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SOCIO ECONOMIC CRIMES

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I PERSPECTIVE

लोभः सदाविचिंत्योलज्धेभ्यः सर्वतोभयंदृष्टम्। कार्यस्विचारोलोभविमूढस्यनासस्त्येव ॥[2]

Greed in men is always a matter of concern and is questionable, because if a person is seized by greed, he loses the ability to distinguish between good and bad deeds and is subject to fear all around him. Greedy persons do not hesitate even to indulge in crimes with a view of attaining more wealth, with very disastrous consequences.

Socio-economic crimes are the result of greed mostly. They have been globally identified as a bigger threat to social and political fabric. The United Nations recognises the term "economic and financial crime" which "refers broadly to any non-violent crime that results in a financial loss, even though at times such losses may be hidden or not socially perceived as such."[3] It has "severely damaged the credibility of a number of companies and financial institutions, leading to bankruptcy, loss of jobs and serious damage to both institutional and individual investors."[4] In 2022 the constitution bench case of *Vijay Madanlal Choudhary* v. *Union of India*[5] reiterated the same as under:[6]

> "soft state" which is used to describe a nation which is not capable of preventing the offence of money-laundering. The Court held thus: "13. The concept of a "soft state" was famously articulated by the Nobel Laureate, Gunnar Myrdal. It is a broad-based assessment of the degree to which the State, and its machinery, is equipped to deal with its responsibilities of governance. The more soft the State is,

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2 Krishna Shastri Bhatavadekar, *SubhashitaRatnakara*,(1888) *available at* https://archive.org/details/in.ernet.dli.2015.327797/page/n11/mode/2up

3 "Economic and financial crimes: challenges to sustainable development," Working paper, 1, Eleventh United Nations Congress on Crime Prevention and Criminal Justice, Bangkok, 2005.

4 *Ibid.*

5 [2022] 6 S.C.R. 382: (2022) SCC Online 929.

6 *Ram Jethmalani* v. *Union of India* (2011) 8 SCC 1.

> greater the likelihood that there is an unholy nexus between the law maker, the law keeper, and the law breaker."

The *sui generis* nature of these crimes have compelled the State and the Globe to tilt towards "security" of State compromising "liberty" of individuals. Willingly or unwillingly an entire new set of jurisprudential regimes has emerged and established. This new criminal jurisprudence came in the form of dilution of the requirements of *mens rea* and elements of *actus reus,* presumption clauses, provisions of reverse onus, modification in standard of proof, reduction of foundational elements, addition of inchoate crimes with main crimes, harsh conditions of bail, minimum punishment, recognition of proceeds of crimes, attachment of property *etc*. To secure the society from the scourge of socio economic crimes the new jurisprudence was not only welcomed by the UN Conventions, experts and liberal regimes but also promoted at international level as a necessary evil. Indeed, socio economic crimes like corruption, money laundering, drug trafficking etc and the *modus operandi* of economic offenders are termed as violations of human rights.[7] It is correctly said that "contemporary transnational criminals take advantage of globalization, trade liberalization, and emerging technologies to commit a diverse range of crimes and to move money, goods, services, and people instantaneously for purposes of pure economic gain, political violence, or both."[8]

Developing countries like India are more vulnerable to the impact of socio-economic crimes because of lack of enforcement infrastructure and political will. This survey of cases on socio-economic crimes 2022[9] also highlights the constitutional and legal issues involved in various cases. This survey is limited to the Prevention of Corruption Act, 1985; the Prevention of Money Laundering Act, 2002 and Provisions under the Indian Penal Code, 1860 and Dowry cases.

II PREVENTION OF CORRUPTION ACT, 1985

A. Demand of Bribe : Conditional permission of secondary evidence

Ms Neeraj Dutta v. *State(Govt.ofN.C.T.of Delhi)*[10] is a case decided by a constitution bench on the issue of desirability of primary evidence of demand of bribe. In trap cases (or sting operations) to catch a corrupt officer the proof of *acceptance* of bribe money is very much established by primary evidence like eye witnesses and other evidence like scientific evidence. Is it essential to establish the *demand* for bribes also by primary or direct evidence? This issue of direct

7 *State of Maharashtra Tr.C.B.I* v. *Balakrishna Dattatrya Kumbhar*, AIRONLINE 2012 SC 627 https://www.unodc.org/dohadeclaration/en/news/2018/04/corruption—human-rights—and-judicial-independence.html , See also, Anne Peters, "Corruption as a Violation of International Human Rights" *The European Journal of International Law* Vol. 29 no. 4, (OuP 2019).

8 Bruce Zagaris, Berliner, Corcoran and Rowe: *International White Collar Crime- Cases and Materials,* (Cambridge University Press, 2015).

9 Either decided in 2022 or reported in 2022 though decided in 2021 by the Supreme Court of India.

10 [2022] 5 S.C.R. 104. It was unanimously decided by a constitution bench of five judges.

proof of demand becomes more important in case of a complainant turning hostile, or a complainant dies. There are two visible approaches of the judiciary. One favours the accused and other favours the State. The accused centric interpretation insists that the proof of demand for a bribe must be established only by direct evidence and not by circumstantial evidence. On the other hand, the State oriented interpretation asserts that such proof can also be inferential or circumstantial if direct proof is not available. The judicial pendulum kept on moving from one approach to another in the last two decades. Ultimately a constitution bench pronouncement of *Neeraj Dutta* v. *NCT, Delhi* is able to remove the cloud of confusion that direct proof of demand is not essential. Before the finding of the case is critically analysed, it is desirable to understand the background. The offence of bribery can be committed by two means. He may accept without demand or he may demand and then accept. In the judicial and legal parlance first is called as mere acceptance and second is called as obtainment. Section 7 of the Prevention of Corruption Act, 1988(PCA) uses both terms (accept or obtains) while section 13(1)(d) uses only 'obtains'. Therefore, the pronouncements of the Supreme Court came with identifying an important difference between 'accept' and 'obtains'. Acceptance is different from obtainment. Obtainment shows "the *initiative* vests in the person who receives and, in that context, a demand or request from him will be a primary requisite."[11] If the prosecution argues that the public servant 'accepts' a bribe. The element is (i) bribe offered by or proposal initiated by the bribe giver. (ii) bribe giver delivers it. (iii)The public servant accepts the bribe, (iv) recovery. When a public servant "obtains" a bribe, the element of offence is (i) demand offer of bribe by the public servant (ii) delivery by bribe giver, (iii) acceptance by public servant (iv) recovery. The element of demand is not expressly mentioned in the PCA. It is a judicial creation[12] so that the difference between 'accept' and 'obtain' can be maintained and understood. It is also noticeable that there is a statutory presumption under section 20 of the PCA but it is available for the offence punishable under sections 7 or 11 or 13(1)(a) and (b) [which use the words 'accept and obtains' in alternative] but not for 13(1)(d)[which use the word 'obtain' only]. In other words, for section 13(1)(d) the proof of demand is essential.

In *Neeraj Dutta* case the constitution bench endorses the requirement of the element of 'demand' and summarises the problem as under:

> "Thus, the proof of demand is a *sine qua non* for an offence to be established under Sections 7, 13(1)(d)(i) and (ii) of the Act and *de hors* the proof of demand the offence under the two sections cannot be brought home. Thus, mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof in the absence of proof of demand would not be sufficient to bring home the charge under Sections 7, 13(1)(d)(i) and (ii) of the Act." In "the absence of proof of demand, a legal presumption under Section 20 of the Prevention of Corruption Act, 1988 would not arise."

11 *C.K. Damodaran Nair* v. *Government of India* (1997) 9 SCC 477.

12 *Ibid.*

That essentiality of the proof of demand beyond reasonable doubts has to be proved is very well recorded in various precedents and the same has been endorsed by the constitution bench in *Neeraj Dutta* case.

Issues

Should such proof of demand of bribe be primary only or can the element of demand be established by secondary evidence also? The constitution bench framed the single issue as under:

> Whether, in the absence of evidence of complainant/direct or primary evidence of demand of illegal gratification, is it not permissible to draw an inferential deduction of culpability/guilt of a public servant under Section 7 and Section 13(1)(d) read with Section 13(2) of Prevention of Corruption Act, 1988 based on other evidence adduced by the prosecution?"

The dispute therefore, lies in the nature of proof.

a. Should such proof of demand be only direct or can it be circumstantial? Can a factual presumption lead to legal presumption?

b. Can the evidence of tainted money lead to a presumption that a demand was made by the accused?

"This question becomes significant in the absence of the complainant from whom the demand of illegal gratification was made. The complainant may be absent either because he is dead or has become hostile or is not traceable etc."

Nature of proof of demand: Direct or Circumstantial

There seemed to be an inconsistent approach of the Supreme Court on this issue. A few benches of the Supreme Court[13] held that the proof of demand can only be direct. Any evidence through inferences cannot be drawn to establish proof. Circumstances cannot be helpful to establish proof of demand. The prosecution has greater liability. The reasoning was that any proof of demand will lead to the presumption under section 20. Section 20 is a shall presumption. Once presumption is done the burden shifts on the accused. Therefore, the process to arrive at such a presumption ought to be strict and not liberal. In the words of this author the presumption has already granted liberty to the prosecution. Any further liberty will jeopardise the interest of the accused. The classical approach to interpretation also supports this liberal interpretation because any doubt or silence of law must help the accused and not the State.

Other precedents[14], some of equal strength ie full bench, held that the proof of demand can be established by circumstantial evidence also. From tainted money

13 *A. Subair* v. *State of Kerala*, (2009) 6 SCC 587; *B. Jayaraj* v. *State of Andhra Pradesh*, (2014) 13 SCC 55; *P.Satyanarayana Murthy* v. *District Inspector of Police, State of Andhra Pradesh*, (2015) 10 SCC 152; *Selvaraj* v. *State of Karnataka*, (2015) 10 SCC 230.

caught from the possession accused the inference of demand can be drawn in suitable cases. This is factual presumption. There is no such law that only direct evidence can be produced to draw a presumption. This is a state-oriented argument because the burden of prosecution is further reduced (or rationalised). The purposive interpretation also supports this approach. The accused oriented route and interpretation can be suitable in general penal law but not special penal laws like PCA. Otherwise, the interpretation in favour of the accused will incentivise hostile witnesses. Death of the complainant will be a premium to the accused. Based on the above two inconsistent approaches the Supreme Court decided various cases.

***Neerj Dutta* case-The Origin of the precedential controversy**

Can the proof of demand be only direct and not circumstantial? Can a factual presumption lead to legal presumption? Can the evidence of tainted money lead to a presumption that a demand was made by the accused? In the case of *B. Jayaraj*[15] the complainant V1, complained that A1 demanded bribe money. V1 gave Rs 250/ as bribe money. The accused was caught with the money. Therefore, there were four pieces of evidence, (i) the complaint (ii) the complainant from whom the demand was made followed by the team to trap the accused (iii) delivery of money as bribe money by the complainant (iv) the recovery of tainted money. All four made a chain. There was no witness when V1 delivered Rs 250 in pursuance of the demand. In the trial V1, the complainant and eye witness of the demand for bribe became hostile. He said that Rs 250 was given as licence fee to A1 so that it could be submitted in bank. When V1 did not support the prosecution version, the evidence (ii) and (iii) was out of the chain. In other words, there was neither proof of demand nor proof of acceptance of bribe money. The accused was acquitted.

In the case of *P. Satyanarayana Murthy*[16] the complainant died before the prosecution could examine him. As there was no *direct* witness to establish demand or voluntary acceptance, the accused was acquitted. Both *Jayraj* and *Murthy* were decided by three judges.

