* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on: 10th January, 2018
Decided on: 16th January, 2018

\+ **BAIL APPLN. 1165/2017**

YOGESH MITTAL ..... Petitioner

Represented by: Mr. Vikram Chaudhri, Sr. Advocate with Mr. Sanjay Agarwal, Mr. Ashish Batra, Mr. Arjun Malik, Mr. Harshit Sethi and Mr. Sameer Rohtagi, Advocates.

versus

ENFORCEMENT DIRECTORATE ..... Respondent

Represented by: Ms. Pinky Anand, Additional Solicitor General with Mr. Ajay Digpaul, CGSC, Mr. Amit Mahajan, CGSC with Mr. Hemant Arya, Advocates.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

1. FIR No. 205/2016 under Sections 420/406/409/467/468/471/188/ 120B IPC was registered by the Crime Branch of Delhi Police on 25th December, 2016 followed by ESIR No. 18/DZO-II/2016 on 26th December, 2016 by the Enforcement Directorate for offence punishable under Section 4 of the Prevention of Money Laundering Act, 2002 (in short 'PMLA'). In the investigation carried out by the Enforcement Directorate, the respondent herein, the first complaint was filed before the learned Special Court on 23rd February, 2016.

2. On 30th May, 2017 searches were conducted at the business and residential premises of the petitioner by the officers of the respondent and he

was arrested on 5th June, 2017. The petitioner was produced before the learned Special Court on 6th June, 2017 and remanded to custody of the respondent till 9th June, 2017. Further custody remand of the petitioner was granted till 13th June, 2017 vide order dated 9th June, 2017 when the petitioner was sent to judicial custody. Thereafter the petitioner was remanded to judicial custody from time to time. Since for offence punishable under Section 4 PMLA sentence that could be awarded was imprisonment upto seven years, the charge sheet was required to be filed within 60 days of the arrest of the petitioner and cognizance taken thereon. The stipulated period of 60 days was expiring on 4th August, 2017, thus the second/supplementary prosecution complaint was filed before the learned Special Court on 2nd August, 2017. Before filing of the supplementary prosecution complaint, the petitioner preferred the present bail application on merits before this Court to which a counter affidavit and additional affidavit were filed by the respondent.

3. It is the case of the petitioner that on 2nd August, 2017, the learned Trial Court did not take cognizance on the supplementary prosecution complaint but directed the same to be tagged with the main complaint, thus, no cognizance having been taken till 4th August, 2017 when 60 days period expired, he is entitled to bail under Section 167 (2) of Cr.P.C. Further on 8th August, 2017 the petitioner was remanded to judicial custody till 11th August, 2017 whereafter no order of further remand was passed as on 11th August, 2017 the Special Court was on leave and the reader adjourned the case to 31st August, 2017 without any order of remand by the Court. Thus claiming illegal custody the petitioner filed two further applications being Crl. M.A. Nos. 13800/2017 and 20623/2017 seeking permission to take

additional grounds which were allowed vide orders dated 10th August, 2017 and 25th August, 2017 respectively. No affidavits to the two applications taking additional grounds were filed by the respondent.

4. This Court heard the bail application on merits and dismissed the same vide order dated 14th September, 2017. Challenging the order dated 14th September, 2017 passed by this Court, the petitioner preferred a special leave petition being SLP (Crl.) which on grant of leave was registered as Crl. Appeal No. 2102/2017. The petitioner also preferred a writ petition before the Hon'ble Supreme Court challenging the constitutional validity of Section 45 of the PMLA imposing two additional conditions for grant of bail for offence punishable for a term of imprisonment for more than three years under Part-A of Schedule of the PMLA being W.P. (Crl.) No. 1144/2017. The criminal appeal and the writ petition were decided along with the batch of other matters by the Hon'ble Supreme Court.

5. The Hon'ble Supreme Court vide order dated 23rd November, 2017 declared Section 45 (1) of PMLA in so far as it imposes two further conditions for release on bail to be unconstitutional being violative of Articles 14 and 21 of the Constitution of India and remanded the matter back to the respective Courts for the bail applications to be heard on merits without application of the twin conditions contained in Section 45 of PMLA Act.

6. Since in the order passed by this Court dismissing the bail application the issue of illegality in remand was also considered, the petitioner filed an application for clarification before the Supreme Court in Crl. Appeal No. 2012/2017 wherein the Hon'ble Supreme Court vide order dated 11th December, 2017 held as under:

"Having heard the learned counsel appearing for the parties, we set aside the judgment and order dated 14.09.2017 of the High Court inasmuch, as after recording in paras 76 & 77 that the appellant was remanded for more than 15 days in one go and that a clear/specific endorsement was necessary and without that having been recorded, the remand was illegal, yet the Court went on to state that for the fault of the Court, the prosecution cannot be made to suffer. Another major departure from settled procedure was that the order of remand was permitted to be recorded by the Reader of the Court which would, according to the High Court, only be an irregularity and not an illegality, which is obviously incorrect in law.

