2018-TIOL-1201-HC-MUM-FEMA

IN THE HIGH COURT OF BOMBAY

Writ Petition No. 2026 of 2017

**NEW DELHI TELEVISION LTD
A PUBLIC LIMITED COMPANY INCORPORATED UNDER THE COMPANIES ACT, 1956, HAVING REGISTERED OFFICE AT 207 OKHLA INDUSTRIAL ESTATE PHASE-III, NEW DELHI-110020**

Vs

**1) RESERVE BANK OF INDIA
FOREIGN EXCHANGE DEPARTMENT CENTRAL OFFICE
SHAHID BHAGAT SINGH ROAD, MUMBAI-400001**

**2) DIRECTORATE OF ENFORCEMENT
MINISTRY OF FINANCE, DEPARTMENT OF REVENUE
THROUGH ITS DIRECTOR, 6TH FLOOR, LOK NAYAK BHAWAN
KHAN MARKET, NEW DELHI-110003**

**3) UNION OF INDIA
THROUGH THE SECRETARY, MINISTRY
OF FINANCE, NORTH BLOCK, NEW DELHI-110001**

S C Dharmadhikari & Bharati H Dangre, JJ

Dated: June 26, 2018

Appellant Rep by: Mr Janak Dwarkadas Senior Adv. with Ms Fereshte Sethna, Mr Pawan Sharma, Mr Sumit Garg, Ms Shreema Doshi and Mr Lokesh Aidasani i/b.M/s DMD Advs.
Respondent Rep by: Mr Venkatesh Dhond Senior Adv. with Mr Prasad Shenoy, Ms Mansi Mahida and Mr Parag Sharma i/b. M/s Udwadia and Comapny Mr Hiten Venegaonkar with Mr D P Singh, Ms Priya Singhania, Mr Satya Prakash, Mr Anjan Chanda and Mr Praful Wable i/b. Mr S P Singh and Ms Dona Datta

FEMA - the petitioner company is a leading news agency engaged in operating news channels - The Enforcement Directorate (ED) served an SCN u/s 13 of the FEMA, alleging contravention of Section 3(d) of FEMA r/w Sections 6(3)(a), 6(3)(b) and 6(3)(j) r/w Regulations 6(2)(ii) & 6(2)(iv) of the FEM (Transfer or Issue of any Foreign Security) Regulations, 2004, Regulation 5(1) and 10B of FEM (Transfer or Issue of Security to Persons Resident Outside India) Regulations, 2000 and Regulation 3 of the FEM (Guarantees) Regulations, 2000 - In their replies to the SCN, the petitioner and the other noticeees denied any contravention - Thereafter, so as to protect its goodwill and to avoid bad publicity and keeping in mind the interests of existing & potential investors, the petitioner sought compounding of offences - Hence it filed two applications with the Reserve Bank of India (RBI) as the jurisdiction for compouding lay with it - Pursuant to filing such applications, the petitioner requested the RBI to stay ongoing investigation proceedings - The ED stayed the investigation proceedings - Meanwhile the RBI returned the two applications on grounds that the petitioner had to complete certain administrative actions - The petitioner did so and again filed two compounding applications - Thereafter, the petitioner filed a third compounding application when it realized that certain other technical & procedural contraventions also needed compounding - Later, the RBI again returned all three applications & advised the petitioner to approach its OID and Foreign Investment Division (FID) for

guidance in this regard - When the petitioner approached the OID & FID, it was advised to set forth all its transactions in a simplified manner - The petitioner set forth all transactions in a simplief manner using various charts, which it then submitted to the FID & OID - However, the petitioner received no response from either of them - Meanwhile, the ED restarted adjudication proceedings against the petitioner - When the petitioner requested the ED to stay the adjudication proceedings for a second time, such request was denied & date of hearing was fixed - Thereafter, the petitioner wrote to the FID & OID & marked a copy to the RBI's cell for effective implementation of FEMA, as reminder for seeking guidance - However, depsite such efforts, neither the FID nor the OID provided any guidance to the petitioner - Hence the petitioner is aggrived by the act of the ED in continuing proceedings against the petitioner under FEMA despite the petitioner being entitled for compounding - It also contested the RBI's inability to compound the alleged offences.

Held - It is seen that the termination of compounding of offences was the result of a communication exchanged between the ED and the RBI, wherein the former claimed that one of the promoters of the petitioner was an accused in the Aircel-Maxis case - Hence considering the gravity of the offence, it recommended that the offences not be compounded - It is the FEMA which permits a compounding application to be considered by the RBI - This is a specific power given to it - The ED cannot be allowed to interfere with the exercise of discretionary powers as doing so would defeat the purpose of the FEMA - Also considering the the RBI's position as an apex bank & also considering the trust reposed in it by the public and the legislature, the undermining of its authority would not be conducive to the proper management of forex - While the RBI cannot be expected to compound an offence casually & lightly, it certainly cannot refuse to exercise its discretion to compound offences, spurred on by general & vague material - Thus, the ED cannot be permitted to intervene in compounding proceedings - Hence the compounding proceedings initiated vide the compounding applications of the petitioner and pending before the RBI should proceed uninfuenced by the communication from the ED - Agencies such as the RBI also form the pillars of Indian democracy - The safety of legal rights is safeguarded by the safety of the RBI - Hence such institutions should be left out from unnecessary attacks, uncalled for criticism and attempts to overpower or over-reach them: HC (Para 7-20,102-119)

Writ Petition Allowed

Case Followed:

Bhikhubhai Vithlabhai Patel and Ors. vs. State of Gujarat and Anr. (2008) 4 SCC 144

JUDGEMENT

Per: S C Dharmadhikari:

1. In view of the detailed orders passed by this court from time to time, the writ petition is admitted.

2. Rule. Respondents waive service. By consent of all parties, Rule is made returnable forthwith and the writ petition is finally disposed of by this judgment.

3. By this petition under Article 226 of the Constitution of India and prior to its amendment, the petitioner desires that this court should issue a writ of mandamus or any other writ, order or direction analogous to that writ, directing respondent no. 1 to this writ petition to guide the petitioner in making of an application styled as an application for compounding and to take on file and determine the compounding application within the time frame prescribed by the Foreign Exchange (Compounding Proceedings) Rules, 2000 (hereinafter referred to as "the Compounding Rules") or such other time frame as may be prescribed by this court.

4. Then, prayer clause (b) claims the following relief:-

> *"(b) that this Hon'ble Court may be pleased to issue a writ of prohibition, or any writ, order or direction analogous to the writ of prohibition, restraining the Respondent No. 2 from proceeding with adjudication proceedings in the SCN No.F.No.T-4/2D/2015 dated 13 November 2015 until the decision of Respondent No. 1 on the compounding applications which will be filed by the Petitioner after guidance is forthcoming."*

5. It is in pursuance of this prayer clause, which we have reproduced, that the petitioner amended the writ petition and sought the following reliefs:-

"(a1) wholly in the alternative to prayer clause (a), that this Hon'ble Court may be pleased to issue a writ of certiorari, or any writ, order or direction analogous to the writ of certiorari, calling for the records of the case and after going through the same and examining the legality thereof to quash and/or cancel the letters/orders dated 24 January 2017 addressed by the Respondent No. 1 to the Petitioner purporting to return compounding applications on grounds that 'guidance' is liable to be sought thereon by the Petitioner;

(a2) that this Hon'ble Court may be pleased to issue a writ of certiorari, or any writ, order or direction analogous to the writ of certiorari, calling for the records of the case and after going through the same and examining the legality thereof to quash and cancel the letter/order/direction dated 6 March 2017 issued/passed by Respondent No. 2 to Respondent No. 1 in relation to the compounding applications of the Petitioner;

(a3) that this Hon'ble Court may be pleased to issue a writ of certiorari, or any writ, order or direction analogous to the writ of certiorari, calling for the records of the case and after going through the same and examining the legality thereof to quash and cancel the Order sheet/Hearing Note dated 20 April 2017 passed by Respondent No. 2;

(a4) that this Hon'ble Court be pleased to strike down and declare that the proviso to Rule 8(2) of the Foreign Exchange (Compounding Proceedings) Rules, 2000 inserted vide 2017 Notification introduced by the Foreign Exchange (Compounding Proceedings) Amendment Rules, 2017, ultra vires, unconstitutional, non est and violative of Article 14 of the Constitution of India;

(a5) that this Hon'ble Court may be pleased to issue a writ of certiorari, or any writ, order or direction analogous to the writ of certiorari, calling for the records of the case and after going through the same and examining the legality thereof to quash and cancel the letters dated 15 December 2018 and 1 January 2018 issued by Respondent No. 1 to the Petitioner in relation to seek guidance from the AD Bank;

(a6) that this Hon'ble Court may be pleased to issue a writ of certiorari, or any writ, order or direction analogous to the writ of certiorari, calling for the records of the case and after going through the same and examining the legality thereof to quash and cancel the letter dated 1 December 2017 issued by Respondent No. 2 to Respondent No. 1 in relation to the compounding applications of the Petitioner;"

6. It would be necessary to set out the factual background, in which this petition has been filed by the petitioner company incorporated under the Companies Act, 1956. The petitioner carries on business of operating news channels. The petitioner company was established by Dr. Prannoy Roy an eminent journalist, claiming to be a pioneer in the introduction of electronic media in the space of news broadcasting. The first respondent is the Reserve Bank of India (RBI) constituted under the Reserve Bank of India Act, 1934. It has been conferred with wide-ranging powers under the Foreign Exchange Management Act, 1999 (hereinafter referred to as "the FEMA"). The second respondent-Directorate of Enforcement is constituted under section 36 of the FEMA. It exercises powers of investigation in relation to the contraventions of the FEMA. The third respondent is the Union of India.

7. The petitioner submits that vide GSR No. 383(E) dated 3rd May, 2000, foreign Exchange (Compounding Proceedings) Rules, 2000 have been notified in pursuance of powers conferred by section 46 read with section 15(1) of the FEMA. A comprehensive regime is contained within the said Rules, which contemplates the "Compounding Authority" to be either an officer of the first respondent or the second respondent, with certain monetary thresholds imposed in relation to powers for compounding, depending on the nature of the violation and prescribes procedures to be followed in relation to compounding generally. Under Rule 8, specifically, it is the statutory duty of the Compounding Authority to call for any information, record or any other documents relevant to the compounding application and to pass an order of compounding after affording an opportunity of being heard to all concerned "as expeditiously as possible and not later than 180 days from the date of application".

8. Respondent no. 2 initiated adjudication proceedings against the petitioner and its Directors vide Show Cause Notice No.F.No.T- 4/2-D/2015 dated 13th November, 2015 issued under section 13 of the FEMA, copy of which is annexed as Exhibit 'B' to the petition. The alleged FEMA violations cited in the show cause notice related to section 3(d), read with sections 6(3)(a), 6(3)(b) and 6(3)(j) of the FEMA, read with Regulations 6(2)(ii) and (iv) of the FEM (Transfer or Issue of any Foreign Security) Regulations, 2004,

Regulation 5(1) and 10B of FEM (Transfer or Issue of Security to Persons Resident Outside India) Regulations, 2000 and Regulation 3 of the FEM (Guarantees) Regulations, 2000.

9. The petitioner and its Directors filed replies dated 30th March, 2016 and 18th April, 2016 stating therein that the Petitioner and/or its Directors have not contravened any provisions of the FEMA as alleged in the show cause notice.

10. The petitioner states that although it was satisfied that there was no FEMA contravention warranting compounding, nevertheless, with a view to avert negative publicity, which, in turn, was adversely affecting the goodwill, reputation, growth prospects and sentiments of existing and prospective investors of the petitioner, with a view to ensure that actions were adopted in the best interests of the petitioner's shareholders and stakeholders, the petitioner took a decision to seek compounding, in the larger interest of the petitioner's stakeholders. Amongst the factors that weighed with the petitioner in arriving at its considered decisions were that apart from adverse publicity on various media platforms, including on social media, the adjudication proceedings would entail several years to complete, which would hamper day to day functioning of the petitioner and also prove to be a significant drain on resources of the petitioner. Even though the petitioner was certain that the end result will eventually be in favour of the petitioner, to avoid the prejudicial effect of such proceedings, including protracted litigation and related legal costs, the petitioner filed two compounding applications bearing *C.A.No.3998/2016 and C.A.No.3999/2016*, both dated 7th May, 2016 with respondent no. 1. The petitioner filed its compounding applications with respondent no. 1, since as per the said Rules, the jurisdiction for compounding lay with respondent no. 1. The copies of the said compounding applications are annexed as Exhibit 'E' and Exhibit 'F'. These compounding applications filed by the petitioner encompassed all the contraventions under the FEMA and the relevant regulations made thereunder as alleged by respondent no. 2's show cause notice.

11. Based on having instituted compounding applications dated 7th May, 2016, by a letter dated 11th May, 2016, the petitioner requested respondent no. 2 to keep its investigation proceedings in abeyance. After this letter, respondent no. 2 did not proceed with the adjudication proceedings and kept the same in abeyance, until 31st March, 2017.

12. Respondent no. 1, vide letters bearing Reference *No.FE.Co.CEFA/1411/15.20.67/2016-17 dated 05th August, 2016* and FE.Co.CEFA/1690/15.20.67/2016-17 dated 12th August, 2016 returned the compounding applications dated 7th May, 2016 on the ground that certain administrative actions were required to be completed by the petitioner. These administrative actions, namely, reporting the concerned Step Down Subsidiaries, reconciling the remittances/guarantees made to the JV and reporting pending APRs in that regard, were immediately complied with and accordingly, the petitioner once again filed two compounding applications, both dated 19th August, 2016 bearing *CA Nos. 4113/2016 and 4114/2016*, respectively.

13. During the discussions held by the petitioner's counsel with the Overseas Investment Division (OID) of respondent no. 1 in relation to the matter of the compounding applications dated 19th August, 2016, it was pointed out that there were certain other additional technical/procedural contraventions which may also require compounding as a direct consequence of the compounding applications dated 19th August, 2016. In order to immediately address such observations, the petitioner filed a third compounding application dated 24th October, 2016 with respondent no. 1 being CA No. 4195/2016, copy of which is annexed as Exhibit 'K' to the petition.

14. By its letter dated 24th January, 2017 bearing Reference No.FE.CO.CEFA/7579/15.20.67/2016-17 and FE.CO.CEFA/7581/ 15.20.67/2016-17, respondent no. 1 returned all of the three compounding applications of the petitioner (two dated 19th August, 2016 and one dated 24th October, 2016) advising the petitioner to approach its OID and Foreign Investment Division (FID) for further guidance, in the matter of compounding.

15. Upon receipt of the aforereferred letters dated 24th January, 2017 issued by respondent no. 1, the petitioner, acting through its legal counsel, met with the concerned officers in the FID and OID of respondent no. 1 on several occasions to seek guidance in the matter of compounding. During these meetings, the concerned officers informed the petitioner's counsel that all the transactions undertaken by the petitioner, whether FDI or ODI, would be required to be set forth in a simplified manner.

16. Accordingly, vide the petitioner's counsel letters, both dated 11th April, 2017, the details of all such transactions were set forth in a simplified manner, by way of various charts and submitted to the FID and OID. After submission of the said letters dated 11th April, 2017 with FID and OID, neither the FID nor the

OID have responded till date to the petitioner. In the meanwhile, vide letter dated 31st March, 2017, respondent no. 2 restarted the adjudication proceedings and fixed the date of hearing on 20th April, 2017.

17. On 20th April, 2017, the petitioner and its Directors' counsel, vide letter dated 20th April, 2017 requested respondent no. 2 to keep the adjudication proceedings in abeyance till respondent no. 1 provides guidance to the petitioner in the matter of compounding. Respondent no. 2, however, rejected the petitioner's request of keeping the adjudication proceedings in abeyance, vide its order dated 20th April, 2017. The next date of hearing before respondent no. 2 was on 6th July, 2017.

18. The petitioner's counsel also submitted letters dated 23rd June, 2017 with the FID and OID, with a copy to respondent no.1's Cell for effective implementation of FEMA, as a reminder to seek guidance in the matter. Neither the FID nor the OID have provided any guidance and the request for guidance remained pending.

19. The petitioner submits that respondent no. 1 has been compounding similar contraventions during the pendency of the proceedings/investigations before respondent no. 2. In fact, a few cases concern compounding by respondent no.1 of contraventions even when investigations under the Prevention of Money Laundering Act, 2002 (hereinafter referred to as "the PMLA") were ongoing. However, in the case of the petitioner, respondent no. 1 has been returning the compounding applications.

20. The petitioner is aggrieved by the fact that respondent no.2 is continuing proceedings against the petitioner and its Directors under the FEMA, despite the legal entitlement of the petitioner and its Directors to seek compounding. Also, when respondent no. 2, on the basis of information available to it, can undertake adjudication proceedings, the basis on which respondent no. 1 claims inability to compound alleged offences, is irreconcilable.

21. The petitioner submits that without in any manner seeking to be trammeling the realm of merits of the show cause notice, vide letter dated 28th February, 2014, respondent no. 1 in relation to one of the contraventions alleged in the show cause notice relating to Regulation 6(2)(ii) of the Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004 advised the AD Bank of the petitioner to call for the information from the petitioner to enable it to advise the petitioner to opt for compounding. Thus, initially, respondent no.1 was itself participating in the process that would facilitate the petitioner to opt for the compounding, but when the petitioner approached respondent no.1 for compounding the very allegation, the compounding application was returned. While one of the allegations in the show cause notice is that the petitioner deposited certain sums with Bank of Baroda, which according to respondent no. 2 amounts to violation of section 3(d) of the FEMA, no corollary show cause notice has been issued by respondent no. 2 to the Bank of Baroda.

22. This writ petition was filed in this court on 1st July, 2017. An affidavit in reply was filed by the Directorate of Enforcementrespondent no. 2 and after the preliminary submissions, it was stated that the adjudication proceedings relating to the show cause notice dated 13th November, 2015 have been initiated against the petitioner for contravention of the provisions of the FEMA and the Rules/Regulations made under the Act, as mentioned in the show cause notice. The petitioner and its Directors have filed replies dated 30th March, 2016 and 18th April, 2016, in which, they have pleaded not guilty to the contraventions alleged in the show cause notice.

