2023:DHC:5059

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

% **Judgment reserved on: 09 May 2023**
Judgment pronounced on: 24 July 2023

\+ W.P.(C) 138/2021 & CM APPL. 421/2021 (Interim Relief), CM APPL. 37179/2022 (Direction)

PAYPAL PAYMENTS PRIVATE LIMITED ..... Petitioner

Through: Mr. Kapil Sibal and Mr. Sajan Poovayya, Sr. Adv. with Ms. Shally Bhasin Ms. Shreya Mukerjee, Mr. Prateek Gupta, Ms. Varshini Sudhinder and Mr. Palash Maheshwari, Advs.

versus

FINANCIAL INTELLIGENCE UNIT INDIA & ANR.
..... Respondents

Through: Mr. Zoheb Hossain, SSC with Mr. Vivek Gurnani and Ms. Farheen Penwale, Advs. for R-1
Mr. Parag P. Tripathi, Sr. Adv. with Mr. Ramesh Babu, M. R., Ms. Manisha Singh, Mr. Rohan Srivastava and Ms. Mishika Bajpai, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

J U D G M E N T

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A. PREFACE

1. **PayPal Payments Private Limited**[1], the petitioner impugns the order dated 17 December 2020 passed by the first respondent the **Financial Intelligence Unit India**[2] holding it to be a "reporting entity" under the **Prevention of Money Laundering Act 2002**[3] and consequently proceeding to impose monetary penalties for it having failed to comply with the reporting obligations as placed under the **Prevention of Money Laundering (Maintenance of Records) Rules 2005**[4]. PayPal asserts that it is not a "payment system operator" as defined under the PMLA and consequently it would be erroneous for FIU-IND to hold it to be a Reporting Entity. This is asserted on the basis of it not being engaged in rendering services relating to clearing, payment or provision of settlement between a payer and a beneficiary. It essentially avers that it merely provides a technological interface enabling export related transactions that may be undertaken by an Indian exporter and an overseas buyer. It is its categorical case that in

[1] PayPal
[2] FIU-IND
[3] PMLA
[4] 2005 Rules

the chain of transaction which ensues between the Indian exporter and an overseas buyer, PayPal is at no stage engaged in the actual handling of funds. According to it, the transmission of funds occurs between the constituent **Authorised Dealer Category-1 Schedule Commercial Banks**[5] which not only collect the amounts from the foreign purchaser directly and without any intervention of PayPal, the said funds are then transmitted to the AD Partner Bank's Export Collection Account. PayPal also relies upon the stand as struck by the **Reserve Bank of India**[6] which in separate proceedings had averred on affidavit that it is not a payment system operator. The petitioner seeks to derive advantage from the stand so taken by RBI in those proceedings since the definition of a "Payment System" under the **Payments and Settlements System Act 2007**[7] is identical to the provision embodied in the PMLA.

2. For the purposes of evaluating the challenge which stands raised, it would be apposite to notice the following essential facts. As per the disclosures made in the writ petition the officials of the petitioner are stated to have participated in a meeting with the Additional Director of the FIU-IND on 08 October 2017 where they had been invited to explain the scope and content of their business operations in India. The petitioner asserts that it had expressed its willingness to cooperate with the FIU-IND in that meeting and remains bound by that

[5] AD Banks
[6] RBI
[7] 2007 Act/PSS Act

obligation even today. On 16 March 2018 FIU-IND issued a communication directing PayPal to register itself as a reporting entity under the PMLA. FIU-IND further asserted that the business model of PayPal clearly established that it would fall within the definition of a reporting entity as embodied in Section 2(1)(wa) of the PMLA. FIU-IND alleged that despite the detailed clarifications that had been submitted by PayPal it was convinced that it was liable to register itself in accordance with the statutory obligations placed by the PMLA. Acknowledging the receipt of that letter, PayPal in terms of its communication of 06 April 2018 sought further time to respond. Ultimately and on 17 April 2018, it addressed a communication to FIU-IND asserting that it could not be treated as a reporting entity and that it was in any case not operating a payment system. It would be apposite to extract the following parts from the aforesaid communication hereinbelow:-

> "3. We would take this opportunity to bring to your kind notice that PayPal conducts the following businesses in India:
>
> a. Operates and provides domestic payment gateway services with Partnership with Scheduled Commercial Banks with nodal and card acquiring bank arrangements.
>
> b. Operates under RBI's Online Payment Gateway Service (OPGSP) guidelines and processes export related receipts from exporters in arrangement with AD Category - I Schedule commercial Bank.
>
> 4. RBI does not consider or regulate PayPal and similar companies as an operator of a "payment system" under the Payment System Services Act ("**PSS Act**") by virtue of PayPal providing payment intermediary services. Since the definition of "*payment system*" under the PMLA and the PSS Act is the same, therefore in our view, the same interpretation should also be

applied in case of the definition of a "payment system" under the PMLA, and Pay Pal should not be considered to be a "payment system operator" for the purposes of the PMLA.

5. Further, from our inquiries on the FIU registration process, we are not able to ascertain how payment intermediaries such as PayPal can register. For example, on the '**Reporting entity number**' (registration number or any number used in correspondence with the regulator). Since PayPal is not a regulated entity, we do not have any registration number or authorization letter directly from RBI which we use in correspondence with regulator nor we have any direct formal engagement with them. All formal interactions with RBI are made through the nodal, AD and acquiring banks only.

6. Additionally, we have been advised by an external law firm that payment intermediary companies such as **PayPal** should not be considered as a "*reporting entity*" (as defined in Section 2(wa) of the PMLA) and is therefore not required to comply with the requirements, conditions that are applicable to a "*reporting entity*" under the PMLA and the rules made thereunder.

Request

7. Based on all of the above, we believe that PayPal is not covered under the definition of a "*reporting entity*" under the PMLA and therefore at this time cannot register as such with the India FIU.

Despite this, we remain very open and eager to have further discussions with the FIU India to identify an alternative and mutually agreeable solution that supports the FIU and PayPal in our joint goals of disrupting and preventing financial crime.

8. Given the above, we kindly request that you grant us time to meet you in-person for us to seek further guidance and discuss the best possible way forward."

3. On 23 July 2019 FIU-IND issued a Show Cause Notice purporting to be under Section 13 of the PMLA addressed to PayPal and its six officers alleging non-compliance of Section 12 of the PMLA along with Rule 7 of the 2005 Rules. PayPal was in terms of the aforesaid notice called upon to show cause why suitable directions

be not issued against them including the imposition of penalties. Responding to the aforesaid show cause notice, PayPal on 08 August 2019 asserted as under:-

> "3. We would like to highlight that PayPal is not licensed as a '*payment system operator*' under the Payment and Settlement Systems Act, 2007 (the "**PSS Act**") and is not treated as a payment system operator by the Reserve Bank of India (the "**RBI**").
>
> 4. As we had set out in our letter to the FIU-IND dated 17 April 2018 (since when there has been no change in the in the business activity being conducted by PayPal), PayPal conducts the following businesses in India:
>
> a. Operates and provides domestic payment gateway services in partnership with Scheduled Commercial Banks with nodal and card acquiring bank arrangements in accordance with the "*Directions for Opening and Operation of Accounts and Settlement of Payments for Electronic Payment Transactions involving Intermediaries*" dated 24 November 2009 with reference number RBI/2009-10/231 DPSS.CO.PD.No.1102/02.14.08/2009-10 ("**Payment Intermediary Circular**") issued by the RBI.
>
> b. Operates under the regulatory framework set out in the circulars issued by the RBI applicable to Online Payment Gateway Service Providers ("**OPGSP**") and processes export related receipts from exporters in arrangement with an AD Category - 1 Schedule Commercial Bank.
>
> We request that the contents of our letter dated 17 April 2018 to the FIU-IND may be read as part of the present reply.
>
> 5. We would like to clarify that PayPal is classified as a payment intermediary and not a *'payment system operator'* under the rules and regulations issued by the RBI in this respect. A payment system intermediary, such as PayPal, is required to comply with the Payment Intermediary Circular which provides for a separate regime regulating the functioning of the payment system intermediaries.
>
> 6. PayPal's business in India of providing payment processing

services and facilitation of processing and settlement of import and export related payments is governed under the framework prescribed by the RBI-"*Processing and settlement of import and export related payments facilitated by Online Payment Gateway Service Providers*". While providing such services, PayPal operates as an OPGSP and is compliant with the applicable RBI regulatory framework.

7. It is submitted that the RBI does not consider or regulate PayPal as an operator of a "*payment system*" under the PSS Act by virtue of PayPal providing payment intermediary services.

Request

8. Based on what is stated above, we believe that payment intermediaries, such as PayPal, are not covered within the definition of a '*payment system operator'* or '*financial institution'* and in turn, not covered under the definition of a "*reporting entity*" under the PMLA. Therefore, at this time payment intermediaries, such as PayPal, are not required to register as such with the FIU-IND.

9.We wish to further submit that unless the PMLA and/or the applicable rules are amended in order to specifically include payment intermediaries, such as PayPal, within the definition of a '*payment system operator*', we sincerely request that FIU-IND not consider PayPal as a "*reporting entity*" required to register with the FIU-IND."

B. PA's AND OPGSP's- REGULATORY FRAMEWORK

4. As would be evident from the aforesaid extracts PayPal had reiterated the stand taken on earlier occasions by contending that it was not a payment system operator as defined under the PMLA and that payment intermediaries could not be said to be reporting entities under the enactment. It was PayPal's case further that till appropriate amendments are introduced in the PMLA as well as the 2005 Rules, it could not be forced to register as a reporting entity under the PMLA.

The said show cause notice was followed by, yet another notice issued by FIU-IND on 17 September 2019 reiterating that PayPal had failed to register as a reporting entity despite earlier communications issued and thus making it liable to face imposition of penalties by the FIU-IND. PayPal responded to the said show cause notice in terms of its letter of 11 October 2019. Apart from the various pleas which had been raised in its earlier communication, PayPal additionally averred that it was essentially an **Online Payment Gateway Service Provider**[8] and which business is governed and regulated solely by the various circulars issued by the RBI from time to time. It would be pertinent to note that with the tremendous growth of e-commerce and financial transactions being affected on the internet, RBI had firstly issued directions in respect of electronic and online payments on 24 November 2009. Those directions had been issued in exercise of powers conferred upon it by Section 18 of the 2007 Act. Dealing further with the subject of processing and settlement of import and export related payments facilitated specifically by OPGSPs, RBI had issued a subsequent circular dated 24 September 2015. This was in addition to the guidelines which had been circulated by RBI for regulation of Payment Aggregators and Payment Gateways on 17 March 2020. In order to understand the concept of **Payment Aggregators**[9] and OPGSPs it would be pertinent to firstly advert to

[8] OPGSP
[9] PA

the **Intermediary Directions issued on 24 November 2009** [10]and which defined intermediaries engaged in facilitating electronic and online payments. The said directions are reproduced hereinbelow: -

> **"Directions for opening and operation of Accounts and settlement of payments for electronic payment transactions involving intermediaries**
>
> **1. Introduction**
>
> 1.1 The use of Electronic/Online Payment modes for payments to merchants for goods and services like bill payments, online shopping etc. has been gaining popularity in the country. The increased facilitation by banks and prepaid payment instrument issuers of the use of electronic modes by customers for payments to merchants generally involves the use of intermediaries like aggregators and payment gateway service providers. Further, Electronic Commerce and Mobile Commerce (e-commerce and m-commerce) service providers have also been acting as intermediaries by providing platforms for facilitating such payments.
>
> 1.2 In most existing arrangements involving such intermediaries, the payments made by customers (for settlement of e-commerce/m-commerce/bill payment transactions), are credited to the accounts of these intermediaries, before the funds are transferred to the accounts of the merchants in final settlement of the obligations of the paying customers. Any delay in the transfer of the funds by the intermediaries to the merchants account will not only entail risks to the customers and the merchants but also impact the payment system.
>
> 1.3 With a view to safeguard the interests of the customers and to ensure that the payments made by them are duly accounted for by the intermediaries receiving such payments and remitted to the accounts of the merchants who have supplied the goods and services without undue delay, it is considered necessary to frame these directions for the safe and orderly conduct of these transactions. Accordingly, following directions are being issued under Section 18 of the Payment and Settlement Systems Act,

[10] Intermediary Directions

2007 (Act 51 of 2007).

2. Definitions

2.1 **Intermediaries:** Intermediaries would include all entities that collect monies received from customers for payment to merchants using any electronic/online payment mode, for goods and services availed by them and subsequently facilitate the transfer of these monies to the merchants in final settlement of the obligations of the paying customers.

Explanation: For the purpose of these directions, all intermediaries who facilitate delivery of goods/services immediately/simultaneously (e.g. Travel tickets/movie tickets etc) on the completion of payment by the customer shall not fall within the definition of the expression "intermediaries". These transactions which are akin to a Delivery versus Payment (DvP) arrangement will continue to be facilitated as per the contracts between the merchants and the intermediaries as hitherto and banks shall satisfy themselves that such intermediaries do not fall within the definition of the "intermediaries" when they open accounts other than internal accounts.

2.2 Merchants: For the purpose of these directions, merchants shall include all Electronic commerce/Mobile commerce service providers and other persons (including but not limited to utility service providers) who accept payments for goods and service provided by them, through Electronic/Online Payment modes.

3. Maintaining of accounts for collection of payments

3.1 All accounts opened and maintained by banks for facilitating collection of payments by intermediaries from customers of merchants, shall be treated as internal accounts of the banks. While it is left to the banks to decide on the exact nomenclature of such accounts it shall be ensured that such accounts are not maintained or operated by the intermediaries.

3.2 Banks shall ensure that the process of converting all the existing accounts maintained and operated by intermediaries for the purpose covered in these directions shall be completed within three months of issuance of these directions.

3.3 For the sake of further clarity, the permitted credits/debits in these accounts are set out below:

i. Credits

a) Payments from various persons towards purchase

of goods/services.

b) Transfers from other banks as per pre-determined agreement into the account, if this account is the nodal bank account for the intermediary.

c) Transfers representing refunds for failed/disputed transactions.

ii. Debits

a) Payments to various merchants/service providers.

b) Transfers to other banks as per pre-determined agreement into the account, if that account is the nodal bank account for the intermediary.

c) Transfers representing refunds for failed/disputed transactions.

d) Commissions to the intermediaries. These amounts shall be at predetermined rates/frequency.

Note: No payment other than the commissions at the pre-determined rates/frequency shall be payable to the intermediaries. Such transfers shall only be effected to a bank account intimated to the bank by the intermediary during the agreement.

3.4 Pending conversion of the existing accounts to internal accounts, banks shall ensure that only transactions as stated at paragraph 3.3 are permitted in these accounts. **This process shall be implemented with immediate effect.**

4. Settlement

4.1 The final settlements of funds to the merchants are presently guided by business practices followed by the intermediaries/merchants. In order to increase the efficiency of the payment process, it is necessary that banks transfer funds to the ultimate beneficiaries with minimum time delay. It is therefore mandated that banks shall implement the following settlement cycle for all final settlements to merchants. This settlement arrangement shall be implemented within three months of issuance of this circular:-

i. All payments to merchants which do not involve transfer of funds to nodal banks shall be effected within a maximum of T+2 settlement cycle (where T is defined as the day of intimation regarding the completion of

transaction).

ii. All payments to merchants involving nodal banks shall be effected within a maximum of T+3 settlement cycle.

5. Treatment of balances by banks

5.1 As the funds held in the accounts as indicated in paragraph 3.1 would be in the nature of outside liability of the bank, the balances in these accounts shall be reckoned as such for the purpose of computation of Net Demand and Time Liabilities of the bank.

6. Concurrent Audit

6.1 Banks shall subject these accounts to concurrent audit and a certificate to the effect that these accounts are operated in accordance with these directions shall be submitted to Department of Payment and Settlement System, Reserve Bank of India, on a quarterly basis.

7. Instruction applicable to other payment system operators

7.1 All persons authorized to operate payment system for issuance of prepaid payment instruments and card schemes shall facilitate compliance with these directions."

5. In terms of the circular of 24 September 2015, RBI permitted AD Category- I Banks to offer facilities similar to those as provided by OPGSPs by entering into standing arrangements with the latter. It becomes pertinent to note that the aforenoted circular was preceded by the circular dated 16 November 2010 which had permitted similar arrangements with respect to exports. The aforenoted two circulars thus enabled AD Category I Banks to enter into standing arrangements with OPGSPs both with respect to exports as well as imports. The relevant parts of the aforesaid circulars are extracted hereinbelow:-

Circular of 24 September 2015

"4. Export transactions

As already notified vide our A. P. (DIR Series) Circular No.109 dated June 11, 2013 and A.P. (DIR Series) Circular No. 17 dated November 16, 2010 referred to earlier:

(i) the facility shall only be available for export of goods and services (as permitted in the prevalent Foreign Trade Policy) of value not exceeding USD 10,000 (US Dollar ten thousand) per transaction.

(ii) AD Category-I banks providing such facilities shall open a NOSTRO collection account for receipt of the export related payments facilitated through such arrangements. Where the exporters availing of this facility are required to open notional accounts with the OPGSP, it shall be ensured that no funds are allowed to be retained in such accounts and all receipts should be automatically swept and pooled into the NOSTRO collection account opened by the AD Category-I bank.

(iii) The balances held in the NOSTRO collection account shall be repatriated to the Export Collection account in India and then credited to the respective exporter's account with a bank in India immediately on receipt of the confirmation from the importer and, in no case, later than seven days from the date of credit to the NOSTRO collection account.

(iv) The permitted debits to the OPGSP Export Collection account maintained in India will be:

a) payment to the respective Indian exporters' accounts;

b) payment of commission at rates/frequencies as defined under the contract to the current account of the OPGSP; and

c) charge back to the overseas importer where the Indian exporter has failed in discharging his obligations under the sale contract.

(v) The only credit permitted in the same OPGSP Export Collection account will be repatriation from the NOSTRO collection accounts electronically.

5. AD Category-I banks may bring the contents of this circular to the notice of their constituents and customers concerned.

6. The directions contained in this circular have been issued under Section 10 (4) and Section 11 (1) of the Foreign Exchange Management Act (FEMA), 1999 (42 of 1999) and are without prejudice to permissions / approvals, if any, required under any

other law."

Circular of 16 November 2010

"2. Accordingly, it has been decided to allow the Authorised Dealer Category- l (AD Category-l) banks to offer the facility of repatriation of export related remittances by entering into standing arrangements with OPGSPs, subject to the following conditions:

(i) The AD Category-I banks offering this facility shall carry out the due diligence of the OPGSP.

(ii) This facility shall only be available for export of goods and services of value not exceeding USD 500 (US Dollar five hundred).

(iii) AD Category-I banks providing such facilities shall open a NOSTRO collection account for receipt of the export related payments facilitated through such arrangements. Where the exporters availing of this facility are required to open notional accounts with the OPGSP, it shall be ensured that no funds are allowed to be retained in such accounts and all receipts should be automatically swept and pooled into the NOSTRO collection account opened by the AD Category-I bank.

(iv) A separate NOSTRO collection account may be maintained for each OPGSP or the bank should be able to delineate the transactions in the NOSTRO account of each OPGSP.

(v) The following debits will only be permitted to the NOSTRO collection account opened under this arrangement:

a) Repatriation of funds representing export proceeds to India for credit to the exporters' account;

(b) Payment of fee/commission to the OPGSP as per the predetermined rates / frequency/ arrangement; and

(c) Charge back to the importer where the exporter has failed in discharging his obligations under the sale contract.

(vi) The balances held in the NOSTRO collection account shall be repatriated and credited to the respective exporter's account with a bank in India immediately on receipt of the confirmation from the importer and, in no case, later than seven days from the date of credit to the NOSTRO collection account.

(vii) AD Category -I banks shall satisfy themselves as to the bonafides of the transactions and ensure that the purpose codes reported to the Reserve Bank in the online payment gateways are

appropriate.

(viii) AD Category -I banks shall submit all the relevant information relating to any transaction under this arrangement to the Reserve Bank, as and when advised to do so.

(ix) Each NOSTRO collection account should be subject to reconciliation and audit on a quarterly basis.

(x) Resolution of all payment related complaints of exporters in India shall remain the responsibility of the OPGSP concerned.

(xi) OPGSPs who are already providing such services as per the specific holding-on approvals issued by the Reserve Bank shall open a liaison office in India within three months from the date of this circular, after duly finalizing their arrangement with the AD-Category-I banks and obtaining approval from the Chief General Manager, Reserve Bank of India, Foreign Exchange Department, Central Office, Fort, Mumbai 400 001 for this purpose.

In respect of all new arrangements, the OPGSP shall open a liaison office with the approval of the Reserve Bank before operationalising the arrangement.

3. AD Category-I banks desirous of entering into such an arrangement/s should approach the Chief General Manager, Reserve Bank of India, Foreign Exchange Department, Central Office, Fort, Mumbai 400 001, for obtaining one time permission in this regard and thereafter report the details of each such arrangement as and when entered into.

4. AD Category-I banks may bring the contents of this circular to the notice of their constituents concerned.

5. The directions contained in the circular have been issued under Section 10(4) and Section 11(1) of the Foreign Exchange Management Act, 1999 (42 of 1999) and are without prejudice to permissions / approvals, if any required under any law."

6. The 17 March 2020 circular of RBI essentially framed Guidelines for Regulation of Payment Aggregators and Payment Gateways. It defined the two in the following terms:-

"1. **Definitions**

1.1. For the purpose of this circular, the PAs and PGs are defined as under:

1.1.1. PAs are entities that facilitate e-commerce sites and merchants to accept various payment instruments from the customers for completion of their payment obligations without the need for merchants to create a separate payment integration system of their own. PAs facilitate merchants to connect with acquirers. In the process, they receive payments from customers, pool and transfer them on to the merchants after a time period.

1.1.2. PGs are entities that provide technology infrastructure to route and facilitate processing of an online payment transaction without any involvement in handling of funds.

1.2. In the processing of an online transaction the following timelines are involved:

• '*Tp*' – date of charge / debit to the customer's account against the purchase of goods / services.

• '*Ts*' – date of intimation by the merchant to the intermediary about shipment of goods.

• '*Td*' – date of confirmation by the merchant to the intermediary about delivery of goods to the customer.

