IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On: 19.06.2018

DATED : 10.07.2018

CORAM

THE HON'BLE MR. JUSTICE **M.M.SUNDRESH**
and
THE HON'BLE MR. JUSTICE **N.ANAND VENKATESH**

W.A.Nos.1168 and 1169 of 2018
and C.M.P Nos.9408 to 9410 and 10312 to 10314 of 2018

Nalini Chidambaram
No.16, Pycofts Garden Road,
Chennai-600 006. ... Appellant in both writ appeals

Vs.

1.The Directorate of Enforcement,
Represented by its Director,
Government of India,
6th Floor, Lok Nayak Bhawan,
Khan Market, New Delhi-110 003.

2.The Assistant Director,
Enforcement Directorate,
CGO Complex, 3rd MSO Building,
6th Floor, DF Block, Salt Lake,
Kolkata-700 064.

3.Karnal Singh,
Director of Enforcement,
6th Floor, Lok Nayak Bhawan,
Khan Market, New Delhi-110 003. ... Respondents in both writ appeals

Writ Appeals are preferred under Clause 15 of the Letters Patent against the common order dated 24.04.2018 made in W.P.Nos.32848 and 32849 of 2016.

For Appellant : Mr.K.T.S.Tulsi,
Senior Counsel for Ms.C.Uma &
Mr.N.R.R.Arun Natarajan

For Respondents : Mr.G.Rajagopal,
Addl. Solicitor General

COMMON JUDGMENT

M.M.SUNDRESH,J.

A Senior Lawyer of repute rendering professional service across the country is the appellant. Challenge is made to the summons issued under Sections 50(2) and 3 of the Prevention of Money-Laundering Act, 2002 seeking umbrage under Section 160 of the Code of Criminal Procedure, 1973, among other grounds. Incidentally she has also sought for other prayers. On the dismissal of the writ petitions, the present writ appeals are before us.

2. Since the core facts required for the disposal of the writ appeals are undisputed, narration at length by the learned single Judge does not require to be reiterated except to the extent required. Thus, the primary facts are taken as such from the recording made in

the orders under challenge.

3. Heard Shri K.T.S.Tulsi, learned Senior Counsel for Ms.C.Uma and Mr.N.R.R.Arun Natarajan, learned counsel appearing for the appellant and Shri G.Rajagopal, learned Additional Solicitor General for the respondents.

4. The appellant was engaged by one Ms.Manoranjana Sinh through her counsel to act as a Senior Lawyer on two occasions before the Company Law Board and the Delhi High Court. A Memorandum of Understanding(MOU) was signed between M/s GNN Pvt. Ltd., a media company owned by Ms.Manoranjana Sinh and M/s Bengal Media Pvt. Ltd., owned by Mr.Sudipto Sen on 09.06.2010. The relevant Clause 15 is furnished hereunder.

> "15.Bengal media will assist Mrs.Manoranjana in the ongoing litigation with Mr.Matang Sinh by co-ordinating with her lawyers."

5. It was followed by another Agreement signed by one Ms.Manoranjana Sinh on behalf of GNN Pvt. Ltd., and Mr.Sudipto Sen on behalf of M/s Bengal Media Pvt. Ltd., in which, clause 5.2 is apposite.

> "5.2. The company shall issue fresh shares to the Investor

which is valued at Rs.30 crore. The Promoters shall transfer a portion of the shares from their 5,74,000 Equity shares for which the Investor shall pay an additional Rs.12.5 crores directly to the Promotors such that after the about to transactions the investor and the promotor shall hold 50% each in the total share capital of the company. The capital gains tax is any payable on such transfer will be borne by the Promotors in favour of the Investors shall take place anytime after 4.12.2010."

6. The appellant is stated to have been paid Rs.1 crore by Mr.Sudipto Sen through his company. It was done after deducting TDS. The appellant disclosed the income in her return of income and accordingly paid the tax.

7. Mr.Sudipto Sen failed to honour his commitment to the depositors, a case was registered by the Central Bureau of Investigation. The appellant was asked to produce certain documents. In the supplementary charge sheet filed, the appellant was not even arrayed as a witness. The Investigation Agency also found the factum of payment made to the appellant for the professional service rendered.

8. In the proceedings initiated under the Prevention of Money Laundering Act, 2002, summons were issued from 03.02.2016

onwards by the second respondent to the appellant. The appellant engaged her authorised representative to appear and produce the documents. Having found that there are discrepancies between the statement of Ms.Manoranjana Sinh and the appellant, she was directed to appear in person through the impugned summons. This is sought to be challenged on the premise that the protective discrimination, which is otherwise available to a woman under Section 160 of the Code of Criminal Procedure, 1973, will have to be extended to the appellant. While alleging mala fides, a contention has been raised on the privilege available to a Lawyer *qua* a professional service to a client.

9. **Submissions of the Appellant:**

Shri K.T.S.Tulsi, learned Senior Counsel appearing for the appellant made the following submissions.

After the investigation done by the Central Bureau of Investigation(CBI) which found nothing incriminatory against the appellant, the summons issued would amount to malice. When once the CBI has not proceeded against the appellant for want of any material, the respondents cannot do it in a different way. As the third respondent had not chosen to file a counter affidavit denying the allegations made, they should be taken as admitted and thus true. On

a query, the learned Senior Counsel would submit that both malice in fact and law are available. There is also an element of bias involved in the proceedings initiated. The appellant is entitled for the protection under Sections 126 and 129 of the Indian Evidence Act, 1872, which are meant to uphold the sanctity of the legal profession qua a client. A liberal interpretation is required in extending the benefit under Section 160 of the Code of Criminal procedure in calling a woman for investigation. The submissions of the eloquence are sought to be buttressed through the sprinkling of the following decisions.

(i) **NANDINI SATPATHY VS. P.L. DANI AND ANOTHER ((1978) 2 Supreme Court Cases 424);**

(ii) **ASMITA AGARWAL VS. THE ENFORCEMENT DIRECTORATE AND OTHERS ((2002) Criminal Law Journal 819);**

(iii) **M/S PUSMA INVESTMENT PVT. LTD., AND OTHERS VS. STATE OF MEGHALAYA AND OTHERS ((2010) Criminal Law Journal 56);**

(iv) **FOZIYA SAMIR GODIL VS. UNION OF INDIA AND TWO OTHERS (Spl. Crl. Application (Direction) No.1725 of 2014 with Spl. Crl. Appln.No.1748 of 2014 dated 09.05.2014);**

(v) **VIJAY MADANLAL CHOUDHARY VS. UNION OF INDIA AND ANR. (W.P.Nos.4336, 4341, 4344, 4347, 4350, 5089, 5091 and 5625 of 2015 dated 20.10.2015);**

(vi) **ASHOK MUNILAL JAIN AND ANOTHER VS. ASSISTANT DIRECTOR, DIRECTORATE OF ENFORCEMENT (Crl.Appeal No.566 of 2017 dated 22.03.2017);**

(vii) **B.PREMANAND AND OTHERS V. MOHAN KOIKAL**

AND OTHERS ((2011) 4 Supreme Court Cases 266);

(viii) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, WEST BENGAL VS. SATYEN BHOWMICK AND OTHERS ((1981) 2 Supreme Court Cases, 109);

(ix) THE SUPERINTENDENT, OFFICE OF THE PUBLIC PROSECUTOR VS. THE REGISTRAR, TAMIL NADU INFORMATION COMMISSION AND ANOTHER (W.P.No.20574 of 2009 dated 05.01.2010); and

(x) KOKKANDA B.POONDACHA AND OTHERS VS. K.D.GANAPATHI AND ANOTHER ((2011) 12 Supreme Court Cases 600).

