2024 INSC 512

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 2493 OF 2024

ARVIND KEJRIWAL ..... APPELLANT

VERSUS

DIRECTORATE OF ENFORCEMENT ..... RESPONDENT

J U D G M E N T

SANJIV KHANNA, J.

This appeal filed by the appellant – Arvind Kejriwal assails the judgment and order dated 09.04.2024 passed by the single Judge of the High Court of Delhi whereby the Criminal Writ Petition filed by Arvind Kejriwal under Articles 226 and 227 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973[1], challenging his arrest by the Directorate of Enforcement[2], *vide* the arrest order dated 21.03.2024, on the ground of violation of Section 19 of the Prevention of Money Laundering Act, 2002[3], and the proceedings pursuant thereto including the order of remand dated 22.03.2024 to the custody of DoE passed by the Special Judge, has been rejected.

2. At the outset, we must clarify that this is not an appeal against refusal or grant of bail. Instead, this appeal impugns the validity of arrest under Section 19 of

[1] For short, the "Code".
[2] For short, "DoE".
[3] For short, the "PML Act".

the PML Act. It raises a pivotal question regarding the scope and ambit of the trial court/courts to examine the legality of the arrest under Section 19. The issue is legal in nature, and with the ratio being propounded in detail, the decision becomes complex and legalistic.[4]

3. On 17.08.2022, the Central Bureau of Investigation[5] registered RC No. 0032022A0053 for the offences punishable under Section 120B read with Section 477A of the Indian Penal Code, 1860[6] and Section 7 of the Prevention of Corruption Act, 1988. The registration was based on a complaint dated 20.07.2022, made by the Lieutenant Governor of the Government of National Capital Territory[7] of Delhi, and on the directions of the competent authority conveyed by the Director, Ministry of Home Affairs, Government of India.

4. Later, on 25.11.2022, the CBI filed a chargesheet. Thereafter, on 25.04.2023 and 08.07.2023, two supplementary chargesheets were filed. On 15.12.2022, the Special Court took cognisance of the offences. The chargesheets *inter alia* allege that the excise policy, framed for the sale of liquor in NCT of Delhi, was a product of criminal conspiracy. It was hatched by a cartel of liquor manufacturers, wholesalers and retailers and it provided undue pecuniary gain to public servants and other accused in the conspiracy. It resulted in huge losses to the government exchequer and ultimately to the public. Arvind Kejriwal is not an accused in the said chargesheets.

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[4] While introducing the Prevention of Money Laundering (Amendment) Bill, 2012 in the Rajya Sabha on 17.12.2012, the then Finance Minister, Mr. P Chidambaram, stated, "Firstly, we must remember that money-laundering is a very technically-defined offence. It is not the way we understand 'money-laundering in a colloquial sense." This has been quoted with approval in *Vijay Madanlal Choudhary and others* v. *Union of India and others*, (2022) SCC OnLine SC 929, at paragraph 35.

[5] For short, "CBI".

[6] For short, "IPC".

[7] For short, "NCT".

5. On 22.08.2022, the DoE recorded ECIR No. HIU-II/14/2022 based on offences detailed under the RC registered by CBI. The offences under the RC are the predicate offence for investigation/inquiry into the scheduled offences under the PML Act. On 26.11.2022, the DoE filed the first prosecution complaint. On 20.12.2022, the Special Court took cognisance. Since then, the DoE has filed seven supplementary prosecution complaints. In the last complaint, that is, the Seventh Supplementary Prosecution Complaint dated 17.05.2024, Arvind Kejriwal has been named as an accused.

6. On 30.10.2023, Arvind Kejriwal was issued notice under Section 50 of the PML Act for his appearance and recording of statement. Thereafter, eight summons were issued till his arrest on 21.03.2024. DoE states that Arvind Kejriwal failed to appear and join the investigation. Arvind Kejriwal claims that the summons and notices under Section 50 were illegal, bad in law and invalid.[8]

7. The cardinal ground taken in the present appeal is that Arvind Kejriwal was arrested in violation of Section 19(1) of the PML Act. It is contended that the arrest was illegal, which makes the order of remand to custody of the DoE passed by the Special Court dated 01.04.2024 also illegal. Therefore, it would be apt to begin by referring to Section 19 and elucidating how the Courts have interpreted and applied the section.

8. Section 19 of the PML Act reads:

> "**19. Power to arrest**.—(1) If the Director, Deputy Director, Assistant Director or any other officer authorised in this behalf by the Central Government by general or special order, has on the

[8] We are not directly examining the question of validity of the summons and notices, though the effect and failure to appear is one of the aspects which will be noticed subsequently.

> basis of material in his possession, reason to believe (the reason for such belief to be recorded in writing) that any person has been guilty of an offence punishable under this Act, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.
>
> (2) The Director, Deputy Director, Assistant Director or any other officer shall, immediately after arrest of such person under sub-section (1), forward a copy of the order along with the material in his possession, referred to in that sub-section, to the Adjudicating Authority, in a sealed envelope, in the manner as may be prescribed and such Adjudicating Authority shall keep such order and material for such period, as may be prescribed.
>
> (3) Every person arrested under sub-section (1) shall, within twenty-four hours, be taken to a Special Court or Judicial Magistrate or a Metropolitan Magistrate, as the case may be, having jurisdiction:
>
> Provided that the period of twenty-four hours shall exclude the time necessary for the journey from the place of arrest to the Special Court or Magistrate's Court."

9. A bare reading of the section reflects, that while the legislature has given power to the Director, Deputy Director, Assistant Director, or an authorised officer to arrest a person, it is fenced with preconditions and requirements, which must be satisfied prior to the arrest of a person. The conditions are –

- ⇒ The officer must have material in his possession.
- ⇒ On the basis of such material, the authorised officer should form and record in writing, "reasons to believe" that the person to be arrested, is guilty of an offence punishable under the PML Act.
- ⇒ The person arrested, as soon as may be, must be informed of the grounds of arrest.

These preconditions act as stringent safeguards to protect life and liberty of individuals. We shall subsequently interpret the words "material", "reason to believe", and "guilty of the offence". Before that, we will refer to some judgments

of this Court on the importance of Section 19(1) and the effect on the legality of the arrest upon failure to comply with the statutory requirements.

10. In ***Pankaj Bansal*** v. ***Union of India and others***,[9] interpreting Section 19 of the PML Act with reference to Article 22(1) of the Constitution of India,[10] this Court has observed:

> "32. In this regard, we may note that Article 22(1) of the Constitution provides, *inter alia*, that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest. This being the fundamental right guaranteed to the arrested person, the mode of conveying information of the grounds of arrest must necessarily be meaningful so as to serve the intended purpose. It may be noted that Section 45 of the Act of 2002 enables the person arrested under Section 19 thereof to seek release on bail but it postulates that unless the twin conditions prescribed thereunder are satisfied, such a person would not be entitled to grant of bail. The twin conditions set out in the provision are that, firstly, the Court must be satisfied, after giving an opportunity to the public prosecutor to oppose the application for release, that there are reasonable grounds to believe that the arrested person is not guilty of the offence and, secondly, that he is not likely to commit any offence while on bail. To meet this requirement, it would be essential for the arrested person to be aware of the grounds on which the authorized officer arrested him/her under Section 19 and the basis for the officer's 'reason to believe' that he/she is guilty of an offence punishable under the Act of 2002. It is only if the arrested person has knowledge of these facts that he/she would be in a position to plead and prove before the Special Court that there are grounds to believe that he/she is not guilty of such offence, so as to avail the relief of bail. Therefore, communication of the grounds of arrest, as mandated by Article 22(1) of the Constitution and Section 19 of the Act of 2002, is meant to serve this higher purpose and must be given due importance."

In the Court's view, Section 19 includes inbuilt checks that designated officers must adhere to. First, the "reasons to believe" of the alleged involvement of the arrestee have to be recorded in writing. Secondly, while affecting the arrest, the

[9] 2023 SCC Online SC 1244.

[10] "22. Protection against arrest and detention in certain cases.—(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice."

reasons shall be furnished to the arrestee. Lastly, a copy of the order of arrest along with the material in possession have to be forwarded to the safe custody of the adjudicating authority. This ensures fairness, objectivity and accountability of the designated officer while forming their opinion, regarding the involvement of the arrestee in the offence of money laundering.

11. Arrest under Section 19(1) of the PML Act may occur prior to the filing of the prosecution complaint and before the Special Judge takes cognizance.[11] Till the prosecution complaint is filed, there is no requirement to provide the accused with a copy of the ECIR.[12] The ECIR is not a public document. Thus, to introduce checks and balances, Section 19(1) imposes safeguards to protect the rights and liberty of the arrestee. This is in compliance with the mandate of Article 22(1) of the Constitution of India.

12. ***V. Senthil Balaji*** v. ***State and others***[13] similarly states that the designated officer can only arrest once they record "reasons to believe" in writing, that the person being arrested is guilty of the offence punishable under the PML Act. It is mandatory to record the "reasons to believe" to arrive at the opinion that the arrestee is guilty of the offence, and to furnish the reasons to the arrestee. This ensures an element of fairness and accountability.

13. The decision in ***V. Senthil Balaji*** (supra) has also examined the interplay between Section 19 of the PML Act and Section 167 of the Code. The magistrate is expected to do a balancing act as the investigation is to be

[11] See *Tarsem Lal* v. *Directorate of Enforcement, Jalandhar Zonal Office*, (2024) SCC Online SC 971.
[12] It appears that in several cases multiple complaints in same ECIR are filed. Whether a copy of the ECIR must be supplied to an accused has been examined in *Vijay Madanlal Choudhary* (supra) which has been referred to subsequently.
[13] (2024) 3 SCC 51.

concluded within 24 hours as a matter of rule. Therefore, the investigating agency has to satisfy the magistrate with adequate material on the need for custody of the arrestee. Magistrates must bear this crucial aspect in mind while examining and passing an order on the DoE's prayer for custodial remand. More significantly, the magistrate is under the bounden duty to ensure due compliance with Section 19(1) of the PML Act. Any failure to comply would entitle the arrestee to be released. Section 167 of the Code, therefore, enjoins upon the magistrate the necessity to satisfy due compliance of the law by perusing the order passed by the authority under Section 19(1) of the PML Act. Upon such satisfaction, the magistrate may consider the request for custodial remand.

14. ***Pankaj Bansal*** (supra) reiterates ***V. Senthil Balaji*** (supra) to hold that the magistrate/court has the duty to ensure that the conditions in Section 19(1) of the PML Act are duly satisfied and that the arrest is valid and lawful. This is in lieu of the mandate under Section 167 of the Code. If the court fails to discharge its duty in right earnest and with proper perspective, the remand order would fail on the ground that the court cannot validate an unlawful arrest made under Section 19(1). The Court relied on ***In the matter of Madhu Limaye and others,***[14] which held that it is necessary for the State to establish that, at the stage of remand, while directing detention in custody, the magistrate has applied their mind to all relevant matters. If the arrest itself is unconstitutional *viz.* Article 22(1) of the Constitution, the remand would not cure the constitutional infirmities attached to such arrest. The principle stands

[14] (1969) 1 SCC 292.

expanded, as the violation of Section 19(1) of the PML Act will equally vitiate the arrest.

15. In ***Pankaj Bansal*** (supra), one of the contentions raised by the DoE was that the legality of arrest is rendered immaterial once the competent court passes an order of remand. Reliance was placed on certain judgments. However, these judgments were distinguished on the ground that they primarily addressed writs of *habeas corpus* following remand orders by the jurisdictional court. Therefore, the ratios therein are not applicable to this scenario. In the context of statutory compliance, the Court observed in clear terms that if the arrest is not in conformity with Section 19(1) of the PML Act, the mere passing of an order of remand, in itself, would not be sufficient to validate the person's arrest. Thus, notwithstanding the order of remand, the issue whether the arrest of the person is lawful at its inception, is open for consideration and must be answered.