23. The petitioner informed the second respondent regarding filing of compounding application with the RBI and requested for keeping the adjudication proceedings in abeyance. The Enforcement Directorate, in para 8 of this affidavit stated that it is not bound to wait for the outcome of the application filed by the petitioner with the RBI and the Enforcement Directorate was entitled in law to proceed with the ongoing adjudication proceedings. Hence, the request for keeping the proceedings in abeyance was not granted. However, the Enforcement Directorate did not proceed in the adjudication for some time as the matter was under further investigation. However, the fact remains that the first respondent-RBI returned the compounding applications to the petitioner explaining the grounds for doing so. This information was communicated to the second respondent by the first respondent by their letter dated 14th March, 2017. Thus, the compounding applications were returned. Secondly, the RBI also forwarded a list of contraventions admitted by the petitioner, some of which were not mentioned in the show cause notice dated 13th November, 2015. The contravention detected by the RBI related to the NDTV-I Holdings Limited and NDTV Networks PLC, both of which are apparently under investigation of the second respondent. Then, a reference is made to the petitioner's application dated 20th April, 2017 filed before the adjudicating authority, requesting that the adjudication proceedings be held in abeyance till they seek guidance from the FID and OID of the first respondent. However, the second respondent inquired as to whether there is any provision in law enabling it to hold the proceedings in abeyance, in absence of which,

no cognizance can be taken of this application. The petitioner also very fairly stated that there was no legal provision, but it is the discretion of the authority to take the application or not. The adjudicating authority rejected this application dated 20th April, 2017 on the ground that there is no such provision in the Foreign Exchange (Compounding Proceedings) Rules, 2000. Thus, it was denied that there was any provision, under which, the petitioner can insist on keeping the proceedings in abeyance till the compounding application is considered. Finally, what is argued is that by an application dated 20th February, 2017 of the Department of Revenue, Ministry of Finance, amendments have been made in the Compounding Rules and which completely deal with the argument of the petitioner that they have a right to seek compounding of their offences. This is the sum and substance of the affidavit in reply dated 25th July, 2017.

24. Thereafter, the petitioner filed a rejoinder affidavit on 4th August, 2017 reiterating the legal contentions as raised in the petition as also the factual position narrated in this rejoinder. The petitioner also pointed out that the petitioner's application to keep the proceedings before the second respondent in abeyance should have been granted because there is absolutely nothing, which would indicate contravention of the provisions of the PMLA/FEMA. This is nothing but an unlawful interference in the right of the petitioner to seek compounding and the issue is apparently raised to prejudice the court. The petitioner pointed out that there was no question of the second respondent directing the first respondent, much less by a letter dated 6th March, 2017, not to compound the offence on the ground of the alleged investigation under the PMLA in Aircel's case. The petitioner pointed out that it was summoned by the second respondent in connection with this case as a witness and not as an accused. In any event, before the communication of the second respondent to the RBI dated 6th March, 2017, the learned Special Judge- CBI/PMLA, vide two separate orders dated 2nd February, 2017 has already discharged all the accused in the Aircel's case. Exhibit 'B' and 'C' to the rejoinder are the copies of these orders of the learned Special Judge. For these reasons, it was submitted that the communication dated 6th March, 2017 cannot interfere with the petitioner's right to seek compounding nor it can bind the RBI. In these circumstances, this affidavit-in-rejoinder reaffirm that the petition deserves to succeed.

25. What we have on record thereafter is an affidavit in reply of the RBI and which, apart from containing the preliminary submissions, also says on merits that the application of the petitioner for compounding cannot be granted. The RBI is not inclined to grant an order of compounding having regard to the nature of the contravention and with a view that the matter will have to be further investigated by the Directorate of Enforcement. This affidavit of the RBI is dated 7th August, 2017. Pertinently, after these affidavits of the respective respondents, this court was persuaded to pass a detailed order. That order dated 9th August, 2017 reads as under:-

> *"1. Yesterday, when we invited attention of the learned counsel representing the first respondent – Reserve Bank of India to the communications at Exhibits – J and K, Shri Sharma, the learned counsel on instructions of Shri R. Seetaraman, DGM, OID, FED stated that Reserve Bank of India will immediately address a letter to the petitioner calling upon the petitioner to submit necessary data/ documents to enable its Foreign Investment Division, OID, FED, Central Office Mumbai to provide necessary guidance to the petitioner as stated in the aforesaid communications. He states that on the petitioner supplying necessary data/ documents, necessary guidance will be provided to the petitioner within 20 days from the date on which necessary documents/ data are providedby the petitioner. We accept the said statement.*
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> *2. Place the Writ Petition high upon board on 22nd August, 2017. The learned counsel appearing for the second and third respondents states on instructions that the said respondents agree for adjourning the hearing fixed today at 3.00 pm by fixing a date for hearing on some other date after 22nd August, 2017. We accept the said statement."*

26. Pursuant to that order, an application seeking leave to amend the petition was filed and on that date itself, the chamber summons seeking amendment to the petition was allowed. Thereafter, the petitioner filed a rejoinder affidavit to the counter affidavit of the RBI and it reiterated the contentions raised in the earlier affidavit-in-rejoinder filed to the second respondent's affidavit-in-reply. It also raised additional contentions. An additional counter affidavit on behalf of the RBI was also filed on 22nd August, 2017, in which, it was stated the the compounding applications submitted by the petitioner were returned by the Compounding Authority for the reasons mentioned in the letter dated 24th January, 2017. As on 6th March, 2017, neither there was any old compounding application filed by the petitioner pending before the RBI nor any fresh application has been filed by the petitioner thereafter. In these circumstances, the first

respondent reiterated that the writ petition deserves to be dismissed, as the reasons for returning the compounding applications are well founded.

27. Since the amended copy of the petition was supplied, counter affidavit on behalf of the Enforcement Directorate-second respondent came to be filed dated 22nd August, 2017, in which, after reiterating the earlier stand, it is stated as under:-

> *"i) Pursuant to the directions of the Hon'ble Supreme Court in December 2010, the CBI initiated investigation into the 2G Spectrum Scam. Eventually the CBI filed a Charge Sheet dated 29th August, 2014 against certain accused persons in the court of the Special Judge (CBI) (2G Spectrum Cases), Patiala House Courts, New Delhi. ("Aircel-Maxis Case"). The offences alleged in the charge sheet were that Mr. Dayanidhi Maran (the then Minister of Communications and Information Technology of the Govt. Of India) in criminal conspiracy with Mr.Kalanithi Maran, Mr.Ralph Marshall, Mr.T. Ananda Krishnan, Astro All Asia Networks Plc, UK ("Astro") and Maxis Communications Berhad, Malaysia ("Maxis") illegally facilitated the sale of shares of Aircel Limited, India ("Aircel Ltd.") held by Mr.C. Sivasankaran to Global Communication Services Holdings Limited, Mauritius, ("GCSHL") a wholly owned subsidiary of Maxis. After Maxis acquired the shares of Aircel Ltd., Mr. Dayabnidhi Maran granted licence etc. to Aircel for which he received Rs.742.58 crores as illegal gratification from Maxis through Astro and other associate entities including the subsidiaries of Astro under the garb of equity contribution in companies controlled by his brother Mr.Kalanithi Maran viz. Sun Direct TV Pvt. Ltd., India ("SDTPL") and South Asia FM Limited, India ("SAFL").*
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> *ii) Although New Delhi Television Ltd. ("NDTV Ltd.") was not named as an accused in the CBI Charge Sheet, it was established in the Charge sheet that Rs.742.58 crores was paid by Astro to SDTPL and SAFL through its subsidiaries based in Mauritius as illegal gratification to Mr.Dayanidhi Maran. Out of this amount approximately Rs.193 crores was paid to SAFL from February 2008 to October 2010 by Astro, directly and indirectly. This amount was paid on the basis of a Share Subscription Agreement and a Joint Venture & Shareholder's Agreement, both dated 10th Jan 2008. One of the companies through which part of the aforesaid amount was routed to SAFL was a company called AH Multi Soft Pvt Ltd. ("AHMPL"), a company incorporated in India. Investigation under PMLA from SAFL revealed that a group company of NDTV Ltd. called NDTV News Ltd. ("NDTV News") had purchased the primary equity shares of SAFL for an amount of Rs.5.1 crores (Rs.1.72 crore paid on 30.08.2007 and Rs.3.39 crore paid on 28.02.2008). These shares were subsequently acquired by AHMPL from NDTV News for the same amount of Rs.5.1 crores on 23.07.2009 and passed on to the Mauritius based subsidiary of Astro. NDTV News was also a party to the above agreement. The above facts show the connection between NDTV Ltd. with Astro in receiving funds from Mauritius based subsidiary of Astro through AHMPL, in Aircel-Maxis Case.*
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> *iii) Maxis was to acquire Aircel Limited by purchasing its shares for an amount of about UD$ 800 million. It was to do so through its subsidiary GCSHL. For this purpose GCSHL applied in January 2006 to Foreign Investment Promotion Board (FIPB) for the approval of the Central Government. Under the applicable rules, then Finance Minister was empowered to grant such approval if the amount involved in foreign investment was up to Rs.600 crores. If the amount involved in foreign investment was more than Rs.600 crores it was the Cabinet Committee on Economic Affairs ("CCEA") which was competent to grant the approval. Accordingly in such cases then Finance Minister was required to forward the application to CCEA. In the Aircel Maxis case, the Finance Minister did not follow this procedure and himself granted the approval on 20.03.2006 even though the amount involved in foreign investment was approximately Rs.3500 crores. This he did on the erroneous basis that for the purpose of computing the amount involved, the premium to be paid on the share was liable to be ignored.*
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> *iv) The investigation into the aforesaid aspect of the approval granted by the then Finance Minister was pending at the time of filing of the CBI Charge Sheet on 29th August 2014. This fact was expressly stated in the Charge Sheet. It was also stated that further investigation under Section 173(8) of the Cr.PC 1973 was continuing in that regard.*
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> *v) Prior to the filing of the charge sheet in the Aircel Maxis case, the CBI, ACB, New Delhi had registered the FIR no.RC-DAI-2011-A-0022 on 09.10.2011 for investigation into the offences u/s 7, 13(2) read with 13(1)(d) of PC Act and Section 120B of IPC prior to filing of the Charge Sheet by the CBI in this case. The said FIR lodged by the CBI disclosed the above said*

offences which were/are scheduled offences under the PMLA, 2002. The Enforcement Directorate, therefore, recorded a case being ECIR No.05/DZ/2012 dated 7th February 2012 under the PMLA for investigation of the offence of money laundering as defined u/s 3 punishable under Section 4 of the Act, against the persons accused in the said FIR. The Enforcement Directorate thereafter filed a Prosecution Complaint dated 8th January 2016 under the PMLA before the Hon'ble Special Judge (PMLA) Patiala House Courts, New Delhi. In the Complaint, although NDTV News was not arrayed as an accused, its connection with SAFL was set out in detail. The sale of its shares in SAFL by NDTV News to AHMPL for approximately Rs.5.10 crores was also noticed in the Complaint. The fact that the investigation was ongoing was also mentioned in the Complaint and leave of the Hon'ble Special Judge was sought to file a further supplementary Complaint under PMLA on the basis of the outcome of the ongoing investigation.

vi) On 27th February 2016 the Learned Special Judge took cognizance of the case made out by the Enforcement Directorate in the said Complaint and directed issue of process to the accused. At the same time the Learned Special Judge granted leave to the Enforcement Directorate to continue with the ongoing investigation and to take action thereon in accordance with law.

vii) During Financial year 2010-2011, Astro paid an amount of US$ 40 million through its subsidiary South Asia Creative Assets Ltd. (SACAL) to NDTV Lifestyle Holdings (P) Limited ("NLHL"), a subsidiary of NDTV Limited, ostensibly for acquiring 49% stake in the company. Significantly, at that time the worth of NLHL was only a few thousand US dollars. The amount paid by Astro/SACAL was therefore far in excess of the value of the shares. Before receiving the amount of US$ 40 million from Astro, NLHL in the same F. Y. transferred Rs.183.25 crores to another associate company of NDTV Limited i.e. NDTV Networks Plc., U. K. ("NNPLC") in U. K. Subsequently NNPLC has undergone voluntary liquidation in the same Financial Year.

viii) The Enforcement Directorate therefore has a serious suspicion that NDTV Ltd. is involved in money laundering activities and it is possible that the result of the ongoing investigation will establish this fact.

ix) The US$ 40 million was paid by NLHL to NNPLC ostensibly towards the acquisition of shares held by NNPLC in various companies forming part of the NDTV group companies. This was a contravention of the FEMA Regulations. This is one of the violations/contraventions that NDTV has sought to compound vide its Compounding Application dated 19th August 2016.

x) It is suspected that the aforesaid payment of US$ 40 million by Astro to NLHL was also part of illegal gratification paid by Maxis in relation to the acquisition of the shares of Aircel by Maxis. The Enforcement Directorate is at present investigating this aspect under PMLA.

xi) Another contravention committed by NDTV Limited was in respect of the investment of US$ 163.78 million by NNPLC in 5 Indian group companies of NDTV Limited. It is suspected that the funds raised by NNPLC may be linked to overseas entities involved in the Aircel-Maxis Case. Accordingly further enquiries under PMLA are being carried out for which NDTV Limited has sought compounding.

xi) It was in these circumstances that, in response to the letter of RBI dated 05.12.2016 the Enforcement Directorate issued the letter dated 6th March, 2017 to RBI advising the RBI not to compound the contraventions referred to in the Compounding Applications of NDTV, the Petitioner."

28. Thereafter, it was stated that from the Airce Maxis case, the CBI has registered another FIR on 2nd June, 2017 against the petitioner, its promoters and unknown officials of ICICI Bank Limited and other unknown persons in respect of the offences punishable under section 120B read with section 420 of the Indian Penal Code, 1860 and section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act, 1988. Based on this FIR, the Enforcement Directorate recorded a case under the PMLA against the accused in the aforesaid FIR dated 7th August, 2017. Then, the facts as alleged by the Enforcement Directorate against the accused are set out in para 7 (sub paras of the additional counter affidavit). Then, as far as the contraventions against some companies, which are Mauritius based, are set out and it is stated that the order of discharge of the learned CBI Judge is also under challenge. The further steps have been set out in the subsequent paragraphs of this additional counter affidavit and it is reiterated that there is no obligation to hold the adjudication proceedings in abeyance. All the more, in the light of the subsequent

amendments to the Compounding Rules. For these reasons, the submission is that the petition be dismissed.

29. The petitioner filed, on 22nd September, 2017, an additional affidavit-in-rejoinder to the counter affidavit of the second respondent. In both these affidavits, the petitioner prayed that no pending case can interfere with the petitioner's right to seek compounding of the offences and for these reasons, the petition be allowed.

30. With these materials, though the petitioner was heard on subsequent dates by this court, what we have seen is that the petition was listed on 6th November, 2017, but was adjourned to 13th November, 2017. On 13th November, 2017, after hearing both sides, this court passed the following order:-

> *"On the earlier date, we had called upon the learned counsel appearing for the Union of India to produce the file of the decision which is communicated vide communication dated 6th March 2017 addressed by the Special Director of Enforcement Directorate to the Chief General Manager, Foreign Exchange Department, OID, Reserve Bank of India, Mumbai. The learned counsel appearing for the second and third respondents, on instruction from Mr.Kamal Singh, Deputy Director, states that the Enforcement Directorate will withdraw the decision communicated by the aforesaid letter dated 6th March 2017. He further states that this statement will not preclude the Enforcement Directorate from applying its mind as regards exercise of power under proviso to subrule (2) of Rule 8 of the Foreign Exchange (Compounding Proceedings) Rules, 2000. We accept the statement made. In view of the said statement, challenge to the communication dated 6th March 2017 does not survive.*
>
> *2. The learned counsel appearing for the Reserve Bank of India seeks time on the ground that the counsel briefed in the matter is not available. By consent, fix the petition for admission on 4th December 2017, high upon board.*
>
> *3. The learned counsel appearing for the second and third respondents, on instruction, states that the adjudicating proceedings will be adjourned to a date after 4th December 2017."*

31. The writ petition was then placed on 4th December, 2017 and 22nd December, 2017. After these dates, on 12th January, 2018 onwards, it has been listed before us. From the record, it appears that another Chamber Summons *(ST) No. 64 of 2018* for amendment was moved. That was moved after inspecting the records by the petitioner. On that chamber summons, a detailed order was passed on 8th February, 2018. That order reads as under:-

> *"1. We have heard Mr. Dwarkadas appearing in support of the chamber summons and Mr. Venegaonkar for the contesting respondent, particularly the second respondent.*
>
> *2. Mr. Venegaonkar would submit that this chamber summons should not be granted for leave to amend is sought to insert the pleas inconsistent with the case of the petitioner as initially or originally pleaded. Therefore, the structure of the petition undergoes a drastic change and equally the cause of action.*
>
> *3. Mr. Dwarkadas would submit to the contrary. He would submit that as pointed out in the affidavit in support, the petitioner was required to move this chamber summons. The petitioner was required to move this chamber summons only on account of the stand of the Directorate of Enforcement.*
>
> *4. The facts are relevant and the events transpiring subsequent to the filing of the petition are now required to be incorporated. Further, the events require the petitioner to challenge the constitutional validity of a notification of 2017.*
>
> *5. In these circumstances, Mr. Dwarkadas would submit that the petitioner be permitted to amend the petition.*
>
> *6. After hearing both sides on this limited point, it is evident that by our order on the chamber summons, we are not expressing any opinion on the rival contentions and particularly the merits of the amended pleas. Therefore, the merits have to be gone into at a subsequent stage. All contentions and pleas of the Directorate of Enforcement with regard to the merits of these added paragraphs are, therefore, expressly kept open. Without prejudice to the contentions of all parties on merits, the chamber summons is made absolute. The amendment is allowed. The writ petition stands amended in terms of the Schedule to the chamber summons. There would be no order as to costs.*

7. It is also argued by the RBI that any allegations made by the petitioner against it are not admitted. Once the reply filed to the chamber summons is exhaustive and dealing with merits of the amended pleas, they are not filing any additional affidavit. Therefore, the court can proceed on the available material.

8. Let the amendment be formally carried out within a period of one week from today, but we would proceed on the footing that the petition stands amended.

9. List the writ petition on 12th February, 2018 at 3.00 p.m."

32. In pursuance of that order, Mr. Venegaonkar learned advocate appearing for the second respondent produced a sealed envelop which was opened and re-sealed and kept in the custody of this court. On 23rd February, 2018, during the course of hearing, Mr. Venegaonkar produced a copy of the communication dated 9th February, 2018 of the Government of India, Ministry of Finance, Department of Revenue, addressed to the Director of Enforcement, New Delhi, annexing therewith the opinion of the Ministry of Law and Justice, Department of Legal Affairs, which opinion was sought by the Department of Revenue. That was taken on record and marked as 'X' for identification. That was with regard to a legal argument canvased before us.