M. Narsinga Rao[17] was also decided by three judges. However, they did not follow the direct evidence rule as above. In this case (i) a complaint (ii) complainant (iii) recovery of money with phenolphthalein was the initial evidence. In the court the complainant was won over and became hostile. The only evidence was the complaint before DSP and recovery of tainted money from the pocket of the accused. There was no direct evidence. The court held that a complaint of demand

14 *Hazari Lal* v. *State (Delhi Admn.)*, (1980) 2 SCC 390; *Kishan Chand Mangal* v. *State of Rajasthan*, (1982) 3 SCC 466; *M. Narasinga Rao* v. *State of Andhra Pradesh*, 2001 (1) SCC 691; *State of Andhra Pradesh* v. *V. Vasudeva Rao* (2004) 9 SCC 319; *State of Andhra Pradesh* v. *P. Venkateshwarlu*(2015) 7 SCC 283; *Nayan Kumar Shivappa Waghmare* v. *State of Maharashtra* (2015) 11 SCC 213;

15 *B. Jayaraj* v. *State of Andhra Pradesh*, (2014) 13 SCC 55.

16 *P.Satyanarayana Murthy* v. *District Inspector of Police, State of Andhra Pradesh*, (2015) 10 SCC 152.

17 *M. Narasinga Rao* v. *State of Andhra Pradesh*, 2001 (1) SCC 691.

of Rs 500 was made before DSP and recovery of the same tainted money from the accused completed the chain that such money was delivered on demand only. There is no other explanation. The circumstances explain the demand. Demand need not be proved only by direct evidence. There is no such rule. Once demand is established by circumstantial evidence, the presumption under section 20 of PCA has to be made that Rs 500/ was given for some reward. An interesting argument was jurisprudential in nature. Can a factual presumption be used for a legal presumption. Shall presume under section 20 is a legal presumption. Drawing inferences from the facts based on circumstances lead to factual presumption. For example, V1 makes a complaint to an officer P1 that A1 has demanded a bribe of Rs 2500. Officer P1 registers it. P1 plans a trap with the help of V1. V1 arranges Rs 2500/ which was chemically treated with phenolphthalein. V1 leads P1 and his trap team to A1. V1 pays the bribe money of Rs 2500/. V1 makes indications and P1 catches A1 with the money. Now during trial V1 becomes hostile (or dies before examination). The evidence of complaint, registration of FIR by P1, P1 reaching A1, A1 caught red handed with the money are still evidence permissible under law. As V1 is hostile, the proof of demand is lacking, can other evidence from complaint to recovery of money [ignoring V1 and his evidence against A1] be given an inference that the money of Rs 2500/ was given because A1 demanded it. Such inference is based on facts and therefore factual presumption. If proof of demand is established, section 20 of PCA comes into picture which is a legal presumption ie once demand and acceptance of money is established beyond reasonable doubts, it shall be presumed that it was for reward or motive. Now another party ie A1 has to establish by preponderance probability that the money given was for some legitimate purpose. The Supreme Court held that a factual presumption can be the basis for a legal presumption under section 20 of PCA.

The law laid down

After analysing many judgements on the issue, the constitution bench summarised it as under:

a. Proof of demand and acceptance of illegal gratification by a public servant as a fact in issue by the prosecution is a*sine qua non* in order to establish the guilt of the accused public servant under Sections 7 and 13 (1)(d) (i) and(ii) of the Act.

b. In order to bring home the guilt of the accused, the prosecution has to first prove the demand of illegal gratification and the subsequent acceptance as a matter of fact. This fact in issue can be proved either by direct evidence which can be in the nature of oral evidence or documentary evidence.

c. Further, the fact in issue, namely, the proof of demand and acceptance of illegal gratification can also be proved by circumstantial evidence in the absence of direct oral and documentary evidence.

d. In order to prove the fact in issue, namely, the demand and acceptance of illegal gratification by the public servant, the following aspects have to be borne in mind:

i. if there is an offer to pay by the bribe giverwithout there being any demand from the public servant and the latter simply accepts the offer and receives the illegal gratification, it is a case of acceptanceas per Section 7 of the Act. In such a case, there need not be a prior demand by the public servant.

ii. On the other hand, if the public servant makes a demandand the bribe giver accepts the demand and tenders the demanded gratification which in turn is received by the public servant, it is a case of obtainment. In the case of obtainment, the prior demand for illegal gratification emanates from the public servant. This is an offence under Section 13 (1)(d)(i) and (ii) of the Act.

iii. In both cases of (i) and (ii) above, the offer by the bribe giver and the demand by the public servant respectively have to be proved by the prosecution as a fact in issue. In other words, mere acceptance or receipt of an illegal gratification without anything more would not make it an offence under Section 7 or Section 13 (1)(d), (i) and (ii) respectively of the Act. Therefore, under Section 7 of the Act, in order to bring home the offence, there must be an offer which emanates from the bribe giver which is accepted by the public servant which would make it an offence. Similarly, a prior demand by the public servant when accepted by the bribe giver and inturn there is a payment made which is received by the public servant, would be an offence of obtainment under Section 13 (1)(d) and (i) and (ii) of the Act.

e. The presumption of fact with regard to the demand and acceptance or obtainment of an illegal gratification may be made when the foundational facts have been proved by relevant oral and documentary evidence and not in the absence thereof. On the basis of the material on record, the Court has the discretion to raise a presumption of fact while considering whether the fact of demand has been proved by the prosecution or not. Of course, a presumption of fact is subject to rebuttal by the accused and in the absence of rebuttable presumption stands.

f. In the event the complainant turns 'hostile', or has died or is unavailable to let in his evidence during trial, demand of illegal gratification can be proved by letting in the evidence of any other witness who can again let in evidence, either orally or by documentary evidence or the prosecution can prove the case by circumstantial evidence. The trial does not abate nor does it result in an order of acquittal of the accused public servant.

B. Jayaraj and M. Narasinga Raocase : **no conflict**

The constitution bench did not find any contradiction in three judge Bench decisions in *B. Jayaraj* and*P. Satyanarayana Murthy*with the three judge Bench decision in *M. Narasinga Rao.* A bench of two judges and three judges found there is conflict in the judgements. It seems the Supreme Court wanted to avoid

going into the conflict because in such case *Jayaraj* and*P. Satyanarayana Murthy* has to be declared bad in law or *per incuriam*. To escape this unpleasant exercise the constitution bench has taken a mid way and laid down the correct law, by endorsing *M. Narasinga Rao*. The law laid down is "in the absence of evidence of the complainant (direct/primary, oral/documentary evidence) it is permissible to draw an inferential deduction of culpability/guilt of a public servant under Section 7 and Section 13(1)(d) read with Section 13(2) of the Act based on other evidenceadduced by the prosecution." In other words secondary evidence of demand can be used if primary evidence is not available.

Proposal for reforms

Regarding reverse onus cases where presumption is provided, there are two possible approaches, (a)the foundational facts should be proved by direct evidence only and circumsatantial evidence is excluded. This is rule of prudence (b) the foundational element can be proved by circumstantial evidence also if direct evidence is not available. This is the rule of law. A few precedents elevated the rule of prudence to the status of rule of law.

This interpretation of the constitution bench will help the State and civil society to fight against corruption. For the prosecution the burden is little easier to establish its case against a corrupt official. Therefore, the Supreme Court has made a purposive interpretation. The judicial creation of the element of proof of demand is endorsed by the constitution bench. This is the protection of an honest officer. A factual presumption can lead to a legal presumption is another contribution of *Neeraj Dutta* which needed more elaboration as this seems a new idea which will further develop in future. If the primary evidence of demand is not available and circumstances are closely connecting the chain it is fair to allow such evidence.

In the opinion of this author the PCA may be amended to incorporate the constitution bench decision of *Neeraj Dutta* case as under: After section 11 two explanations can be considered by legislature :

For the purpose of section 7, 7A, 9 and 11

a. "Obtain" means demand and acceptance.
b. The proof of demand can also be established by secondary evidence only if primary evidence is not available.

Both these modifications will be only statutory recognition of the law laid down in the constitution bench in *Neeraj Dutta* case. The statutory recognition will be useful for the Police, prosecution, advocates and the courts because their dependence on judicial decisions will be reduced. Moreover, it will be a step in the creation of a better informed criminal justice system. It will reduce the chances of exploitation of accused as well as victims and help in reducing delay because of conflicting claims by both parties.

On judgement writing

The constitution bench judgement is in 71 page only is a great relief of many readers though the issues were complex. The content of the judgement is rich in the sense that it has explained various concepts of the law of evidence under the

head "Relevant provisions of Law of Evidence - A discussion". This covers deliberations on sections 3, 4, 59, 60, 61, 62, 63, 64, 65 and 154 of the Evidence Act viz, Fact in issue, types of evidence viz oral, documentary, primary, secondary evidence, 'presumption' and 'circumstantial evidence,'is discussed [para 30-56, pg 41-57, out of total 71 pages]. These can be useful to students and teachers of LL.B. though the discussion is mere reproduction of the concept already in various books of LL.B. and there is hardly anything to add to the jurisprudence of evidence in these 16 pages. Should not a judgement avoid elaboration of such basic concepts so that the judgement is shorter.

However while elaborating on presumption the constitution bench refers to a precedent and concludes that "further, the presumptions of law constitute a branch of jurisprudence unlike a case of presumption of fact which is discretionary." It is not understandable why to exclude presumption of fact from being a part of a branch of jurisprudence.

On the issue of delay

In *Neeraj Dutta* case, the FIR was registered in 2000. The special trial court judgement came in 2006. The high court judgement came in 2009. The matter came to the Supreme Court in 2009 itself. The accused [offender] got bail. In 2012 and 2018 it was listed two times. In 2019 it was listed before a division bench which referred the matter for higher bench. It was again listed before the full bench which further referred it to the higher bench. In 2019 it was listed for 8 times. In 2022 it was listed before a constitution bench for 6 times and the matter of law was finally decided on Dec 15, 2022. The matter of fact was listed three times in 2023 and the accused was acquitted finally. The journey was for 23 years. 6 years in trial court, 2 years in high court. And 13-14 years in the Supreme Court. It is high time the Supreme Court should find ways to reduce the delay. It is more important in matters of law like the *Neeraj Dutta* case because many cases in courts wait for the Supreme Court to finally decide on the issue of law.

Satender Kumar Antil v. *CBI*[18] highlights the issue of bail.[19] In 2021 the Supreme court issued various directions by classifying bails under various categories.[20] In 2022 the Court issued fresh directions where they suggested to bring a separate law on bail. The UK or USA have separate law on bail. There is a reference to bail in economic offences. The Court held that precedents will govern the matters of bail. These precedents are *P. Chidambaram* v. *Directorate of Enforcement*,[21] *Sanjay Chandra* v. *CBI*.[22]

18 [2022] 10 S.C.R. 351.

19 This survey will not cover it comprehensively because it will be covered by expert of Criminal Procedure Code.

20 *Satendra Kumar Antil* v. *Central Bureau of Investigation* (2021) 10 SCC 773.

21 (2020) 13 SCC 791.

22 (2012) 1 SCC 40.

B. Interpretation of section 415, 420- Cheating under IPC

Cheating, fraud, forgery etc is an instrument of various socio economic crimes. One of the difficulties in these cases is the fact that fraud is both civil and criminal wrong. Similarly a breach of contract and an intentional breach under penal law form a fine but decisive line. It is significant for the police, government advocates and to the judges that they are aware of how to identify this "distinction with difference".

Vijay Kumar Ghai v. *State of West Bengal*[23] and *M.N.G Bharateesh Reddy* v. *Ramesh Ranganathan*,[24]provides some light on the issue.

Vijay Kumar Ghai: Forum Shopping, second FIR

Vijay Kumar Ghai v. *State of West Bengal*[25] has the occasion to dilate on forum shopping, second FIR on one case.

C1 and C2 are two companies. In 2008 they reached an agreement that C2 will invest in C1 Rs 2.5 crore. In consideration C1 made two promises to C2. (i) C1 will sell its shares worth 2.5 crores to C2. (ii) C1 will bring an IPO. It was alleged that (i) the shares were allotted late though on record C2 conveyed that the shares were allotted. (ii) the IPO was not issued. A notice was given by C1 to C2 in 2011 which was replied.