We are, therefore, of the considered view that, in the interest of justice, this order is set aside and the matter is remanded for hearing afresh by the High Court. All contentions are kept open to both the parties. We request the High Court to decide the matter as expeditiously as possible.

Application is disposed of accordingly."

7. Learned counsel for the petitioner contends that since maximum punishment provided for an offence punishable under Section 4 PMLA is imprisonment for seven years, the petitioner could not have been remanded to custody beyond 60 days within which period the Special Court was obliged to take cognizance on the complaint. Since no cognizance was taken by the learned Special Court, the stage of remand under Section 309 Cr.P.C. had not arrived. Custody of the petitioner beyond 4th August, 2017 when 60 days period expired was thus illegal. Thus the petitioner was entitled to bail under Section 167 (2) Cr.P.C.

8. It is further contended that vide order dated 11th August, 2017 no order of remand was passed as the learned Special Court was on leave and

the reader of the Court had no jurisdiction to pass remand order. In fact no order of remand was passed and the matter was simply adjourned to 31st August, 2017. Further the date of 31st August, 2017 to which the case was adjourned was beyond 15 days and no Court has power to grant a remand beyond 15 days. Thus the custody of the petitioner being illegal from 4th August, 2017 and the petitioner having taken these grounds vide the two applications, that is, Crl. M.A. No. 13800/2017 and Crl. M.A. No. 20623/2017 which came up before this Court on 10th August, 2017 and 25th August, 2017 respectively and allowed on the same date, therefore the date of return and hearing also being the same, the petitioner is entitled to bail being in illegal custody.

9. Learned counsel for the petitioner further contends that the learned Single Judge of this Court vide order dated 14th September, 2017 noted that there was an illegality in the remand order however, declined to grant benefit to the petitioner noting that the prosecution cannot be made to suffer for the fault of the Court which fact was noted by the Hon'ble Supreme Court and the finding was held to be incorrect. To support the contentions, learned counsel for the petitioner relies upon the decisions reported AIR 1953 SC 277 *Ram Narayan Singh vs. State of Delhi & Ors.*, 1979 (2) SCC 322 *Ramlal Narang vs. State (Delhi Administration)* and 1992 (3) SCC 141 *Central Bureau of Investigation, Special Investigation Cell-I, New Delhi vs. Anupam J. Kulkarni*.

10. Contentions of learned counsel for the petitioner on merits is that the petitioner joined investigation on 27th March, 2017, 28th March, 2017, 29th March, 2017, 30th March, 2017, 3rd April, 2017, 5th April, 2017, 6th April, 2017, 7th April, 2017, 11th April, 2017 and 21st April, 2017 thus there was no

requirement to arrest the petitioner. In any case the supplementary complaint also having been filed and the entire evidence being based on documents already collected by the prosecution, petitioner be released on bail.

11. Seeking dismissal of the bail application, learned counsel for the respondent contends that the supplementary complaint in the present case does not relate to a fresh offence but additional material evidence and additional accused thus warranting no fresh cognizance. The Court of Special Court being a Court of Additional Sessions Judge, the restriction of remand for a maximum period of 15 days is not provided. The petitioner has been instrumental in opening number of companies through his employees and during demonization got ₹38 crores deposited, bank drafts whereof were got prepared besides taking their commission for the balance amount. The petitioner has been influencing the witnesses, statements in which regard of the witnesses have been recorded.

12. Before proceeding to decide the bail application on merits for which it was initially filed, this Court is required to first deal with the additional grounds taken by the petitioner, that is, whether the petitioner is entitled to bail as his custody is illegal. To deal with this issue it would be appropriate to note that the first complaint was filed by the respondent in ESIR No. 18/DZO-II/2016 on 26th December, 2016 wherein the petitioner was not named followed by a supplementary complaint on 2nd August, 2017. Prayer in the said supplementary complaint was to take cognizance on the complaint and to proceed against the accused persons for offence of money laundering under Section 3 punishable under Section 4 of PMLA and punish

them. The order dated 2nd August, 2017 passed by learned Special Court reads as under:

> *"The IO has filed supplementary chargesheet/prosecution complaint qua accused Yogesh Mittal and Ramesh Chandra Sharma.*
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> *The supplementary chargesheet/prosecution complaint be tagged with the main chargesheet which is stated to be pending before the court on 11.08.2017.*
>
> *S/d*
> *Ajay Kumar Kuhar"*

13. The petitioner had earlier been remanded to custody till 8th August, 2017. Thus on 8th August, 2017 an application was filed by the Deputy Director of the respondent requesting for remanding the petitioner to judicial custody. Since the supplementary prosecution complaint was directed to be tagged with the main complaint and listed on 11th August, 2017, the learned Special Court remanded the petitioner to judicial custody till 11th August, 2017. However, on 11th August, 2017 the learned Special Court was on leave and the matter was adjourned to 31st August, 2017 with the following noting by the reader of the Court:

> *"11.8.2017*
> *Ld. P.O. is on leave for today.*
> *Sh. Vikas Garg, SPP for ED.*
> *Accused Rohit Tandon, Raj Kumar Goel, Yogesh Mittal and Ashish Kumar are present from J/C.*
> *Accused Dinesh Bhola and Kamal Jain are present on bail with their Counsel.*
> *Put up on 31.08.2017 for purpose already fixed.*
>
> *Reader/11.08.2017"*

14. Admittedly, before 31st August, 2017 when an order was passed by the learned Trial Court, the petitioner filed two additional applications before this Court taking the plea of bail on illegal custody which were allowed as noted above. The order dated 11th August, 2017 can by no stretch of imagination be treated as order of remand having not been passed by any judicial office but an administrative noting by the reader fixing the date for 31st August, 2017.