33. Before we refer to all the arguments, we must make a reference to an affidavit of the petitioner dated 2nd December, 2017 filed in this petition seeking to place on record the outcome of the inspection of the documents taken by the petitioner. The writ petition raises the issue of a compounding application being not considered by the RBI, though the Rules enable it to do so, but the RBI maintains that it was equally bound to consider the contents of a letter from the Enforcement Directorate. It is in these circumstances and when the RBI relied upon the amendment to the Compounding Rules that the petitioner filed an affidavit seeking to raise certain legal issues. Prior to that, it sought to place on record the further developments/events and further correspondence exchanged with the RBI. That is how this affidavit of 2nd December, 2017 was filed.

34. The petitioner, as stated above, filed a chamber summons for amendment of the petition, which was allowed and the contents of that amendment are equally material for this petition. It is based on those contents that the issue of legality and validity of the Rules would arise for determination of this court, according to the petitioner.

35. Mr. Dwarkadas learned senior counsel appearing on behalf of the petitioner submitted that the writ petition raises certain important issues and according to him, it would be necessary for this court to consider the scheme of compounding as envisaged by the FEMA. He submitted that the scheme of compounding under the FEMA postulates that contravention of FEMA is treated as a civil offence. It is amenable to penalty under the FEMA. Mr.Dwarkadas would contend that the Compounding Rules, vide Rule 3, envisage two compounding authorities, namely, the RBI and the Enforcement Directorate, such that the RBI, as statutory regulator and repository of foreign exchange dealings, is vested with powers to compound all contraventions under the FEMA, save and except for contraventions under section 3(a) of the FEMA (vide Rule 4 of the Compounding Rules) and the Enforcement Directorate is the sole repository of powers to compound contraventions under section 3(a) of the FEMA (vide Rule 5 of the Compounding rules. The procedure for compounding is set forth in Rule 8 of the Compounding Rules. It confers power upon the Compounding Authority to call for any information, record or other documents relevant to the compounding proceedings, and stipulates that the compounding authority shall pass an order of compounding after affording an opportunity of hearing, as expeditiously as possible and not later than 180 days from the date of application.

36. Mr. Dwarkadas would submit that the proviso to Rule 8(2) of the Compounding Rules was introduced vide the impugned notification dated 20th February, 2018. A reading of the proviso would mean that before the Directorate of Enforcement can form a view, it must be satisfied that the proceeding initiated under Rule 4 of the Compounding Rules must relate to a serious contravention suspected of money laundering. In other words, the proceedings for compounding must be a direct or indirect attempt either to indulge or knowingly assist or knowingly be a party to or actual involvement in any process or activity connected with proceeds of crime (see section 3 of the PMLA). In other words, the compounding proceedings must relate to an offence of money laundering i.e. foreign exchange or foreign security derived or obtained directly or indirectly as a consequence of a criminal activity relating to a scheduled offence under the PMLA. The view which to be formed must, therefore, be based upon existence of circumstances, from which, a reasonable, bonafide and honest opinion/inference can be drawn to the aforesaid effect and in particular that the compounding proceedings, therefore, relates to a serious contravention suspected of money laundering.

37. Mr. Dwarkadas would submit that the delegated legislation fails to conform to parent legislation. In that, the impugned notification seeks to deprive RBI of its vast powers as statutory custodian of foreign exchange, to exercise powers to compound offences under section 15 of the FEMA read with Rule 4 of the Compounding Rules and purports to clothe the Enforcement Directorate with powers to denude RBI of exercise of statutory powers and authority without stipulating any minimum safeguards of objectivity.

38. Mr. Dwarkadas submits that wide and untrammeled powers are conferred upon the Enforcement Directorate under the impugned notification, whereby, if the Enforcement Directorate were merely of the "view", that a serious contravention suspected of money laundering or terror financing or affecting the sovereignty and integrity of the nation, the compounding authority shall become liable to remit the matter to the appropriate adjudicating authority for adjudicating the contravention under section 13 of the FEMA, exposes such power to the vice of arbitrariness.

39. Mr. Dwarkadas submits that the statutory powers vested in the RBI are incapable of being lightly interfered with and/or undermined by the executive. Accordingly, mere suspicion cannot take the place of relevant circumstances that must exist in order to justify inference, which must demonstrably be the sine qua non for action.

40. Mr. Dwarkadas would submit that it is insufficient in law for the Enforcement Directorate to interdict RBI's compounding powers on mere suspicion as to the commission of one or more out of the category of offences stipulated within the impugned notification vis-a-vis a person seeking to exercise the right of compounding conferred under section 15 of the FEMA.

41. Mr. Dwarkadas would submit that through the impugned notification, civil consequences under the FEMA are at risk of undermining and powers to compound a civil wrong are interfered with through introducing a tenuous link with potential criminal proceedings. Thus, two similarly situated persons, namely, both of whom otherwise have a vested statutory right under section 15 of the FEMA to seek compounding, are exposed to arbitrary and discriminatory treatment. Illustratively, where a person instituting an application under section 15 of the FEMA for compounding were purportedly suspected by the Enforcement Directorate, either prior to or after institution of such compounding application of an offence of money laundering, then, (a) the mere commencement of investigation by the Enforcement Directorate absent the mandatory pre-requisite of a predicate registered offence under sections 2(u), 2(y) and 3 read with the Schedule to the PMLA (notably, in the case of the present petitioner, no registered offence under the Schedule to the PMLA exists); and/or (b) despite potential closure of such purported investigation, without charges being eventually brought; and/or (c) where any such purported investigations culminate in proceedings, which are dismissed by final conclusive unappealable order/judgment, unequal and discriminatory treatment lacking intelligible differentia ensures, in effect violation of Article 14 of the Constitution of India. In effect, the mere fact of pendency of investigation against two similarly situated persons cannot deprive either the statutory right to secure compounding under the FEMA, whether through the RBI or the Enforcement Directorate and where such compounding of a civil offence were granted by the RBI or the Enforcement Directorate, cannot hinder the Enforcement Directorate from instituting criminal proceedings. In the case of Sociedade De Fomento Industrial Pvt. Ltd., despite the pendency of proceedings before the adjudicating authority, the RBI proceeded ahead with compounding.

42. Mr. Dwarkadas further submits that the PMLA is a complete Code in itself, providing inter alia for imprisonment, attachment, confiscation of proceeds of crime and civil compounding under the FEMA cannot in any manner affect the maintainability of the PMLA proceedings. While the PMLA proceedings arise out of offences which are criminal in nature, since the FEMA contraventions are civil in nature, these are completely independent of the PMLA proceedings. Thus, even if the FEMA contraventions by the petitioner were compounded, such compounding can have no bearing on any contravention of the PMLA, since any such proceedings are capable of being proceeded with independently in law, despite the FEMA contraventions being compounded. Compounding of the FEMA contraventions, which are civil in nature, do not in any manner affect any ongoing or future PMLA proceedings.

43. Mr. Dwarkadas submits that the actions of the Enforcement Directorate, in notifying the RBI that a serious contravention involving money laundering is suspected, may, in any event, be questioned on grounds that no circumstances leading to inference of the kind contemplated i.e. where no serious contravention suspected of money laundering exists, the action might be exposed to interference through judicial review, unless the existence of circumstances is made out and in such a case, the onus of proof must lie on the Enforcement Directorate to establish that the facts justify such an inference. The Enforcement Directorate's actions are amenable to judicial review, since it is available to the petitioner to show that either such circumstances do not exist or that they are such that it is impossible for anyone to

form an opinion therefrom suggestive of the aforesaid and to challenge any such conclusion/opinion on grounds of (a) nonapplication of mind or (b) perversity or (c) that it was formed on collateral grounds and was beyond the scope of the statute. Formation of opinion is a subjective process, which must be founded on the objective test of existence of circumstances suggesting that the inference is made out. While such an opinion is not subject to a challenge on the grounds of propriety, reasonableness or sufficiency, the honest formation of an opinion that an investigation is necessary. It is not reasonable to say that such opinion has been formed on circumstances which it thinks exist. The existence of circumstances, if questioned, has to be proved at least prima facie. It is not sufficient to assert circumstances exist and give no clue to what they are, because the circumstances must be such as to lead to conclusions of certain definiteness. If the circumstances are such that no inference of the enumerated kind to justify an investigation can at all be drawn, the action would be ultra vires the statute and void. It is hard to contemplate that the legislature could have left to subjective process both the formation of opinion and also the existence of circumstances on which it is to be founded, abandoning safeguard of requiring the opinion to be founded on existent circumstances which suggest the things for which an investigation can be ordered. If it is shown that the circumstances do not exist or that they are such that it is impossible for anyone to form an opinion therefrom suggestive of the things necessary, the opinion is challengeable on grounds of non-application of mind, or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute.

44. Mr.Dwarkadas would submit that the impugned notification is contrary to and exceeds the scope and amplitude of section 15 of the FEMA, which gives a right to every person to make a compounding application and empowers the RBI and the Enforcement Directorate to compound offences in the manner prescribed. Section 46(1) of the FEMA empowers the Central Government to make rules to carry out the provisions of this Act. Section 46(2) provides that the Central Government may make rules to provide for the manner in which the contravention may be compounded under sub-section (1) of section 15. However, the impugned notification, on the contrary, provides that a compounding application will be rejected without any consideration if the Enforcement Directorate is of the view that the applicant is suspected of offences mentioned in the impugned notification. Thus, the impugned notification travels beyond the power conferred under section 46 and is contrary to section 15 and hence violative of Article 14 of the constitution of India.

45. Mr. Dwarkadas further submits that the impugned notification becomes a weapon of unbridled harassment, whereby, its misuse by the executive acting through the Enforcement Directorate cannot be ruled out. In the case of *Rameshwar Prasad vs. Union of India (2006) 2 SCC 1* it is held that if the satisfaction is mala fide or is based on wholly extraneous or irrelevant grounds, the court would have the jurisdiction to examine, because in that case there would be no satisfaction in regard to matters on which the concerned authority was required to be *satisfied. Exercise of* power is subject to judicial review, at least to the extent of examining whether the conditions precedent have been satisfied or not. This examination will necessarily involve the scrutiny as to whether there existed material for the satisfaction that the situation had arisen. When considering the question of material it is not the personal whim, wish, view or opinion or the ipse dixit de hors material placed which is relevant for the purpose. The authority has to be convinced of, or has to have sufficient proof of information with regard to or has to be free from doubt or uncertainty about the state of things indicating the situation. Although the sufficiency or otherwise of the material cannot be questioned, the legitimacy of the inference drawn from the material is certainly open to judicial review. The burden of proof would, when there is a challenge brought in judicial review, be on the authority to satisfy that the material exists, since the material is within the exclusive knowledge of the authority (see paras 124, 125 and 126 of the Majority judgment of Y. K. Sabharwal, B. N. Agrawal and Ashok Bhan, JJ). Sometimes, power is coupled with a duty. Thus a limited judicial review against administrative action is always available to the courts. A person entrusted with discretion must direct himself properly in law. He must call his attention to matters which he is bound to consider. He must exclude from consideration matters which are irrelevant. If he does not obey those rules, he may truly be said to be acting unreasonably. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. It is an unwritten rule of law, constitutional and administrative, that whenever a decision making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote (*Shalini Soni vs. Union of India 1980 Cri. L. J. 1487*). A decision will be said to be unreasonable in the wednesbury sense when it is (a) based on wholly irrelevant material or irrelevant considerations; (b) it has ignored a very relevant material which it should have taken into consideration; or (c) it is so absurd that no sensible person could ever have reached it. As Lord Diplock observed in the CCSU case, a decision will be said to suffer from wednesbury unreasonableness, if it is so outrageous in its defiance of logic or of accepted moral standards that no

sensible person who had applied his mind to the question to be decided could have arrived at it. Interference is called for when there is an abuse of power or what is sometimes called fraud on power (see paras 239 to 243 and 249: Minority dissenting judgment of A. Passayat, J. concurs on this issue).

46. Mr.Dwarkadas further submits that the compounding applications were filed by the petitioner with RBI on 19th August, 2016 and 24th October, 2016, but returned to the petitioner on 20th January, 2017 for guidance by Overseas Investment Division and Foreign Investment Division (both divisions of the RBI), but not rejected. During the pendency of such 'guidance', the amendment notification was issued on 20th February, 2017 and the letter of 6th March, 2017 followed thereafter. Therefore, the impugned notification cannot have any retrospective effect vis-a-vis the compounding applications and is not applicable to the petitioner.

47. Mr. Dwarkadas further submits that the impugned notification was not laid in the manner required in law forthwith after 20th February, 2017 and the explanation of the Enforcement Directorate that it has been tabled in Rajya Sabha on 6th March, 2018 (during the financial year of the writ petition) after the lapse of a mere 61 days (across four parliamentary sessions) renders the notification to the interdict of the salutary principle of administrative law. In the case of *Babu Verghese vs. Bar Council of Kerala (1999) 3 SCC 422*, it is held that if the statute prescribes a particular procedure to do an act in a particular way, that act must be done in that manner, otherwise, it is not at all done. A principle cited with approval in AICTE, wherein, it was held that non-placing on the floor of the Houses of Parliament, in the manner required under the relevant statute vitiated those regulations. The AICTE judgment was held by this Court in the case of *Anil versus Maharashtra Academy of Engineering and Education Research (2017) 3 Bom. C. R. 511,* to be per incuriam and principles laid down in *Atlas Cycles vs. State of Haryana (1979) 2 SCC 196* **= *2002-TIOL-1531-SC-MISC-LB*** i.e. requirements are 'directory' not 'mandatory', have been held to be good law. The petitioner has also placed reliance on the judgments in the case of *Quarry Owners Assn vs. State of Bihar (2000) 8 SCC 655*, Prohibition and Excise Superintendent, A. P. vs. Toddy Tappers Co.op. Society, Narredpally *(2003) 12 SCC 738 and K. T. Plantation Private Limited vs. State of Karnataka (2011) 9 SCC 1.*

48. Mr.Dwarkadas further submits that the impugned notification seeks to take away the right of compounding and thus transgresses principles of natural justice. While Rule 8(2) of the Compounding Rules provides for the right of a personal hearing before passing orders on a compounding application, the impugned notification does not provide for the right of a personal hearing before rejecting the compounding application.

49. Mr.Dwarkadas then submits that the impugned notification is in any event meaningless and/or contrary to law: (a) it contemplates serious contravention failing to carry minimum safeguards quintessential to distinguishing a serious transgression of law from one otherwise than serious. All contraventions of law are bound to be treated as serious and therefore, no effective meaning can be given to the use of the word 'serious' within the purported proviso to sub-rule (2) of Rule 8 of the Compounding Rules, absent requisite minimum objective safeguards; (b) alternately, 'serious' must be attributed the meaning of something more than routine contravention, assuming without admitting that the FEMA contraventions were at all capable of such a distinction being drawn, in which event, again, no rational criterion has been devised in the impugned notification to distinguish what type of contravention will fulfill the scope of 'serious'; (c) in stipulating that the Enforcement Directorate must have formed a view although the Enforcement Directorate has attempted to distinguish the use of 'view' against the requirements of 'opinion, the petitioner has nullified such contention through relying on the dictionary meaning of 'view', to be synonymous with that of 'opinion'. The impugned notification lacks criterion to be employed by the Enforcement Directorate in reaching such a view, thus endangering misuse by the Enforcement Directorate through manifest arbitrariness/ unreasonableness, without any accountability whatsoever, as apparent in the present case. Significantly, when the Enforcement Directorate issued its letter of 6th March, 2017 to the RBI purporting to interdict the petitioner's right to seek compounding, no notice or writing whatsoever had been received by the petitioner in relation to any purported investigation ongoing by the Enforcement Directorate. Again, therefore, absent requisite minimum objective safeguards, there can be no subjective satisfaction capable of being recorded; (c) finally, the impugned notification fails to define the contours of suspicion and confers unfettered powers upon the executive without guidance as to degree of suspicion, which must fulfill the minimum requirement of grave suspicion and necessarily be founded upon the existence of circumstances such that were supported by compelling material evidence, justifying tentative conclusions of certain definiteness and in the case of money laundering fulfill the minimum criterion of a registered predicate offence under the Schedule to the PMLA. As held by the Hon'ble Supreme Court in the case of *Barium Chemicals Limited vs. Company Law Board AIR 1967 SC 295,* the requirement must postulate the absence of a general discretion to go on a fishing

expedition to find evidence. Absent such minimum objective safeguards, every application to the RBI for compounding would be put to risk of being pre-empted by the Enforcement Directorate.

50. Mr. Dwarkadas further submits that the Enforcement Directorate appears to be operating entirely under a misconception that under the impugned notification, it is sufficient to have a mere suspicion to justify purported investigation, which, in turn, must form and is treated as the view required under the impugned notification. If that alone were the requirement, the impugned notification would have to provide that wherever any investigation under the PMLA is undertaken, compounding applications shall be liable to stand rejected. However, that is not the language of the impugned notification and such a meaning, which would run contrary to the parent legislation, would, in any event, be ultra vires the FEMA.

51. Mr.Dwarkadas then submits that the facts of the petitioner's case would reveal that the actions of the Enforcement Directorate in purporting to interdict RBI display non application of mind and perversity. The Enforcement Directorate's view is founded on collateral grounds beyond the scope of the statute and the impugned notification.

52. Mr. Dwarkadas submits that the applications for compounding, which have been returned by the RBI arise from the show cause notices of the Enforcement Directorate and do not concern any matters, which are alleged to be subject of a purported PMLA investigation by the Enforcement Directorate. To the extent this Directorate purports to rely upon the PMLA investigations allegedly commenced against the petitioner so as to interdict the compounding proceedings, the Enforcement Directorate is acting contrary to the provisions of law. They are virtually dictating the RBI in matters of compounding, which are within the exclusive jurisdiction and power of the RBI. The RBI has not to concern itself with the investigations allegedly commenced and pending by virtue of the proviso to Sub-rule (2) of Rule 8 of the Compounding Rules. The RBI is being directed by the Enforcement Directorate not to proceed with the compounding applications of the petitioner. This act of the Enforcement Directorate is contrary to the FEMA. Assuming without admitting that the Enforcement Directorate can communicate its views to the RBI within the meaning of the proviso to Sub-rule (2) of Rule 8, still, the RBI cannot be directed to abide by that view if that view of the Enforcement Directorate is not in accordance with the proviso. In other words, so long as the view taken and recorded by the Enforcement Directorate does not indicate that it is relating to a serious contravention suspected of money laundering, terror financing or affecting sovereignty and integrity of the nation, the Compounding Authority is not obliged to abide or respect that view. It is then not obliged to remand the case to the appropriate adjudicating authority for adjudication under section 13 of the FEMA.