16. Recently, in ***Prabir Purkayastha*** v. ***State (NCT of Delhi)***,[15] this Court reiterated the aforesaid principles expounded in ***Pankaj Bansal*** (supra). The said principles were applied to the *pari materia* provisions[16] of the Unlawful Activities (Prevention) Act, 1967. The Court explained that Section 19(1) of the PML Act is meant to serve a higher purpose, and also to enforce the mandate of Article 22(1) of the Constitution. The right to life and personal liberty is sacrosanct, a fundamental right guaranteed under Article 21 and protected by Articles 20 and 22 of the Constitution. Reference was made to the observations of this Court in ***Roy V.D.*** v. ***State of Kerala***[17] that the right to be informed about

[15] 2024 SCC OnLine SC 934.
[16] Sections 43A, 43B and 43C of the UAPA.
[17] (2000) 8 SCC 590.

the grounds of arrest flows from Article 22(1) of the Constitution and any infringement of this fundamental right vitiates the process of arrest and remand. The fact that the chargesheet has been filed in the matter would not validate the otherwise illegality and unconstitutionality committed at the time of arrest and grant of remand custody of the accused. Reference is also made to the principle behind Article 22(5) of the Constitution. Thus, this Court held that not complying with the constitutional mandate under Article 22(1) and the statutory mandate of the UAPA, on the requirement to communicate grounds of arrest or grounds of detention, would lead to the custody or detention being rendered illegal.

17. In ***Vijay Madanlal Choudhary and others*** v. ***Union of India and others***,[18] a three Judge Bench of this Court distinguished between the stringent requirements stipulated in Section 19(1) of the PML Act, and the power of arrest given to the police in cognisable offences under Section 41 of the Code[19].

[18] (2022) SCC Online SC 929.

[19] "41. When police may arrest without warrant.—(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person—
(*a*) who commits, in the presence of a police officer, a cognizable offence;
(*b*) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:—
(*i*) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;
(*ii*) the police office is satisfied that such arrest is necessary—
(*a*) to prevent such person from committing any further offence; or
(*b*) for proper investigation of the offence; or
(*c*) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or
(*d*) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or
(*e*) as unless such person is arrested, his presence in the Court whenever required cannot be ensured, and the police officer shall record while making such arrest, his reasons in writing.
Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest.

Reference was made to Section 104 of the Customs Act, 1962,[20] which was elucidated and considered by the Constitution Bench of this Court in ***Ramesh Chandra Mehta*** v. ***State of West Bengal***[21], and in ***Union of India*** v. ***Padam Narain Aggarwal and others***[22]. On the safeguards against the abuse of the power of arrest in case of the Customs Act, ***Padam Narain Aggarwal*** (supra) observes that the power to arrest by a customs os anfficer is statutory in character. Such power can be exercised only in cases where the customs officer has the "reason to believe" that the person sought to be arrested is guilty of the offence punishable under the prescribed sections. ***Padam Narain Aggarwal*** (supra) observes:

> "36. From the above discussion, it is amply clear that power to arrest a person by a Customs Officer is statutory in character and cannot be interfered with. Such power of arrest can be exercised only in those cases where the Customs Officer has "reason to believe" that a person has been guilty of an offence punishable under Sections 132, 133, 135, 135-A or 136 of the Act. Thus, the power must be exercised on *objective facts* of *commission of an*

(*ba*) against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years whether with or without fine or with death sentence and the police officer has reason to believe on the basis of that information that such person has committed the said offence;
(*c*) who has been proclaimed as an offender either under this Code or by order of the State Government; or
(*d*) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or
(*e*) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or
(*f*) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or
(*g*) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or
(*h*) who, being a released convict, commits a breach of any rule made under sub-section (5) of Section 356; or
(*i*) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition."

[20] For short, "Customs Act".
[21] (1969) 2 SCR 461.
[22] (2008) 13 SCC 305.

> *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.
>
> 37. The section also obliges the Customs Officer to inform the person arrested of the grounds of arrest *as soon as may be*. The law requires such person to be produced before a Magistrate *without unnecessary delay*.
>
> 38. The law thus, on the one hand, allows a Customs Officer to exercise power to arrest a person who has committed certain offences, and on the other hand, takes due care to ensure individual freedom and liberty by laying down norms and providing safeguards so that the power of arrest is not abused or misused by the authorities. It is keeping in view these considerations that we have to decide correctness or otherwise of the directions issued by a Single Judge of the High Court. "Blanket" order of bail may amount to or result in an invitation to commit an offence or a passport to carry on criminal activities or to afford a shield against any and all types of illegal operations, which, in our judgment, can never be allowed in a society governed by the rule of law."

18. ***Vijay Madanlal Choudhary*** (supra) affirms the aforesaid ratio, and states that the safeguards provided as preconditions in Section 19(1) of the PML Act have to be fulfilled by the designated officer before affecting arrest. The safeguards are of a higher standard. They ensure that the designated officer does not act arbitrarily, and is made accountable for their judgment about the 'necessity to arrest' the person[23] alleged to be involved in the offence of money laundering, at the stage before the complaint is filed. Paragraph 89 reads as under:

> "89…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

[23] The aspect of necessity to arrest, has been independently examined later.

> 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 of the 2002 Act. The safeguards to be adhered to by the jurisdictional police officer before effecting arrest as stipulated in the 1973 Code, are certainly not comparable. Suffice it to observe that this power has been given to the high-ranking officials with further conditions to ensure that there is objectivity and their own accountability in resorting to arrest of a person even before a formal complaint is filed under section 44(1)(b) of the 2002 Act. Investing of power in the high-ranking officials in this regard has stood the test of reasonableness in Premium Granites (supra), wherein the court restated the position that requirement of giving reasons for exercise of power by itself excludes chances of arbitrariness. Further, in Sukhwinder Pal Bipan Kumar (supra), the court restated the position that where the discretion to apply the provisions of a particular statute is left with the Government or one of the highest officers, it will be presumed that the discretion vested in such highest authority will not be abused. Additionally, the Central Government has framed Rules under section 73 in 2005, regarding the forms and the manner of forwarding a copy of order of arrest of a person along with the material to the Adjudicating Authority and the period of its retention. In yet another decision in Ahmed Noormohmed Bhatti (supra), this court opined that the provision cannot be held to be unreasonable or arbitrary and, therefore, unconstitutional merely because the authority vested with the power may abuse his authority. (Also see Manzoor Ali Khan (supra).”

We respectfully agree with the ratio of the decisions in ***Pankaj Bansal*** (supra) and ***Prabir Purkayastha*** (supra), which enrich and strengthen the view taken in ***Vijay Madanlal Choudhary*** (supra), on the interpretation of Section 19 of the PML Act. Power to arrest a person without a warrant from the court and without instituting a criminal case is a drastic and extreme power. Therefore, the legislature has prescribed safeguards in the form of exacting conditions as to how and when the power is exercisable. The conditions are salutary and serve as a check against the exercise of an otherwise harsh and pernicious power.

19. Given that the legislature has prescribed preconditions to prevent abuse and unauthorised use of statutory power, the wielding of such power by an authorized person or authority cannot be conclusive. The exercise of the power and satisfaction of the conditions must and should be put to judicial scrutiny and examination, if the arrestee specifically challenges their arrest. If we do not hold so, then the restraint prescribed by the legislature would, in fact and in practice, be reduced to a mere formal exercise. Given the conditions imposed, the nature of the power and the effect on the rights of the individuals, it is nobody's case, and not even argued by the DoE, that the authorised officer is entitled to arrest a person without following the statutory requirements.

20. However, it has been argued by the DoE that the power to arrest is neither an administrative nor a quasi-judicial power as the arrest is made during investigation. Judicial scrutiny is not permissible as it will interfere with investigation, or at best should be limited to subversive abuse of law. Discretion and right to arrest vests with the competent officer, whose subjective opinion should prevail.

21. We do not agree and must reject this argument. We hold that the power of judicial review shall prevail, and the court/magistrate is required to examine that the exercise of the power to arrest meets the statutory conditions. The legislature, while imposing strict conditions as preconditions to arrest, was aware that the arrest may be before or prior to initiation of the criminal proceedings/prosecution complaint. The legislature, neither explicitly nor impliedly, excludes the court surveillance and examination of the preconditions of Section 19(1) of the PML Act being satisfied in a particular case. This flows

from the mandate of Section 19(3) which requires that the arrestee must be produced within 24 hours and taken to the Special Court, or court of judicial/metropolitan magistrate having jurisdiction. The exercise of the power to arrest is not exempt from the scrutiny of courts. The power of judicial review remains both before and after the filing of criminal proceedings/prosecution complaint. It cannot be said that the courts would exceed their power, when they examine the validity of arrest under Section 19(1) of the PML Act, once the accused is produced in court in terms of Section 19(3) of the PML Act.

22. Before we examine the scope and width of the jurisdiction of the court when it examines validity of arrest under Section 19(1) of the PML Act, we must take on record and deal with the argument of the DoE relying on the paragraphs 176 to 179 in ***Vijay Madanlal Choudhary*** (supra) under the heading 'ECIR vis-a-vis FIR'. The submission is that there is difference between the "reasons to believe", and the "grounds of arrest", the latter is mandated to be furnished to the arrestee, but the former is an internal and confidential document, the furnishing of which may be detrimental to investigation. Therefore, it is urged that "reasons to believe" need not be supplied to the arrestee. Paragraphs 178 and 179 of ***Vijay Madanlal Choudhary*** (supra) read:

> "178. The next issue is: whether it is necessary to furnish copy of ECIR to the person concerned apprehending arrest or at least after his arrest? section 19(1) of the 2002 Act postulates that after arrest, as soon as may be, the person should be informed about the grounds for such arrest. This stipulation is compliant with the mandate of article 22(1) of the Constitution. Being a special legislation and considering the complexity of the inquiry/ investigation both for the purposes of initiating civil action as well as prosecution, non-supply of ECIR in a given case cannot be faulted. The ECIR may contain details of the material in possession of the Authority and recording satisfaction of reason to believe that the person is guilty of money-laundering offence, if revealed before the inquiry/ investigation required to proceed

against the property being proceeds of crime including to the person involved in the process or activity connected therewith, may have deleterious impact on the final outcome of the inquiry/investigation. So long as the person has been informed about grounds of his arrest that is sufficient compliance of mandate of article 22(1) of the Constitution. Moreover, the arrested person before being produced before the Special Court within twenty-four hours or for that purposes of remand on each occasion, the court is free to look into the relevant records made available by the Authority about the involvement of the arrested person in the offence of money-laundering. In any case, upon filing of the complaint before the statutory period provided in 1973 Code, after arrest, the person would get all relevant materials forming part of the complaint filed by the Authority under section 44(1)(b) of the 2002 Act before the Special Court.

179. Viewed thus, supply of ECIR in every case to person concerned is not mandatory. From the submissions made across the Bar, it is noticed that in some cases ED has furnished copy of ECIR to the person before filing of the complaint. That does not mean that in every case same procedure must be followed. It is enough, if ED at the time of arrest, contemporaneously discloses the grounds of such arrest to such person. Suffice it to observe that ECIR cannot be equated with an FIR which is mandatorily required to be recorded and supplied to the accused as per the provisions of 1973 Code. Revealing a copy of an ECIR, if made mandatory, may defeat the purpose sought to be achieved by the 2002 Act including frustrating the attachment of property (proceeds of crime). Non-supply of ECIR, which is essentially an internal document of ED, cannot be cited as violation of constitutional right. Concededly, the person arrested, in terms of section 19 of the 2002 Act, is contemporaneously made aware about the grounds of his arrest. This is compliant with the mandate of article 22(1) of the Constitution. It is not unknown that at times FIR does not reveal all aspects of the offence in question. In several cases, even the names of persons actually involved in the commission of offence are not mentioned in the FIR and described as unknown accused. Even, the particulars as unfolded are not fully recorded in the FIR. Despite that, the accused named in any ordinary offence is able to apply for anticipatory bail or regular bail, in which proceeding, the police papers are normally perused by the concerned court. On the same analogy, the argument of prejudice pressed into service by the petitioners for non-supply of ECIR deserves to be answered against the petitioners. For, the arrested person for offence of money-laundering is contemporaneously informed about the grounds of his arrest ; and when produced before the Special Court, it is open to the Special Court to call upon the representative of ED to produce relevant record concerning the case of the accused before him and look into the same for answering the need for his

> continued detention. Taking any view of the matter, therefore, the argument under consideration does not take the matter any further."

