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GAHC010110732020

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/3284/2020

AFTABUDDIN AHMED AND ANR.
S/O. LT. MAFIZ UDDIN AHMED, R/O. SUNDARPUR, HOUSE NO.45, R.G. BARUAH ROAD, P.O. DISPUR, PIN-781005, DIST. KAMRUP (M), ASSAM.

VERSUS

ENFORCEMENT DIRECTORATE AND 2 ORS.
GOVT. OF INDIA, RAJGARH ROAD, BYE LANE NO.1, HOUSE NO.20, 2ND FLOOR, GUWAHATI-781003, ASSAM.

2:DEPUTY DIRECTOR

ENFORCEMENT DIRECTORATE
GUWAHATI ZONAL OFFICE
RAJGARH ROAD
BYE LANE NO.1
HOUSE NO.20
2ND FLOOR
GUWAHATI-781003
ASSAM.

3:THE STATE OF ASSAM
REP. BY THE CHIEF SECRETARY
BLOCK-C
3RD FLOOR JANATA BHAWAN
DISPUR
GUWAHATI-781006

For the Petitioner(s) : Mr. A. M. Bora, Sr. Advocate
: Mr. V. A. Choudhury, Advocate

For the Respondent(s) : Mr. R.K.D. Choudhury, Dy. S.G.I.
: Mrs. A. Gayan, C.G.C.

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Date of Hearing : **06.02.2024, 21.03.2024**
Date of Judgment : **28.03.2024**

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

JUDGMENT AND ORDER (CAV)

Heard Mr. A. M. Bora, the learned Senior counsel assisted by Mr. V. A. Choudhury, the learned counsel appearing on behalf of the Petitioners and Mr. R. K. D. Choudhury, the learned Deputy Solicitor General of India. I have also heard Mrs. A. Gayan, the learned CGC appearing on behalf of the Respondents.

2. The present writ petition has been filed assailing the Provisional Attachment Order No.01/2020 dated 24.06.2020 (for short "the impugned order") whereby the Respondent No.2 in exercise of the powers under Section 5(1) of the Prevention of Money Laundering Act, 2002 (for short "the Act of 2002") had provisionally attached the 3 (three) properties mentioned in the Schedule to the impugned order.

3. Before dealing with the legality and validity of the said impugned order, this Court would like to deal with the facts involved which would have material bearing on the decision.

4. From a perusal of the writ petition, it reveals that one Kuruna Bordoloi, APS, the Deputy Superintendent of Police, Vigilance & Anti-Corruption, Assam lodged a First Information Report on 12.02.2018 stating inter alia that an enquiry was initiated at the Directorate of Vigilance & Anti-Corruption, Assam against the Petitioner No.1 on the basis of a complaint regarding accumulation of assets disproportionate to his known source of income.

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Upon completion of enquiry, it revealed that the estimated disproportionate assets acquired/possessed by the Petitioner No.1 was to the tune of Rs.1,42,59,064/-. Upon receipt of the said First Information Report dated 12.02.2018, the Officer-in-Charge, ACB Police Station cum Superintendent of Police, Vigilance & Anti-Corruption, Assam registered a case being ACB Police Station Case No.02/2018 under Sections 13(1)(e) and 13(2) of the Prevention of Corruption Act, 1988 (for short "the Act of 1988") and started the investigation of the case. Taking into account that the provisions of Sections 13(1)(e) and 13(2) of the Act of 1988 were Scheduled Offences under Paragraph No.8 of Part-A of the Act of 2002, ECIR No.01/GWZO/2018 dated 12.02.2018 was recorded and the investigation against the Petitioner No.1 was initiated under the Act of 2002.

5. From the averments made in the writ petition, it reveals that during the investigation made under the provisions of the Act of 2002, the details of the properties held by both the Petitioners and the bank details of both the Petitioners were collected. Further to that, summons were also issued to both the Petitioners as well as their son namely Shri Arkish Aftab. The statements were duly recorded under Section 50 of the Act of 2002. Subsequent thereto, the impugned order was passed whereby three of the properties of the Petitioners were attached. The details of the said properties having relevance to the instant dispute is quoted herein below:

Sl. No.	*Name of Owner*	*Description of property*	*Type of Deed and date*	*Value in Rupees*

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01	Md. Aftabuddin Ahmed	Land measuring 1 Katha 10 Lechas covered by Dag No.1129, K.P. Patta No-201 in Vill-Jagorigog under MoujaBeltola, Dist-Kamrup, Assam including entire three storied building constructed thereupon.	Sale Deed dated 06.03.1997	58,55,250/-
02	Farida Sultana @ Naz Ahmed @ Farida Ahmed	Flat No.-K-1/27, Chittaranjan Park, New Delhi-110019 (Entire First Floor)	Sale Deed dated 23.12.2015	60,00,000/-
03	Farida Sultana @ Naz Ahmed @ Farida Ahmed	A vacant floor are measuring 2607 sq. ft. on first floor of the residential floor and the said residential	Sale Deed No.13174, dated 13.11.2009	30,15,948/-

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		premises together with proportionate undivided share of land covered by Dag No.173(old)/1187 (new) of K.P. Patta No.134 situated at Village – Dharandha, Six Miles under Mouza-Beltola, Dist.-Kamrup (M) including super built area		
			Total =	*1,48,71,198/-*

6. Pursuant to the impugned order, a corrigendum was issued on 29.07.2020 by the Respondent No.2 thereby substituting the words "first proviso used in the heading of the impugned order No.01/2020 dated 24.06.2020" by the words "second proviso to Sub-Section (1) of Section 5 of the Act of 2002". Both the Petitioners have assailed the said impugned order by way of the instant writ petition alleging that the condition precedent for exercising the powers under the second proviso to Section 5(1) were not satisfied inasmuch as for exercising of the powers under the second proviso to Section 5(1) of the Act of 2002, the concerned Officer has to have

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reasons to believe which is required to be recorded in writing and it was alleged that the Respondent No.2 who passed the impugned order did not record any reasons as would be apparent from the impugned order. It was alleged that the twin conditions for initiating action under Section 5(1) of the Act of 2002 were not fulfilled.

7. In addition to the above, it was the case of the Petitioners that a perusal of the Schedule attached to the impugned order would show that three properties have been attached and out of the three properties, one property admittedly is a property acquired by the Petitioner No.1 on 06.03.1997 on which date, the Act of 2002 was not even enacted. It is also the case of the Petitioners that various provisions of the Act of 1988 were included as Scheduled Offences in Part-B by the Prevention of Money Laundering (Amendment) Act, 2009 which came into operation from 01.06.2009. Further to that, the entire Part-B was deleted in 2013 and the provisions of the Act of 1988 were included in Part-A of the Schedule to the Act of 2002. Therefore, it was the specific case of the Petitioners that as the property acquired vide Deed of Sale dated 06.03.1997 is much prior to the insertion of the offence under the Act of 1988 as part of the Scheduled Offence, the said impugned order is required to be set aside as the same clearly shows non-application of mind.

8. Primarily on the above basis, the instant writ petition was filed on 19.08.2020. This Court vide an order dated 10.09.2020 had issued notice and in the interim stayed the impugned order dated 24.06.2020. The reasons for doing so can be seen in Paragraph No.9 of the said order dated 10.09.2020 wherein this Court had observed that in view of the absence of

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reasons being recorded, the condition precedent to invoke the power under the second proviso to Section 5(1) of the Act of 2002 was not satisfied.

9. The record further reveals that an Interlocutory Application was filed by the Respondents praying for vacation of the order dated 10.09.2020 passed by this Court. The said Interlocutory Application was registered and numbered as I.A.(Civil) No.1813/2020. Vide an order dated 24.11.2020, the said Interlocutory Application was rejected however, this Court duly observed that pending finalization of the enquiry initiated by the Respondents, the writ Petitioners shall not alienate any of the properties mentioned in the impugned order dated 24.06.2020.