In 2012 Respondent C2 filed a police complaint and then an application under Section 156(3) of Cr.P.C in New Delhi for registration of FIR against the C1 ie Appellants and their company. Another complaint was filed under Companies Act read with Section 200 of Cr.P.C. The Metropolitan Magistrate in 2013 observed that the entire dispute raised by C2 was civil in nature and there was no criminality involved. Therefore, the prayer of Respondent No. 2 for registration of an FIR was declined and this attained finality as it was not put to further challenge. In 2013, C2, Respondent No. 2 filed a second complaint under Section 406, 409, 420, 468,120B and 34 IPC on the basis of the same cause of action at Kolkata, West Bengal. [Earlier an FIR was registered in Kolkata]. The same was converted into an FIR under section 406, 420, 120B IPC. A final closure report in 2014 was filed by the Police recommending closure of the case since the entire dispute was found to be civil in nature. A protest petition was filed and the competent court [CJM] Kolkata allowed the protest petition and directed for further investigation in 2016. In the meantime, C2 applied for withdrawing the complaint case under Companies Act in New Delhi. In 2017, the CMM, Calcutta took cognizance of the offence under section 406, 420, 120B IPC. C2, Appellants filed petition in Kolkata high court to quash [under section 482 Cr.P.C] FIR and cognizance. The High Court in 2019 refused to quash the petition. It observed "that in order to exercise the power under section 482Cr.P.C, the only requirement is to see whether continuance of the criminal proceedings would be a total abuse of the process of the court and the

23 2022] 1 S.C.R. 884.

24 2022 SCC Online SC 1061.

25 [2022] 1 S.C.R. 884.

continuance of the criminal proceedings against the appellants is in no way an abuse of the process of the court. The operative portion of the high court judgment reads as under:

> In the present case, the allegation in the FIR disclosed the offences alleged. Moreover, the allegations made in the FIR disclosed that the petitioner induced the complainant to purchase share or invest money by willful misrepresentation. It is true that the complaint discloses that there was a commercial transaction between the parties but at the same time, it cannot be overlooked that the averments made in the complaint/FIR prima facie reveal the commission of a cognizable offence. Moreover, when the complaint discloses that the commercial transaction involve criminal offences, then the question of quashing the complaint cannot be allowed.

When the high court refused to quash the criminal proceeding the matter came to the Supreme Court.

Issue of forum shopping

The Supreme Court first dealt with the issue of forum shopping and reiterated the condemnation of such disreputable practices.[26] The Supreme Court has taken support from the Merriam Webster dictionary to find a definition of forum shopping as under:

The practice of choosing the court in which to bring an action from among those courts that could properly exercise jurisdiction based on determination of which court is likely to provide the most favourable outcome.

The Supreme Court in *Vijay Kumar Ghai* has identified three categories of forum shopping. "A classic example of forum shopping is when a litigant approaches one Court for relief but does not get the desired relief and then approaches another Court for the same relief."[27] Second category is when sometimes litigants and their lawyers create jurisdiction artificially.[28] Third category contains cases where multiple jurisdiction is lawfully provided, like, choice of appeal in Customs, Excise and Service Tax Appellate Tribunal (the CESTAT).[29] As facts are essential it is presented in brief as under:

Respondent No. 2 filed two complaints i.e., a complaint u/s 156(3)Cr.P.C before the Tis Hazari Court, New Delhi on 06.06.2012 and a complaint which was eventually registered as FIR No. 168 u/s 406, 420, 120B IPC before PS Bowbazar, Calcutta on 28.03.2013. ie., one in Delhi and one complaint in Kolkata. The Complaint filed in Kolkata was a reproduction of the complaint filed in Delhi except with the change of place occurrence in order to create a jurisdiction.

26 *Union of India* v. *Cipla Ltd.* (2017) 5 SCC 262.

27 *Rajiv Bhatia* v. *Govt. of NCT of Delhi*, (1999) 8 SCC 525.

28 *Arathi Bandi* v. *Bandi Jagadrakshaka Rao*(2013) 15 SCC 790; *World Tanker Carrier Corporation* v. *SNP Shipping Services Pvt. Ltd,* (1998) 5 SCC 310.

29 Ambica Industries v. Commissioner of Central Excise (2007) 6 SCC 769.

In this case of *Vijay Kumar Ghai* [C1], C2 filed two identical complaints of cheating and fraud in Delhi and Kolkata. This is generally impermissible because the accused will be required to "keep surrendering his liberty and precious time" with the Police and the court at two different places.[30]

Two FIRs/complaints in the same case: Legal position

Can there be two FIRs in the same case on the same facts by the same party? The issue of a second FIR was an essential outcome in the case of *Vijay Kumar Ghai*. The court noticed the leading precedent of *T.T. Antony* Vs. *State of Kerala*[31]which elaborately discussed the legality of the second FIR. It was held that

a. there can be no second FIR if the information concerns the same cognisable offence alleged in the first FIR or the same occurrence or incident which gives rise to one or more cognizable offences.

b. once an FIR has been recorded, any information received after the commencement of investigation cannot form the basis of a second FIR as doing so would fail to comport with the scheme of the Cr.P.C.

c. barring situations in which a counter- case is filed, a fresh investigation or a second FIR on the basis of the same or connected cognizable offence would constitute an "abuse of the statutory power of investigation"

d. second FIR may be a fit case for the exercise of power either under Section 482 of Cr.P.C or articles 226/227 of the Constitution of India.

The law laid down in *T.T. Antony* was misunderstood. A few trial courts and high courts thought that *T.T. Antony* has ordered a complete bar on the second FIR even if it is a cross FIR. Therefore *T.T. Antony,* which was a division bench ruling, was considered by a full bench in the case of *Upkar Singh* v. *Ved Prakash*[32] which upheld *T.T. Antony* because it has indeed permitted a cross FIR. Cross FIR means FIR registered by the opposite party which gives a different version of the fact. *Upkar Singh* also provides an illustration if second FIR is absolutely prohibited it will create an anomalous and unfair situation which is as under:

> Be that as it may, if the law laid down by this Court in T.T. Antony's case is to be accepted as holding a second complaint in regard to the same incident filed as a counter complaint is prohibited under the Code then, in our opinion, such conclusion would lead to serious consequences. This will be clear from the hypothetical example given herein below i.e. if in regard to a crime committed by the real accused he takes the first opportunity to lodge a false complaint and the same is registered by the jurisdictional police then the aggrieved victim of such crime will be precluded from lodging a complaint giving his version of the incident in question consequently he will

30 *Krishna Lal Chawla* v. *State of U.P.* (2021) 5 SCC 435.

31 (2001) 6 SCC 181.

32 AIR 2004 SC 4320.

> be deprived of his legitimated right to bring the real accused to books. This cannot be the purport of the Code.

For second complaint *Ram Lal Narang* v. *State (Delhi Administration)*[33] held :

> Even in regard to a complaint arising out of a complaint on further investigation if it was found that there was a large conspiracy than the one referred to in the previous complaint then a further investigation under the court culminating in *another complaint is permissible*. [emphasis added]

Kari Choudhary v. *Mst. Sita Devi*[34] also notes that:

> Of course the legal position is that there cannot be two FIRs against the same accused in respect of the same case. But when there are rival versions in respect of the same episode, they would normally take the shape of two different FIRs and investigation can be carried on under both of them by the same investigating agency.

Second FIR/ complaint- not absolute bar

In other words*Vijay Kumar Ghai* reaffirmed *TT Anthony, Upkar Singh* that second FIR is not permissible generally but it is not absolutely barred. Cross FIR, second complaint is permissible by the opposite party. Indeed the same party can register another FIR if the material facts disclose different offences also. For example F1 registered a case against A1 that a minor girl [16 year] is kidnapped from Ghaziabad, UP. During investigation it was revealed that the girl was also raped in Delhi. Can F1 register a fresh case against A1. Answer is yes. The registration of a fresh case cannot be denied just because a kidnapping case is registered against A1 in the same incident.

Such misunderstandings like *T.T. Antony* can be addressed if the judges of the Supreme Court and the High Court do write their conclusion under a separate head as a matter of practice. This is being done by various Supreme Court judges like CJ Dr DY Chandrachud. If the judgement or order contains the conclusion part which should include the general law laid down as well as the operative part for that specific case, the "playing with the words" by some litigants will be reduced.

Coming back to the *Vijay Kumar Ghai case,* the court referred to another precedent of *K. Jayaram* v. *Bangalore Development Authority*,[35] which mandates that the contesting parties are bound to disclose "the details of *all legal proceedings and litigations* either past or present concerning any part of the subject-matter of dispute"...if "no legal proceedings or court litigations was or is pending, they have to mandatorily state so in their pleadings." This will help the court know if there is any other similar proceeding going on. This will also check the tendency of multiple proceedings in different courts. In K. Jayaram case also

33 1979 (2) SCC 322.
34 2002 (1) SCC 714.
35 2021 SCC OnLine SC 1194.

the court did not mention the "conclusion". Therefore, this part remained inoperative or unknown to the lawyers. *Vijay k Ghai case* refers to *K Jayaram* to convey the value of disclosure of different past proceedings.

Quashing FIR : Application of legal principle

Vijay k Ghai case reminds the grounds on which a legal proceeding like FIR or complaint can be quashed for which *State of Haryana* v. *Bhajan Lal*[36] is the most cited precedent. Based on this precedent the court also referred *Vesa Holdings Pvt. Ltd.* v. *State of Kerala*[37] where it was found that the facts disclose only civil disputes like breach of contract and not a criminal dispute. There was nothing to show *mens rea* [an intention to deceive] from the beginning. Allowing FIR would have led to police investigation which would have been a futile exercise. The FIR or complaint was quashed because of malafide or abuse of process of law.

In the *Vijay k Ghai*case the agreement kicked off in 2008 leading to MoU between parties in 2009. The complaint did not disclose any intention to commit cheating when the agreement was entered into. Nor was there any allegation that certain facts were knowingly concealed to take advantage or with intention to cause injury. There might be a failure in keeping the promise. It is a civil dispute. Civil dispute cannot be given the colour of criminal dispute to exert pressure on other party. The Supreme Court also concluded that two complaints "clearly indicate the malafide intention of Respondent No. 2 which was to simply harass the petitioners so as to pressurise them into shelling out the investment made by Respondent No. 2." *Malafide intention* was demonstrated by the fact that

a. Two complaints were filed

b. The previous complaint was not disclosed in the later complaint

c. They themselves admit that Delhi is the jurisdiction and registered a complaint. Then they filed a case in Kolkata.

d. There is no mention of wrongful loss or wrongful gain

e. Complaint is filed in 2013 while agreement matured in 2009

The Supreme Court in *Vijay k Ghai* ultimately found that the case is fit for quashing because

a. The intention to file two cases at two different jurisdiction for the same offences was to harass the party and it is malafide,

b. The ingredients do not match *prima facie* the elements of criminal law of cheating.

Reform in laws

The abuse of process by concealing facts of a previous pending case on the same issue was identified and condemned by the court. The parties are desperate to recover their dues. They begin criminal proceedings deliberately to place pressure

36 1992 Supp (1) SCC 335.

37 (2015) 8 SCC 293.

on another party for an early solution. This multiplicity of suits can be addressed by

a. Fast forwarding civil process so that the party who has transferred money is not encouraged to take penal remedies by changing the colour of facts from civil to criminal dispute. Three adjournment rules need to be honoured seriously.

b. Those who deliberately abuse the process of law like *Vijay Kumar Ghai* case need to pay the price for such abuse. Abuse of process works like an incentive to them because it places pressure on other party. The Supreme Court should begin imposing huge costs like 10 lakh for deliberately hiding the facts of earlier complaints and forum shopping. This fear of heavy cost on deliberately or intentionally hiding facts of previous litigation will also alert the lawyers.

c. The court can also issue a contempt notice.

d. It was a case of tortious liability also for which the court should have awarded some compensation. This would have checked the abuse of process. It is correct that the option of civil action and compensation is a separate judicial process. It begins from District court, goes to high court and again to the Supreme Court. Only a rarest of the rare aggrieved is going to take this pain to get his rights back. If the court begins giving litigation costs, it will be some compensation to the harassment caused to the litigant. It will also be a check on the other party who abuses the process. In the long run the burden on judiciary is reduced and rationalised.