10. **Submissions of the Respondents:**

Shri G.Rajagopal, learned Additional Solicitor General appearing for the respondents, would submit that the challenge made is premature. Having found that the assistance of the authorised representative was not sufficient, the appellant was directed to appear in person to address the discrepancy and the contradiction that emerged between the information provided by her and the statement given by Ms.Manoranjana Sinh. Ms.Manoranjana Sinh therefore had no idea on the appellant having paid by Mr.Sudipto Sen on her behalf. Therefore, in view of the new facts having emerged coupled with the contradictions, the presence of the appellant is very much required. Section 160 of the Code of Criminal Procedure and Section 50 of the Act 15 of 2003 stand apart. Therefore, the appellant cannot

avoid her appearance. Thus, these writ appeals will have to be dismissed.

11. **DISCUSSION:**

Before proceeding to decide the issues involved, it would be appropriate to understand the extent, object and the scope of provisions involved.

12.**The Prevention of the Money-Laundering Act, 2002(Act 15 of 2003):**

12.1. This Act is meant to prevent and prohibit money laundering. When money laundering takes place, it provides for confiscation of the property and for the matters connected there with and incidental thereto. Therefore, an authority constituted has got different roles to play. Such an authority has been clothed with sufficient powers since a consequence of an offence would be detrimental to the development and growth of country's economy.

12.2. Section 2(s) defines the word "person"

(s)"person" includes;-

(i)an individual,

(ii)a Hindu undivided family,

(iii)a company,

(iv)a firm,

(v)an association of persons or a body of individuals, whether incorporated or not,

(vi)every artificial juridical person, not falling within any of the preceding sub-clauses, and

(vii)any agency, office or branch owned or controlled by any of the above persons mentioned in the preceding sub-clauses;

(sa)"person carrying on designated business or profession" means,-

(i)a person carrying on activities for playing games of chance for cash or kind, and includes such activities associated with casino;

(ii)a Registrar or Sub-Registrar appointed under section 6 of the Registration Act, 1908 (16 of 1908) as may be notified by the Central Government;

(iii)real estate agent, as may be notified by the Central Government;

(iv)dealer in precious metals, precious stones and other high value goods, as may be notified by the Central Government;

(v)person engaged in safekeeping and administration of cash and liquid securities on behalf of other persons, as may be notified by the Central Government; or

(vi)person carrying on such other activities as the Central Government may, by notification, so designate, from time-to-time;

(sb)"precious metal" means gold, silver, platinum, palladium or rhodium or such other metal as may be notified by the Central Government;

(sc)"precious stone" means diamond, emerald, ruby, sapphire or any such other stone as may be notified by the Central Government;

(t)"prescribed" means prescribed by rules made under this Act;

(u)"proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property;

(v)"property" means any property or assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and includes deeds and instruments evidencing title to, or interest in, such property or assets, wherever located;

Explanation.- For the removal of doubts, it is hereby clarified that the term "property" includes property of any kind used in the commission of an offence under this Act or any of the scheduled offences;

(va)"real estate agent" means a real estate agent as defined in clause (88) of section 65 of the Finance Act, 1994;

(w)"records" include the records maintained in the form of books or stored in a computer or such other form as may be prescribed;

(wa)"reporting entity" means a banking company, financial institution, intermediary or a person carrying on a designated business or profession;

12.3. The aforesaid definition of a "person" is merely illustrative and thus, not exhaustive. Therefore, the word "person" would mean anyone who contravenes the provisions of the Act.

12.4. Chapter VIII provides for classes of authorities under Section 48. Section 50 empowers them on the matters touching upon the issuance of summons, production of documents and to give evidence etc. For better appreciation, the aforesaid provision is

extracted below.

> **"50.**Powers of authorities regarding summons, production of documents and to give evidence, etc.-(l) The Director shall, for the purposes of section 13, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:-
>
> (a)discovery and inspection;
>
> (b)enforcing the attendance of any person, including any officer of a reporting entity and examining him on oath;
>
> (c) compelling the production of records;
>
> (d) receiving evidence on affidavits;
>
> (e) issuing commissions for examination of witnesses and documents; and
>
> (f) any other matter which may be prescribed.
>
> (2) The Director, Additional Director, Joint Director, Deputy Director or Assistant Director shall have power to summon any person whose attendance he considers necessary whether to give evidence or to produce any records during the course of any investigation or proceeding under this Act.
>
> (3) All the persons so summoned shall be bound to attend in person or through authorised agents, as such officer may direct, and shall be bound to state the truth upon any subject respecting which they are examined or make statements, and produce such documents as may be required.
>
> (4) Every proceeding under sub-sections (2) and (3) shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code, 1860 (45 of 1860)."

12.5. Section 50(2) gives sufficient ammunition to an authority

to summon any person whose attendance is considered necessary. The word "shall" is to be interpreted to mean absolute power to seek attendance ofcourse to a subjective satisfaction. Such a power can be exercised requiring a person to give evidence or to produce during the course of investigation. An investigation cannot be given a restrictive meaning since it is included in the definition clause of "proceedings". Section 50(2) also makes this position abundantly clear by suffixing the word "investigation" with the word "any".

12.6. Such an exercise of an authority is also reiterated under sub-section 3 which mandates a person so summoned to attend in person. Here also the discretion given to the authority is extended either to call a person or permit to represent by an authorised agent. Therefore, if an authority is of the view that the assistance rendered by an authorised agent is not sufficient enough, then certainly a person can be directed to attend physically.

12.7. Interestingly sub-section 4 goes one step further and makes the position clear. It starts with the words "every proceeding under sub-section (2) and (3). Such a proceeding shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228

of the Indian Penal Code. Hence, a deeming fiction is created by giving status of the judicial proceedings to an investigation or proceedings under sub-section (2)and (3). Therefore, a person is required to furnish the facts known to him by facilitating the process of investigation or any other proceeding.

12.8 Section 65 provides for the application of the Code of Criminal Procedure, 1973. It arises, when there is no inconsistency with the provisions of the Act 15 of 2003. This is also with specific reference to arrest, search, seizure, attachment, confiscation, investigation etc. Therefore, this provision is introduced to help the authority in its investigation or proceedings under the Act by having recourse to the Code whenever the Act does not provide so. Hence, Section 65 has to be interpreted to mean that Code is meant to be used by an authority in discharge of his functions under Act 15 of 2003.