10. An affidavit-in-opposition has been filed by the Respondent Nos. 1 and 2 wherein preliminary objections were taken as regards the maintainability of the writ petition on the ground that there is no legal question of law involved in the instant proceedings and the Petitioners can very well avail their remedies under Section 8 of the Act of 2002 before the Adjudicating Authority. It was further mentioned that while passing the impugned order, the reasons were duly recorded in writing. Further to that, the provisions of the Act of 2002 do not mandate the necessity that the reasons which have been recorded in writing has to be disclosed to the Petitioners or for that matter, the reasons which have been recorded has to be a part of the Provisional Attachment Order. On the second aspect, it was stated that the "proceeds of crime" which have been defined in Section 2(1)(u) of the Act of 2002 also brings within its ambit any property derived or obtained directly or indirectly by any person as a result of criminal activity relating to a scheduled offence or the value of any such property. As per the

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Respondents, the term "or the value of any such property" can be deemed to include any property acquired even prior to the enactment and enforcement of the Act of 2002.

11. An affidavit-in-reply was filed by the Petitioners to the said affidavit-in-opposition wherein the case as set out in the writ petition was reiterated and further it was mentioned that the writ petitioners cannot be prosecuted for alleged offences, as the offences were not scheduled offences under the Act of 2002 till 01.06.2009. It was also mentioned in the said affidavit-in-reply that the Directorate of Enforcement, Government of India, Guwahati Zonal Office had filed a complaint under Sections 44 and 45(1) of the Act of 2002 before the Court of the Special Judge, Assam at Guwahati against the Petitioners on 18.01.2022 and the learned Trial Court vide order dated 19.01.2022 in ECIR No.01/GWZO/2018 subsequently registered as Special (PMLA) Case No.01/2022, after perusal of the materials on the complaint, took cognizance of the offence under Section 4 of the Act of 2002 against both the Petitioners and the said case is presently pending before the learned Trial Court for consideration of charge. It was also stated that as regards the "Schedule Offence", no charge sheet has been filed and it is still at the stage of investigation.

12. It is further seen from the records that the Petitioners have filed an additional affidavit to bring to the notice of this Court that the notice to show cause has been issued by the Adjudicating Authority under Section 8 of the Act of 2002 on the basis of the complaint filed by the Respondent No.2. By the said show cause notice, the Petitioner No.1 herein was asked to show cause as to why the properties attached should not be declared to be the

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properties involved in the money-laundering and be confiscated by the Central Government and further why the Provisional Attachment Order should not be confirmed.

13. In the backdrop of the materials on record, this Court finds it relevant to take note of the contentions raised by the learned counsels for the parties.

(A) The learned Senior counsel for the Petitioner in the lines of the pleadings and the issues raised therein submitted that the order of provisional attachment has to contain the reasons on which the belief was formed which is a condition precedent for invoking the jurisdiction under the second proviso to Section 5(1) of the Act of 2002. He submitted that if the reasons are not disclosed in the order of provisional attachment, it renders the order of provisional attachment fatal. He further elaborated his submissions and contended that a perusal of Section 5(1) of the Act of 2002 would show that in order to invoke the powers, the twin tests mentioned in the said Sub-Section is required to be fulfilled on the basis of the materials available in possession of the Authorized Officer. However, the satisfaction in the instant case had been arrived at without fulfilling the twin test. The second leg of submission of Mr. A. M. Bora, the learned Senior counsel is that a perusal of the Schedule to the impugned order would show that one of the three properties were purchased on 06.03.1997 i.e. much prior to the coming into effect of the Act of 2002. The Act of 1988 was brought within the ambit of Scheduled offence in terms with the Act of 2002 for the first time w.e.f. 01.06.2009. In that regard, the learned Senior counsel therefore submitted that on the face of it, the reasons on which the belief was formed

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cannot be sustained for passing the impugned order. In that regard, he referred to the various provisions of the Act of 2002 and specifically referred to the judgment of the learned Division Bench of the Punjab and Haryana High Court in the case of ***Seema Garg Vs. Deputy Director, Directorate of Enforcement*** *reported in* ***(2020) SCC OnLine P&H 738.***

(B) On the other hand, the learned Deputy Solicitor General of India, Mr. R. K. D. Choudhury, submitted that the reasons to believe for exercise of jurisdiction under the second proviso to Section 5(1) of the Act of 2002 is required to be recorded only which have been duly done and as such the question of the condition precedent being not there as alleged does not arise. During the course of hearing, the learned Deputy S.G.I. duly produced the records to show that the reasons on which the belief was formed was duly recorded in writing. Further to that, the learned Deputy S.G.I. submitted that the expression "proceed of crime" as defined in Section 2(1)(u) of the Act of 2002 includes any property created out of the proceeds of a Scheduled Offence which also includes the value of such property and as per the interpretation given by the learned Single Bench of the Delhi High Court in the case of ***Deputy Director Directorate of Enforcement, Delhi Vs. Axis Bank and Others*** *reported in* ***(2019) SCC OnLine Del 7854***, a property acquired prior to the enactment of the Act of 2002 can also be included within the purview of the definition of the "proceed of crime". In that regard, he referred to paragraph Nos. 109, 110 and 111 of the said judgment.

14. In the backdrop of the pleadings, the following points of determination arise for consideration before this Court.

(i) Whether the instant writ petition is maintainable and if so whether this

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Court should entertain the writ petition in the present facts?

(ii) Whether the impugned order is issued in consonance with the provisions of Section 5(1) of the Act of 2002 and more particularly the second proviso to Section 5(1) of the Act of 2002?

(iii) Whether the property acquired by the Petitioner No.1 vide the Deed of Sale dated 06.03.1997 could have been provisionally attached by the impugned order taking into account that the said property was acquired when the Act of 2002 had not come into force and more particularly when the provisions of the Act of 1988 was brought within the fold of the Act of 2002 only on 01.06.2009?

15. For deciding the first point for determination as to whether the instant writ petition is maintainable and if so, should it be entertained, this Court finds it very pertinent to observe that from the contentions so raised by the parties, an interpretation is being sought for as to whether one of the three properties i.e. the property acquired by the Petitioner No.1 vide the Deed of Sale dated 06.03.1997 can be brought within the ambit of the term "proceeds of crime" as defined under Section 2(1)(u) of the Act of 2002 and if not, whether the reasons to believe of the Respondent No.2 as recorded in writing exists insofar as the said property. This is a pure question of law on the legal interpretation of the term "proceeds of crime" as defined in Section 2(1)(u) of the Act of 2002. Further to that, the exercise of jurisdiction for issuing the impugned order had been questioned on the ground of not fulfilling the condition precedent as stipulated in Section 5(1) as well as its second proviso of the Act of 2002. This question touches on the very jurisdiction for initiation of the proceedings under Section 5(1) or its second

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proviso of the Act of 2002.