• '*Tr*' – date of expiry of refund period as fixed by the merchant."

7. In terms of Clause 2.1, RBI clarified that while the guidelines would be applicable to PAs, Payment Gateways may "*as a measure of good practice*" also adhere to the technology related recommendations as embodied therein. In terms of Clause 3 it placed non-banking PAs under the obligation to obtain appropriate authorisation from RBI under the 2007 Act. Payment Gateways however were not placed under that obligation with it being observed that they were essentially 'technology providers' or 'outsourcing partners' of banks and would thus be bound by the guidelines contained in the 3 November 2006 Circular which essentially dealt with the management of risks and

code of conduct to be observed by banks in course of outsourcing of financial services. It proceeded to thereafter set out various baseline requirements which PAs were required to adhere to. These were contained in Clauses 4, 5, 6, 7 & 8 of that circular and the same are extracted hereunder:-

> "**4. Capital Requirements**
>
> 4.1. PAs existing as on the date of this circular shall achieve a net worth of ₹15 crore by March 31, 2021 and a net-worth of ₹25 crore by the end of third financial year, i.e., on or before March 31, 2023. The net-worth of ₹25 crore shall be maintained at all times thereafter.
>
> 4.2. New PAs shall have a minimum net-worth of ₹15 crore at the time of application for authorization and shall attain a net-worth of ₹25 crore by the end of third financial year of grant of authorisation. The net-worth of ₹25 crore shall be maintained at all times thereafter.
>
> 4.4. Net-worth shall consist of paid-up equity capital, preference shares that are compulsorily convertible to equity, free reserves, balance in share premium account and capital reserves representing surplus arising out of sale proceeds of assets but not reserves created by revaluation of assets adjusted for accumulated loss balance, book value of intangible assets and deferred revenue expenditure, if any. Compulsorily convertible preference shares can be either non-cumulative or cumulative, and they should be compulsorily convertible into equity shares and the shareholder agreements should specifically prohibit any withdrawal of this preference capital at any time.
>
> 4.5. Entities having Foreign Direct Investment (FDI) shall be guided by the Consolidated Foreign Direct Investment policy of the Government of India and the relevant foreign exchange management regulations on this subject.
>
> 4.6. PAs shall submit a certificate in the enclosed format from their Chartered Accountants (CA) to evidence compliance with the applicable net-worth requirement while submitting the application for authorisation. Newly incorporated non-bank entities which may not have an audited statement of financial accounts shall submit a certificate in the enclosed format from

their Chartered Accountants regarding the current net-worth along with provisional balance sheet.

4.7. PAs that are not able to comply with the net-worth requirement within the stipulated time frame (as given at clauses 4.1 & 4.2) shall wind-up payment aggregation business. The banks maintaining nodal / escrow accounts of such entities shall monitor and report compliance in this regard.

5. Governance

5.1. PAs shall be professionally managed. The promoters of the entity shall satisfy the fit and proper criteria prescribed by RBI. The directors of the applicant entity shall submit a declaration in the enclosed format. RBI shall also check 'fit and proper' status of the applicant entity and management by obtaining inputs from other regulators, government departments, etc., as deemed fit. Applications of those entities not meeting the eligibility criteria, or those which are incomplete / not in the prescribed form with all details, shall be returned.

5.2. Any takeover or acquisition of control or change in management of a non-bank PA shall be communicated by way of a letter to the Chief General Manager, Department of Payment and Settlement Systems (DPSS), RBI, Central Office, Mumbai within 15 days with complete details, including 'Declaration and Undertaking' by each of the new directors, if any. RBI shall examine the 'fit and proper' status of the management and, if required, may place suitable restrictions on

such changes.

5.3. Agreements between PAs, merchants, acquiring banks, and all other stake holders shall clearly delineate the roles and responsibilities of the involved parties in sorting / handling complaints, refund / failed transactions, return policy, customer grievance redressal (including turnaround time for resolving queries), dispute resolution mechanism, reconciliation, etc.

5.4. PAs shall disclose comprehensive information regarding merchant policies, customer grievances, privacy policy and other terms and conditions on the website and / or their mobile application.

5.5. PAs shall have a Board approved policy for disposal of complaints / dispute resolution mechanism / time-lines for processing refunds, etc., in such a manner that the RBI instructions on Turn Around Time (TAT) for resolution of failed

transactions issued vide DPSS.CO.PD No.629/02.01.014/2019-20 dated September 20, 2019 are adequately taken care of. Any future instructions in this regard shall also be adhered to by PAs.

5.6. PAs shall appoint a Nodal Officer responsible for regulatory and customer grievance handling functions. PAs shall prominently display details of the nodal officer on their website.

6. Safeguards against Money Laundering (KYC / AML / CFT) Provisions

6.1. The Know Your Customer (KYC) / Anti-Money Laundering (AML) / Combating Financing of Terrorism (CFT) guidelines issued by the Department of Regulation, RBI, in their "Master Direction – Know Your Customer (KYC) Directions" updated from time to time, shall apply mutatis mutandis to all entities.

6.2. Provisions of Prevention of Money Laundering Act, 2002 and Rules framed thereunder, as amended from time to time, shall also be applicable.

7. Merchant On-boarding

7.1. PAs shall have a Board approved policy for merchant on-boarding.

7.2. PAs shall undertake background and antecedent check of the merchants, to ensure that such merchants do not have any malafide intention of duping customers, do not sell fake / counterfeit/ prohibited products, etc. The merchant's website shall clearly indicate the terms and conditions

of the service and time-line for processing returns and refunds.

7.3. PAs shall be responsible to check Payment Card Industry-Data Security Standard (PCI-DSS) and Payment Application-Data Security Standard (PA-DSS) compliance of the infrastructure of

the merchants on-boarded.

7.4. Merchant site shall not save customer card and such related data. A security audit of the merchant may be carried out to check compliance, as and when required.

7.5. Agreement with merchant shall have provision for security / privacy of customer data. Pas agreement with merchants shall include compliance to PA-DSS and incident reporting obligations. The PAs shall obtain periodic security assessment reports either based on the risk assessment (large or small merchants) and / or at the time of renewal of contracts.

8. Settlement and Escrow Account Management

8.1. Non-bank PAs shall maintain the amount collected by them in an escrow account with any scheduled commercial bank. An additional escrow account may be maintained with a different scheduled commercial bank at the discretion of the PA. For the purpose of maintenance of escrow account, operations of PAs shall be deemed to be 'designated payment systems' under Section 23A of the PSSA (as amended in 2015).

8.2. In case there is a need to shift the escrow account from one bank to another, the same shall be effected in a time-bound manner without impacting the payment cycle to merchants, under advice to RBI.

8.3. Amounts deducted from the customer's account shall be remitted to the escrow account maintaining bank on Tp+0 / Tp+1 basis. The same rules shall apply to the non-bank entities where wallets are used as a payment instrument.

8.4. Final settlement with the merchant by the PA shall be effected as under:

> 8.4.1. Where PA is responsible for delivery of goods / services the payment to the merchant shall be not later than on Ts + 1 basis.
>
> 8.4.2. Where merchant is responsible for delivery, the payment to the merchant shall be not later than on Td + 1 basis.
>
> 8.4.3. Where the agreement with the merchant provides for keeping the amount by the PA till expiry of refund period, the payment to the merchant shall be not later than on Tr + 1 basis.

8.5. Credits towards reversed transactions (where funds are received by PA) and refund transactions shall be routed back through the escrow account unless as per contract the refund is directly managed by the merchant and the customer has been made aware of the same.

8.6. At the end of the day, the amount in escrow account shall not be less than the amount already collected from customer as per 'Tp' or the amount due to the merchant.

8.7. PAs shall be permitted to pre-fund the escrow account with own / merchant's funds. However, in the latter scenario, merchant's beneficial interest shall be created on the pre-funded portion.

8.8. The escrow account shall not be operated for 'Cash-on-Delivery' transactions.

8.9. Permitted credits / debits to the escrow account shall be as set out below; where an additional escrow account is maintained, credit and debit from one escrow account to the other shall also be permitted. However, inter-escrow transfers should be avoided as far as possible and if resorted to, auditor's certification shall clearly mention such transactions.

8.9.1.1. Credits

a) Payment from various customers towards purchase of goods / services.

b) Pre-funding by merchants / PAs.

c) Transfer representing refunds for failed / disputed / returned / cancelled transactions.

d) Payment received for onward transfer to merchants under promotional activities, incentives, cash-backs etc.

8.9.1.2. Debits

a) Payment to various merchants / service providers.

b) Payment to any other account on specific directions from the merchant.

c) Transfer representing refunds for failed / disputed transactions.

d) Payment of commission to the intermediaries. This amount shall be at pre-determined rates / frequency.

e) Payment of amount received under promotional activities, incentives, cash-backs, etc.

8.10. For banks the outstanding balance in the escrow account shall be part of the 'net demand and time liabilities' (NDTL) for the purpose of maintenance of reserve requirements. This position shall

be computed on the basis of the balances appearing in the books of the bank as on the date of reporting.

8.11. The entity and the escrow account banker shall be responsible for compliance with RBI instructions issued from time to time. The decision of RBI in this regard shall be final and binding.

8.12. Settlement of funds with merchants shall not be co-mingled with other business, if any, handled by the PA.

8.13. A certificate signed by the auditor(s), shall be submitted by the authorised entities to the respective Regional Office of DPSS, RBI, where registered office of PA is situated, certifying that the entity has been maintaining balance(s) in the escrow account(s) in compliance with these instructions, as per periodicity prescribed in Annex 3. In case, an additional escrow account is being maintained, it shall be ensured that balances in both accounts are considered for the above certification. This shall also be indicated in the certificate. The same auditor shall be employed to audit both escrow accounts.

8.14. PAs shall submit the list of merchants acquired by them to the bank where they are maintaining the escrow account and update the same from time to time. The bank shall ensure that payments are made only to eligible merchants / purposes. There shall be an exclusive clause in the agreement signed between the PA and the bank maintaining escrow account towards usage of balance in escrow account only for the purposes mentioned above.

8.15. No interest shall be payable by the bank on balances maintained in the escrow account, except when the PA enters into an agreement with the bank maintaining the escrow account, to transfer "core portion" of the amount, in the escrow account, to a separate account on which interest is payable, subject to the following:

> 8.15.1. The bank shall satisfy itself that the amount deposited represents the "core portion" after due verification of necessary documents.
>
> 8.15.2. The amount shall be linked to the escrow account, i.e. the amounts held in the interest-bearing account shall be available to the bank, to meet payment requirements of the entity, in case of any shortfall in the escrow account.

> 8.15.3. This facility shall be permissible to entities who have been in business for 26 fortnights and whose accounts have been duly audited for the full accounting year. For this purpose, the period of 26 fortnights shall be calculated from the actual business operation in the account.
>
> 8.15.4. No loan is permissible against such deposits. Banks shall not issue any deposit receipts or mark any lien on the amount held in such form of deposits.
>
> 8.15.5. The core portion shall be calculated separately for each of the escrow accounts and will remain linked to the respective escrow account. The escrow balance and core portion maintained shall be clearly disclosed in the auditors' certificates submitted to RBI on quarterly and annual basis.
>
> **Note:** For the purpose of this regulation, "Core Portion" shall be computed as under:
>
> Step 1: Compute lowest daily outstanding balance (LB) in the escrow account on a fortnightly (FN) basis, for 26 fortnights from the preceding month.
>
> Step 2: Calculate the average of the lowest fortnightly outstanding balances [(LB1 of FN1+ LB2 of FN2+ .....+ LB26 of FN26) divided by 26].
>
> Step 3: The average balance so computed represents the "Core Portion" eligible to earn interest."

C. ESSENTIAL FACTS

8. Reverting then to the facts of the present case FIU-IND is stated to have granted an opportunity of personal hearing to PayPal in terms of its letter of 21 November 2019 and invited it to make a presentation before it on 09 December 2019. After the aforesaid meeting PayPal filed detailed written submissions dated 20.12.2019. Apart from the contentions which it raised in that letter, PayPal also submitted a draft on possible information sharing approaches vide a separate email of

20 December 2019, relevant parts whereof are extracted hereinbelow:-

> **"Approach 1 - PayPal can continue to share information on an ad-hoc basis.** In 2019, FIU-India raised 2 requests with PayPal and in both cases, information was shared with FIU-India within 48 hours of the request being raised. The requests were received by PayPal *via* email.
>
> To further enhance this approach, FIU-India can utilize PayPal SafetyHub (a PayPal law enforcement information sharing platform) which will enable FIU-India officers to raise a request and receive the information from PayPal. PayPal will be able to provide on-site guidance to FIU-India officers on the registration steps for PayPal SafetyHub. Alternatively, FIU-India can reach out to the PayPal Investigations team which is focused on Asia-Pacific (APAC) law enforcement requests through asiapacificpolice@paypal.com.
>
> PayPal and FIU-India can mutually agree to a turnaround time for ad-hoc request(s) raised by FIU-India.
>
> **Approach 2 - PayPal can explore sharing of Indian account related Suspicions Transaction Reports which are filed to the Financial Crimes Enforcement Network (FinCEN) in the United States of America** where PayPal Inc is registered as a Money Service Business. If this approach is feasible, then the information would need to be shared with FIU-India through an encrypted and secured file sharing mechanism.
>
> **Approach 3- PayPal can explore sharing of additional information with partner banks**. FIU-India could share a list of Banks with whom additional information needs to be shared. PayPal will then engage with the Banks to determine how the information can be shared which will then be shared with FIU-India."

9. The draft is stated to have been discussed between the officers of the petitioner and FIU-IND on 28 February 2020. On 10 June 2020 FIU-IND addressed yet another letter to PayPal wherein it reiterated its perceived obligation of the petitioner to register as a reporting entity. While doing so it also referred to the guidelines promulgated

by RBI regulating payment aggregators and payment gateways which have been referred to hereinabove. On 21 August 2020, the petitioner addressed a letter to FIU-IND indicating its intent to cease all domestic operation as a payment intermediary with effect from 01 April 2021. On 17 December 2020, the impugned order came to be passed. On 12 January 2021 after considering detailed submissions addressed by respective sides, a learned Judge of this Court framed the following directions: -

> "11. The stand of the RBI in the affidavit referred above appears to be in contrast with the view taken in the impugned order. The RBI and Union of India ought to take a clear stand after due consultation as to whether they consider platforms such as that of the Petitioners as being within the purview of the PML Act. Accordingly, the Secretary, Ministry of Finance, is directed to constitute a Committee with a nominee of the RBI and the Ministry of Finance, to clarify their position as to whether companies like the Petitioners who claim to , be facilitators of monetary transactions, both in foreign exchange and in Indian Rupees, ought to be categorised as "payment system operators" and hence "reporting entities" under the PML Act. Let the Committee meet within ten days and the conclusion of the Committee be filed, by way of an affidavit, within two weeks thereafter.
>
> 12. In the meantime, the following directions are issued:
>
> i. The Petitioner shall, henceforth, maintain records of all transactions under Section 12(l)(a) of the PML Act, in electronic form on a secure server, located in India, for the same to be retrieved, if required, subject to further orders in this writ petition.
>
> ii. The Petitioner shall furnish a bank guarantee, to the satisfaction of the Registrar General of this Court, for a sum of Rs.96 lakhs. The said bank guarantee shall be deposited within two weeks.
>
> iii. The Managing Director of the Petitioner Company shall furnish an undertaking to the Court to the effect that

> it would abide by any orders that may be passed in this petition, including furnishing of data (irrespective of where the servers are located), as may be required by a reporting entity under Section 12 of the PML Act, if the Petitioner is unsuccessful in this petition. The said affidavit of undertaking be filed within two weeks by the Petitioner."

10. As would be evident from the aforesaid directions, the Court had called upon the Secretary in the Ministry of Finance to constitute a Committee which may examine the issue as to whether facilitators of monetary transactions ought to be categorised as Payment System Operators and thus be held to be reporting entities under the PMLA. The said Committee after according an opportunity to parties to address submissions has ultimately submitted a report which stands placed on the record. In terms of the ultimate conclusions as so recorded it has essentially held that entities like PayPal should be held to be covered under the PMLA and that they are liable to be categorised as payment system operators. The Conclusions as formally recorded by the Committee are extracted hereinbelow:-

> "**Conclusion**
>
> 11. Entities like PayPal are very much covered under the definition of Payment System Operator under PMLA. The definition of Payment System Operator in PMLA is a standalone definition and not linked with PSS Act. Non-requirement of registration of PayPal and similar entities with RBI under PSS Act does not preclude them from registering with FIU India under PMLA and discharging their Anti-Money Laundering and Countering financing of Terrorism (AML/CFT) obligations under PMLA. It is the mandate of Ministry of Finance, Government of India to implement PMLA and discussions in the Committee clearly point towards the intention of legislature in making PMLA definitions oriented towards covering ML/TF risks. There is a

continued very high ML/TF risk in not covering PayPal and similar entities under PMLA. RBI concurs with the view of the Committee that the interpretation of "payment system" / "payment system operator" definitions in PMLA is the sole mandate of Ministry of Finance.

12. Having discussed all the issues at hand as per the mandate in the order of Hon'ble High Court of Delhi, answers to the two main questions posed by the Hon'ble High Court are unanimously and categorically decided and are as follows:

(i) Yes, Government of India considers entities such as that of the petitioners as being covered within the purview of the Prevention of Money Laundering Act, 2002.

(ii) Yes, companies like PayPal, who claim to be facilitators of monetary transactions, both in foreign exchange and in Indian Rupee, are categorised as "payment system operators" and hence "reporting entities" under the PML Act."

D. PSS ACT & PMLA- THE STATUTORY STRUCTURE

11. In order to appreciate the submissions which were addressed by learned senior counsels appearing for respective sides, it would be apposite to firstly notice the relevant statutory provisions. The 2007 Act seeks to regulate and supervise payment systems in India and designates RBI to be the nodal agency for all matters connected therewith. The expression "*electronic fund transfer*" is defined in Section 2(1)(c) as under: -

> "(c) "electronic funds transfer" means any transfer of funds which is initiated by a person by way of instruction, authorisation or order to a bank to debit or credit an account maintained with that bank through electronic means and includes point of sale transfers, automated teller machine transactions, direct deposits or withdrawal of funds, transfers initiated by telephone, internet and card payment."

12. Section 2(1)(d) defines a "*gross settlement system*" as follows:-

> "(d) "gross settlement system" means a payment system in which each settlement of funds or securities occurs on the basis of separate or individual instructions;"

13. The word "*netting"* is defined in Section 2(1)(e) in the following terms:-

> (e) "netting" means the determination by the system provider of the amount of money or securities, due or payable or deliverable, as a result of setting off or adjusting, the payment obligations or delivery obligations among the system participants, including the claims and obligations arising out of the termination by the system provider, on the insolvency or dissolution or winding up of any system participant or such other circumstances as the system provider may specify in its rules or regulations or bye-laws (by whatever name called), of the transactions admitted for settlement at a future date so that only a net claim be demanded or a net obligation be owned;"

14. "*Payment system"* is defined in Section 2(1)(i) as follows:-

> "(i) "payment system" means a system that enables payment to be effected between a payer and a beneficiary, involving clearing, payment or settlement service or all of them, but does not include a stock exchange."

15. Section 2(1)(n) defines "*settlement"* as under:-

> (n) "settlement" means settlement of payment instructions and includes the settlement of securities, foreign exchange or derivatives or other transactions which involve payment obligations;"

16. A "*system provider"* is defined in Section 2(1)(q) in the following terms:-

> "(q) "system provider" means a person who operates an authorised payment system;"

17. Section 4 prohibits any person from operating a payment system

without an authorisation from the RBI. That provision reads thus:-

> "4. **Payment system not to operate without authorisation**.—(1) No person, other than the Reserve Bank, shall commence or operate a payment system except under and in accordance with an authorisation issued by the Reserve Bank under the provisions of this Act:
>
> Provided that nothing contained in this section shall apply to—
>
> (a) the continued operation of an existing payment system on commencement of this Act for a period not exceeding six months from such commencement, unless within such period, the operator of such payment system obtains an authorisation under this Act or the application for authorisation made under section 7 of this Act is refused by the Reserve Bank;
>
> (b) any person acting as the duly appointed agent of another person to whom the payment is due;
>
> (c) a company accepting payments either from its holding company or any of its subsidiary companies or from any other company which is also a subsidiary of the same holding company;
>
> (d) any other person whom the Reserve Bank may, after considering the interests of monetary policy or efficient operation of payment systems, the size of any payment system or for any other reason, by notification, exempt from the provisions of this section.
>
> (2) The Reserve Bank may, under sub-section (1) of this section, authorise a company or corporation to operate or regulate the existing clearing houses or new clearing houses of banks in order to have a common retail clearing house system for the banks throughout the country:
>
> Provided, however, that not less than fifty-one per cent. of the equity of such company or corporation shall be held by public sector banks.
>
> *Explanation*.—For the purposes of this clause, "public sector banks" shall include a "corresponding new bank", "State Bank of India" and "subsidiary bank" as defined in section 5 of the Banking Regulation Act, 1949 (10 of 1949)."

18. In terms of Chapter IV of the 2007 Act, RBI is conferred the

power to regulate and supervise payment systems generally. Section 16 confers RBI with the authority to carry out audit and inspection of a payment system operator. The said provision reads as follows:-

> "16. **Power to carry out audit and inspection**.—The Reserve Bank may, for the purpose of carrying out its functions under this Act, conduct or get conducted audits and inspections of a payment system or participants thereof and it shall be the duty of the system provider and the system participants to assist the Reserve Bank to carry out such audit or inspection, as the case may be."