53. Even otherwise, Mr. Dwarkadas would submit that since this court has granted an opportunity to take inspection of the Enforcement Directorate's files, after taking inspection, the petitioner has informed this court that no material is found in the files justifying the Enforcement Directorate's action. Further, it is apparent that the Enforcement Directorate has unequivocally and unconditionally withdrawn its earlier letter dated 6th March, 2017. Onces it has so withdrawn its letter, then, it is apparent that the Enforcement Directorate has no material in its possession, based on which, it can communicate a view to the RBI as envisaged by the proviso. Mr.Dwarkadas then submits that the further communication from the Enforcement Directorate dated 1st December, 2017 is inadequate to justify the interference with the power of compounding vesting with the RBI. The letter is clear, inasmuch as that power is also exclusive in nature and vesting solely in the RBI. Therefore, today there is no material, based on which, any view can be recorded by the Enforcement Directorate.

54. Mr. Dwarkadas then submitted that the Enforcement Directorate has since attempted to supplement its position vide affidavit in reply dated 8th February, 2018 filed by the Enforcement Directorate to Chamber Summons (L) No. 64 of 2018 contending (a) the petitioner is accused in FIR No.2172017A009 dated 2nd June, 2017; (b) the petitioner is accused in a case registered by the Enforcement Directorate vide ECIR/09/HIU/2017 dated 7th August, 2017; and (c) the petitioner is under investigation in PMLA Case No. ECIR/05/DZ/2012 (Aircel-Maxis case), wherein overseas investigation is pending.

55. Mr. Dwarkadas further submits that it is not available in law to the Enforcement Directorate to supplement/amplify/add to the lack of credible basis apparent from the Enforcement Directorate's letter of 1st December, 2017 which forms the premise for purporting to interdict the RBI's right to proceed with its statutory power to consider the petitioner's compounding application, through the means of the Enforcement Directorate's affidavit of 8th February, 2018, which offers reasons which are not to be found in the letter of 1st December, 2017 and thereby causing grave injustice to the petitioner.

56. Mr.Dwarkadas further submits that assuming whilst maintaining its position that the Enforcement Directorate's affidavit of 8th February, 2018 cannot supplement reasons or rather the lack of them in the

letter of 1st December, 2017, significantly, no fair-minded person can form a view against the petitioner based on the allegations made in the Enforcement Directorate's affidavit of 8th February, 2018: (i) as regards the first of the matters cited in the Enforcement Directorate's affidavit of 8th February, 2018 i.e. the FIR dated 2nd June, 2017, it mainly relates to an interest waiver/reduction that was granted by the ICICI Bank to the promoters and/or a holding company of the petitioner which does not directly concern the petitioner. In any event, the FIR was registered only on 2nd June, 2017 i.e. well subsequent to the Enforcement Directorate's letter dated 6th March, 2017 to the RBI. A writ petition being *Writ Petition No.1863 of 2017* was instituted and is currently pending in the Hon'ble Delhi High Court against the FIR. In the writ petition, it was specifically averred by the petitioner that there is no allegation of any offence committed by the petitioner. Pertinently, in response thereto, the Enforcement Directorate in para 26E at page 4 stated that "no comments are offered for want of knowledge". In effect, this averment is tantamount to an admission that there is no offence by the petitioner, which is the subject-matter of the purported FIR; (ii) as regards the second of the matters cited in the Enforcement Directorate's affidavit of 8th February, 2018 i.e. the ECIR of 7th August, 2017, the petitioner has no record of having received any intimation in relation thereto; (iii) as regards the last of the matters cited in the Enforcement Directorate's affidavit of 8th February, 2018 i.e. the Aircel-Maxis case, the petitioner was merely summoned as a witness and not as an accused. Further more, since the Aircel-Maxis case was relied upon in the Enforcement Directorate's letter dated 6th March, 2017, which has been unequivocally withdrawn with the permission of this court, there is no scope to resurrect reference to such case once again, through the back-door method of the affidavit in reply to the petitioner's chamber summons. In any event, in the Aircel-Maxis case, the Special Judge/Trial Court has discharged/acquitted the accused persons, vide order dated 2nd February, 2017.

57. Mr.Dwarkadas, therefore, submits that this court should allow the petition and direct the RBI to take a decision on the compounding applications preferred by the petitioner. This court should also direct that the Enforcement Directorate now cannot adjudicate on the alleged contravention of the provisions of the FEMA by passing an adjudication order and the Enforcement Directorate should be restrained accordingly by this court by passing an appropriate order and issuing a writ in regard thereto. Mr.Dwarkadas also supported his oral arguments by the written note handed in on 12th March, 2018. To be fair, Mr. Dwarkadas also argued that the proviso below Sub-rule (2) of Rule 8 cannot be relied upon for the Rules have to be amended and the amendment has to take effect strictly in accordance with law. The position today is that the law has not been abided by and in that regard, strong reliance is placed by Mr.Dwarkadas on the provisions contained in section 48 of the FEMA. He would submit that once the Rule has not been laid before the Parliament, then, it cannot take effect. If the amendment to the Rule also requires that the same should be laid before the Parliament and in terms of section 48, then, unless the respondents demonstrate compliance with this provision, they are not empowered to rely on the proviso. To the extent they are relying upon it and as noted above, that reliance should not be permitted at all as the law is contravened totally.

58. In support of the above contentions, Mr. Dwarkadas placed reliance on the following judgments:-

(i) Association of Management of Private Colleges vs. All India Council for Technical Education and Ors., (2013) 8 SCC 271.

(ii) Barium Chemicals Ltd. and Anr. vs. Company Law Board and Ors., AIR 1967 SC 295 (V. 54 C 59).

(iii) Rameshwar Prasad and Ors. (VI) vs. Union of India and Anr., (2006) 2 SCC 1.

(iv) State of T. N. and Anr. vs. P. Krishnamurthy and Ors., (2006) 4 SCC 517.

(v) P. Vijayan vs. State of Kerala and Anr., (2010) 2 SCC 398.

(vi) Kishan Singh (Dead) through Lrs. vs. Gurpal Singh and Ors., (2010) 8 SCC 775.

59. In answer to Mr. Dwarkadas's arguments, all that Mr.Dhond learned senior counsel appearing on behalf of respondent no. 1- RBI would submit is that the issue now raised is of a wider nature. The issue concerns invocation and application of the proviso below Sub-rule (2) of Rule 8 of the Compounding Rules. This court would have to rule upon that aspect of the matter and which is squarely arising between the petitioner and the Enforcement Directorate. So far as the RBI is concerned, it will abide by the order and directions of this court in this petition and act accordingly. The writ petition, therefore, is mainly contested by the Enforcement Directorate and the Union of India.

60. Mr. Venegaonkar learned advocate appearing for respondent nos. 2 and 3 would submit that the writ petition has no merit and should be dismissed. He would submit that there is complete compliance with the provisions of section 48 of the FEMA. The notification inserting proviso dated 20th February, 2017 has been forwarded to the Parliament on 26th February, 2018. The notification has been tabled in the Rajya Sabha on 6th March, 2018. In these circumstances, there is compliance with the provisions of law. Mr.Venegaonkar also supplied to us the details of the days when the House was in session. He would submit that once the Rules have been laid before the Parliament, then, there is complete compliance with law. In any event, the position is very clear and that is that the provision, which requires laying of rules and regulations before the Parliament, is not mandatory, but directory. Section 48 of the FEMA entails laying of rules before the Parliament simplicitor. That does not mean that the rules have to wait to take effect until both Houses agree in making the modification in terms of the proviso or until both Houses agree with the rule, amendment should not be made. In any event, that requirement can be still complied with. Once the rules have been tabled before the Rajya Sabha, then, there are further sittings of both Houses, during which, the amendment can be considered. Therefore, the invocation of the notification and its application at the instance of the Enforcement Directorate is not illegal.

61. Mr. Venegaonkar placed strong reliance upon the judgment of the Hon'ble Supreme Court in the case of Atlas Cycles (supra). Our attention was also invited to a Division Bench judgment of this court rendered by the Bench at Aurangabad in the case of *Anil vs. Maharashtra Academy of Engineering and Education Research (2017) 3 Bom. C. R. 511*. A copy thereof was produced very fairly for our perusal by Mr. Dwarkadas. Mr. Venegaonkar, therefore, submits that in view of this judgment of this Court, the issue regarding the rules becoming operative, effective and capable of being invoked and applied is concluded.

62. Mr. Venegaonkar submits that the whole petition is founded on erroneous legal basis that compounding of an offence is a right vesting in the petitioner. Rather, according to Mr. Venegaonkar, the position is otherwise in law. None can claim unfettered, unrestricted and absolute right of compounding an offence. It is not for an offender to dictate terms and he cannot decide whether he deserves to be tried for an offence or that the offence should be compounded. The power to take all such decisions vests exclusively in the State or the authority. Therefore, a person like the petitioner, who has contravened the provisions of the Act cannot choose for itself whether to be tried for such contravention and penalised or whether that contravention should be 10 compounded. Precisely, this is what the petitioner has taken upon itself to decide and determine. If that cannot be determined by the petitioner, then, the whole petition must be dismissed solely on this reasoning and conclusion. More so, when the Compounding Authority/RBI does not complain of any undue or uncalled for much less illegal interference with its power under section 15 of the FEMA.

63. Alternatively and without prejudice to the above argument and in the event this court holds that there is a statutory mechanism, which enables the RBI to compound the offence, then, even that power vesting in the RBI is not absolute. It is coupled with a duty. The RBI is not bound to compound every contravention unmindful of the consequences of such act on its part. The RBI ought to take into account several matters, including whether larger public interest is going to be subserved by such compounding. Therefore, the power to compound contravention conferred by section 15 should be exercised cautiously, carefully and to subserve larger public interest. If that is not interpreted as above, then, by the exercise of power contemplated by section 15, the object and purpose of the FEMA would be defeated. Thus, Mr. Venegaonkar submits that the power to compound, which has been conferred in the RBI should be exercised in terms of section 15 read with the Compounding Rules and that procedure should be strictly followed. Even without the amendment and intervention of the proviso below Sub-rule (2) of Rule 8, that power of compounding was not absolute or uncontrolled. Once the compounding has to be done by the authority only after passing an order and before that order, opportunity of being heard has to be granted to all concerned, then, it is evident from the scheme of the Act that such power, as is vesting in the RBI, has to be exercised more or less on par with similar power, which is conferred in the Enforcement Directorate. Our attention in that behalf is invited to Rules 4 and 5 of the Compounding Rules by Mr.Venegaonkar. On the aspect of the constitutional validity of the proviso recently introduced by the amendment to the rules, Mr.Venegaonkar contended that in the affidavit in reply/counter affidavits of the Enforcement Directorate, sufficient and adequate light is thrown on this aspect and it is elaborately pointed out as to how this proviso is not unconstitutional, much less ultra vires the FEMA or the RBI Act. If matters, which are extremely relevant for the purpose of decision on the compounding applications, are implicit in the scheme of law, then, that law or provision cannot be declared as unconstitutional or ultra vires. Mr. Venegaonkar submits that the mandate of Articles 14 and 21 is not violated at all and that argument has no merit. The Act and the Rules have all to be read and construed together and harmoniously. So read, it would be evident that there is parallel mechanism of compounding the contravention and power in that behalf is conferred equally in the Enforcement Directorate. The

Enforcement Directorate cannot exercise that power unmindful of the contravention or suspected involvement of the applicant in offences punishable under the PMLA. Equally, the RBI cannot ignore the mandate of the PMLA. A money launderer cannot escape the clutches of law by seeking recourse to the power of compounding the contravention of FEMA. The result would be that he would rely upon such proceedings and outcome or decision thereof to defeat the object of PMLA/FEMA and escape the consequences in law. It is well settled that the power conferred in a statutory authority under an Act cannot be exercised in such a manner so as to defeat and frustrate the object and purpose of a pari materia enactment or an another stringent law. Precisely, that is sought to be achieved in the instant case and therefore, neither the law is unconstitutional nor is the communication of the Enforcement Directorate vague or illegal by any means. Hence, the writ petition has no merit.

64. Mr. Venegaonkar then addressed us on merits and submitted that all that the proviso envisages is a formation of an opinion. That is not synonymous with the formation of a view. This formation of a view and formation of an opinion are not parts of the same coin. The material that is required to be referred is different at both stages. As far as formation of view is concerned, it is only an initial stage exercise, whereas when a definite opinion is sought to be reached, then, that exercise will have different and distinct consequences and there could be an element of finality attached to it. Apart therefrom and if both concepts are synonymous to each other, still, at any initial stage, the material required should be enough to raise a suspicion. That is adequate and sufficient. No elaborate or detailed exercise is contemplated as the process is entirely subjective. No objective analysis is contemplated at that stage. It is only to set in motion or initiate a process in law that some material is to be provided to the authority. Thus, adequacy and sufficiency of that material cannot be probed by this court in its writ jurisdiction. So long as there was some material to form a view or an opinion and communicate it to the Compounding Authority, then, that test is satisfied in the instant case. There is enough material, which would raise suspicion about the involvement of the petitioner in contravention of PMLA. Therefore, on merits as well, the requirement of the proviso is satisfied and the writ petition must be dismissed.

65. Mr. Venegaonkar relies upon the following decisions in support of his aforereferred rival contentions:-

(i) Narayan Govind Gavate and Ors. vs. State of Maharashtra and Ors., (1977) 1 SCC 133.

(ii) Rochester Telephone Corporation vs. United States, (1939) No. 481, decided on 17th April, 1939.

(iii) New Delhi Television Limited vs. Deputy Commissioner of Income Tax, Circle-18(1), New Delhi and Anr., WP © No. 9120 of 2015 and connected matter, decided on 10th August, 2017 = ***2017-TII-60-HC-DEL-TP*****.**

(iv) M/s. Atlas Cycle Industries Ltd. and Ors. vs. The State of Maharashtra, (1979) 2 SCC 196 ***= 2002-TIOL-1531-SC-MISC-LB*****.**

(v) Prohibition and Excise Supde., A. P. and Ors. vs. Toddy Tappers Coop. Society, Marredpally and Ors., (2003) 12 SCC 738.

(vi) K. T. Plantation Private Limited and Anr. vs. State of Karnataka, (2011) 9 SCC 1.

(vii) M/s. Brentfield Travels Co. Pvt. Ltd. vs. The Reserve Bank of India and Anr., Writ Petition No. 1777 of 2011, decided on 23rd September, 2011.

66. For properly appreciating the rival contentions, we would refer to the FEMA. The FEMA is an Act to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India. It is a successor legislation to the Foreign Exchange Regulation Act, 1973 (FERA). In the statement of objects and reasons leading to FEMA, it was stated that the FERA was reviewed in 1993 and several amendments were enacted as part of the on going process of economic liberalisation relating to foreign investments and foreign trade for closer interaction with the world economy. At that stage, the Central Government decided that a further review of the FERA would be undertaken in the light of subsequent developments and experience in relation to foreign trade and investment. It was subsequently felt that a better course would be to repeal the existing FERA and enact a new legislation. The RBI was accordingly asked to undertake a fresh exercise and suggest a new legislation. A task force constituted for this purpose submitted its report in 1994 recommending substantial changes in the existing Act. However, after considering this report and significant developments, a decision was taken to repeal and replace the FERA with a new law and with the above objective. The FEMA, therefore, contains provisions which would enable achievement of the above objective and purpose. The Act is divided into several chapters. Chapter

II is titled as "Regulation and Management of Foreign Exchange". Chapter III is titled as "Authorised Person" and Chapter IV is titled as "Contravention and Penalties". The comprehensive Chapter, namely, Chapter V, titled as "Adjudication and Appeal", is inserted in this enactment. A separate chapter, Chapter VI contains provisions of setting up of Directorate of Enforcement and several powers conferred in the authorities under the FEMA. The last Chapter, Chapter VII is titled as "Miscellaneous".

67. Section 2 contains definitions and the term "Adjudicating Authority" is defined in section 2(a) to mean an officer authorised under sub-section (1) of section 16. The person authorised to deal in foreign exchange or foreign securities is an "Authorised Person" and that definition is to be found in section 2(c). Since section 37-A refers to an "Authorised Officer", even that term is defined under section 2(cc). The word "Competent Authority" is defined in section 2(gg). The term "Director of Enforcement" means the Director of Enforcement appointed under sub-section (1) of section 36. The term "foreign exchange" is defined under section 2(n). The term "prescribed" is defined under section 2(x) to mean prescribed by Rules made under the Act. Finally, the term "Reserve Bank" means the Reserve Bank of India constituted under sub-section (1) of section 3 of the Reserve Bank of India Act, 1934. No person can deal in foreign exchange, save as otherwise provided under the Act, Rules or requirements made thereunder or with the general or special permission of the RBI. The holding of foreign exchange by a person resident in India is also governed by the Act.

68. The various sections, which would enable the RBI to be approached for dealing in foreign exchange or in foreign security are then to be found in the subsequent sections of the Act and particularly sections 10 and 11. There is a power of the RBI to inspect authorised person. Chapter IV is titled as "Contravention and Penalties". Section 13 falling therein reads as under:-

> *"13. Penalties. - (1) If any person contravenes any provision of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorisation is issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable, or up to two lakh rupees where the amount is not quantifiable, and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day during which the contravention continues.*
>
> *(1-A) If any person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37-A, he shall be liable to a penalty up to three times the sum involved in such contravention and confiscation of the value equivalent, situated in India, the the Foreign exchange, foreign security or immovable property.*
>
> *(1-B) If the Adjudicating Authority, in a proceeding under sub-section (1-A) deems fits, he may, after recording the reasons in writing, recommend for the initiation of prosecution and if the Director of Enforcement is satisfied, he may, after recording the reasons in writing, may direct prosecution by filing a Criminal Complaint against the guilty person by an officer not below the rank of Assistant Director.*
>
> *(1-C) If any person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37-A, he shall be, in addition to the penalty imposed under sub-section (1-A), punishable with imprisonment for a term which may extend to five years and with fine.*
>
> *(1-D) No Court shall take cognizance of an offence under sub-section (1-C) of section 13 except as on complaint in writing by an officer not below the rank of Assistant Director referred to in sub-section (1-B).*
>
> *(2) Any Adjudicating Authority adjudging any contravention under sub-section (1), may, if he thinks fit in addition to any penalty which he may impose for such contravention direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any, of the persons committing the contravention or any part thereof, shall be brought back into India or shall be retained outside India in accordance with the directions made in this behalf.*

Explanation. - For the purpose of this sub-section, "property" in respect of which contravention has taken place, shall include -

(a) deposits in a bank, where the said property is converted into such deposits;

(b) Indian currency, where the said property is converted into that currency; and

(c) any other property which has resulted out of the conversion of that property."