16. This Court finds it relevant to take note of the judgment of the Supreme Court in the case of ***Godrej Sara Lee Ltd. Vs. Excise and Taxation Officer cum Assessing Authority and Others*** *reported in* ***(2023) 109 GSTR 402/ (2023) SCC OnLine SC 95*** wherein the Supreme Court had observed that when a pure question of law is raised and if investigation into the facts is unnecessary, the High Court would entertain a writ petition in its discretion even though the alternative remedy was not availed. It was further observed that where a controversy is a purely legal one and it does not involve disputed questions of facts but only question of law, then it should be decided by the High Court instead of dismissing the writ petition on the ground of an alternative remedy being available. Paragraph Nos. 4 to 8 of the said judgment in the case of ***Godrej Sara Lee (supra)*** being relevant are reproduced herein under:

> "***4****. Before answering the questions, we feel the urge to say a few words on the exercise of writ powers conferred by Article 226 of the Constitution having come across certain orders passed by the high Courts holding writ petitions as "not maintainable" merely because the alternative remedy provided by the relevant statutes has not been pursued by the parties desirous of invocation of the writ jurisdiction. The power to issue prerogative writs under Article 226 is plenary in nature. Any limitation on the exercise of such power must be traceable in the Constitution itself. Profitable reference in this regard may be made to Article 329 and ordainments of other similarly worded articles in the Constitution. Article 226 does not, in terms, impose any limitation or restraint on the exercise of power to issue writs. While it is true that exercise of writ powers despite availability of a remedy under the very statute which has been invoked and has given rise to the action impugned in the writ petition ought*

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not to be made in a routine manner, yet, the mere fact that the petitioner before the high court, in a given case, has not pursued the alternative remedy available to him/it cannot mechanically be construed as a ground for its dismissal. It is axiomatic that the High Courts (bearing in mind the facts of each particular case) have a discretion whether to entertain a writ petition or not. One of the self-imposed restrictions on the exercise of power under Article 226 that has evolved through judicial precedents is that the high courts should normally not entertain a writ petition, where an effective and efficacious alternative remedy is available. At the same time, it must be remembered that mere availability of an alternative remedy of appeal or revision, which the party invoking the jurisdiction of the high court under Article 226 has not pursued, would not oust the jurisdiction of the high court and render a writ petition "not maintainable". In a long line of decisions, this Court has made it clear that availability of an alternative remedy does not operate as an absolute bar to the "maintainability" of a writ petition and that the rule, which requires a party to pursue the alternative remedy provided by a statute, is a rule of policy, convenience and discretion rather than a rule of law. Though elementary, it needs to be restated that "entertainability" and "maintainability" of a writ petition are distinct concepts. The fine but real distinction between the two ought not to be lost sight of. The objection as to "maintainability" goes to the root of the matter and if such objection were found to be of substance, the courts would be rendered incapable of even receiving the lis for adjudication. On the other hand, the question of "entertainability" is entirely within the realm of discretion of the high courts, writ remedy being discretionary. A writ petition despite being maintainable may not be entertained by a high court for very many reasons or relief could even be refused to the petitioner, despite setting up a sound legal point, if grant of the claimed relief would not further public interest. Hence, dismissal of a writ petition by a high court on the ground that the petitioner has not availed the alternative remedy without, however, examining whether an exceptional case has been made out for such entertainment would not be

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proper.

5. *A little after the dawn of the Constitution, a Constitution Bench of this Court in its decision reported in 1958 SCR 595 (State of Uttar Pradesh vs. Mohd. Nooh) had the occasion to observe as follows:*

> "*10. In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute, (Halsbury's Laws of England, 3rd Edn., Vol. 11, p. 130 and the cases cited there). The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies. ***"*

6. *At the end of the last century, this Court in paragraph 15 of the its decision reported in (1998) 8 SCC 1 (Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and Others) carved out the exceptions on the existence whereof a Writ Court would be justified in entertaining a writ petition despite the party approaching it not having availed the alternative remedy provided by the statute. The same read as under:*

(i) *where the writ petition seeks enforcement of any of the fundamental rights;*

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(ii) where there is violation of principles of natural justice;

(iii) where the order or the proceedings are wholly without jurisdiction; or

(iv) where the vires of an Act is challenged.

***7**. Not too long ago, this Court in its decision reported in 2021 SCC OnLine SC 884 (Assistant Commissioner of State Tax vs. M/s. Commercial Steel Limited) has reiterated the same principles in paragraph 11.*

***8**. That apart, we may also usefully refer to the decisions of this Court reported in (1977) 2 SCC 724 (State of Uttar Pradesh & ors. vs. Indian Hume Pipe Co. Ltd.) and (2000) 10 SCC 482 (Union of India vs. State of Haryana). What appears on a plain reading of the former decision is that whether a certain item falls within an entry in a sales tax statute, raises a pure question of law and if investigation into facts is unnecessary, the high court could entertain a writ petition in its discretion even though the alternative remedy was not availed of; and, unless exercise of discretion is shown to be unreasonable or perverse, this Court would not interfere. In the latter decision, this Court found the issue raised by the appellant to be pristinely legal requiring determination by the high court without putting the appellant through the mill of statutory appeals in the hierarchy. What follows from the said decisions is that where the controversy is a purely legal one and it does not involve disputed questions of fact but only questions of law, then it should be decided by the high court instead of dismissing the writ petition on the ground of an alternative remedy being available."*

17. From the above quoted proposition of law settled by the Supreme Court, it would show that maintainability and entertainability are two separate and distinct concepts. While maintainability strikes at the root of the jurisdiction of the judicial forum to deal with the matter whereas entertainability relates to the judicial fora having the jurisdiction but on

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account of the discretion conferred upon it, the judicial fora may or may not in the given facts entertain the lis. There is no quarrel with the proposition that this Court under Article 226 of the Constitution has the jurisdiction in the present facts and as such the question of maintainability of writ petition does not arise. However, the question arises as to whether this Court in its discretion should entertain the writ petition. The issue involved in the present proceedings as to whether a property purchased prior to coming into effect of the Act of 2002 could be brought within the ambit of the definition "proceeds of crime" as defined in Section 2(1)(u) of the Act of 2002 is a purely legal issue, which in the opinion of this Court requires to be addressed by this Court. The second issue relates to whether the condition precedent for exercise of the jurisdiction under the second proviso to Section 5(1) of the Act of 2002 was fulfilled is a question of the jurisdiction of the Authority to pass the provisional attachment order. This Court is of the opinion that these issues having been raised, requires to be addressed to by this Court. Be that as it may, a further question duly arises as to what extent this Court should entertain the present proceedings in the extant facts taking into account that the Petitioners would be in a position to place various details before the Adjudicating Authority in the proceedings under Section 8 of the Act of 2002 or before the Appellate Tribunal under Section 26 of the Act of 2002 and even before this Court under Section 42 of the Act of 2002. This question can only be answered on the basis of the analysis and the discussion on the remaining points of determination so formulated above.

18. Keeping the aforesaid aspect alive for the reasons aforestated, let this Court take up the remaining two points for determination. For the purpose of deciding the same, this Court finds it relevant to take note of the brief

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background of the Act of 2002 and its relevant provisions. The Act of 2002 was enacted to address the urgent need to have a comprehensive legislation inter alia for preventing money-laundering, attachment of proceeds of crime, adjudication and confiscation thereof including vesting of it in the Central Government, setting up of agencies and mechanisms for coordinating measures for combating money-laundering and also to prosecute the persons indulging in the process or activity connected with the proceeds of crime. This need was felt throughout the world, owing to the serious threat to the financial systems of the countries, including their integrity and sovereignty because of money-laundering. Notably, before coming into force of the Act of 2002, various other legislations including the Act of 1988 were already invoked to deal with attachment and confiscation/forfeiture of the proceeds of crime linked to concerned offences. Notwithstanding the then existing dispenses to deal with the proceeds of crime under various enactments including the Act of 1988, the Parliament enacted the Act of 2002 as a result of international commitments to sternly deal with the menace of the money-laundering of the proceeds of crime having transnational consequences and on the financial systems of the countries. It is seen that the said Act of 2002 was passed by both the Houses of the Parliament and received the Presidential assent on 17.01.2003 however, the same was brought into force w.e.f. 01.07.2005.

19. The broad framework of the Act of 2002 is that it consist of 10 (ten) chapters. Chapter-I deals with the Short title, extent and commencement and definitions; Chapter-II deals with the Offence of Money-Laundering; Chapter-III deals with the mechanism of Attachment, Adjudication and Confiscation; Chapter-IV deals with the Obligations of the Banking

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Companies, Financial Institutions and Intermediaries; Chapter-V is in respect of Steps and Safeguards for issuing summons, carrying out searches and seizures including power to arrest, presumptions and burden of proof; Chapter-VI deals with matters concerning Appellate Tribunal; Chapter-VII deals with matters concerning Special Courts; Chapter-VIII is regarding the authorities under the Act of 2002 and their jurisdictional powers; Chapter-IX deals with the Reciprocal Arrangement for Assistance in certain matters and procedures for Attachment and Confiscation of property; Chapter-X deals with Miscellaneous and Incidental matters.