19. Sections 17 and 18 confer a power on RBI to issue directions either to a payment system operator specifically or generally in respect of payment system operators. The said provisions reads thus: -

> "17. **Power to issue directions**.—Where the Reserve Bank is of the opinion that,—
>
> (a) a payment system or a system participant is engaging in, or is about to engage in, any act, omission or course of conduct that results, or is likely to result, in systemic risk being inadequately controlled; or
>
> (b) any action under clause (a) is likely to affect the payment system, the monetary policy or the credit policy of the country,
>
> the Reserve Bank may issue directions in writing to such payment system or system participant requiring it, within such time as the Reserve Bank may specify—
>
> (i) to cease and desist from engaging in the act, omission or course of conduct or to ensure the system participants to cease and desist from the act, omission or course of conduct; or
>
> (ii) to perform such acts as may be necessary, in the opinion of the Reserve Bank, to remedy the situation.
>
> **18. Power of Reserve Bank to give directions generally**.—Without prejudice to the provisions of the foregoing, the Reserve Bank may, if it is satisfied that for the purpose of enabling it to regulate the payment systems or in the interest of management or

operation of any of the payment systems or in public interest, it is necessary so to do, lay down policies relating to the regulation of payment systems including electronic, non-electronic, domestic and international payment systems affecting domestic transactions and give such directions in writing as it may consider necessary to system providers or the system participants or any other person either generally or to any such agency and in particular, pertaining to the conduct of business relating to payment systems."

20. Section 23 which deals with the subject of settlement and netting reads as under:-

"**23**. **Settlement and netting**.—(1) The payment obligations and settlement instructions among the system participants shall be determined in accordance with the gross or netting procedure, as the case maybe, approved by the Reserve Bank while issuing authorisation to a payment system under section 7, or, such gross or netting procedure as may be approved by it under any other provisions of this Act.

(2) Where the rules providing for the operation of a payment system indicates a procedure for the distribution of losses between the system participants and the payment system, such procedure shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force.

(3) A settlement effected under such procedure shall be final and irrevocable.

(4) Where, by an order of a court, Tribunal or authority—

(a) a system participant is declared as insolvent or is dissolved or wound up; or

(b) a liquidator or receiver or assignee (by whatever name called), whether provisional or otherwise, is appointed in a proceeding relating to insolvency or dissolution or winding up of a system participant,

then, notwithstanding anything contained in the Banking Regulation Act, 1949 (10 of 1949) or the Companies Act, 1956 (1 of 1956) or the Companies Act, 2013 (18 of 2013) **3** [or the Insolvency and Bankruptcy Code, 2016] or any other law for the time being in force, such order shall not affect any settlement that has become final and irrevocable prior to such order or

immediately thereafter, and the right of the system provider to appropriate any collaterals contributed by the system participants towards its settlement or other obligations in accordance with the rules, regulations or bye-laws relating to such system provider.]

(5) Where an order referred to in sub-section (4) is made with respect to a central counter party, then, notwithstanding such order or anything contained in the Banking Regulation Act, 1949 (10 of 1949) or the Companies Act, 1956 (1 of 1956) or the Companies Act, 2013 (18 of 2013) or the Insolvency and Bankruptcy Code, 2016 or any other law for the time being in force, the payment obligations and settlement instructions between the central counter party and the system participants including those arising from transactions admitted for settlement at a future date, shall be determined forthwith by such central counter party in accordance with the gross or netting procedure, as the case may be, approved by the Reserve Bank, while issuing authorisation or under any other provisions of this Act, and such determination shall be final and irrevocable.

(6) Notwithstanding anything contained in the Banking Regulation Act, 1949 (10 of 1949) or the Companies Act, 1956 (1 of 1956) or the Companies Act, 2013 (18 of 2013) or the Insolvency and Bankruptcy Code, 2016 or any other law for the time being in force, the liquidator or receiver or assignee (by whatever name called) of the central counter party, whether appointed as provisional or otherwise, shall—

(a) not re-open any determination that has become final and irrevocable;

(b) after appropriating in accordance with the rules, regulations or bye-laws of the central counter party, the collaterals provided by the system participants towards their settlement or other obligations, return the collaterals held in excess to the system participants concerned.

Explanation1.—For the removal of doubts, it is hereby declared that the settlement, whether gross or net, referred to in this section is final and irrevocable as soon as the money, securities, foreign exchange or derivatives or other transactions payable as a result of such settlement is determined, whether or not such money, securities or foreign exchange or derivatives or other transactions is actually paid.

Explanation 2.—For the purposes of this section, the expression "central counter party" means a system provider who by way of novation interposes between system participants in the transactions admitted for settlement, thereby becoming the buyer to every seller and the seller to every buyer, for the purpose of effecting settlement of their transactions."

21. Section 23A makes provisions for the protection of funds collected from customers and is extracted hereunder: -

"**23A. Protection of funds collected from customers**.—(1) The Reserve Bank may, in public interest or in the interest of the customers of designated payment systems or to prevent the affairs of such designated payment system from being conducted in a manner prejudicial to the interests of its customers, require system provider of such payment system to—

(a) deposit and keep deposited in a separate account or accounts held in a scheduled commercial bank; or

(b) maintain liquid assets in such manner and form as it may specify from time to time,

of an amount equal to such percentage of the amounts collected by the system provider of designated payment system from its customers and remaining outstanding, as maybe specified by the Reserve Bank from time to time:

Provided that the Reserve Bank may specify different percentages and the manner and forms for different categories of designated payment systems.

(2) The balance held in the account or accounts, referred to in sub-section (1), shall not be utilised for any purpose other than for discharging the liabilities arising on account of the usage of the payment service by the customers or for repaying to the customers or for such other purpose as may be specified by the Reserve Bank from time to time.

(3) Notwithstanding anything contained in the Banking Regulation Act, 1949 (10 of 1949), or the Companies Act, 1956 (1 of 1956) or the Companies Act, 2013 (18 of 2013) or the Insolvency and Bankruptcy Code, 2016 or any other law for the time being in force, the persons entitled to receive payment under sub-section (2) shall have a first and paramount charge on the balance held in that account and the liquidator or receiver or

assignee (by whatever name called) of the system provider of the designated payment system or the scheduled commercial bank concerned, whether appointed as provisional or otherwise, shall not utilise the said balances for any other purposes until all such persons are paid in full or adequate provision is made therefor.

Explanation.—For the purposes of this section, the expressions—

(a) "designated payment system" shall mean a payment system or a class of payment system, as may be specified by the Reserve Bank from time to time, engaged in collection of funds from their customers for rendering payment service;

"scheduled commercial bank" shall mean a "banking company", "corresponding new bank", "State Bank of India" and "subsidiary bank" as defined in section 5 of the Banking Regulation Act, 1949 (10 of 1949) and included in the Second Schedule to the Reserve Bank of India Act,1934 (1 of 1934)."

22. A "*reporting entity*" is defined under section 2(1)(wa) of the PMLA in the following terms:-

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

23. The expression "*financial institution*" is defined in Section 2(1)(l) as follows:-

"(l) **"financial institution"** means a financial institution as defined in clause (c) of section 45-1 of the Reserve Bank of India Act, 1934 (2 of 1934) and includes a chit fund company, a housing finance institution, an authorised person, a payment system operator, a non-banking financial company and the Department of Posts in the Government of India;"

24. The word "*intermediary*" is defined by Section 2(1)(n) as under:-

"(n) **"intermediary" means"** ,—

(i) a stock-broker, share transfer agent, banker to an issue, trustee to a trust deed, registrar to an issue, merchant banker,

> underwriter, portfolio manager, investment adviser or any other intermediary associated with securities market and registered under section 12 of the Securities and Exchange Board of India Act, 1992 (15 of 1992); or
>
> (ii) an association recognised or registered under the Forward Contracts (Regulation) Act, 1952 (74 of 1952) or any member of such association; or
>
> (iii) intermediary registered by the Pension Fund Regulatory and Development Authority; or
>
> *(iv)* a recognised stock exchange referred to in clause (f) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956);"

25. Undisputedly PayPal can neither be said to be a banking company nor would it fall within the ambit of the expression "*intermediary*" as defined. The expression "*financial institution*", however, which stands included in the definition of reporting entity leads one to the heart of the issue which stands raised in the present petition. It is the case of the respondents that PayPal is a payment system operator and thus a reporting entity. The expressions "*payment system*" and "*payment system operator*" are defined by Section 2(1)(rb) and (rc) and are reproduced hereinbelow:-

> "(rb) **"payment system"** means a system that enables payment to be effected between a payer and a beneficiary, involving clearing, payment or settlement service or all of them.
>
> *Explanation*.—For the purposes of this clause, "payment system" includes the systems enabling credit card operations, debit card operations, smart card operations, money transfer operations or similar operations;
>
> (rc) **"payment system operator"** means a person who operates a payment system and such person includes his overseas principal.
>
> *Explanation*.—For the purposes of this clause, "overseas principal" means,—

(A) in the case of a person, being an individual, such individual residing outside India, who owns or controls or manages, directly or indirectly, the activities or functions of payment system in India;

(B) in the case of a Hindu undivided family, Karta of such Hindu undivided family residing outside India who owns or controls or manages, directly or indirectly, the activities or functions of payment system in India;

(C) in the case of a company, a firm, an association of persons, a body of individuals, an artificial juridical person, whether incorporated or not, such company, firm, association of persons, body of individuals, artificial juridical person incorporated or registered outside India or existing as such and which owns or controls or manages, directly or indirectly, the activities or functions of payment system in India;"

26. Chapter IV of the PMLA lays down the obligations of banking companies, financial institutions and intermediaries. Section 12 of the Act reads as under:-

"12. **Reporting entity to maintain records.**— (1) Every reporting entity shall—

(a) maintain a record of all transactions, including information relating to transactions covered under clause (b), in such manner as to enable it to reconstruct individual transactions;

(b) furnish to the Director within such time as may be prescribed, information relating to such transactions, whether attempted or executed, the nature and value of which may be prescribed;

(c) ***

(d) ***

(e) maintain record of documents evidencing identity of its clients and beneficial owners as well as account files and business correspondence relating to its clients."

27. In terms of Section 12A, the Director is empowered to call upon

any reporting entity to furnish records referred to in Section 11A, 12 and 12AA. Section 11A reads thus:-

> **"11A. Verification of Identity by Reporting Entity**.—(1) Every Reporting Entity shall verify the identity of its clients and the beneficial owner, by—
>
> (a) authentication under the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (18 of 2016) if the reporting entity is a banking company; or
>
> (b) offline verification under the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (18 of 2016); or
>
> (c) use of passport issued under section 4 of the Passports Act, 1967 (15 of 1967); or
>
> (d) use of any other officially valid document or modes of identification as may be notified by the Central Government in this behalf:
>
> Provided that the Central Government may, if satisfied that a reporting entity other than banking company, complies with such the standards of privacy and security under the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (18 of 2016), and it is necessary and expedient to do so, by notification, permit such entity to perform authentication under clause (a):
>
> Provided further that no notification under the first proviso shall be issued without consultation with the Unique Identification Authority of India established under sub-section (1) of section 11 of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (18 of 2016) and the appropriate regulator.
>
> (2) If any reporting entity performs authentication under clause (a) of sub-section (1), to verify the identity of its client or the beneficial owner it shall make the other modes of identification under clauses (b), (c) and (d) of sub-section (1) also available to such client or the beneficial owner.
>
> (3) The use of modes of identification under sub-section (1) shall be a voluntary choice of every client or beneficial owner who is

sought to be identified and no client or beneficial owner shall be denied services for not having an Aadhaar number,

(4) If, for identification of a client or beneficial owner, authentication or offline verification under clause (a) or clause (b) of sub-section (1) is used, neither his core biometric information nor his Aadhaar number shall be stored.

(5) Nothing in this section shall prevent the Central Government from notifying additional safeguards on any reporting entity in respect of verification of the identity of its client or beneficial owner.

Explanation.—The expressions "Aadhaar number" and "core biometric information" shall have the same meanings as are respectively assigned to them in clauses (a) and (j) of section 2 of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (18 of 2016)."

28. Finance Act No. 22 of 2019 which came into effect from 01 August 2019 introduced Section 12AA in the PMLA which reads as follows:-

"**12AA. Enhanced due diligence**.—(1) Every reporting entity shall, prior to the commencement of each specified transaction,—

(a) verify the identity of the clients undertaking such specified transaction by authentication under the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (18 of 2016) in such manner and subject to such conditions, as may be prescribed:

Provided that where verification requires authentication of a person who is not entitled to obtain an Aadhaar number under the provisions of the said Act, verification to authenticate the identity of the client undertaking such specified transaction shall be carried out by such other process or mode, as may be prescribed;

(b) take additional steps to examine the ownership and financial position, including sources of funds of the client, in such manner as may be prescribed;

(c) take additional steps as may be prescribed to record the purpose behind conducting the specified transaction and the

intended nature of the relationship between the transaction parties.

(2) Where the client fails to fulfill the conditions laid down under sub-section (1), the reporting entity shall not allow the specified transaction to be carried out.

(3) Where any specified transaction or series of specified transactions undertaken by a client is considered suspicious or likely to involve proceeds of crime, the reporting entity shall increase the future monitoring of the business relationship with the client, including greater scrutiny or transactions in such manner as may be prescribed.

(4) The information obtained while applying the enhanced due diligence measures under sub-section (1) shall be maintained for a period of five years from the date of transaction between a client and the reporting entity.

Explanation.—For the purposes of this section, "specified transaction" means—

(a) any withdrawal or deposit in cash, exceeding such amount;

(b) any transaction in foreign exchange, exceeding such amount;

(c) any transaction in any high value imports or remittances;

(d) such other transaction or class of transactions, in the interest of revenue or where there is a high risk or money-laundering or terrorist financing,

As may be prescribed."

29. The Director is conferred with the power of imposition of fines and monetary penalties upon erring reporting entities in terms of Section 13 and is extracted hereinbelow: -

"13. Powers of Director to impose fine.—(1) The Director may, either of his own motion or on an application made by any authority, officer or person, make such inquiry or cause such inquiry to be made, as he thinks fit to be necessary, with regard to the obligations of the reporting entity, under this Chapter.

(1A) If at any stage of inquiry or any other proceedings before him, the Director having regard to the nature and complexity of the case, is of the opinion that it is necessary to do so, he may

direct the concerned reporting entity to get its records, as may be specified, audited by an accountant from amongst a panel of accountants, maintained by the Central Government for this purpose.

(1B)The expenses of, and incidental to, any audit under sub-section (1A) shall be borne by the Central Government.

(2) If the Director, in the course of any inquiry, finds that a reporting entity or its designated director on the Board or any of its employees has failed to comply with the obligations under this Chapter, then, without prejudice to any other action that may be taken under any other provisions of this Act, he may—

(a) issue a warning in writing; or

(b) direct such reporting entity or its designated director on the Board or any of its employees, to comply with specific instructions; or

(c) direct such reporting entity or its designated director on the Board or any of its employees, to send reports at such interval as may be prescribed on the measures it is taking; or

(d) by an order, impose a monetary penalty on such reporting entity or its designated director on the Board or any of its employees, which shall not be less than ten thousand rupees but may extend to one lakh rupees for each failure.

(3) The Director shall forward a copy of the order passed under sub-section (2) to every banking company, financial institution or intermediary or person who is a party to the proceedings under that sub-section.

Explanation.—For the purpose of this section, "accountant" shall mean a chartered accountant within the meaning of the Chartered Accountants Act, 1949 (38 of 1949)."

30. Rule 3 of the 2005 Rules obligates reporting entities to maintain records of varied transactions and reads as under:-

"3**. Maintenance of records of transactions (nature and value)**.-(l) Every reporting entity shall maintain the record of all transactions including, the record of-

(A) all cash transactions of the value of more than ten lakh rupees or its equivalent in foreign currency;

(B) all series of cash transactions integrally connected to each other which have been individually valued below rupees ten lakh or its equivalent in foreign currency where such series of transactions have taken place within a month and the monthly aggregate exceeds an amount of ten lakh rupees or its equivalent in foreign currency;

(BA) all transactions involving receipts by non-profit organisations of value more than rupees ten lakh, or its equivalent in foreign currency;

(C) all cash transactions where forged or counterfeit currency notes or bank notes have been used as genuine or where any forgery of a valuable security or a document has taken place facilitating the transactions;

(D) all suspicious transactions whether or not made in cash and by way of-

i) deposits and credits, withdrawals into or from any accounts in whatsoever name they are referred to in any currency maintained by way of-

(a) cheques including third party cheques, pay orders, demand drafts, cashiers cheques or any other instrument of payment of money including electronic receipts or credits and electronic payments or debits, or

(b) travellers cheques, or

(c) transfer from one account within the same banking company, financial institution and intermediary, as the case may be, including from or to Nostro and Vostro accounts, or

(d) any other mode in whatsoever name it is referred to;

ii) credits or debits into or from any non-monetary accounts such as d-mat account, security account in any currency maintained by the banking company, financial institution and intermediary, as the case may be;

iii) money transfer or remittances in favour of own clients or non-clients from India or abroad and to third party beneficiaries in India or abroad including transactions on its own account in any currency by any of the following:-

a) payment orders, or

b) cashiers cheques, or

c) demand drafts, or

d) telegraphic or wire transfers or electronic remittances or transfers, or

e) internet transfers, or

f) Automated Clearing House remittances, or

g) lock box driven transfers or remittances, or

h) remittances for credit or loading to electronic cards, or

i) any other mode of money transfer by whatsoever-name it is called;

iv) loans and advances including credit or loan substitutes, investments and contingent liability by way of-

a) subscription to debt instruments such as commercial paper, certificate of deposits, preferential shares, debentures, securitised participation, inter bank participation or any other investments in securities or the like in whatever form and name it is referred to, or

b) purchase and negotiation of bills, cheques and other instruments, or

c) foreign exchange contracts, currency, interest rate and commodity and any other derivative instrument in whatsoever name it is called, or

d) letters of credit, standby letters of credit, guarantees, comfort letters, solvency certificates and any other instrument for settlement and/or credit support;

v) collection services in any currency by way of collection of bills, cheques, instruments or any other mode of collection in whatsoever name it is referred to.

(E) all cross border wire transfers of the value of more than five lakh rupees or its equivalent in foreign currency where either the origin or destination of fund is in India;

(F) all purchase and sale by any person of immovable property valued at fifty lakh rupees or more that is registered by the reporting entity, as the case may be."

31. It would also be appropriate to notice Rules 4, 5 and 7 of 2005 Rules which are reproduced hereinbelow: -

> **"4. Records containing information.**- The records referred to in rule 3 shall contain all necessary information specified by the Regulator to permit reconstruction of individual transaction, including the following information:-
>
> (a) the nature of the transactions;
>
> (b) the amount of the transaction and the currency in which it was denominated;
>
> (c) the date on which the transaction was conducted; and
>
> (d) the parties to the transaction
>
> **5. Procedure and manner of maintaining information**.-(l) Every reporting entity shall maintain information in respect of transactions with its client referred to in rule 3 in accordance with the procedure and manner as may be specified by its regulator from time to time.
>
> (2)Every reporting entity shall evolve an internal mechanism for maintaining such information in such form and manner and at such intervals as may be specified by its regulator from time to time.
>
> (3) It shall be the duty of every reporting entity, its designated director, officers and employees to observe the procedure and the manner of maintaining information as specified by its regulator under sub-rule (1).
>
> [***]
>
> **7. Procedure and manner of furnishing information**.-(l) Every reporting entity shall communicate to the Director the name, designation and address of the Designated Director and the Principal Officer.
>
> (2) The Principal Officer shall furnish the information referred to in clauses (A), (B),(BA), (C), (D), (E) and (F) of sub-rule (1) of rule 3 to the Director on the basis of information available with the reporting entity. A copy of such information shall be retained by the Principal Officer for the purposes of official record.
>
> (3)Every reporting entity shall evolve an internal mechanism having regard to any guidelines issued by the Director in consultation with, its regulator, for detecting the transactions

referred to in clauses (A), (B),(BA), (C), (D), (E) and (F) of sub-rule (1) of rule 3 and for furnishing information about such transactions in such form as may be directed by the Director in consultation with its Regulator.

(4) It shall be the duty of every reporting entity, its designated director, officers and employees to observe the procedure and the manner of furnishing information as specified by the Director in consultation with its Regulator."

32. The obligations placed upon a reporting entity to undertake due diligence in respect of clients is reiterated in Rule 9 which reads thus:-

"9. Client Due Diligence.-(l) Every reporting entity shall-

(a) at the time of commencement of an account-based relationship-

(i) identify its clients, verify their identity, obtain information on the purpose and intended nature of the business relationship; and

(ii) determine whether a client is acting on behalf of a beneficial owner, and identify, the beneficial owner and take all steps to verify the identity of the beneficial owner:

Provided that where the Regulator is of the view that money laundering and terrorist financing risks are effectively managed and where this is essential not to interrupt the normal conduct of business, the Regulator may permit the reporting entity to complete the verification as soon as reasonably practicable following the establishment of the relationship; and

b) in all other cases, verify identity while carrying out-

(i) transaction of an amount equal to or exceeding rupees fifty thousand, whether conducted as a single transaction or several transactions that appear to be connected, or

(ii) any international money transfer operations:

Provided that where a client is subscribing or dealing with depository receipts or equity shares, issued or listed in jurisdictions notified by the Central Government, of a company incorporated in India, and it is acting on behalf of a beneficial owner who is a resident of such jurisdiction, the determination, identification and verification of such beneficial owner, shall be as per the norms of such jurisdiction and nothing in the sub-rules (3) to (9) of these rules shall be applicable for due-diligence of such beneficial owner.

Explanation.—For the purposes of this proviso, the expression "equity share" means a share in the equity share capital of a company and equity share capital shall have the same meaning as assigned to it in the Explanation to section 43 of the Companies Act, 2013.

(lA) Subject to the provisions of sub-rule (1), every reporting entity shall within ten days after the commencement of an account-based relationship with a client, file the electronic copy of the client's KYC records with the Central KYC Records Registry;

(lB) The Central KYC Records Registry shall process the KYC records received from a reporting entity for de-duplicating and issue a KYC Identifier for each client to the reporting entity, which shall communicate the KYC Identifier in writing to their client;

(1C)Where a client, for the purposes of clause (a) and clause (b), submits a KYC Identifier to a reporting entity, then such reporting entity shall retrieve the KYC records online from the Central KYC Records Registry by using the KYC Identifier and shall not require a client to submit the same KYC records or information or any other additional identification documents or details, unless-

(i) there is a change in the information of the client as existing in the records of Central KYC Records Registry;

(ii) the current address of the client is required to be verified;

(iii) the reporting entity considers it necessary in order to verify the identity or address of the client, or to

perform enhanced due diligence or to build an appropriate risk profile of the client.

(lD) A reporting entity after obtaining additional or updated information from a client under sub-rule (1C), shall as soon as possible furnish the updated information to the Central KYC Records Registry which shall update the existing KYC records of the client and the Central KYC Records Registry shall thereafter inform electronically all reporting entities who have dealt with the concerned client regarding updatation of KYC record of the said client.