12.9. Section 71 speaks of the over riding effect. It contains a non-obstante clause dealing with any possible inconsistency in any other law. While Section 65 applies to the Code of Criminal Procedure for helping the authority, Section 71 clears any possible inconsistency with all the provisions of the Act 15 of 2003. Resultantly, even assuming if there is any inconsistency, with any other law for the

time being in force, Act 15 of 2003 will have primacy. Idea is to avoid any obstacle that might arise through the operation of other enactments.

13. **Code of Criminal Procedure, 1973:**

Section 160 of the Code of Criminal Procedure comes under Chapter XII which deals with information to police and their power to investigate. Section 160 of the Code of Criminal Procedure deals with the power of the police officer to require attendance of witnesses. Proviso to section carries out an exception when it comes to a woman. Thus, she shall not be required to attend the enquiry at any place other than the place in which she resides. Under Section 161 of Cr.P.C, a witness can be examined by the police. However, a statement made by any person during the course of investigation shall not be signed and used in evidence except to the extent provided under the Code.

14. **Comparison between the Code and Act 15 of 2003:**

14.1. Both the Code and the Act travel on their respective channels. Under the Code investigation is done by the police over a crime**.** On the contrary, under Act 15 of 2003, an authority has got different roles to play, in tune with the objectives. While Section 50(2) of the Act 15 of 2003 speaks of an authorised agent, the same is missing under the Code. There is no proceedings under the Code as

being dealt with under the Act 15 of 2003 by an authority. Merely because trappings of police power is given, an authority cannot be compared with the policemen under all circumstances and so is his office.

14.2. The Code and the Act are to be interpreted to sail together qua investigation. A person summoned has to say the truth before an authority in accordance with sub section (3) of Section 50. For giving a false evidence intentionally insulting an authority or interpreting the proceedings conducted by a authority, a person would be visited with penal consequence under I.P.C. Therefore, to that extent, an investigation under sub-section (2) and (3) of Section 50 assumes the character of the judicial proceedings. Further more, a statement given before the authority is admissible in law under Act 15 of 2003 which stands prohibited before the police officer under Section 162 of the Code.

14.3. Coming to the issue qua a woman, certainly an authority can call a woman, who comes within the definition of a "person", since the nature of investigation or a proceeding is totally different apart from being distinct from the one under the Code. After all, a wide discretion is given to an authority even to call a person or permit his or

her authorised agent. Therefore, when once a satisfaction is arrived on the need to summon a person physically, the same has to be done to facilitate a smooth progress in the investigation process. Thus, a woman can certainly be called in a given case by an authority while exercising its discretion on relevant materials. The object behind Section 160 of the Criminal Procedure Code is not to expose a woman to the environment surrounding police station which will certainly not be available in a proceeding by way of an investigation under Act 15 of 2003. The summons that were issued by the competent authority under the Act was in exercise of powers conferred on the authority under Section 50 of the Act. There is no necessity to meet the requirements of the proviso to Section 160 of the Code of Criminal Procedure since an independent power has been conferred on the authority under Section 50 of the Act. Wherever the Act itself stipulates the specific power, authority and procedure, there is no requirement to read the provisions of Code of Criminal Procedure into it. In fact, the most harmonious manner in which both the enactments can be parallely invoked would be to ensure that the provisions of Code of Criminal Procedure are not read into or invoked wherever the Act itself specifically provides for the same.

15. **Case on Hand:-**

While dealing with the interpretation of statutes, we are supposed to apply a reasonable, creative and fair construction principle. Unless there appears to be a dire conflict, they are to be allowed to sail in their own waters. Considering the above, one of us (M.M.Sundresh,J.) has held in **STAR INDIA PRIVATE LIMITED VS. DEPARTMENT OF INDUSTRIAL POLICY AND PROMOTION, MINISTRY OF COMMERCE AND INDUSTRY, NEW DELHI AND OTHERS (W.P.Nos.44126 and 44127 of 2016 dated 23.05.2018)** as follows:

> 6.2. Judging a statute through "literal" to "Hyden's Golden Rule" has gone through a circle. What is being applied by the Courts today is on the reasonable, creative and Fair Construction Principle. A liberal interpretation is required more in a social, welfare legislation with the objective in mind.
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> 6.3. **LORD DENNING:**
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> "A Judge should ask himself the question (how). If the makers of the Act had themselves come across this rule in the texture of it, how would they have straightened it out? He must do so as they would have done. A Judge must not alter the material on which (the Act) it is woven but he can and should iron out the creases."
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> 6.4. **CRAIES IN STATUTE LAW:**
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> "... It is the duty of Courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed' .. that in each case you must look to the subject-matter, consider the importance of the

provision and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory."

6.5. **OLIVER WENDELL HOMES:**

"It is sometimes more important to emphasise the obvious than to elucidate the obscure."

6.6. **A.DRIEDGER, Construction of Statute(2nd Ed. 1983):**

The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the Scheme of the Act, the object of the Act, and the intention of Parliament.

6.7. The celebrated and often quoted words of Justice Chinnappa Reddy in **RESERVE BANK OF INDIA VS. PEERLESS GENERAL FINANCE AND INVESTMENT COMPANY LIMITED AND OTHERS (1987 1 SCC 424)**, holds the field even today. Relevant passage is apposite:

"**51**. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word.

If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear

different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."

6.8. An entry in the List under the Seventh Schedule is the field of legislation. Thus the power is derived only under Article 246 of the Constitution of India. Such an entry has to be given widest amplitude of its power as against a narrow and restricted one. A liberal construction of the words in an entry is the rule. Hence legislative entries are to be interpreted broad and wide. However, the general rule of interpretation also would apply by a combined reading of provisions, objects and reasons put together as a whole.

6.9. **R.S.REKHCHAND MOHOTA SPINNING & WEAVING MILLS LTD., VS. STATE OF MAHARASHTRA (1997) 6 Supreme Court Cases 12).**

"**8.**.....The interpretation of the statute would apply to the interpretation of the entries subject to reservation that their application is of necessity conditioned by the subject-matter of the enactment itself. It should be remembered that the problem before us is to construe a word appearing in Entry 45 which is a head of legislative power. It cannot be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended to it. It is, therefore, clear that in construing an entry in a list conferring legislative powers, the widest possible construction, according to their ordinary meaning, must be put upon the words used therein. Reference to legislative practice may be admissible for cutting down the meaning of a word in order to reconcile

two conflicting provisions in two legislative lists. The cardinal rule of interpretation, however, is that words should be given their ordinary, natural and grammatical meaning subject to the rider that in construing words in a constitutional enactment, conferring legislative power under Article 246, the most liberal construction should be put upon the words in the entries in the respective lists in the Seventh Schedule so that the same may have effect in their widest amplitude. The same principle was reiterated in Kunnathat Thathunni Moopil Nair v. State of Kerala **1961 3 SCR 77 (SCR at p. 106**) by Sarkar, J. though in a dissenting tone but on this principle there is no dissent by majority and it cannot be dissented. It was said thus:

> "8. .....It is well known that entries in the legislative lists have to be read as widely as possible. It is not necessary to cut down the plain meaning of the word 'land' in Entry 49 to give full effect to the word 'forest' in Entry 19. In my view, the two entries, namely, Entry 49 and Entry 18 deal with entirely different matters. Therefore, under Entry 49 taxation on land on which a forest stands is permissible and legal."