***M.N.G Bharateesh Reddy* v. *Ramesh Ranganathan*[38]**

A doctor was employed by a hospital on a guaranteed monthly fee of Rs 4,25000. The terms of the contract stated that either party may terminate the agreement, with or without cause, by giving a prior notice of thirty days. In 2014 some disputes erupted between the Doctor and the Hospital. Doctor alleged that the patients who come to the hospital for him are diverted to other doctors. So he is not getting his patients and his fees. The Doctor also alleged that the staff was overbilling, misbehaving with him. The administration allegedly maligned and threatened him etc. The service of the doctor was terminated. The doctor filed a complaint under section 200 of CrPC and the Judicial Magistrate First Class (JMFC) took cognizance in 2015 under Sections 120A, 405, 415, 420, 499, and 500 of IPC. Section 405 is criminal breach of trust. Section 415, 420 is cheating. Section 499, 500 is defamation. Section 120B is conspiracy [for above offences]. The issue was whether the cognizance by court was validly taken. A cognizance is not valid if

a. the court has no jurisdiction b. The allegations do not disclose elements required for the offence.

38 2022 SCC Online SC 1061, hereinafter referred as *M.N.G Bharateesh Reddy*.

The cognizance order of JMFC was challenged in revision under section 397 of CrPC 1973 before Additional Sessions Judge (ASJ). After 9 months of JMFC order ASJ set aside the order of JMFC on the reasoning that the complaint did not disclose the ingredients of the offences of defamation (section 499,500) or cheating (section 415,420). Moreover, the Additional Sessions Judge held that the JMFC was not competent to take cognizance of the offence punishable under section 420 of the IPC. What happened to section 405 — Criminal breach of trust is not clear.

After four years in 2019 the high court (Single Judge) held that no case of sections 499 and 500 was made out. However, there are *prima facie* disclosure of ingredients of offences under sections 405 and 420 of the IPC. On appeal the Supreme Court issued notice in 2019 and after three years the case was decided in 2022.

The division bench of the Supreme Court in *M.N.G Bharateesh Reddy* framed the issue as under :

> whether the ingredients of the offences of cheating and criminal breach of trust have been made out on the face of the complaint. Following the well settled principle of law, the contents of the complaint would have to be read in order to deduce as to whether the ingredients of the offence have been duly established.

As it was essential to go into the ingredients of section 415 and 420 the Court analysed the provision as under:

> 14. The ingredients of the offence under Section 415 emerge from a textual reading.[39]
>
> Firstly, to constitute cheating, a person must deceive another.
>
> Secondly, by doing so the former must induce the person so deceived to
>
> (i) deliver any property to any person; or
>
> (ii) to consent that any person shall retain any property; or
>
> (iii) intentionally induce the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived and such an act or omission must cause or be likely to cause damage or harm to that person in body, mind, reputation or property.

Therefore deceiving is an essential element which essentially needs an intention to cheat under criminal law. DY Chandrachud, J observed as under :

39 415. Cheating — Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation — A dishonest concealment of facts is a deception within the meaning of this section."

> 15. In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed."

The proof of intention to deceive at the beginning is essential and at the stage of FIR or complaint some proof will serve the purpose.

The Supreme Court took support from *Dalip Kaur* v. *Jagnar Singh*.[40] In this case A1 promised to sell a land to V1 for Rs 22 lakh. V1 paid an advance amount of 7 lakh. Rest of the amount was to be paid in seven months. After a few months A1 sold the land to another person without informing V1. Is it a criminal breach of trust or cheating by A1? The test is whether A1 *desired* to commit fraud and cheating right from the very beginning? Is there any statement or conduct or circumstance to disclose such elements of intention? And this should be established by *prima facie* evidence in case of framing of charge. V1 states that there was an agreement to sell the land for which advance amount was paid. Later on the seller sold it to someone else. The seller might be getting a better deal. Such selling may be a civil breach of promise or may be against higher business ethics. But it cannot be penal. For civil wrong V1 can bring a case under civil law, breach of contract or compensation for tort.

The court referred to *Hridaya Ranjan Prasad Verma* v. *State of Bihar*,[41] to understand the ingredients of section 415 and 420 of IPC as under:

> 14. On a reading of the section it is manifest that in the definition there are set forth two separate classes of acts which the person

40 (2009) 14 SCC 696.

41 (2000) 4 SCC 168All that the respondent No. 2 has alleged against the appellants is that they did not disclose to him that one of their brothers had filed a partition suit which was pending. The requirement that the information was not disclosed by the appellants intentionally in order to make the respondent No. 2 part with property is not alleged expressly or even impliedly in the complaint. Therefore the core postulate of dishonest intention in order to deceive the complainant-respondent no.2 is not made out even accepting all the averments in the complaint on their face value. In such a situation continuing the criminal proceeding against the accused will be, in our considered view, an abuse of process of the court. The High Court was not right in declining to quash the complaint and the proceeding initiated on the basis of the same.

> deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest.

The court further quoted :

> 15. In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. *Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed.*" (emphasis supplied)

Application of Principle : Intention to cheat from the beginning

In the case of *M.N.G Bharateesh Reddy* the grievance is regarding termination of service of the doctor, improper billing. "At the most, the allegations allude to a breach of terms of the Consultancy Agreement by the Appellant, which is essentially in the nature of a civil dispute." The complaint does not disclose any deception or dishonest intention against him. Moreover, the complaint also does not state if the doctor was induced to deliver some property. Or the doctor gave his "consent that any person shall retain any property or that he was deceived to do or omit to do anything which he would have not done or omitted to do if he was not so deceived." Similarly there was no entrustment made by him to the hospital or employees. Therefore, it cannot be a criminal breach of trust. In other words no case *prima facie* can be made under section 415, 405 etc of IPC. The order of the high court was wrong and the order of the ADJ was correct. It can be safely inferred that the understanding of the district court on principles, provisions and precedents on cheating, criminal breach of trust was better than the high court. Are these things taken into account while deciding the *suitability* of a candidate from a district court to high court or from high court to Supreme court? If not, they should.

C. *Kanchan Kumar* v *State of Bihar*[42] : Meaning of roving inquiry in PCA cases

If a PCA case is registered against a public servant regarding a disproportionate asset case, one of the remedies is to challenge the calculation made by the authorities regarding the property. Disproportionate asset means A1 has earnings of Rs 100 in a period and asset in the same period is Rs 125/ and A1 fails to give satisfactory explanation of the extra Rs 25/. The accused can always argue that the income is undervalued and the asset is overvalued. Should the court go into this calculation at the time of framing into charge? Or is it a matter of trial because such calculation will amount to roving inquiry before trial begins? *Kanchan Kumar* case addresses this issue and holds that a *prima facie* calculation is not a fishing inquiry.

The Supreme Court appreciated the scope of inquiry under Section 227.[43] The court observed that "The threshold of scrutiny required to adjudicate an application under Section 227 of the Cr.P.C., is to consider the broad probabilities of the case and the total effect of the material on record, including examination of any infirmities appearing in the case."

The Supreme Court followed the law laid down in the case of *Union of India* v. *Prafulla Kumar Samal*, [44] and quoted the same as under:

"10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

> (1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the *undoubted power to sift and weigh the evidence for the limited purpose* of finding out whether or not a prima facie case against the accused has been made out.
>
> (2) Where the materials placed before the Court disclose *grave suspicion against the accused* which has not been properly explained the Court will be fully justified in *framing a charge* and proceeding with the trial.
>
> (3) The test to determine a *prima facie* case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before

42 (2022) 9 SCC 577.

43 CrPC "227. Discharge — If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

44 (1979) 3 SCC 4. This was also a case under PCA where discharge of a public servant was an issue. There was concurrent finding of trial court and the high court that there is not sufficient evidence to frame charges. The Supreme Court upheld the courts below and dischrged the accused.

> him while *giving rise to some suspicion but not grave suspicion* against the accused, he will be fully within his *right to discharge the accused*.
>
> (4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act *merely as a Post Office or a mouthpiece of the prosecution*, but has to *consider the broad probabilities of the case*, the *total effect of the evidence* and the *documents produced before the Court*, any *basic infirmities* appearing in the case and so on. This however does *not* mean that the Judge should *make a roving enquiry* into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

Application of principle of discharge

The Supreme Court presented three pointers which states that following are not roving inquiry but the courts are obliged to inquire before charge is framed:

A. Suppose the prosecution in its chargesheet shows a balance of Rs 55000/ in a bank of K1 on a particular date but the passbook of the same bank shows less than Rs 12000/. If the prosecution is not able to explain it at the stage of the charge sheet the prosecution cannot argue that this will be explained at the time of trial.

B. K1 took a loan of Rs 55000/ from a bank. The loan amount in the form of EMI was deducted from gross salary. It was considered an expenditure. "The amount repaid towards loan installments was already deducted from Appellant's gross salary, and the deducted figure was recorded as the total disposable income with the Appellant during the check period. Hence, the loan repayment cannot be separately counted as an expenditure yet again. This is a glaring mistake." Can it be treated as a separate expenditure again ? Is it demonstrated after roving inquiry or by applying common sense to the evidence available?

C. A search was conducted in the house of K1 in 2000 and articles worth Rs 1.6 lakh were found. The check period of disproportionate assets was 1974-1988. Prosecution was not able to suggest that the articles were purchased during the check period. The difference between 1988 and 2000 is 12 years which is too remote to connect the articles found. *Prima facie* the calculation has something seriously faulty. Such discrepancy cannot be permitted lightly. They do not "require much scrutiny of the material on record."

The Supreme Court concluded :

> What we have undertaken is not a roving inquiry, but a simple and necessary inquiry for a proper adjudication of an application for discharge. The Special Judge (Vigilance) was bound to conduct a similar inquiry for coming to a conclusion that a prima facie case is made out for the Appellant to stand trial. Unfortunately, the High

> Court committed the same mistake as that of the Special Judge (Vigilance).

The Supreme Court also expressed a sense of guilt in the investigatin and judicial process which is as under:

> 19. Apart from the above analysis, we would note with great distress that the allegation relating to Appellant's disproportionate income in the period between 1974 and 1988 was levelled in an FIR filed twelve years after the said period concluded. The charge-sheet came to be filed seven years after the registration of the FIR. The application for discharge came to be dismissed on 28.03.2016, almost after a decade of filing of the charge sheet. The dismissal was affirmed by the High Court seven months thereafter, i.e., on 05.10.2016. Finally, and most unfortunately, the present SLP has been pending before this Court for the last six years. In the meanwhile, the Appellant superannuated from service in 2010, but had no option except to contest the case. He is now 72 years. Continuation of the prosecution, apart from the illegality as indicated hereinabove, would also be unjust.

The Accused K1 was discharged.

Three comments

This author proposes three comments. On the judicial side, as there was inordinate delay in the criminal justice system including the judicial process K1 deserved some compensation for the tension and the trauma he faced for many decades. There were delays in this case which establish negligence if not intentional delay. On the executive side, in these cases an inquiry ought to be made about who were the negligent stakeholders. If such stakeholders are identified and some of them are taken into task for their negligence the system may begin improving. Secondly, such inquiry is also essential to ensure if someone in the system was interested to cause delay either to put pressure on the accused to extort money or to let the evidence be weak to help the accused. Thirdly, such inquiry will also bring clarity if negligence is the outcome of want of human and material resources. On the academic side, these cases should be in the course of the National Judicial Academy and in the training programme of officers dealing with PCA cases as well as prosecution officers so that the application part of section 227 of CrPC can be appreciated by learned judges at the level of district and high court.