(lE) The reporting entity which performed the last KYC verification or sent updated information in respect of a client shall be responsible for verifying the authenticity of the identity or address of the client.

(lF) A reporting entity shall not use the KYC records of a client obtained from the Central KYC Records Registry for purposes other than verifying the identity or address of the client and shall not transfer KYC records or any information contained therein to any third party unless authorized to do so by the client or by the Regulator or by the Director;

(1G) The regulator shall issue guidelines to ensure that the Central KYC records are accessible to the reporting entities in real time.

(2) For the purpose of clause (a) of sub-rule (1), a reporting entity may rely on a third party subject to the conditions that-.

(a) the reporting entity, within two days, obtains from the third party or from the Central KYC Records Registry records or the information of the client due diligence carried out by the third party.

(b) the reporting entity takes adequate steps to satisfy itself that copies of identification data and other relevant documentation relating to the client due diligence requirements will be made available from the third party upon request without delay;

(c) the reporting entity is satisfied that such third party is regulated, supervised or monitored for, and has measures in place for compliance with client due diligence and record-keeping requirements in line with the requirements and obligations under the Act;

(d) the third party is not based in a country or jurisdiction assessed as high risk;

(e) the reporting entity is ultimately responsible for client due diligence and undertaking enhanced due diligence measures, as applicable; and

(f) where a reporting entity relies on a third party that is part of the same financial group, the Regulator may issue guidelines to consider any relaxation in the conditions (a) to (d).

(3) The beneficial owner for the purpose of sub-rule (1) shall be determined as under—

(a) where the client is a company, the beneficial owner is the natural person(s), who, whether acting alone or together, or through one or more juridical person, has a controlling ownership interest or who exercises control through other means.

Explanation. —For the purpose of this sub-clause—

1. "Controlling ownership interest" means ownership of or entitlement to more than twenty-five per cent. of shares or capital or profits of the company;
2. "Control" shall include the right to appoint majority of the directors or to control the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreements or voting agreements;

(b) where the client is a partnership firm, the beneficial owner is the natural persons) who, whether acting alone or together, or through one or more juridical person, has ownership of entitlement to more than fifteen per cent. of capital or profits of the partnership;

(c) where the client is an unincorporated association or body of individuals, the beneficial owner is the natural person(s), who, whether acting alone or together, or through one or more juridical person, has ownership of or entitlement to more than fifteen per cent. of the property or capital or profits of such association or body of individuals;

(d) where no natural person is identified under (a) or (b) or (c) above, the beneficial owner is the relevant natural person who holds the position of senior managing official;

(e) where the client is a trust, the identification of beneficial owner(s) shall include identification of the author of the trust, the trustee, the beneficiaries with fifteen per cent. or more interest in the trust and any other natural person exercising ultimate effective control over the trust through a chain of control or ownership; and

(f) where the client or the owner of the controlling interest is an entity listed on a stock exchange in India, or it is an entity resident in jurisdictions notified by the Central Government and listed on stock exchanges in such jurisdictions notified by the Central Government, or it is a subsidiary of such listed entities, it is not necessary to identify and verify the identity of any shareholder or beneficial owner of such entities.

(4) Where the client is an individual, he shall for the purpose of sub-rule (1) submit to the reporting entity, —

(a) the Aadhaar number where,

(i) he is desirous of receiving any benefit or subsidy under any scheme notified under section 7 of the Aadhaar (Targeted Delivery of Financial and Other subsidies, Benefits and Services) Act, 2016 (18 of 2016); or

(ii) he decides to submit his Aadhaar number voluntarily to a banking company or any reporting entity notified under first proviso to sub-section (1) of section 11A of the Act; or

(aa) the proof of possession of Aadhaar number where offline verification can be carried out; or

(ab) the proof of possession of Aadhaar number where offline verification cannot be carried out or any officially valid document or the equivalent e-document thereof containing the details of his identify and address; and

(b) the Permanent Account Number or the equivalent e-document thereof or Form No. 60 as defined in Income-tax Rules, 1962; and

(c) such other documents including in respect of the nature of business and financial status of the client, or the equivalent e-documents thereof as may be required by the reporting entity:

(4A) [***]

(5) Notwithstanding anything contained in sub-rules (4) [***] and as an alternative thereto, an individual who desires to open a small account in a banking company may be allowed to open such an account on production of a self-attested photograph and affixation of signature or thumb print, as the case may be, on the form for opening the account:

Provided that-

(i) the designated officer of the banking company, while opening the small account, certifies under this signature that the person opening the account has affixed his signature or thump print, as the case may be, in his presence:

Provided that where the individual is a prisoner in a jail, the signature or thumb print shall be affixed in presence of the officer in-charge of the jail and the said officer shall certify the same under his signature and the account shall remain operational on annual submission of certificate of proof of address issued by the officer in-charge of the jail.

(ii) the small account shall be opened only at Core Banking Solution linked banking company branches or in a branch where it is possible to manually monitor and ensure that foreign remittances are not credited to a small account and that the stipulated limits on monthly and annual aggregate of transactions and balance in such accounts are not breached, before a transaction is allowed to take place;

(iii) the small account shall remain operational initially for a period of twelve months, and thereafter for a further period of twelve months if the holder of such an account provides evidence before the banking company of having applied for any of the officially valid documents within twelve months of the opening of the said account, with the entire relaxation provisions to be reviewed in respect of the said account after twenty-four months.

(iiia) Notwithstanding anything contained in clause (iii), the small account shall remain operational between 1st April, 2020 and 30th June 2020 and such other periods as may be notified by the Central Government.

(iv) the small account shall be monitored and when there is suspicion of money laundering or financing of terrorism or other high risk scenarios, the identity of client shall be established as per the provisions of sub-rule (4):

[***]

(v) the foreign remittance shall not be allowed to be credited into the small account unless the identity of the client is fully established as per provision of sub-rule (4):

[***]

(6) Where the client is a company, it shall for the purposes of sub-rule (1), submit to the reporting entity the certified copies of the following documents or the equivalent e-documents thereof, namely:-

(i) certificate of incorporation;

(ii) Memorandum and Articles of Association;

(iii) Permanent Account Number of the company;

(iv) a resolution from the Board of Directors and power of attorney granted to its managers, officers or employees, as the case may be, to transact on its behalf; and

(v) Such documents as are required for an individual under sub-rule (4) relating to beneficial owner, managers, officers or employees, as the case may be, holding an attorney to transact on the company's behalf;

(7) Where the client is a partnership firm, it shall, for the purposes of sub-rule (1), submit to the reporting entity the certified copies of the following documents or the equivalent e-documents thereof, namely:- .

(i) registration certificate;

(ii) partnership deed;

(iii) Permanent Account Number of the partnership firm; and

(iv) such documents as are required for an individual under sub-rule (4) relating to beneficial owner, managers, officers or employees, as the case may be, holding an attorney to transact on its behalf;

(8) Where the client is a trust, it shall, for the purposes of sub-rule (1) submit to the reporting entity the certified copies of the following documents, namely or the equivalent e-documents thereof:-

(i) registration certificate:

(ii) trust deed; and

(iii) Permanent Account Number or Form 60 of the trust; and

(iv) Such documents as are required for an individual under sub-rule (4) relating to beneficial owner, managers, officers or employees, as the case may be, holding an attorney to transact on its behalf;

(9) Where the client is an unincorporated association or a body of individuals, it shall submit to the reporting entity the certified copies of the following documents or the equivalent e-documents thereof, namely:-

(i) resolution of the managing body of such association or body of individuals;

(ii) Permanent account number or Form 60 of the unincorporated association or a body of individuals;

(iii) Power of attorney granted to him to transact on its behalf; [and]

(iv) such documents as are required for an individual under sub-rule (4) relating to beneficial owner, managers, officers or employees, as the case may be, holding an attorney to transact on its behalf;

(v) such information as may be required by the reporting entity to collectively establish the existence of such association or body of individuals;

(10) Where the client is a juridical person, the reporting entity shall verify that any person purporting to act on behalf of such client is so authorized and verify the identity of that person.

(11) No reporting entity shall allow the opening of or keep any anonymous account or account in fictitious names or account on behalf of other persons whose identity has not been disclosed or cannot be verified.

(12) (i) Every reporting entity shall exercise ongoing due diligence with respect to the business relationship with every client and closely examine the transactions in order to ensure that they are consistent with their knowledge of the client, his business and risk profile and where necessary, the source of funds.

(ii) When there are suspicions of money laundering or financing of the activities relating to terrorism or where there are doubts about the adequacy or veracity of previously obtained client identification data, the reporting entity shall review the due diligence measures including verifying again the identity of the client and obtaining information on the purpose and intended nature of the business relationship, as the case may be.

(iii) The reporting entity shall apply client due diligence measures also to existing clients on the basis of materiality and risk, and conduct due diligence on such existing relationships at appropriate times or as may be specified by the regulator, taking into account whether and when client due diligence measures have previously been undertaken and the adequacy of data obtained.

(13) (i) Every reporting entity shall carry out risk assessment to identify, assess and take effective measures to mitigate its money laundering and terrorist financing risk for clients, countries or geographic areas, and products, services, transactions or delivery channels that is consistent with any national risk assessment conducted by a body or authority duly notified by the Central Government.

(ii) The risk assessment mentioned in clause (i) shall-

(a) be documented;

(b) consider all the relevant risk factors before determining the level of overall risk and the appropriate level and type of mitigation to be applied;

(c) be kept up to date; and

(d) be available to competent authorities and self-regulating bodies.

(14) (i) The regulator shall issue guidelines incorporating the requirements of sub-rules (1) to (13) sub-rule (15) and sub-rule (17) and may prescribe enhanced or simplified measures to verify the client's identity taking into consideration the type of client, business relationship, nature and value of transactions based on the overall money laundering and terrorist financing risks involved.

Explanation.-For the purpose of this clause, simplified measures are not acceptable whenever there is a suspicion of money laundering or terrorist financing, or where specific higher-risk scenarios apply or where the risk identified is not consistent with the national risk assessment.

(ia) The guidelines issued under clause(i) shall also include appropriate –

(A) exemptions, limitations and conditions and alternate and viable means of identification, to provide account based services to clients who are unable to undergo biometric authentication;

(B) relaxation for continued operation of accounts for clients who are unable to provide Permanent Account Number or Form No. 60; and

(C) exemption, limitations and conditions and alternate and viable means of identification, to provide account based services of clients who are unable to undergo Aadhaar authentication for receiving any benefit or subsidy under any scheme notified under section 7 of the Aadhaar (Targeted Delivery of Financial and Other subsidies, Benefits and Services) Act, 2016 (18 of 2016);

Owing to injury, illness or infirmity on account of old age or otherwise, and such like causes.

(ii) Every reporting entity shall formulate and implement a Client Due Diligence Programme, incorporating the requirements of sub-rules (1) to (13), sub – rle (15) and sub-rule (17) and guidelines issued under clause (i) and (ia).

(iii) the Client Due Diligence Programme shall include policies, controls and procedures, approved by tile senior management, to enable the reporting entity to manage and mitigate the risk that

have been identified either by the reporting entity or through national risk assessment.

(15) Where the client has submitted –

(a) his Aadhaar number under clause (a) of sub-rule (4) to the banking company or a reporting entity notified under first proviso to sub-section (1) of section 11A, such banking company or reporting entity shall carry out authentication of the client's Aadhaar number using e-KYC authentication facility provided by the Unique Identification Authority of India;

(b) proof of possession of Aadhaar under clause (aa) of sub-rule (4) where offiline verification can be carried out, the reporting entity shall carry out offline verification;

(c) an equivalent e-document of any officially valid document, the reporting entity shall verify the digital signature as per the provisions of the Information Technology Act,2000 (21 of 2000) and any rules issues thereunder and take a live photo as specified under Annexure 1.

(d) any officially valid document or proof of possession of Aadhaar number under clause (ab) of sub-rule (4) where offline verification cannot be carried out, the reporting entity shall carry out verification through digital KYC as specified under Annexure 1:

Provided that for a period not beyond such date as may be notified for a class of reporting entity, instead of carrying out digital KYC, the reporting entity pertaining to such class may obtain a certified copy of the proof of possession of Aadhaar number or the officially valid document and a recent photograph where an equivalent e-document is not submitted.

Explanation. – Obtaining a certified copy by the reporting entity shall mean comparing the copy of the proof of possession of Aadhaar number where offline verification cannot be carried out or officially valid document so produced by the client with the original and recording the same on the copy by the authorized officer of the reporting entity as per the provisions contained in the Act.

(16) Every reporting entity shall, where its client submits a proof of possession of Aadhaar Number containing Aadhaar Number,

ensure that such client redacts of blacks out his Aadhaar number through appropriate means where the authentication of Aadhaar number is not required under sub-rule (15).

(17) (i) A client already having an account based relationship with a reporting entity, shall submit his Permanent Account Number of equivalent e-document thereof or Form No. 60, on such date as may be notified by the Central Government, failing which the account shall temporarily cease to be operational till the time the Permanent Account Number or Form No. 60 is submitted by the client:

Provided that before temporarily ceasing operations for an account, the reporting entity shall give the client an accessible notice and a reasonable opportunity to be heard.

Explanation.-For the purpose of this clause, "temporary ceasing of operations" in relation to an account means the temporary suspension of all transactions or activities in relation to that account by the reporting entity till such time the client complies with the provisions of this clause;

(ii) if a client having an existing account based relationship with a reporting entity gives in writing to the reporting entity that he does not want to submit his Permanent Account Number or equivalent e-document thereof of Form No. 60, as the case may be, the client's account with the reporting entity shall be closed and all obligations due in relation to the account shall be appropriately settled after establishing the identity of the client in the manner as may be determined by the regulator.

(18) In case of officially valid document furnished by the client does not contain updated address, the following documents or their equivalent e-documents thereof shall be deemed to be officially valid documents for the limited purpose of proof of address:-

(a) utility bill which is not more than two months old of any service provider (electricity, telephone, post-paid mobile phone, piped gas, water bill);

(b) property or Municipal tax receipt;

(c) pension or family pension payment orders (PPOs) issued to retired employees by Government Departments or Public Sector Undertakings, if they contain the address;

(d) letter of allotment of accommodation from employer issued by State Government or Central Government Departments, statutory or regulatory bodies, public sector undertakings, scheduled commercial banks, financial institutions and listed companies and leave and licence agreements with such employers allotting official accommodation:

Provided further that the client shall submit updated officially valid document for their equivalent e-documents thereof with current address within a period of three months of submitting the above documents.

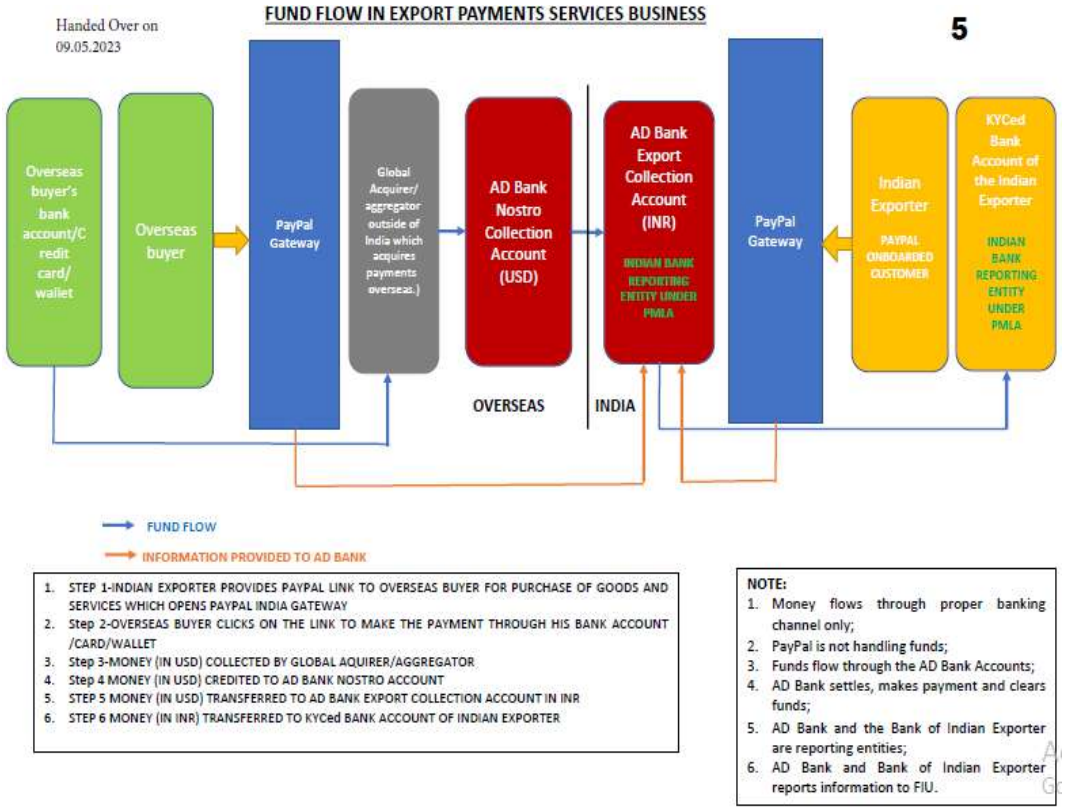
(19) Where a client has provided his Aadhaar number for identification under clause (a) of sub-rule (4) and wants to provide a current address, different from the address as per the identity information available in the Central Identities Data Repository, he may give a self-declaration to that effect to the reporting entity."

E. PAYPAL'S CHALLENGE

33. Advancing submissions on behalf of PayPal, Mr. Sibal and Mr. Poovayya, learned senior counsels firstly stated that while the petitioner had been functioning as a PA as well as an OPGSP at the time when the impugned order came to be passed, undisputedly, it has discontinued its PA business with effect from 01 April 2021 and the challenge in the petition thus stands restricted to the question of whether an OPGSP could be said to be a Reporting Agency under the PMLA. The principal submission addressed was that PayPal while operating as an OPGSP cannot be said to be a reporting entity as defined under the Act.

34. For the purposes of lending clarity on the nature of the functions performed by PayPal while working as a payment facilitator, learned

senior counsels placed for the consideration of the Court a diagrammatical presentation of its business operations which is extracted hereinbelow :-



35. It becomes pertinent to note that PayPal categorically asserts that it only onboards the Indian exporter and does not enrol the overseas remitter involved in the export transaction. It was also firmly asserted that PayPal only provides services to various Indian exporters by offering them a convenient technological interface for the receipt of funds from overseas buyers.

36. Mr. Sibal and Mr. Poovayya submitted that PayPal provides a

technology platform which is utilised by lakhs of small Indian exporters, a majority of which are micro-enterprises. It was their submission that the said exporters bring in valuable foreign exchange to the country and by virtue of being engaged in the export of goods and services made in India aid in employment creation for lakhs of Indian citizens directly as well as indirectly.

37. In terms of the closing submissions, which were filed for our consideration, PayPal succinctly explained its business model in the following terms:-

> "10. PayPal's business is very simple and straightforward. In order to understand the business of an OPGSP, the following illustration is provided:
>
> • A foreigner entity contacts an Indian Merchant for purchase of good A from the Indian Merchant. Once they confirm, the foreign entity (which is not onboarded by PayPal India and as such does not have an account with PayPal India) proceeds to make a payment to the Indian Merchant.
>
> • The Indian Merchant (onboarded by PayPal India) provides the PayPal India link / check-out page for the payment to the foreign entity. The foreign entity then clicks on the link/ check-out page and makes payment by credit card/debit card/prepaid card/Online Banking etc. to the Indian Merchant.
>
> • The money is debited from the instrument of the foreign entity and collected in the AD Nostro Collection Account (in Foreign Currency) with the AD Bank. The said AD Bank then transfers the same to the AD Bank Export Collection Account (in INR) held in India with the AD Bank. The AD Bank then transfers the same to the Indian Merchant."

38. On the basis of the aforesaid disclosures, learned senior counsels submitted that PayPal's onboarded customers are Indian merchants only and that the funds which move through AD Partner Banks during

the course of an export transaction flow from bank accounts of those Indian merchants which have been duly verified in accordance with the applicable KYC norms. It was further averred that PayPal at no stage handles the funds which move between the Indian exporter and the foreign buyer and the money is directly handled and systematically routed by the AD Banks at the end of each transaction.

39. Adverting to the fund flow graph, it was pointed out that the overseas remitter effects payment by either using a credit card, bank account or e-wallet and which money is collected overseas by a global acquirer or aggregator. The funds then move from the global aggregator's hands to the AD Banks NOSTRO collection account where it is held in US dollars. The money so received is then transferred to the AD Banks Export Collection Account where funds are then retained in Indian rupees.

40. Learned senior counsels pointed out that the AD Banks both overseas as well as in India, undisputedly, are reporting entities under the PMLA. It was also submitted that it is the AD Banks which undertake the operation of receiving payments, clearing funds and performing settlement activities. According to PayPal, since it merely provides a link to the Indian exporter which is then transmitted to the foreign or overseas buyer and results in the interface created by PayPal being utilised for effective and convenient transfer of funds, it cannot possibly be said that it would fall within the definition of a reporting entity.

41. It was submitted by PayPal that this position was duly recognised by RBI when it clearly averred in the affidavit filed in **Abhijit Mishra vs. Reserve Bank of India**[11] that PayPal cannot be recognised to be a reporting entity as defined under the PSS Act. Reliance was also placed on the disclosures made in that affidavit and in terms of which it had been clearly averred by RBI that PayPal was not operating or participating in a payment system. It would be apposite to extract the following paragraphs from that affidavit:-

> "12….It will be pertinent to mention here that as per the information available with the answering Respondent i.e. RBI, the Respondent· No. 3 i.e. Paypal Payments Pvt. Ltd. has an OPGSP arrangement with the Citi Bank…"
>
> "Further according to this scheme, 'System Provider' means and includes a person who operates an authorised payment system as defined under Section 2 of the Payment and Settlement Systems Act, 2007. It is further submitted that currently Paypal Payments Private Ltd. is not operating or participating in, a payment system and hence this scheme is not applicable to it.."

