed before the Court to indicate compliance of Section 17 of PMLA, more particularly

recording the belief of commission of the act of money laundering and placing it before the Adjudicating Authority or for filing application after securing the freezing of the account to be made. In that view, the freezing or the continuation thereof is without due compliance of the legal requirement and, therefore, not sustainable.

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15. This Court has time and again emphasized that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner alone and in no other manner. Among others, in a matter relating to the presentation of an Election Petition, as per the procedure prescribed under the Patna High Court Rules, this Court had an occasion to consider the Rules to find out as to what would be a valid presentation of an Election Petition in the case of Chandra Kishor Jha vs. Mahavir Prasad and Ors. (1999) 8 SCC 266 and in the course of consideration observed as hereunder:

"It is a well settled salutary principle that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner".

Therefore, if the salutary principle is kept in perspective, in the instant case, though the Authorised Officer is vested with sufficient power; such power is circumscribed by a procedure laid down under the statute. As such the power is to be exercised in that manner alone, failing which it would fall foul of the requirement of complying due process under law."

61. From a perusal of the above decisions, it is clear that the specific procedure that is contemplated under the Act, in respect of investigations, seizures and freezing of assets/property/ bank accounts, ought to be strictly and scrupulously followed, in the manner prescribed under the Act.

62. While initiating action upon receiving a letter of request under Section

60 of the Act, broadly, the Director ED or the person authorized (not below the rank of Deputy Director) - has to have 'reasons to believe' that the acts complained of, constitute money laundering or the offence alleged therein. Thus, from the facts explained and the documents submitted by the requesting country, the Director or the person authorized, has to have reasonable basis and sufficient grounds to believe that an offence may have been committed. After perusing the letter of request received from the contracting State, as also the facts set out therein and the supporting documentation, the Director ED, or the person authorized, ought to have 'reasons to believe' that the persons/entities against whom search or seizure is being directed have committed acts which constitute money laundering or are in possession of 'proceeds of crime' as per the Act.

63. This satisfaction has to be an independent satisfaction, and the same cannot, purely, be based on the orders, or the material received from the contracting

State. In other words, the authority cannot simply and mechanically follow the rationale and logic of the material received, but has to also, independently, satisfy itself that an illegal act has been committed under the provisions of the Act.

64. After arriving at that satisfaction, the Director ED, or the person authorized has to record the same as the 'reasons to believe' and thereafter, pass orders directing search or seizure, as also freezing of accounts, under Section 17(1A) of the PMLA.

65. Both parties have made detailed submissions on the question whether the 'reasons to believe' recorded by the Director ED, or the person authorized, at the time of search and seizure have to be provided to the parties concerned or not. On behalf of the Petitioners, the judgment in J. Sekar vs. Union of India 246 (2018) DLT 610 is relied on to argue that the 'reason to believe' recorded by the Director ED, or the person authorised under Section 5(1) has to be given to the party concerned, and therefore similarly 'reasons to believe' recorded by the person authorised under Section 17(1A) also have to be given to the parties concerned. The Respondent, however, has argued to the contrary stating that 'reasons to believe' under Section 17(1A) are not to be provided to the party concerned. The question as to whether while directing provisional attachment under Section 5(1), the 'reason to believe' is to be supplied to the party concerned or not, is stated to be pending before the Supreme Court in SLP(C) No. 12865/2018 titled Union of India and Ors. vs. J. Sekar. In the present case, this Court is only concerned with the orders passed under Section 17 by the ED and under Section 8(1) by the Adjudicating Authority wherein the 'Relied Upon Documents (RUDs)' have not been supplied to the parties concerned.

66. As per Section 17(2) of the PMLA, immediately upon the search and seizure order/ freezing order being passed, the Director ED or the person authorized (as per Section 17(1) of the PMLA) has to forward a copy of the said 'reasons to believe' so recorded, along with the 'material in his possession', in respect of the case, to the Adjudicating Authority (AA) in a sealed cover. Section 17(2) of the PMLA reads as under:

"S.17. Search and seizure.-

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(2) The authority, who has been authorised under sub-section (1) shall, immediately after search and seizure or upon issuance of a freezing order, forward a copy of the reasons so recorded along with material in his possession, referred to in that sub-section, to the Adjudicating Authority in a sealed envelope, in the manner, as may be prescribed and such Adjudicating Authority shall keep such reasons and material for such period, as may be prescribed.

xxx"