D. Gifts to doctors as White collar crimes: the legitimate rackets[45]

Can the distribution of incentives or freebies to medical practitioners be treated as a conduct under white collar departure? Can it be termed as undue

45 Al Capone is credited to state that the "Capitalism is the legitimate racket of the ruling class." https://www.economist.com/schumpeter/2012/07/06/capitalism. The word "legitimate rackets" is also credited to Al Capone by Edwin H Sutherland in his work White Collar Criminality, *American Sociological Review*, 1-12,Vol. 5, No. 1 (Feb., 1940), *available at* http://www.jstor.org/stable/208393.

advantage given and taken and can it amount to an offfence under the PCA, 1988? These questions are indirectly found a passing reference by the government counsel in *Apex Laboratories Pvt. Ltd* v. *Deputy Commissioner of Income Tax, Large Tax Payer Unit - II.*[46] Though the Supreme Court did not go into this issue but in future such issues will need attention.

The main question was "can freebies given to medical practitioners or doctors be considered 'business expenditure' under Section 37(1) of the Income Tax Act, 1961 so that exemption can be claimed?"

The Medical Council Act, 1956 Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (hereinafter, "2002 Regulations"), published in the Official Gazette on 14.12.2009, disallowed medical practitioners from accepting emoluments in the form of inter alia gifts, travel facilities, hospitality, cash or monetary grants. Acceptance of such freebies could result in a range of sanctions against the medical practitioners, from 'censure' for incentives received up to 5,000/-, to removal from the Indian Medical Register or State Medical Register for periods ranging from three months to one year. A government circular of 2012 states as under:

"expenses incurred by pharmaceutical and allied health sector industries for distribution of incentives (i.e., "freebies") to medical practitioners are ineligible for the benefit of Explanation 1 to Section 37(1), which denies the application of the benefit for any purpose which is an 'offence' or 'prohibited by law'.

Apex company has spent about 4 crore 72 Lakh in "gifting freebies such as hospitality, conference fees, gold coins, LCD TVs, fridges, laptops, etc. to medical practitioners." These incentives were given "for creating awareness about the health supplement 'Zincovit'," . The IT department issued a notice why this 4.7crore is not added in income?

One argument of the pharmaceutical companies is worth mentioning. The prohibition of gifts is for medical practitioners and not for pharmaceutical companies. The argument was that incentive giver is not prohibited by law but only incentive taker is prohibited by law. So, taking is illegal but giving it is not illegal. The Court rightly rejected this argument and termed it as a narrow interpretation. The Supreme Court further observed :

23. The illogicality and completely misconceived nature of such an interpretation was dealt with in a similar interpretation of the provisions of PC Act, by a Constitution Bench of this Court in *P.V. Narasimha Rao* v. *State (CBI/SPE)*.[47] Prior to the 2018 amendment,[48] the PC Act only punished the bribe taker who was a public servant, and not the bribe-giver. Reliance was placed [by Apex] on this to acquit the appellant bribe-giver.

The Supreme Court reminded that in *P.V. Narasimha Rao* bribery case the the bribe givers and bribe takers were considered as same. The bribe takers have

46 (2022) 7 SCC 98.

47 (1998) 4 SCC 626.

48 s. Section 8, 2018.

immunity and so they cannot be prosecuted. But bribe givers could be prosecuted. "Those who have conspired with the Member of Parliament in the commission of that offence have no such immunity. They can, therefore, be prosecuted for it." The Supreme Court observed that "Pharmaceutical companies have misused a legislative gap to actively perpetuate the commission of an offence." It finally held that "that medical practitioners were forbidden from accepting such gifts, or "freebies" was no less a prohibition on the part of their giver, or donor, i.e., Apex."

There were news reports that Dolo spent around 1000 crore on gifts to doctors as promotional measures.[49] The report in the news was held to be misinterpreted. [50] Dolo admitted that like many companies the promotional measures are taken which is lawful but it is not in 1000 crores.

As the level of health awareness is increasing, the welfare measures by the government on health are taking center stage, health insurance is becoming popular and pollution and food habits are aggravating health issues. The market for the health sector is more attractive and rewarding than ever. The nexus between the doctors and the pharmaceutical companies are likely to multiply. It is high time pharmaceutical companies should be encouraged to spend more on research with the help of doctors. The empirical studies by doctors based on daily interaction with patients may be published and rewarded by the pharmaceutical companies. The pharmaceutical companies will get real time information for changing needs of medicines and the medical doctors can earn a few more money for conducting and sharing empirical studies with patients. This is also high time that the government circular should be issued again to include the order of the Court in this case ie*M/s Apex Laboratories Pvt. Ltd* v. *Deputy Commissioner of Income Tax, Large Tax Payer Unit - II.*[51] Suitable civil and penal law is required to address the issue. A PIL has been filed by the Federation of Medical and Sales Representatives Association of India (FMRAI) in the Supreme Court in March, 2024. It highlights that Pharma Companies have spent thousands of crores of rupees on freebies to doctors so that certain medicines are preferred even if they are over priced or not essential.[52]

49 Links of articles: https://www.indiatoday.in/law/supreme-court/story/dolo-makers-freebies-crores-doctors-prescribing-tabletsupreme-court-pil-1989551-2022-08-18 https://www.livelaw.in/amp/top-stories/dolo-650-pharma-companies-freebies-to-doctors-supreme-court-206870 https://indianexpress.com/article/india/supreme-court-dolo-tablets-freebies-doctors-8098830/ https://www.indiatoday.in/law/supreme-court/story/dolo-makers-freebies-crores-doctors-prescribing-tabletsupreme-court-pil-1989551-2022-08-18 https://www.businessworld.in/article/Manufacturers-Of-Dolo-650-Tablet-Spent-1000-Cr-On-Freebies-To-DoctorsFor-Prescribing-The-Drug-SC-Told/19-08-2022-442860/ https://economictimes.indiatimes.com/news/india/dolo-650-makers-spent-rs-1000-cr-on-docs-for-prescribingdrug-sc-asks-centre-to-file-a-reply/articleshow/93642719.cms?from=mdr

50 *Available at:* https://www.ipa-india.org/wp-content/uploads/2022/11/decision-ipa-internal-committee.pdf

51 (2022) 7 SCC 98.

52 *Available at:*https://www.expresspharma.in/will-fmrais-pil-finally-prod-govt-to-make-ucpmp-mandatory-editors-blog/.

The PIL seeks a mandamus to the government to bring rules, regulations to address such practices.

Edwin H Sutherland has termed such conduct as white collar crimes as it contains all elements[53] *viz.* Doctors as well as the policy makers of Pharma companies are highly *respectable* members. There is trust of common persons on both. Both abuse their *official position* in a *quid pro quo* manner. And both do it for *monetary* gains. Certain reports highlight the gravity of the situation as very serious that the Medical Council has proposed legislation.[54] The Prevention of Cut Practices in Healthcare Services Bill, 2017 was proposed but the government of Maharashtra did not do anything. This is high time such conduct be expressly treated as a corrupt practice under the PCA, 1988. However, such criminalisation of conduct will face certain challenges. First, can the gift given by pharma companies to doctors be treated as "undue advantage" under section 2(d) of PCA, 1988?[55] While accepting or obtaining such a gift is prohibited under MCI Regulations for which there are administrative sanctions, they are not penal in any criminal statute.[56] If a doctor charges fees for his professional service it is not an undue advantage. In the case of *Kanwarjit Singh Kakkar* v. *State of Punjab*[57] it was held that even if a doctor who is a government servant [and therefore a public servant] does private practice at home and takes fees, this is not an undue advantage because he is not doing this practice while 'on duty' and the fee is his in lieu of his professional service lawfully due to him.[58] In case a doctor prescribes "unnecessary surgery for the purpose of extracting money by way of professional fee … the same obviously

53 Edwin H Sutherland in his work White Collar Criminality, *American Sociological Review*, 1-12,Vol. 5, No. 1 (Feb., 1940), *available at* http://www.jstor.org/stable/208393.

54 Priyanka Vora, Patients pay a heavy price as India's doctors continue with the corrupt 'cut practice', https://scroll.in/pulse/842492/patients-pay-a-heavy-price-as-indias-doctors-continue-with-the-corrupt-cut-practice, TNN, 6 years on, bill against 'cut practice' in medical sector back in spotlight https://timesofindia.indiatimes.com/city/mumbai/6-years-on-bill-against-cut-practice-in-medical-sector-back-in-spotlight/articleshow/99350484.cms

55 PCA, 1988 : 2(d) "undue advantage" means any gratification whatever, other than legal remuneration. Explanation.—For the purposes of this clause,—

(a) the word "gratification" is not limited to pecuniary gratifications or to gratifications estimable in money; (b) the expression "legal remuneration" is not restricted to remuneration paid to a public servant, but includes all remuneration which he is permitted by the Government or the organisation, which he serves, to receive.]

Explanation 1.—Persons falling under any of the above sub-clauses are public servants, whether appointed by the Government or not.

Explanation 2.—Wherever the words "public servant" occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation.

56 MCI Regulation 6.8. of the 2002. See also, National Medical Commission Registered Medical Practitioner (Professional Conduct) Regulations, 2023- clause 35.

57 (2011) 13 SCC 158.

58 "It would be preposterous in our view to hold that if a doctor charges fee for extending medical help and is doing that by way of his professional duty, the same would amount to illegal gratification as that would be even against the plain common sense."

would be a clear case to be registered under the IPC as also under the Prevention of Corruption Act". If a Doctor prescribes a drug of a particular company, can it be criminalised? The proximate causal relation between conduct and consequence needs to be worked out. In case it is criminalised [giving and taking of gift] under PCA, 1988 it should be made punishable. In the USA Anti-Kickback Statute [42 U.S.C. § 1320a-7b(b)] and Physician Self-Referral Law [42 U.S.C. § 1395nn] makes such conduct criminal.[59] The Maharashtra Bill needs serious consideration by Maharashtra and the Government of India.

III PREVENTION OF MONEY LAUNDERING ACT, 2002

In thecase of *Vijay Madanlal Choudhary* v. *Union of India*[60] the constitution bench rightly observed as under:

> Money-laundering is one of the heinous crimes, which not only affects the social and economic fabric of the nation, but also tends to promote other heinous offences, such as terrorism, offences related to NDPS Act, etc. It is a proven fact that international criminal network that support home grown extremist groups relies on transfer of unaccounted money across nation States

One of the leading developments in the last survey of 2018 in the area of socio-economic crime was *Nikesh Tarachand Shah* v. *Union of India*.[61] It involved the question constitutional validity of section 45 (1) of PMLA which contained the twin conditions for bail. A Division Bench led by RS Nariman, J. in a very comprehensive and illustrative pronouncement has declared section 45(1) of the PMLA, 2002 as violative of article 14 and 21. The Parliament rectified the defect and amended PMLA. Twin conditions were restored taking lessons from the Supreme Court. The amendment was challenged in the Supreme Court. With this constitutional validity of various other provisions of the PMLA was also challenged and decided in the case of *Vijay Madanlal Choudhary* v. *Union of India*.[62] Various provisions under the Customs Act, 19624, the Central Goods and Services Tax Act, 2017, the Companies Act, 2013, the Prevention of Corruption Act, 1988, the Indian Penal Code, 1860 and the Code of Criminal Procedure, 1973 were also under challenge. However, the Supreme Court confined itself only with challenges to the provisions of PMLA.

What is the meaning and scope of the words "investigation includes all the proceedings " under section 2(na). Does it mean a proceeding before court only or can it be before any authority like investigation authority, director even if there is no court order? The power to summon, attachment of property etc can be and is exercised by executive authorities under PMLA. If "proceeding" is given a narrow

59 https://oig.hhs.gov/compliance/physician-education/fraud-abuse-laws/.