42. Learned senior counsels further urged that a bare perusal of the definition of payment system as embodied under the PSS Act and the PMLA would indicate that they are identical in all respects except for the exclusion of a stock exchange which stands incorporated in the definition of a payment system under the PSS Act but is absent from Section 2(1)(rb) of the PMLA. It was the submission of Mr. Sibal and Mr. Poovayya that apart from that facile distinction both statutes define the expression *"payment system"* in identical terms. According

[11] W.P.(C) NO. 7007 OF 2019

to learned senior counsels in light of the aforesaid admitted position which prevails, the stand as taken by FIU-IND and RBI is clearly rendered arbitrary and illegal.

43. Turning then to the specific provisions contained in the PMLA, it was submitted that PayPal while working as an OPGSP cannot possibly be recognised as being an entity which operates a payment system. Referring specifically to Section 2(1)(rb) of the PMLA it was submitted that a payment system in order to be covered under the Act must necessarily be one which while enabling payment between a payer and a beneficiary involves clearing, payment or settlement services or all of them.

44. According to PayPal, the business model and the details thereof as set forth in these proceedings would clearly establish that it is neither involved in clearing nor is it engaged in providing payment or settlement services. According to PayPal, even the Explanation to Section 2(1)(rb) would not sustain the stand as struck by the respondents since admittedly PayPal is neither enabling credit or debit card operations, smart card operations or money transfer operations. It was submitted that it is not even the case of the respondents that PayPal is engaged in debit card, smart card or credit card operations. It was further argued that the functions performed by PayPal would also not extend to money transfer operations since it at no stage of the entire transaction handles funds which move between the Indian exporter and the overseas buyer. In view of the aforesaid, it was

argued that since the technological interface provided by PayPal would not fall within the ambit of Section 2(1)(rb), it cannot be said to be a payment system operator.

45. It was then submitted that the task of regulation and supervision of payment systems is entrusted with the RBI in terms of the PSS Act. PayPal urged that RBI has admittedly not directed it to seek any authorisation under the aforesaid enactment even though it has been functioning as an OPGSP since 2017. Reliance was also placed on a response tendered by RBI under the **Right to Information Act, 2005**[12] and which stands placed on the record as Annexure-19 and in terms of which RBI acknowledges that it had not issued any registration certificate to PayPal for setting up or operating a payment system in India.

46. It was submitted that in light of the *pari materia* definition of 'payment system' in the two statutes, it would be wholly impermissible for the respondents to urge that while PayPal does not operate a payment system as defined under the PSS Act but it would still be liable to be recognised as a payment system operator under the PMLA. In the course of rejoinder submissions, reliance was also placed upon the decision rendered by a Division Bench of the Court in **Lotus Pay Solutions (P) Ltd. v. Union of India**[13] where the Court

[12] RTI Act

[13] 2022 SCC OnLine Del 2939

had come to hold that OPGSPs do not handle funds and are only concerned with providing technological infrastructure to facilitate the processing of online payment transactions.

47. Reliance was placed on the following observations as appearing in *Lotus Pay Solutions*:-

> "**62.** Therefore, in any digital payment transaction, there is a payer and a beneficiary. The interface is the PA, which ensures that the money is transferred to the designated nodal account, and after a gap of a stipulated time-frame, which the petitioners say is three days, a settlement takes place and funds are transmitted to the merchant's account.
>
> **63.** However, under Clause 8 of the 2020 Guidelines, the PAs are required to maintain an escrow account with a scheduled commercial bank, and thus the funds received from customers get placed in the escrow account and upon settlement, get transferred to the merchant's account.
>
> **64.** The PAs, thus, not only provide, an integration system but also handle the funds of the customer. The definition of a PA, according to us, would include this work function. A close perusal of the definition of payment system would show, that it is meant to include a system, that enables, firstly, payment to be effected between a payer and a beneficiary and secondly, concerns clearing, payment or settlement service or all of them, but does not include a stock exchange.
>
> **65.** While the term "settlement" has been defined in Section 2(1)(*n*) of the 2007 Act, there is no definition of the terms "payment" and "clearing". The term settlement, as defined, means, settlement of payment instructions and includes the settlement of securities, foreign exchange or derivatives or other transactions which involve payment obligations.
>
> **70.** It is pertinent to note, that because PGs do not handle funds, and are only concerned with providing technology infrastructure to route and/or facilitate the processing of online payment transactions, the impugned clauses of the 2020 Guidelines i.e. Clauses 3, 4 and 8 are not made applicable to them. The scope of the work function of a PG in the RBI's discussion paper reads thus:

> "A technology infrastructure provider to route and facilitate processing of an online payment transaction, without any involvement in the actual handling of funds…."
>
> **71.** Therefore, in our view, the answer to the poser, as to whether PAs fall within the ambit of the definition of payment system can only be in the affirmative, for the reasons given above. That being said, as alluded to above, there is, perhaps, merit in the responses received by RBI to its discussion paper, that separate legislation may have to be enacted for payment services. This aspect, however, falls in the domain of the legislators. The executive could consider this suggestion, and initiate necessary steps in that behalf."

48. Mr. Poovayya submitted that *Lotus Pay Solutions* in clear and unequivocal terms recognises the distinction between a PA and an OPGSP. It was also highlighted that the Court in *Lotus Pay Solutions* had also clearly found that this distinction rested on the fact that OPGSPs do not handle funds and merely put in place a technology interface which facilitates the completion of online payment transactions.

49. PayPal then asserted that by virtue of being an OPGSP, it carries on its functions in India strictly in accordance with the OPGSP guidelines as framed by RBI and which stand encapsulated in its circular dated 24 September 2015. According to PayPal, the distinction between a PA and an OPGSP also comes to the fore when one analyses various circulars issued by RBI. It was pointed out that even the OPGSP guidelines in unambiguous terms recognise such entities to be those which merely facilitate the processing of an online payment transaction without being involved in the actual handling of funds.

50. It was further submitted that those guidelines also do not lend credence or advance the case of the respondents by merely stipulating that the provisions of the PMLA would be applicable. It was submitted that those circulars merely refer to an obligation placed on entities to abide by all applicable laws. It was submitted that unless it could be successfully established that PayPal operates a payment system, PMLA would clearly not be a relevant statute whose provisions would stand attracted.

51. Insofar as the submissions urged by the respondents of PayPal being obliged to onboard foreign buyers as well is concerned, it was submitted that onboarding of customers in terms of the architecture of the technology interface only requires the Indian customer to be onboarded by PayPal. It was pointed out that such onboarding is effected strictly in accordance with the contractual standing arrangements which PayPal has entered with AD Banks. In terms of those contractual obligations, PayPal disclosed that all relevant transaction information containing data points such as name, city, state, country, telephone, mobile, email and other relevant details are in fact furnished by it to AD Banks. It was further submitted that the remaining information data points which number approximately 1440 are duly captured in **Cross Border Wire Transaction Report**[14] prepared by the AD Banks and which in turn is forwarded to FIU-IND.

[14] CBWTR

52. It was further submitted that as would be evident from Clauses 2.1 and 2.2, it is manifest that due diligence obligations are placed on the AD Banks as opposed to an OPGSP. Taking the Court through paragraph 4 of the OPGSP guidelines and which deals with the subject of export transactions, it was again submitted that all obligations including those concerning the opening of a NOSTRO collection account as well as maintenance of an Export Collection Account are those which are placed on AD Banks as opposed to an OPGSP.

53. Mr. Poovayya further argued that undisputedly PMLA imposes numerous penal sanctions. It was submitted that it is a settled principle that statutes with penal implications ought to be interpreted strictly and its provisions be not accorded an expansive construction. Reliance in support of the aforesaid was placed on the following enunciation on the legal position in **Glaxo Laboratories (I) Ltd. vs. Presiding Officer**:-[15]

> " 22. Having examined the matter both on principle and precedent, it would clearly emerge that clause 10 of Standing Order 22 which collects various heads of misconduct must be strictly construed being a penal provision in the sense that on the proof of a misconduct therein enumerated, penalty up to and inclusive of dismissal from service can be imposed. We see no reason for departing from the well-established canon of construction that penal provisions must receive strict construction, and not extended beyond their normal requirement. The framer's intention in using the expression "committed within the premises of the establishment or in the vicinity thereof" are the words of limitation and they must receive due attention at the hands of the interpreter and the clause should not receive such broad construction as to render the last clause redundant."

[15] (1984) 1 SCC 1

54. It was contended that the provisions of PMLA must be construed strictly and notwithstanding the mischief and the malice of money laundering which it seeks to tackle. It was argued that even if it were accepted that PMLA embodies both regulatory as well as penal provisions that too would not detract from the provisions of Section 2(1)(rb) being interpreted by employing the rule of strict construction.

55. Mr. Poovayya submitted that if the terms of the definition of a payment system be found to be specific and unambiguous, it cannot be accorded a hypothetical interpretation solely for the purposes of including PayPal as a payment system operator, even though it clearly stands excluded. Reliance was placed on the following passages as appearing in the decision of the Supreme Court in **Kanai Lal Sur vs. Paramnidhi Sadhukhan**[16]:-

> "6. …. However, in applying these observations to the provisions of any statute, it must always be borne in mind that the first and primary rule of construction is that the intention of the legislature must be found in the words used by the legislature itself. If the words used are capable of one construction, only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act. The words used in the material provisions of the statute must be interpreted in their plain grammatical meaning and it is only when such words are capable of two constructions that the question of giving effect to the policy or object of the Act can legitimately arise. When the material words are capable of two constructions, one of which is likely to defeat or impair the policy of the Act whilst the other construction is likely to assist the achievement of the said policy, then the courts would prefer to

[16] 1958 SCR 360

> adopt the latter construction. It is only in such cases that it becomes relevant to consider the mischief and defect which the Act purports to remedy and correct."

56. Mr. Poovayya further submitted that the impugned order suffers from a more fundamental fallacy since the same proceeds on the precept of a "deemed" payment system operator. It was contended that in the absence of the statute deploying a deemed fiction, the respondents could not have introduced the concept of a deemed payment system operator. According to PayPal while holding it to be a deemed payment system operator, FIU-IND has clearly travelled far beyond the statute itself quite apart from having exceeded the jurisdiction and authority conferred upon it. It was further urged that while the scourge of terror financing is liable to be prevented and effective safeguards need to be adopted to fight that malaise, that alone cannot constitute a valid ground for PayPal being held to be a reporting agency under the statute.

57. Mr. Poovayya submitted that while, undisputedly, FIU-IND is bound by the international obligations which flow from the various international covenants to which India is a party as well as the **Financial Action Task Force**[17] directives that cannot possibly be a ground for either re-writing Section 2(1)(rb) or for holding PayPal to be covered by that provision. Mr. Poovayya further submitted that if the provisions of the PMLA do not cover PayPal, it cannot be forced

[17] FATF

to become a reporting entity merely to subserve the international obligations of FIU-IND.

58. In any case, PayPal submitted that it had proffered various suggestions to FIU-IND in order to aid and assist its fight against terror financing. Mr. Poovayya pointed out that while PayPal remains bound to cooperate with the FIU-IND in its fight against terror financing and money laundering, it cannot be compelled to concede to be a reporting entity even though the statute does not render an OPGSP to either fall within the scope of a payment system or be liable to be held to be a payment system operator.

F. CONTENTIONS OF FIU-IND

59. Advancing submissions on behalf of FIU-IND Mr. Hossain, learned counsel firstly urged that the challenge as mounted by PayPal ignores well settled principles of statutory interpretation. Mr. Hossain submitted that it is by now well-settled that a statutory provision must be interpreted consistent with the purpose of the enactment. It was pointed out that there exists a stark and evident difference between the PSS Act and PMLA. According to Mr. Hossain, while the former is merely a financial regulatory statute, PMLA constructs a framework which is intended to deal with special fiscal offences and illicit financial flows. In view of the aforesaid, it was submitted that the mere fact that PayPal is not recognised to be covered by the provisions of the PSS Act would not be determinative of the question of whether

it is liable to be treated as a payment system operator under the PMLA. It was further submitted that the very fact that the framers of the PMLA chose to independently define *"payment system"* and *"payment system operator"* rather than merely incorporating through reference and adopting the provisions of the PSS Act is indicative of the legislative intent to confer a different and distinct meaning upon the phrase *"payment system"* for the purposes of the former. According to Mr. Hossain, the fact that the Legislature did not adopt the well-known tool of incorporation by reference is an important indicator of the distinct regimes which stand created under the two statutes. Mr. Hossain submitted that regard must also be had to the fact that PMLA is a statute with a dual character in the sense of it containing penal as well as preventive and regulatory provisions.

60. It was submitted that merely because PayPal is required to be registered as a reporting entity under the PMLA, the same cannot possibly be held to be an obligation which is penal in character. The fact that PMLA comprises of both penal as well as regulatory averments, Mr. Hossain pointed out was one which stands duly recognised by the Supreme Court in **Vijay Madan Lal Choudhary vs. Union of India & Ors**[18] itself.

61. In order to impress upon the Court, the extent of operations that occur on the interface created by PayPal, Mr. Hossain stated that the

[18] 2022 SCC OnLine SC 929

nodal account maintained by PayPal in India with Citibank witnessed export transactions of a combined value of more than Rs.12,000 crores in 2021. The details of transactions were also set out in paragraph 8 of the written submissions filed on behalf of FIU-IND in these proceedings and the table so presented is extracted hereinbelow:-

Year (calendar)	Number of Transactions	Total value of (Export) Transactions conducted through Petitioner (in Rs.)
2020	59,54,123	Rs. 9951,80,49,416/- (approx. Rs. 9951 crores)
2021	70,10,294	Rs. 12327,19,88,016.92/- (approx. Rs. 12327 crores)
2022 (till March, 2022)	16,17,910	Rs. 3048,83,29,183.51/- (approx. Rs. 3048 crores)

62. Mr. Hossain also questioned the assertion of PayPal being unaware of the overseas remitter and its assertion that it does not onboard the foreign or overseas buyer. Mr. Hossain drew the attention of the Court to the disclosures made in the counter affidavit filed in these proceedings and more particularly to Paragraphs 98 and 99 thereof which read thus:-

> "98. It is evident from the above that the collection of payments as well transfer of funds to the exporters accounts is both done on the basis of details provided by the petitioner to the partner bank, implying that both collection as well payment is done on the instruction of the petitioner, in turn implying that this account is controlled by the petitioner. In fact the petitioner's partner bank viz Citibank had not reported names of actual remitters in Cross Border Wire Transfer Reports (CBWTRs) filed by it with the FIU-IND for transactions facilitated by the petitioner as an OPGSP. The FIU-IND by way of letter issued

under Section 12A of PMLA on 05.01.2021 asked for these details from Citibank, which were submitted by the Citibank vide its email dated 16.01.2021. Further vide email dated 20.01.2021, Citibank clarified that the details of actual remitters submitted vide reply dated 16th January 2021 did not form part of the original fund transfer instructions received by Citibank N.A. India and hence could not be reported in the Cross Border Wire Transfer Reports submitted for the period between April 2017 to July 2020. Citibank further clarified that following receipt of letter of the respondent dated 05.01.2021 the Bank enforced the need to provide actual remitter details with the petitioner and consequently the petitioner furnished the details of actual remitters for the transactions reported. Thus it is the petitioner which had complete details of transactions facilitated by it as an OPGSP and part of these details i.e. actual remitter details were not even shared with the partner banks by the Petitioner in the first place.

[A True Copy of the Email dated 20.01.2021 received by the FIU-IND from Citibank is attached herewith and marked as **Annexure R-2**].

99. This conduct of the petitioner itself shows that its conduct is suspicious and that the petitioner is creating legal fictions to avoid complying to the laws of India deliberately. The continued hindrance to furnish information of the parties to the transaction is an obstacle created by the petitioner in the legitimate functioning of FIU-India. Further, the transactions in question here are not routine transactions; these are cross border wire transfers of more than Rs. Five lakh Indian rupees which considering the risk that such funds pose to the country's Anti-Money Laundering and Countering of Terrorist Financing Framework, the government in its wisdom deemed it fit to be reported under the provisions of PMLA and the Rules thereunder. The amount of hindrance created by the petitioner in the legitimate functioning of FIU-India can be gauged from the fact that there were more than 22000 cross border wire transactions involving fund transfer of the tune of Rs. 2500 crores that were reported by just one bank i.e. Citibank for transactions carried out between 01.04.2017 and 31.07.2020 through PayPal and all these transactions had been reported without actual remitter details because the petitioner held

back the said information. ”

63. Since the emails addressed by Citibank, the nodal partner of PayPal, would have some bearing on the issues which stand raised, the contents thereof are reproduced hereinbelow:-

“**Annexure R1**

ATTN: Mr. Manoj Kaushik, Addl. Director, FIU India

Dear Sir,

As desired please find below a short write up on PayPal's OPGSP flows. We hope this will be helpful:

Citibank India processes payments for Paypal under RBI's OPGSP guidelines dated 24 September 2015- "Processing and settlement of import and export related payments facilitated by Online Payment Gateway Service Providers (OPGSP)".

As per these guidelines, banks have been permitted to offer the facility to repatriate export related remittances by entering into standing arrangements with Online Payment Gateway Service Providers (OPGSPs) in respect of export of goods and services. There is RBI mandated limit on the amount of single transaction (USD 10000 for exports) processed through this route.

Broad steps of the fund flows as below:

- Exporters in India register with Paypal to enable collection of exports payments,
- Overseas buyers make the payments to Paypal offshore accounts across various financial institutions/banks,
- Payments due to Indian exporters are transferred from the Paypal offshore account to a Citi Nostro USD Export Collection account,
- Funds received in Citi USD Nostro export collection account are converted in INR and transferred to exporters' banks and accounts in India under the OPGSP guidelines based on client instructions.”

“Annexure R2

Subject: RE: Report submitted in response to Alert No. Compliance/2020/01 dated 4th September, 2020.

Kind Attn. Sh. Shailesh Thakur / Harish Kumar

Dear Sir,

Further to our discussion yesterday in respect of our submissions made under FIU-IND's letter reference F.No. 19-4/COMPL/Misc./2017/FIU-IND dated 5 January 2021, we wish to clarify that the details of actual remitter submitted, did not form part of the original fund transfer instructions received by Citibank N.A. India and hence could not have been reported in the Cross Border Wire Transfer Reports submitted for the period between April 2017 to July 2020. This was also highlighted in our meeting held on 25 February 2020.

Following the receipt of FIU-IND's directions on 5 January 2021, the Bank enforced the need to provide actual remitter details with PayPal & Payoneer within the FIU-IND defined timelines, through senior management engagement. Consequently, PayPal and Payoneer furnished the details of actual remitters for the transactions reported for the period April 2017 to July 2020 to the Bank in tranches between 8 to 14 January 2021.

The Bank has put in a process to obtain the end remitter data for reportable transactions from the two OPGSPs- Payoneer and PayPal incrementally and effective July 2020 (for Payoneer) & September 2020 (for PayPal), the Bank has started including the same in the CBWTR reports to the FIU.

Please do let us know if there any incremental details that may be needed from our end.

Thanks & Regards,

Ajay Kataria
Citi AML | India"

64. In paragraph 100, FIU-IND then refers to the communications which were exchanged between it and SBI Card and Payment Services Limited. The exchange of these communications is detailed in paragraph 100 of the counter affidavit which reads as follows:-

> "100. Similarly, it is pertinent to highlight the reply given by another reporting entity i.e. SBI Cards and Payment Services Ltd.

> by way of e-mail dated January 7, 2021 to similar letter issued by respondent on January 5, 2021 seeking actual remitter/beneficiary details in CBWTR, reported by it for transaction involving PayPal. SBI Cards and Payment Services Ltd. in its reply said *"We had earlier also tried to seek beneficiary details from PayPal in the past however they had communicated their stance that such information will be directly provided only to the Law Enforcement Agencies upon request. Thus we would humbly request your good self to kindly direct PayPal for submission of the necessary beneficiary for these 18 transactions directly to your good office".*
>
> [A True Copy of the Email dated 07.01.2021 received by the FIU-IND from SBI Cards and Payment Services Ltd. is attached herewith and marked as **Annexure R-3**]"

65. Mr. Hossain also argued that PayPal through its concerned or parent entity has also committed to comply with analogous legislations prevalent in United States, Australia, Hong Kong and Luxembourg to name a few. He also drew the attention of the Court to the following disclaimer as appearing on the website of the parent entity of PayPal which reads as follows: -

> "As a global financial institution, PayPal is committed to full compliance with all applicable laws and regulations regarding Anti- Money Laundering ("AML"). PayPal's policy is to prevent people engaged in money laundering, fraud, and other financial crimes, including terrorist financing, from using PayPal's services. PayPal has robust policies and procedures to detect, prevent and report suspicious activity. To comply with OFAC (Office of Foreign Asset Control) requirements, and global sanctions, we screen our customer accounts against government watch lists. In addition, we may request that you provide us with documentation to help prove your identity or for business verification purposes. We report suspicious transactions to the financial intelligence unit in the respective country."

66. Mr. Hossain submitted that PayPal for unjustifiable reasons is seeking to create an exception insofar as India is concerned and thus

seeking exemption from coverage under the PMLA. It was submitted that the questions which stand raised cannot be fully appreciated without bearing in mind the various obligations which India is obliged to discharge by virtue of being a member of FATF and comply with the global efforts to fight the malaise of money-laundering.

67. It was submitted that the fight against money-laundering in order to succeed must keep in step with the digital transformation which is reshaping the economies and societies across the globe. It was submitted that the anti-money-laundering and counter terrorist financing modes adopted by nations across the globe rest upon the exchange of financial intelligence. It was submitted that FIU-IND is a member of the Egmont Group of Financial Intelligence Units, a global organisation consisting of 167 global FIUs which came to be constituted to enable FIUs established in various jurisdictions to sit on a common platform and thus enabling exchange of expertise and financial intelligence needed to combat money-laundering, terror financing and associated predicated crimes. FIU-IND also placed on the record the details evidencing a regular exchange of information and intelligence with partnering FIUs situate overseas. Those details are extracted hereinbelow: -

Year	No. of requests received from foreign FIUs	No. of requests sent to foreign FIUs	No. of spontaneous disclosures received from foreign FIUs
2015-16	100	140	120
2016-17	123	138	125
2017-18	109	177	129
2018-19	111	288	160
2019-20	135	485	180
2020-21	137	405	209

68. It was submitted that the failure of PayPal to register as a reporting entity is continuing to cause harm to vital security and law enforcement interests and resulting in FIU-IND being deprived of full transactional information which is not shared by the petitioner even with its nodal bank. It was submitted that even when the data is presently shared by the petitioner with its nodal bank, the same is an activity which is undertaken only on a monthly ad hoc basis and thus undermining the value of the data itself which, ceases in many situations to constitute actionable financial intelligence. It was additionally pointed out that even where transaction data is shared by the nodal bank, it is usually incomplete and does not include key data fields such as sender reference, originating bank details, beneficiary address and payment particulars.