15. On the facts of the case, following issues arise for consideration before this Court:

(i) Whether a supplementary complaint is maintainable? If yes, whether even without the leave of the Court?

(ii) Whether cognizance is required to be taken again on filing of a supplementary complaint?

(iii) If cognizance is required to be taken on the supplementary complaint whether the order passed by the learned Trial Court on 2nd August, 2017 amounted to taking cognizance?

(iv) Whether the custody of the petitioner after 11th August, 2017 is illegal, resulting in an indefeasible right to the petitioner to be released on bail? And/or

(v) Whether the petitioner is entitled to bail on merits?

16. Issue No. (i): Whether a supplementary complaint is maintainable? If yes, whether even without the leave of the Court?

16.1 Divergent views have been taken by various High Courts in this regard. In the decision reported as Manu/JH/0515/2014 *Narendra Mohan Singh vs. Directorate of Enforcement, Ranchi & Anr.* a Single

Judge of the Jharkhand High Court though did not discuss the provisions in this regard but held:

> *15. Going further into the matter, it be stated that the question has been raised over the maintainability of the supplementary complaint on the premise that the provisions as contained in Section 44(1)(b) and 45 of the P.M.L. Act, refers to 'a complaint'. Even if such reference is there of 'a complaint', it never prevents of filing of supplementary complaint as the reference of a complaint has been made in those provisions in the context that whenever a complaint filed by an authority authorized, court may take cognizance over it.*
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> *16. We have already noted the circumstances, under which a supplementary complaint has been lodged. In such situation, it can be said that it has been lodged in the same manner in which supplementary charge sheet is submitted in a police case. If such a restricted meaning as has been sought to be advanced then the result would be that even if after filing of a complaint culpability of any other person is found during investigation, he will not be prosecuted. This can never be the intention of the legislature."*

16.2 In the decision reported as 2016 SCC OnLine Cal 6708 *Amit Banerjee vs. Manoj Kumar, Assistant Director, Enforcement Directorate* the Calcutta High Court took the view:

> "*Coming to the issue of filing of the supplementary complaint, I find that the said complaint was presented before the Special Court pursuant to the leave granted by the Special Court to conduct further investigation. Although the power to conduct further investigation is envisaged in Section 173(8) of the Code relating to Police investigation under Chapter XII of the Code, the said powers would extend to investigation of a crime, cases where investigations are conducted under the special law*

conducted by any other agency under a special statute, namely PML Act, in view of the fact that 'investigation' as defined in Section 2(h) of the Code is to include investigation conducted by other agencies under special statutes as has been held in Directorate of Enforcement v. Deepak Mukherjee MANU/SC/0422/1994 : (1994) 3 SCC 440.

21. It is trite law that if there are more than one offenders who have committed-offence or offences in course of same transaction, they are to be tried together (see Section 223 Cr.P.C). Accordingly, the filing of the subsequent complaint and the prayer of the prosecuting agency to prosecute the offenders including the petitioner herein in the subsequent complaint along with offenders arrayed in the earlier complaint cannot be said to be a procedure which is alien to law or prejudicial to the interest of the complaint. In this regard, reference may be made to the ratio of the Apex Court in S.R. Sukumar (supra) wherein the Court held that there are limited powers to amend a complaint and in order to correct patent ex-facie errors, which do not prejudice the accused or in certain circumstances where the trial of the offence or the offenders in the subsequent complaint are to be conducted together. In the aforesaid factual matrix, I am of the view that the filing of the subsequent complaint and the prayer to proceed against the accused therein along with accused persons in the earlier complaint is in no way prejudicial to the interest of the accused persons and is, in fact, for the ends of justice and to avoid multiplicity of proceedings."

16.3 However, the Division Bench of Punjab & Haryana High Court in the decision reported as 2016(3) RCR (Criminal) 883 *Arun Sharma vs. Union of India & Ors.* rejecting the contention of the petitioner therein that Section 173(8) Cr.P.C. would apply in PMLA complaint cases held that Section 173(8) Cr.P.C. cannot be applicable in absence

of a report under Section 173(2) Cr.P.C. The Special Leave Petition filed by Arun Sharma being SLP (Crl.) No. 5978/2017 was dismissed. Further a learned Single Judge of the Karnataka High Court in the decision reported as ILR 2002 KAR 2175 *Ajit Narain Haskar & Ors. vs. Assistant Commissioner of Central Excise (Legal), Bangalore* also held that the procedure adopted by the learned Magistrate in permitting the additional accused to be brought in by way of what the complainant calls 'supplementary complaint' to be faulty.