23. The paragraphs in ***Vijay Madanlal Choudhary*** (supra), while recording that there is a difference between ECIR and FIR, hold that the ECIR need not to be furnished to the accused, unlike an FIR recorded under Section 154 of the Code. The PML Act, a special legislation for the offence of money laundering, creates a unique mechanism for inquiry/investigation into the offence. An analogy cannot be drawn with the provisions of the Code. ECIR is an internal document for initiating penal action or prosecution. Having held so in paragraphs 178 and 179, it is observed that Section 19(1) of the PML Act postulates that after arrest, as soon as may be, the arrestee should be contemporaneously informed of the grounds of arrest to ensure compliance with Article 22(1) of the Constitution. Non-supply of ECIR is not to be faulted. ECIR may contain details of material in possession of the authority, which if revealed before the inquiry/investigation, may have a deleterious impact on the final outcome of the inquiry/investigation. The judgment states that the accused, upon filing of the prosecution complaint, will get all relevant materials forming part of the complaint. For the same reason, it is argued by the DoE that the accused is entitled to the "grounds of arrest" and not the "reasons to believe". Grounds of arrest may only summarily refer to the reasons given for arrest.

24. In the present case, we are examining Section 19(1) of the PML Act and the rights of the accused. We are not concerned with the ECIR. The relevant question arising is – whether the arrestee is entitled to be supplied with a copy

of the "reasons to believe"? Paragraph 89 in ***Vijay Madanlal Choudhary*** (supra) refers to the importance of recording the "reasons to believe" in writing, and states this is mandatory. Further, both ***Pankaj Bansal*** (supra) and ***Prabir Purkayastha*** (supra) hold that the failure to record "reasons to believe" in writing will result in the arrest being rendered illegal and invalid. Paragraph 131 of ***Vijay Madanlal Choudhary*** (supra), which has been quoted subsequently, states that Section 19(1) requires in-depth scrutiny by the designated officer. A higher threshold is required for making an arrest, necessitating a review of the material available to demonstrate the person's guilt. Production of the "reasons to believe" before the Special Court/magistrate, cannot be construed and is not the same as furnishing or providing the "reasons to believe" to the arrestee who has a right to challenge his arrest in violation of Section 19(1) of the PML Act.[24]

25. On the aspect of the checks on the power to arrest under the PML Act, we would like to quote from the submission made on behalf of the DoE, as recorded in ***Vijay Madanlal Choudhary*** (supra). Specific reliance was placed on a Canadian judgment in the case of ***Gifford*** v. ***Kelson***[25]. The relevant paragraphs in ***Vijay Madanlal Choudhary*** (supra) read:

> "16(liii). …Secondly, there must be material in possession with the Authority before the power of arrest can be exercised as opposed to the Cr. P. C. which gives the power of arrest to any police officer and the officer can arrest any person merely on the basis of a complaint, credible information or reasonable suspicion against such person. Thirdly, there should be reason to believe that the person being arrested is guilty of the offence punishable under the PMLA in contrast to the provision in Cr. P. C., which mainly requires reasonable apprehension/suspicion of commission of offence. Also, such "reasons to believe" must be reduced in writing. Fifthly, as per the constitutional mandate of

[24] The arrestee may also challenge his arrest under Section 19(1) of the PML Act on the basis of the "grounds of arrest."
[25] (1943) 51 Man. R 120.

article 22(1), the person arrested is required to be informed of the grounds of his arrest. It is submitted that the argument of the other side that the accused or arrested persons are not even informed of the case against them, is contrary to the plain language of the Act, as the Act itself mandates that the person arrested is to be informed of the ground of his arrest…

xx xx xx

16(lix). Reliance is then placed on the decision of this court in Union of India v. Padam Narain Aggarwal, wherein the court examined the power to arrest under section 104 of the 1962 Act. Relying on the decision, it was stated that the power to arrest is statutory in character and cannot be interfered with and can only be exercised on objective considerations free from whims, caprice or fancy of the officer. The law takes due care to ensure individual freedom and liberty by laying down norms and providing safeguards so that the authorities may not misuse such power. It is submitted that the requirement of "reason to believe" and "recording of such reasons in writing" prevent arbitrariness and makes the provision compliant with article 14. This is reinforced from the fact that only 313 arrests have been made under the PMLA in 17 years of operations of the PMLA.

16(lx). Canadian judgment in Gifford v. Kelson was also relied on to state that "reason to believe" conveys conviction of the mind founded on evidence regarding the existence of a fact or the doing of an act, therefore, is of a higher standard than mere suspicion. Reliance has been further placed on Premium Granites v. State of T. N. to urge that the requirement of giving reasons for exercise of the power by itself excludes chances of arbitrariness…"

26. We will reproduce what has been held in ***Gifford*** (supra):

"A suspicion or belief may be entertained, but suspicion and belief cannot exist together. Suspicion is much less than belief; belief includes or absorbs suspicion.

xx xx xx

When, we speak of "reason to believe" we mean a conclusion arrived at as to the existence of a fact. Of course "reason to believe" does not amount to positive knowledge nor does it mean absolute certainty but it does convey conviction of the mind founded on evidence regarding the existence of a fact or the doing of an act. Suspicion, on the other hand, rings uncertainty. It lives in imagination. It is inkling. It is mistrust. It is chalk. 'Reason to believe' is not. It is cheese."

27. ***Gifford*** (supra) accurately explains the difference between the "reasons to believe" and "suspicion". "Suspicion" requires lower degree of satisfaction, and does not amount to belief. Belief is beyond speculation or doubt, and the threshold of belief "conveys conviction founded on evidence regarding existence of a fact or doing of an act". Given that the power of arrest is drastic and violates Article 21 of the Constitution, we must give meaningful, true and full play to the legislative intent.[26]

28. Providing the written "grounds of arrest", though a must, does not in itself satisfy the compliance requirement. The authorized officer's genuine belief and reasoning based on the evidence that establishes the arrestee's guilt is also the legal necessity. As the "reasons to believe" are accorded by the authorised officer, the onus to establish satisfaction of the said condition will be on the DoE and not on the arrestee.

29. On the necessity to satisfy the preconditions mentioned in Section 19(1) of the PML Act, we have quoted from the judgment of this Court in ***Padam Narain Aggarwal*** (supra) and also referred to and quoted from the Canadian judgment in ***Gifford*** (supra). Existence and validity of the "reasons to believe" goes to the root of the power to arrest. The subjective opinion of the arresting officer must be founded and based upon fair and objective consideration of the material, as available with them on the date of arrest. On the reading of the "reasons to believe" the court must form the 'secondary opinion' on the validity of the exercise undertaken for compliance of Section 19(1) of the PML Act when the

[26] We would subsequently examine the expressions "reason to believe", "guilty of an offence punishable under this Act" and "material" in some detail.

arrest was made. The "reasons to believe" that the person is guilty of an offence under the PML Act should be founded on the material in the form of documents and oral statements.

30. Referring to the legal position, this Court in ***Dr. Partap Singh and Another*** v. ***Director of Enforcement, Foreign Exchange Regulation Act and others***[27] has observed:

> "9. When an officer of the Enforcement Department proposes to act under Section 37 undoubtedly, he must have reason to believe that the documents useful for investigation or proceeding under the Act are secreted. The material on which the belief is grounded may be secret, may be obtained through Intelligence or occasionally may be conveyed orally by informants. It is not obligatory upon the officer to disclose his material on the mere allegation that there was no material before him on which his reason to believe can be grounded. The expression "reason to believe" is to be found in various statutes. We may take note of one such. Section 34 of Income Tax Act, 1922 inter alia provides that the Income Tax Officer must have "reason to believe" that the incomes, profits or gains chargeable to income tax have been underassessed, then alone he can take action under Section 34. In *S. Narayanappa* v. *CIT* the assessee challenged the action taken under Section 34 and amongst others it was contended on his behalf that the reasons which induced the Income Tax Officer to initiate proceedings under Section 34 were justiciable, and therefore, these reasons should have been communicated by the Income Tax Officer to the assessee before the assessment can be reopened. It was also submitted that the reasons must be sufficient for a prudent man to come to the conclusion that the income escaped assessment and that the Court can examine the sufficiency or adequacy of the reasons on which the Income Tax Officer has acted. Negativing all the limbs of the contention, this Court held that
>
> > "if there are in fact some reasonable grounds for the Income Tax Officer to believe that there had been any non-disclosure as regards any fact, which could have a material bearing on the question of under-assessment, that would be sufficient to give jurisdiction to the Income Tax Officer to issue notice under Section 34."

[27] (1985) 3 SCC 72.

The Court in terms held that whether these grounds are adequate or not is not a matter for the court to investigate.

10. The expression "reason to believe" is not synonymous with subjective satisfaction of the Officer. The belief must be held in good faith; it cannot merely be a pretence. In the same case, it was held that it is open to the court to examine the question whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief and are not extraneous or irrelevant to the purpose of the section. To this limited extent the action of the Income Tax Officer in starting proceedings under Section 34 is open to challenge in a court of law. (See *Calcutta Discount Co. Ltd.* v. *ITO).* In *R.S. Seth Gopikrishan Agarwal* v. *R.N. Sen*, *Assistant Collector of Customs* this Court repelled the challenge to the validity of the search of the premises of the appellant and the seizure of the documents found therein. The search was carried out under the authority of an authorisation issued under Rule 126(L)(2) of the Defence of India (Amendment) Rules, 1963 (Gold Control Rules) for search of the premises of the appellant. The validity of the authorisation was challenged on the ground of mala fides as also on the ground that the authorisation did not expressly employ the phrase 'reason to believe' occurring in Section 105 of the Customs Act. Negativing both the contentions, Subba Rao, C.J. speaking for the Court observed that the subject underlying Section 105 of the Customs Act which confers power for issuing authorisation for search of the premises and seizure of incriminating articles was to search for goods liable to be confiscated or documents secreted in any place, which are relevant to any proceeding under the Act. The legislative policy reflected in the section is that the search must be in regard to the two categories mentioned in the section. The Court further observed that though under the section, the officer concerned need not give reasons if the existence of belief is questioned in any collateral proceedings he has to produce relevant evidence to sustain his belief. A shield against the abuse of power was found in the provision that the officer authorised to search has to send forthwith to the Collector of Customs a copy of any record made by him. Sub-section (2) of Section 37 of the Act takes care for this position inasmuch as that where an officer below the rank of the Director of Enforcement carried out the search, he must send a report to the Director of Enforcement. The last part of the submission does not commend to us because the file was produced before us and as stated earlier, the Officer issuing the search warrant had material which he rightly claimed to be adequate for forming the reasonable belief to issue the search warrant."

This decision relates to the power of authorised officers to conduct search and seizure operations under Section 37 of the Foreign Exchange Regulation Act, 1973. The aforesaid observations would be equally relevant, though in the context of the power to arrest, a power which is more drastic and intrusive. Thus, the nature of inquiry to be undertaken by the courts has to be in-depth and detailed.

31. In ***Barium Chemicals Ltd. and another*** v. ***Company Law Board and others***[28], the Constitution Bench of this Court had referred to and quoted from the decision of the Privy Council in ***Nakkuda Ali*** v. ***Jayaratne***[29], wherein Lord Radcliffe had observed:

> "After all words such as these are commonly found when a legislature or law making authority confers powers on a minister or official. However read, they must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power. But if the question whether the condition has been satisfied is to be conclusively decided by the man who wields the power the value of the intended restraint is in effect nothing. No doubt he must not exercise the power in bad faith; but the field in which this kind of question arises is such that the reservation for the case of bad faith is hardly more than a formality."

While agreeing with the first part of the aforesaid quotation, the Constitution Bench went on to refer to ***Joseph Kuruvilla Vellukunnel*** v. ***Reserve Bank of India and others***[30], wherein Hidayatullah, J., speaking for the majority, had observed:

> "It is enough to say that the Reserve Bank in its dealings with banking companies does not act on suspicion but on proved facts."

Thereafter, it was further observed:

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[28] AIR 1967 SC 295.
[29] 1951 AC 66.
[30] AIR 1962 SC 1371.

> "But this seems certain that the action (winding up) would not be taken up without scrutinising all the evidence and checking and re-checking all the findings."

32. Accordingly, in ***Barium Chemicals Ltd.*** (supra), it was held that the expression "reason to believe" is not a subjective process altogether, not lending itself even to a limited scrutiny of the court that such "reason to believe" or opinion is not formed on relevant facts or within the limits.