9. In the case of Synthetics and Chemicals Ltd. v. State of U.P 1990 1 SCC 109 a Bench of seven Judges of this Court considered the effect of interpretation of the Constitution and legislative entries in para 67 which reads as under: **(SCC pp. 150-51)**

> **"67**. It is well to remember that the meaning of the expressions used in the Constitution must be found from the language used. We should interpret the words of the Constitution on the same principle of interpretation as one applies to an ordinary law but these very principles of interpretation compel one to take into account the nature and scope of the Act which requires interpretation. A Constitution is the mechanism under which laws are to be made and not merely an Act which declares what the law is to be. It is also well settled that a Constitution must not be construed in any narrow or pedantic sense and that construction which is most beneficial to the widest possible

amplitude of its power, must be adopted. An exclusionary clause in any of the entries should be strictly and, therefore, narrowly construed. No entry should, however, be so read as not (sic) to rob it of entire content. A broad and liberal spirit should, therefore, inspire those whose duty it is to interpret the Constitution, and the courts are not free to stretch or to pervert the language of an enactment in the interest of any legal or constitutional theory. Constitutional adjudication is not strengthened by such an attempt but it must seek to declare the law but it must not try to give meaning on the theory of what the law should be, but it must so look upon a Constitution that it is a living and organic thing and must adapt itself to the changing situations and pattern in which it has to be interpreted. It has also to be borne in mind that where division of powers and jurisdiction in a federal Constitution is the scheme, it is desirable to read the Constitution in harmonious way. It is also necessary that in deciding whether any particular enactment is within the purview of one legislature or the other, it is the pith and substance of the legislation in question that has to be looked into. It is well settled that the various entries in the three lists of the Indian Constitution are not powers but fields of legislation. The power to legislate is given by Article 246 and other articles of the Constitution. The three lists of the Seventh Schedule to the Constitution are legislative heads of fields of legislation. These demarcate the area over which the appropriate legislatures can operate. It is well settled that widest amplitude should be given to the language of the entries in three Lists but some of these entries in different lists or in the same list may override and sometimes may appear to be in direct conflict with each other, then and then only comes the duty of the court to find the true intent and purpose and to examine the particular legislation in question. Each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it. In interpreting an entry it would not be reasonable to import any limitation by comparing or contrasting that entry with any other in the same list. It has to be interpreted as the

Constitution must be interpreted as an organic document in the light of the experience gathered. In the constitutional scheme of division of powers under the legislative lists, there are separate entries pertaining to taxation and other laws. The aforesaid principles are fairly well settled by various decisions of this Court and other courts. Some of these decisions have been referred to in the decision of this Court in India Cement Ltd. v. State of T.N 1990 1 SCC 12"

10. In a recent judgment, this Court, by a Bench of two Judges, to which K. Ramaswamy and G.P Pattanaik, JJ. were members, in Indian Aluminium Co. v. State of Kerala 1996 7 SCC 637 considered the same question in paras 12 and 20 which read as under: (SCC pp. 647 and 649)

"12. The primary question, therefore, is: Whether the impugned Act enacted by the State Legislature is one under Entry 53 of the State List, viz., 'Taxes on the consumption or sale of electricity'. Indisputably, the title of the Act as well as the charging Section 3 employ the words 'duty on supply of electricity'. Under article 246(3) of the constitution, every State legislature has explicit power to make law for that State with respect to the matters enumerated in List II (State List) of the Seventh Schedule to the Constitution. The State's power to impose tax is derived from the Constitution. The entries in the three lists of the Seventh Schedule are not power of legislation but merely fields of legislation. The power is derived under Article 246 and other related articles of the Constitution. The legislative fields are of enabling character designed to define and delimit the respective areas of legislative competence of the respective legislatures. There is neither implied restriction imposed on the legislature nor is any duty prescribed to exercise that legislative power in a particular manner. But the legislation must be subject to the limitations prescribed under the Constitution.

20. When the vires of an enactment is challenged, it is very difficult to ascertain the limits of the legislative power. Therefore, the controversy must be resolved as far as possible, in favour of the

> legislative body putting the most liberal construction upon the relevant legislative entry so that it may have the widest amplitude. The court is required to look at the substance of the legislation. It is an equally settled law that in order to determine whether a tax statute is within the competence of the legislature, it is necessary to determine the nature of the tax and whether the legislature had power to enact such a law. The primary guidance for this purpose is to be gathered from the charging section. It is the substance of the impost and not the form that determines the nature of the tax."

11. Thus, it is settled principle of interpretation that legislative entries are required to be interpreted broadly and widely so as to give powers to the legislature to enact the law with respect to matters enumerated in the legislative entries. Substantive power of the legislature to enact the law is under article 246 of the constitution and legislative entries in the respective Lists I to III of the Seventh Schedule are of enabling character, designed to define and de-limit the respective areas of legislative competence of the respective legislatures, the substantive power in Article 246 and all other related articles."

7. <u>CONFLICT OF ENACTMENTS:</u>

7.1. When two enactments are stated to be pitted against each other, a Court of law is required to adopt a construction in harmony with both of them. A suspicion through a jaundiced eye cannot be the approach. What is required to be seen is the object and intentment of the legislations. They must be allowed to travel in their respective channels. Even if the Channel is one, their respective waters are not supposed to mix with each other. This principle would apply both for interpreting a provision of law and provisions contained in two different enactments. A conflict cannot be foreseen as against the presumption of validity of a legislative exercise. Thus, the interpretation must depend upon the text and the context. There is very limited difference between a purposive, reasonable, creative and fair construction interpretation. One has to fall

upon the object and the reasons behind an enactment. The Court may sit in the arm chair of a maker of the enactment and see through its eyes.

7.2. Interpretations of two enactments as stated above are to be made on the settled legal principles. Thus, there is no presumption of one enactment encroaching upon the other unless there is a clear inconsistency or repugnancy. Therefore, the Court has to be satisfied that the provisions contained in both the enactments sought to be impugned with respect to one of them are irreconcilable and such inconsistency appears so apparent. In the absence of a direct conflict or collision between the two enactments, one cannot be held as contrary to the other. In such a case, even if there is an incidental overlapping, it would not violate the provisions. Occasional vagaries do not matter much.

7.3. By a general principle, a special Act is to be given primacy over a general one. However, this also has to be seen on the provisions governing both enactments. There may be a case where General Act may have the substantive provision as against the special one.

7.4. In **MACQUARIE BANK LIMITED VS. SHILPI CABLE TECHNOLOGIES LIMITED ((2018) 2 Supreme Court Cases 674),** the Supreme Court has considered the principle governing interpretation through the following paragraphs.