60 [2022] 6 S.C.R. 382: (2022) SCC Online 929.

61 (2018) 11 SCC 1. It was decided on Nov 23, 2017 by a Division Bench of RF Nariman and SK Kaul, JJ. Nariman, J. delivered the verdict, *hereinafter* referred as *Nikesh Tarachand Shah*.

62 [2022] 6 S.C.R. 382: (2022) SCC Online 929.

meaning then such power shall be only exercised by a court. The expression "proceedings", therefore, need not be given a narrow meaning only to limit it to proceedings before the Court or before the Adjudicating Authority as is contended but must be understood contextually. Statement recorded by the Director in the course of inquiry, to be deemed to be judicial proceedings in terms of Section 50(4) of the 2002 Act.

Is the word "investigation" used under section 2(na), PMLA similar to Section 2(h) of the 1973 Code? After investigation the evidence collected can be "utilised to bolster the allegation in the complaint to be filed against the person from whom the property has been recovered, being the proceeds of crime". This is the same as the Police does in case of investigation where they collect evidence to support their chargesheet. If so, then the officers can only investigate an offence and cannot have civil powers like provisional attachment of property. The Court held that section 2(na) " does not limit itself to matter of investigation concerning the offence under the Act and Section 3 in particular." Further, the expression "investigation" used in the 2002 Act is interchangeable with the function of "inquiry" to be undertaken by the Authorities under the Act. The reasoning for expensive interpretation is the fact and the law that "the provisions of the 2002 Act is of prevention of money- laundering, attachment of proceeds of crime, adjudication and confiscation thereof, including vesting of it in the Central Government and also setting up of agency and mechanism for coordinating measures for combating money-laundering." Under CrPC many of these powers like attachment are not granted to executive authorities but to trial courts only. In case of PMLA it is expressly given to administrative authorities. The extent of PMLA is much wider than CrPC. Therefore, a wider interpretation is required.

Property of crime and proceeds of crime

Vijay Madanlal Choudhary makes a difference between the property of crime and proceeds of crime. A property used in a crime [like use of a red colour car for robbery][63] is a property of crime but not the proceeds of crime because this car is not the product of crime. This blue car will also be attached because this car was used in the crime. According to section 2(1)(u) the property must be "derived or obtained by any person as a result of criminal activity." This car was a means of crime. If robbers take the car of the victim which is blue colour, now this blue car of the victim is the proceeds of crime. Proceed of crime is the consequence element of a crime.

Another illustration worth noticing here is as under:

> Similarly, possession of unaccounted property acquired by legal means may be actionable for tax violation and yet, will not be regarded as proceeds of crime unless the concerned tax legislation prescribes such violation as an offence and such offence is included in the Schedule of the 2002 Act.

63 Offences relating to robbery and dacoity section 392-402 is scheduled offence.

Proceeds of crime

Proceeds of Crime is described under section 2(1)(u). It was amended in 2019 and an explanation was added.[64] It was argued that explanation goes beyond the main provisions. The Court held as under:

> The fact that it also includes any property which may, directly or indirectly, be derived as a result of any criminal activity relatable to scheduled offence does not transcend beyond the original provision. In that, the word "relating to" (associated with/has to do with) used in the main provision is a present participle of word "relate" and the word "relatable" is only an adjective. The thrust of the original provision itself is to indicate that any property is derived or obtained, directly or indirectly, as a result of criminal activity concerning the scheduled offence, the same be regarded as proceeds of crime…. It must follow that the Explanation inserted in 2019 is merely clarificatory and restatement of the position emerging from the principal provision

Arrest under PMLA

Section 19 empowers authorities to arrest if

a. Certain materials in the possession of PMLA authorities ie ED
b. Materials provide reason to believe
c. That any person[A1] is *guilty* of offence under PMLA
d. Reason to be recorded [if not recorded, punishment under section 62]
e. Can arrest A1
f. Inform ground or arrest as soon as may be
g. Immediately pass to Adjudicating Authority a copy of
   i. the arrest order
   ii. material in his possession,
h. Present within 24 human rights before judicial officer [special PMLA court]

Section 104 of the Customs Act, 1962 also has similar power of arrest and a constitution bench in the case of *Romesh Chandra Mehta* v. *State of West Bengal*,[65] has upheld this power of arrest as under:

> Thus, the power must be exercised on objective facts of commission of an offence enumerated and the Customs Officer has reason to believe that a person sought to be arrested has been guilty of commission of such offence. The power to arrest thus is circumscribed by objective considerations and cannot be exercised on whims, caprice or fancy of the officer.

64 *"Explanation.—For the removal of doubts, it is hereby clarified that "proceeds of crime" including property not only derived or obtained from the scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence". (emphasis supplied)*

65 AIR 1970 SC 940. It was a constitution bench decision.

Based on the above precedential reference, *Vijay Madanlal Choudhary* held as under:

> 325. The safeguards provided in the 2002 Act and the preconditions to be fulfilled by the authorised officer before effecting arrest, as contained in Section 19 of the 2002 Act, are equally stringent and of higher standard. Those safeguards ensure that the authorised officers do not act arbitrarily, but make them accountable for their judgment about the necessity to arrest any person as being involved in the commission of offence of money-laundering even before filing of the complaint before the Special Court under Section 44(1)(b) of the 2002 Act in that regard. If the action of the authorised officer is found to be vexatious, he can be proceeded with and inflicted with punishment specified under Section 62[66] of the 2002 Act…….

Section 19 was declared constitutional. This surveyor feels that the Court has found it valid because it satisfies both the test of article 14. One, the reasonable classification test. It has a reasonable nexus with the Act and the objective to be achieved. Two, the test of arbitrariness. The Act has sufficient safeguards. It is also not against article 21 because on the substantive and procedural count, section 19 is valid.

Validity of ECIR

One of the controversial issues is "whether it is necessary to furnish copy of ECIR to the person apprehending arrest or at least after his arrest?" The Court in *Vijay Madanlal Choudhary* held that the copy of ECIR cannot be a matter of right because

a. Grounds of arrest has to be given as soon as may be. In anycase there is a constitutional as well as statutory requirement of 24hour rule, information on grounds of arrest cannot be delayed further. "This stipulation is compliant with the mandate of Article 22(1) of the Constitution".

b. However, ECIR can not be equated with FIR because

   i. PMLA is a special enactment to deal with socio economic crimes and white collar crimes. Unlike other conventional crimes money laundering is *unique* in nature which deserves different treatment.

   ii. PMLA contains the power of civil action like attachment of property. ECIR may contain details of property, persons, source of information [*khabri*], reasons to believe in minute details, property and persons under

66 PMLA, CHAPTER X MISCELLANEOUS

62. Punishment for vexatious search.—Any authority or officer exercising powers under this Act or any rules made thereunder, who, without reasons recorded in writing,—

(a) searches or causes to be searched any building or place; or

(b) detains or searches or *arrests* any person,

shall for every such offence be liable on conviction for imprisonment for a term which may extend to two years or fine which may extend to fifty thousand rupees or both.

surveillance, telephone numbers, E-mails, chats, future course of suggestion like possible raids etc. It may also contain bank details of third parties. Security of *khabri* and witnesses, privacy and secrecy of investigation, if revealed, can be compromised. It will have "deleterious impact on the final outcome of the inquiry/investigation."

c. The court where the accused will be produced within 24 hours is empowered and free to see any documents for its satisfaction.[67]

d. Once a complaint is filed by the Authority under section 44(1)(b) of the 2002 Act before the Special Court before the statutory period provided in 1973, the accused will be entitled to all documents as per law.

e. Even FIR sometime do not reveal various informations, other particulars. Many times the accused is not named in FIR. However, the accused who is apprehending arrest or is arrested applies for bail even if it has no credible records with him to defend his case. The courts look into the police records, privileged information [case diary] and decide on bail matters. Similarly, non supply of ECIR does not prejudice the rights and due process.

f. ED can decide itself whom and when to give a copy of ECIR, which part to conceal and which information to reveal. *Vijay Madanlal Choudhary* feels that this is subjective satisfaction of ED. This author also agrees with the reasoning.

The search and seazure, attachment procedure have sufficient safeguragds. The Court resorted to the Constitution Bench precedent *Pooran Mal* v. *Director of Inspection (Investigation), New Delhi,*[68] which had dealt with similar power entrusted to the Director of Inspection or the Commissioner under the Income-tax Act, 1961.[69]

Whether projection as untainted property essential: Explanation to section 3

Section 3 is in two parts ie main body and its explanation. Main body prescribes that "...activity connected with the [proceeds of crime including its concealment, possession, acquisition or use ***and*** projecting or claiming] it as untainted property shall be guilty of offence of money-laundering". Use of "and" shows projection of property as white money is an essential element besides

67 24hour courts are the second protector of human rights. [first is the executive like the Police or ED]. These courts where an accused is presented within 24 hours do not give sufficient time, exercise their power [subject to distinguished exceptions] to ensure unfair play is ruled out as far as possible. The reason is these courts, like all courts, are overburdened and under pressure of declining liberty or bail. It is an unwritten rule that let the higher courts like sessions court or high court decide on liberty. While the Supreme Court has sent various directions to ensure minimum restrictions on personal liberty [bail is the rule and jail is the exception] the administrative judges of the high courts have key to revolutionise the change. The administrative judges of the high courts ought to encourage the sessions court and the subordinate magistrates to decide without any pressure as per established jurisprudence.

68 (1974) 1 SCC 345.

69 Income-Tax Officer, Special Investigation Circle-B, Meerut.

having tainted money. The explanation makes express changes and states any "...(a) concealment; or (b) possession; or (c) acquisition; or (d) use; or (e) projecting as untainted property; ***or*** (f) claiming as untainted property, in any manner whatsoever..". In other words even if the money is not claimed as untainted mere having tainted money will attract the offence of money laundering. It was argued that the two parts of section 3 are inconsistent. The scope of the main offence is unreasonably extended by explanation. It will be further harassment of accused and therefore it is violative of article 14 and 21. The Supreme Court disagreed with this argument as under:

> 40. The Explanation as inserted in 2019, therefore, does not entail in expanding the purport of Section 3 as it stood prior to 2019, but is only clarificatory in nature. Inasmuch as Section 3 is widely worded with a view to not only investigate the offence of money-laundering but also to prevent and regulate that offence. This provision plainly indicates that any (every) process or activity connected with the proceeds of crime results in offence of money-laundering. Projecting or claiming the proceeds of crime as untainted property, in itself, is an attempt to indulge in or being involved in money-laundering, just as knowingly concealing, possessing, acquiring or using of proceeds of crime, directly or indirectly.

In other words section 3 comes into picture even if the tainted money is not attempted or integrated in the regular financial system. The money laundering offence is wider that mere changing black into white money. The reasons are (a)the international law (FATF- Financial Action Task Force) Vienna and Palermo Conventions, requires it to which India is a signatory (b) the section 3 uses the word "includes" (c) the enactment is preventive in nature also (d) it covers any activity[b,c,d are prior to section 2019] (e) the parliamentary speech of finance ministers of successive governments reveal the intention of parliament that the explanation added in 2019 is mere clarificatory in nature. (f) The Government of India suggested in FATF meeting that "and" in the principle offence can and has to be interpreted as "Or" so that the objective is not frustrated. It referred the constitution bench case of *Sanjay Dutta*[70] where "and" has been interpreted as "or". "If the argument of the petitioners is to be accepted, that projecting or claiming the property as untainted property is the quintessential ingredient of the offence of money-laundering, that would whittle down the sweep of Section 3." …"If the interpretation set forth by the petitioners was to be accepted, it would

70 *Sanjay Dutt* v. *State through C.B.I., Bombay* (1994) 6 SCC 86. "arms and ammunition" should not be read conjunctively. The Court noted that if it is to be read conjunctively because of word "and", the object of prohibiting unauthorised possession of the forbidden arms and ammunition would be easily frustrated by the simple device of one person carrying the forbidden arms and his accomplice carrying its ammunition so that neither is covered under Section 5 when any one of them carrying more would be so liable. The principle underlying this analysis by the Constitution Bench must apply *proprio vigore* to the interpretation of Section 3 of the 2002 Act.

follow that it is only upon projecting or claiming the property in question as untainted property, the offence would be complete. This would undermine the efficacy of the legislative intent behind Section 3 of the Act and also will be in disregard of the view expressed by the FATF in connection with the occurrence of the word "and" preceding the expression "projecting or claiming" therein." *Sanjay Dutta* argument is used by the Court as under:

> If that interpretation is accepted, the effectiveness of Section 3 of the 2002 Act can be easily frustrated by the simple device of one person possessing proceeds of crime and his accomplice would indulge in projecting or claiming it to be untainted property so that neither is covered under Section 3 of the 2002 Act.