69. A perusal of this section would reveal as to how a contravention of the provisions of the Act has to be dealt with and what are the penalties for the same. If the penalties have to be adjudicated, then, the adjudicating authority, as contemplated by law, must adjudicate the contravention and decide upon the penalty. By section 14, the orders of the adjudicating authority can be enforced. By section 14-A power to recover arrears of penalty are conferred and this section was inserted by Act 28 of 2016. Section 15 is relevant for our purpose and it reads as under:-

"15. Power to compound contravention. - (1) Any contravention under section 13 may, on an application made by the person committing such contravention, be compounded within one hundred and eighty days from the date of receipt of application by the Director of Enforcement or such other officer of the Directorate of Enforcement and officers of the Reserve Bank as may be authorised in this behalf by the Central Government in such manner as may be prescribed.

(2) Where a contravention has been compounded under sub-section (1), no proceeding or further proceeding, as the case may be, shall be initiated or continued, as the case may be, against the person committing such contravention under that section, in respect of the contravention so compounded."

70. A perusal of section 15, therefore, would reveal as to how any contravention made under section 13 would be compoundable on an application made by such person committing such contravention. He can make an application and then the contravention can be compounded. It can be compounded within 180 days from the date of receipt of application and the power to compound is either to be exercised by the Director of Enforcement or such other officer of the Directorate of Enforcement or the officer of the RBI as may be authorised in this behalf by the Central Government in such manner as may be prescribed. The consequences of compounding of the contraventions are then set out in sub-section (2).

71. Chapter V deals with adjudication and appeals and section 16 provides for appointment of adjudicating authority. It reads as under:-

"16. Appointment of Adjudicating Authority. - (1) For the purpose of adjudication under section 13, the Central Government may, by an order published in the Official Gazette, appoint as many officers of the Central Government as it may think fit, as the Adjudicating Authorities for holding an inquiry in the manner prescribed after giving the person alleged to have committed contravention under section 13, against whom a complaint has been made under sub-section (3) (hereinafter in this section referred to as the said person) a reasonable opportunity of being heard for the purpose of imposing any penalty:

Provided that where the Adjudicating Authority is of opinion that the said person is likely to abscond or is likely to evade in any manner, the payment of penalty, if levied, it may direct the said person to furnish a bond or guarantee for such amount and subject to such conditions as it may deem fit.

(2) The Central Government shall, while appointing the Adjudicating Authorities under sub-section (1), also specify in the order published in the Official Gazette, their respective jurisdictions.

(3) No Adjudicating Authority shall hold an enquiry under sub-section (1) except upon a complaint in writing made by any officer authorised by a general or special order by the Central Government.

(4) The said person may appear either in person or take the assistance of a legal practitioner or a chartered accountant of his choice for presenting his case before the Adjudicating Authority.

(5) Every Adjudicating Authority shall have the same powers of a Civil Court which are conferred on the Appellate Tribunal under sub-section (2) of section 28 and-

(a) all proceedings before it shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860);

(b) shall be deemed to be a Civil Court for the purposes of sections 345 and 346 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) Every Adjudicating Authority shall deal with the complaint under sub-section (2) as expeditiously as possible and endeavour shall be made to dispose of the complaint finally within one year from the date of receipt of the complaint:

Provided that where the complaint cannot be disposed of within the said period, the Adjudicating Authority shall record periodically the reasons in writing for not disposing of the complaint within the said period."

72. A perusal of sub-section (1) of section 16 would reveal as to how the Central Government can, for the purpose of adjudication under section 13, appoint as many officers of the Central Government as it may think fit, as the adjudicating authorities for holding an inquiry in the manner prescribed after giving the person alleged to have committed contravention under section 13, against whom a complaint has been made under sub-section (3), a reasonable opportunity of being heard for the purpose of imposing any penalty. How the adjudication has to be held and in what manner is then provided by the further sub-sections of section 15 and by section 17, there is an appeal provided to Special Director (Appeals) and there is a further appeal to the appellate tribunal.

73. We need not then set out or refer to further provisions of the law, save and except to emphasise them. When the adjudication is a process which results in imposition of penalty, then, adherence to the procedural matters is expected. The law expects the provisions to be followed scrupulously. The law also allows a legal practitioner or a chartered accountant of the choice of the person proceeded against to be appointed. We feel that particular emphasis has to be laid on section 34 for that completely takes away the jurisdiction of a civil court in matters of adjudication and appeals. Therefore, the law gives further power to appeal to this court and that appeal is provided by section 35. As observed above, Chapter VI deals with the Directorate of Enforcement and such a Directorate with a Director and such other officers or class of officers, as deemed fit by the Central Government, have to be appointed. By section 37, there is a power of search and seizure conferred in the Director of Enforcement and we would also refer to sub-section (2) of section 37, where the power of investigation of contravention referred to in section 13 can be exercised by an officer of the RBI to be appointed by the Government of India. There are several provisions relating to estates held outside India in contravention of section 4 and there is also a provision in section 38, which empowers other officers to discharge such of the duties of the Director of Enforcement or any other officer of the Enforcement, as may be stated in the order. Since great emphasis has been laid on Chapter VII containing miscellaneous provisions and particularly section 46 thereof, we deem it fit to refer to subsection (2) of section 46. Section 46 gives power to the Central Government to make Rules to carry out the provisions of the Act and without prejudice to the generality of this power, the Central Government may make Rules providing for the manner in which the contraventions can be compounded under sub-section (1) of section 15. By section 47, there is a power to make Regulations. Section 48 is necessary to be referred for another aspect of the matter and that section is reproduced hereinbelow:-

"48. Rules and regulations to be laid before Parliament. - Every rule and regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation, or both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation."

74. We would come to the consequences flowing from the language of section 48 a little later. For the time being, we only hold that such a comprehensive law has been made and enacted for the purpose of fulfilling the objectives particularly referred above. An interpretation, which would enable fulfillment of the objects and purpose, for which the law has been made, would, therefore, have to be placed on the

provisions of this Act. An interpretation, which would defeat and frustrate this object and purpose must be avoided at all cost. Since the Act provides for exercise of power of compounding, both, by the Director of Enforcement or by the RBI, an interpretation, which would enable exercise of the powers of compounding by both should be placed on the provisions. However, if the RBI were to exercise all powers to compound, as is the factual position in the present case, then, the question before us is whether the Director of Enforcement can control the exercise of that power by the RBI or interfere, much less interdict it and for that purpose, we would have to refer to the Rules, styled as the Foreign Exchange (Compounding Proceedings) Rules, 2000. These Rules were made vide G.S.R. 383(E) dated 3rd March, 2000, published in the Gazette of India, Extension, Part II section 3(2) dated 4th May, 2000. It is known as Government Standing Order. These rules are made in exercise of powers conferred by section 46 read with sub-section (1) of section 15 of the FEMA.

75. Rule 2 contains definitions and the definition of the term "applicant" is relevant. The expression "Compounding Authority" is defined in Rule 3 and in the case of a RBI officer, an officer of the RBI not below the rank of the Assistant General Manager can be entrusted with the exercise of powers under section 15(1) of the FEMA. Rule 4 reads as under:-

> *"4. Power of Reserve Bank to compound contravention. - (1) If any person contravenes any provisions of the Foreign Exchange Management Act, 1999* ***(42 of 1999)*** *except clause (a) of section 3 of that Act -*
>
> > *(a) in case where the sum involved in such contravention is ten lakhs rupees or below, by the Assistant General manager of the Reserve Bank of India;*
> >
> > *(b) in case where the sum involved in such contravention is more than rupees ten lakhs but less than rupees forty lakhs, by the Deputy General Manager of Reserve Bank of India;*
> >
> > *(c) in case where the sum involved in the contravention is rupees forty lakhs or more but less than rupees one hundred lakhs by the General Manager of Reserve Bank of India;*
> >
> > *(d) in case the sum involved in such contravention is rupees one hundred lakhs or more, by the chief General Manager of the Reserve Bank of India; Provided further that no contravention shall be compounded unless the amount involved in such contravention is quantifiable.*
>
> *(2) Nothing contained in sub-section (1) shall apply to a contravention committed by any person within a period of three years from the date on which a similar contravention committed by him was compounded under these rules.*
>
> *Explanation. - For the purposes of this rule, any second or subsequent contravention committed after the expiry of a period of three years from the date on which the contravention was previously compounded shall be deemed to be a first contravention.*
>
> *(3) Every officer specified under sub-rule (1) of rule 4 of the Reserve Bank of India shall exercise the powers to compound any contravention subject to the direction, control and supervision of the Governor of the Reserve Bank of India.*
>
> *(4) Every application for compounding any contravention under this rule shall be made in Form to the Reserve Bank of India, Exchange Control Department, Central Office, Mumbai along with a fee of Rs.5,000 by Demand Draft in favour of compounding authority."*

76. A perusal of Rule 4, therefore, leaves us in no manner of doubt that the applicant cannot seek compounding of the contravention as of right, but the law permits him to make an application to the Compounding Authority and the Compounding Authority has to exercise the power of compounding subject to the directions, control and supervision of the Governor of the RBI. The power to compound is not unbridled, unchecked, much less unregulated. It has to be exercised in accordance with the Act and the Rules and subject to the directions, control and the supervision of the Governor of RBI. The law eschews every possibility of unguided exercise of this power. As far as the power of the Enforcement Directorate to compound contravention is concerned, that is to be found in Rule 5. In that case as well, the Director of Enforcement has to direct, control and supervise the exercise of power to compound contravention. Rule 6 is important and it says that where any contravention is compounded before the adjudication of any contravention under section 16, no inquiry shall be held for adjudication of such

contravention in relation to such contravention against the person in relation to whom the contravention is so compounded. However, Rule 7 says that where the compounding of any contravention is made after making of a complaint under subsection (3) of section 16, such compounding shall be brought by the authority specified in rule 4 or rule 5 in writing, to the notice of the Adjudicating Authority and on such notice of the compounding of the contravention being given, the person in relation to whom the contravention is so compounded shall be discharged. Rule 8, after its amendment reads as under:-

> ***"8. Procedure for compounding.*** *- (1) The Compounding Authority may call for any information, record or any other documents relevant to the compounding proceedings.*
>
> *(2) The Compounding Authority shall pass an order of compounding after affording an opportunity of being heard to all the concerned as expeditiously as possible and not later than 180 days from the date of application.*
>
> *Provided that with respect to any proceeding initiated under rule 4, if the Enforcement Directorate is of the view that the said proceeding relates to a serious contravention suspected of money laundering, terror financing or affecting sovereignty and integrity of the nation, the Compounding Authority shall not proceed with the matter and shall remit the case to the appropriate Adjudicating Authority for adjudicating contravention under section 13."*

77. A bare perusal of Rule 8, therefore, would indicate that procedure of compounding is that the Compounding Authority has a discretion to call for any information, record or any other documents relating to the compounding proceedings and there is an outer limit to pass an order of compounding a contravention and that order has to be passed not later than 180 days from the date of the application.

78. It is not, therefore, right to urge that the Compounding Authority has to proceed only on the materials brought by the person seeking contravention, but the authority is free to call for any information, record or any other document relevant to the compounding proceedings. That information or record or any other document so long as it is relevant to the compounding proceedings, the Compounding Authority has a discretion to call for it and that may include anything in relation to adjudication as well. Therefore, absent the proviso, does not mean that the Compounding Authority cannot call for the relevant information, but in its discretion, it is free to call for it. Secondly, there being an outer limit for the exercise of the power that the authority is expected to adhere to that time limit.

79. All that the proviso does is to enable the Enforcement Directorate to communicate its view with regard to a serious contravention suspected of money laundering, terror financing or affecting sovereignty and integrity of the nation. Once that view is recorded and communicated, it is the bounden duty of the Compounding Authority and namely the RBI in this case not to proceed with the matter, but to remit the matter to the adjudicating authority for adjudication of the contravention. Therefore, no compounding is then permissible. In any event, if the compounding results in making payment, but that payment is not made, then, no compounding can come into effect. No contravention can be compounded if an appeal stands filed under sections 17 and 19 of the Act.

80. It is in these circumstances, that we are of the opinion that there is much substance in the argument of Mr.Venegaonkar that there is no absolute right to seek compounding of contravention. At the same time, Mr.Dwarkadas can justifiably argue that an application for compounding, if made to the RBI, the power to compound vesting in the RBI cannot be taken away nor that exercise can be nullified except in the eventualities set out in the statute. Whether the same are found in the statute and whether there is any flaw in the view communicated resulting in a prohibition against compounding by the RBI is the moot question before us.

81. Before we address that issue/question, we would also like to refer to the PMLA. That Act has been enacted so as to prevent money laundering and to provide for confiscation of property derived from, or involved in, money laundering and for matters connected therewith or incidental thereto. In the light of the resolution adopted by the General Assembly of the United Nations and the political declaration adopted by the Special Session of the United Nations General Assembly, details of which are referred in the preamble to the law, it was imperative for the countries world over to take steps so as to prevent money laundering. It is in these circumstances and when international community was geared up and took the steps, in view of a urgent need of an enactment or comprehensive legislation, inter alia, for preventing money laundering of proceeds of drug crimes and other connected activities and confiscation of proceeds derived from such offence, setting up of agencies and mechanisms for coordinating measures for combating money laundering etc., the PMLA Bill 1998 was introduced in the Lok Sabha on 4th August, 1998. Thereafter, it was referred to the Standing Committee on Finance, which presented its report to the

Lok Sabha. Thereupon, the Central Government took the steps and the law was enacted. It has been amended by the Amendment Act 20 of 2005, the Amendment Act 21 of 2009 and the Amendment Act 2 of 2013. The Statement of Objects and Reasons leading to the Amendment Act 2 of 2013 states that the problem of money laundering is no longer restricted to the geo political boundaries of any country. It is a global menace that cannot be contained by any nation alone. In view of this, India has become a member of the Financial Action Task Force and Asia Pacific Group on money-laundering, which are committed to the effective implementation and enforcement of internationally accepted standards against money laundering and the financing of terrorism. Consequent to the submission of an action plan to the Financial Action Task Force to bring anti money laundering legislation of India at par with the international standards and to obviate some of the deficiencies in the Act that have been experienced by the implementing agencies, the need to amend the Prevention of Money-Laundering Act, 2002 has become necessary.

82. The Act must, therefore, receive such interpretation as would further this object and purpose. Towards that end, the Act has been enacted by dividing it into several chapters. The preliminary provisions are contained in Chapter I. Section 2 falling in that Chapter contains definitions and the definition of the term "money-laundering" is to be found in section 2(p). The word "money-laundering" is defined by stating that the word carries the meaning assigned to it in section 3 of the PMLA. The word "investigation" is defined in section 2(na), which is inserted by the Act 20 of 2005 to include all the proceedings under the PMLA conducted by the Director or by an authority authorised by the Central Government under the PMLA for collection of evidence. The word "Director" or "Additional Director" or "Joint Director" means a Director or Additional Director or Joint Director, as the case may be, appointed under sub-section (1) of section 49. That section falls in Chapter VIII titled as "Authorities". Thus, these and the other words, including the definition of the term "financial institution" as appearing in section 2(l), the expression "offence of cross border implications" as defined in section 2(ra) together with the definition of the word "proceeds of crime" and prior thereto the word "prescribed", the expression "Schedule" and "scheduled offence" as appearing in section 2(x) and (y) would enable us to understand as to what is money laundering. Section 3 is titled as offence of money laundering. That is the heading of the Chapter also. Section 3 reads as under:-

> ***"3. Offence of money-laundering.*** *- Whosoever directly or indirectly attempts to indulge or knowingly assist or knowingly is a party or is actually involved in any process or activity connected with the [proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming] it as untainted property shall be guilty of offence of money laundering."*

83. Thus, the offence of money laundering has several components. Firstly, directly or indirectly attempting to indulge, secondly, knowingly assisting or knowingly becoming a party or knowingly being a party and thirdly, actually involving in any process or activity connected with the proceeds of crime. That part of the provision and which is bracketed has been substituted by the Act 2 of 2013. Thus, direct or indirect attempt to indulge, knowingly assist or knowingly become a party to, actual involvement in any process or activity connected with the proceeds of crime, including its concealment, possession, acquisition or use and projecting or claiming it as untainted property is an offence and whosoever is guilty of the same is said to be committing an offence of money laundering. Section 4 provides for its punishment. Then, Chapter III titled as "Attachment, Adjudication and Confiscation" contains provisions so as to attach properties involved in money laundering and its adjudication and vesting in the Central Government and thereafter its management and all this is to be found in sections 5 to 11. In Chapter IV, there are provisions setting out obligations of banking companies, financial institutions and intermediaries. Chapter V contains provisions in relation to summons searches and seizure etc. and there are three sections, namely, sections 22, 23 and 24. The first is "presumption as to records or property in certain cases", second is "presumption in inter-connected transactions" and the third is "burden of proof", which entirely rests on the person charged with the offence of money laundering. The authority or court shall, unless the contrary is proved, presume that such proceeds of crime are involved in money laundering. The rest of the provisions are for setting up of appellate tribunal (Chapter VI), Special Courts (Chapter VII) and authorities (Chapter VIII). Since the offence has serious and far reaching implications across even national boundaries that Chapter IX contains provisions regarding reciprocal arrangement for assistance in certain matters and procedure for attachment and confiscation of property. Chapter X contains miscellaneous provisions, prominent amongst which is section 71, which has given the Act an overriding effect. Thus, when the FEMA in the FEMA Rules relating to compounding refers to the view of the Enforcement Directorate that the compounding proceedings relate to a serious contravention suspected of money laundering, terror financing or affecting sovereignty and integrity of the nation so as to compel the Compounding Authority to remit the case to the adjudicating authority for adjudication of the

contravention under section 13, then, that view of the Enforcement Directorate has to be based on materials pointing towards firstly, the relation of the compounding proceedings and secondly to a serious contravention suspected of money laundering, terror financing or affecting sovereignty and integrity of the nation.