69. In addition, it was submitted that the rule of strict construction of regulatory statutes was one which was duly propounded by the Supreme Court in **Balram Kumawat vs. UOI**[19] where it was observed as follows:-

[19] AIR 2003 SC 3266

> "**24**….The rule of strict construction does not also prevent the court in interpreting a statute according to its current meaning and applying the language to cover developments in science and technology not known at the time of passing of the statute. Thus psychiatric injury caused by silent telephone calls was held to amount to 'assault' and 'bodily harm' under sections 20 and 47 of the Offence Against the Person Act, 1861 in the light of the current scientific appreciation of the link between the body and psychiatric injury."

70. It was the submission of Mr. Hossain that money-laundering and financial crimes clearly fall in the genre of crimes of a special nature and which thus warrant the provisions of the PMLA being interpreted in a manner where the plain intention of Parliament is subserved. It was submitted that unless the provisions of the PMLA were to be interpreted bearing the aforesaid aspects in mind, it would clearly result in a proliferation of unmonitored channels of finance and facilitate the very mischief sought to be to be addressed by PMLA.

71. Mr. Hossain submitted that if Section 2(1)(rb) were to be interpreted and accepted on lines advocated by the petitioner, it would clearly hinder the anti money-laundering and counterterrorist financing measures which India seeks to adopt. Mr. Hossain also in aid of his submissions invited the attention of the Court to the judgement of the Supreme Court in **Baldeo Krishna Sahi v. Shipping Corp of India Ltd**[20] which had held that a statute must not be interpreted in a manner which would either promote a mischief or create a lacuna.

[20] (1987) 4 SCC 361, 366

72. Turning then to the provisions of the relevant provisions of PMLA itself, Mr. Hossain argued that Section 2(1)(rb) significantly uses the expression "*enables*" while dealing with the subject of payment which is to be effected between a payer and a beneficiary. Of equal significance, Mr. Hossain would urge is the insertion of the word "or" between payment and settlement service. It was further underlined that Section 2(1)(rb) thus clearly has been constructed in order to include a wide category of entities which facilitate payments.

73. According to Mr. Hossain, PayPal principally discharges a role of facilitating payment transactions. Mr. Hossain submitted that it would thus be clear that the technological platform created by PayPal would clearly fall within the ambit of a payment system as defined under the PMLA. It was further urged that merely because PayPal does not directly engage in clearing or settlement activities relating to monetary transactions would not detract from it being recognised to be a system which involves payment services.

74. Reference was made in this regard to the definition of the word "*enable*" as contained in Stroud's Judicial Dictionary and which is reproduced hereinbelow: -

> "**ENABLE**. To "enable" means to give power to do something, but does not connote a compulsion to some one else to concur therein. " 'Enable', in itself, has the primary meaning, in the case of a person under any disability as to dealing with another, of removing that disability; not of conferring a compulsory power as against that other" (per Rigby L.J., *West Derby* v *Met-ropolitan Life Assurance*, 66 L.J. Ch. 208). Therefore, though Poor Law Loans Act 1871 (c.11) s.2, "enables" poor law guardians to redeem

current loans it did not give them power to do so compulsorily as against the lenders (*West Derby* [1897) A.C.647).

Gift to trustees "in order to enable them" to bring-up children; see *Pear-man v Pearman*, 33 Bea. 394.

In *Lickbarrow Mason*, 2 T.R. 63 Ashurst J., said: "whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it". "Enabled" in this context means the doing of something by one of the innocent parties which in fact misled the other (*Jerome v Bentley & Co* [1952] 2 T.L.R. 58).

A car-owner who entrusts another person with his car and its registration book does not thereby "enable" that person to dispose of them within the meaning of Sale of Goods Act 1893 (c.71) s.21(2)(a) so as to raise an estoppel against the car-owner (*Central Newbury Car Auctions v Unity Finance; Mercury Motors Third Parties*) [1957 1 Q.B. 371].

One can do something to "enable" a person to travel with the London Transport Board By-laws No. 8(1) at any time before that person travels or while he is still telling (Murphy v Verati [1967] 1 W.L.R. 641)."

75. According to Mr. Hossain, of equal significance is the placement of a comma between the expressions "*clearing*" and "*payment*" coupled with the use of the disjunctive word "*or*" in Section 2(1)(rb). Reliance was placed on the decision of the Supreme Court in **Rasila S. Mehta & Ors. vs. Custodian, Nariman Bhavan**[21] where the meaning to be accorded to the expression "involving" arose. Mr. Hossain referred to the following passages from that decision:-

"75. The object of the Act is not merely to bring the offender to book but also to recover what are ultimately public funds. Even if there is a nexus between a third party, an offender and/or property the third party can also be notified. The word "involved" in Section 3(2) of the Special Court Act has to be interpreted in such a

[21] (2011) 6 SCC 220

manner so as to achieve the purpose of the Act. This Court in Ashwin S. Mehta v. Custodian [(2006) 2 SCC 385] , has observed as under : (SCC p. 400, para 34)

> "34. Although, we do not intend to enter into the correctness or otherwise of the said contention of the appellants at this stage, however, there cannot be any doubt whatsoever that they being notified persons, all their properties would be deemed to be automatically attached as a consequence thereto. For the said purpose, it is not necessary that they should be accused of commission of an offence as such."
>
> (emphasis supplied)

76. In Jyoti H. Mehta v. Custodian [(2009) 10 SCC 564 : (2010) 2 SCC (Cri) 1494] , this Court from paras 33 to 38 has held that the Special Court Act is a special statute and is a complete code in itself. The purpose and object for which it was created was to punish the persons who were involved in the act for criminal misconduct in respect of defrauding banks and financial institutions and its object was to see that the properties of those who were involved shall be appropriated for the discharge of liabilities of not only banks and financial institutions but also other governmental agencies. In construing the statute of this nature the court should not always adhere to a literal meaning but should construe the same, keeping in view the larger public interest. For the said purpose, the court may also take recourse to the basic rules of interpretation, namely, ut res magis valeat quam pereat to see that a machinery must be so construed as to effectuate the liability imposed by the charging section and to make the machinery workable.

77. The statutes must be construed in a manner which will suppress the mischief and advance the object the legislature had in view. A narrow construction which tends to stultify the law must not be taken. Contextual reading is a well-known proposition of interpretation of statute. The clauses of a statute should be construed with reference to the context vis-à-vis the other provisions so as to make a consistent enactment of the whole statute relating to the subject-matter. Furthermore, even in relation to a penal statute any narrow and pedantic, literal and lexical construction may not always be given effect to. The law would have to be interpreted having regard to the subject-matter of the offence and the object of the law it seeks to achieve. The purpose

> of the law is not to allow the offender to sneak out of the meshes of law. The courts will reject the construction which will defeat the plain intention of the legislature even though there may be some inexactitude in the language used.
>
> 78. Reducing the legislation (sic to a) futility shall be avoided and in a case where the intention of the legislature cannot be given effect to, the courts would accept the bolder construction for the purpose of bringing about an effective result. The courts, when rule of purposive construction is gaining momentum, should be very reluctant to hold that Parliament has achieved nothing by the language it used when it is tolerably plain what it seeks to achieve."

G. RBI'S POSITION

76. Appearing for RBI Mr. Tripathi, learned senior counsel at the outset, submitted that the affidavit tendered on its behalf in *Abhijit Mishra* cannot be viewed as being dispositive of the question which stands raised. According to Mr. Tripathi, the said affidavit is liable to be read and appreciated in the context of the statute which formed the subject matter of those proceedings, namely, the PSS Act. Mr. Tripathi drew the attention of the Court to the Preamble of the PSS Act and submitted that a reading thereof would establish that the said statute is principally concerned with the regulation and supervision of payment systems involved in the actual transmission of funds between the payer and a beneficiary. According to Mr. Tripathi, the object of the PMLA, on the other hand, is clearly distinct and different. Mr. Tripathi submitted that PMLA is fundamentally concerned with prevention, regulation and carrying forward the fight against the crime of money-laundering.

77. It was submitted that PMLA came to be enacted with the avowed objective of investigating offences of money-laundering and for punishment being meted out to those who are found guilty of the commission of the said offence. Mr. Tripathi invited our attention to the succinct observations as entered by the Bombay High Court in the matter of **Babulal Verma and Another vs. Enforcement Directorate**[22] where the objectives of the PMLA were explained in the following terms:-

> "**21.** A conjoint reading of Sections 2(1)(n)(na)(p)(u)(y), 3, 4 and 5 with the Statement of Object in enacting the PMLA would clearly indicate that, it has been enacted with an avowed object to investigate into the offence of money-laundering and to punish the accused for commission of the said offence. It also provides for attachment of property involved in money-laundering."

78. Mr. Tripathi also referred to the following passages from *Babulal Verma* in order to delineate the principles which must be borne in mind while construing the provisions of the PMLA:-

> **"22.** It is the settled position of law by a catena of judgments that, a statute is an edict of the Legislature and the conventional way of interpreting or construing a statute is to seek the 'intention' of its maker. A statute is to be construed according to the intent of them, that make it and the duty of judicature is to act upon the true intention of the Legislature. If a statutory provision is open to more than one interpretation the Court has to choose that interpretation which represents the true intention of the Legislature, in other words the 'legal meaning' or 'true meaning' of the statutory provision. The statute must be read as a whole in its context. It is now firmly established that the intention of the Legislature must be found by reading the statute as a whole.
>
> **23.** The statute to be construed to make it effective and workable

[22] 2021 SCC OnLine Bom 392

and the Courts strongly lean against a construction which reduces a statute to futility. A statute or any enacting provision therein must be so construed as to make it effective and operative. The Courts should therefore reject that construction which will defeat the plain intention of the Legislature even though there may be some inaccuracy or inexactness in the language used in a provision. Every provision and word must be looked at generally and in the context in which it is used. Elementary principle of interpreting any word while considering a statute is to gather the intention of the legislature. The Court can make a purposeful interpretation so as to effectuate the intention of the legislature and not a purposeless one in order to defeat the intention of the legislature wholly or in part.

24. At the time of debate in Rajya Sabha, while introducing Amendment to the Finance Act on 17 December, 2012, the then Finance Minister has categorically made the aforestated statements as reproduced in para No. 5 page No. 8 above. From the statement of the Finance Minister, it can be clearly discerned that, or lodgement for an offence under the PMLA, there must be a Predicate Offence and it is dealing with the proceeds of a crime. The information published by Respondent No. 1-ED pertaining to FAQs, for an answer to question No. 13 therein, it has been specifically stated that, every Scheduled Offence is a Predicate Offence. The Scheduled Offence is called Predicate Offence and the occurrence of the same is prerequisite for initiating investigation into the offence of money-laundering.

25. The Hon'ble Supreme Court, in the case of P. Chidambaram (Supra) while considering various provisions of PMLA and in particular Section 2(1)(y), which defines "Scheduled Offence" has held that, "Scheduled Offence" is a sine qua non for the offence of money-laundering which would generate the money that is being laundered. It is held that, PMLA contains schedules, which originally contained three parts namely, Part-A, Part-B and Part-C.

26. The Division Bench of this Court in the case of Radha Mohan Lakhotia (Supra) in para No. 13 has held that, Sections 3 and 4 of the Act deal with the offence of money laundering and punishment for money-laundering respectively. That, both these provisions, even on strict construction, plainly indicate that, the person to be proceeded for this offence need not necessarily be charged of having committed a Scheduled Offence. For the Expression used is "whosoever". The offence of money laundering under Section 3 of the Act is an independent offence. It is

committed if "any person" directly or indirectly attends to indulge or knowingly assists or knowingly is a party or is actually involving any process or activity connected with the proceeds of crime and projecting it as untainted property. The Division Bench thus in unequivocal terms has held that, the offence of money-laundering under Section 3 of the PMLA is an independent offence.

27. The Division Bench of Madras High Court in the case of VGN Developers P. Ltd. (Supra) has relied upon the decision in the case of Radha Mohan Lakhotia (Supra). The Madras High Court accepted the contention of the learned Additional Solicitor General appearing therein, that, the PMLA is self-contained and stand alone and thus, independent of predicating offence. It has been held that, it cannot be stated that, a mere closure by the CBI would provide a death knell to the proceedings of the Respondent (i.e. ED therein). That, in a given case, the complaint may emanate from a registration of a case involving scheduled offence. But the fate of the investigation in the said scheduled offence cannot have bearing to the proceedings under the PMLA. From the reading of the said decision it is clear that, mere filing of closure report by the Investigating Agency will not create any impediment or hurdle in the process of investigation by the ED of an offence registered under PMLA and being investigated by it.

28. It is thus absolutely clear that, for initiation/registration of a crime under the PMLA, the only necessity is registration of a Predicate/Scheduled Offence as prescribed in various Paragraphs of the Schedule appended to the Act and nothing more than it. In other words, for initiating or setting the criminal law in motion under the PMLA, it is only that requirement of having a predicate/Scheduled crime registered prior to it. Once an offence under the PMLA is registered on the basis of a Scheduled Offence, then it stands on its own and it thereafter does not require support of Predicate/Scheduled Offence. It further does not depend upon the ultimate result of the Predicate/Scheduled Offence. Even if the Predicate/Scheduled Offence is compromised, compounded, quashed or the accused therein is/are acquitted, the investigation of ED under PMLA does not get affected, wiped away or ceased to continue. It may continue till the ED concludes investigation and either files complaint or closure report before the Court of competent jurisdiction.

29. The language of Sections 3 and 4 of PMLA, makes it absolutely clear that, the investigation of an offence under Section

> 3, which is punishable under Section 4, is not dependent upon the ultimate result of the Predicate/Scheduled Offence. In other words, it is a totally independent investigation as defined and contemplated under Section 2(na), of an offence committed under Section 3 of the said Act.
>
> **30.** PMLA is a special statute enacted with a specific object i.e. to track and investigate cases of money-laundering. Therefore, after lodgment of Predicate/Scheduled Offence, its ultimate result will not have any bearing on the lodgment/investigation of a crime under the PMLA and the offence under the PMLA will survive and stand alone on its own. A Predicate/Scheduled Offence is necessary only for registration of crime/launching prosecution under PMLA and once a crime is registered under the PMLA, then the ED has to take it to its logical end, as contemplated under Section 44 of the Act."

79. Learned senior counsel further submitted that the expression *"payment system"* as defined under the PSS Act cannot be mechanically applied or imputed while understanding the scope and intent of the Legislature in seeking to regulate the activities of a payment system operator under the PMLA. This, according to Mr. Tripathi, would clearly flow from the fact that the PSS Act operates in an entirely different sphere. It was submitted that even though the definition of a "payment system" be more or less identical in the two statutes, the same would have to be appreciated bearing in mind the well settled principle of statutory interpretation that identical words employed in two separate statutes may be ordained and intended to carry completely different meanings. According to Mr. Tripathi, it would be the principle of contextual interpretation which would apply in order to understand and appreciate the distinction which must necessarily be understood to exist and the meaning liable to be

ascribed to the phrase "payment system" under the two statutes.

80. In support of the aforenoted submissions, reliance was placed on the following pertinent observations as entered by the Constitution Bench in **D.N. Banerjee vs. P.R. Mukherjee and others[23]: -**

> "11. These remarks are necessary for a proper understanding of the meaning of the terms employed by the statute. It is no doubt true that the meaning should be ascertained only from the words employed in the definitions, but the get-up and context are also relevant for ascertaining what exactly was meant to be conveyed by the terminology employed. As observed, by Lord Atkinson in Keates v. Lewis Merthyr Consolidated Collieries,
>
> > "In the construction of a statute it is, of course, at all times and under all circumstances permissible to have regard to the state of things existing at the time the statute was passed, and to the evils which, as appears from it provisions, it was designed to remedy".
>
> If the words are capable of one meaning alone, then it must be adopted, but if they are susceptible of wider import, we have to pay regard to what the statute or the particular piece of legislation had in view. Though the definition may be more or less the same in two different statutes, still the objects to be achieved not only as set out in the preamble but also as gatherable from the antecedent history of the legislation may be widely different. The same words may mean one thing in one context and another in a different context. his is the reason why decisions on the meaning of particular words or collection of words found in other statutes are scarcely of much value when we have to deal with a specific statute of our own; they may be helpful, but cannot be taken as guides or precedents."

81. Mr. Tripathi in support of the aforesaid contention also relied upon the following pertinent observations as appearing in the decision of the Supreme Court in **Commissioner of Central Excise v Shree**

[23] AIR 1953 SC 58

Baidyanath Ayurved Bhawan Ltd.[24] :-

> "**55**. True it is that Section 3(a) of the Drugs and Cosmetics Act, 1940 defines "Ayurvedic, siddha or unani drug" but that definition is not necessary to be imported in the new Tariff Act. The definition of one statute having different object, purpose and scheme cannot be applied mechanically to another statute. As stated above, the object of the Excise Act is to raise revenue for which various products are differently classified in the new Tariff Act."

82. Continuing along this thread, Mr. Tripathi, further submitted that an identical word while appearing in the very same statute may, if circumstances so warrant, be liable to be interpreted in different ways based on the context in which it is placed. Learned senior counsel sought to draw sustenance in this respect on the following succinct observations as appearing in the decision of the Supreme Court in **Whirlpool v. Registrar of Trademarks[25]:-**

> "**28.** Now, the principle is that all statutory definitions have to be read subject to the qualification variously expressed in the definition clauses which created them and it may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to have a somewhat different meaning in different sections of the Act depending upon the subject or context. That is why all definitions in statutes generally begin with the qualifying words, similar to the words used in the present case, namely "unless there is anything repugnant in the subject or context". Thus there may be sections in the Act where the meaning may have to be departed from on account of the subject or context in which the word had been used and that will be giving effect to the opening sentence in the definition section, namely "unless there is anything repugnant in the subject or context". In view of this qualification, the court has

[24] (2009) 12 SCC 419

[25] (1998) 8 SCC 1

> not only to look at the words but also to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning intended to be conveyed by the use of the words "under those circumstances". (see *Vanguard Fire and General Insurance Co. Ltd.* v. *Fraser & Ross* [AIR 1960 SC 971 : (1960) 3 SCR 857])"

83. To buttress the aforesaid proposition, Mr. Tripathi, additionally referred to the following passage from the decision of the Supreme Court in **Jagir Singh vs. State of Bihar[26]:-**

> "**20.** The general rule of construction is not only to look at the words but to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning according to what would appear to be the meaning intended to be conveyed by the use of the words under the circumstances. Sometimes definition clauses create qualification by expressions like "unless the context otherwise requires"; or "unless the contrary intention appears"; or "if not inconsistent with the context or subject-matter". "Parliament would legislate to little purpose," said Lord Macnaghten in *Netherseal Co.* v. *Bourne* [(1889) LR 14 AC 228 : 59 LJ QB 66 : 61 LT 125] , "if the objects of its care might supplement or undo the work of legislation by making a definition clause of their own. People cannot escape from the obligation of a statute by putting a private interpretation on its language." The courts will always examine the real nature of the transaction by which it is sought to evade the tax."

84. In order to expand upon the objectives underlying the PSS Act, Mr. Tripathi also relied upon the following observations as were rendered by the Supreme Court in **Internet and Mobile Assn. v. Reserve Bank of India [27]**

> "157. Apart from the provisions of the RBI Act, 1934 and the Banking Regulation Act, 1949, the impugned Circular also refers to

[26] (1976) 2 SCC 942

[27] (2020) 10 SCC 274

the power under Section 18 of the Payment and Settlement Systems Act, 2007. In order to buttress their contention regarding the availability of power to regulate, the petitioners refer to the definition of the expression "payment system" under Section 2(1)(i) of the said Act and contend that VCEs do not operate any payment system and that since the power to issue directions under Section 18 is only to regulate the payment systems, the invocation of the said power to something that does not fall within the purview of payment system, is arbitrary.

158. But Section 18 of the Payment and Settlement Systems Act indicates (i) what RBI can do, (ii) the persons qua whom it can be done, and (iii) the object for which it can be done. In other words, Section 18 empowers RBI (i) to lay down policies relating to the regulation of payment systems including electronic, non-electronic, domestic and international payment systems affecting domestic transactions and (ii) to give such directions as it may consider necessary. These are what RBI can do under Section 18. Coming to the second aspect, the persons qua whom the powers under Section 18 can be exercised are (i) system providers (ii) system participants and (iii) any other person generally or any such agency. The expression "system provider" is defined under Section 2(1)(q) to mean a person who operates an authorised payment system. The expression "system participant" is defined in Section 2(1)(p) to mean a bank or any other person participating in a payment system, including the system provider. Other than the expressions "system provider" and "system participant", Section 18 also uses the expressions "any other person" and "any such agency".

159. It is true that the purposes for which the power under Section 18 can be exercised, are also indicated in Section 18. They are (i) regulation of the payment systems, (ii) the interest of the management and operation of any payment system, and (iii) public interest.

160. As we have pointed out elsewhere, the impugned Circular is primarily addressed to banks who are "system participants" within the meaning of Section 2(1)(p). The banks certainly have a system of payment to be effected between a payer and a beneficiary, falling thereby within the meaning of the expression payment system.

161. It may also be relevant to take note of the definition of the expressions "payment instruction" and "payment obligation" appearing in clauses (g) and (h) of sub-section (1) of Section 2

which read as follows:

"2. (1)(g) "payment instruction" means any instrument, authorisation or order in any form, including electronic means, to effect a payment—

(i) by a person to a system participant; or

(ii) by a system participant to another system participant;

(h) "payment obligation" means an indebtedness that is owned by one system participant to another system participant as a result of clearing or settlement of one or more payment instructions relating to funds, securities or foreign exchange or derivatives or other transactions;"

162. Therefore, in the overall scheme of the Payment and Settlement Systems Act, 2007, it is impossible to say that RBI does not have the power to frame policies and issue directions to banks who are system participants, with respect to transactions that will fall under the category of payment obligation or payment instruction, if not a payment system. Hence, the argument revolving around Section 18 should fail."