> "**27**. Equally, Dr. Singhvi's argument that the Code leads to very drastic action being taken once an application for insolvency is filed and admitted and that, therefore, all conditions precedent must be strictly construed is also not in sync with the recent trend of authorities as has been noticed by a concurring judgment in Ms. Eera through Dr. Manjula Krippendorf v. State (Govt. of NCT of Delhi) & Anr, Criminal Appeal Nos. 1217-1219 of 2017 decided on July 21, 2017. In this judgment, the correct interpretation of Section 2(1)(d) of the Protection of Children from Sexual Offences Act,

2012 arose. After referring to the celebrated Heydon's case, 76 E.R. 637 [1584] and to the judgments in which the golden rule of interpretation of statutes was set out, the concurring judgment of R.F. Nariman, J., after an exhaustive survey of the relevant case law, came to the conclusion that the modern trend of case law is that creative interpretation is within the Lakshman Rekha of the Judiciary. Creative interpretation is when the Court looks at both the literal language as well as the purpose or object of the statute, in order to better determine what the words used by the draftsman of the legislation mean. The concurring judgment then concluded: (Eera case, SCC p.204, para 127).

> " 127. It is thus clear on a reading of English, U.S., Australian and our own Supreme Court judgments that the 'Lakshman Rekhrea' has in fact been extended to move away from the strictly literal rule of interpretation back to the rule of the old English case of Heydon, where the Court must have recourse to the purpose, object, text, and context of a particular provision before arriving at a judicial result. In fact, the wheel has turned full circle. It started out by the rule as stated in 1584 in Heydon's case, which was then waylaid by the literal interpretation rule laid down by the Privy Council and the House of Lords in the mid 1800s, and has come back to restate the rule somewhat in terms of what was most felicitously put over 400 years ago in Heydon's case."

28. In dealing with penal statutes, the Court was confronted with a body of case law which stated that as penal consequences ensue, the provisions of such statutes should be strictly construed. Here again, the modern trend in construing penal statutes has moved away from a mechanical incantation of strict construction. Several judgments were referred to and it was held that a purposive interpretation of such statutes is not ruled out. Ultimately, it was held that a fair construction of penal statutes based on purposive as well as literal interpretation is the correct modern day approach.

29. However, Dr. Singhvi cited Raghunath Rai Bareja v. Punjab National Bank, (2007) 2 SCC 230 and relied upon paragraphs 39 to 47 for the proposition that the literal construction of a statute is the only mode of interpretation when the statute is clear and unambiguous. Paragraph 43 of the said judgment was relied upon strongly by the learned counsel, which states:

> "In other words, once we depart from the literal rule, then any number of interpretations can be put to a statutory provision, each judge having a free play to put his own interpretation as he likes. This would be destructive of judicial discipline, and also the basic principle in a democracy that it is not for the Judge to legislate as that is the task of the elected representatives of the people. Even if the literal interpretation results in hardship or inconvenience, it has to be followed (see G.P. Singh's Principles of Statutory Interpretations, 9th Edn., pp. 45-49). Hence departure from the literal rule should only be done in very rare cases, and ordinarily there should be judicial restraint in this connection."

30. Regard being had to the modern trend of authorities referred to in the concurring judgment in Ms. Eera through Dr. Manjula Krippendorf (supra), we need not be afraid of each Judge having a free play to put forth his own interpretation as he likes. Any arbitrary interpretation, as opposed to fair interpretation, of a statute, keeping the object of the legislature in mind, would be outside the judicial ken. The task of a Judge, when he looks at the literal language of the statute as well as the object and purpose of the statute, is not to interpret the provision as he likes but is to interpret the provision keeping in mind Parliament's language and the object that Parliament had in mind. With this caveat, it is clear that judges are not knight-errants free to roam around in the interpretative world doing as each Judge likes. They are bound by the text of the statute, together with the context in which the statute is enacted; and both text and context are Parliaments', and not what the Judge thinks the statute has been enacted

for. Also, it is clear that for the reasons stated by us above, a fair construction of Section 9(3)(c), in consonance with the object sought to be achieved by the Code, would lead to the conclusion that it cannot be construed as a threshold bar or a condition precedent as has been contended by Dr. Singhvi.

.....**43**.The doctrine of harmonious construction of a statute extends also to a harmonious construction of all statutes made by Parliament. In Harshad S. Mehta v. State of Maharashtra (2001) 8 SCC 257 at 280-81, the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 was held, insofar as the criminal jurisdiction of the Special Court was concerned, to be harmoniously construed with the Code of Criminal Procedure,1973 in the following terms:

> "48. To our mind, the Special Court has all the powers of a Court of Session and/or Magistrate, as the case may be, after the prosecution is instituted or transferred before that Court. The width of the power of the Special Court will be same whether trying such cases as are instituted before it or transferred to it. The use of different words in Sections 6 and 7 of the Act as already noticed earlier also shows that the words in Section 7 that the prosecution for any offence shall be instituted only in the Special Court deserve a liberal and wider construction. They confer on the Special Court all powers of the Magistrate including the one at the stage of investigation or inquiry. Here, the institution of the prosecution means taking any steps in respect thereof before the Special Court. The scheme of the Act nowhere contemplates that it was intended that steps at pre-cognizance stage shall be taken before a court other than a Special Court. We may note an illustration given by Mr Salve referring to Section 157 of the Code. Learned counsel submitted that the report under that section is required to be sent to a Magistrate empowered to take cognizance of offence. In relation to offence under the Act, the Magistrate has no power to take cognizance. That power is exclusively with the Special Court and thus report under Section

157 of the Code will have to be sent to the Special Court though the section requires it to be sent to the Magistrate. It is clear that for the expression "Magistrate" in Section 157, so far as the Act is concerned, it is required to be read as "Special Court" and likewise in respect of other provisions of the Code. If the expression "Special Court" is read for the expression "Magistrate", everything will fall in line. This harmonious construction of the provisions of the Act and the Code makes the Act work. That is what is required by principles of statutory interpretation. Section 9(1) of the Act provides that the Special Court shall in the trial of such cases follow the procedure prescribed by the Code for the trial of warrant cases before the Magistrate. The expression "trial" is not defined in the Act or the Code. For the purpose of the Act, it has a wider connotation and also includes in it the pre-trial stage as well. Section 9(2) makes the Special Court, a Court of Session by a fiction by providing that the Special Court shall be deemed to be a Court of Session and shall have all the powers of a Court of Session. In case, the Special Court is held not to have the dual capacity and powers both of the Magistrate and the Court of Session, depending upon the stage of the case, there will be a complete hiatus. It is also to be kept in view that the Special Court under the Act comprises of a High Court Judge and it is a court of exclusive jurisdiction in respect of any offence as provided in Section 3(2) which will include offences under the Indian Penal Code, the Prevention of Corruption Act and other penal laws. It is only in the event of inconsistency that the provisions of the Act would prevail as provided in Section 13 thereof. Any other interpretation will make the provision of the Act unworkable which could not be the intention of the legislature. Section 9(2) does not exclude Sections 306 to 308 of the Code from the purview of the Act. This section rather provides that the provisions of the Code shall apply to the proceedings before the Special Court. The inconsistency seems to be only imaginary. There is nothing in the Act to show that Sections

306 to 308 were intended to be excluded from the purview of the Act."