16.4 A learned Single Judge of this Court in the decision reported as 2012 SCC OnLine Del 1574 *S. Nagrajan vs. State* held a second supplementary complaint filed under the Prevention of Food Adulteration Act to be erroneous and not sustainable as under:

> *"15. The petitioner in the instant case had rightly agitated before the learned Magistrate that the second complaint could not have been filed, and therefore, they ought to have been discharged in respect of the second complaint, but this request was rejected by the learned Magistrate on 26.9.2003. Curiously enough, the revision was also dismissed by the learned Sessions Judge by giving an erroneous interpretation to the provisions of law. The learned Additional Sessions Judge relied upon Section 173(8) Cr.P.C., which permits the filing of a supplementary charge-sheet in a police case. There is a distinct procedure prescribed under the Code of Criminal Procedure for a police case and a complaint case. The Magistrate or much less a court of Sessions cannot follow two different procedures and try an accused person by amalgamating two different procedures. So far as Section 173 (8) of Cr.P.C. is concerned, it appears under the Chapter XII of the Cr.P.C. under the heading 'investigation', it comes into operation in a situation when an offence which is cognizable is registered by the police*

and an FIR is registered that the law envisages filing of a charge sheet and a supplementary charge sheet. When the cognizance is taken on the basis of a complaint, the Magistrate has to follow a procedure prescribed under Section 200, 202 and 204 and not under Section 173 Cr.P.C. This kind of amalgamation of two different kinds of procedures by the learned Sessions Judge has caused serious prejudice to the accused. The first complaint which was filed in the instant case was held by the learned Additional Sessions Judge to be permitted as a complaint against the vendor and the supplier, while as the second complaint can be treated against the manufacturer and the distributor. With utmost respect to the reasoning of the learned Sessions Judge, such an interpretation is erroneous. It is not open to the Judge to contend that the first complaint is against the vendor and the supplier specifically when the manufacturer was made a party in the first complaint itself. Moreover, under the Prevention of Food Adulteration Act only one complaint is filed by the Department against all the accused persons whether they are vendors, suppliers, distributors or manufacturers. There is no provision in Cr.P.C. for filing of a second complaint which may be akin to the filing of a supplementary charge-sheet in a police case. Therefore, I feel the reasoning given by the learned Magistrate as well as the learned Sessions Judge in this regard was totally erroneous. I am of the view that only the first complaint against the petitioner was sustainable.

16.5 The Division Bench of the High Court of Himachal Pradesh at Shimla in the decision reported as 2017 SCC OnLine HP 1808 *Khekh Ram vs. Narcotics Central Bureau & Anr.* taking note of the various decisions of different High Courts and disagreeing with the views expressed by the High Courts of Bombay, Karnataka, Delhi and Punjab & Haryana held:

> *"34. As noticed above, all the decisions on the subject as have been referred to above, have been rendered by the learned Single Bench. We cannot persuade ourselves to agree with the view taken by the Hon'ble High Courts of Bombay, Karnataka, Delhi and Punjab & Haryana High Court as we are inclined to hold that a supplementary complaint after having obtained leave of the court in given facts and circumstances of the case is legally maintainable in the same manner in which a supplementary charge-sheet is submitted in a police case. We also inclined to adopt the reasoning of the Hon'ble Jharkhand High Court where it held that, in case, a restricted meaning is given then result would be that even after filing of the complaint culpability of any other person is found during investigation, he would not be prosecuted, which can never be the intention of the legislature.*
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> *35. From the conspectuous of the aforesaid discussion, we have no hesitation to conclude even though there exists no specific provision in the Code of Criminal Procedure to file supplementary complaint in a complaint case, however, if on further investigation and with the express leave of the court, the culpability and the complicity of any other person is established the supplementary complaint be filed."*

16.6 The extreme view that once a complaint is filed then a second complaint is totally barred and cognizance on the second complaint against a new accused person is illegal appears to be erroneous as once power of investigation is vested in an agency and cognizance can be taken on a complaint only then on a further investigation carried out with the leave of the court, the investigating agency is required to place on record the said material collected during further investigation and the only mode available to the investigating agency

to place on record the said material is a supplementary complaint. Thus if the Court grants leave to the investigating agency to place on record further material collected, it is bound to place the same on record.