33. Section 26 of the IPC, defines the expression "reason to believe" as sufficient cause to believe a thing and not otherwise. ***Joti Parshad*** v. ***State of Haryana***[31], referring to Section 26 of the IPC, has observed:

> "5… "Reason to believe" is not the same thing as "suspicion" or "doubt" and mere seeing also cannot be equated to believing. "Reason to believe" is a higher level of state of mind. Likewise "knowledge" will be slightly on a higher plane than "reason to believe". A person can be supposed to know where there is a direct appeal to his senses and a person is presumed to have a reason to believe if he has sufficient cause to believe the same. Section 26 IPC explains the meaning of the words "reason to believe" thus:
>
> > "26. '*Reason to believe*'.— A person is said to have 'reason to believe' a thing, if he has sufficient cause to believe that thing but not otherwise."
>
> In substance what it means is that a person must have reason to believe if the circumstances are such that a reasonable man would, by probable reasoning, conclude or infer regarding the nature of the thing concerned. Such circumstances need not necessarily be capable of absolute conviction or inference; but it is sufficient if the circumstances are such creating a cause to believe by chain of probable reasoning leading to the conclusion or inference about the nature of the thing…"

34. Use of the expression 'not otherwise', in Section 26 of the IPC, refers to contrary evidence or material which would not support the "reason to believe". The

[31] 1993 Supp (2) SCC 497.

definition extends and puts a more stringent condition in the context of penal enactment as compared to the civil law. Clearly, “reason to believe” has to be distinguished and is not the same as grave suspicion. It refers to the reasons for the formation of the belief which must have a rational connection with or an element bearing on the formation of belief. The reason should not be extraneous or irrelevant for the purpose of the provision.

35. As explained in ***A.S. Krishnan and others*** v. ***State of Kerala***[32], Section 26 of the IPC in substance means that the person must have “reason to believe" if the circumstances are such that a reasonable man would, by probable reasoning, conclude or infer regarding the nature of things concerned. Such circumstances need not necessarily be capable of absolute conviction or inference; but it is sufficient if the circumstances are such that it creates a chain of probable reasoning leading to the conclusion or inference about the nature of the thing.[33]

36. Once we hold that the accused is entitled to challenge his arrest under Section 19(1) of the PML Act, the court to examine the validity of arrest must catechise both the existence and soundness of the “reasons to believe”, based upon the material available with the authorised officer. It is difficult to accept that the “reasons to believe”, as recorded in writing, are not to be furnished. As observed above, the requirements in Section 19(1) are the jurisdictional conditions to be satisfied for arrest, the validity of which can be challenged by

[32] (2004) 11 SCC 576.

[33] Wednesbury unreasonableness strikes at irrationality when a decision is so outrageous in its defiance of logic or of accepted standards that no sensible person who had applied his mind to the question to be decided would have arrived at it. See *Council of Civil Services Union* v. *Minister of State for Civil Services*, (1984) 3 All. ER 935.

the accused and examined by the court. Consequently, it would be incongruous, if not wrong, to hold that the accused can be denied and not furnished a copy of the "reasons to believe". In reality, this would effectively prevent the accused from challenging their arrest, questioning the "reasons to believe". We are concerned with violation of personal liberty, and the exercise of the power to arrest in accordance with law. Scrutiny of the action to arrest, whether in accordance with law, is amenable to judicial review. It follows that the "reasons to believe" should be furnished to the arrestee to enable him to exercise his right to challenge the validity of arrest.

37. We would accept that in a one-off case, it may not be feasible to reveal all material, including names of witnesses and details of documents, when the investigation is in progress. This will not be the position in most cases. DoE may claim redaction and exclusion of specific particulars and details. However, the onus to justify redaction would be on the DoE. The officers of the DoE are the authors of the "reasons to believe" and can use appropriate wordings, with details of the material, as are necessary in a particular case. As there may only be a small number of cases where redaction is justified for good cause, this reason is not a good ground to deny the accused's access to a copy of the "reasons to believe" in most cases. Where the non-disclosure of the "reasons to believe" with redaction is justified and claimed, the court must be informed. The file, including the documents, must be produced before the court. Thereupon, the court should examine the request and if they find justification, a portion of the "reasons to believe" and the document may be withheld. This requires consideration and decision by the court. DoE is not the sole judge.

38. Section 173(6) of the Code, permits the police officer not to furnish statements or make disclosures to the accused when it is inexpedient in public interest. In such an event, the police officer is to indicate the specific part of the statement and append a note requesting the magistrate to exclude that part from the copy given to the accused. He has to state the reasons for making such request. The same principle will apply.

39. We now turn to the scope and ambit of judicial review to be exercised by the court. Judicial review does not amount to a mini-trial or a merit review. The exercise is confined to ascertain whether the "reasons to believe" are based upon material which 'establish' that the arrestee is guilty of an offence under the PML Act. The exercise is to ensure that the DoE has acted in accordance with the law. The courts scrutinize the validity of the arrest in exercise of power of judicial review. If adequate and due care is taken by the DoE to ensure that the "reasons to believe" justify the arrest in terms of Section 19(1) of the PML Act, the exercise of power of judicial review would not be a cause of concern. Doubts will only arise when the reasons recorded by the authority are not clear and lucid, and therefore a deeper and in-depth scrutiny is required. Arrest, after all, cannot be made arbitrarily and on the whims and fancies of the authorities. It is to be made on the basis of the valid "reasons to believe", meeting the parameters prescribed by the law. In fact, not to undertake judicial scrutiny when justified and necessary, would be an abdication and failure of constitutional and statutory duty placed on the court to ensure that the fundamental right to life and liberty is not violated.

40. At this stage, we must consider the arguments presented by the DoE, which rely on judgments regarding the scope of judicial interference in investigations, including the power of arrest. Reference in this regard was made to ***The King Emperor*** v. ***Khawaja Nazir Ahmad***,[34] ***Dukhishyam Benupani, Asst. Director, Enforcement Directorate (FERA)*** v. ***Arun Kumar Bajoria***,[35] ***State of Bihar and another*** v. ***J.A.C. Saldanha and others***,[36] and ***M.C. Abraham and another*** v. ***State of Maharashtra and others***.[37]In our opinion, these decisions do not apply to the present controversy, as the power of arrest in this case is governed by Section 19(1) of the PML Act. These decisions restrict the courts from interfering with the statutory right of the police to investigate, provided that no legal provisions are violated. Investigation and crime detection vests in the authorities by statute, albeit, these powers differ from the Court's authority to adjudicate and determine whether an arrest complies with constitutional and statutory provisions. As indicated above, the power to arrest without a warrant for cognizable offences is exercised by the police officer in terms of Section 41 of the Code.[38] Arrest under Section 41 can be made on the grounds mentioned in clauses (a) to (i) of Section 41(1) of the Code, which include a reasonable complaint, credible information or reasonable suspicion that a person has committed an offence, or the arrest is necessary for proper investigation of the offence, etc. The grounds mentioned in Section 41 are different from the juridical preconditions for exercise of power of arrest under Section 19(1) of the PML Act. Section 19(1) conditions are more rigid and

[34] AIR 1945 PC 18.
[35] (1998) 1 SCC 52.
[36] (1980) 1 SCC 554.
[37] (2003) 2 SCC 649.
[38] Refer footnote 18 above.

restrictive. As such, the two provisions cannot be equated. The legislature has deliberately avoided reference to the grounds mentioned in Section 41 and considered it appropriate to impose strict and stringent conditions that act as a safeguard. The same reasoning will apply to the contention raised by the DoE relying upon the provisions of Section 437 of the Code and the judgment of this Court in ***Gurcharan Singh and others*** v. ***State (Delhi Administration)***.[39] Section 437 of the Code applies when an accused suspected of committing a non-bailable offence is arrested or detained without warrant by a police officer in charge of a police station or is brought before a court, other than the High Court or the Court of Sessions. It is observed that the accused would be released on bail, except for in cases specified in clauses (i) and (ii) of Section 437(1) of the Code. Section 437(1)(i) applies at the stage of initial investigation where a person has been arrested for an offence punishable with death or imprisonment for life. Section 437(1)(ii) imposes certain fetters on the power of granting bail in specified cases when the offence is cognizable and the accused has been previously convicted with death, imprisonment for life, or 7 years or more, or has previously been convicted on two or more occasions for non-bailable and cognizable offences. The power under Section 437(1) of the Code is exercised by the court, other than the High Court or the Sessions Court. In other cases, Section 437(3) of the Code will apply. ***Gurcharan Singh*** (supra) distinguishes between the language of two sub-sections of Section 437 – Section 437(1) and 437(7). It is observed that 437(7) does not apply at the investigation stage, but rather after the conclusion of trial and before the court delivers its judgment. Thus, the use of the expression 'not guilty' pertains to

[39] (1978) 1 SCC 118.

releasing the accused who is in custody, on a bond without surety, for appearance to hear the judgment delivered. Notably, Section 437(6) states that if the trial of a person accused of a non-bailable offence is not completed within sixty days from the first date fixed for taking evidence, the magistrate to their satisfaction shall release such person on bail, provided they have been in custody throughout this period. The magistrate may direct otherwise only for reasons recorded in writing. Section 439 of the Code, which relates to the power of the High Court or the Sessions Court to grant bail, remains free from the legislative constraints applicable in cases covered by Section 437(1) of the Code. However, Section 437(3) of the Code when applicable applies.

41. DoE has drawn our attention to the use of the expression 'material in possession' in Section 19(1) of the PML Act instead of 'evidence in possession'. Though etymologically correct, this argument overlooks the requirement that the designated officer should and must, based on the material, reach and form an opinion that the arrestee is guilty of the offence under the PML Act. Guilt can only be established on admissible evidence to be led before the court, and cannot be based on inadmissible evidence. While there is an element of hypothesis, as oral evidence has not been led and the documents are to be proven, the decision to arrest should be rational, fair and as per law. Power to arrest under Section 19(1) is not for the purpose of investigation. Arrest can and should wait, and the power in terms of Section 19(1) of the PML Act can be exercised only when the material with the designated officer enables them to form an opinion, by recording reasons in writing that the arrestee is guilty.

42. DoE relies upon the language of Sections 227 and 228 of the Code, pertaining to discharge and framing of charge, respectively. Section 227 uses the words – 'sufficient grounds for proceeding against the accused'. Section 228 uses – 'grounds of presuming that the accused has committed an offence'. Thus, DoE contends that grave suspicion is sufficient to frame a charge and put the accused to trial. This contention should not be accepted, since we are not dealing with the trial, framing of charge or recording the evidence. The issue before us, which has to be examined and answered, is whether the arrest of the person during the course of investigation complies with the law. The language of Section 19(1) is clear, and should not be disregarded to defeat the legislative intent – to provide stringent safeguards against pre-trial arrest during pending investigations. Framing of the charge and putting the accused on trial cannot be equated with the power to arrest. A person may face the charge and trial even when he is on bail. Notably, Section 439 of the Code does not impose statutory restrictions, except under Section 437(3) when applicable, on the court's power to grant bail. However, Section 45 of the PML Act prescribes specific fetters in addition to the stipulations under the Code.

43. At this stage, it is important to distinguish between Section 19(1) and Section 45 of the PML Act. We have already quoted Section 19, but would like to quote Section 45 which reads as under:

> "**45. Offences to be cognizable and non-bailable**.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence under this Act shall be released on bail or on his own bond unless—
>
> (*i*) the Public Prosecutor has been given an 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:

Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees, may be released on bail, if the Special Court so directs:

Provided further that the Special Court shall not take cognizance of any offence punishable under Section 4 except upon a complaint in writing made by—

(*i*) the Director; or

(*ii*) any officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government by a general or special order made in this behalf by that Government.

(1-A) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or any other provision of this Act, no police officer shall investigate into an offence under this Act unless specifically authorised, by the Central Government by a general or special order, and, subject to such conditions as may be prescribed.

(2) The limitation on granting of bail specified in sub-section (1) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.

Explanation.—For the removal of doubts, it is clarified that the expression "Offences to be cognizable and non-bailable" shall mean and shall be deemed to have always meant that all offences under this Act shall be cognizable offences and non-bailable offences notwithstanding anything to the contrary contained in the Code of Criminal Procedure, 1973 (2 of 1974), and accordingly the officers authorised under this Act are empowered to arrest an accused without warrant, subject to the fulfilment of conditions under section 19 and subject to the conditions enshrined under this section."