67. Apart from the above provision, detailed Rules have also been enacted under

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. The relevant provisions of the said Rules read as under:

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"2. Definitions:

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(j)"material for the purpose of sub-section (1A) and sub-section (2) of section 17 of the Act" means the material in possession of the authority, referred to in clause (c) of sub-rule (1) of rule 2, after search, seizure or freezing under sub-section (1) of section 17 respectively of the Act, including a report forwarded to a Magistrate under section 157 of the Code of Criminal Procedure, 1973 (2 of 1974) or a complaint filed before a Magistrate or a court by a person authorized to investigate the scheduled offence for taking cognizance of such scheduled offence, as the case may be, or in cases where such report is not required to be forwarded, a similar report of information received or otherwise submitted by an officer authorized to investigate a scheduled offence to an officer not below the rank of Additional Secretary to the Government of India or equivalent being Head of the office or Ministry or Department or Unit, as the case may be, or any other officer who maybe authorized by the Central Government, by notification, for this purpose;"

xxx

"8. Manner of forwarding of a copy of the reasons and the material relating to search, seizure and freezing under sub-section (2) of section 17 and sub-section (1A) of section 17 of the Act and search of persons under sub-section (2) of section 18 and sub-section (2) of section 20 of the Act to the Adjudicating Authority:

(1) The authority, as the case may be, shall prepare an index of a copy of the reasons recorded along with the material in his possession and sign each page of such index and shall also write a letter while forwarding copy of reasons and material to the Adjudicating Authority in a sealed envelope.

(2) The authority, as the case may be, shall place an acknowledgement slip in Form III appended to these rules inside the envelope before sealing it.

(3) The authority, as the case may be, shall indicate a reference number and date of despatch on the sealed envelope.

(4) The sealed envelope shall be marked

"Confidential" and "To be opened by the addressee only" and the complete address of the Adjudicating Authority including his name shall be mentioned on the sealed envelope with official seal.

(5) The authority, as the case may be, shall place the sealed envelope inside the outer envelope, and shall place an acknowledgement slip in Form IV appended to these rules.

(6) The outer envelope shall be sealed and marked

"Confidential". Complete address of the Adjudicating Authority shall be mentioned on the sealed outer envelope.

(7) The authority, as the case may be, shall maintain registers and other records such as acknowledgement slip register, dak register for the purposes of this rule and shall ensure that necessary entries are made in the register immediately as soon as a copy of the reasons along with the material are forwarded to the Adjudicating Authority."

xxx

"9. Acknowledgement of receipt of a copy of the reasons and the material relating to search, seizure or freezing and search of person by the Adjudicating Authority:

(1) On receipt of the outer sealed envelope along with Form IV, the Adjudicating Authority or in his absence, the designated officer of the office of Adjudicating Authority shall forward Form IV duly filled in, signed and his name legibly written below his signature. The seal of the office of the Adjudicating Authority shall be affixed before forwarding Form IV to the authority as a token of receipt of the sealed envelope.

(2) The Adjudicating Authority shall, on opening of the sealed envelope, forward Form III duly filled in, signed and his name legibly written below his signature. The seal of the office of the Adjudicating Authority shall be affixed before forwarding of Form III to the authority as a token of receipt of a copy of the reasons and the material.

(3) The Adjudicating Authority shall maintain registers and other records such as acknowledgement slip register, dak register and register showing details of receipt of a copy of the reasons recorded along with the material for the purposes of this rule and shall ensure that necessary entries are made in the register immediately on receipt of such copy of the reasons and the material."

xxx

10. Period of retention of copy of the reasons and the material relating to search, seizure and freezing and search of persons by the Adjudicating Authority:

(1) The Adjudicating Authority shall retain copy of the reasons and the material relating to search and seizure and search of persons for a period of ten years or if, before the expiry of the said period of ten years,-

(i) any proceedings under section 8 of the Act have been commenced, until the disposal of such proceedings, or

(ii) where an appeal has been preferred to the

Appellate Tribunal under section 26 of the Act, until the disposal of such appeal by the Appellate Tribunal, or

(iii) where an appeal has been filed in the High Court under section 42 of the Act, until the disposal of such appeal by the High Court; whichever is later."

68. A perusal of the Section 17(2) of the PMLA, as also the 2005 Rules, clearly show that the Director/Deputy Director level officer/person authorized has to forward - first, the reasons so recorded, and secondly, the said reasons have to be accompanied with the "material in his possession" to the AA.