85. In view of the aforesaid, it was his submission that neither the affidavit of RBI filed in *Abhijit Mishra*, nor the mere fact that the expression *"payment system"* is identically defined under the PSS and PMLA Acts would lend credence to the submissions addressed on behalf of PayPal.

86. Proceeding further, Mr. Tripathi submitted that even the Committee which came to be constituted by this Court has correctly appreciated the distinction which is liable to be recognised to exist when the PMLA chooses to define a payment system and referred to the stand of the Department of Revenue which was noticed as under:-

"7. Department of Revenue representative stated-

- The definitions of Payment System and Payment System Operator under PMLA are quite exhaustive. These

definitions are oriented towards covering the entities from ML/TF risk perspective.

- Interpretation of the provisions of PMLA is primarily the mandate of Department of Revenue, Ministry of Finance, Government of India.
- Department of Revenue is of the view that PayPal and other similar entities having similar operations are very well covered in the definitions of "Payment system" and Payment System operator" in PMLA. Hence, PayPal and other similar entities having similar operations fall under the definitions of "Financial Institution" and hence "Reporting entity" under PMLA.
- OPGSP circular of Foreign Exchange Department, RBI makes it incumbent upon the OPGSP to ensure adherence to the information Technology Act, 2000 and all other relevant laws/regulations in force.
- There is a very high M/TF risk involved in continued co-compliance by such entities in not registering with FIU India and this is negatively impacting the implementation of AML/CFT regime as per FATF recommendations. Besides, it also negatively impacts the integrity of financial systems from AML/CFT perspective.

9. The Senior Economic Adviser, DEA steered the discussions and reiterated the mandate of the Committee. The Hon'ble High Court of Delhi has, inter alia, given the following directions in the W.P.(C) 138/2021 between PayPal Payments Private Limited versus Financial Intelligence Unit-India.

(i) The Reserve Bank of India (RBI) and Ministry of Finance to take a clear stand after the due consultation as to whether they consider platforms such as that of the petitioners (PayPal) as being the purview of PML Act.

(ii) Accordingly, Ministry of Finance is directed to constitute a Committee with a nominee of RBI and the Ministry of Finance to clarify their position as to whether companies like the petitioners who claim to be facilitators of monetary transactions, both in foreign exchange and in India rupees, ought to be categorized as "Payment System operators" and hence “reporting entities” under the PML Act.”

87. Mr. Tripathi also drew the attention of the Court to the ultimate

conclusions which came to be recorded by that Committee when it opined as under: -

> "**Conclusion**
>
> 11. Entities like PayPal are very much covered under the definition of Payment System Operator under PMLA. The definition of Payment System Operator in PMLA is a standalone definition and not linked with PSS Act. Non-requirement of registration of PayPal and similar entities with RBI under PSS Act does not preclude them from registering with FIU India under PMLA and discharging their Anti-Money Laundering and Countering financing of Terrorism (AML/CFT) obligations under PMLA. It is the mandate of Ministry of Finance, Government of India to implement PMLA and discussions in the Committee clearly point towards the intention of legislature in making PMLA definitions oriented towards covering ML/TF risks. There is a continued very high ML/TF risk in not covering PayPal and similar entities under PMLA. RBI concurs with the view of the Committee that the interpretation of "payment system" / "payment system operator" definitions in PMLA is the sole mandate of Ministry of Finance."

88. Reverting then to the affidavit filed in *Abhijit Mishra*, it was pointed out that the said affidavit must be understood bearing in mind the regulatory regime which prevailed at the relevant time and governed payment aggregation services. It was submitted that while RBI at that time had adopted a *"light touch"* approach by advising banks to exercise caution on their part and to follow instructions, with the exponential increase in online transactions and the expanding roles performed by such intermediaries, it decided to regulate PA activities in terms of its circular of 17 March 2020. It was submitted by Mr. Tripathi that in light of the prevalent scenario and bearing in mind the

Anti-Money Laundering /Terror Financing[28] risks and challenges which face the Nation, the provisions of the PMLA must be accorded a purposive interpretation and PayPal held to be a payment system operator.

H. PROCEEDINGS ON THE PETITION

89. It would be appropriate to pause at this juncture and briefly take note of certain proceedings which ensued prior to the matter being closed for judgement. The Court on 12 January 2021 had taken note of the issues which stood raised and proceeded to constitute a Committee comprising of nominees of the RBI as well as the Ministry of Finance and other stakeholders so that a principled view of those authorities may be elicited for the consideration of the Court. The deliberations which ensued and the conclusions which ultimately came to be recorded by that Committee have already been extracted hereinabove.

90. During the course of the preliminary submissions which were addressed, the Court on 15 December 2022 also accorded liberty to parties to place a short note explaining the business model of PayPal and why according to FIU-IND, it was liable to be viewed as a reporting entity under the PMLA. Pursuant to the liberty so granted, FIU-IND in terms of its Note of 16 January 2023 highlighted the following issues:-

> "Business Model of Petitioner

[28] AML/TF

1. The Petitioner is a payment facilitation platform which onboards merchants / sellers and enables such individuals / entities to collect payments. In doing so, the Petitioner essentially must collect details of the onboarded party – including their identity as well as details such as the account in which proceeds are to be ultimately credited. Further, where a third party customer wishes to pay the onboarded party, Petitioner would facilitate the same transaction by collecting money on behalf of the onboarded party and crediting the same as instructed.

2. In this manner, while nominally being an intermediary, the Petitioner does more. It collects monies on behalf of various persons and credits them as instructed. Even though such transactions may take place through banking channels, the banks only have visibility over the transaction end points and values. Any further information collected by the Petitioner about a transacting party is not available to the Bank. In contrast, the Petitioner – due to its onboarding-related due diligence – collects far more amounts of data than which it passes on. For example, in situations where the online portal of the Petitioner is accessed (hypothetically) by a user whose IP address is based in Pakistan, the Petitioner web platform collects and makes note of the same. However, such information is not passed on to the banks. This is just one example.

3. Under foreign law, the Petitioner and its affiliate entities are required to ensure that they do not breach sanctions which may be in place regarding an individual or organisation. In order to ensure compliance with such regimes, the Petitioner cannot afford to blind itself to looking into every data point regarding onboarded parties to ensure there is no breach of sanctions. Therefore, when the Petitioner takes a stand that it is an innocent intermediary before this Court, such stand is disingenuous and misleading.

4. Under Indian law, the Petitioner, by its own admission, operates as an OPGSP entity. In this regard, reference to the relevant framework of RBI governing OPGSP entities itself makes clear that (emphasis supplied)[1]:

> "*2.2 Foreign entities, desirous of operating as OPGSP, shall open a liaison office in India with the approval of the Reserve*

Bank before operationalising the arrangement with any AD category-I bank. It would be incumbent upon the OPGSP to:

(i) ensure adherence to the Information Technology Act, 2000 and all other relevant laws / regulations in force;

(ii) put in place a mechanism for resolution of disputes and redressalof complaints;

(iii) create a Reserve Fund appropriate to its return and refund policy and

(iv) ***onboard sellers, Indian as well as foreign, following appropriatedue diligence procedure.***

Resolution of all payment related complaints in India shall remain theresponsibility of the OPGSP concerned."

5. This makes it clear that, by regulation, the Petitioner is required to conduct onboarding due diligence. In order to comply with this requirement it is clear that the Petitioner must collect and process various data points relating to the business and profile of the merchants it onboards. Within context of this binding obligation, it is not open for the Petitioner now to claim that it merely serves as an intermediary entity.

6. In view of its requirement to conduct due diligence and onboard of transacting parties, the Petitioner would reasonably be expected to collect at least the following data points at the time of onboarding as well as on an ongoing basis. As relevant to the present context where the Petitioner is facilitating exports from India, such data points would be relevant in connection with the Indian exporter as well as the foreign remitter (to the extent relevant / applicable).

Data Point	Value
Entity / Person Name	Required to complete transactions; for onboarding diligence; and screening against blacklists.
Entity / Person Address	Required to complete transactions; onboarding diligence; and screening against blacklists.
Entity / Person Banking information including account, bank, etc.	Required to complete transactions; for onboarding diligence; and screening against blacklists.

Entity / Person line of business	Required to complete transactions; onboarding diligence; and screening against blacklists.
Entity / Person device information	Required to complete transactions; onboarding diligence; and detection of fraudulent activity.
Entity / Person IP address and technical metadata	Required to complete transactions; for onboarding diligence; screening; and detection of fraudulent activity.
Entity / Person registration/ licensing details (if applicable)	Required to complete transactions; for onboarding diligence;
Entity / Person contact information including website, email, and phone number	Required to complete transactions and provide services;
Whether entity / person has been blocked or suspended for fraudulent activity	Required to protect business from fraud;
Whether any law enforcement requests have been received in respect of Entity / Person	Required for screening against blacklists.
Note: The above data points are illustrative only and, in the experience of FIU-IND, most large entities in the payments ecosystem collect a large number of datapoints beyond the above.	

7. Further, at the time of the Impugned Order, the Petitioner was also operating its domestic business. The arguments above apply in equal measure to this business while it was in operation.

8. In prior hearings, the Petitioner has also sought to equate its business model with other common applications e.g. UPI applications (which are referred to as Third Party Application Providers (TPAPs) in the UPI ecosystem). However, such comparisons are completely misleading and factually erroneous. In the case of the UPI ecosystem, TPAPs are basically software / application providers which provide an interface to access the UPI ecosystem through a bank. They do not themselves onboard customers – which is done by banks and TPAPs merely provide a new interface through which banks and UPI can be interacted with. In contrast:

- PayPal plays an active role in onboarding foreign parties under the OPGSP framework and has an obligation to undertake due diligence under the same framework;

- PayPal maintains a nodal / collection account with a Bank through which OPGSP funds are routed. Credits / debits in such account are made by the Bank in accordance with the instructions of PayPal (as defined under the OPGSP framework). This is in contrast to the TPAP which does not handle fund flows.

9. In connection with the business model, the following points assume critical importance:

- The business model of the Petitioner, in order to comply with extant regulation, requires it to be the entity onboarding foreign parties and requires due diligence to be conducted over such parties.

- The Petitioner collects a wide variety of data points relating to foreign parties it onboards which far exceeds the data points shared with its bank partners;

- The Petitioner collects a wide variety of data points relating to foreign parties it onboards which far exceeds what is to be included in the CBWTR format which is merely one type of threshold report to be filed by the RE.

- The Petitioner is aware of the criticality of STR reporting based on its compliance with similar commitments abroad.

- The Petitioner's role cannot be equated with TPAP or other stakeholders since the Petitioner plays an active role in onboarding transacting parties, is under an obligation to conduct due diligence, and handles funds through a collection account maintained in its partner bank."

91. The said Note while expanding upon the role discharged by FIU-IND asserts as under: -

"Role of FIU-IND with respect to business model:

12. In order to conduct such analysis, FIU-IND leverages every single data point available from a report filed by a 'reporting entity' – this includes transacting parties, values, KYC information of parties, location, information as well as technical metadata such as IP address (e.g. from which banking account was accessed). Each and every data points lends itself to analysis when seen within a large dataset and each and every data point can serve as a valuable tool in detecting, deterring, and investigating illicit

financial flows. In this regard, it is the sole prerogative of FIU-IND, which is possessed with the requisite expertise, to determine which data points are of value from a broader financial intelligence perspective.

13. In this regard, it is not open for the Petitioner to submit that it only maintains some data points and rest are filled in by its banking partner. Even if there is a single data point collected by or available to the Petitioner, the same serves as a basis for valuable analytics and pattern detection at the end of FIU-IND. Therefore, the admission of the Petitioner that it provides certain data points not otherwise available to its banking partner itself demonstrates the value of bringing it within the financial intelligence reporting net.

14. Flowing from the above, it is important to understand that FIU-IND receives a wide variety of reports from 'reporting entities'. This includes:

- Threshold-based reports i.e. when a transaction above a certain threshold takes place (e.g. cash transactions and cross-border transactions); and
- Subjective / non-threshold reports which are based on subjective assessments and analysis of a 'reporting entity' that a transaction meets a specific criteria (e.g. suspicious transaction reports which concerns assessment that a transaction may relate to the proceeds of crime or other illicit financial flows).

15. In this regard, the case of the Petitioner is that it meets its obligations by supplying all information available to it to its banking partner which files reports. The Petitioner has even provided the fields of the cross-border wire transfer report format to demonstrate how the same is populated. However, in doing so, the Petitioner is attempting to mislead the court by setting its own goalpost. As discussed above, the cross-border wire transfer report is merely one of the many threshold reports received by FIU-IND from 'reporting entities'. Merely demonstrating that it provides certain information to the bank in connection with the same format does not account for the other types of reports required to be filed by 'reporting entities'.

16. In this regard, of particular concern are 'suspicious transaction reports' which are the most valuable type of report received by FIU-IND. Such reports are based on subjective

assessments of 'reporting entities' that certain transactions may directly relate to the proceeds of crime or some other illicit financial activity. By collecting STRs, FIU-INDpushes the frontiers of intelligence collection and early warning and creates a framework whereby every stakeholder in the financial ecosystem is incentivised to undertake actions to detect and report potential criminality. Given the scale of criminal misuse of the financial system, such a framework – leveraging maximum number of stakeholders – is crucial to the early detection and deterrence of illicit financial flows. It is essential that every single stakeholder plays its part to protect the public as well asthe system from illicit financial flows. The Petitioner's case is silent on STR reporting.

17. As a responsible stakeholder in the financial ecosystem, the Petitioner itself must also use all available data points and its resources to detect and report STRs. These are subjective and based on assessment of the respective 'reporting entity'. These go far beyond the threshold reports and, therefore, the data points populated by the Petitioner in the CBWTR format are wholly irrelevant and misleading. The fact remains that the CBWTR is merely one type of report filed by a 'reporting entity' and the data points to be leveraged to report the same are limited in nature. In contrast, STR reporting requiresevery 'reporting entity' to leverage all data points available to it to report to FIU-IND. The Petitioner, by its own admission, collects several data points exclusive to it. Regardless of whether the same are shared with its banking partner, the fact remains that the Petitioner is best placed to analyse and report STRs based on the same.

18. Therein lies the logical inconsistency within the case of the Petitioner. On one hand, the Petitioner is at pains to point out that it shares certain data points with banks. In doing so, the Petitioner acknowledges and admits that certain data points (which are shared) are only available with it. Such admission itself establishes the case that the Petitioner itself is only privy to certain data points which can serve as basis for reporting of STRs and other reports. Even a single data point collected by the Petitioner must be leveraged to full extent. Therefore, the admission of the Petitioner establishes the needfor it to be covered as a 'reporting entity'.

The Petitioner in choosing to present its data points in a specific reporting format also seeks to mislead the Court on another front – its extensive collection of technical metadata (e.g. IP addresses). There is no doubt that the Petitioner collects such information. However, by the Petitioner's own illustration the same does not

flow to itsbanking partner. Therefore, it is clear that the Petitioner presents a misleading picture when it chooses to present its data elements in the CBWTR format. Further, the fact that such data is required to be leveraged for STR reporting is conveniently glossed over by the Petitioner by relying on a format for a narrow purpose."

92. FIU-IND also alluded to the fact that PayPal was in fact complying with AML statutes prevalent across different jurisdictions. This was sought to be highlighted with the aid of a chart which stood appended to that note and the same is extracted hereinbelow: -

"**Provisions of Foreign Law under which Petitioner appears to be registered**

(based on material available in public domain)

Jurisdiction	Provision/Definition	Notes
United States where PayPal is registered under the category of 'money service business' and specifically a 'money transmitter' 31CFR § 1010.100(ff)	**(ff) Money services business. A person wherever located doing business, whether or not on a regular basis or as an organized or licensed business concern, wholly or in substantial part within the United States, in one or more of the capacities listed in paragraphs (ff)(1) through (ff)(7) of this section. This includes but is not limited to maintenance of any agent, agency, branch, or office within the United States.** (1) Dealer in foreign exchange. A person that accepts the currency, or other monetary instruments, funds, or other instruments denominated in the currency, of one or more countries in exchange for the currency, or other monetary instruments, funds, or other instruments denominated in the currency, of one or more other	Two primary points arise from the present definition: (1) PayPal is registered as a money transmitter despite the various exclusions included in the statutory provision suggesting its business model fits within the definition of money transmitted and is not merely an intermediary as sought to be

	countries in an amount greater than $1,000 for any other person on any day in one or more transactions, whether or not for same-day delivery. (2) Check casher - (i) In general. A person that accepts checks (as defined in the Uniform Commercial Code), or monetary instruments (as defined at § 1010.100(dd)(1)(ii), (iii), (iv), and (v)) in return for currency or a combination of currency and other monetary instruments or other instruments, in an amount greater than $1,000 for any person on any day in one or more transactions. (ii) Facts and circumstances; Limitations. Whether a person is a check casher as described in this section is a matter of facts and circumstances. The term "check casher" shall not include: (A) A person that sells prepaid access in exchange for a check (as defined in the Uniform Commercial Code), monetary instrument or other instrument; (B) A person that solely accepts monetary instruments as payment for goods or services other than check cashing services; (C) A person that engages in check cashing for the verified maker of the check who is a customer otherwise buyinggoods and services; (D) A person that redeems	argued. (2) The Indian PMLA lacks the express statutory carve-outs contained in the US. This clearly establishes the coverage of the Petitioner within the PMLA's scope.

	its own checks; or (E) A person that only holds a customer's check as collateral for repayment by the customerof a loan. (3) Issuer or seller of traveler's checksor money orders. A person that (i) Issues traveler's checks or money orders that are sold in an amount greater than $1,000 to any person on any day in one or more transactions; or (ii) Sells traveler's checks or money orders in an amount greater than $1,000 to any person on any day in one or more transactions. (4) Provider of prepaid access – (i) In general. A provider of prepaid access is the participant within a prepaid program that agrees to serve as the principal conduit for access to information from its fellow program participants. The participants in each prepaid access program must determine a single participant within the prepaid program to serve as the provider of prepaid access. (ii) Considerations for provider determination. In the absence of registration as the provider of prepaid access for a prepaid program by one of the participants in a prepaid access program, the provider of prepaid access is the person	

	with principal oversight and control over the prepaid program. Which person exercises "principal oversight and control" is a matter of facts and circumstances. Activities that indicate "principal oversight and control" include: (A) Organizing the prepaid program; (B) Setting the terms and conditions of the prepaid program and determining that the terms have not been exceeded; (C) Determining the other businesses that will participate in the prepaid program, which may include the issuing bank, the payment processor, or the distributor; (D) Controlling or directing the appropriate party to initiate, freeze, or terminate prepaid access; and (E) Engaging in activity that demonstrates oversight and control of the prepaid program. (iii) Prepaid program. A prepaid program is an arrangement under which one or more persons acting together provide(s) prepaid access. However, an arrangement is not a prepaid program if; (A) It provides closed loop prepaid access to funds not to exceed $2,000 maximum value that can be associated with a prepaid access device or vehicle	

	on any day; (B) It provides prepaid access solely to funds provided by a Federal, State, local, Territory and Insular Possession, or Tribal government agency; (C) It provides prepaid access solely to funds from pre-tax flexible spending arrangements for health care and dependent care expenses, or from Health Reimbursement Arrangements (as defined in 26 U.S.C. 105(b)and 125) for health care expenses; or (D) It provides prepaid access solely to: (i) Employment benefits, incentives, wages or salaries; or (ii) Funds not to exceed $1,000 maximum value and from which no more than $1,000 maximum value can be initially or subsequently loaded, used, or withdrawn on any day through a device or vehicle; and (2) It does not permit: (i) Funds or value to be transmitted internationally; (ii) Transfers between or among users of prepaid access within a prepaid program; or (iii) Loading additional funds or the value of funds from non-depository sources. (5) **Money transmitter**–	

	(i) In general **(A) A person that provides money transmission services. The term "money transmission services" means the acceptance of currency, funds, or other value that substitutes for currency from one person and the transmission of currency, funds, or other value that substitutes for currency to another location or person by any means. "Any means" includes, but is not limited to, through a financial agency or institution; a Federal Reserve Bank or other facility of one or more Federal Reserve Banks, the Board of Governors of the Federal Reserve System, or both; an electronic funds transfer network; or an informal value transfer system; or** **(B) Any other person engaged in thetransfer of funds.** **(ii) Facts and circumstances;** **Limitations. Whether a person is a money transmitter as described in this section is a matter of facts and circumstances. The term "money transmitter" shall not include aperson that only:** **(A) Provides the delivery, communication, or**	

		network access services used by a money transmitter to support money transmission services; **(B) Acts as a payment processor to facilitate the purchase of, or payment of a bill for, a good or service through a clearance and settlement system by agreement with the creditor or seller;** **(C) Operates a clearance and settlement system or otherwise acts as an intermediary solely between BSA regulated institutions. This includes but is not limited to the Fedwire system, electronic funds transfer networks, certain registered clearing agencies regulated by the Securities and Exchange Commission ("SEC"), and derivatives clearing organizations, or other clearinghouse arrangements established by a financial agency or institution;** **(D) Physically transports currency, other monetary instruments, other commercial paper, or other value that substitutes for currency as a person primarily engaged in such business, such as an armored car,**	

		from one person to the same person at another location or to an account belonging to the same person at a financial institution, provided that the person engaged in physical transportation has no more than a custodial interest in the currency, other monetary instruments, other commercial paper, or other value at any point during the transportation; **(E) Provides prepaid access;** **(F) Accepts and transmits funds only integral to the sale of goods or the provision of services, other than money transmission services, by the person who is accepting and transmitting the funds.** (6) U.S. Postal Service. The United States Postal Service, except with respect to the sale of postage or philatelic products. (7) Seller of prepaid access. Any person that receives funds or the value of funds in exchange for an initial loading or subsequent loading of prepaid access if that person. (i) Sells prepaid access offered under a prepaid program that can be used before verification of	

	customer identification under §1022.210(d)(1) (iv) ; or (ii) Sells prepaid access (including closed loop prepaid access) to funds that exceed $10,000 to any person during any one day, and has not implemented policies and procedures reasonably adapted to prevent such a sale. (8) Limitation. For the purposes of this section, the term "money services business" shall not include. (i) A bank or foreign bank; (ii) A person registered with, and functionally regulated or examined by, the SEC or the CFTC, or a foreign financial agency that engages in financial activities that, if conducted in the United States, would require the foreign financial agency to be registered with the SEC or CFTC; (iii) A natural person who engages in an activity identified in paragraphs (ff)(1) through (ff)(5) of this section on an infrequent basis and not for gain or profit.	
Luxembourg	**Law of 12 November 2004 on the fight against money laundering and terrorist financing transposing Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001**	Report of the European Parliamentary Research service confirms that PayPal is registered

	amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering. (Specific category under which Petitioner is registered with the Luxembourg FIU is not clear)	with FIU of Luxembourg and files suspicious activity reports with the same. Extract (Page 70): *"The pilot project was launched to require FIU Luxembourg to share spontaneously 'all STRs filed by Amazon, Paypal and Ipay with other national FIUs via the FIU.NET Crossborder system. 90 percent of cross-border reports were transferred to another FIU within 24 hours and 99 percent within 3 days'."*
Australia	PayPal is registered as a "reporting entity" under the Anti-Money Laundering and Counter-Terrorism Financing Act 2006. The specific provision under which PayPal is registered is not clear.	Extract from PayPal submission to the Australian Consumer and Competition Commission (2018)[3] "8.3 We are a reporting entity to AUSTRAC under the Anti-Money Laundering and Counter-Terrorism Financing Act."