44. In our opinion, the key distinction between Section 19(1) and Section 45 is the authority undertaking the exercise, in each case. Under Section 19(1), it is the designated/authorised officer who records in writing, their "reasons to believe"

that the arrestee is 'guilty' of an offence under the PML Act. Thus, the arrest is based on the opinion of such officer, which opinion is open to judicial review, however not merits review, in terms of the well-settled principles of law. Contrastingly, under Section 45, it is the Special Court which undertakes the exercise. The Special Court independently examines pleas and contentions of both the accused and the DoE, and arrives at an objective opinion. The Special Court is not bound by the opinion of the designated/authorised officer recorded in the "reasons to believe". A court's opinion is different and cannot be equated to an officer's opinion. While the Special Court's opinion is determinative, and is only subject to appeal before the higher courts, the DoE's opinion is not in the same category as it is open to judicial review.

45. In ***Vijay Madanlal Choudhary*** (supra), the three Judge Bench has in paragraph 131 referred to the decision in ***Ranjitsing Brahmajeetsing Sharma*** v. ***State of Maharashtra and another***[40], a case of Maharashtra Control of Organised Crime Act, 1999[41], which observes as under:

> "44. The wording of Section 21(4), in our opinion, does not lead to the conclusion that the court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act. If such a construction is placed, the court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an event, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the legislature. Section 21(4) of MCOCA, therefore, must be construed reasonably. It must be so construed that the court is able to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. Similarly, the Court will be required to record a finding as to the possibility of his committing a crime after grant of bail. However, such an offence in futuro must be an offence under the Act and not any other offence. Since it is difficult to predict the future conduct of an

[40] (2005) 5 SCC 294.
[41] For short, "MCOCA".

> accused, the court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence.
>
> 45. It is, furthermore, trite that for the purpose of considering an application for grant of bail, although detailed reasons are not necessary to be assigned, the order granting bail must demonstrate application of mind at least in serious cases as to why the applicant has been granted or denied the privilege of bail.
>
> 46. The duty of the court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. However, while dealing with a special statute like MCOCA having regard to the provisions contained in sub-section (4) of Section 21 of the Act, the court may have to probe into the matter deeper so as to enable it to arrive at a finding that the materials collected against the accused during the investigation may not justify a judgment of conviction. The findings recorded by the court while granting or refusing bail undoubtedly would be tentative in nature, which may not have any bearing on the merit of the case and the trial court would, thus, be free to decide the case on the basis of evidence adduced at the trial, without in any manner being prejudiced thereby"

This Court in ***Vijay Madanlal Choudhary*** (supra) had agreed with the aforesaid observations.

46. Two more legal aspects need to be addressed. Section 45 of the PML Act does not stipulate the stage when the accused may move an application for bail. A bail application can be submitted at any stage, either before or after the complaint is filed. Whether the charge is framed or evidence is recorded or not recorded, is immaterial. Clearly, the fact that the prosecution complaint has not been filed, the charge has not been framed, or evidence is either not recorded or partly recorded, will not prevent the court from examining the application for bail within the parameters of Section 45 of the PML Act. As the issue would relate to grant or denial of bail, the parameters or the stipulation in ***State of***

Orissa v. ***Debendra Nath Padhi***,[42] which states that evidence or material not relied by the prosecution cannot be examined at the stage of charge, will not apply. The reason is simple and straightforward. Right to bail under Section 45 of the PML Act is not dependant on the stage of the proceedings. The power of the court under Section 45 is unrestricted with reference to the stage of the proceedings. All material and evidence that can be led in the trial and admissible, whether relied on by the prosecution or not, and can be examined.[43] On the question of burden of proof, Section 24 of the PML Act can be relied on by the prosecution. However, at the same time, the observations of this Court in ***Vijay Madanlal Choudhary*** (supra) with reference to clauses (a) and (b) of Section 24, as well as the burden of proof placed on the prosecution to the extent indicated in paragraph 57 refer to at least three foundational facts. These foundational facts are – criminal activity relating to the scheduled offence has been committed; property in question has been derived or obtained directly or indirectly by any person as a result of that criminal activity; and the person concerned is directly or indirectly involved in any process or activity connected with the said property being proceeds of crime, have to be established. It is only on establishing the three facts that the offence of money laundering is committed. When the foundational facts of Section 24 are met, a legal presumption would arise that the proceeds of crime are involved in money laundering. The person concerned who has no causal connection with such proceeds of crime can disprove their involvement in the process or activity

[42] (2005) 1 SCC 568.
[43] It goes without saying that the oral evidence when recorded in the Court can be taken into consideration.

connected therewith by producing evidence or material in that regard. In that event, the legal presumption would be rebutted.

47. We now turn to the facts of the present case. At the outset we must record that the DoE has produced the "reasons to believe" to invoke Section 19(1) of the PML Act. We have examined the contents thereof and the contents of the "grounds of arrest" furnished to Arvind Kejriwal upon his arrest. They are identical.[44]

48. We would briefly refer to the contents of the "reasons to believe":

- CBI has registered an RC regarding framing and implementation of the excise policy by the Govt. of NCT of Delhi for the year 2021-22 with the intent to procure undue favours from the licensee post the tender. Contents of the FIR have been elaborated.
- DoE has registered an ECIR on the basis of the aforesaid predicate offence. Upon investigation by the DoE, several searches have been conducted and statements have been recorded.
- Salient features of the excise policy that establish criminality are:
    - The wholesale entity should not be a manufacturer/winery/ brewery/bottler of liquor in India or abroad either directly or through any sister entities;
    - The manufacturer/winery/brewery/bottler of liquor has to choose a distributor holding wholesale license for supply of Indian and foreign liquor as an exclusive distributor;

[44] The reasons to believe are enclosed at pages 19 to 34 of Volume I of the convenience compilation filed by the DoE. The grounds of arrest are to be found at pages 35 to 62 of the same compilation.

- The wholesale licensee shall not directly or indirectly have any retail wings. The retail license holder shall not be a manufacturer/winery/brewery/bottler of liquor in India or abroad either directly or through any sister concerns/related entities;
- The final price to the retailer shall be fixed by the excise commissioner as per the formula prescribed which will include the profit margin of 12% for the wholesale license holders.

- A cartel was formed wherein one group/person effectively would be controlling manufacturing, wholesale and retail entitles of liquor business in return for bribes/kickbacks.
- The excise policy 2021 was implemented on 17.11.2021, which continued till 31.08.2022, after which the government discontinued the policy and went back to the old regime.
- The role of Arvind Kejriwal is elaborated. He has been described as the kingpin/key conspirator in formulation of the policy, which favoured certain persons in exchange for kickbacks from liquor businessmen. Further, Arvind Kejriwal was involved in the use of proceeds of crime generated in the Goa election campaign of Aam Aadmi Party[45], in which he is the convenor and the ultimate decision maker.
- C. Arvind, the then Secretary of Manish Sisodia, in his statement dated 07.12.2022, has stated that the policy was given to him in the form of a draft report of the Group of Ministers[46] by Manish Sisodia at the residence of Arvind Kejriwal. Satyender Jain was also present at that

[45] For short, “AA Party”.
[46] For short, “GoM”.

time. The details mentioned in the draft document on wholesale profit margin of 12%, etc., had not been discussed earlier in the meetings of the GoM. He had prepared the policy on the basis of the draft which was submitted to the cabinet on 22.03.2021.

- Statement of Butchi Babu dated 23.03.2023, the then Chartered Accountant of K. Kavitha, is referred. Butchi Babu had revealed that Vijay Nair who was working for Arvind Kejriwal and Manish Sisodia was in touch with Arun Pillai. Vijay Nair was involved in policy formulation, for ensuring that the policy favours K. Kavitha. This is corroborated by WhatsApp chats which were retrieved from the mobile phone of Butchi Babu, wherein certain terms of the excise policy, two days before it was finalised by the GoM, were found.
- Association of Arvind Kejriwal with Vijay Nair is elaborated. Vijay Nair has been described as a broker/liaison/middleman on behalf of top leaders of AA Party, who wanted bribes/kickbacks from the stakeholders. Vijay Nair had threatened those opposing and not agreeing to his demands. Vijay Nair was staying in the official residence allotted to Kailash Gehlot, a cabinet minister and a close associate of Arvind Kejriwal.
- Vijay Nair on behalf of Arvind Kejriwal and AA Party had received kickbacks to the tune of Rs.100 crores from the group/cartel who had been favoured.
- The permanent members of the liquor group/cartel were Magunta Srinivasulu Reddy, Raghav Magunta, and K. Kavitha. The group/cartel

was also represented by Abhishek Boinpally, Arun Pillai and Butchi Babu.

- P. Sarath Reddy in his statement dated 25.04.2023 under Section 50 of the PML Act had revealed having expressed his desire to meet top political leaders in Delhi, that is, Arvind Kejriwal and Manish Sisodia, through Arun Pillai. Arun Pillai had assured him and had coordinated with Vijay Nair. Later on he met Arvind Kejriwal in a brief meeting of 10 minutes or so in which Vijay Nair was also present. He was told by Arvind Kejriwal to trust Vijay Nair who was very smart and could handle big and small issues. Arvind Kejriwal spoke about the new liquor policy which would be a win-win for all.
- On Arvind Kejriwal's role of demanding kickbacks, reference is made to the statement of Magunta Srinivasulu Reddy dated 16.07.2023 recorded under Section 50 of the PML Act; and his statement dated 17.07.2023 recorded under Section 164 of the Code. K. Kavitha had offered to pay Rs. 100 crore to AA Party for the excise policy. She had spoken and interacted with Arvind Kejriwal. She had asked Magunta Srinivasulu Reddy to arrange Rs. 50 crores. He had his son Raghav Magunta to further deal with K. Kavitha. Raghav Magunta had agreed to pay Rs.30 Crores. Raghav Magunta had paid Rs. 25 crores in cash to Butchi Babu and Abhishek Boinpally.
- Raghav Magunta in his statement dated 26.07.2023 recorded under Section 50 of the PML Act, and statement dated 27.07.2023 recorded under Section 164 of the Code, has accepted that he had paid Rs.25 crores in cash to Abhishek Boinpally and Butchi Babu in view of the

agreement between him, his father – Magunta Srinivasulu Reddy and K. Kavitha. Raghav Magunta's father – Magunta Srinivasulu Reddy had met Arvind Kejriwal in mid-March 2021. Arvind Kejriwal had invited him to do business under the new excise policy, and in turn Arvind Kejriwal wanted funding for the upcoming elections in Punjab and Goa.

- Proceeds of crime of about Rs.45 Crores, a part of the bribes received, were used in the election campaign at Goa in 2021-22. AA Party is the real beneficiary of the proceeds of crime.
- The *hawala* transfer of approximately Rs. 45 crores is substantiated by the CBI in its second supplementary chargesheet.
- Dinesh Arora in his statement dated 01.10.2022 has stated that he had, on instructions of Vijay Nair coordinated the *hawala* transfer of Rs.31 Crores with Abhishek Boinpally, Rajesh Joshi and Sudhir. Dinesh Arora is a close associate of Manish Sisodia. Sudhir is a close associate of Vijay Nair. Rajesh Joshi is the proprietor of M/s Chariot Productions Media Pvt. Ltd.[47], who were engaged by AA Party for its election campaign in Goa.
- The details of transfer of money from Mumbai to Goa by *hawala* transfers are stated with names and particulars including the amounts. *Angadiyas* based out of Mumbai made such transfers to the entities including Chariot, Islam Qazi etc. engaged by AA Party in Goa are elaborated with names and figures. Payments for the activities/work was partly in cash.
- Chariot had itself received such *hawala* payments and had also engaged several vendors for campaign of AA Party to whom part cash payments

[47] For short, "Chariot".

were paid. These are proven through various statements by employees of vendors, CDR records and data seized by the Income Tax department.

- Use of cash in Goa elections is also corroborated by one of the candidates of AA Party.
- Arvind Kejriwal is guilty as an individual, being a part of the conspiracy in the formulation of the excise policy, and, also vicariously as the person in-charge and responsible for AA Party. Reference is made to Section 70 of the PML Act relating to offences by 'companies'. Arvind Kejriwal, as National Convenor of AA Party and member of the Political Affairs Committee and National Executive, is ultimately responsible for the funds being used in the election expenses, including its generation. Thus, he is both individually and vicariously liable for generation and utilisation of the proceeds of crime.
- Lastly, Arvind Kejriwal was afforded multiple opportunities to cooperate with the investigation. In spite of summons being issued to him on nine occasions, he wilfully disobeyed them by not appearing.