69. This clearly shows that the Director ED or the person authorized has to transmit all the material in his possession, at this stage, in accordance with the procedure mentioned under Rule 8 of the 2005 Rules, extracted above. It would not be permissible for the ED to retain some part of the material, and send partial documents to the Adjudicating Authority, at this stage, in as much as the statute contemplates sending of 'the material in possession of the authority' and NOT 'material forming the basis of the 'reasons to believe'".

70. The fact that the 'material in possession' of the ED has to be sent to the Adjudicating Authority, in a sealed envelope, shows that it is at that stage that the Adjudicating Authority has to satisfy itself, on the basis of all the material received, i.e., all the material in possession of the ED, as also the 'reasons to believe' recorded by the ED, that a case is made out to issue show-cause notice to the party under Section 8 of the PMLA. After the AA has issued notice to show cause under Section 8(1) of the PMLA, the ED cannot be permitted to produce any documents before the Adjudicating Authority in relation to the matter, which were already in its possession prior to the issuance of the said show cause notice.

71. Rule 8 of the Rules extracted above, also provides a detailed procedure for transmission of the material, to ensure that there is no tampering in the material sent by the ED to the Adjudicating Authority. Safeguards, such as an officer at the ED signing sign each page of the index, and also writing a letter to the Adjudicating Authority, giving details of the material being forwarded, have been duly incorporated.

72. An acknowledgement is also to be issued by the Adjudicating Authority, in terms of Form III of the Rules, and utmost confidentiality is to be maintained at this stage, considering the sensitive nature of the proceedings.

73. The Rules, extracted above, contemplate that there should be an inner envelope and outer envelope, both marked confidential, to ensure that there is no leakage in transit.

74. Further, the language in Rule 8(1) and Rule 8(7) of the 2005 Rules extracted above, leave no manner of doubt that the copy of the reasons and all the material available with the ED, in relation to the investigation in terms of Section

60 of the Act, and the request received from the contracting state, has to be sent to the Adjudicating Authority.

75. The material in possession would mean and include all material in possession, in respect of the investigation, which is to be forwarded by the ED to the AA, irrespective of whether the same have been referred to in the 'reasons to believe' or not.

76. On the basis of these "reasons to believe" and the "material in possession" of the ED, the ED has to then move an Application under Section 17(4) of the PMLA before the Adjudicating Authority, for retention of the record or the property seized, or for continuation of the freezing order, as applicable.

III. Procedure to be followed by the Adjudicating Authority, upon receipt of an Application under Section 17(4) of the PMLA from the ED

77. As per Section 8 of the PMLA, when the Adjudicating Authority receives a complaint or an application filed by the ED under Section 17(4), if the Adjudicating Authority has 'reason to believe' that an act has been committed which constitutes money laundering under Section 3, or a person is in possession of 'proceeds of crime', a show cause notice has to be served by the Adjudicating Authority to the party/parties concerned.

78. The 'reason to believe' to be recorded by the Adjudicating Authority under Section 8(1) is independent of the 'reasons to believe' recorded by the ED under Section 17(1). The Adjudicating Authority cannot mechanically go by the reasons recorded by the ED, and has to have separate and independent grounds to believe that such an offence has been committed. The fact that the Adjudicating Authority is again required to have 'reason to believe' as per the provisions of the Act shows that there is a two-tier process which is to be followed prior to the issuance of the show cause notice, namely- satisfaction by the ED and thereafter, independent satisfaction by the Adjudicating Authority.

79. Upon arriving at such satisfaction, the same would have to be recorded as the 'reason to believe' under Section 8(1) of the Act, by the Adjudicating Authority. A notice to show cause would have to be then issued to the parties concerned, along with the evidence on which the Adjudicating Authority has relied to reach the conclusions in its 'reason to believe'. This material is called the 'Relied Upon Documents' (RUDs). Section 8(1) and 8(2) of the PMLA read:

"8. Adjudication:

(1) On receipt of a complaint under sub-section (5) of section 5, or applications made under sub-section (4) of section 17 or under sub-section (10) of section 18, if the Adjudicating Authority has reason to believe that any person has committed an offence under section 3 or is in possession of proceeds of crime, it may serve a notice of not less than thirty days on such person calling upon him to indicate the sources of his income, earning or assets, 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 or section 18, the evidence on which he relies and other relevant information and particulars, and to show cause why all or any of such properties should not be declared to be the properties involved in money-laundering and confiscated by the Central Government:

Provided that where a notice under this sub-section specifies any property as being held by a person on behalf of any other person, a copy of such notice shall also be served upon such other person.