44. Similarly, in CTO v. Binani Cements Ltd. (2014) 8 SCC 319 at 332, the rule of construction of two Parliamentary statutes being harmoniously construed was laid down as follows:

> "35. Generally, the principle has found vast application in cases of there being two statutes: general or specific with the latter treating the common subject-matter more specifically or minutely than the former. Corpus Juris Secundum, 82 C.J.S. Statutes § 482 states that when construing a general and a specific statute pertaining to the same topic, it is necessary to consider the statutes as consistent with one another and such statutes therefore should be harmonised, if possible, with the objective of giving effect to a consistent legislative policy. On the other hand, where a general statute and a specific statute relating to the same subject-matter cannot be reconciled, the special or specific statute ordinarily will control. The provision more specifically directed to the matter at issue prevails as an exception to or qualification of the provision which is more general in nature, provided that the specific or special statute clearly includes the matter in controversy (Edmond v. United States [137 L Ed 2d 917 : 520 US 651 (1997)] , Warden v. Marrero [41 L Ed 2d 383 : 417 US 653 (1974)])."

45. More recently, in Binoy Viswam v. Union of India (2017) 7 SCC 59 at 132, this Court construed the Income Tax Act, 1961 and the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 harmoniously in the following manner:

> "98. In view of the above, we are not impressed by the contention of the petitioners that the two enactments are contradictory with each other. A harmonious reading of the two enactments would clearly suggest that whereas enrolment of Aadhaar is voluntary when it comes

to taking benefits of various welfare schemes even if it is presumed that requirement of Section 7 of the Aadhaar Act that it is necessary to provide Aadhaar number to avail the benefits of schemes and services, it is up to a person to avail those benefits or not. On the other hand, purpose behind enacting Section 139-AA of the Act is to check a menace of black money as well as money laundering and also to widen the income tax net so as to cover those persons who are evading the payment of tax."

48. In Central Bank of India v. State of Kerala (2009) 4 SCC 94 at 141-42, the non-obstante clauses contained in Section 34(1) of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and Section 35 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 were held not to override specific provisions contained in the Bombay Sales Tax Act, 1959 and the Kerala Sales Tax Act 1963 dealing with a declaration of a first charge in the following terms:

"130. Undisputedly, the two enactments do not contain provision similar to the Workmen's Compensation Act, etc. In the absence of any specific provision to that effect, it is not possible to read any conflict or inconsistency or overlapping between the provisions of the DRT Act and the Securitisation Act on the one hand and Section 38-C of the Bombay Act and Section 26-B of the Kerala Act on the other and the non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act cannot be invoked for declaring that the first charge created under the State legislation will not operate qua or affect the proceedings initiated by banks, financial institutions and other secured creditors for recovery of their dues or enforcement of security interest, as the case may be.

131. The Court could have given effect to the non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act vis-à-vis Section 38-C of the Bombay Act and

Section 26-B of the Kerala Act and similar other State legislations only if there was a specific provision in the two enactments creating first charge in favour of the banks, financial institutions and other secured creditors but as Parliament has not made any such provision in either of the enactments, the first charge created by the State legislations on the property of the dealer or any other person, liable to pay sales tax, etc., cannot be destroyed by implication or inference, notwithstanding the fact that banks, etc. fall in the category of secured creditors."

49. Since there is no clear disharmony between the two Parliamentary statutes in the present case which cannot be resolved by harmonious interpretation, it is clear that both statutes must be read together. Also, we must not forget that Section 30 of the Advocates Act deals with the fundamental right under Article 19(1)(g) of the Constitution to practice one's profession. Therefore, a conjoint reading of Section 30 of the Advocates Act and Sections 8 and 9 of the Code together with the Adjudicatory Authority Rules and Forms thereunder would yield the result that a notice sent on behalf of an operational creditor by a lawyer would be in order."

7.5. In **KSL AND INDUSTRIES LIMITED VS. ARIHANT THREADS LIMITED AND OTHERS ((2015) 1 Supreme Court Cases 166),** it is held as under**.**

"This Court in solidaire case approved the observations of the Special Court to the effect that if the legislature confers a non-obstante clause on a later enactment, it means that the legislature intends that the later enactment should prevail. Further, it is a settled rule of interpretation that if one construction leads to a conflict, whereas on another construction two Acts can be harmoniously construed, then the latter must be adopted."

8. PRESUMPTION:

While holding that there is a presumption in favour of the legislation qua the scope of both the enactments on the same subject matter, it was accordingly held by the Supreme Court in **KISHOREBHAI KHAMANCHAND GOYAL VS. STATE OF GUJARAT AND ANOTHER ((2003) 12 Supreme Court Cases 274)** as:

> **6**. There is presumption against a repeal by implication; and the reason of this rule is based on the theory that the Legislature while enacting a law has a complete knowledge of the existing laws on the same subject matter, and therefore, when it does not provide a repealing provision, the intention is clear not to repeal the existing legislation. (See: Municipal Council, Palai through the Commissioner of Municipal Council, Palai vs. I.J. Joseph 1963 AIR(SC) 1561), Northern India Caterers (Private) Ltd. and Anr. vs. State of Punjab and Anr. 1967 AIR(SC) 1581), Municipal Corporation of Delhi vs. Shiv Shanker 1971 (1) SCC 442) and Ratan Lal Adukia and Anr. vs. Union of India 1990 AIR(SC) 104). When the new Act contains a repealing section mentioning the Acts which it expressly repeals, the presumption against implied repeal of other laws is further strengthened on the princile expressio unius (persone vel rei) est exclusio alterius. (The express intention of one person or thing is the exclusion of another) as illuminatingly stated in Garnett vs. Bradley [1878] 3 A.C. 944 (HL). The continuance of existing legislation, in the absence of an express provision of repeal by implication lies on the party asserting the same. The presumption is, however, rebutted and a repeal is inferred by necessary implication when the provisions of the later Act are so inconsistent with or repugnant to the provisions of the earlier Act and that the two cannot stand together. But, if the two can be read together and some implication can be made of the words in the earlier Act, a repeal will not be inferred. (See: A.G. vs. Moore 1878 (3) ExD 276, Ratanlal's case (supra) and R.S. Raghunath vs. State of Karnataka and Anr. 1992 AIR(SC) 81).
>
> **7**. The necessary questions to be asked are:

(1) Whether there is direct conflict between the two provisions-

(2) Whether the Legislature intended to lay down an exhaustive Code in respect of the subject-matter replacing the earlier law;

(3) Whether the two laws occupy the same field.

(See: Pt. Rishikesh and Anr. vs. Salma Begum (Smt.) 1995 (4) SCC 718), and Shri A.B. Krishna & Ors. vs. The State of Karnataka & Ors. 1998 (1) JT 613).