20. Section 73 of the Act of 2002 empowers the Central Government to make Rules for carrying out the provisions of the Act of 2002. Various Rules have been made by the Central Government including the Prevention of Money-Laundering (the Manner of forwarding a copy of the Order of Provisional Attachment of Property along with the Material, and copy of the Reasons along with the Material in respect of the Survey, to the Adjudicating Authority and its period of Retention) Rules, 2005 (for short "the Rules of 2005"). These Rules of 2005 have relevance for which specific reference is made herein and the same would be seen at a subsequent stage of the instant judgment.

21. The Act of 2002 though was brought into effect from 01.07.2005, but in order to address the exigencies and for the need to strengthen the mechanism as per the recommendations made by the international body to change the scourge of laundering of proceeds of crime affecting the financial systems and also integrity and sovereignty of the country, the said Act of 2002 had undergone various amendments from time to time and the last of

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such amendment was made by the Finance (No.2) Act, 2019.

22. Section 2(p) of the Act of 2002 defines the term "Money-laundering" as the meaning assigned to it by Section 3 of the Act of 2002. The expression "Money-laundering" ordinarily means the process or activity of placement, layering and finally integrating the tainted property in the formal economy of the country. However, taking into account that Section 3 of the Act of 2002 specifically defines the offence of money-laundering, this Court finds it relevant to quote the said provision. Section 3 reads as under:

> "***3. Offence of money-laundering -*** *Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected [proceeds of crime including its concealment, possession, acquisition or use and projecting of claiming] it as untained property shall be guilty of offence of money-laundering.*
>
> *[Explanation. – For the removal of doubts, it is hereby clarified that,-*
>
> *(i) a person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely –*
>
> *(a) concealment; or*
>
> *(b) possession; or*
>
> *(c) acquisition; or*
>
> *(d) use; or*
>
> *(e) projecting as untainted property; or*

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(f) claiming as untainted property, in any manner whatsoever;

(ii) the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever]"

23. Section 3 of the Act of 2002 would show that the said provision addresses itself to three things i.e.

(i) Person;

(ii) Process or activity; and

(iii) Product.

Insofar as person(s) covered by Section 3 of the Act of 2002 are concerned, they would be -

(i) Those who directly or indirectly attempt to indulge; or

(ii) Those who knowingly assists; or

(iii) Those who are knowingly a party; or

(iv) Those who are actually involved.

On the second aspect i.e. "process or activity", it would be seen that Section 3 of the Act of 2002 clearly identified 6 (six) different activities namely:

(i) Concealment; or

(ii) Possession; or

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(iii) Acquisition; or

(iv) Use; or

(v) Projecting; or

(vi) Claiming as untainted property, in any manner whatsoever.

The use of the word "or" denotes any one of the aforesaid activities would be sufficient to constitute the offence.

It is also relevant to mention that the process or activity connected with the proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as a untainted property or claiming it as untainted property in any manner whatsoever.

Insofar as the third aspect i.e. "product", Section 3 identifies "proceeds of crime" or the property representing the proceeds of crime as the product of the process or activity.

24. From the above analysis, it would be seen that out of the three things i.e "person", "process or activity" and "product", the first two aspects do not require much elaboration in its interpretation. The third aspect namely "product" which Section 3 refers to as "proceeds of crime" has been defined in Section 2(1)(u) of the Act of 2002. The said definition for the sake of convenience is reproduced herein under:

(u) "proceeds of crime" means any property derived or obtained, directly or

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indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad;

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

25. Before further expanding the analysis of Section 3 of the Act of 2002, let this Court slightly deviate and deal with the aspect "proceeds of crime". The original provision prior to the amendments carried out took within its ambit any property (as defined in Section 2(1)(v) of the Act of 2002) derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of such property. By the amendment carried out vide the Finance Act, 2015, the term "proceeds of crime" was enlarged to include any property equivalent in value held within the country if such property is taken or held outside the country. By the amendment made vide Act 13 of 2018, the words "or abroad" was added thereby any property equivalent in value held within the country or abroad would come within the ambit of proceeds of crime, if a property derived or obtained directly or indirectly by any person as a result of a criminal activity related to a scheduled offence is held or taken out of the country. By the Finance (No.2) Act, 2019, an Explanation was added which on the face of it seems to be clarificatory in nature. In terms with the said Explanation, the term "proceeds of crime" would include property not only derived or obtained from the scheduled offence but also any property which may

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directly or indirectly be derived or obtained as a result of any criminal activity relatable to the Scheduled Offence.

26. The Supreme Court in the case of ***Vijay Madanlal Choudhary and Others Vs. Union of India and Others*** *reported in* ***(2022) SCC OnLine SC 929*** explained the term "proceeds of crime" at paragraph Nos. 251 to 253 which are reproduced herein below:

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

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

***252**. Be it noted that the definition clause includes any property derived or obtained "indirectly" as well. This would include property derived or obtained from the sale proceeds or in a given case in lieu of or in exchange of the "property" which had been directly derived or obtained as a result of criminal activity relating to a scheduled offence. In the context of Explanation added in 2019 to the definition of expression "proceeds of crime", it would inevitably include other property which may not have been derived or obtained as a result of any criminal activity relatable to the scheduled offence. As noticed from the definition, it essentially refers to "any property" including abroad derived or obtained directly or indirectly. The Explanation added in 2019 in no way travels beyond that intent of tracking and reaching upto the property derived or obtained directly or indirectly as a result of criminal activity relating to a scheduled offence. Therefore, the Explanation is in the nature of clarification and not to increase the width of the main definition "proceeds of crime". The definition of "property" also contains Explanation which is for the removal of doubts and to clarify that the term property includes property of any kind used in the commission of an offence under the 2002 Act or any of the scheduled offences. In the earlier part of this judgment, we have already noted that every crime property need not be termed as proceeds of crime but the converse may be true. Additionally, some other property is purchased or derived from the proceeds of crime even such subsequently acquired property must be regarded as tainted property and actionable under the Act. For, it would become property for the purpose of taking action under the 2002 Act which is being used in the commission of offence of money-laundering. Such purposive interpretation would be necessary to uphold the purposes and*

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objects for enactment of 2002 Act.

> ***253***. *Tersely put, it is only such property which is derived or obtained, directly or indirectly, as a result of criminal activity relating to a scheduled offence can be regarded as proceeds of crime. The authorities under the 2002 Act cannot resort to action against any person for money-laundering on an assumption that the property recovered by them must be proceeds of crime and that a scheduled offence has been committed, unless the same is registered with the jurisdictional police or pending inquiry by way of complaint before the competent forum. For, the expression "derived or obtained" is indicative of criminal activity relating to a scheduled offence already accomplished. Similarly, in the event the person named in the criminal activity relating to a scheduled offence is finally absolved by a Court of competent jurisdiction owing to an order of discharge, acquittal or because of quashing of the criminal case (scheduled offence) against him/her, there can be no action for money-laundering against such a person or person claiming through him in relation to the property linked to the stated scheduled offence. This interpretation alone can be countenanced on the basis of the provisions of the 2002 Act, in particular Section 2(1)(u) read with Section 3. Taking any other view would be rewriting of these provisions and disregarding the express language of definition clause "proceeds of crime", as it obtains as of now."*

27. From the above quoted paragraphs, it would be seen that the Supreme Court observed that the term "proceeds of crime" being the core of the ingredients constituting the offence of money-laundering, the said expression needs to be construed strictly. It was observed that all properties recovered or attached by the Investigating Agency in connection with criminal activity relating to Scheduled Offence under the General Law cannot be regarded as a proceeds of crime. There may be cases where property involved in commission of a Scheduled Offence attached by the Investigating

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Agency dealing with that offence cannot be wholly or partly regarded as a proceeds of crime so long as the whole or some portion of the property has been derived or obtained by any person "as a result of" criminal activity relatable to the Scheduled Offence. Therefore, the property must be derived or obtained, directly or indirectly as a result of criminal activity relating to a Scheduled Offence. The Supreme Court had also dealt with how a property obtained indirectly would come within the ambit of the expression "proceeds of crime" and observed such property derived or obtained from the sale proceeds or in a given case in lieu of or exchange of the property directly derived or obtained as a result of a criminal activity relating to a Scheduled Offence. The Supreme Court further observed that it only such property which is derived or obtained, directly or indirectly as a result of criminal activity relating to a Scheduled Offence that can be regarded as proceeds of crime.