It is doubtful if the *Sanjay Dutta* analogy is applicable with the same force or not. However, the intention of parliament is clear and the Supreme court has correctly implemented the intention of the Parliament by reading "and" in the main body as "or".

The Court also endorsed the opinion that money laundering is a continuing offence and "The offence of money-laundering is not dependent on or linked to the date on which the scheduled offence or if we may say so the predicate offence has been committed. The relevant date is the date on which the person indulges in the process or activity connected with such proceeds of crime. These ingredients are intrinsic in the original provision (Section 3, as amended until 2013 and were in force till 31.7.2019)"

Burden of proof : section 24[71]

The Supreme court held that section 24 is not only applicable to the judicial proceeding before special trial court but also before adjudicating authority because section expressly uses the words "any proceeding" which indicates all proceeding whether before a trial court or otherwise. The only difference is that the standard of proof in case of adjudicating authority will not be beyond reasonable doubts as the proceeding is not criminal in nature but deals with attachment of property. E interpretation to section 24 the Court held as under:

> 93. Be that as it may, this Section 24 deals with two situations. The first part concerns the person charged with the offence of money-laundering under Section 3. The second part [Clause (b)] concerns any other person. Taking the second part first, such other person would obviously mean a person not charged with the offence of money-laundering under Section 3 of the 2002 Act. The two parts, in

71 24. Burden of proof.— post 2013

In any proceeding relating to proceeds of crime under this Act,—

(a) in the case of a person charged with the offence of money-laundering under section 3, the Authority or Court shall, unless the contrary is proved, presume that such proceeds of crime are involved in money-laundering; and

(b) in the case of any other person the Authority or Court, may presume that such proceeds of crime are involved in money-laundering.]"

> one sense, are mutually exclusive. If a person is charged with the offence of money-laundering under Section 3 of the 2002 Act owing to a complaint filed by the authority authorised before the Special Court, Clause (a) would trigger in. As regards the second category [Clause (b)] of person, the expression used is "may presume".

It further held :

> Whereas, qua the first category [covered under Clause (a)] the expression used is "shall, unless the contrary is proved, presume". In this category, if a charge is already framed against the person for having committed offence of money-laundering, it would presuppose that the Court framing charge against him was **prima facie convinced** that the materials placed before it had disclosed grave suspicion against such person. In such a case, once the issue of **admissibility** of materials supporting the factum of grave suspicion about the involvement of the person in the commission of crime under the 2002 Act, is accepted, in law, the burden must shift on the person concerned to dispel that suspicion. It would then not be a case of reversal of burden of proof as such, but one of shifting of burden on him to show that no offence of money-laundering had been committed and, in any case, the property (proceeds of crime) was not involved in money-laundering.

The Court also identified the foundational element of money laundering as under:

> First, that the criminal activity relating to a scheduled offence has been committed.
>
> Second, that the property in question has been derived or obtained, directly or indirectly, by any person as a result of that criminal activity.
>
> Third, the person concerned is, directly or indirectly, involved in any process or activity connected with the said property being proceeds of crime.

Besides above the other safeguard available to the accused is " The fact that the person concerned had no causal connection with such proceeds of crime and he is able to disprove the fact about his involvement in any process or activity connected therewith, by producing evidence in that regard, the legal presumption would stand rebutted."

Finally the court held that "Section 24 has reasonable nexus with the purposes and objects sought to be achieved by the 2002 Act and cannot be regarded as manifestly arbitrary or unconstitutional."

Bail : the twin conditions

Section 45(1) of PMLA presents twin conditions of bail as (i) the Public Prosecutor has been given a opportunity to oppose the application for such release; and (ii) where the Public Prosecutor opposes the application, the court is

satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail. The provision was amended after *Nikesh Tarachand Shah* v. *Union of India*[72] declared it unconstitutional. The amendment of 2019 was challenged on the ground of (a) competency (b) fundamental rights. It was argued that through a subsequent enactment the legislature is not competent to remove the unconstitutionality and the previous position cannot be restored. The Supreme Court referred a seven judge bench decision of *Jagannath*, v. *Authorised Officer, Land Reforms*[73] and held that "where the defect as pointed out by the Court has been removed by virtue of the validating Act retrospectively, then the provision can be held to be intra vires provided that it does not transgress any other constitutional limitation."

Disagreement from *Nikesh Tarachand Shah*

On the issue of twin conditions under section 45 as violative of fundamental right to article 14 and 21 *VijayMadanlal Choudhary* provided reasons (a) similar twin conditions in various enactments have been declared by constitution benchs. (b) It slightly differed on the reasoning of *Nikesh Tarachand Shah* because a portion[paragraphs 342 to 344] of a binding constitution bench precedent of *UsmanbhaiDawoodbhai Memon*[74] "has not been noticed in *Nikesh Tarachand Shah*."

PMLA *vis a vis* TADA

Nikesh Tarachand Shah argued that TADA is more heinous than PMLA because of the nature of terror offences and punishment. *Vijay Madanlal Choudhary* case disagrees with this reasoning also on the ground that (a) PMLA is against socio economic crimes which have a well accepted wider impact on society. (b) It advances the constitutional goal of article 38 and 39 of the Constitution of India. (c) Punishment is a policy matter of the Parliament and the same cannot be a crucial criteria to create a hierarchy. Based on above reasoning it was held that

> Therefore, the observations and in particular in paragraph 47 of *Nikesh Tarachand Shah* , are in the nature of doubting the perception of the Parliament in that regard, which is beyond the scope of judicial review. That cannot be the basis to declare the law manifestly arbitrary.

Another argument was the proceeds of crime may come from a non cognizable offence. But section 45 will come into play and bail becomes very stringent. The Court clarified as under:

72 (2018) 11 SCC 1. It was decided on Nov 23, 2017 by a Division Bench of RF Nariman and SK Kaul, JJ. Nariman, J. delivered the verdict, *hereinafter* referred as *Nikesh Tarachand Shah*.

73 (1971) 2 SCC 893.

74 *UsmanbhaiDawoodbhaiMemon* v. State of Gujarat (1988) 2 SCC 271 : [1988] 3 SCR 225.

> The fact that the proceeds of crime have been generated as a result of criminal activity relating to a scheduled offence, which incidentally happens to be a non-cognizable offence, would make no difference. The person is not prosecuted for the scheduled offence by invoking provisions of the 2002 Act, but only when he has derived or obtained property as a result of criminal activity relating to or in relation to a scheduled offence and then indulges in process or activity connected with such proceeds of crime.

Is the twin condition also applicable to anticipatory bail?

It was held that the twin condition under section 45 is applicable to all bail proceedings. If it is not applied to anticipatory bail the very purpose of section 45 will be frustrated. Similarly the provision of default bail under section 167 or release under 436A shall be applicable to prisoners in case of PMLA also.

PMLA *vis a vis* NDPS Act: whether ED officers are police officers ?

In *Tofan Singh* case[75] the Supreme Court decided that the NDPS officers are police officers and confessions before them will be hit by section 25 of the Indian Evidence Act, 1872 and violative of article 20(3) of the Constitution. In the*Vijay Madanlal Choudhary* case the constitution bench distinguished *Tofan Singh* as (a) NDPS Act is a pure penal statute. The attachment order of proceeds of crime can be only by judicial proceeding while in PMLA it is by administrative process. (b) NDPS Act does not prohibit regular police officers to investigate while PMLA section 45(1A) requires that officers must be authorised under PMLA only. (c) Section 50(4) expressly makes the proceeding before ED as judicial proceeding. (d) the officials file closure reports in NDPS Act while in PMLA the authority files closure reports.

The court in *Vijay Madanlal Choudhary* held that Authorities under the 2002 Act are not Police Officers. The statements given to officers under PMLA do not violate article 20(3) or article 21. But it refused to go into the question whether *Tofan Singh* is *per incuriam* and rightly so because it was not essential for determination in this case.

The question of the competency of the Parliament to pass the 2019 amendment as money Bill was not dealt with because it is being considered by a larger bench of seven judges in the *Rojer Mathew* case.[76]

A prosecution under PMLA can be proceeded only if a scheduled offence is registered. If a scheduled offence [also called predicate offence] is quashed or the accused is acquitted/discharged, the PMLA case cannot be prosecuted. *Vijay Madanlal Choudhary* also raised concern on the vacancies in the authority under PMLA which is an obiter remark.

75 [2021] 4 SCC 1.

76 *Rojer Mathew* v. *South Indian Bank Limited* (2020) 6 SCC 1 : [2019] 16 SCR 1.

IV NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1988

Reasonable grounds To believe and confessional statement under section 67

In the bail proceeding under NDPS Act, 1985 section 37(1)(b)(ii)[77] before releasing an accused on bail the court must satisfy itself that there are reasonable grounds to believe that the accused is not guilty of the offence and he is not likely to commit the offence again. His level of satisfaction cannot be beyond reasonable doubts because that will be required at the time of trial. What is the meaning of reasonable ground to believe? This issue was discussed in the case of *Narcotics Control Bureau* v. *Mohit Aggarwal*.[78] The Court in *Mohit Aggarwal* took precedential guidelines from *Collector of Customs, New Delhi* v. *Ahmadalieva Nodira*,[79] and *State of Kerala* v. *Rajesh.*[80] Based on these precedents the Court in *Mohit Aggarwal* laid down that "reasonable grounds" is more than *prima facie.* It contemplates substantial probable causes. It "requires existence of such facts and circumstances" as are sufficient for satisfaction of the court. "Such facts and circumstances must exist in a case that can persuade the Court to believe that the accused person would not have committed such an offence." What is available evidence against the accused?

In *Mohit Aggrawal*case central evidence of prosecution was the confessional statement of the accused under section 67. As a rule of prudence a confessional statement before officers in any department is not considered good evidence even if permissible. Besides, the statement under section 67 is also not admissible as per *Tofan Singh* v. *TN*.[81] The rule of prudence has been elevated to a rule of law by a judicial pronouncement. "Such facts and circumstances must exist in a case that can persuade the Court to believe that the accused person would not have committed such an offence."

However, there were materials which indicate that the accused may have committed an offence. The Court observed as under:

> However, this was not the only material that the appellant- NCB had relied on to oppose the bail application filed by the respondent. The appellant-NCB had specifically stated that it was the disclosures made by the respondent that had led the NCB team to arrive at and raid the godown of the co-accused, Promod Jaipuria which resulted in the recovery of a large haul of different psychotropic substances in the form of tablets, injections and syrups. Counsel for the appellant-NCB had also pointed out that it was the respondent who had disclosed the address and location of the co-accused, Promod

77 Section 67 (1)((b)(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are *reasonable grounds* for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

78 2022 SCC OnLine SC 891, *hereinafter referred as Mohit Aggrawal.*

79 (2004) 3 SCC 549.

80 (2020) 12 SCC 122.

81 (2021) 4 SCC 1. A three judge bench decision with 2:1 opinion.

> Jaipuria who was arrested later on and the CDR details of the mobile phones of all co- accused including the respondent herein showed that they were in touch with each other.