Provided further that where such property is held jointly by more than one person, such notice shall be served to all persons holding such property.

(2) The Adjudicating Authority shall, after:

(a) considering the reply, if any, to the notice issued under sub-section (1);

(b) hearing the aggrieved person and the Director or any other officer authorised by him in this behalf; and

(c) taking into account all relevant materials placed on record before him,

by an order, record a finding whether all or any of the properties referred to in the notice issued under sub-section (1) are involved in money-laundering

Provided that if the property is claimed by a person, other than a person to whom the notice had been issued, such person shall also be given an opportunity of being heard to prove that the property is not involved in money-laundering."

80. In order to streamline the procedure of the Adjudicating Authority, detailed Regulations titled 'The Adjudicating Authority (Procedure) Regulations, 2013' have been enacted. The relevant provisions of the said Regulations read:

Regulation 13. Issues of summons and notices:

(1) Every summon or notice shall be issued in Form 3 or Form 4 or Form 5 or Form 6, as the case may be, and signed by the Registrar or Administrative Officer.

(2) Every summon and notice shall be served by the complainant or applicant upon the defendant or respondent along with complete relied upon documents in a bound paper book and an affidavit of service along with proof of service shall be filed by the person affecting such service.

81. A conjoint reading of Section 8(1) of the PMLA and Regulation 13(2) of the Adjudicating Authority (Procedure) Regulations, 2013, leaves no doubt that the Adjudicating Authority is duty bound to serve all the documents, that it has 'relied upon' i.e., the RUDs, while coming to its 'reason to believe' to the party concerned, in a bound paper book.

82. The said service of documents can be effected through the ED, and the Adjudicating Authority has to ensure that the said service has been effected. A simple service of the show cause notice, without the RUDs would not be

sufficient. The 30-day period notice would naturally have to be thus counted from the date when the complete "Relied Upon Documents" are supplied to the parties concerned/ Defendants, as no effective opportunity to reply would be possible unless all the "Relied Upon Documents" are received.

83. The language of Section 8(1) of the Act, read with Regulation 13 of the Regulations of 2013 is clear, to the effect that all the evidence which the Adjudicating Authority relies upon, including the relevant information and particulars thereof, which form the basis of its 'reason to believe' have to accompany the said show cause notice. It would not be permissible for the Adjudicating Authority, in terms of the PMLA and the Regulations thereunder, to withhold evidence or other information and particulars, which the Adjudicating Authority relies upon while framing its 'reason to believe'.

84. The Adjudicating Authority, after issuing the show cause notice, has to give a 30 days period for the parties/ defendants to file their replies. Upon receipt of the show cause notice, if the defendants concerned seek inspection of records, prior to filing of their reply, the same would have to be provided in terms of Regulations 16, 17 & 18 of the Adjudicating Authority (Procedure) Regulations, 2013. The issues raised concerning inspection shall be dealt with at a later stage of this judgment.

85. The time for filing of reply ought to be fixed by the Adjudicating Authority keeping in mind the time that may be consumed in service of the RUDs, after the issue of the show cause notice under Section 8(1).

86. Under Section 8(2) of the PMLA, the Adjudicating Authority is duty bound to provide a hearing to the defendants. Such a hearing ought to be a meaningful one, and a proper hearing where the complainant i.e., the ED, as also the Defendant(s), are able to place their respective stands before the Adjudicating Authority ought to be given. The complainant cannot be given any preferential treatment by the Adjudicating Authority.

87. The Adjudicating Authority, as the name suggests, is an authority which adjudicates, i.e., which decides disputes between the parties on merits without bias or prejudice.

88. The records that are relied upon by the Complainant are to be properly marked as C-1 series of exhibits, and the documents filed by other Applicants are to be marked as A-1 series of exhibits, under Regulation 25 of the Adjudicating Authority (Procedure) Regulations, 2013. Further, all documents relied upon by the Defendants are to be marked as D-1 series of exhibits. This shows that documents which are not marked, cannot be considered as the part of the adjudicatory process by the Adjudicating Authority.

89. Under Section 11 of the Act, the Adjudicating Authority is vested with the powers of a Civil Court under the CPC, and it can accordingly summon witnesses. A perusal of Regulations 21 to 24 of the Adjudicating Authority (Procedure)

Regulations, 2013, also shows that the Adjudicating Authority can, in appropriate cases, record deposition of witnesses, who can even be subjected to cross-examination.