28. Expanding further, on the basis of the definition of "proceeds of crime", it would show that the term encompasses three types of properties.

(i) Those property/properties which is/are derived or obtained, directly or indirectly by any person as a result of criminal activity relating to a Schedule Offence – First Category.

(ii) Value of any such property. The expression "such" used clearly denotes the value of such property/properties as mentioned in the first category – Second Category.

(iii) Any other property/properties in India or abroad immaterial of such property/properties having a connection with the criminal activity relating to

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the Scheduled Offence if the property/properties of the first category is held or taken outside the country - Third Category.

29. An interesting aspect which this Court finds it relevant to observe is that in the main definition of "proceeds of crime", more particularly dealing with the first category of the property/properties, the words used are property derived or obtained, directly or indirectly by any person as a result of a criminal activity relating to a Scheduled Offence. However, if this Court takes note of the Explanation, the words used are "criminal activity relatable to the Scheduled Offence". The terms "relating to Scheduled Offence" and "relatable to Scheduled Offence" have been used by the legislature while defining the term "proceeds of crime". The question arises why? The terms "relating" and "relatable" are distinct adverbal expressions. While the former denotes in connection with a Scheduled Offence whereas the latter connotes possibility to connect to a Scheduled Offence. The only reason for doing so is to bring the second and third category of property within the fold of "proceeds of crime". Further to that, the definition of "proceeds of crime" does not state that property/properties derived or obtained after the offence is made a Scheduled offence would come within the fold of proceeds of crime. The definition envelopes all properties derived or obtained, directly or indirectly as a result of a criminal activity relating to or relatable to a Scheduled Offence. Simply put, all properties derived or obtained, directly or indirectly, as a result of a criminal activity relating to or relatable to a Scheduled Offence would be proceeds of crime, irrespective of when the said property/properties is/are derived or obtained. In the opinion of this Court, any other interpretation would go against the legislative intent behind the Act of 2002.

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30. The above aspect would be further clear from a further analysis of Section 3 of the Act of 2002. From the language so employed in Section 3, it would show that the offence of money-laundering is an independent offence regarding the process or activity connected with the proceeds of crime which had been derived or obtained as a result of a criminal activity relating to or relatable to a Scheduled Offence. The inclusion of various offences in Part-A, Part-B, Part-C of the Schedule to the Act of 2002 brings any criminal activity in relation to the Scheduled Offence or relatable to the Scheduled Offence within the fold of the Act of 2002. At the cost of repetition, it reiterated that the process or activity as clarified in the Explanation to Section 3 of the Act of 2002 includes concealment or possession or acquisition or use or projecting as untainted property or claiming as untainted property. Further to that, this process or activity would be a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by any of the activities aforementioned. Therefore, the involvement in any one of such process or activity connected with the proceeds of crime would constitute the offence of money-laundering. The offence of money-laundering in the opinion of this Court has nothing to do with the criminal activity relating to the Schedule Offence except the proceeds of crime derived or obtained as result of that crime.

31. The Supreme Court in the case of ***Vijay Madanlal Choudhary (supra)*** had dealt with this aspect of the matter specifically in paragraph No.270 and 296 and observed that it would be an offence of money-laundering to indulge in or to assist or being party to the process or activity connected with the proceeds of crime and such process or activity in a given situation may be a continuing offence, irrespective of the date and time of the

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commission of the Scheduled Offence. The Supreme Court categorically observed in the said decision that the criminal activity may have been committed before the same have been notified as a scheduled offence for the purpose of the Act of 2002. But if a person has indulged in or continues to indulge directly or indirectly in dealing with the proceeds of crime, derived or obtained from such criminal activity even after it has been notified as a Scheduled Offence, may be liable to be prosecuted for offence of money-laundering under the Act of 2002 – for continuing to possess or conceal the proceeds of crime (fully or in part) or retaining possession thereof or using it in trenches until fully exhausted. It was further observed that the relevant date i.e. the date on which the person indulges in the process or activity connected with such proceeds of crime irrespective of when the property was derived or obtained. Paragraph Nos. 270 and 296 of the said judgment is quoted herein under.

> "***270***. *Needless to mention that such process or activity can be indulged in only after the property is derived or obtained as a result of criminal activity (a scheduled offence). It would be an offence of money -laundering to indulge in or to assist or being party to the process or activity connected with the proceeds of crime; and such process or activity in a given fact situation may be a continuing offence, irrespective of the date and time of commission of the scheduled offence. In other words, the criminal activity may have been committed before the same had been notified as scheduled offence for the purpose of the 2002 Act, but if a person has indulged in or continues to indulge directly or indirectly in dealing with proceeds of crime, derived or obtained from such criminal activity even after it has been notified as scheduled offence, may be liable to be prosecuted for offence of money-laundering under the 2002 Act — for continuing to possess or conceal the proceeds of crime (fully or in part) or retaining possession thereof or uses it in*

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trenches until fully exhausted. 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); and the same has been merely explained and clarified by way of Explanation vide Finance (No. 2) Act, 2019. Thus understood, inclusion of Clause (ii) in Explanation inserted in 2019 is of no consequence as it does not alter or enlarge the scope of Section 3 at all.

***296**. Be it noted that the attachment must be only in respect of property which appears to be proceeds of crime and not all the properties belonging to concerned person who would eventually face the action of confiscation of proceeds of crime, including prosecution for offence of money-laundering. As mentioned earlier, the relevant date for initiating action under the 2002 Act — be it of attachment and confiscation or prosecution, is linked to the inclusion of the offence as scheduled offence and of carrying on the process or activity in connection with the proceeds of crime after such date. The pivot moves around the date of carrying on the process and activity connected with the proceeds of crime; and not the date on which the property has been derived or obtained by the person concerned as a result of any criminal activity relating to or relatable to the scheduled offence."*

32. This Court now finds it relevant to take note of that the observations made by the Supreme Court in Paragraph No.296 as quoted above further makes it clear that the pivot moves around the date of carrying on the process or activity connected with the proceeds of crime and not on the date when the property was derived or obtained by the person concerned as a result of a criminal activity in relation to or relatable to a Scheduled Offence.

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The judgments of both the Delhi High Court in the case of ***Axis Bank (supra)*** as well as Punjab and Haryana High Court in the case of ***Seema Garg (supra)*** which in the opinion of this Court would therefore neither help the Petitioners nor the Respondents in view of the categorical observations made by the Supreme Court in the above quoted paragraphs.