84. Since the matter before us involves the "view" relating to serious contravention suspected of money laundering, then, even if there is an element of suspicion enabling the view to be formed, still, the compounding proceedings must relate to it. These words in the proviso are crucial and cannot be ignored. It is well settled rule of interpretation that no words in the statute or any statutory provision are to be construed as wastage or surplusage. The legislature is presumed to employ or use words carrying a definite meaning. It does not insert a word or expression without intending to ascribe or attach a meaning to it. Therefore, the words and expressions inserted with definite intention ought to receive the meaning carrying forward the same and not frustrating or defeating it. In the Principles of Statutory Interpretation by Justice G. P. Singh, revised by Justice A. K. Patnaik former Judge of Supreme Court of India, the principles have been summarised as under:-

> *"Avoiding rejection of words.*
>
> *As on the one hand, it is not permissible to add words or to fill in a gap or lacuna, on the other hand effort should be made to give meaning to each and every word used by the Legislature. "It is not a sound principle of construction", said PATANJALI SHASTRY, C.J.I., "to brush aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute" [Aswinin Kumar Ghose v. Arabinda Bose, AIR 1952 SC 369 p. 377 : 1953 SCR 1; see further Union of India v. Hansoli Devi, AIR 2002 SC 3240, p. 3246 : (2002) 7 SCC 273; State of Orissa vs. Joginder Patjoshi, AIR 2004 SC 1039, p. 1142 : (2004) 9 SCC 278.] And as pointed out by JAGANNATHDAS, J., "It is incumbent on the court to avoid a construction, if reasonably permissible on the language, which would render a part of the statute devoid of any meaning or application" [Rao Shiv Bahadur Singh v. State of U. P., AIR 1953 SC 394]. "In the interpretation of statutes", observed DAS GUPTA, J., "the courts always presume that the Legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect" [J. K. Cotton Spinning & Weaving Mills Co. Ltd. v. State of U. P., AIR 1961 SC 1170, p. 1174 : (1962) 1 SCJ 417 : (1961) 1 LLJ 540; Shri Mohammad Alikhan v. Commissioner of Wealth Tax, AIR 1997 SC 1165, p. 1167 : (1997) 3 SCC 511; Dilawar balu Kurane v. State of Maharashtra, AIR 2002 SC 564, p. 566 : (2002) 2 SCC 135; Ramphal Kundu v. Kamal Sharma, AIR 2004 SC 1039, p. 1042 : (2004) 9 SCC 279]. The Legislature is deemed not to waste its words or to say anything in vain and [Wuebec Railway, Light, heat & Power Co. V. Vandry, AIR 1920 PC 181, p. 186 : 1920 AC 662; see further Union of India v. Hansoli Devi, supra] a construction which attributes redundancy to the Legislature will not be accepted except for compelling reasons [Ghanshyamdas v. Regional Asstt. Commr., Sales Tax, AIR 1964 SC 766, p. 772 ; CIT v. Kanpur Coal Syndicate, AIR 1965 SC 325* **=** ***2002-TIOL-828-SC-IT-LB****; State of Rajasthan v. Leela Jain, AIR 1965 SC 1296, p. 1299; Bhanu Pratap Singh (Raja) v. Asstt. Custodian, E. P., Bahraich, AIR 1966 SC 245, p. 247; CIT v. Moon Mills, AIR 1966 SC 870, p. 873* **=** ***2002-TIOL-1739-SC-IT-LB****, D. R. Jerry v. Union of India, AIR 1974 SC 130, p. 133; Shri Balaganeshan Metals v. Shanmugham Chetty, (1987) 2 SCC 707, p. 713; State of Uttar Pradesh v. Radhey Shyam, AIR 1989 SC 682, pp. 689, 690; State of Maharashtra v. Santosh Shankar Acharya, (2007) 7 SCC 463, p. 469; Borosil Glass Works Ltd. Employees Union v. D. D. Bambode, AIR 2001 SC 378, p. 380; Union of India v. Hansoli Devi, AIR 2002 SC 3240, p. 3246; Nathi Devi v. Radha Devi, (2005) 2 SCC 271, p. 277; Promoters & Builders Ass. Of Pune v. Pune Municipal Corpn., (2007) 6 SCC 143 (para 11); Visitor AMU v. K. S. Misra, (2007) 8 SCC 593, para 13 (9th Edition of this book is referred)]. ….."Though a parliamentary enactment (like parliamentary eloquence) is capable of saying the same thing twice over without adding anything to what has already been said once, this repetition in the case of any Act of Parliament is not to be assumed. When the Legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately before. The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which would not be there if the words were left out" [Hill v. Williams Hhill (Park Lane) Ltd. supra, p. 461; referred to in Umed v. Raj Singh, AIR 1975 SC 43, p. 63 : (1975) 1 SCC 76]."*

85. Therefore, we must start with a presumption that the legislature employs and uses every word as in this proviso with a purpose. That purpose is that the Compounding Authority should not compound

contravention of the provision of the FEMA if the compounding proceedings have a relation to a serious contravention suspected of money laundering, terror financing etc. for that would totally defeat the object of enacting a stringent law like the PMLA. That is obviously a later law and the FEMA precedes it. One who is guilty of contravention of the provisions of the FEMA should not derive any advantage by getting that contravention compounded and with the aid of that compounding proceedings, seek to escape from the clutches of the PMLA. If that is how the proviso is brought in by an amendment to Rule 8, then, that purpose would have to be achieved. A meaning which would help achieving that purpose must be given to the expressions highlighted before us.

86. Mr. Dwarkadas, on being confronted with the returning of the compounding applications and as pointed out later on account of the view expressed by the Enforcement Directorate, argued that if the interpretation as is placed by the respondents on the wording of the proviso is accepted, then, that would be travelling much beyond the parent Act. It would then make it impossible for the RBI to exercise the power vesting in it under the statute. Mr.Dwarkadas argued that it is not any other authority, but the apex bank in whom the power is invested as is apparent from a reading of section 15 of the FEMA read with the Compounding Rules. The RBI will not surrender its authority and power in favour of the applicant seeking the compounding of the contravention. It will not, in each and every case, compound the contravention even though the applicant may pray for it. The RBI will bear in mind the object and purpose of the FEMA, its role in the scheme of the said Act, the gravity and seriousness of the contravention and may, in a given case, by assigning reasons, refuse to compound it. Thus, the RBI is expected to exercise this power cautiously, carefully and reasonably. Once enormous powers are vesting in the RBI insofar as dealings in foreign exchange are concerned and it is entrusted with the management of foreign exchange, then, the RBI is bound to take into consideration all the relevant facts of a matter before exercising its discretionary power in terms of sub-section (1) of section 15. Mr. Dwarkadas submits that a bald or vague communication from the Enforcement Directorate should not interdict this power conferred in the RBI and take away the opportunity given by the statute to the applicant to seek compounding of the contravention. Else, we would have to declare the proviso to be unconstitutional and ultra vires the parent Act as that fails to conform to the parent legislation. With all this, Mr. Dwarkadas does not argue that the proviso be declared unconstitutional straight away, but should be read and interpreted in such a way so as to not to interfere or unduly control the independent exercise of powers by the RBI. Thus, a balance will have to be struck so as to save the proviso from the vice of unconstitutionality.

87. Mr. Venegaonkar's arguments have already been noted by us and to be fair, he also did not suggest that in the absence of cogent and satisfactory material, a mere letter or communication from the Enforcement Directorate recording its view in terms of the proviso would suffice or that is beyond judicial review. He agreed that in the event the view taken by the Enforcement Directorate is questioned before a writ court exercising powers of judicial review, then, but for the adequacy or sufficiency of the material, the court is not prohibited from probing and finding out whether there was any material at all to arrive at that view. All that Mr. Venegaonkar would argue is that there is a difference between recording a view and forming an opinion. More so, when even suspicion would suffice.

88. We are mindful of these positions taken by the counsel, but we are in agreement with the petitioner that if the Enforcement Directorate is of the view that the compounding proceedings relate to a serious contravention suspected of money laundering as in this case, then, this court is not prevented from seeking appropriate clarifications from the Enforcement Directorate with regard to presence or availability of material in its possession before it forms the view. In our opinion, the use of the word 'view' hardly makes any difference. Eventually, whether a view can be equated with an opinion or not in the light of the far reaching consequences, the Enforcement Directorate would have to satisfy this court that there is some material available with it, based on which, it communicated to the RBI its view as in this case of serious contravention suspected of money laundering. Thus, there is a broad agreement that this court, in exercise of its powers of judicial review, can seek such answers and clarifications from the Enforcement Directorate. That would ensure that the RBI is not unnecessarily and unjustifiably prevented from exercising its discretionary powers to compound a particular contravention inviting penalty under section 13 of the FEMA. To enable the RBI to exercise that power in accordance with law, it must be allowed to proceed with the compounding proceedings. They can be interdicted only when the Enforcement Directorate is of the view as above. However, if the Enforcement Directorate's view is challenged or questioned, then, a writ court is not prevented from seeking appropriate and necessary answers and clarifications. We propose to place such interpretation on this proviso so as not to make it impossible for the RBI to exercise its statutory power of compounding contravention. The RBI's authority or power will be undermined in the event a mere communication conveying a view of the Enforcement Directorate is received by it but there being no backup material at all to hold that there is serious contravention suspected of money laundering. It may not be possible for the RBI to go behind the Enforcement

Directorate's communication in every case, but in the event an application for compounding the contravention under the FEMA is made to the RBI and the RBI is dealing with such application, but during its pendency, a communication from the Enforcement Directorate to the above effect prevents it from proceeding further, then, that course adopted by the RBI and its remittance of the proceedings straight away to the adjudicating authority can be questioned by the applicant seeking compounding of the contravention under the FEMA, by making an application to the RBI. Thus, the applicant invoking the RBI's power of compounding can then approach a court of law and challenge both, the refusal or reluctance on the part of RBI to proceed further as also the Enforcement Directorate's communication or view to the aforesaid effect. If that is the constitutional safeguard and protection ensured to every aggrieved applicant, then, it is not necessary to declare the proviso unconstitutional.

89. We agree with Mr. Dwarkadas that no interpretation which totally takes away the power to compound contravention vesting in the RBI be placed on the proviso. We must, on a harmonious and complete reading of the statutory scheme, together with the rules, hold as above and that would ensure that the contravention can be compounded by resort to section 15 and the requisite rules by the RBI. It is only when a situation of the above nature is faced, then, the applicant seeking compounding of the contravention may invoke the powers of judicial review to strike down the actions of the statutory authorities. We will have to presume that the statutory authorities act within the four corners of the statute and their actions are reasonable, just and fair. Unless proven to be arbitrary, unreasonable and malafide, this presumption would operate as the power is not conferred in any authority, but high functionaries such as the Enforcement Directorate. The Directorate of Enforcement Directorate is expected to exercise its powers bonafide and reasonably. It is only in the event of a wholly uncalled for interdiction or interference with the powers of compounding vesting in the RBI that the question of challenging the RBI's inaction and the Enforcement Directorate's opinion or view will arise.

90. We also agree with Mr. Dwarkadas that the RBI's powers to compound the contravention should not be lightly and casually interfered with or interdicted frequently, but we cannot agree with him that it is open for the RBI to question the view of the Enforcement Directorate or to seek from that Directorate necessary clarifications every time when the RBI is confronted with a situation of a 'view' of the Enforcement Directorate communicated to it and to the aforesaid effect. If the RBI is allowed to go on questioning every communication and seek clarification about the presence of necessary material before the Enforcement Directorate, then, the RBI would be acting as either an appellate authority or a superior, which is not envisaged by law. The law invests both, the RBI and the Enforcement Directorate with the power to compound an offence and expects both high functionaries to trust and respect each other so also abide by the mandate of the statute. Once the power is parallel and vested in both, then, allowing the RBI to question the communication or the view of the Enforcement Directorate recorded therein would mean that the Enforcement Directorate would be prevented from exericising the powers of adjudication of the contravention in terms of the powers conferred in it by the FEMA and in a given case, it may also be prevented from investigating the matter further in order to find out whether the PMLA can be invoked. That would only benefit the wrongdoer or the person contravening the laws and he may as well avoid the consequences that the law visits him/her in the event he/she contravenes it. Then, the adjudication proceedings under the FEMA would also not commence and would be unnecessarily and unjustifiably delayed and equally when the Enforcement Directorate's views are questioned in order to find out whether there is a serious contravention suspected of money laundering etc., then, offences having cross border repercussions and effect cannot be investigated and probed further. That surely is not the intent of the law makers. In these circumstances, it would not be proper to contend that the RBI has an authority to question the view of the Enforcement Directorate and that, in every case, it can seek a clarification from the Enforcement Directorate on receipt of its view as above. In a given case, of course, it would be open for the RBI to seek the details, but we expect from the RBI that it will not assist a wrongdoer or a law breaker to such an extent that he avoids the compliance and possibly consequences of the breach and of both, FEMA and a statute like the PMLA. Therefore, this will not be a rule, but an exception and for which, the RBI would definitely have to record reasons. However, when it seeks the details, it cannot refuse to hold the compounding proceedings in abeyance, which, in any event, it would have to . Secondly, after the details are known, it would have to makeover the papers to the adjudicating authority as required by the proviso for that authority to proceed and adjudicate the contravention. In no case, the RBI can probe or question the sufficiency or adequacy of the materials regarding the view of the Enforcement Directorate, but must leave the matter to the applicant seeking compounding to workout his/her remedies. That is how we can ensure that the proviso does not become a weapon or tool of unbridled harassment nor will it allow the misuse of the power conferred in the Enforcement Directorate. It is precisely to rule out such exercise of power that we have allowed the view of the Enforcement Directorate to be tested in exercise of our powers of judicial review.

91. We are spared of a detailed or elaborate exercise by the fact that it is agreed that none can claim a absolute right of compounding an offence. That right is not unconditional or unfettered. If it is conferred by a statute, then, its exercise is controlled and regulated by the statute. If the law gives a right to seek compounding of an offence by making an application, then, that right to make an application cannot be placed at such a pedestal or height that the authority is left with no choice, but to pass an order compounding the offence. It is a right at best to make an application seeking compounding of the contravention, but beyond that, the applicant cannot insist on an order of compounding contravention, as prayed by him, to be passed. The matter is left to the Compounding Authority's discretion and if that discretion is not exercised reasonably, the applicant has a legal remedy available to him/her to approach a court of competent jurisdiction questioning that action of the RBI. Hence, if the exercise of the right to seek compounding of the contravention is controlled and regulated by the statute, then, we cannot agree with Mr. Dwarkadas that the intervention as envisaged by the proviso is unconstitutional or ultra vires the parent Act.

92. Mr. Dwarkadas would submit that the words and expressions in the proviso are capable of being conveniently interpreted and unless a firm and clear meaning is assigned to them, there is a possibility that a mere communication of a view without any material to support it would be enough to stall the compounding proceedings. He would submit that this court should not allow the Enforcement Directorate to play with words and even if there is no material supporting before the communication or regarding the view, as in this case, later on, the Enforcement Directorate will fish out something so as to try and convince the court particularly when its action or that of the RBI, as in this case, is challenged. That is how he would submit that we must apply the test laid down in several decisions of the Hon'ble Supreme Court right from Barium Chemicals (supra) and holding that there should be definite material and nothing should be in the realm of speculation and guesswork. That would negate the purpose of the proviso. Though Mr.Dwarkadas has relied upon several decisions in this behalf, we are of the clear view that the judgment of the Hon'ble Supreme Court in the case of *Bhikhubhai Vithlabhai Patel and Ors. vs. State of Gujarat and Anr. (2008) 4 SCC 144* would guide all concerned. In the judgment before the Hon'ble Supreme Court, the proviso opening with the words "where the State Government is of opinion that substantial modifications in the draft development plan and regulations are necessary" fell for interpretation and the Hon'ble Supreme Court held as under:-

> *20. The State Government is entitled to publish the modifications provided it is of opinion that substantial modifications in the draft development plan are necessary. The expression "is of opinion" that substantial modifications in the draft development plan are necessary is of crucial importance. Is there any material available on record which enabled the State Government to form its opinion that substantial modifications in the draft development plan were necessary? The State Government's jurisdiction to make substantial modifications in the draft development plan is inter-twined with the formation of its opinion that such substantial modifications are necessary in the draft development plan. The State Government without forming any such opinion cannot publish the modifications considered necessary along with notice inviting suggestions or objections. We have already noticed that as on the day when the Minister concerned took the decision proposing to designate the land for educational use the material available on record were :*
>
> > *(a) the opinion of the Chief Town Planner;*
> >
> > *(b) Note dated 23rd April, 2004 prepared on the basis of the record providing the entire background of the previous litigation together with the suggestion that the land should no more be reserved for the purpose of South Gujarat University and after releasing the lands from reservation, the same should be placed under the residential zone.*
>
> *21. It is true that the State Government is not bound by such opinion and entitled to take its own decision in the matter provided there is material available on record to form opinion that substantial modifications in the draft development plan were necessary. Formation of opinion is a condition precedent for setting the law in motion proposing substantial modifications in the draft development plan.*
>
> *22. Any opinion of the Government to be formed is not subject to objective test. The language leaves no room for the relevance of a judicial examination as to the sufficiency of the grounds on which the Government acted in forming its opinion. But there must be material based on which alone the State Government could form its opinion that it has become necessary to make substantial modification in the draft development plan.*

23. The power conferred by Section 17(1)(a)(ii) read with proviso is a conditional power. It is not an absolute power to be exercised in the discretion of the State Government. The condition is formation of opinion subjective, no doubt that it had become necessary to make substantial modifications in the draft development plan. This opinion may be formed on the basis of material sent along with the draft development plan or on the basis of relevant information that may be available with the State Government. The existence of relevant material is a precondition to the formation of opinion. The use of word "may" indicates not only a discretion but an obligation to consider that a necessity has arisen to make substantial modifications in the draft development plan. It also involves an obligation to consider which are of the several steps specified in sub-clauses (i), (ii) and (iii) should be taken.

24. Proviso opens with the words "where the State Government is of opinion that substantial modifications in the draft development plan and regulations are necessary …..". These words are indicative of the satisfaction being subjective one but there must exist circumstances stated in the proviso which are conditions precedent for the formation of the opinion. Opinion to be formed by the State Government cannot be on imaginary grounds, wishful thinking, however, laudable that may be. Such a course is impermissible in law. The formation of the opinion, though subjective, must be based on the material disclosing that a necessity had arisen to make substantial modifications in the draft development plan.

25. The formation of the opinion by the State Government is with reference to the necessity that may have had arisen to make substantial modifications in the draft development plan. The expression: "as considered necessary" is again of crucial importance. The term "consider" means to think over; it connotes that there should be active application of the mind. In other words the term "consider" postulates consideration of all the relevant aspects of the matter. A plain reading of the relevant provision suggests that the State Government may publish the modifications only after consideration that such modifications have become necessary. The word "necessary" means indispensable, requisite; indispensably requisite, useful, incidental or conducive; essential; unavoidable; impossible to be otherwise; not to be avoided; inevitable. The word "necessary" must be construed in the connection in which it is used. (See-Advanced Law Lexicon, 3rd Edition, 2005; P. Ramanatha Aiyar)

26. The formation of the opinion by the State Government should reflect intense application of mind with reference to the material available on record that it had become necessary to propose substantial modifications to the draft development plan.