90. According to Section 11(3) of the PMLA, the proceedings before the Adjudicating Authority are judicial proceedings. The said provision reads:

"Section 11. Power regarding summons, production of documents and evidence, etc:.

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(3) Every proceeding under this section shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code (45 of 1860)."

91. As the hearing before the Adjudicating Authority is not merely a procedural hearing, but an adjudicatory hearing, the Adjudicating Authority has to, as per Section 8(2) of the PMLA, first consider the reply to the show cause notice filed by the defendants; secondly, hear all the parties in a meaningful manner; and thirdly peruse all the relevant material placed on record before it, and only then record a finding confirming the search or seizure/ confiscation/ freezing, after reaching a conclusion that the defendant(s) is involved in the offence of money laundering under Section 3 of the Act, or is in possession of proceeds of crime.

92. It would not be permissible for the complainant-ED to show any documents or material to the Adjudicating Authority outside of the hearing being given, or behind the back of the parties concerned. The hearing has to also be transparent and in the presence of the parties concerned. Unilateral hearings in the absence of the opposing party would not be permissible before the AA.

93. If there is any third party, whose interests are being affected, apart from the parties to whom show cause notice is issued, such third party would also be given an opportunity of being heard to prove that the party is not involved in money laundering.

94. If the Adjudicating Authority comes to the conclusion that the party(s) concerned is involved in money laundering, an order would have to be passed in writing under Section 8(3) of the Act.

95. The order passed by the Adjudicating Authority would then be communicated to all the parties concerned. Thereafter, remedies can be availed of by the parties concerned, in accordance with law.

IV. Procedure to be followed for inspection of records

96. After receiving the show cause notice and the 'Relied Upon Documents' if the defendant(s) concerned is of the opinion that the material forwarded by the ED to the Adjudicating Authority could include documents/material beyond the documents relied upon by the AA, inspection can be sought by the defendant(s)

of the said records.

97. An application for inspection has to be filed, by the party concerned, in terms of Form 7 and Regulation 16 of the Adjudicating Authority (Procedure) Regulations, 2013, and a fee, in respect thereof, has to be deposited as per Regulation 17 of the said Regulations. After inspection, the Defendant may request for copies of the documents as per Regulation 18, after paying the stipulated fee.

98. Thus, the provisions relating to inspection and fees for inspection and copying, are in respect of records which are beyond the 'Relied Upon Documents' which may be part of 'material in possession'. Inspection of such documents can only be given to the party concerned and not to any third parties. Strict confidentiality ought to be maintained. No fee can be charged for supplying the 'Relied Upon Documents' by the Adjudicating Authority directly, or through the ED.

99. After conducting the said inspection, which, if granted, ought to be facilitated in an expeditious manner by the Adjudicating Authority bearing in mind the limited time fixed for filing the reply.

Findings on the legal issues

100. In terms of the discussion above, the following are the findings on the issues raised above:

i) What is the procedure to be followed by the ED when letters of request are received under Section 60 of the Act from a contracting state?

? When a letter of request is received under Section 60 from a contracting state, the requisite safeguards contained in Chapters III and V of the Act, as well as the procedure mentioned in the Rules and Regulations framed under the Act have to be followed. The said requests cannot be treated at a higher threshold. The ED and the Adjudicating Authority, would have to adhere to all provisions relating to recording the 'reason(s) to believe' and supplying the 'Relied Upon Documents', as is required to be done in the case of domestic proceedings under the PMLA.

ii) Whether the ED is duty bound to provide the 'reasons to believe' while passing orders under Section 17 of the PMLA, to the concerned parties?

? The said question is pending for determination before the Supreme Court in SLP(C) No. 12865/2018 titled Union of India and Ors. vs. J. Sekar.

iii) What is the procedure to be followed by the ED while forwarding the 'reasons to believe' and the application under Section 17(4) of the PMLA to the Adjudicating Authority seeking continuation of the freezing orders and confiscation?

? Immediately upon a search and seizure/ freezing order being passed, the Director ED, or the person authorized has to forward a copy of the 'reasons to

believe' recorded by the ED along with 'material in its possession' to the Adjudicating Authority, in a sealed cover, as per the provisions 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. The detailed procedure provided under the said Rules has to strictly be complied with to ensure that there is no tampering in the material sent by the ED to the Adjudicating Authority.

iv) Whether the ED ought to transmit all the documents, which are in its possession, to the Adjudicating Authority while sending the same in a sealed cover under Rule 8 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?