Above statements identify two relevant pieces of evidence. One, the disclosure statement leads to recovery of various prescribed drugs. The prosecution has to establish such recovery and the accused has to explain such recovery. At the time of bail proceedings the duty of prosecution is not to establish it beyond reasonable doubts. Once the recovery is established the accused has a duty to explain his possession. In case of trial this duty of the accused is to the extent of preponderance probability. Here it will be a little less. Two, disclosure led to Call Detail Record [CDR] details which shows all accused are connected to each other. The Court rejected the bail.l

The Court found these proofs sufficient to fulfill the twin condition. Regarding these twin tests the Court should have further explained its reasons. For example the facts may satisfy that the accused may have committed an offence but the second test is regarding chances of committing offences. On what material did the Court arrive at this conclusion of recurrence of offence? More reflection would have enhanced the precedential value of the verdict.

V DOWRY CASES

Among socio economic crimes, dowry is unique because of the violence involved in the offence. Most of the socio economic crimes are non violent in nature be it corruption, money laundering, food adulteration or NDPS cases. Dowry cases contain dual evil of monetary gain by illegal means and violence to the extent of death for the monetary gains. Another element that makes dowry offences as unique is the fact that offenders and the victim both belong to the family. Third element that adds to the uniqueness is the fact that dowry has received a social, cultural, religious and customary acceptance. The law not only makes it illegal but penal. The penal law is special in nature because it contains a presumption clause[82], shifting of burden[83] and minimum punishment.[84]

***Jogendra* case : Strict or purposive interpretation of dowry law**

There are many cases on conviction and acquittal but there is hardly any material legal development. In *State of Madhya Pradesh* v. *Jogendra*[85] the demand for money was for construction of a house. For this demand the bride was harassed, cruelty was committed and she committed suicide. One of the contention was whether demand by in-laws family for construction of house can be treated as

82 The Indian Evidence Act, 113B or theBharatiyaSakshyaAdhiniyam, 2023- section 118.

83 The Dowry Prohibition Act, 1961, 8A. Burden of proof in certain cases.—Where any person is prosecuted for taking or abetting the taking of any dowry under section 3, or the demanding of dowry under section 4, the burden of proving that he had not committed an offence under those sections shall be on him.

84 Section 80(2) Bharatiya Nyaya Sanhita, 2023 or IPC section 304B(2).

85 (2022) 5 SCC 401, decided by three judges.

dowry or not? Is such a demand "in connection with marriage."[86] The argument was as the marriage took place in 1998 and demand was made many months after the marriage, it cannot be treated as dowry. Moreover it was for construction of a house which was also useful to the bride and bride herself was a party to such demand. It cannot be treated as dowry demand under harassment. Another argument was that the interpretation must be made strictly if there is any vague expression or doubt in the meaning of any word. Any benefit of doubt must go to the accused.

Repelling all such contention the Court observed as under:

> 13. The Latin maxim "Ut Res Magis Valeat Quam Pereat" i.e, a liberal construction should be put up on written instruments, so as to uphold them, if possible, and carry into effect, the intention of the parties, sums it up. Interpretation of a provision of law that will defeat the very intention of the legislature must be shunned in favour of an interpretation that will promote the object sought to be achieved through the legislation meant to uproot a social evil like dowry demand. In this context the word "Dowry" ought to be ascribed an expansive meaning so as to encompass any demand made on a woman, whether in respect of a property or a valuable security of any nature. When dealing with cases under Section 304-B IPC, a provision legislated to act as a deterrent in the society and curb the heinous crime of dowry demands, the shift in the approach of the courts ought to be from strict to liberal, from constricted to dilated. Any rigid meaning would tend to bring to naught, the real object of the provision. Therefore, a push in the right direction is required to accomplish the task of eradicating this evil which has become deeply entrenched in our society.

In case of the legislation dealing with socio economic crimes there are two approaches. First, s conventional ie in case of doubt, interpret in favour of accused. This is a literal or strict interpretation. Second approach is purposive. The purpose or object of the special enactment must be fulfilled through interpretation. Object of interpretation will dominate and strict interpretation will be avoided. If demand for house construction is not treated as a dowry then every demand will be clothed with such excuses and it will defeat the purpose of special laws on dowry. The principle of law restated is that penal enactment is not always open to strict interpretation or rule of benefit of doubt. It must be interpreted purposefully.

Delay in judicial process

This case [*Jogendra*] shows a disturbing picture. The suicide was committed in 2002. The trial court delivered its verdict in 2003. The High court passed judgement in 2007. The matter came to the Supreme Court in 2008 and the final decision was pronounced in 2022. 1 year with trial court, 4 years with high court and 14 years in the Supreme Court. The daily orders show the case was first heard in 2010. In 2011

86 The Dowry Prohibition Act, 1961, section 2(b) states that the demand must be "in connection with marriage".

it was listed on three dates[but actually two dates because one date is repeated], in 2012 it was listed on one date. Then it was listed on two dates in 2014, seven dates in 2016[but actually four dates because three dates are repeated]], one date in 2019, four dates in 2021 and finally in 2022.

The orders show that from 2010 to 2021 there was an attempt to serve notice by various means and respondents accused did not appear. For eleven years the Supreme court and the government machinery was not able to serve notice to the respondents. As the respondents were enjoying their liberty [the high court acquitted all accused] they were designing their absence through a legitimate racket. In 2021 the Court ordered an advocate from the legal services authority to represent absent respondents. At least on two dates the matter was adjourned because of the government advocates.

The lesson is that the judicial system needs to use technology to trace the accused. Aadhar card, PAN number which cannot be changed generally, should be used to identify the location. The *privacy* judgement also states that for public welfare laws can be made to restrict privacy.[87] *AADHAR judgement*[88] also makes space for such exceptions. An enactment may be passed for this purpose to make AADHAR mandatory for the parties.

In *Meera* v. *State*,[89] *Surendram*v. *State of Kerala*,[90] it was held that "Delay in concluding trial cannot be a ground for not imposing punishment or to impose sentence already undergone".

Parvati Devi v. *State of BiharNow State of Jharkhand*[91] is helpful in understanding the words "otherwise than under normal circumstances " used in section 304A of IPC. These words are required to be proved beyond reasonable doubts by the prosecution. The deceased bride was staying with husband and in-laws before death. She went missing from matrimonial home. The husband or in-laws did not inform the father of the deceased. They did not inform the Police. The house of in laws was locked immediately after the incident. A skeleton was found in a nearby pond which was identified by the father of the deceased. These facts establish death under unnatural circumstances. The death need not be committed by the accused. In section 304B of IPC [section 80 of BNS] the *actus reus* of killing and *mens rea* of killing need not be established [unlike section 302 of IPC(101 of BNS)]. The *actus reus* of demand of dowry [which can be verbal only] and the *actus reus* of cruelty or harassment [which can be verbal or physical] has to be proved beyond reasonable doubts. If it was done soon before (which is the *actus reus* of circumstances) [closely connected through the conduct of demand and cruelty] and the objective element of death within seven years (which is easy to

87 *Justice K.S.Puttaswamy (Retd.)*. v. *Union of India*, (2017) 10 SCC 1: [2017] 10 S.C.R. 56. See opinion of SK Kaul, J.

88 *K.S. Puttaswamy (Aadhaar-5 J.)* v. *Union of India*, (2019) 1 SCC 1.

89 AIR 2022 SC 355.

90 AIR 2022 SC 2322.

91 [2021] 9 S.C.R. 711 : 2021 INSC 911.

establish) the deeming clause is that the husband or in laws has committed dowry death. Under section 113B of the Indian Evidence Act, 1872 [section 118 of BharatiyaSakashyaAdhiniyam, 2023] it is presumed that husband or in laws committed dowry death. The accused need to rebut these facts or offer convincing defences like *alibi*.

Delay

Parvati Devi case was with the trial court between 1997-1999[2 years], High Court between 1999-2007[8 years] and the Supreme Court between 2012-2022 [10 years]. Out of 23 years the case remained with higher courts for around 18 years. What is more disturbing is that the Supreme Court spent 10 years. The Supreme Court should do something to reduce delays. Similar trend may be witnessed in *Kuljit Singh* v. *State of Punjab.* Only delay issue is material here. The case was with the Trial Court between 1999-2002[4 years], High Court between 2002-2011[9 years] and the Supreme Court between 2012-2022[10 years]. Out of 20 years the case remained with higher courts for around 19 years.

Sarepalli Sreenivas v. *State of A.P.i*[92] is a non reportable case but deserves attention because the case of section 304B was changed to section 302 of IPC and the conviction under section 302 was secured. If the investigation is done properly, the prosecution argues effectively the conviction of dowry cases under section 302 is a possibility. A punishment without a presumption clause and reverse onus is the most fair way of restoring rule of law. This case was with the Trial Court between 2006-2013[5 years], High Court between 2013-2018[5 years] and the Supreme Court between 2018-2022[4 years]. Out of 16 years the case remained with higher courts for around 9 years and with trial court for 11 years. The higher courts performed better where the matter was disposed of in 4-5 years in each court.

VI CONCLUSION

The most important contribution of the survey of 2022 is the constitution bench pronouncement on *Ms Neeraj Dutta* v. *State (Govt. of N.C.T.of Delhi)*.[93] In this case the constitution bench unanimously decided that in bribery offences under PCA the proof of demand is essential. This is approval of the precedents of the 1950s and is a check against false implication of public servants. This case has also settled the decade long dispute on the quality of proof required through harmonious construction of two seemingly conflicting precedents. It is held that secondary evidence of demand for bribes can also be presented in court if primary evidence is not available. The gift to doctors by companies should be treated under PCA as suggested in a Maharashtra Bill. *Vijay Madanlal Choudhary* upheld the constitutional validity of PMLA. Edwin H Sutherlan has established that the criminal laws are made and enforced in such a manner that "most powerful groups

92 Criminal Appeal No.1630 OF 2018.

93 [2022] 5 S.C.R. 104. It was unanimously decided by a constitution bench of five judges.

secure relative immunity by benefit of business or profession."[94] PMLA disproves the concern of Sutherland. For prosecution and the State both *Neeraj Dutta* and *Vijay Madanlal Choudhary* came as relief. On *Vijay Madanlal Choudhary* there are various criticisms of eminent lawyers and academicians. However this author feels that the enactment like PMLA needs stringent measures so that a deterrent is created in the minds of powerful and corrupt people. In *Mohit Aggarwal* the alertness of State and the court under NDPS cases is underscored to meet the balancing task of security *vis a vis* liberty. In dowry cases like *Jogendra* the purposive interpretation of dowry provisions was reiterated.

Delay in the courts is a perennial problem. This survey highlights the delay in corruption and dowry cases [as illustration] in the Supreme Court which needs urgent judicial attention. A couple of suggestions have also been advanced by this author. There is another point that needs urgent social attention. The decline in moral values has given impetus to socio economic crimes. Law is only a temporary solution. The long term solution rests in focussing on the moral and ethical content of human life. Currently moral values are limited to kids school. The civil services exams have rightly incorporated this content in its syllabus. However, this has to be a regular exercise at all levels be it in the public or private sector. For this purpose the understanding of *dharma* is essential. *Dharma* is not religion but the highest standard of life. *Dharma* like law creates deterrence which earns greater values in Indian society. To conclude One illustration can be from Vamana Purana (Chapter 12 verse 37) which states

पृष्ठमांसाशिनोमूढास्तथैवोञ्छकीवजीवनः । क्षिप्यन्तेवृकभक्षेतेनरके रजनीचर ॥३७ ॥

PrusthaManSaShiNoMudhaStaThaiVoTtaKivaJivanahKshpyateVrukBhaksheTeNarakeRanajiChara

The meaning of the above Sanskrit quote is "O monster ! The sneaking and bribe accepting rudes are thrown into the hell called "Vrakbhaksa."

94 Edwin H. Sutherland, "White-Collar Criminality," 9, *American Sociological Review*, Vol. 5, No. 1 (1940).