8. The doctrine of implied repeal is based on the theory that the Legislature, which is presumed to know the existing law, did not intend to create any confusion by retaining conflicting provisions and, therefore, when the court applies the doctrine, it does not more than give effect to the intention of the Legislature by examining the scope and the object of the two enactments and by a comparison of their provisions. The matter in each case is one of the construction and comparison of the two statutes. The Court leans against implying a repeal, "unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied, or that there is a necessary inconsistency in the two Acts standing together." (See Craies on Statute Law, Seventh Edition, page 366, with reference to Re: Berrey [1936] Ch. 274). To determine whether a later statute repeals by implication an earlier, it is necessary to scrutinize the terms and consider the true meaning and effect of the earlier Act. Until this is done, it is impossible to ascertain whether any inconsistency exists between the two enactments. The areas of operation of the Act and the Establishments Act in question are different with wholly different aims and objects. They operate in their respective fields and there is no impediment for their existence side by side. (See State of M.P. vs. Kedia Leather and Liquor Ltd. and Ors. (2003 (6) Supreme 213).

Accordingly, we find no conflict either implied or express between the

Code and the enactment.

16. **Bias:-**

An element of bias is likely to arise in any decision making process be it administrative, executive, quasi judicial or judicial. It emanates from the state of mind and thus, truth at times becomes rather elusive. When we deal with an official bias, sufficient material is required for the Court to hold so, which are to be seen from the purview of a reasonable man. After all, an authority may not have any axe to grind. It has been held by one of us (M.M.Sundresh,J.) in **A.V.BELLARMIN AND OTHERS VS. V.SANTHAKUMARAN NAIR, SUB-INSPECTOR, RAILWAY PROTECTION FORCE ((2015) 4 Law Weekly 443)** as follows.

> **"Bias:**
>
> 3. Bias is a condition or a state of mind which impairs the concept of impartiality in a decision making process. It might arise in an administrative, executive, quasi judicial or judicial decision making. Such a bias occurs due to pre-determination or pre-disposition leading to a decision moving in one direction, sans impartiality. Thus bias strikes at the very basis of a decision, which is supposed to be fair.
>
> 4. As bias emanates from the mind of a person, proof of it is at times very difficult. Therefore, a litigant has been given the lesser burden of establishing before the Court that there exists a real

likelihood of bias or reasonable suspicion of it. The test is not existence of the bias as an authority may act in good faith, but such an action is liable to be questioned on the ground of real likelihood of bias or reasonable suspicion of it. This is for the reason that a mind may honestly think and act keeping fairness in mind, but such a decision which flows from it might lead to an element of bias unconsciously.

5. Bias is synonymous with prejudice. Robert Ingersoll defined prejudice in the following manner:

"Prejudice is the spider of the mind. It is the womb of injustice." When an apparent bias transforms itself into a womb of injustice then, it has to be struck down by the Courts.

6. Bias can be divided into three parts. They are:

(i) Pecuniary Bias

(ii) Personal Bias and

(iii) Official Bias.

7. We are primarily concerned with personal and official bias. Bias may also occur by a combination of these two. When an authority, plays a role being predominant in nature, cannot thereafter take a different role leading to a positive or potential conflict with the earlier one. This mixture of two roles would create either likelihood of bias or reasonable apprehension of bias. The source of the potential bias has to be a personal interest for it to be potentially objectionable in law.

8. The Courts have evolved the principles governing bias i.e., real likelihood of bias test and reasonable suspicion test. For the real likelihood of bias test, the paramount consideration is from the point of view of a fair minded informed observer. Insofar as the reasonable suspicion test is concerned, the test is from the point of view of a reasonable common mind. Though the Courts

have evolved these two principles, in effect there is little difference between the two. A fair minded man also has to be reasonable and vice versa. What is reasonable is a quality that has to be attributed to a fair minded informed person. Similarly, a reasonable member of the public has to exhibit fairness. After all the principles governing natural justice are ingrained in the conscious of a man, thus the words "reasonable man" and a "fair minded man" are interchangeable to be applied to the facts of a particular case by the Court while testing a possible existence of a bias. The concept of informed observer is one which is developed by the Courts. It is not as if a reasonable member of the public is neither complacent nor unduly sensitive or suspicious as held by Kirby J in ***Johnson v. Johnson (2000) 200 CLR 488, 509.*** A reasonable man is not a rustic, but reasonably informed. The word "well informed" has to be seen in the context of worldly knowledge which a reasonable man is also expected to possess. To put it differently, a high degree of intellect is not required. Ultimately it is for the Court to decide whether there exists a likelihood or reasonable apprehension of bias warranting interference. The background of bias has to be very reasonable suspicion of bias or a real likelihood of bias. In fact these two concepts are prefix to bias. The Courts are required not to delve into the actual bias but to find the likelihood or a reasonable existence of it. Therefore, real bias is not a relevant inquiry especially when the same cannot be established with ease. Thus a reasonable apprehension of bias and real likelihood of bias are surrogates for bias. This is also for the reason that apart from rule of law and fairness, there can be an unconscious bias exists though not intended.

9.Pre-determination and pre-disposition are two facets of bias.

An alleged predetermination or predisposition has to be highlighted from an apparent bias. An apparent bias has to be found out from the point of view of either a reasonable mind or a fair minded informed observer as discussed above. Thus, the Court has to sit in the armed chair as a fair minded man who otherwise could be called a reasonable man and determine whether there exists a real bias. Therefore, a Court is required to transform itself to such a man and then decide. This is the common law principle, which has been evolved by the Courts. There is very little difference between a real likelihood and a reasonable suspicion of bias in practice. It is ultimately for the Courts to decide that there exists a bias or not. After all, the test of likelihood or reasonable suspicion is a mere instrument in identifying an element of bias.

10.Coming to an official bias, it can transform into legal malice at times but not in every case. To decide as to whether there exists a likelihood or reasonable suspicion of bias, the test shall not be unacceptably high considering the concept and proof of bias.

11. An apparent bias can be identified with the relative ease in pecuniary and personal as against official. Deciphering an official bias is an arduous job for a Court. That is the reason why the tests of likelihood or reasonable suspicion of bias is required to be used.

13. In ***State of Gujarat v. R.A. Mehta, (2013) 1 MLJ 362 (SC)***, while dealing with the doctrine of bias, the Apex Court held that reasonable suspicion that there is likelihood of bias affecting decision would be sufficient to invoke the doctrine of bias. Therefore, in effect the test of likelihood of bias or reasonable apprehension of bias are interchangeable in nature and

consequently, the parameters required for such a test will also be construed to be the same.

Investigator's Bias:

20. An investigator is the kingpin of criminal justice delivery system. (See ***Amitbhai Anilchandra Shah v. CBI, (2013) 6 Supreme Court Cases 348***).

21. A bias attributed on the part of the investigator may lead to a deception leading to injustice. A duty is imposed upon the investigator to give an impression that it has been done without an element of unfairness or ulterior motive. He must dispel a possible suspicion to the genuineness of the investigation done. An attempt of an investigation officer is to make a genuine endeavour to bring out the truth."

17. **Malice:-**

17.1. Malice can be divided into malice in law and fact. When some one is discharging professional duty, the question of malice in law might arise very often as against malice in fact. However, as against bias, which can be tested on its likelihood or reasonable suspicion, a malice would require some concrete evidence. The Court has to satisfy on its existence. A deliberate attempt to use the law can certainly be a ground but it also requires motive and intention supported by adequate materials.