17. Issue No.(ii): Whether cognizance is required to be taken again on filing of a supplementary complaint?

17.1 In the decision reported as 2015 (7) SCC 440 *Prasad Shrikant Purohit vs. State of Maharashtra & Anr.* Supreme Court dealing with the issue of cognizance on a supplementary charge sheet held:

> *"71. Reliance was then placed upon the decision in Fakhruddin Ahmad [(2008) 17 SCC 157: (2010) 4 SCC (Cri) 478], in particular para 17. The said para 17 reads as under: (SCC p. 163)*
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> > *"17. Nevertheless, it is well settled that before a Magistrate can be said to have taken cognizance of an offence, it is imperative that he must have taken notice of the accusations and *applied his mind* to the allegations made in the complaint or in the police report or the information received from a source other than a police report, as the case may be, and the material filed therewith. It needs little emphasis that it is only when the Magistrate *applies his mind* and is satisfied that the allegations, if proved, would constitute an offence and decides to initiate proceedings against the alleged offender, that it can be positively stated that he has taken cognizance of the offence. Cognizance is in regard to the offence and not the offender."*
>
> *(emphasis supplied)*
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> *Even here this Court has stated in uncontroverted terms that once the Magistrate applies his mind to the offence alleged and decides to initiate proceedings against the alleged offender, it can be stated that he has taken cognizance of the offence and by way of reiteration, it is further stated that cognizance is in regard to the offence and not the offender.*

This decision, therefore, reinforces the position that cognizance is mainly of the offence and not the offender.

72. In R.R. Chari [AIR 1951 SC 207: (1951) 52 Cri LJ 775: 1951 SCR 312], in para 8, this Court made it clear that the word "cognizance" is used by the Court to indicate the point when the Magistrate or a Judge first takes judicial notice of an offence. Therefore, primarily cognizance of an offence takes place when a Judicial Magistrate applies his mind and takes judicial notice of the offence. In fact that is what has been even statutorily stipulated under Section 190(1) CrPC.

73. In Darshan Singh Ram Kishan [(1971) 2 SCC 654 : 1971 SCC (Cri) 628 : AIR 1971 SC 2372] , in para 8, with particular reference to Section 190, this Court has held as under: (SCC p. 656)

> *"8. As provided by Section 190 of the Code of Criminal Procedure, a Magistrate may take cognizance of an offence either, (a) upon receiving a complaint, or (b) upon a police report, or (c) upon information received from a person other than a police officer or even upon his own information or suspicion that such an offence has been committed. As has often been held, taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance, therefore, takes place at a point when a Magistrate first takes judicial notice of an offence. This is the position whether the Magistrate takes cognizance of an offence on a complaint, or on a police report, or upon information of a person other than a police officer. Therefore, when a Magistrate takes cognizance of an offence upon a police report, prima facie he does so of the offence or offences disclosed in such report."*
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> *(emphasis supplied)*

The above passage referred to in the said decision makes the position explicitly clear that cognizance would take place at a

point when a Magistrate first takes judicial notice of the offence either on a complaint or on a police report or upon information of a person other than the police officer. Taking judicial notice is nothing but perusing the report of the police officer, proceeding further on that report by opening the file and thereafter taking further steps to ensure the presence of the accused and all other consequential steps including at a later stage, depending upon the nature of offence alleged, to pass necessary order of committal to Court of Session.

74. In Salap Service Station [1994 Supp (3) SCC 318: 1994 SCC (Cri) 1713] , the question as to what is the implication of a supplementary report filed by the investigating agency under Section 173(8) CrPC was considered. While dealing with the same, it has been stated as under in para 2: (SCC p. 319)

> *"2. ... It may be mentioned here that in the supplementary charge-sheet allegations are to the effect that there was violation of Direction 12 of the Control Order. The question of taking cognizance does not arise at this stage since cognizance has already been taken on the basis of the main charge-sheet. What all Section 173(8) lays down is that the investigating agency can carry on further investigation in respect of the offence after a report under sub-section (2) has been filed. The further investigation may also disclose some fresh offences but connected with the transaction which is the subject-matter of the earlier report. ... The purpose of sub-section (8) of Section 173 CrPC is to enable the investigating agency to gather further evidence and that cannot be frustrated. If the materials incorporated in the supplementary charge-sheet do not make out any offence, the question of framing any other charge on the basis of that may not arise but in case the court frames a charge it is open to the accused persons to seek discharge in respect of that offence also as they have done already in respect of the offence disclosed in the main charge-sheet. The rejection of the report outright at that stage in our view is not correct."*

(emphasis supplied)

The above statement of law with particular reference to Section 173(8) CrPC makes the position much more clear to the effect that the filing of the supplementary charge-sheet does not and will not amount to taking cognizance by the court afresh against whomsoever again with reference to the very same offence. What all it states is that by virtue of the supplementary charge-sheet further offence may also be alleged and charge to that effect may be filed. In fact, going by Section 173(8) it can be stated like in our case by way of supplementary charge-sheet some more accused may also be added to the offence with reference to which cognizance is already taken by the Judicial Magistrate. While cognizance is already taken of the main offence against the accused already arrayed, the supplementary charge-sheet may provide scope for taking cognizance of additional charges or against more accused with reference to the offence already taken cognizance of and the only scope would be for the added offender to seek for discharge after the filing of the supplementary charge-sheet against the said offender.