49. If we go by the narration of facts and assertions made in the "reasons to believe", the subjective satisfaction that Arvind Kejriwal is guilty, on the basis of the material relied is clearly recorded. The "reasons to believe" refer to the "material" to show involvement of Arvind Kejriwal in the offence of money laundering.

50. However, the assertion on behalf of Arvind Kejriwal is that the "reasons to believe" do not mention and evaluate "all" or "entire" material. It selectively

refers to “incriminating” material by giving it a semblance of good faith exercise. In reality, the reasons are a sham, and the exercise is undertaken in a pre-determined and biased manner. The expression “material” in Section 19(1) of the PML Act refers to the “all” or “entire” material in possession of the DoE. Thus, “all” or “entire” material must be examined and considered by the designated/authorised officer to determine the guilt or innocence of the person. The following aspects are highlighted:

- P. Sarath Chandra Reddy was arrested on 10.11.2022. In his statements before the DoE on 16.09.2022 and 09.11.2022, which were recorded before his arrest, he did not make any allegation or comment against Arvind Kejriwal. On the contrary, in his statement dated 09.11.2022, on being questioned whether Rs.100 crores in cash was transferred from Hyderabad to Delhi (Vijay Nair), through Abhishek Boinpally and Dinesh Arora, he has denied having transferred any amount to Vijay Nair, Dinesh Arora or Abhishek Boinpally. After his arrest, in his statements recorded on 9 occasions, from 11.11.2022 to 25.12.2022, he did not make any allegation against Arvind Kejriwal.
- P. Sarath Chandra Reddy’s application for regular bail was dismissed by the Special Judge on 16.02.2023. However, on 01.04.2023, in spite of opposition from the DoE, he was granted interim bail as his wife was indisposed. On 19.04.2023, he moved an application before the Delhi High Court for regular bail. After a few days, on 25.04.2023, P. Sarath Chandra Reddy made a statement under Section 50 of the PML Act implicating Arvind Kejriwal. Thereafter, interim bail granted to him was extended in view of the request made by DoE seeking time to file reply

and verify documents. On 29.04.2023, P. Sarath Chandra Reddy made a statement under Section 164 of the Code to the Magistrate, in which he implicated Arvind Kejriwal. On 08.05.2023, he filed an affidavit before the High Court wherein he cited health issues and claimed that he is sick and infirm. The High Court granted him regular bail as it was not objected to by the DoE. On 29.05.2024, P. Sarath Chandra Reddy was granted pardon.

- Magunta Srinivasulu Reddy in his statement recorded on 16.09.2022 did not implicate Arvind Kejriwal. In his statement recorded on 24.03.2023, on being asked whether he had met Arvind Kejriwal in the context of Delhi liquor business, Magunta Srinivasulu Reddy had stated that he had met Arvind Kejriwal in his office in 2021 to discuss whether the trust of Magunta family could be given land in Delhi for their charitable trust. The meeting had lasted for 5-6 minutes. Thus, he had not spoken about the Delhi liquor business.
- Raghav Magunta, son of Magunta Srinivasuly Reddy, was arrested on 11.02.2023. Raghav Magunta in his first statement recorded before his arrest on 16.09.2022 and 5 statements recorded between 10.02.2023 and 17.02.2023 did not implicate or make any assertion against Arvind Kejriwal. Regular bail application filed by Raghav Magunta was dismissed by the Special Judge on 20.04.2023. Raghav Magunta's wife attempted suicide on 01.05.2023, and on this ground he sought interim bail. The interim bail application was dismissed by the Special Judge on 08.05.2023. Thereupon, Raghav Magunta had moved the High Court on 11.05.2023 for grant of interim bail, which application was withdrawn on

29.05.2023. While doing so, certain observations made by the Special Judge in the order dated 08.05.2023 were expunged. On 07.06.2023, the maternal grandmother of Raghav Magunta suffered injuries and was admitted to an Intensive Care Unit. The High Court granted an interim bail to Raghav Magunta for a period of 15 days on this ground. This order was challenged by the DoE before this Court. This Court *vide* order dated 09.06.2023 reduced the interim bail period from 15 days to 6 days. On 16.07.2023 and 17.07.2023, Magunta Srinivasulu Reddy gave statements under Section 50 of the PML Act and Section 164 of the Code respectively, implicating and naming Arvind Kejriwal. On 18.07.2023, the High Court extended the interim bail granted to Raghav Magunta recording that the DoE had no objection. On 26.07.2023 and 27.07.2023, Raghav Magunta gave statements under Section 50 of the PML Act and Section 164 of the Code respectively, implicating and naming Arvind Kejriwal. On 10.08.2023, the interim bail granted to Raghav Magunta was made absolute, recording that the DoE had no objection to the grant of bail. On 03.10.2023, Raghav Magunta was granted pardon. Magunta Srinivasulu Reddy was never arrested. He is a Member of Parliament from Andhra Pradesh.

- Statement of Butchi Babu is hearsay and it is not evidence. Besides the statement was made by Butchi Babu while he was in the custody of CBI, and to escape his arrest by the DoE. He was not arrested by the DoE, despite being an accused in the CBI case. Butchi Babu had contradicted as well as corrected his earlier statements dated 28.02.2023, wherein he had stated that he does not know when K. Kavitha and Vijay Nair met.

Hearsay evidence is inadmissible as per the Indian Evidence Act, 1872.[48]

- C. Arvind has not made any allegation against Arvind Kejriwal or linked and referred to the role of Arvind Kejriwal in the proceeds of crime. Mere presence of Arvind Kejriwal, the Chief Minister, when files were handed over to him would not implicate Arvind Kejriwal. The "reasons to believe" do not take into account the fact that the statements of the co-accused relied upon, cannot in terms of Section 30 of the Evidence Act, be the starting point for ascertainment of the guilt of the accused. The statements made earlier in point of time which do not implicate Arvind Kejriwal have been ignored. The statements are also contradictory. Factually, no incriminating document involving Arvind Kejriwal has been recovered during the course of investigation, which commenced in August 2022. The statements also do not establish involvement of Arvind Kejriwal in activities related to commission of a predicate offence as well as act of concealment, possession, acquisition or utilisation of proceeds of crime, which are penal offences under Section 3 of the PML Act.
- The statements of persons stated to be engaged with *Angadiyas* in Mumbai do not in any way implicate and link Arvind Kejriwal to the crime. The statements are not of such sterling quality as to justify arrest of the Chief Minister, who is a prominent leader of a national political party and an opposition leader. There is no documentary proof to show that AA Party has received kickback from the funds received from the cartel, let

[48] For short, "Evidence Act".

alone utilising them in the Goa election campaign. Rajesh Joshi of Chariot was granted bail by the Special Judge *vide* order dated 06.05.2023 as huge amount of Rs.20-30 crores alleged to have been transferred was not established. The payment alleged to have been made for election related to jobs of meagre amount in lakhs.

- Contention of the DoE that P. Sarath Reddy, Magunta Srinivasulu Reddy, Raghav Magunta, and Butchi Babu in their earlier statements were quiet and did not link Arvind Kejriwal is contested on the ground that the statements were recorded by the officers of DoE who had the discretion to put questions and also in recording the contents.

51. Arvind Kejriwal submits that the "reasons to believe" selectively refer to the implicating material, and ignore the exculpatory material. Thus, there is no attempt to evaluate the entire material and evidence on record. The co-accused, in view of prolonged incarceration, strong-arm tactics and threats have been coerced to accept the DoE's version of facts. In support, it is highlighted that the DoE changed their position, *viz*. the co-accused conspirators, who were granted bail post the statements implicating Arvind Kejriwal. This establishes and shows prejudice and malicious intent.

52. In response, the DoE submits that the investigation in the present case is complicated. As it is a case of political corruption, independent witnesses are not available, and the co-accused were initially reluctant to name and blame the top political stakeholders. Admissibility or veracity of the approver/witness statements cannot be dealt with in the present proceedings, as credibility of the witnesses is to be tested during trial. Statements under Section 164 of the Code

were recorded before the Magistrate. That apart, the statements are corroborated by material evidence or by statement of other witnesses. Reliance is placed upon Section 145 of the Evidence Act which permits cross-examination of witnesses on previous statements made by them.

53. At this juncture, we would like to reiterate and clarify that we are not deciding an appeal against an order rejecting the prayer/application for grant of bail under Section 45 of the PML Act. We are examining the question of the legality of arrest of Arvind Kejriwal on 21.03.2024. While doing so, we would be exercising the power of judicial review and not merit based review.

54. We must also state that the DoE in their additional note filed before us has referred to certain retrieved WhatsApp chats which, as per the allegation made, show that Arvind Kejriwal was known to Vinod Chauhan, who was involved in the *hawala* transfer of money through *Angadiyas* from Mumbai to Goa. These chats were retrieved after the arrest of Arvind Kejriwal and is not mentioned in the "reasons to believe". Thus, it cannot be examined by us to determine the validity of the arrest in terms of Section 19(1) of the PML Act.

55. The legality of the "reasons to believe" have to be examined based on what is mentioned and recorded therein and the material on record. However, the officer acting under Section 19(1) of the PML Act cannot ignore or not consider the material which exonerates the arrestee. Any such non-consideration would lead to difficult and unacceptable results. First, it would negate the legislative intent which imposes stringent conditions. As a general rule of interpretation,

penal provisions must be interpreted strictly.[49] Secondly, any undue indulgence and latitude to the DoE will be deleterious to the constitutional values of rule of law and life and liberty of persons. An officer cannot be allowed to selectively pick and choose material implicating the person to be arrested. They have to equally apply their mind to other material which absolves and exculpates the arrestee. The power to arrest under Section 19(1) of the PML Act cannot be exercised as per the whims and fancies of the officer.

56. Undoubtedly, the opinion of the officer is subjective, but formation of opinion should be in accordance with the law. Subjectivity of the opinion is not a *carte blanche* to ignore relevant absolving material without an explanation. In such a situation, the officer commits an error in law which goes to the root of the decision making process, and amounts to legal malice.

57. A contention raised by the DoE, and accepted in ***Vijay Madanlal Choudhary*** (supra), was that the order of arrest under Section 19(1) of the PML Act is a decision taken by a high ranking officer. Thus, it is expected that the high ranking officer is conscious of the obligation imposed by Section 19(1) of the PML Act before passing an order of arrest. We are of the opinion that it would

[49] See *Vijay Madanlal Choudhary* (supra) at paragraph 31 – "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…"
Also see *M. Ravindran* v. *Intelligence Officer, Directorate of Revenue Intelligence,* (2021) 2 SCC 485 at paragraph 17.9. – "Additionally, it is well-settled that in case of any ambiguity in the construction of a penal statute, the courts must favour the interpretation which leans towards protecting the rights of the accused, given the ubiquitous power disparity between the individual accused and the State machinery. This is applicable not only in the case of substantive penal statutes but also in the case of procedures providing for the curtailment of the liberty of the accused."

be incongruous to argue that the high ranking officer should not objectively consider all material, including exculpatory material.

58. A wrong application of law or arbitrary exercise of duty leads to illegality in the process. The court can exercise their judicial review to strike down such a decision. This would not amount to judicial overreach or interference with the investigation, as has been argued by the DoE. The court only ensures that the enforcement of law is in accordance with the statute and the Constitution. An adverse decision would only help in ensuring better compliance with the statute and the principles of the Constitution.

59. Having said so, we accept that a question would arise – does judicial review mean a detailed merits review? We have already referred to the contours of judicial review expounded in ***Padam Narain Aggarwal*** (supra), and ***Dr. Pratap Singh*** (supra). We have also referred to the principles of Wednesbury reasonableness.[50]

60. In ***Amarendra Kumar Pandey*** v. ***Union of India and others***,[51] this Court elaborated on the different facets of judicial review regarding subjective opinion or satisfaction. It was held that the courts should not inquire into correctness or otherwise of the facts found except where the facts found existing are not supported by any evidence at all or the finding is so perverse that no reasonable man would say that the facts and circumstances exist. Secondly, it is permissible to inquire whether the facts and circumstances so found to exist have a reasonable nexus with the purpose for which the power is to be

[50] See *supra* note 33.
[51] (2022) SCC Online SC 881.

exercised. In simple words, the conclusion has to logically flow from the facts. If it does not, then the courts can interfere, treating the lack of reasonable nexus as an error of law. Thirdly, jurisdictional review permits review of errors of law when constitutional or statutory terms, essential for the exercise of power, are misapplied or misconstrued. Fourthly, judicial review is permissible to check improper exercise of power. For instance, it is an improper exercise of power when the power is not exercised genuinely, but rather to avoid embarrassment or for wreaking personal vengeance. Lastly, judicial review can be exercised when the authorities have not considered grounds which are relevant or has accounted for grounds which are not relevant.