17.2. Legal malice is an action or inaction without a lawful excuse, which is done without a reasonable cause with the willful intention. What is legal malice has been dealt with by the Apex Court in **KALABHARATI ADVERTISING VS. HEMANTG VIMALNATH NARICHANIA AND OTHERS ((2010) 9 Supreme Court Cases 437)**. The following paragraph would be apposite.

> "Legal Malice:
>
> 25. The State is under obligation to act fairly without ill will or malice- in fact or in law. "Legal malice" or "malice in law" means something done without lawful excuse. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard to the rights of others. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. It is an act which is taken with an oblique or indirect object. It means exercise of statutory power for "purposes foreign to those for which it is in law intended." It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, which intent is manifested by its injurious acts. (Vide Addl. Distt. Magistrate, Jabalpur v. Shivakant Shukla, AIR 1976 SC 1207; Smt. S.R. Venkataraman v. Union of India, AIR 1979 SC 49; State of A.P. v. Goverdhanlal Pitti, AIR 2003 SC 1941; Chairman and M.D., B.P.L. Ltd. V. S.P. Gururaja & Ors., (2003) 8 SCC 567; and West Bengal State Electricity Board v. Dilip Kumar Ray, AIR 2007 SC 976).

> 26. Passing an order for an unauthorized purpose constitutes malice in law. (Vide Punjab State Electricity Board Ltd. v. Zora Singh & Ors., (2005) 6 SCC 776; and Union of India Through Government of Pondicherry & Anr. v. V. Ramakrishnan & Ors., (2005) 8 SCC 394)."

17.3.It is an admitted fact that initially the appellant was permitted to appear through the authorised agent. The impugned notice was issued on finding certain new facts and contradiction in the statements given, which could not be satisfactorily explained by the authorised agent. The appellant has been rendering a professional service by travelling extensively throughout the country. While doing so, the question of determination of sex did not stand in any way. However, for appearing before an authority, which is mandated by law, she seeks protective discrimination as a woman. A legal profession stands apart on its own. In discharge of a professional duty, there is no difference between a man and woman. The summons were issued to the appellant in her discharge and capacity as a professional and not otherwise. It is clear from reading of Section 160 of the Code of Criminal Procedure, certainly, the fair construction principle as discussed supra would apply. This Court is unable to see any demon in the summons issued at this stage. There is no need to speculate. Neither a likelihood of bias nor malice can be seen through the

summons issued. The appellant did not choose to challenge the summons earlier. She did rightly appear through the authorised agent. Issues have been raised only when the second respondent had asked her to appear in person.

17.4. The Submissions on the CBI enquiry vis-a-vis the summons cannot be countenanced with the scope being totally different. Similarly, the scope and applicability of Sections 126 to 129 of the Indian Evidence Act, 1872, is not required to be gone into at this stage as otherwise we will be entering into a realm of speculation. We also find that the appellant is not entitled to invoke Section 160 of the Code of Criminal Procedure since the special enactment specifically deals with the power, authority and procedure for issuance of summons under Section 50 of the Act and therefore, there is no requirement to read the proviso to Section 160 of the Code of Criminal Procedure into Section 50 of the Act.

17.5. The contention of the learned Senior Counsel appearing for the appellant that the averments not being controverted, there is a deemed acceptance, in our considered view cannot be countenanced. When there is no material to substantiate the averments, there is no need to deny them. The appellant has not produced sufficient

materials, even prima facie so as to enable us either to hold the existence to likelihood of bias or malice either in fact or law.

18. **Decisions:**

18.1. As the learned single Judge has made reliance upon number of decisions, it would be appropriate to consider them. In **ASMITA AGARWAL VS. THE ENFORCEMENT DIRECTORATE AND OTHERS ((2002) Criminal Law Journal 819)**, the High Court of Delhi was dealing with the proceedings in FERA Act. Having found that FERA is silent regarding the investigation of women, it was held that the provision of Section 160 of the Code will apply. To be noted, there is no pari materia provisions under the FERA Act as contained in Act 15 of 2003 with specific reference to Sections 52, 65 and 72. Further, the petitioner therein was apprehending trouble at the hands of her husband and therefore, the aforesaid case is distinguishable on facts.

18.2. In **M/S PUSMA INVESTMENT PVT. LTD., AND OTHERS VS. STATE OF MEGHALAYA AND OTHERS ((2010) Criminal Law Journal 56)**, the Gauhati High Court was interpreting Section 160 of the Code of Criminal Procedure. It was a case where a notice was issued by the police for involving in IPC offence. Hence, the said decision has got no application.

18.3. The Gujarat High Court in **FOZIYA SAMIR GODIL VS. UNION OF INDIA AND TWO OTHERS (Spl. Crl. Application (Direction) No.1725 of 2014 with Spl. Crl. Appln. No.1748 of 2014 dated 09.05.2014**) was in fact dealing with the very same issue. After going through the abovesaid judgment, we are of the view that inasmuch as there is no conflict between Section 52 of the Act and Section 160 of the Code, it is not mandatory in all cases a woman shall never be called whatever be her involvement and status. Thus, it is for the second respondent to exercise power in a given case either to call a person or an authorised agent. Since a definition of the word "person" would include a woman, it is certainly open to the authority to take a call either summon her physically or otherwise through an agent.

18.4. The decision rendered in **VIJAY MADANLAL CHOUDHARY VS. UNION OF INDIA AND ANR. (W.P.Nos.4336, 4341, 4344, 4347, 4350, 5089, 5091 and 5625 of 2015 dated 20.10.2015)** in fact helps the case of the respondents. The High Court of Madhya Pradesh was pleased to hold that the arrest of the petitioner was in accordance with the provisions of PMLA and they will prevail in the event of any inconsistency. Incidentally the scope of sections 65 and 72 of the PMLA Act was also considered.

18.5. Much has been said on the decision of the Apex Court in **ASHOK MUNILAL JAIN AND ANOTHER VS. ASSISTANT DIRECTOR, DIRECTORATE OF ENFORCEMENT (Crl.Appeal No.566 of 2017 dated 22.03.2017)**, where the appellant was given the benefit of statutory bail. The said decision also cannot help the case of the appellant. We are not dealing with the provision, which gives a substantive right.

19. In fine, both the appeals stand dismissed. However, liberty is given to the respondents to issue a fresh summons to the appellant requiring her appearance in person. No costs.

(M.M.S.,J.) **(N.A.V.,J.)**

10.07.2018

Index:Yes

Note: Issue order copy on 12.07.2018

raa

To

1.The Director,
Directorate of Enforcement,
Government of India,
6th Floor, Lok Nayak Bhawan,
Khan Market, New Delhi-110 003.

2.The Assistant Director,
Enforcement Directorate,
CGO Complex, 3rd MSO Building,
6th Floor, DF Block, Salt Lake,
Kolkata-700 064.

3.Karnal Singh,
Director of Enforcement,
6th Floor, Lok Nayak Bhawan,
Khan Market, New Delhi-110 003.

M.M.SUNDRESH, J.
and
N.ANAND VENKATESH, J.

raa

Pre-Delivery common Judgment in W.A.Nos.1168 and 1169 of 2018

10.07.2018