75. In CREF Finance Ltd. [(2005) 7 SCC 467 : 2005 SCC (Cri) 1697] para 10 is relevant wherein this Court has held as under: (SCC p. 471)

> *"10. … Cognizance is taken of the offence and not of the offender and, therefore, once the court on perusal of the complaint is satisfied that the complaint discloses the commission of an offence and there is no reason to reject the complaint at that stage, and proceeds further in the matter, it must be held to have taken cognizance of the offence. One should not confuse taking of cognizance with issuance of process. Cognizance is taken at the initial stage when the Magistrate peruses the complaint with a view to ascertain whether the commission of any offence is disclosed."*
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> *(emphasis supplied)*

The said statement of law reinforces the legal position that cognizance is always of the offence and not the offender and once the Magistrate applies his judicial mind with reference to the commission of an offence the cognizance is taken at that very moment.

76. To the very same effect is the judgment in Pastor P. Raju [(2006) 6 SCC 728: (2006) 3 SCC (Cri) 179]. Para 13 is relevant for our purpose, which reads as under: (SCC p. 734)

> *"13. It is necessary to mention here that taking cognizance of an offence is not the same thing as issuance of process. Cognizance is taken at the initial stage when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to a police report or upon information received from any other person that an offence has been committed. The issuance of process is at a subsequent stage when after considering the material placed before it the court decides to proceed against the offenders against whom a prima facie case is made out."*
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> *(emphasis supplied)*

77. The above principle has been reiterated again in Videocon International Ltd.[(2008) 2 SCC 492: (2008) 1 SCC (Cri) 471] in para 19. Para 19 can be usefully extracted, which reads as under: (SCC p. 499)

> *"19. The expression 'cognizance' has not been defined in the Code. But the word (cognizance) is of indefinite import. It has no esoteric or mystic significance in criminal law. It merely means 'become aware of' and when used with reference to a court or a Judge, it connotes 'to take notice of judicially'. It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone."*
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> *(emphasis supplied)*

78. In Mona Panwar [(2011) 3 SCC 496: (2011) 1 SCC (Cri) 1181] at para 19 what is meant by "taking cognizance" has been explained as under: (SCC p. 503)

> *"19. The phrase 'taking cognizance of' means cognizance of an offence and not of the offender. Taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance, therefore, takes place at a point when a Magistrate first takes judicial notice of an offence. This is the position whether the Magistrate takes cognizance of an offence on a complaint or on a police report or upon information of a person other than a police officer. Before the Magistrate can be said to have taken cognizance of an offence under Section 190(1)(b) of the Code, he must have not only applied his mind to the contents of the complaint presented before him, but must have done so for the purpose of proceeding under Section 200 and the provisions following that section. However, when the Magistrate had applied his mind only for ordering an investigation under Section 156(3) of the Code or issued a warrant for the purposes of investigation, he cannot be said to have taken cognizance of an offence."*
>
> *(emphasis supplied)*

The above statement of law makes the position amply clear that cognizance is of an offence and not of the offender, that it does not involve any formal action and as soon as the Magistrate applies his judicial mind to the suspected commission of offence, cognizance takes place.

17.2 It is thus trite law that cognizance is taken of the offence and not the offender. It is also well settled that cognizance of an offence/offences once taken cannot be taken again for the second time. Since this Court has already taken a view that a supplementary complaint on

additional evidence qua the same accused or additional accused who are part of same larger transactions/conspiracy is maintainable however, with the leave of the Court and cognizance is taken of the offence/offences, not the offender and in case no new offence is made out from the additional material collected during further investigation, supporting an earlier offence on which cognizance has already been taken or additional accused are arrayed no further cognizance is required to be taken.

18. Issue No.(iii): If cognizance is required to be taken whether the order passed by the learned Trial Court on 2nd August, 2017 amounted to taking cognizance?

18.1 Since in the present supplementary complaint no new offence was found out and it was only additional evidence in support of the offence already filed in the main complaint and evidence against additional accused, the cognizance was not required to be taken again and the order dated 2nd August, 2017 passed by the learned Special Court tagging the supplementary prosecution complaint with the main complaint cannot be held to be illegal.

19. Issue No. (iv): Whether the custody of the petitioner after 11th August, 2017 is illegal, resulting in a right to the petitioner to be released on bail?

19.1 Section 309 Cr.P.C. reads as under:

> *"309. Power to postpone or adjourn proceedings-(1) In every inquiry or trial, the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same*

beyond the following day to be necessary for reasons to be recorded.

Provided that when the inquiry or trial relates to an offence under sections 376 to 376D of the Indian Penal Code (45 of 1860), the inquiry or trial shall, as far as possible, be completed within a period of two months from the date of commencement of the examination of witnesses

(2) If the Court after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing:

Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him.

Provided also that-

(a) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party;
(b) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment.