27. In J. Jayalalitha v. Union of India [(1999) 5 SCC 138] this Court while construing the expression "as may be necessary" employed in Section 3(1) of the Prevention of Corruption Act, 1988 which conferred the discretion upon the State Government to appoint as many Special Judges as may be necessary for such area or areas or for such case or group of cases to try the offences punishable under the Act, observed: (SCC pp. 154-155, para 14)

> *"14. ….. The legislature had to leave it to the discretion of the Government as it would be in a better position to know the requirement. Further, the discretion conferred upon the Government is not absolute. It is in the nature of a statutory obligation or duty. It is the requirement which would necessitate exercise of power by the Government. When a necessity would arise and of what type being uncertain the legislature could not have laid down any other guideline except the guidance of necessity. It is really for that reason that the legislature while conferring discretion upon the Government has provided that the Government shall appoint as many Special Judges as may be necessary. The words "as may be necessary" in our opinion is the guideline according to which the Government has to exercise its discretion to achieve the object of speedy trial. The term necessary means what is indispensable, needful or essential."*

28. In the case in hand, was there any material before the State Government for its consideration that it had become necessary to make substantial modifications to the draft development plan? The emphatic answer is, none. The record does not reveal that there has been any consideration by the State Government that necessity had arisen to make substantial modifications to the draft development plan. We are of the view that there has been no formation of the opinion by the State Government which is a condition precedent for exercising the power under the proviso to Section 17(1) (a) (ii) of the Act.

29. In Barium Chemicals Ltd. v. Company Law Board [AIR 1967 SC 295] this Court pointed out, on consideration of several English and Indian authorities that the expressions "is satisfied", "is of the opinion" and "has reason to believe" are indicative of subjective satisfaction, though it is true that the nature of the power has to be determined on a totality of consideration of all the relevant provisions. This Court while construing Section 237 of the Companies Act, 1956 held: (AIR p. 325, para 64)

> *"64. The object of Section 237 is to safeguard the interests of those dealing with a company by providing for an investigation where the management is so conducted as to jeopardize those interests or where a company is floated for a fraudulent or an unlawful object. Clause (a) does not create any difficulty as investigation is instituted either at the wishes of the company itself expressed through a special resolution or through an order of the court where a judicial process intervenes. Clause (b), on the other hand, leaves directing an investigation to the subjective opinion of the Government or the Board. Since the legislature enacted Section 637(i)(a) it knew that Government would entrust to the Board its power under Section 237(b). Could the legislature have left without any restraints or limitations the entire power of ordering an investigation to the subjective decision of the Government or the Board? There is no doubt that the formation of opinion by the Central Government is a purely subjective process. There can also be no doubt that since the legislature has provided for the opinion of the Government and not of the court such an opinion is not subject to a challenge on the ground of propriety, reasonableness or sufficiency. But the Authority is required to arrive at such an opinion from circumstances suggesting what is set out in sub-clauses (i), (ii) or (iii). If these circumstances were not to exist, can the Government still say that in its opinion they exist or can the Government say the same thing where the circumstances relevant to the clause do not exist? The legislature no doubt has used the expression "circumstances suggesting". But that expression means that the circumstances need not be such as would conclusively establish an intent to defraud or a fraudulent or illegal purpose. The proof of such an intent or purpose is still to be adduced through an investigation. But the expression "circumstances suggesting" cannot support the construction that even the existence of circumstances is a matter of subjective opinion. That expression points out that there must exist circumstances from which the Authority forms an opinion that they are suggestive of the crucial matters set out in the three sub-clauses. It is hard to contemplate that the legislature could have left to the subjective process both the formation of opinion and also the existence of circumstances on which it is to be founded. It is also not reasonable to say that the clause permitted the Authority to say that it has formed the opinion on circumstances which in its opinion exist and which in its opinion suggest an intent to defraud or a fraudulent or unlawful purpose. It is equally unreasonable to think that the legislature could have abandoned even the small safeguard of requiring the opinion to be founded on existent circumstances which suggest the things for which an investigation can be ordered and left the opinion and even the existence of circumstances from which it is to be formed to a subjective process. These analysis finds support in Gower's Modern Company Law (2nd Ed.) p. 547 where the learned author, while dealing with Section 165(b) of the English Act observes that "the Board of Trade will always exercise its discretionary power in the light of specified grounds for an appointment on their own motion" and that "they may be trusted not to appoint unless the circumstances warrant it but they will test the need on the basis of public and commercial morality." There must therefore exist circumstances which in the opinion of the Authority suggest what has been set out in sub- clauses (i), (ii) or (iii). If it is shown that the circumstances do not exist or that they are such that it is impossible for any one to form an opinion therefrom suggestive of the aforesaid things, the opinion is challengeable on the ground of nonapplication of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute.*

30. This Court while expressly referring to the expressions such as "reason to believe", "in the opinion of" observed: (AIR p. 324, para 63)

> *"63. ….. Therefore, the words, "reason to believe" or "in the opinion of" do not always lead to the construction that the process of entertaining "reason to believe" or the "opinion" is an altogether subjective to process not lending itself even to a limited scrutiny by the court that such a "reason to believe" or "opinion" was not formed on relevant facts or within the limits or as Lord Radcliffe and Lord Reid called the restraints of the statute as an alternative safeguard to rules of natural justice where the function is administrative."*

31. In the Income-tax Officer, Calcutta & Ors. Vs. Lakhmani Mewal Das [(1967) 3 SCC 757] **=** ***2002-TIOL-886-SC-IT*** *this court construed the expressions "reason to believe" employed in Section 147 of the Income-tax Act, 1961 and observed: the reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income-tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully or truly all material facts. It is not any or every material, howsoever vague and indefinite or distant which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment. The reason for the formation of the belief must be held in good faith and should not be a mere pretence.*

32. We are of the view that the construction placed on the expression reason to believe will equally be applicable to the expression "is of opinion" employed in the proviso to Section 17(1)(a) (ii) of the Act. The expression "is of opinion", that substantial modifications in the draft development plan and regulations, "are necessary", in our considered opinion, does not confer any unlimited discretion on the Government. The discretion, if any, conferred upon the State Government to make substantial modifications in the draft development plan is not unfettered. There is nothing like absolute or unfettered discretion and at any rate in the case of statutory powers. The basic principles in this regard are clearly expressed and explained by Prof. Sir William Wade in Administrative Law (9th Edn.) in the chapter entitled "Abuse of discretion" and under the general heading "the principle of reasonableness" which read as under:

> *"The common theme of all the authorities so far mentioned is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose everything depends upon the true intent and meaning of the empowering Act.*
>
> *The powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependents, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land, to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do none of these things it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good. There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed."*

93. Thus, the Hon'ble Supreme Court has reiterated the settled principles and it is not now open to contend that the RBI should be inhibited in compounding the offences merely because the Enforcement Directorate is holding some view. If the Enforcement Directorate's and consequently the RBI's actions in not proceeding with the compounding proceedings, but dropping them or returning the compounding

applications, are challenged, then, it is futile to urge that the right to compound the contravention conferred by the statute is not absolute or mere insertion of a provision like section 15 would not enable the parties like the petitioner as of right to seek compounding a contravention. Here, we are dealing with a case where no extreme proposition, as is sought to be met by Mr.Venegaonkar, is canvassed, but what is pointed out is that once a compounding application is made and is being sincerely and bonafide pursued by the petitioner, they were advised to approach different cells and departments within the RBI and to seek their guidance, then, suddenly the compounding applications are returned and while returning them, the initial reason assigned is that the petitioner should seek proper guidance from the above referred cells/departments. Thereafter, the Enforcement Directorate interdicted the proceedings and did not allow the RBI to proceed by communicating its view. That initial communication also was withdrawn when this court desired to know the material which enabled the Enforcement Directorate to communicate its view. Thereafter, another communication has been forwarded dated 1st December, 2017, which is also not backed by any material satisfying the tests laid down in the above judgment of the Hon'ble Supreme Court, but later on an affidavit was filed to the amended petition seeking to place the material, which was in possession of the Enforcement Directorate, based on which it communicated the view. These allegations are being levelled in the pleadings before us by the petitioner and the Enforcement Directorate has to meet the same. Hence, it is futile to urge that the petitioner has no right to seek compounding of the contravention and mere filing of the application does not mean the RBI is obliged to compound the contravention at the instance of the applicant. We are aware of the position that there is nothing like an duty to compound the contravention, but it is obligatory to deal with the application once it is made and in terms of the statutory scheme and if it is not taken to its logical end, then, of-course, a party like the petitioner can complain by urging that the RBI dropped the proceedings or has sat over it deliberately or illegally refused to compound the contravention. Though it is empowered to do so, merely it was pressurised or has acted at the behest of the Enforcement Directorate. A mere forwarding letter is being relied upon not to proceed with the compounding proceedings and that is untenable in law. We are of the opinion that such a foundation can be laid in the pleadings and once that is laid, then, none, much less the Enforcement Directorate can escape the consequences in law.

94. By Exhibit 'DD' to the petition, the petitioner is pointing out that in response to the petitioner's e-mail dated 2nd December, 2017, the subject of reporting of transactions undertaken by the petitioner and group companies under the Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004, as amended from time to time, appears to have been taken up. An advise was given by the RBI by its letter dated 18th December, 2017 to the petitioner and in this letter, that advise is mentioned. At the same time, in para 3 of this letter, the RBI is inviting the attention of the petitioner to a letter dated 1st December, 2017 received from the Directorate of Enforcement of Government of India. That letter is annexed at page 127.525 (Exhibit 'EE' to the petition). That letter reads as under:-

"GOVT. OF INDIA
DIRECTORATE OF Enforcement
6th Floor, Lok Nayak Bhawan, Khan Market
New Delhi-110003
(Tel. No. 011-24629633, Fax No. 24631847, 24640760)

F. No. T-4/2-D/2015 (Part) Dated: 01.12.2017

To The Chief General Manager
Foreign Exchange Department
Reserve Bank of India
Central Office Building
Shahid Bhagt Singh Road
Fort, Mumbai-400 001.

Subject – M/s. NDTV Ltd. and others – reg. (Your ref: EF.CO.CEFA/15678/ 15.20.67/2016-17 dated 05.12.2016)

Please refer to Show Cause Notice No. T-4/2-D/2015 dated 13.11.2015 in respect of NDTV Ltd. and others which is pending adjudication before Adjudicating Authority.

2. In this regard, it is stated that the contraventions invoked against the noticees under Foreign Exchange Management Act, 1999 (FEMA) which are subject matter of compounding proceedings before RBI also part and parcel of offence of money laundering being investigated by the Directorate of Enforcement under the Prevention of Money Laundering Act, 2002 (PMLA).

3. Kind attention is also invited to the newly inserted proviso to sub-rule (2) of Rule 8 in the Foreign Exchange (Compounding Proceedings) Rules, 2000 which have been notified w.e.f. 20.02.2017. The said proviso stipulates that, in case of certain contingencies as mentioned therein, the RBI should not entertain any compounding application. The impugned contraventions under FEMA which are subject matter of compounding applications filed by the aforesaid noticees squarely falls within the provisions of proviso to Sub-rule (2) of Rule 8 of Foreign Exchange (Compounding Proceedings) Rules, 2000.

4. In view of the above, Enforcement Directorate is of the view that the impugned contraventions of the aforesaid Show Cause Notice are serious contraventions suspected of money laundering and are being investigated under PMLA by the Enforcement Directorate. Accordingly it is requested that the compounding applications filed by the subject entities may not be proceeded with by RBI and that the case be remitted to the Adjudicating Authority for adjudicating the contraventions under Section 13 of FEMA.

Yours faithfully,

sd/-
(D. K. Gupta)
Special Director)"

95. In relation to this communication/letter of the Enforcement Directorate, the pleading in the petition is as under:-

"X. Without prejudice, the Respondent No. 2 once again failed to consider that the 2017 Notification can become applicable only if Respondent No. 2 is of the 'view' that 'proceedings' relate to a serious contravention 'suspected' to be money laundering, and any such 'view' of Respondent No. 2 is bound to have been based on cogent material, which is significant by its absence.

Y. Barring the bald allegation in the letter dated 1 December 2017 issued by Respondent No. 2 to Respondent No. 1 that the impugned contraventions of suspected of money laundering and are being investigated under PMLA, there is no allegation of a predicate offence triggering PMLA, in the absence of which the 2017 Notification can have no application to the Petitioner. Mere allegation of an investigation under PMLA is insufficient to trigger the applicability of the 2017 Notification.

Z. The Respondent No. 1 acting under the influence of the Respondent No. 2 and in complete dereliction of its statutory duty is trying to drag its feet from considering the compounding applications. The aforesaid is clear from the fact that whereas before the Respondent No. 2 issued the 6 March 2017 letter, the Respondent No. 1 informed the Petitioner that its departments will give guidance on the matter of compounding but after the 6 March 2017 letter and finally after 1 December 2017 letter of Respondent No. 2 it has completely changed its stand. Despite the Petitioner complying with the directions/ guidance of the Respondent No. 1 communicated to the Petitioner during the personal meeting and confirming the same vide its letter dated 2 December 2017, the Respondent No. 1 instead of guiding the Petitioner for filing of the compounding application has now vide its letter dated 15 December 2017 directed the Petitioner to approach the AD Bank. It is submitted that the Respondent No. 1 is undertaking an exercise without which also the contraventions the compounding as has been sought can be compounded. As already mentioned above, substantially the Contraventions for which the compounding has been sought are the specific contraventions which are the subject matter of the SCN of Respondent No. 2. Accordingly, the Respondent No. 1 ought to have considered the compounding applications without diverting itself to other transactions because even if the Respondent No. 1 compounds any contravention(s) it will not affect any other contravention, if any, which the Respondent No. 1 and/or Respondent No. 2 can take up even after the compounding. Having said that, it is submitted that it is not the case of the Petitioner that the Respondent No. 1 should not examine any transaction but the Petitioner submits that the Respondent No. 1 should not link other transactions with the transactions in respect of which the compounding has been sought as the compounding has been sought only for specific transactions and the order of compounding will not affect other contraventions, if any. The Petitioner is stuck in a precarious situation in which the Respondent No. 2 is pressing for continuation of adjudication proceedings whereas the Respondent No. 1 is not deciding the compounding applications due to which the right of the Petitioner to approach for

compounding is being defeated in this very precarious manner which is arbitrary and discriminatory because in other cases the Respondent No.1 has been compounding similar contraventions on standalone basis even where the Respondent No.2's investigation under PMLA are still going on."

96. In reply to these specific grounds and the contents of the letter referred above, there is an affidavit, which has been filed, but it is evident that in the earliest affidavit, a reference is made to the letter dated 6th March, 2017, but the Enforcement Directorate itself gave up its reliance on this letter of 6th March, 2017 addressed by it to RBI, as recorded in this court's earlier order and reproduced above. In relation to the amended pleadings, what we find is that the Enforcement Directorate filed its response/reply, in which, it stated that the view of the Directorate was formed on the basis of material against the petitioner relating to suspected money laundering, which is under investigation in the Directorate. The petitioner has also invited our attention to the reply to the chamber summons dated 8th February, 2018/affidavit of the Enforcement Directorate filed to the proposed amendments to the petition, in which as well, the only statement made is that the letter dated 1st December, 2017 has been issued by the Directorate to the RBI after the withdrawal of the letter dated 6th March, 2017 pursuance to the directions of this court dated 13th November, 2017. It is stated that there is a wrong claim made by the petitioner that the letter dated 1st December, 2017 was to cure the lacuna in the letter dated 6th March, 2017 and constitutes unlawful interference on the right of the petitioner to seek compounding. The statutory duty of the RBI is to compound only those cases which are not covered by the notification dated 20th February, 2017. Meaning thereby, the amended proviso. The case before the RBI is the subject matter of ongoing investigation under the PMLA, of which, the investigation file was shown to this court to find out application of mind to the issuance of the letter dated 1st December, 2017.

97. Then, it is stated that the allegation that the mandate of Articles 14, 19 and 21 is violated, is bald, without any merit and basis. That is how the Enforcement Directorate deals purportedly with the amended paragraphs reproduced above. It is stated that the petitioner is one of the accused in FIR No. 217-2017A009 dated 2nd June, 2017 registered by CBI and suspected accused in the case registered by the Directorate vide ECIR/09/HIU/2017 dated 7th August, 2017. The petitioner is under investigation in another PMLA Case No. ECIR/05/DZ/2012 (for short known as "Aircel Maxis case"), in which overseas investigation is pending. Hence, the letter dated 1st December, 2017 was not issued on mere allegation of investigation under the PMLA to trigger the notification/amended provision in any manner. It is asserted that the view of the Directorate is based on the material facts being investigated under the PMLA against the petitioner. Then, it is stated that the Directorate has communicated its view to the RBI. The Enforcement Directorate denies that the RBI is acting at its behest and is merely holding up the compounding applications on account of a bald and general communication.

98. It is clear from what we have narrated above that the petitioner has already taken inspection of certain documents and therefore, filed additional affidavits. Apart from that, in the writ petition itself, the petitioner has clearly averred that the entire assertion of the Enforcement Directorate as above is false to its knowledge for it is not in respect of any investigation against the petitioner. It is pointed out in the petition itself as to how the petitioner is not at all under investigation or suspected of any money laundering. In that regard, we have already referred to the requisite assertions. The petitioner has also relied upon the judicial orders passed by the Special Judge-CBI, New Delhi in what is styled as the 2G Spectrum Case. The petitioner has also annexed documents pointing out as to how the petitioner has not been summoned as an accused, but as a witness. The petitioner's stand is that even in its writ petition filed before the High Court of Delhi, New Delhi, it has pointed out as to how no offence is disclosed in the FIR, which is subject matter of Writ Petition (Cri.) No. 1863 of 2017. Thus, the petitioner cannot be said to be suspected of involved in money laundering operations.

99. In the written notes of arguments, the details are set out with reference to the FIRs and the case numbers taken from the Enforcement Directorate's affidavit. It is pointed out as to how the FIR dated 2nd June, 2017, which mainly relates to interest waiver/reduction granted by the ICICI Bank to the Promoters or holding companies of the petitioner, directly does not concern the petitioner. The FIR was registered only on 2nd June, 2017, which is subsequent to the Enforcement Directorate's letter dated 6th March, 2017. As far as the second of the matters, namely, ECIR of 7th August, 2017, the petitioner has no record of having received intimation in relation thereto. In the Aircel Maxis case, the petitioner was summoned as a witness and not an accused. The petitioner has also relied upon the order of discharge of the accused persons dated 2nd February, 2017.

100. Thus, the petitioner's categoric assertion is that what is subject matter of their earlier letter of 6th March, 2017, which is expressly withdrawn and given up, cannot be now reintroduced either by filing an

additional affidavit or by supplementing the reasons.