33. In the backdrop of the above, let this Court take the third point for determination formulated above. It would be seen from the impugned order that for the period from 01.04.1986 to 2012, the total income of the Petitioner No.1, his wife, son and daughter from all known sources was arrived at Rs.2,17,95,572/-. It was also mentioned in the said impugned order that the total expenditure so made was Rs.3,60,54,636/- and the difference amount was Rs.1,42,59,064/- which was opined to disproportionate assets. Therefore, from a perusal of the said impugned order, it appears that there is an allegation of criminal activity relating to offences under the Act of 1988 having been committed between the period from 1986 to 2012. It is also alleged that during this period, various properties were derived or obtained by the Petitioners which included the 3 properties as mentioned in the Schedule of the impugned order which was attached. No doubt, various offences under the Act of 1988 were brought within the fold of the Scheduled Offences w.e.f 01.06.2009 but the moment, the Act of 1988 and more particularly those provisions of the Act of 1988 were brought within the ambit of the Act of 2002, any property derived or obtained, directly or indirectly as a result of the criminal activity in relation to the Act of 1988 would become proceeds of crime. The question whether it would amount to money-laundering or not would be dependent upon process or activity as regards the proceeds of crime. This aspect of the

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matter is very clear from a reading of Paragraph Nos. 270 and 296 of the judgment in the case of ***Vijay Madanlal Choudhary (supra)*** which have been quoted hereinabove. Therefore, the properties mentioned in the Schedule to the impugned order including the property acquired vide the Deed of Sale dated 06.03.1997 would come within the fold of proceeds of crime provided the property/properties are derived or obtained directly or indirectly by the Petitioners as a result of a criminal activity relating to or relatable to a Scheduled Offence. It is also observed that in the circumstances, the Authorized Officer treats the property/properties as proceeds of crime, the Petitioners would be at liberty before the Authorities under the Act of 2002 to establish that the crime property have been rightly owned and possessed by them and such property by no stage of imagination can be termed as crime property and exconscequenti proceeds of crime within the meaning of Section 2(1)(u) of the Act of 2002. This therefore answers the third point for determination so formulated above.

34. In the backdrop of the above, let this Court deal with the second point for determination as to whether the Respondent No.2 had fulfilled the condition precedents for invoking the jurisdiction for passing the impugned order under second proviso to Section 5(1) of the Act of 2002?

35. The main provision of Section 5(1) would show that the said provision empowers the Director or the Officers not below the rank of a Deputy Director authorized by the Director to provisionally attach property. It further reveals that for exercising the said jurisdiction, the Director or any Officer not below the rank of the Deputy Director so authorized by the Director has to have reasons to believe (the reasons for such believe to be recorded in

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writing) on the basis of materials in his possession that

(a) Any person is in possession of any proceeds of crime; and

(b) Such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under Chapter-III.

On the basis of the said reasons to believe or for that matter the formation of the opinion which is required to be recorded in writing, the Director or any other Officer not below the rank of the Deputy Director by an order in writing, provisionally attach such property for a period not exceeding 180 days from the date of the order in such a manner as may be prescribed. There are three provisos to Sub-Section (1) of Section 5 of the Act of 2002.

The first proviso stipulates that no such order of attachment shall be made unless, in relation to the Scheduled Offence, a report has been forwarded to the Magistrate under Section 173 of the Code of Criminal Procedure, 1973 or a complaint has been filed by a person authorized to investigate the offence mentioned in that Schedule, before a Magistrate or Court for taking cognizance of the Scheduled Offence, as the case may be, or a similar report or complaint has been made or filed under the corresponding law of any other country. In other words, filing of a police report or a complaint before a Magistrate or Court in relation to the Scheduled Offence had been a pre-condition for issuing an order of provisional attachment as per the first proviso.

The second proviso stipulates that the Authorized Officer has to record

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satisfaction and reasons for his belief in writing on the basis of materials in his possession that the property (proceeds of crime) involved in money-laundering if not attached immediately would frustrate the proceedings under the Act of 2002. Normally, an order of provisional attachment under Section 5(1) of the Act of 2002 can be passed on filing of police report or private complaint in relation to a Scheduled Offence. However, vide the second proviso, the Authorized Officer is empowered to act even without fulfilling the requirement under the first proviso provided he records his satisfaction and reasons to believe in writing on the basis of the materials in his possession that if the property (proceeds of crime) involved in money-laundering is not attached immediately would frustrate the proceedings under the Act of 2002. The second proviso on the face of it shows that the Authorized Officer had been empowered to invoke urgent powers to provisionally attach property (proceeds of crime). In doing so, the Authorized Officer has to record the reasons on the basis of the materials in his possession that he has reasons to believe that the offence of money-laundering has been committed and if the provisional attachment order is not passed on an urgent basis, it would frustrate any proceedings under the Act of 2002. In other words, the Authorized Officer has to have reasons to believe on the basis of materials in his possession about the existence of the three P's i.e. **person, process** and **product** which he has to record in writing. At the cost of repetition, it is observed that the Authorized Officer is required to record in writing the reasons for formation of the belief that offence of money-laundering has been committed. In addition to the above, the Authorized Officer has to record the reasons for formation of his belief in writing that there is urgency to invoke the powers under the second proviso

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to Section 5(1) of the Act of 2002, taking into consideration that such extraordinary powers have been conferred only to be exercised with immediacy.

The third proviso to Section 5(1) of the Act of 2002 stipulates that while computing the 180 days of the validity of the provisional attachment order, the period of stay by the High Court shall be excluded and further period not exceeding 30 days from the date of order of vacation of such stay order shall be counted. This third proviso assumes relevance taking into account that this Court vide order dated 10.09.2020 had stayed the impugned order dated 24.06.2020 and presently the stay order is in operation.

36. This Court finds it very pertinent to observe that Section 5(1) of the Act of 2002 envisages an action of provisional attachment can be initiated only on the basis of materials in possession of the Authorized Officer indicative of any person being in possession of proceeds of crime. The precondition of being proceeds of crime is that the property has been derived or obtained, directly or indirectly by any person as a result of criminal activity relating to a Scheduled Offence. The sweep of Section 5(1) of the Act of 2002 is not limited to the accused named in the criminal activity relating to a Scheduled Offence but would also apply to any person if he is involved in any process or activity connected with proceeds of crime. Such a person besides facing the consequence of a provisional attachment order, may end up being named as accused in the complaint to be filed by the Authorized Officer concerning offences under Section 3 of the Act of 2002.

37. At this stage, this Court finds it relevant to take note of the term "reasons to believe". The said term came up for consideration in the context

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of Act of 2002 in the case of ***P. Chidambaram Vs. Director of Enforcement*** *reported in* ***(2019) 9 SCC 24*** and it was observed that the said term "reasons for believe" having not been defined in the Act of 2002, the expression "reasons to believe" as defined in Section 26 of the Indian Penal Code was taken into consideration. It was observed that a person is said to have reasons to believe a thing if he has sufficient cause to believe that thing but not otherwise. It was observed that the specified officer therefore must have reasons to believe on the basis of the materials in his possession that the property sought to be attached is likely to be concealed, transferred or dealt with in a manner which may result in frustrating any proceedings for confiscation of their property under the Act of 2002. Paragraph No.29 of the said judgment in the case of ***P. Chidambaram (supra)*** is reproduced herein below.