61. Error in decision making process can vitiate a judgment/decision of a statutory authority. In terms of Section 19(1) of the PML Act, a decision-making error can lead to the arrest and deprivation of liberty of the arrestee. Though not akin to preventive detention cases, but given the nature of the order entailing arrest – it requires careful scrutiny and consideration. Yet, at the same time, the courts should not go into the correctness of the opinion formed or sufficiency of the material on which it is based, albeit if a vital ground or fact is not considered or the ground or reason is found to be non-existent, the order of detention may fail.[52]

62. In ***Centre for PIL and another*** v. ***Union of India and another***,[53] this Court observed that in judicial review, it is permissible to examine the question of illegality in the decision-making process. A decision which is vitiated by

[52] *Ram Manohar Lohia* v. *State of Bihar and another*, AIR 1966 SC 740 and *Moti Lal Jain* v. *State of Bihar and others*, AIR 1968 SC 1509.
[53] (2011) 4 SCC 1.

extraneous considerations can be set aside. Similarly, in ***Uttamrao Shivdas Jankhar*** v. ***Ranjitsinh Vijaysinh Mohite Patil,***[54] elaborating on the expression "decision making process", this Court held that judicial interference is warranted when there is no proper application of mind on the requirements of law. An error in the decision making process crops up where the authority fails to consider a relevant factor and considers irrelevant factors to decide the issue.

63. In the present case, as noticed above, the "reasons to believe" have recorded several facts and grounds. One of the grounds for arrest relates to the formulation of the excise policy with the intent to obtain kickbacks/bribes. What has been discussed above in the arguments raised by Arvind Kejriwal relates to corruption amounting Rs.45 crores to facilitate Goa elections for the AA Party. However, the "reasons to believe" also refer to the policy itself and that it was vitiated on the ground of criminality, *viz.* to promote cartelization and benefit from those providing bribes or kickbacks. We have briefly referred to the terms of the excise policy, albeit for clarity we would like to reproduce the findings recorded in the case of ***Manish Sisodia*** v. ***Central Bureau of Investigation***[55], a judgment authored by one of us (Sanjiv Khanna, J.), the relevant portion of which reads as under:

> "**22.** However, there is one clear ground or charge in the complaint filed under the PML Act, which is free from perceptible legal challenge and the facts as alleged are tentatively supported by material and evidence. This discussion is equally relevant for the charge-sheet filed by the CBI under the PoC Act and IPC. We would like to recapitulate the facts as alleged, which it is stated establish an offence under Section 3 of the PML Act and the PoC Act. These are:

[54] (2009) 13 SCC 131.
[55] 2023 SCC OnLine SC 1393.

- In a period of about ten months, during which the new excise policy was in operation, the wholesale distributors had earned Rs. 581,00,00,000 (rupees five hundred eighty one crores only) as the fixed fee.
- The one time licence fee collected from 14 wholesale distributors was about Rs. 70,00,00,000 (rupees seventy crores only).
- Under the old policy 5% commission was payable to the wholesale distributors/licensees.
  The difference between the 12%; minus 5% of the wholesale profit margin *plus* Rs. 70,00,00,000/-; it is submitted, would constitute proceeds of crime, an offence punishable under the PML Act. The proceeds of crime were acquired, used and were in possession of the wholesale distributors who have unlawfully benefitted from illegal gain at the expense of the government exchequer and the consumers/ buyers. Relevant portion of the criminal complaint filed by the DoE dated 04.05.2023, reads:

  "One of the reasons given by Sh Manish Sisodia is to compensate the wholesaler for increased license fee from Rs. 5 lacs to Rs. 5 Cr. During this policy period, 14 LI licences were given by Excise Department, by raising the license fee for LI to Rs. 5 Cr in the entire period of operation of the Delhi Excise Policy 2021-2022, the Govt. has earned Rs. 75.16 Cr from the license fee of LI (as per Excise department communication dated 11.04.2023) (RUD 34). On the other hand the excess profit earned by the wholesalers during this period is to the tune of Rs. 338 Cr. (7% additional profit earned due to increase from 5% to 12%, Rs. 581 Cr being the total profit of LI as informed by Excise department). Therefore there is no logical correlation between the license fee increase and the profit margin increase. Whereas this excess profit margin benefit could have been passed on to the consumers in form of lower MRP. Contrary to the claim that the policy was meant to benefit the public or the exchequer, it was rather a conspiracy to ensure massive illegal gains to a select few private players/individuals/entities."

23. The charge-sheet under the PoC Act includes offences for unlawful gains to a private person at the expense of the public exchequer. Reference in this regard is made to the provisions of Sections 7, 7A, 8 and 12 of the PoC Act.

24. Clauses (a) and (b) to Section 7 of the PoC Act apply : (a) when a public servant obtains, accepts or intends to obtain from another person undue advantage with the intent to perform or fail to improperly or to forbear or cause forbearance to cause by himself or by another person; (b) obtains or accepts or attempts to obtain undue advantage from a person as a reward or

dishonest performance of a public duty or forbearance to perform such duty, either by himself or by another public servant. Explanation (2) construes the words and expression, "obtains, accepts or attempts to obtain", as to cover cases where a public servant obtains, accepts or intends to obtain any undue advantage by abusing his position as a public servant or by using his personal interest over another public servant by any other corrupt or illegal means. It is immaterial whether such person being a public servant accepts or attempts to obtain the undue advantage directly or through a third party.

25. On this aspect of the offences under the PoC Act, the CBI has submitted that conspiracy and involvement of the appellant - Manish Sisodia is well established. For the sake of clarity, without making any additions, subtractions, or a detailed analysis, we would like to recapitulate what is stated in the chargesheet filed by the CBI against the appellant - Manish Sisodia:

- The existing excise policy was changed to facilitate and get kickbacks and bribes from the wholesale distributors by enhancing their commission/fee from 5% under the old policy to 12% under the new policy. Accordingly, a conspiracy was hatched to carefully draft the new policy, deviating from the expert opinion/views to create an eco-system to assure unjust enrichment of the wholesale distributors at the expense of government exchequer or the consumer. The illegal income (proceeds of crime, as per the DoE) would partly be recycled and returned in the form of bribes.
- Vijay Nair, who was the middleman, a go-between, a member of AAP, and a co-confident of the appellant - Manish Sisodia, had interacted with Butchi Babu, Arun Pillai, Abhishek Boinpally and Sarath Reddy, to frame the excise policy on conditions and terms put forth and to the satisfaction and desire of the liquor group.
- Vijay Nair and the members of the liquor group had meetings on different dates, including 16.03.2021, and had prepared the new excise policy, which was handed over to Vijay Nair. Thereupon, the commission/fee, which was earlier fixed at minimum of 5%, was enhanced to fixed fee of 12% payable to wholesale distributor.
- The appellant - Manish Sisodia was aware that three liquor manufacturers have 85% share in the liquor market in Delhi. Out of them two manufacturers had 65% liquor share, while 14 small manufacturers had 20% market share. As per the term in the new excise policy - each manufacturer could appoint only one wholesale distributor, through whom alone the liquor would be sold. At the same time, the wholesale distributors could enter into distribution agreements with multiple manufacturers. This facilitated getting kickbacks or

bribes from the wholesale distributors having substantial market share and turnover.

- The licence fee payable by the wholesale distributor was a fixed amount of Rs. 5,00,00,000/- (rupees five crores only). It was not dependant on the turnover. The new policy facilitated big wholesale distributors, whose outpour towards the licence fee was fixed.
- The policy favoured and promoted cartelisation. Large wholesale distributors with high market share because of extraneous reasons and kickbacks, were ensured to earn exorbitant profits.
- Mahadev Liquor, who was a wholesale distributor for 14 small manufacturers, having 20% market share, was forced to surrender the wholesale distributorship licence.
- Indo Spirit, the firm in which the liquor group had interest, was granted whole distributor licence, in spite of complaints of cartelisation etc. which were overlooked. The complainant was forced to take back his complaint.
- The excess amount of 7% commission/fee earned by the wholesale distributors of Rs. 338,00,00,000/- (rupees three hundred thirty eight crores only) constitute an offence as defined under Section 7 of the PoC Act, relating to a public servant being bribed. (As per the DoE, these are proceeds of crime). This amount was earned by the wholesale distributors in a span of ten months. This figure cannot be disputed or challenged. Thus, the new excise policy was meant to give windfall gains to select few wholesale distributors, who in turn had agreed to give kickbacks and bribes.
- No doubt, VAT and excise duty was payable separately. However, under the new policy the VAT was reduced to mere 1%.
- Vijay Nair had assured the liquor group that they would be made distributor of Pernod Ricard, one of the biggest players in the market. This did happen."

64. During the course of arguments, we had specifically asked the learned counsel appearing for Arvind Kejriwal to address arguments on facts. He did not, however, address arguments on the said aspect.[56] As noticed above, the arrest of Arvind Kejriwal is on several counts, which are independent and separate from each other.

[56] It was also submitted on behalf of Arvind Kejriwal that he would not like to argue on the question of applicability of Section 70 of the PML Act to political parties or the issue whether he can be prosecuted being the person in-charge and responsible.

65. Arguments raised on behalf of Arvind Kejriwal, which tend to dent the statements and material relied upon by the DoE in the "reasons to believe", though worthy of consideration, are in the nature of propositions or deductions. They are a matter of discussion as they intend to support or establish a point of view on the basis of inferences drawn from the material. It is contended that the statements relied upon by the DoE have been extracted under coercion, a fact that is contested and has to be examined and decided. This argument does not persuade us, given the limited power of judicial review, to set aside and quash the "reasons to believe". Accepting this argument would be equivalent to undertaking a merits review.

66. Arvind Kejriwal can raise these arguments at the time when his application for bail is taken up for hearing. In bail hearings, the court's jurisdiction is wider, though the fetters in terms of Section 45 of the PML Act have to be met. Special Court would have to independently apply its mind, without being influenced by the opinion recorded in the "reasons to believe". To adjudicate on a bail application, pleas and arguments of Arvind Kejriwal and the DoE, including the material that can be relied on and the inferences possible shall be examined. The court will have to undertake the balancing exercise.

67. It has been strenuously urged on behalf of Arvind Kejriwal that the arrest would falter on the ground that the "reasons to believe" do not mention and record reasons for "necessity to arrest". The term "necessity to arrest" is not mentioned in Section 19(1) of the PML Act. However, this expression has been given

judicial recognition in ***Arnesh Kumar* v. *State of Bihar***,[57] which lays down that "necessity to arrest" must be considered by an officer before arresting a person. This Court observed that the officer must ask himself the questions – why arrest?; is it really necessary to arrest?; what purpose would it serve?; and what object would it achieve?

68. This Court in ***Mohammed Zubair*** v. ***State of NCT of Delhi***,[58] has held that power to arrest is not unbridled. The officer must be satisfied that the arrest is necessary. Where the power is exercised without application of mind, and by disregarding the law, it amounts to abuse of the law.

69. In ***Joginder Kumar*** v. ***State of Uttar Pradesh***,[59] the distinction between the power to arrest and the necessity and need to arrest[60], is explained in the following terms:

> "20…No arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the

[57] (2014) 8 SCC 273,
[58] (2022) SCC OnLine SC 897
[59] (1994) 4 SCC 260.
[60] Necessity to arrest is not a precondition and safeguard mentioned in Section 19 of the PML Act, albeit treated as a part of the general law and exercise of the power to arrest. The legislature being aware of this interpretation has not excluded the application of this principle in Section 19 of the PML Act.

> suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave the Station without permission would do."