? Along with the application under Section 17(4), The Director ED or the person authorized has to transmit all the material in the possession of the ED in respect of the said case, to the Adjudicating Authority, in accordance with the procedure stipulated in Rule 8 of the 2005 Rules. It would not be permissible for the ED to retain some part of the material, and send partial documents to the Adjudicating Authority, at this stage, in as much as the statute contemplates sending of 'the material in possession of the authority' and NOT 'material forming the basis of the 'reasons to believe''. No documents already in possession of the ED, can be shared by the ED with the Adjudicating Authority without following the due procedure provided within the 2005 Rules, or post the issuance of the show cause notice.

v) What is the procedure to be followed by the Adjudicating Authority, upon receipt of the application under Section 17(4) of the PMLA?

vi) What is the level of satisfaction to be recorded by the Adjudicating Authority prior to issuance of show cause notice under section 8(1) of the PMLA?

? The Adjudicating Authority is an authority which adjudicates, i.e., which decides disputes between the parties on merits without bias or prejudice. It is independent and distinct from the ED. As per Section 8, upon receipt of a complaint/application filed by the ED under Section 17(4), the Adjudicating Authority has to record its 'reason to believe' that an act has been committed which constitutes money laundering under Section 3, or a person is in possession of 'proceeds of crime'. It has to record its satisfaction independent of the 'reasons to believe' of the ED and only thereafter issue a show cause notice under Section 8(1) to be served upon the party/parties concerned. The said notice has to be issued in accordance with the Adjudicating Authority (Procedure) Regulations, 2013'.

? The Adjudicating Authority cannot mechanically go by the reasons recorded by the ED, and has to have separate and independent grounds to believe that such

an offence has been committed. The fact that the Adjudicating Authority is again required to have 'reason to believe' as per the provisions of the Act shows that there is a two-tier process which is to be followed prior to the issuance of the show cause notice, namely- satisfaction by the ED and thereafter, independent satisfaction by the Adjudicating Authority.

vii) Whether while issuing the show cause notice, all the 'Relied Upon Documents' have to be supplied to the parties concerned?

? A conjoint reading of Section 8(1) of the PMLA and Regulation 13(2) of the Adjudicating Authority (Procedure) Regulations, 2013, leaves no doubt that the Adjudicating Authority is duty bound to serve all the documents, that it has 'relied upon' i.e., the 'Relied Upon Documents (RUDs)', while coming to its 'reason to believe' to the party concerned, in a bound paper book. The said service of documents can be effected through the ED, and the Adjudicating Authority has to ensure that the said service has been effected. A simple service of the show cause notice, without the RUDs would not be sufficient. The 30-day period notice would naturally have to be thus counted from the date when the complete RUDs are supplied to the parties concerned/ Defendants, as no effective opportunity to reply would be possible unless all the RUDs are received.

viii) What is the procedure to be followed for providing inspection of records, and for giving a reasonable hearing to the parties, prior to passing of orders by the Adjudicating Authority under the PMLA?

? No fee can be charged for supplying the 'Relied Upon Documents' by the Adjudicating Authority directly, or through the ED. Insofar as inspection is concerned it is clarified that the provisions relating to inspection and fees for inspection and copying, are in respect of records which are beyond the RUDs which may be part of 'material in possession'. Inspection of such documents can only be given to the party concerned and not to any third parties. Strict confidentiality ought to be maintained. For obtaining inspection, parties may file an application in terms of Form 7 and Regulation 16 of the Adjudicating Authority (Procedure) Regulations, 2013, and deposit a fee as per Regulation 17 of the said Regulations. After inspection, the Defendant may request for copies of the documents as per Regulation 18, after paying the stipulated fee. The said inspection, if granted, ought to be facilitated in an expeditious manner.

? The Adjudicating Authority has to, as per Section 8(2) of the PMLA, first consider the reply to the show cause notice filed by the defendants; secondly, hear all the parties in a meaningful manner; and thirdly peruse all the relevant material placed on record before it, and only then record a finding confirming the search or seizure/ confiscation/ freezing, after reaching a conclusion that the defendant(s) is involved in the offence of money laundering under Section 3 of the Act, or is in possession of proceeds of crime. It would not be permissible for the complainant-ED to show any documents or material to the Adjudicating Authority outside of the hearing being given, or behind the back of the parties

concerned. The hearing has to also be transparent and in the presence of the parties concerned. Unilateral hearings in the absence of the opposing party would not be permissible before the AA.