> *(c) Where a witness is present in Court but a party or his pleader is not present or the party or his pleader though present in Court, is not ready to examine or cross-examine the witness, the Court may, if thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be.*

19.2 A perusal of Section 309 Cr.P.C. reveals that after taking cognizance of the offence and even after commencement of the trial if the Court finds it necessary or advisable to postpone the commencement or adjourn any inquiry or trial, it may, from time to time, for the reasons to be recorded, postpone or adjourn the same and may by a warrant remand an accused if in custody. The only limitation is that the Magistrate cannot remand an accused person to custody under this provision for a term exceeding fifteen days at a time. Though arguments have been advanced as to whether the Special Court on taking cognizance would act as a Court of Magistrate being a Court of original jurisdiction or as a Court of Sessions in which case the period of fifteen days would have no applicability however, in the facts of the present case this discussion need not detain this Court further for the reason the noting dated 11th August, 2017 was not by the Court but by the Reader of the Court which cannot be said to be an order of remand by a Court. This position cannot be and is not disputed by learned counsel for the respondent. Thus the custody of the petitioner from 11th August, 2017 to 31st August, 2017 is illegal.

19.3 It is strenuously contended by learned counsel for the respondent that since arguments in the bail application are being heard now and on 31st August, 2017 the custody, if any, of the petitioner became legal the petitioner is not entitled to bail for being in illegal custody. Reliance in this regard is placed on the decisions reported as *Ram Narayan Singh* (supra), 1974 (4) SCC 141 *Kanu Sanyal vs. District Magistrate, Darjeeling & Ors.* and 2005 SCC OnLine Bom 1236 *Dilip Pandurang Kamath vs. State of Maharashtra*.

19.4 In *Ram Narayan Singh* (supra) the Constitution Bench held that the legality of the custody has to be seen on the date of return. Dealing with Section 344 of the Code of Criminal Procedure 1898 akin to Section 309 of Code of Criminal Procedure, 1973 it was held:

> *"3. Various questions of law and fact have been argued before us by Mr. Sethi on behalf of the petitioner, but we consider it unnecessary to enter upon a discussion of those questions, as it is now conceded that the first order of remand dated the 6th March even assuming it was a valid one expired on the 9th March and is no longer in force. As regards the order of remand alleged to have been made by the trying Magistrate on the 9th March, the position is as follows :- The trying Magistrate was obviously proceeding at that stage under section 344 of the Criminal Procedure Code, which requires him, if he chooses to adjourn the case pending before him, "to remand by warrant the accused if in custody," and it goes on to provide: Every order made under this section by a court other than a High Court shall be in writing signed by the presiding Judge or Magistrate. The order of the Magistrate under this section was produced before us in compliance with an order of this Court made on the 10th March, which directed the production in this Court as early as possible of the records before the Additional*

District Magistrate and the trying Magistrate together with the remand papers for inspection by Counsel for the petitioner. The order produced merely directs the adjournment of the case till the 11th March and contains no direction for remanding the accused to custody till that date. Last evening, four slips of paper were handed to the Registrar of this Court at 5-20 p.m. On one side they purport to be warrants of detention dated 6th March and addressed to the Superintendent of Jail, Delhi, directing the accused to be kept in judicial lock-up and to be produced in court on the 9th March 1953. These warrants contain on their back the following endorsements: "Remanded to judicial till 11th March, 1953."

4. In a question of habeas corpus, when the lawfulness or otherwise of the custody of the persons concerned is in question, it is obvious that these documents, if genuine would be of vital importance, but they were not produced, notwithstanding the clear direction contained in our order of the 10th March. The court records produced before us do not contain any order of remand made on the 9th March. As we have already observed, we have the order of the trying Magistrate merely adjourning the case to the 11th. The Solicitor-General appearing on behalf of the Government explains that these slips of paper, which would be of crucial importance to the case, were with a police officer who was present in court yesterday, but after the Court rose in the evening the latter thought that their production might be of some importance and therefore they were filed before the Registrar at 5-20 p.m. We cannot take notice of documents produced in such circumstances, and we are not satisfied that there was any order of remand committing the accused to further custody till the 11th March. It has been held by this Court that in habeas corpus proceedings, the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution

of the proceedings. The material date on the facts of this case is the 10th March, when the affidavit on behalf of the Government was filed justifying the detention as a lawful one. But the position, as we have stated, is that on that date there was no order remanding the four persons to custody. This Court has often reiterated before that those who feel called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty, must strictly and scrupulously observe the forms and rules of the law. That has not been done in this case. The petitioners now before us are therefore entitled to be released, and they are set at liberty forthwith.

19.5 Supreme Court in *Kanu Sanyal* (supra) further discussed the three dates which would be relevant for deciding the legality of custody, that is, date of filing the application, date of return and the date of hearing. Agreeing with the view that the custody as on the date of return has received the largest measure of approval in India, it was held that the third view cannot be discarded as incorrect because an inquiry whether the detention is legal or not at the date of hearing of the application of habeas corpus would be quite relevant. It was held:

"4. These two grounds relate exclusively to the legality of the initial detention of the petitioner in the District Jail, Darjeeling. We think it unnecessary to decide them. It is now well settled that the earliest date with reference to which the legality of detention challenged in a habeas corpus proceeding may be examined is the date on which the application for habeas corpus is made to the Court. This Court speaking through Wanchoo, J., (as he then was) said in A.K. Gopalan v. Government of India MANU/SC/0091/1965 : 1966CriLJ602 :.