101. In order to test the correctness of these assertions by the parties, we called upon Mr. Venegaonkar to produce before us the relevant record. He was fair enough to handover a sealed cover in this court and that sealed cover contains, according to Mr.Venegaonkar, the requisite material, based on which, the Enforcement Directorate's view has been communicated. Mr.Venegaonkar was further fair enough to state that this material can be perused by the court, but the same may not be allowed to be perused by the petitioner.

102. A perusal of this original record leaves us in no manner of doubt that the communication dated 1st December, 2017 is only based on some investigations resulting in a FIR, but that also not against the petitioner, but its holding company. In the record, there is a letter address by one K. P. S. Gill-IPS (Retired) on 26th January, 2015 received on 29th January, 2015, which letter is addressed to the Minister of Finance, Government of India. This complaint/letter states that there are efforts made by two serving IRS officers in the disguise of litigation in public interest to suppress inquiries and investigations by agencies such as the CBI, Central Board of Direct Tax, ED, SFIO, RBI, SEBI etc. over money laundering/tax evasion/corruption/receipt of bribe and illegal gratification/embezzlement of Government money/theft of secret records etc. by Shri. P. Chidambaram, M/s. NDTV Ltd., complicit IRS officers and culpable relatives, not necessarily in that order. Then, there is a reference made to a receipt of bribe and illegal gratification of Rs.5000 crores by Shri. P. Chidambaram in the 2G scam as reported by the CBDT secret records and another Rs.1,200 crores paid to Shri. P. Chidambaram by M/s. GE Corporation of USA in the Rs. 24,000 crores Dabhol Enron Scam, where he stands already indicted. It is alleged that Shri.Chidambaram received these payments through the conduit of M/s. NDTV Ltd. and its subsidiaries, such as M/s.NDTV Network Plc, U. K., M/s. NDTV Network BV, Holland, M/s. NDTV Lifestyle Holdings Pvt. Ltd. etc. and then there are names of some complicit IRS officers. It is stated that Shri.Chidambaram exerted pressure on one IRS officer Shri. Srivastava, who traced US $ 427 million laundered by M/s. NDTV Ltd. and which has been held to be correct in statutory proceedings under the Income Tax Act, 1961. However, two serving officers have filed PIL before the Hon'ble Supreme Court and reference is made to these Hon'ble Supreme Court proceedings. The letter then proceeds to allege that the mischievous litigation under public interest before the Hon'ble Supreme Court by two serving IRS officers, who are beneficiary parties to the money laundering, tax evasion and corruption and are exerting efforts to suppress the investigation and the rights of Shri. S. K. Srivastava and are also attempting to influence the inalienable jurisdiction of the High Courts under Article 226 and 227 of the Constitution of India. Thus, this is an attempt to cover up the misdeeds as alleged above and there is a conspiracy allegedly engineered by M/s. NDTV Ltd. and Shri. P.Chidambaram to incapacitate an honest officer in his pursuit of the cases of the loot and plunder of public money. The allegations then proceed to set out particulars received of the bribes received by Shri. P. Chidambaram in the 2G scam. Thus, this is a complaint which narrates essentially the alleged misdeeds of Shri. P. Chidambaram and he was assisted, according to this complaint, in these misdeeds, by certain officers of the Indian Revenue Service and the petitioner and its holding companies. A copy of this complaint was forwarded to the Prime Minister of India, Central Vigilance Commissioner. After a copy of this complaint, what the record contains, is the details of ECIR, which we have referred above dated 7th August, 2017. In that, full particulars have been set out. That includes a reference to Dr.Prannoy Roy, Ms.Radhika Roy and M/s. NDTV Ltd. The complaint is being investigated by CBI. The FIR is based on this complaint/material received by the CBI, New Delhi and in which, it is stated that the complaint refers to movable property and particularly funds of Rs.403.85 crores obtained from M/s.Vishvapradhan Commercial Pvt. Ltd. by RRPR Holdings Pvt. Ltd. It includes proceeds to the tune of Rs.48 crores approximately with RRPR Holdings Pvt. Ltd. and Rs.53.85 crores with Dr. Prannoy Roy. The allegation is that these are bribes to create interest in favour of benami person and to gain covert control of NDTV Ltd.

103. We have already noted in the foregoing paragraphs as to how this is the same material the affidavit of the Enforcement Directorate makes a reference to. This is the same material which is stated to be the subject matter of a pending writ petition before the High Court of Delhi, New Delhi. On a perusal of the same, it is evident that it is the promoter of NDTV Limited against whom the allegations have been made. From the same, it is difficult even prima facie to establish any nexus or connection of the petitioner with the alleged payments. How the above entities obtained the monies and whether they are proceeds of any crime and hence the investigation is being carried out about the process or activity connected therewith and hence this is a case of a serious contravention suspected of money laundering is not spelt out at all.

104. Then, what the record contains is a chart and the chart of the alleged violations of FEMA in relation to which, a show cause notice has already been issued. Based on all this, there is a note prepared of 8 pages by the Deputy Director of Enforcement, New Delhi and a perusal of that note would indicate that the

petitioner was not named as an accused in the charge-sheet in 2G spectrum case and particularly Aircel Maxis case. This note refers to the same allegations and says that certain entities stated to be companies connected with Shri. Dayanidhi Maran were benefited and that investigation under the PMLA from a company called South Asia FL revealed that a group company of NDTV Ltd. called NDTV News Ltd. purchased the primary equity shares of SAFL for an amount of Rs.5.1 crores. These shares were subsequently acquired by another entity called AHMPL from NDTV News for the same amount and passed on to the Mauritius based subsidiary of Astro. It shows the axis between NDTV Ltd. and with Astro in receiving funds from Mauritius based subsidiary of Astro.

105. We need not refer to all these details simply because the petitioner has not been made an accused in the 2G scam case. The investigations in that case are over long time back. Those who had to be tried as accused have been put to trial already. The trial has already ended, as is very widely reported. It is in these circumstances and when the petitioner was not an accused at all in a case which was investigated, tried and concluded, it is futile now to point out, based on the allegations in the same, that the Enforcement Directorate can take a view that the petitioner's compounding proceedings should not be proceeded further because the compounding proceedings relate to serious contravention suspected of money laundering. Therefore, this note and the material referred therein is of absolutely no assistance in forming a view and communicating it to the RBI. It is clear from the plain language of the proviso that it comes into play when with respect to any proceeding initiated under Rule 4 of the Compounding Rules, if the Enforcement Directorate is of the view that the said proceeding relates to a serious contravention suspected of money laundering, then, the Compounding Authority shall not proceed in the matter and shall remit the case to the appropriate adjudicating authority for adjudicating contravention under section 13 of the FEMA. It is, therefore, the relation with the compounding proceedings and the applicant initiating the compounding proceedings, which is the most vital and crucial factor. Absent the relation of the compounding proceedings as also of the applicant therein with a serious contravention suspected of money laundering, it would not be permissible for the Enforcement Directorate to take any view and communicate the same to the RBI by invoking this proviso. If such a interpretation is not placed on the priviso, there is a likelihood of the RBI being informed by a vague and general communication as in the present case not to go ahead and compound the contravention. If such communication is upheld, that would put an end to the compounding proceedings, though the view of the Enforcement Directorate is general in nature and based on no material or on such material which has no relation with the compounding proceedings. The compounding proceedings pertain to a contravention of the provisions of the FEMA. It is the FEMA which permits a compounding application to be considered by the RBI and confers specific power in that behalf in the RBI by section 15. If the RBI is not allowed to proceed and exercise its statutory power, which is also is discretionary, only because the Enforcement Directorate has communicated a view in general and vague terms, then, as is rightly urged before us, the Enforcement Directorate would on every occasion intervene and interfere with the RBI's powers and take it over. It would then be possible for the Enforcement Directorate to control the exercise of the power vesting in the RBI and this would totally defeat the object and purpose of the FEMA. Secondly, the RBI being the apex bank, its authority and position in terms of the FEMA and the RBI Act, 1934 will be undermined completely. Bearing in mind its position as an apex bank and the trust and confidence reposed in it by the public and the Parliament, as is apparent from at-least two parliamentary statutes, diluting its statutory authority or undermining its position would not be conducive and proper management of foreign exchange. We cannot presume that the RBI, unmindful of its role and the trust and confidence reposed in it under the two parliamentary statutes, will compound every contravention of the FEMA very lightly and casually. It would definitely exercise its discretionary power bearing in mind the expectations of the general public, particularly as a guardian of the foreign exchange. It will appropriately advise the applicants seeking contravention and if compounding of contravention is not in larger public interest, then, definitely the RBI will refuse to grant the compounding application. Thus, on such a vague and general materials, as are contained in the original record, we do not find that we should allow the Enforcement Directorate to interdict the compounding proceedings in the present case. Most of the materials in the record pertain to the Aircel Maxis case, the result of which, as observed above, known to all.

106. As a result of the above discussion, we hold that the view communicated by the impugned communication/letter dated 1st December, 2017 could not brought any compounding proceedings an end. The RBI was not bound to act in accordance with such general and vague communication. The proviso could not have been invoked by the Enforcement Directorate in the facts and circumstances of the case. However, we must at once clarify that we are not in agreement with Mr.Dwarkadas when he urges that for the proviso to be invoked and applied, there must be a predicate offence. In the sense, before the view is taken, the Enforcement Directorate would have to demonstrate and prove that a FIR or crime is registered and investigations under the Code (Cr. P. C.) for booking a case under the PMLA have commenced by the

Enforcement Directorate. It is not correct to urge that all this is a pre-requisite or pre-condition to invoke the proviso to Rule 8(2) of the Compounding Rules. It all depends upon the facts and circumstances in each case. All that is required is to possess reliable cogent and satisfactory material for the suspicion to be raised. The nature of the same again depends on the facts and circumstances in each case and no general rule can be laid down.

107. In these circumstances, while upholding the constitutional validity and legality of the proviso, particularly by reading it in the manner noted above, we are in agreement with Mr.Dwarkadas that in the facts of this case, the RBI was not bound to put an end to the compounding proceedings. We are of the opinion that the compounding proceedings initiated vide the compounding applications of the petitioner and pending before the RBI should proceed, but strictly in accordance with law.

108. In the view which we have taken, it is not necessary to decide as to whether the amendment brought to the Compounding Rules by insertion of the proviso by the notification dated 20th February, 2017 has come into force or not. Mr.Dwarkadas fairly argued that it has not come into force because of non-compliance with section 48 of the FEMA, whereas, Mr. Venegaonkar, relying upon the judgment of the Division Bench of this court, rendered at Aurangabad and urging that the provisions of section 48 are directory, urged further that this court should proceed on the footing that the proviso has come into force and could have been invoked. Mr. Venegaonkar fairly stated that even if this court proceeds on the footing that there is compliance with section 48 or that the provisions are directory, it can still consider whether in the facts and circumstances of the present case, the proviso could have been invoked by the Enforcement Directorate at all. Once we have rendered our findings on these lines, then, the argument on the point as to whether compliance with section 48 is mandatory or directory need not be considered and rather is not required to be considered in this case. The arguments of both sides on this point are left open. We clarify that we have not rendered any opinion insofar as this aspect is concerned.

109. Thus, the above discussion concludes this judgment. Rule is made absolute by quashing and setting aside the communication dated 1st December, 2017 and further directing the RBI to consider the compounding applications in accordance with law uninfluenced by the communication of the Enforcement Directorate dated 1st December, 2017 or any prior letters/communications, which are quashed and set aside by this judgment. There would be no order as to costs.

110. The original record produced by Mr. Venegaonkar shall be returned to him after he replaces it with a certified true copy of the same.

111. We also proceed to direct the RBI to render the necessary guidance to the petitioner in the matter of compounding of the contraventions under the FEMA. Since it was clearly stated before us by the RBI that it is presently inhibited in considering the compounding applications or proceeding to decide the same in view of the communication/letter of the Enforcement Directorate, then, as a result of quashing of the same, the RBI is free to proceed and decide the same. However, our order does not oblige the RBI to compound the contravention and all aspects and matters, save and except the one decided above, can be taken into consideration by the RBI in deciding the compounding applications, if otherwise permitted by law.

112. In the view which we have taken, it is not necessary to deal with the judgments, which Mr. Venegaonkar brought to our notice especially on the point of compliance with the requirements of laying of Rules. Secondly, his reliance on the judgment in the case of Narayan Govind Gavate (supra) is misplaced because there, the Hon'ble Supreme Court was concerned with the question, particularly that although the notification under section 4(1) of the Land Acquisition Act is valid, yet, the Government of Maharashtra has not discharged its burden of showing facts constituting the urgency, which impelled it to give declarationscum- directions under section 17(4) of that Act dispensing with the inquiries under section 5A of the Land Acquisition Act, 1894. The High Court took a view that the declarations under section 17(4) are invalid and liable to be quashed and set aside. They were accordingly quashed. It was that view which was assailed in the Hon'ble Supreme Court. The observations in para 10 of this judgment, far from assisting Mr. Venegaonkar, would militate against his arguments. The formation of an opinion may be a subjective matter, nevertheless that opinion has to be based on some relevant material in order to pass the test, which courts do impose. Para 10 of this decision reads as under:-

> *"10. It is true that, in such cases, the formation of an opinion is a subjective matter, as held by this Court repeatedly with regard to situations in which administrative authorities have to form certain opinions before taking actions they are empowered to take. They are expected to know better the difference between a right or wrong opinion than courts could ordinarily on such matters. Nevertheless, that opinion has to be based upon some relevant materials in*

order to pass the test which courts do impose. That test basically is: Was the authority concerned acting within the scope of its powers or in the sphere where its opinion and discretion must be permitted to have full play? Once the court comes to the conclusion that the authority concerned was acting within the scope of its powers and had some material, however meagre, on which it could reasonably base its opinion, the courts should not and will not interfere. There might, however be cases in which the power is exercised in such an obviously arbitrary or perverse fashion, without regard to the actual and undeniable facts, or, in other words, so unreasonably as to leave no doubt whatsoever in the mind of a court that there has been an excess of power. There may also be cases where the mind of the authority concerned has not been applied at all, due to misunderstanding of the law or some other reason, to what was legally imperative for it to consider."

113. To our mind, we have not departed from this test in coming to the above conclusion.

114. Then, his reliance upon a decision of the United States Supreme Court is also misplaced for in that decision as well, the said Court does not hold that a view taken is immune from judicial review. When the exercise of such nature even though subjective, if the relevant materials are lacking or the opinion has no basis, if it is found that the opinion is not based on any material at all and the exercise in that behalf is wholly arbitrary, then, we do not see how this decision can be said to be assisting Mr. Venegaonkar.

115. Mr. Venegaonkar heavily relied upon the order passed by the High Court of Delhi, New Delhi in the two writ petitions, which are filed by the petitioner (New Delhi Television Ltd. vs. The Deputy Commissioner of Income Tax and Anr.). These petitions were challenging a notice proposing reassessment proceedings by the Commissioner of Income Tax under sections 147-148 of the Income Tax Act and the order of provisional attachment of the petitioners' assets.

116. Now, it is apparent that sections 147 and 148 confer in the Income Tax Authority a power to reassess the income and the question posed before the High Court at Delhi was whether the invocation of this power is valid or not. The petitioner argued that the complete details regarding the issuance of the step up coupon bonds by NNPLC and guaranteed by NDTV were submitted during the original assessment proceedings under section 143 of the Act. The Department stressed that there had been suppression and to the extent permitted by law, they can reassess the income if that is found to have escaped the tax. Thus, this was not a case of mere change of opinion. It is in that context that all the observations have been made by the Division Bench. We do not see how de-hors the factual background and the context in which the issue under the provisions of a distinct law, that these observations are relevant for our purpose. The ambit and scope of the powers to reassess the income was in issue and whether the facts justify the same or otherwise. Hence, this judgment is of no assistance.

117. In conclusion, we will be failing in our duty if we do not note other arguments of Mr.Dwarkadas learned senior counsel appearing for the petitioner. He submitted that the statutory position and status of the authorities and high functionaries like the RBI, Enforcement Directorate and the CBI is being undermined and compromised. These institutions, according to him, ought to be allowed to function with full autonomy, independence and impartiality. Their strength lies in such functioning and whenever that is disrupted or disturbed so also interfered with, invariably, the public interest suffers. In their prestige, reputation and dignity lies that of the nation. Mr. Dwarkadas submits that the Hon'ble Supreme Court has emphasised time and again the institutional integrity and that is paramount. If such high functionaries surrender their authority, power and jurisdiction and act as per the dictates of the political bosses, then, the rule of law is a casualty. Mr. Dwarkadas submits that we must not forget and overlook the fact that the petitioner is a company engaged in the business of electronic media. It is running a news channel and is a prominent player on the national television network, particularly in the field of dissemination of news. If an attempt is made to embarrass and harass it with such proceedings, then, we will have to pay a heavy price as the freedom of press and electronic media will be in jeopardy.

118. Though we are not in agreement with Mr. Dwarkadas and the material on record does not lead to this inference leave alone conclusion, it is extremely distressing to note that parties like the petitioner doubt the independence and impartiality of the above institutions. None should entertain this belief or voice it before a court of law for if that is noted in the proceedings, the very credibility and efficacy of such institutions/authorities is than questioned. It is extremely unfortunate that we have to take note of such submissions of the learned senior counsel. We feel that beyond noting these arguments, we should not express any opinion thereon. However, we hope that all concerned understand our pain and anguish. We are concerned in this petition with the actions of the RBI and the Enforcement Directorate, both of whom refer to the criminal proceedings launched by the CBI. Those in-charge of their affairs and those in power giving them directions ought to realise that nothing would be achieved if foundations and base of these

institutions is shaken and if they allegedly obey every command of the political masters. The political parties and outfits in power, in opposition ought to know that just as Defence Forces, Police and the Judiciary, it is important that these institutions do not betray public trust and confidence. By its very name, it is the Directorate of Enforcement and it enforces stringent laws like the FEMA and the PMLA. Such institutions are the custodians of our foreign exchange resources, they safeguard and protect them by properly managing and administering them. They ensure that there is balance, much less in payment. If they are looked upon as guardians of citizens' rights, then, it is time that those in power and opposition realise that they should not act in a manner which gives the public at large an impression that these vital institutions are but puppets in the hands of politicians.

119. These institutions protect our constitutional framework. Every law, which is made and the authority therefrom is but a product of our constitution and the entries in the fields of legislation (Schedule 7 Lists I, II and III) have given us the CBI, the RBI and the Enforcement Directorate together with an independent and impartial judiciary, free-press. The agencies like RBI etc. are also pillars of our democracy. The earlier we realise that in their meaningful existence lies our safety and of our legal rights the better it would be. We pray that hereinafter we do not have to observe anything like this and everybody will leave out these institutions from unnecessary attacks, uncalled for criticism and do not try to overpower or overreach them.