70. Recently, ***Siddharth*** v. ***State of Uttar Pradesh***,[61] relied on ***Joginder Kumar*** (supra), to observe:

> "10. We may note that personal liberty is an important aspect of our constitutional mandate. The occasion to arrest an accused during investigation arises when custodial investigation becomes necessary or it is a heinous crime or where there is a possibility of influencing the witnesses or accused may abscond. Merely because an arrest can be made because it is lawful does not mandate that arrest must be made. A distinction must be made between the existence of the power to arrest and the justification for exercise of it [Joginder Kumar v. State of U.P., (1994) 4 SCC 260 : 1994 SCC (Cri) 1172] . If arrest is made routine, it can cause incalculable harm to the reputation and self-esteem of a person. If the investigating officer has no reason to believe that the accused will abscond or disobey summons and has, in fact, throughout cooperated with the investigation we fail to appreciate why there should be a compulsion on the officer to arrest the accused."

Thus, time and again, courts have emphasised that the power to arrest must be exercised cautiously to prevent severe repercussions on the life and liberty of individuals. Such power must be restricted to necessary instances and must not be exercised routinely or in a cavalier fashion.

71. In ***Vijay Madanlal Choudhary*** (supra), a substantive threshold test is not laid down on the 'necessity to arrest'. However, in paragraph 88 of the judgment, the Court has observed that the safeguard provided in Section 19(1) of the PML Act is to ensure fairness, objectivity and accountability of the authorised officer in forming opinion, as recorded in writing, regarding necessity to arrest a person

[61] (2022) 1 SCC 676.

involved in the offence of money laundering. Similar observations are made in paragraphs 15 and 22 of ***Pankaj Bansal*** (supra).

72. However, we must observe that in paragraph 32 of ***V. Senthil Balaji*** (supra), it is held that an authorised officer is not bound to follow the rigours of Section 41A of the Code as there is already an exhaustive procedure contemplated under the PML Act containing sufficient safeguards in favour of the arrestee. Thereafter, in paragraph 40 of ***V. Senthil Balaji*** (supra), it is observed:

> "40. To effect an arrest, an officer authorised has to assess and evaluate the materials in his possession. Through such materials, he is expected to form a reason to believe that a person has been guilty of an offence punishable under the PMLA, 2002. Thereafter, he is at liberty to arrest, while performing his mandatory duty of recording the reasons. The said exercise has to be followed by way of an information being served on the arrestee of the grounds of arrest. Any non-compliance of the mandate of Section 19(1) of the PMLA, 2002 would vitiate the very arrest itself. Under sub-section (2), the authorised officer shall immediately, after the arrest, forward a copy of the order as mandated under sub-section (1) together with the materials in his custody, forming the basis of his belief, to the adjudicating authority, in a sealed envelope. Needless to state, compliance of sub-section (2) is also a solemn function of the arresting authority which brooks no exception."

73. In ***Prabir Purkayastha*** (supra), this Court went beyond the rigours of the PML Act/UAPA. Drawing a distinction between "reasons to arrest" and "grounds for arrest", it held that while the former refers to the formal parameters, the latter would require all such details in the hands of the investigating officer necessitating the arrest. Thus, the grounds of arrest would be personal to the accused.

74. Therefore, the issue which arises for consideration is whether the court while examining the validity of arrest in terms of Section 19(1) of the PML Act will also go into and examine the necessity and need to arrest. In other words, is the

mere satisfaction of the formal parameters to arrest sufficient? Or is the satisfaction of necessity and need to arrest, beyond mere formal parameters, required? We would concede that such review might be conflated with stipulations in Section 41 of the Code which lays down certain conditions for the police to arrest without warrant:

- Section 41(1)(ii)(a) – preventing a person from committing further offence.
- Section 41(1)(ii)(b) – proper investigation of the offence.
- Section 41(1)(ii)(c) – preventing a person from disappearing or tampering with evidence in any manner.
- Section 41(1)(ii)(d) – preventing the person from making any inducement or threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or police.
- Section 41(1)(ii)(e) – to ensure presence of the person in the Court, whenever required, which without arresting cannot be ensured.

However, Section 19(1) of the PML Act does not permit arrest only to conduct investigation. Conditions of Section 19(1) have to be satisfied. Clauses (a), (c), (d) and (e) to Section 41(1)(ii) of the Code, apart from other considerations, may be relevant.

75. In ***Vijay Madanlal Choudhary*** (supra), this Court has held that when a person applies for bail or anticipatory bail under the PML Act, the conditions stipulated in Section 437/438/439 of the Code would equally apply, in addition to Section 45 of the PML Act. Therefore, it is urged that necessity to arrest, in the case of arrest under Section 19(1), would be an additional factor required to be

considered beyond the conditions and factors stipulated in Section 19(1) of the PML Act.

76. DoE submits that the test of "necessity to arrest" is satisfied in view of Arvind Kejriwal failing to appear despite the issuance of 9 summons dated 30.10.2023, 18.12.2023, 22.12.2023, 12.01.2024, 31.01.2024, 14.02.2024, 21.02.2024, 26.02.2024, and 16.03.2024. It is also submitted that arrest is a part and parcel of investigation intended to secure evidence, leading to discovery of material facts and relevant information as held in ***P. Chidambaram*** v. ***Directorate of Enforcement***.[62]

77. On behalf of Arvind Kejriwal, it is submitted that there was no necessity to arrest on 21.03.2024. The RC/ECIR were registered in the month of August 2022. Further, most of the material relied upon in the "reasons to believe" are prior to July 2023. The statements under Section 50 of the PML Act and under Section 164 of the Code, or otherwise, of Magunta Srinivasulu Reddy, Raghav Magunta, Siddharth Reddy, etc., relate to the period prior to July 2023. Thus, it was not necessary to arrest Arvind Kejriwal on 21.03.2024 based on the said material. Lastly, in ***Pankaj Bansal*** (supra), this Court observed:

> "28. Mere non-cooperation of a witness in response to the summons issued under Section 50 of the Act of 2002 would not be enough to render him/her liable to be arrested under Section 19…"

78. As per the data available on the website of the DoE, as on 31.01.2023[63], 5,906 ECIRs were recorded. However, search was conducted in 531 ECIRs by issue of 4,954 search warrants. The total number of ECIRs recorded against ex-MPs,

[62] (2019) 9 SCC 24.
[63] The data post 31.01.2023 has not been updated.

MLAs and MLCs was 176. The number of persons arrested is 513. Whereas the number of prosecution complaints filed is 1,142. The data raises a number of questions, including the question whether the DoE has formulated a policy, when they should arrest a person involved in offences committed under the PML Act.

79. We are conscious that the principle of parity or equality enshrined under Article 14 of the Constitution cannot be invoked for repeating or multiplying irregularity or illegality. If any advantage or benefit has been wrongly given, another person cannot claim the same advantage as a matter of right on account of the error or mistake. However, this principle may not apply where two or more courses are available to the authorities. The doctrine of need and necessity to arrest possibly accepts the said principle. Section 45 gives primacy to the opinion of the DoE when it comes to grant of bail. DoE should act uniformly, consistent in conduct, confirming one rule for all.

80. One of the developments in the last decade is acceptance of the principle of proportionality, especially when fundamental rights such as right to life and liberty are involved. This Court in ***Chairman, All India Railway Recruitment Board*** v. ***K. Shyam Kumar***[64] referred to a decision of the House of Lords in ***R*** v. ***Secretary of State***,[65] wherein the House of Lords had stressed that when human rights issues are concerned, proportionality is an appropriate standard of review.

[64] (2010) 6 SCC 614.
[65] (1991) 1 All ER 710.

81. The proportionality test[66] is more precise and sophisticated than other traditional grounds of review. The court is required to assess the balance struck by the decision maker, not merely whether it is within the range of rational or reasonable decisions. In this manner, proportionality goes further than the traditional grounds of review as it requires attention to the relative weight according to interest and considerations. ***State of Uttar Pradesh*** v. ***Lal***,[67] which refers to several other cases, states that the proportionality test safeguards fundamental rights of citizens to ensure a fair balance between individual rights and public interest. It requires the court to judge whether the action taken was really needed and whether it was within the range of courses of action which could be reasonably followed. Proportionality is more concerned with the aims and intentions of the decision maker and whether the decision maker has achieved more or less the correct balance or equilibrium.

82. The principle of proportionality has been followed by this Court in several decisions such as ***Modern Dental College & Research Centre*** v. ***State of Madhya Pradesh***,[68] ***K.S. Puttaswamy (Retired) and Anr. (Aadhar)*** v. ***Union of India and Anr.*** (5J),[69] and ***Anuradha Bhasin*** v. ***Union of India and Others***[70].

[66] The test of proportionality comprises four steps: (i) The first step is to examine whether the act/measure restricting the fundamental right has a legitimate aim (legitimate aim/purpose). (ii) The second step is to examine whether the restriction has rational connection with the aim (rational connection). (iii) The third step is to examine whether there should have been a less restrictive alternate measure that is equally effective (minimal impairment/necessity test). (iv) The last stage is to strike an appropriate balance between the fundamental right and the pursued public purpose (balancing act).
[67] (2006) 3 SCC 276.
[68] (2016) 4 SCC 346.
[69] (2019) 1 SCC 1.
[70] (2020) 3 SCC 637.

83. Recently, the Constitution Bench applied the doctrine of proportionality to strike down the Electoral Bond Scheme in ***Association for Democratic Reforms*** v. ***Union of India***[71]. In a way, the present case also relates to funding of elections, an issue which was examined in some depth in ***Association for Democratic Reforms*** (supra).

84. In view of the aforesaid discussion, and as ***Vijay Madanlal Choudhary*** (supra) is a decision rendered by a three Judge Bench, we deem it appropriate to refer the following questions of law for consideration by a larger Bench:

(a) Whether the "need and necessity to arrest" is a separate ground to challenge the order of arrest passed in terms of Section 19(1) of the PML Act?

(b) Whether the "need and necessity to arrest" refers to the satisfaction of formal parameters to arrest and take a person into custody, or it relates to other personal grounds and reasons regarding necessity to arrest a person in the facts and circumstances of the said case?

(c) If questions (a) and (b) are answered in the affirmative, what are the parameters and facts that are to be taken into consideration by the court while examining the question of "need and necessity to arrest"?

85. As we are referring the matter to a larger Bench, we have to, despite our findings on "reasons to believe", consider whether interim bail should be granted to Arvind Kejriwal. Given the fact that right to life and liberty is sacrosanct, and Arvind Kejriwal has suffered incarceration of over 90 days, and that the questions referred to above require in-depth consideration by a larger

[71] (2024) 5 SCC 1.

Bench, we direct that Arvind Kejriwal may be released on interim bail in connection with case ECIR No. HIU-II/14/2022 dated 22.08.2022, on the same terms as imposed *vide* the order dated 10.05.2024 which reads:

(a) he shall furnish bail bonds in the sum of Rs.50,000/- with one surety of the like amount to the satisfaction of the Jail Superintendent;

(b) he shall not visit the Office of the Chief Minister and the Delhi Secretariat;

(c) he shall be bound by the statement made on his behalf that he shall not sign official files unless it is required and necessary for obtaining clearance/approval of the Lieutenant Governor of Delhi;

(d) he will not make any comment with regard to his role in the present case; and

(e) he will not interact with any of the witnesses and/or have access to any official files connected with the case.

The interim bail may be extended, or recalled by the larger Bench.

86. We are conscious that Arvind Kejriwal is an elected leader and the Chief Minister of Delhi, a post holding importance and influence. We have also referred to the allegations. While we do not give any direction, since we are doubtful whether the court can direct an elected leader to step down or not function as the Chief Minister or as a Minister, we leave it to Arvind Kejriwal to take a call. Larger Bench, if deemed appropriate, can frame question(s) and decide the conditions that can be imposed by the court in such cases.

87. Accordingly, the Registry is directed to place the matter before the Hon'ble Chief Justice of India for constitution of an appropriate Bench, and if appropriate, a Constitution Bench, for consideration of the aforesaid questions.

The questions framed above, if required, can be reformulated, substituted and added to.

88. The observations made in this judgment are for deciding the present appeal and will not be construed as findings on merits of the case/allegations. Facts, as alleged, have to be established and proved. Application for regular bail, if pending consideration or required to be decided, shall be decided on its own merits.

.....J.
(SANJIV KHANNA)

.....J.
(DIPANKAR DATTA)

NEW DELHI;
JULY 12, 2024.