Applicability on facts and Directions

101. Coming to the facts of present cases - the chronology of events as set out in paragraph 24 above, the affidavits which have been filed by the Adjudicating Authority and the Petitioners, and the submissions made by the Id. counsels for ED, make it clear that the prescribed procedure, as per the PMLA and the Rules and Regulations framed thereunder, have not been complied with.

102. The ED, initially, did not transmit all the 'material in its possession' to the Adjudicating Authority, prior to the issuance of the show cause notice. This would clearly be contrary to Rule 8 of the 2005 Rules, which have been extracted above in paragraph 67. The only documents that were transmitted along with 'reasons to believe' and the application under Section 17(4), by the ED to the Adjudicating Authority, were the Panchnamas. The said Panchnamas were supplied to the Petitioners as the RUDs along with the show cause notice(s).

103. However, the Petitioners sought inspection of all the other materials on record, which was not granted, obviously because the Adjudicating Authority, itself did not have any of the said material at that stage.

104. Replies were then filed by the Petitioners, merely on the basis of the Panchnamas and the allegations in the show cause notice as also the application under Section 17(4). None of the other relevant material, which was the basis of the seizure under Section 17(1A) and the complaint under Section 17(4) of the PMLA were supplied to the Petitioners, as the same were not even supplied by the ED to the AA.

105. The other aberration in this case was that the documents forming the basis of the 'reasons to believe' of the ED at the stage of Section 17 of the PMLA, were stated to have been shown to the Adjudicating Authority exclusively, of which the Petitioners had no knowledge/notice. The same were shown in non-compliance of the 2005 Rules, and were shown post the issuance of the show cause notice, as is evident from the affidavit filed by the ED. Paragraphs 5.3 to 5.6 of the affidavit filed by the ED dated 22nd September 2021, claims that the ED showed the said documents to the AA at the time of hearing. This, however, has been disputed by all Counsels for the Petitioners who state that during the hearing, the documents were not shown to the AA. It is made clear that sharing of documents with the AA, post the issuance of the show cause notice, outside the hearing and that too without the knowledge of the parties concerned, is not permissible.

106. Whenever letters of request are received from any contracting states, the ED ought to follow due process, as per the domestic law, in line with the spirit of the Merida and the Palermo Conventions. Measures such as searching of premises, seizure of records, freezing of bank accounts, etc., ought to be

resorted to, only after the authority has fully satisfied itself that there is a prima facie case of illegality. The measures taken also ought to be proportionate to the alleged crime or violation as contained in the letter or request.

107. In the present cases, it was noticed that a carte blanche freezing order was passed, freezing several bank accounts belonging to 66 companies. As recently observed by the Supreme Court in *M/s Radha Krishan Industries v. State of Himachal Pradesh and Ors.*, (2021) 6 SCC 771, in the context of GST law, freezing of bank accounts is a 'draconian measure'. The observations of the Supreme Court read:

"76.4 The power to order a provisional attachment of the property of the taxable person including a bank account is draconian in nature and the conditions which are prescribed by the statute for a valid exercise of the power must be strictly fulfilled.

76.5 The exercise of the power for ordering a provisional attachment must be preceded by the formation of an opinion by the Commissioner that it is necessary so to do for the purpose of protecting the interest of the government revenue. Before ordering a provisional attachment the Commissioner must form an opinion on the basis of tangible material that the assessee is likely to defeat the demand, if any, and that therefore, it is necessary so to do for the purpose of protecting the interest of the government revenue."

Such freezing of bank accounts could lead to disruption of personal lives and/or of businesses. Thus, measures such as freezing of bank accounts ought to be proportionate and taken only to the extent required. If any clarifications are required from authorities in the contracting state, the ED ought to seek those clarifications, prior to resorting to such measures of freezing. As is seen in the present case, the ED upon seeking clarifications from the Brazilian Authorities restricted the freezing amounts, which in their opinion were the amounts involved in the commission of offences. This action was several months after the initial freezing order.

108. These cases afford a stark example of mechanical execution of a letter of request received from a contracting state, which would not be permissible under the scheme of PMLA, and would also be contrary to the provisions of the Merida and the Palermo Conventions.

109. However, no orders, in respect thereof, are being passed, in view of the statements made by Mr. Amit Mahajan, Id. CGSC, appearing on behalf of the ED, on instructions from Mr. Deepak Chauhan, Deputy Director, ED.