> "***29.*** *The term "reason to believe" is not defined in PMLA. The expression "reason to believe" has been defined in Section 26 IPC. As per the definition in Section 26 IPC, a person is said to have "reason to believe" a thing, if he has sufficient cause to believe that thing but not otherwise. The specified officer must have "reason to believe" on the basis of material in his possession that the property sought to be attached is likely to be concealed, transferred or dealt with in a manner which may result in frustrating any proceedings for confiscation of their property under the Act. It is stated that in the present case, exercising power under Section 5 of PMLA, the adjudicating authority, had attached some of the properties of the appellant. Challenging the attachment, the appellant and others are said to have preferred appeal before the Appellate Tribunal and stay has been granted by the appellate authority and the said appeal is stated to be pending."*

38. Before further proceedings on the point of determination in hand, this Court would like to deal with one categorical submission of the learned

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Senior counsel for the Petitioners that the reasons which have been recorded has to be mentioned in the Provisional Attachment Order or for that matter, the said reasons are to be furnished to the Petitioners. In the opinion of this Court, the said submission is totally misconceived inasmuch as a perusal of Section 5 of the Act of 2002 do not in any manner stipulate that the said reasons to believe which is required to be recorded in writing is to be furnished to the person whose property have been provisionally attached or the reasons so recorded are to be a part of the Provisional Attachment Order. A similar submission has also been made in respect to Section 8 of the Act of 2002 by filing an additional affidavit which in the opinion of this Court is also fallacious for the same reason as Section 8 of the Act of 2002 also does not require the furnishing of the reasons. At this stage, this Court finds it relevant to take note of the judgment of the Supreme Court in the case of ***S. Narayanappa Vs. CIT*** *reported in* ***(1967) 63 ITR 2019*** wherein the Supreme Court categorically dealt with this specific question of furnishing of the reasons in the context of the Income Tax Act, 1922. Paragraph No.4 of the said judgment of the said case is reproduced herein below:

> "*4. It was also contended for the appellant that the Income Tax Officer should have communicated to him the reasons which led him to initiate the proceedings under Section 34 of the Act. It was stated that a request to this effect was made by the appellant to the Income Tax Officer, but the Income Tax Officer declined to disclose the reasons. In our opinion, the argument of the appellant on this point is misconceived. The proceedings for assessment or re-assessment under Section 34(1)(a) of the Income Tax Act start with the issue of a notice and it is only after the service of the notice that the assessee, whose income in sought to be assessed or re-assessed, becomes a party to those proceedings. The earlier stage of the proceeding for recording the*

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reasons of the Income Tax Officer and for obtaining the sanction of the Commissioner are administrative in character and are not quasi judicial. The scheme of Section 34 of the Act is that, if the conditions of the main section are satisfied a notice has to be issued to the assessee containing all or any of the requirements which may be included in a notice under sub-section (2) of Section 22. But before issuing the notice, the proviso requires that the officer should record his reasons for initiating action under Section 34 and obtain the sanction of the Commissioner who must be satisfied that the action under Section 34 was justified. There is no requirement in any of the provisions of the Act or any section laying down as a condition for the initiation of the proceedings that the reasons which induced the Commissioner to accord sanction to proceed under Section 34 must also be communicated to the assessee. In Presidency Talkies Ltd. v. First Additional Income Tax Officer, City Circle II, Madras the Madras High Court has expressed a similar view and we consider that that view is correct. We accordingly reject the argument of the appellant on this aspect of the case."

39. Apart from the above, this Court finds another reason why the said reasons so recorded in writing need not be furnished. In the previous segments of the instant judgment, this Court dealt with the Rules of 2005 which specifically dealt with the manner of forwarding a copy of the order of provisional attachment of property along with materials and copy of the reasons along with the materials in respect of the survey to the Adjudicating Authority and its period of retention. A reading of Rule 3 and 4 of the Rules of 2015 clearly shows that the materials so forwarded including the reasons has to be kept confidential and as such the question does not arise of providing the reasons so recorded in writing more so when the Act of 2002 is completely silent on the said aspect.

40. Now let this Court again proceed as to whether the conditions

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precedent for issuing the impugned provisional attachment order was duly satisfied. During the course of hearing, the reasons so recorded in writing by the Respondent No.2 was placed before this Court. From a perusal of the reasons, it reveals that the Respondent No.2 had recorded that he had reasons to believe that the properties which have been attached were proceeds of crime. However, in recording the reasons, the Respondent No.2 failed to record reasons that to his belief, an offence of money-laundering has been committed or for that matter, the existence of the three P's i.e. **Person**, **product** and **proceed**. Merely, the Respondent No.2 came to an opinion that the property to be attached were proceeds of crime. This in the opinion of this Court do not satisfy the requirement of the second proviso to Section 5(1) of the Act of 2002.

41. A further analysis of the "reasons to believe" which was placed before this Court shows that the Respondent No.2 ordered provisional attachment of the immovable properties valued at Rs.1,48,71,198/- as detailed in the table under Paragraph No.20 of the provisional attachment order for a period of 180 days. This aspect of the matter therefore makes it very clear that the said "reasons to believe" was recorded subsequent to the provisional attachment order being made. However, if this Court takes note of Section 5(1) of the Act of 2002 as well as the second proviso to Section 5(1) of the Act of 2002, it would show that the reasons to believe (the reasons for such belief to be recorded in writing) is a precondition for issuance of a provisional attachment order. If that be so, the reasons to believe in the instant case having referred to the provisional attachment order makes it clear that the said reasons to believe which were recorded in writing was done subsequent to the impugned provisional attachment order. Under such

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circumstances, it was a clear infraction to the provision of Section 5(1) of the Act of 2002 as well as the second proviso to Section 5(1) of the Act of 2002.

42. This Court finds it relevant to take note of a very pertinent aspect of the matter. In the proceedings before the Supreme Court in the case of ***Vijay Madanlal Choudhary (supra)***, there was a challenge to the amendment made to the second proviso to Section 5(1) of the Act of 2002 on the ground that the said proviso provided unbridled power upon the Authorized Officer to provisionally attach any property dehors the first proviso to Section 5(1) of the Act of 2002. The Supreme Court observed in that context that the second proviso to Section 5(1) as well as Section 5(1) itself of the Act of 2002 provided sufficient safeguards to be adhered by the Authorized Officer before issuing provisional attachment order in respect to the proceeds of crime. It was observed that only upon recording satisfaction regarding the twin requirements referred to in Sub-Section (1) of Section 5 of the Act of 2002, the Authorized Officer can proceed to issue order of provisional attachment of such proceeds of crime. Further to that, it was also observed that the Authorized Officer has to form his opinion and delineate the reasons for such belief to be recorded in writing which indeed is not on the basis of assumption but on the basis of material in his possession. It was also categorically observed that the order of provisional attachment is thus the outcome of such satisfaction already recorded by the authorized officer.

43. This Court further finds relevant to take note of paragraph No. 300(i) and (ii) of the said judgment wherein the Supreme Court amongst others has also dealt with the procedural safeguards in respect to provisional attachment. Paragraph Nos. 300 (i) and (ii) of the judgment in the case of

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Vijay Madanlal Choudhary (supra) is quoted herein under:

> "***300***. *The procedural safeguards provided in respect of provisional attachment are effective measures to protect the interest of the person concerned who is being proceeded with under the 2002 Act, in the following manner as rightly indicated by the Union of India:*
>
> *(i) For invoking the second proviso, the Director or any officer not below the rank of Deputy Director will have to first apply his mind to the materials on record before recording in writing his reasons to believe is certainly a sufficient safeguard to the invocation of the powers under the second proviso to Section 5(1) of the 2002 Act.*
>
> *(ii) There has to be a satisfaction that if the property involved in money-laundering or "proceeds of crime" are not attached "immediately", such non-attachment might frustrate the confiscation proceedings under the 2002 Act.*
>
> *(iii) ....."*

44. This Court also finds it relevant to refer to another judgment of the Supreme Court in the case of ***P. Chidambaram (supra)*** wherein the Supreme Court while dealing with the main provision of Section 5(1) of the Act of 2002 categorically observed that for formation of the opinion which is required to be recorded in writing, the same has to be on the basis of the materials in the possession of the authorized officer that (a) any person is in possession of any proceeds of crime; and (b) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under Chapter III. Paragraph No. 28 of the said judgment being relevant is quoted herein under:

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> "***28.*** *Section 5 of PMLA which provides for attachment of property involved in money-laundering, states that where the Director or any other officer not below the rank of Deputy Director authorised by the Director for the purposes of this Section, has "reason to believe" (the reason for such belief to be recorded in writing), on the basis of material in his possession, that (a) any person is in possession of any proceeds of crime; and (b) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under Chapter III, he may, by order in writing, provisionally attach such property for a period not exceeding one hundred and fifty days from the date of the order, in such manner as may be prescribed. Section 5 provides that no such order of attachment shall be made unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under Section 173 of the Code of Criminal Procedure, 1973 (2 of 1974), or a complaint has been filed by a person authorised to investigate the offence mentioned in that Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be."*

45. In the backdrop of the above, if this Court again reverts back to the "reasons to believe" which was placed before this Court, there is not a single whisper as to what materials were available with the Respondent No.2 that the properties which have been attached, if left unattached, the said properties would be transferred, disposed, parted with or otherwise dealt with. There is not a single mention as regards the reasons for immediacy for the purpose of passing the impugned order. On the other hand, the reasons to believe so recorded by the Respondent No.2 mentioned that if the properties were left unattached, they are likely to be transferred, disposed of, parted with or otherwise dealt with in any manner prejudicial to the

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purpose of investigation carried out under the provisions of the Act of 2002. As already stated, there was no mention of the materials in possession on the basis of which the said belief was formed. It is apposite to observe that merely reiterating the language of the statute sans without recording the basis on what materials, the belief was formed in writing, would not be in consonance with the provisions of Section 5(1) as well as the second proviso to Section 5(1) of the Act of 2002. Under such circumstances, in the opinion of this Court, the condition precedent being not satisfied, the Respondent No.2 could not have issued the impugned order under the second proviso to Section 5(1) of the Act of 2002 or even under the less stringent Section 5(1) of the Act of 2002. Consequently, the impugned order is contrary to Section 5(1) as well as also to the second proviso to Section 5(1) of the Act of 2002 for which the said impugned order is required to be interfered with.

46. In view of the above determination as this Court is of the opinion that the impugned order is required to be interfered with, the consequential effect thereof would be that the adjudication proceedings so initiated on the basis of the complaint filed under Section 5(5) of the Act of 2002 has also to fail inasmuch as without there being a valid provisional attachment order, the adjudicating authority does not get jurisdiction to exercise its powers in terms with Section 8 of the Act of 2002.

47. In the backdrop of the above discussions and analysis, this Court concludes the instant proceedings on the basis of the following observations and directions which are enumerated herein under:

(A) The writ petition challenging the impugned Provisional Attachment Order dated 24.06.2020 is maintainable.

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(B) Being maintainable only would not suffice; the Court while exercising the jurisdiction under Article 226 of the Constitution is required to entertain the writ petition. The entertainability of the writ petition in a case when alternative remedies are available would depend on various factors as detailed out by the Supreme Court in the case of ***Whirlpool Corporation Ltd. (supra)*** as well as ***Godrej Sara Lee Ltd. (supra)***. In the instant case, the questions raised relates to challenging the impugned order on the ground that it was wholly without jurisdiction as the preconditions for issuing the impugned order as stipulated in Section 5(1) of the Act of 2002 as well as the second proviso to Section 5(1) of the Act of 2002 were not fulfilled. The second question raised is a pure question of law as to whether a property derived or obtained prior to the enactment of the Act of 2002 or for that matter prior to the Act of 1988 being made a Scheduled Offence can be treated as a proceeds of crime. These questions raised being questions of law and questions challenging the jurisdiction, in the opinion of this Court, require that the instant writ petition be entertained.

(C) The term "proceeds of crime" as defined in Section 2(1)(u) of the Act of 2002 relates to property/properties derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a Scheduled Offence or the value of such property or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad. Therefore, the said definition of proceeds of crime encompasses three kinds of properties as detailed above in the instant judgment.

(D) The term "proceeds of crime" do not in any manner refer to the date

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the property/properties were derived or obtained. What it stipulates is that any property/properties derived or obtained, directly or indirectly as a result of a criminal activity relating to or relatable to a Scheduled Offence. Therefore, the emphasis is on the property/properties derived or obtained as a result of a criminal activity relating to or relatable to a Scheduled Offence. The date of acquisition of the property being prior to the enactment of the Act of 2002 or the Act of 1988 being made a Scheduled Offence w.e.f 01.06.2009 has therefore no relevance. What is relevant is when the Officer empowered under the Act of 2002 is taking up the matter, he has to form an opinion as to whether the property/properties were derived or obtained, directly or indirectly by a person as a result of a criminal activity relating to or relatable to a Scheduled Offence.

(E) The contention of the Petitioners that the property acquired vide the Deed of Sale dated 06.03.1997 could not have been brought within the fold of proceeds of crime is totally misconceived and fallacious.

(F) In order to exercise the powers under Section 5(1) of the Act of 2002, the twin conditions laid down has to be satisfied i.e. any person is in possession of any proceeds of crime and such proceeds of crime are likely to be concealed, transferred or dealt with in a manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under Chapter-III. This satisfaction has to be arrived at on the basis of materials in possession and the same has to be recorded in writing that the Authorized Officer has a belief of the existence of the twin conditions on the basis of the materials in his possession.

(G) The very definition of proceeds of crime would show that there are

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three categories of properties which can be proceeds of crime as detailed in the instant judgment above. It would be seen that from the said definition itself, the properties in the second category and the third category depend on the identification of the property of the first category. Therefore without identification of the property of the first category, the Authorized Officer cannot apply the second and third category. In the opinion of this Court, in the instant case, the Respondent No.2 recorded his reasons to believe without identifying which properties were actually proceeds of crime and merely on the difference between the known income and the assessment of the value of the assets of the Petitioners and their family members had arrived at the opinion that the properties mentioned in the Schedule to the impugned order are proceeds of crime. This was done on an incorrect interpretation of the terms "proceeds of crime" as would be seen from the law laid down herein as well as the Supreme Court in the case of ***Vijay Madanlal Choudhary (supra)*** more so when the said expression "proceeds of crime" is required to be construed strictly.

(H) For the purpose of taking action under the second proviso to Section 5(1) of the Act of 2002, the Authorized Officer has to record his reasons to believe that the offence of money-laundering have been committed in his opinion and if the "proceeds of crime" are not attached immediately, it would frustrate the proceedings under the Act of 2002. These reasons to believe have to be on the basis of materials in possession of the Authorized Officer and the same are required to be recorded in writing. In other words, the Authorized Officer has to come to an opinion on the basis of the materials in his possession as regards the existence of the three P's i.e. **person**, **process** and **product**. However, nothing as such is discernible in

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the reasons so recorded which was placed before this Court. There is no mention why the impugned order is required to be issued with immediacy or else the proceedings under the Act of 2002 shall be frustrated.

(I) There is no requirement for providing the reasons so recorded in writing to the person whose property is provisionally attached as well as there is no requirement that such reasons has to be a part of the provisional attachment order, for the reasons already discussed in the judgment.

(J) The impugned order so passed is contrary to the requirements of Section 5(1) of the Act of 2002 as well as the second proviso to Section 5(1) of the Act of 2002 for which the impugned order is set aside and quashed.

(K) The consequences of setting aside the impugned order is that the adjudication proceedings so initiated on the basis of the Show Cause notice dated 07.08.2020 by the Adjudicating Authority has also to be set aside and quashed as the Adjudicating Authority gets the jurisdiction only on the basis of an existing Provisional Attachment Order, which this Court had set aside and quashed.

(L) The decision herein to set aside the impugned order as well as the proceedings before the Adjudicating Authority shall not act as a bar to exercise jurisdiction under Section 5 of the Act of 2002 by the Respondents by following the mandate of law and more specifically the provisions of the Act of 2002.

(M) The interim order so passed on 24.11.2020 in I.A.(Civil) No.1813/2020, no longer survives in view of the above adjudication.

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(N) In the present facts, there shall be no order as to costs.

48. The writ petition accordingly stands disposed of.

JUDGE

Comparing Assistant

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