"It is well settled that in dealing with the petition for habeas corpus the Court is to see whether the detention

on the date on which the application is made to the Court is legal, if nothing more has intervened between the date of the application and the date of hearing". In two early decisions of this Court, however, namely, Naranjan Singh v. State of Punjab MANU/SC/0073/1952 : 1952CriLJ656 and Ram Narain Singh v. State of Delhi MANU/SC/0035/1953 : 1953CriLJ113 a slightly different view was expressed and that view was reiterated by this Court in B.R. Rao v. State of Orissa MANU/SC/0085/1971 : AIR1971SC2197 where it was said :

"In habeas corpus the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings".

and yet in another decision of this Court in Talib Husain v. State of Jammu & Kashmir MANU/SC/0202/1970: AIR1971SC62 Mr. Justice Dua, sitting as a Single Judge, presumably in the vacation, observed that "in habeas corpus proceedings the Court has to consider the legality of the detention on the date of the hearing". Of these three views taken by the Court at different times, the second appears to be more in consonance with the law and practice in England and may be taken as having received the largest measure of approval in India, though the third view also cannot be discarded as incorrect, because an inquiry whether the detention is legal or not at the date of hearing of the application for habeas corpus would be quite relevant, for the simple reason that if on that date the detention is legal, the Court cannot order release of the person detained by issuing a writ of habeas corpus. But, for the purpose of the present case, it is immaterial which of these three views is accepted as correct, for it is clear that, whichever be the correct view, the earliest date with reference to which the legality of detention may be examined is the date of filing of the

application for habeas corpus and the Court is not, to quote the words of Mr. Justice Dua in B.R. Rao v. State of Orissa MANU/SC/0085/1971 : AIR1971SC2197 "concerned with a date prior to the initiation of the proceedings for a writ of habeas corpus". Now the writ petition in the present case was filed on 6th January, 1973 and on that date the petitioner was in detention in the Central Jail, Visakhapatnam. The initial detention of the petitioner in the District Jail, Darjeeling had come to an end long before the date of the filing of the writ petition. It is, therefore, unnecessary to examine the legality or otherwise of the detention of the petitioner in the District Jail, Darjeeling. The only question that calls for consideration is whether the detention of the petitioner in the Central Jail, Visakhapatnam is legal or not. Even if we assume that grounds A and B are well founded and there was infirmity in the detention of the petitioner in the District Jail, Darjeeling, that cannot invalidate the subsequent detention of the petitioner in the Central Jail, Visakhapatnam. See para 7 of the judgment of this Court in B. R. Rao v. State of Orissa, (4). The legality of the detention of the petitioner in the Central Jail, Visakhapatnam would have to be judged on its own merits. We, therefore, consider it unnecessary to embark on a discussion of grounds A and B and decline to decide them."

19.6 In the present case, the petitioner filed the present bail application and it came up before this Court on 15th June, 2017. During the pendency of the said bail application when according to the petitioner no cognizance was taken by the learned Special Court on the supplementary complaint, the petitioner filed an application before this Court being Crl.M.A.12920/2017 seeking permission to file additional ground for bail inter alia that no cognizance having been

taken his custody was illegal which application was allowed on 11th August, 2017 in the presence of the counsel for the respondent followed by further application being Crl. M.A. No. 13800/2017 which came up before this Court on 25th August, 2017 inter alia urging that no order of remand in the eyes of law was passed on 11th August, 2017, the remand if any was beyond 15 days hence the custody of the petitioner was illegal which additional grounds were also allowed vide order dated 25th August, 2017 before the custody could be legalized on 31st August, 2017. Even the bail application in the present case was heard on 29th August, 2017, that is, the date before the custody of the petitioner became legal, hence the date of application, the date of return and the date of hearing were all at the time when the custody of the petitioner was illegal, hence the petitioner is entitled to be released on bail on this count itself.

20. Issue No.(v): Whether the petitioner is entitled to bail on merits?

20.1 Since this Court has already held that the petitioner is entitled to bail for being in illegal custody from 11th August, 2017 to 31st August, 2017 this Court need not go into the merits of the matter.

21. It is, therefore, directed that the petitioner be released on bail on his furnishing a personal bond in the sum of ₹1 lakh with two sureties of the like amount, subject to the satisfaction of the Special Court and further subject to the following conditions:

(i) The petitioner will surrender his passport to the investigating agency and will not leave the country without prior permission of the Special Judge, PMLA.

(ii) In case of change of residential address of the petitioner, the same will be intimated to the court concerned by way of an affidavit.

(iii) The petitioner will not contact any of the witnesses cited by the prosecution or in any manner interfere with the further investigation and/or fair progress of the trial.

22. Petition is disposed of.

(MUKTA GUPTA)
JUDGE

JANUARY 16, 2018
'vn'