The said statement has been recorded in the order dated 7th October 2021, reads as under:

"However, without going into this, it is submitted by both Id. CGSC's appearing on behalf of the ED, under instructions, that since these are one of the first set of matters that have arisen under Section 60 of the Prevention of Money

Laundering Act, 2002, the ED would be willing to have a fresh look at the freeing orders dated that have been passed, and any other proceedings pursuant thereto based on the averments made in the writ petitions and in the peculiar facts and circumstances of the respective cases. The said statement is taken on record."

110. Accordingly, in view of the above statement made by Id. Counsels for the ED, the following directions are issued, with the consent of the parties, in the facts and circumstances of these cases:

(i) The impugned order under Section 17(1A) of the PMLA in all these petitions, as also the orders passed by the Adjudicating Authority under Section 8 of the PMLA dated 28th December 2020, are set aside.

(ii) All the documents referred to in paragraph 25 above, which form the basis of the order under Section 17(1A) of the PMLA, shall now be supplied to all the Petitioners, on or before 15th November, 2021.

(iii) All parties/Petitioners shall be permitted to file their submissions based on the material received by them from the ED, on or before 15th December, 2021.

(iv) The ED shall consider the submissions made by all the parties and then pass fresh orders in accordance with law by 15th February, 2022.

(v) In the interregnum, the specific amounts as referred to in the order dated 28th December 2020 of the Adjudicating Authority, shall remain frozen. However, the Petitioners are permitted to furnish either bank guarantees, or securities to the satisfaction of the ED, subject to which the said accounts may be directed to be de-frozen by the ED, on a case-to-case basis.

(vi) All the remedies available to parties, as per law, in respect of the orders, if any, passed by the ED, are kept open.

111. This Court also notices that under Regulations 17 and 18 of the Adjudicating Authority (Procedure) Regulations, 2013, fee for inspection is to be charged on an hourly basis, and Rs.20/- per page is charged for copying of inspected records.

112. The Government may also consider rationalizing the fee structure for inspection and for copying under Regulations 17 and 18 of the Adjudicating Authority (Procedure) Regulations, 2013.

113. In the interregnum, however, especially during the COVID-19 pandemic when providing physical inspection may actually not possible for most requesting parties, the Adjudicating Authority may issue some interim practice directions/guidelines for issuance of electronic copies of the records, inspection of which has been sought by the inspecting parties, for a fixed fees.

Additional directions in respect of W.P.(C) 4680/2021 titled Alok Industries Limited v. Directorate of Enforcement

114. In respect of WP (C) 4680/2021, related to M/s Alok Industries, the case of the Petitioner was that it underwent insolvency proceedings before the NCLT. The

Corporate Insolvency Resolution Process commenced on 18th July 2017 and the NCLT approved the Resolution plans vide orders dated 8th March 2019 and 26th July 2019. Vide Board Resolution dated 14th September 2020, a new management has taken over the said company. Thus, Mr. Ritin Rai, Id. Senior Counsel appearing for the Petitioner, submits that these alleged offences, being prior to the date of commencement of Insolvency proceedings, the company which is now being run by the new management would have to be given the benefit of Section 32A of the Insolvency and Bankruptcy Code 2016.

115. In response, Mr. Amit Mahajan, Id. CGSC has submitted that the ED is willing to take a fresh look, as to whether the Petitioner satisfies the pre-conditions under Section 32A of the IBC, and if so, on the basis of the facts pleaded in the writ petition and any other submissions made by the Petitioner, the ED would pass fresh orders within a period of three months. This statement was taken on record vide the last order dated 7th October 2020. Accordingly, it is directed that the ED would pass fresh orders, in respect of M/s Alok Industries by 31st January 2022. All the other relevant directions, as mentioned in paragraph 121 shall be applicable to this case as well.

116. It is, also noted that WP(C)4680/2021 shall be listed on 30th November, 2021 to receive the status report as directed, pertaining to the issue of appointments and vacancies at the Adjudicating Authority under the PMLA. For the said purpose only, WP(C) 4680/2021 shall remain pending and be treated as a part heard matter.

117. All these petitions and pending applications are disposed of in the above terms. List WP(C) 4680/2021 on 30th November 2021 for receiving the status report in terms of the order dated 28th September 2021.

118. The digitally signed copy of this order, duly uploaded on the official website of the Delhi High Court, www.delhihighcourt.nic.in, shall be treated as the certified copy of the order for the purpose of ensuring compliance. No physical copy of orders shall be insisted by any authority/entity or litigant.