93. Controverting the aforesaid submissions, PayPal argued that its compliance with AML measures mandated across different jurisdictions must necessarily be evaluated bearing in mind the nature of activities that it undertakes in those jurisdictions. PayPal contended that insofar as India is concerned, it only operates as an OPGSP and thus merely because it has chosen to comply with certain statutory obligations placed in terms of different statutes which prevail in other jurisdictions, the same cannot possibly constitute justification for it being held to be a payment system operator.

94. While responding to the note of the FIU-IND dated 16 January 2023, it has asserted as under: -

> "i. It may be noted that the Respondent No.l/FIU vide its Note handed over on 16.01.2023 has produced a chart at the end of the Note, indicating that the PayPal Entities in United States, Luxemburg and Australia are complying with certain reporting obligations in the said jurisdiction and thus, the Petitioner ought to be considered a 'Reporting Entity' under the PMLA, It is submitted that the said contention of the Respondent FIU is misconceived and completely erroneous as it fails to appreciate that the PayPal Entities operating in the said jurisdictions are providing/offering services not identical to the services provided by the Petitioner in India. Illustratively, PayPal Inc. incorporated in United States is providing services such as a) Buy and sell cryptocurrencies services; b)Debit and credit card services; c) Receive and send donations; d) Balance holding account services; e) Buy now pay later services (which is a form of a credit facility); f) Point of sale solution services; g) Working capital loan services, h) send and receive payment for both commercial and personal transactions including domestic and international transactions, etc. Accordingly, PayPal Inc. in United States is registered under the category of 'money service business' which requires the said entity to comply with certain reporting obligations. However, the Petitioner i.e. PayPal Payments Pvt. Ltd. is not providing the said bouquet of services in India and as such only providing online payment

gateway for only export related transactions. Thus, the Petitioner does not merit treatment of a 'Reporting Entity' in India.

ii. PayPal (Europe) S.à.r.l. et Cie, S.C.A. incorporated in Luxemburg holds a Banking Licence. The said Paypal Entity provides a) Buy and sell cryptocurrency services; b) fund raising services, c) Balance Account holding services; d) payment services using electronic money; e) PayPal Wallet services; f) send and receive payment for both commercial and personal transactions including domestic and international transactions, etc. Accordingly, PayPal (Europe) S.à r.l. et Cie, S.C.A. in Luxemburg is complying with certain reporting obligations.

iii. PayPal Australia Pty Limited is providing a) Buy now pay later services (which is a form of a credit facility); b) balance holding account services; c) Point of sale solution services; d) send and receive payment for both commercial and personal transactions including domestic and international transactions, etc. Accordingly, PayPal Australia Pty Limited in Australia is complying with certain reporting obligations. However, the Petitioner i.e. PayPal Payments Pvt. Ltd. is not providing the said bouquet of services in India and as such only providing online payment gateway for only export related transactions. Thus, the Petitioner does not merit treatment of a 'Reporting Entity' in India.

7. From the above description of services offered by the PayPal Entities operating in other jurisdictions, it is evident that the reporting obligations arise on account of the financial services offered by such entities in the said jurisdictions, which cannot equated to the service of 'Online payment gateway service provided for export related transactions' in India. In other words, the PayPal Entities operating in other jurisdictions do not offer services identical to the Petitioner in those jurisdictions. Accordingly, the reporting obligations applicable to the PayPal Entities in each jurisdiction differs from one another, based or) the business/services offered by such entity."

95. Upon the matter being closed for judgement, PayPal placed an Additional Note on the record seeking to explain the reporting obligations discharged by it in different jurisdictions. Apart from placing on the record the statutes which are prevalent in United States,

Brazil, Luxembourg, Australia, Singapore, Japan, Hong Kong, China, Thailand, and Malaysia, it also explained the nature of services offered by it in those jurisdictions by way of a detailed chart which forms part of the record. While explaining the extent of the services offered in the United States, it was pointed out that PayPal complies with the provisions of the Currency and Foreign Transactions Reporting Act of 1970 in light of the myriad services provided by it in that jurisdiction and which include the trading of crypto currencies, debit and credit card services, balance holding account services, "buy now pay later" facilities, point of sale solutions to name a few. In Canada, PayPal disclosed that it complies with the provisions of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, 2000 and that the services provided in that country range from money transfer, crowd funding platform, receiving and sending of donations, foreign exchange currency conversions etc. Similarly in Australia, PayPal while providing services akin to the above, is stated to be licensed by the Australian Financial Services as a non-cash payment facility and also holds a limited Australian Deposit Institution License issued by the Australian Prudential Regulation Authority.

96. In Singapore, PayPal is stated to have applied for a licence under the Singapore Payment Services Act, 2019 and pending its application for exemption, during the statutory transactional period, engaged in providing services such as PayPal wallet, account issuance services as well as remittance and receipt of payments relating to

commercial transactions both domestic as well as international.

97. The essence of the submission was that it is ultimately the nature of services offered by PayPal in respective jurisdictions and the scope and ambit of relevant statutes which are liable to be borne in mind. Both Mr. Sibal as well as Mr. Poovayya submitted that PayPal should thus not be understood to be deliberately avoiding to comply with the provisions of the PMLA and all submissions to the contrary as addressed are clearly designed to prejudice this Court. Mr. Poovayya reiterated the aforesaid contentions in his rejoinder submissions and submitted that the reporting obligations applicable to PayPal entities in each jurisdiction differ from one another and are principally based on the nature of business which it transacts and the services that are offered. It was submitted that the aforesaid, in any case, would not result in PayPal being treated as a reporting entity under the PMLA.

It is these submissions which fall for consideration.

I. MONEY LAUNDERING – GLOBAL EXPERIENCES

98. It must at the outset be acknowledged that the menace of money laundering is not an "India centric" issue. It is a transnational phenomenon and an international challenge. In fact, the PMLA is an embodiment of India's resolve to join the concerted global effort in the fight against money laundering and terror financing. This is also evident from the fact that the legislation in question itself owes its

genesis to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the recommendations of the Financial Action Task Force established at that summit and which was followed by the adoption of the United Nations General Assembly Resolution of 23 February 1990. As PMLA itself acknowledges, it came to be enacted in furtherance of India's international obligations to implement various United Nations Resolutions in terms of which member States were called upon to adopt national anti-money laundering legislations and programmes.

99. The history of the coordinated endeavour and integrated reporting measures adopted by nations to combat the threat of money laundering was elaborately traced by the Supreme Court in *Vijay Madan Lal* as would be evident from the following extracts of that decision: -

> "**94**. To highlight the role played by the FATF in combating the menace of money-laundering, the respondent has traced the origin of FATF and stated its process of reviewing the compliance with its recommendations by every State and the consequences of non-compliance. It is submitted that the FATF was established by the Heads of State or Government of the seven major industrial nations (Group of Seven, G-7) joined by the President of the European Commission in a summit in Paris in July, 1989 which is famous for its 'Forty Recommendations' to combat money-laundering and, hence, carry out its own evaluation and enforcement on the issue of money-laundering across the world. Thus, it acts as a dedicated body dealing with this issue. It is submitted that FATF has recognized dynamic nature of money-laundering and thus attempted to respond to the money-laundering techniques that are constantly evolving, by reviewing its recommendations. Further, the FATF has adopted its Non-Cooperative Countries or Territories ("NCCT") initiative in a report issued on 14.2.2020, according to which a 25 points criteria

was recognized which is consistent with the Forty Recommendations of the FATF and which identified 'detrimental rules and practices' in the international effort to combat laundering. It thus established a review process to target delinquent countries and territories where the anti-laundering regime is ineffective in practice and to take steps against those countries. The steps which FATF may take against a non-compliant nation include 'conditioning, restricting, targeting or even prohibiting financial transactions with non-cooperative jurisdictions'.

95. It is submitted that the measures against money-laundering have evolved over the period of time. Further, FATF has taken preventive, regulatory and monitoring steps through keeping a watch on suspicious or doubtful transactions by amending its Forty Recommendations in 2003 and 2012.

96. It is further submitted that FATF assess the progress of its members in complying with the FATF recommendations through assessments performed annually by the individual members and through mutual evaluations which provides an in-depth description and analysis of a country's system for preventing criminal abuse of the financial system, as well as, by focused recommendations to the country to further strengthen its system.

97. It is submitted that upon evaluation, a country will be placed immediately into enhanced follow-up if it does not comply with the FATF technical and "big six" recommendations or has a low effectiveness outcome-181.

> [EndNote 181 : 181 (i) It has 8 or more Non-compliant NC/Partially Compliant (PC) ratings for technical compliance; (ii) It is rated NC/PC on any one or more of R.3, 5, 10, 11 and 20 "big six" recommendations; or (iii) It has a low level of effectiveness for 4 or more of the 11 effectiveness outcomes.]

98. It is further submitted that jurisdictions under monitoring then, based on their commitments and compliances, are put in two types of list viz., grey list and black list, which serve as a signal to the global financial and banking system about heightened risks in transactions with the country in question which not only severely affect its international reputation but also impose economic challenges, such as impacting the bond/credit market of the country, impacting the banking and financial sector of the country, affecting cross-border capital flows, especially for the

trade sector, documentary requirements for export and import payments, such as letters of credit may become more challenging to fulfil, potentially raising costs and hampering business for companies engaged in trade, adversely affecting the economy due to a lack of investment opportunities which may further deteriorate the financial health of the country and the country may also be deemed as a 'high-risk country'.

99. Further, the learned Solicitor General has relied on a report by the International Monetary Fund182 (IMF) - Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) Report on the Effectiveness of the Program to state the potential economic effects that may arise from such financial crimes, such as destabilizing capital inflows and outflows, loss of access to international financial markets as a result of deterioration in the country's reputation, difficulty in supervising financial institutions, undermining of the stability of a country's financial system and adverse effect on growth of the country.

100. The respondent has further relied on Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005) to state that nations are free to choose the definition of 'predicate offences' for money-laundering purposes from the list of offences given under the Convention, for example, by providing a list of those offences, a category offences, or by reference to offences that have a maximum term of imprisonment of one year or more (or, for states that have minimum thresholds for offences, those with imprisonment of a minimum of six months) and to take measures which are preventive in nature.

101. To illustrate the global development of the approach against money-laundering, 1991 Money Laundering Directive ('First Directive') adopted by the European Union is cited which imposed obligations on credit institutions and financial institutions in relation to customer identification and record-keeping, internal controls and training of staff and mandatory reporting of suspicious transactions. The Second Directive (2001) widened the number of institutions that fell within the scope of reporting obligations and also expanded the range of predicate offences for the purpose of money-laundering. EU Third Directive (2005) was directed to bring the EU legislation into line with the revisions to the FATF Recommendations and further

expanded the range of institutions within its scope to include life insurance intermediaries and widened the definition of high value dealers to capture those who accept cash payments of €15,000 or more. A definition of 'serious crimes' was included that constituted 'predicate offences', including all offences punishable by a maximum sentence of one year or more, or a minimum sentence of six months or more (in jurisdictions where minimum sentences are applied), as well as other specified offences including serious fraud and corruption. It is submitted that the EU Fourth Directive on Money Laundering (2015) aimed to improve the regulatory European framework after taking into account new FATF recommendations published in 2012.

103. To emphasize on the role of international cooperation to combat money-laundering, it has been stated that the Financial Intelligence Unit created by the Egmont Group, which is an international forum to combat money-laundering, should serve as a national centre for receiving, analyzing and disseminating suspicious transaction reports, and should have access on a timely basis to the financial, administrative and law enforcement information that it requires to properly undertake its functions as per the revised FATF Recommendations.

104. The Union of India has further traced the origin of the term "money-laundering" and stated that the term arose in United States in 1920s, which was used by the American Police Officers with reference to the ownership and use of launderettes by mafia groups as the launderettes gave them a means of giving a legitimate appearance to money derived from criminal activities. The profits gained through these launderettes were thus termed 'laundered'. Further, the term 'money-laundering' was first used with a legal meaning in an American judgment of 1982 concerning the confiscation of laundered Columbian drug proceeds.

107. It is stated that the principal sources of illegal proceeds are collar crimes (tax, fraud, corporate crimes, embezzlement and intellectual property crimes), drug related crimes and smuggling of goods, evasion of excise duties, corruption and bribery (and the embezzlement of public funds).

108. To show the global impact of money-laundering, it is submitted that the IMF and the FATF have estimated that the scale of money-laundering transactions is between 2% and 5% of the global GDP. It is also stated that the United Nations has

recently put the figure of money-laundering at USD 2.1 trillion or 3.6% of global GDP. Thus, the operation of money-laundering has international dimension. It is submitted that measures being taken at the national level would be inadequate, which made it necessary to establish effective international co-operation mechanisms to allow national authorities to co-operate in the prevention and prosecution of money-laundering and in international 'proceeds-hunting'.

110. It is stated that India, and its version of the PMLA, is 'merely a cog in this international vehicle' and as India is a signatory to these treaties, therefore, is bound legally and morally, to adopt the best global practices and respond to the changing needs of the times. It is, therefore, submitted that the constitutionality of the PMLA has to be adjudicated from the stand point of the country's obligations and evolving responsibilities internationally.

257. Thus, it is clear from a bare reading of two very initial international Conventions attempting to establish a world order to curb money-laundering, gave a very wide interpretation to the concept of money-laundering. There has been a consensus that acquisition, possession, use, concealing or disguising the illicit origin of illegitimately obtained money to evade legal consequences would be money-laundering. Further, concealing and disguising too were clearly a part of money-laundering and as such there was no bar or understating that pointed to the fact that there was a need to project the monies as untainted. This was obviously subject to the fundamental principles of the domestic law of the countries. However, the growth of the jurisprudence in this law did not stop or end there. As we progressed into a world equipped with the internet and into a digital age, criminals found new ways to launder and the law found new ways to tackle them. In the meanwhile, the FATF was established and it started working towards a goal of preventing money-laundering. It has since its inception been aimed towards reducing cross border and intra State money-laundering activities. In this endeavour, it has made many concerted efforts to study, understand, develop and mutually evaluate the state of the compliance in countries towards reducing money-laundering. Today, as we will see, many of the amendments in the 2002 Act are in response to the recommendations of the FATF. Thereafter, forty recommendations dated 20.6.2003, were made by the FATF which had led to much deliberations go on to show that all

> endeavours were to be Vienna and Palermo Conventions compliant. During the evolution of the jurisprudence on money-laundering, it was found that India was in fact lacking in some aspects of curbing money-laundering. Hence, the recommendations were made to India time and again…"
>
> **258**. Thus, it is clear that certain recommendations were made by the FATF concerning the definition of money-laundering. It is also clear from public records that India has time and again, since the inception of the Act, made active efforts to follow and evolve its own laws in line with the mandates and recommendations of the FATF. Furthermore, it is noteworthy that even in other jurisdictions; the above-mentioned definition has gained a more holistic approach which is not per se the same as the colloquial term, "money launder" or simply turning black money into white. In the UK and Spain, possession of criminal proceeds is covered under money-laundering, similarly by way of interpretation, the same is the case in Germany and Italy452. Following these recommendations, amendments were brought about in India…."

100. Insofar as FIU-IND is concerned, the same came to be set up pursuant to the "40+9" recommendations of the FATF which obliged partnering countries to establish an intelligence unit that would serve as the focal point for receipt and analysis of Suspicious Transaction Reports [STRs'] as well as other information relating to money laundering and other associated predicate offences, the financing of terrorism, for dissemination of analytical results and to ultimately form part of a collaborative system for the benefit of member nations. The FIU-IND essentially acts as the central nodal agency for receiving, processing and analysing information relating to suspicious financial transactions. It is thus tasked with the collection of information, analysis thereof and the consequential sharing of information with other national intelligence and law enforcement

agencies. FIU-IND represents the coordinated mechanism adopted by nations aimed at strengthening the collection and sharing of financial intelligence by the creation of a national, regional and a global network to detect illicit financial flows and combat money laundering.

101. While the ubiquitous imprint of the internet has enabled nations and people to transcend borders and forms the backbone of the *"wired world"*, it has also given rise to its fair share of attendant and ever evolving challenges. This is duly acknowledged in FATF's report on Emerging Terrorists Financing Risks published on 21 October 2015. The Court deems it apposite to extract the following passages from that report: -

> **"EXECUTIVE SUMMARY**
>
> While the number and type of terrorist groups and related threats have changed over time, the basic need for terrorists to raise, move and use funds has remained the same. However, as the size, scope and structure of terrorist organisations have evolved, so too have their methods to raise and manage funds. The main objective of this report is to analyse recently identified terrorist financing (TF) methods and phenomena, referred to as 'emerging TF risks'.
>
> This report highlights that **understanding how a terrorist organisation manages its assets is critical to starving the organisation of funds and disrupting their activities in the long term**. Terrorist organisations have different needs, depending on whether they are large, small, or simply constituted of a network of seemingly isolated individuals. The section on financial management explores the use of funds by terrorist organisations, not only for operational needs but also for propaganda, recruitment and training, and the techniques used to manage these funds, including allocating specialised financial roles. The report finds that authorities need to do further work to identify and target various entities responsible for these functions.

In assessing the continued relevance of traditional TF techniques (that is, those techniques identified in the FATF Terrorist Financing Typologies Report (FATF, 2008)) **the general conclusion is that while all these techniques are evolving, they still represent significant TF risks**. Jurisdictions provided a range of case studies to demonstrate the ongoing threats and vulnerabilities. Jurisdictions' national risk assessments were particularly useful in this analysis. Anti-money laundering (AML) and countering the financing of terrorism (CFT) systems and operational measures have made it more difficult for terrorist organisations to use traditional avenues to raise or move funds. However, **the adaptability of these organisations, and new threats posed by foreign terrorist fighters and small cell terror networks, require authorities to monitor how these traditional methods continue to be used**. The use of national risk assessments to conduct strategic analysis of current TF risks will help inform policy makers to implement the necessary legal and operational measures.

With respect to the section on emerging TF risks, the FATF decided to explore the threats and vulnerabilities posed by:

1. foreign terrorist fighters (FTFs),
2. fundraising through social media,
3. new payment products and services, and
4. the exploitation of natural resources.

The FTF phenomenon is not new, but the recent scaling up of individuals travelling to Iraq and Syria has been a challenge for many FATF members. **FTFs are predominantly using traditional methods, particularly self-funding, to raise the funds they require to travel to the conflict areas.** However, the novel aspect for jurisdictions is the challenge in identifying these individuals because of the relatively low amounts of funding they require and the speed with which they can acquire it. The report reveals that **financial intelligence can assist in identifying FTFs in a number of ways**. Close cooperation between authorities domestically and internationally and close partnerships between authorities and the private sector can assist to better identify FTFs and their facilitation networks. The report also shows that further work is required to shed light on blind spots in information about FTFs, including returnees.

The role of social media in breeding violent extremism has been well reported but less is known about how it used to raise funds for terrorists and terrorist groups. The report finds that **there are**

significant vulnerabilities associated with social media, including anonymity, access to a wider range and number of potential sponsors or sympathisers and the relative ease with which it integrates electronic payment mechanisms. It is also apparent that donors are often unaware of the end-use of funds supported by social media, including crowdfunding, which presents a risk that terrorist organisations can exploit.

This report finds that **electronic, on-line and new payment methods pose an emerging terrorism financing vulnerability which may increase over the short term** as the overall use and popularity of these systems grows. Many of these systems can be accessed globally and used to transfer funds quickly. While transactions may be traceable, it proves difficult to identify the actual end-user or beneficiary. This report presents a number of interesting cases, but the actual prevalence and level of exploitation of these technologies by terrorist groups and their supporters is not clear at this time and remains an ongoing information gap to be explored.

The **exploitation of natural resources for TF was raised as a substantial concern** in the context of the Islamic State of Iraq and the Levant (ISIL) but this report has confirmed that it is also relevant for other terrorist organisations and regions. The ability to reap high rewards from the natural resources sector, coupled with the weak institutional capability, particular in or near areas of conflict, creates a significant vulnerability for terrorist organisations to capitalise on. This report finds that this issue is linked with criminal activity including extortion, smuggling, theft, illegal mining, kidnapping for ransom, corruption and other environmental crimes.

This report builds on the findings of the *Financing of the Terrorist Organisation of the Islamic State in Iraq and the Levant* report (the 'FATF ISIL report', 2015) and takes into account the activities of a broader range of terrorist organisations. The project benefited from the involvement of national experts from FATF's entire global network, including law enforcement, intelligence agencies and Financial Intelligence Units (FIUs). This report also takes into account recent initiatives by the United Nations, the Egmont Group of FIUs and the Members of the Counter-ISIL Coalition, specifically Counter ISIL Financing Group (CIFG). The project involved private sector feedback via their involvement in the FATF/ Financial Action Task Force of Latin America (GAFILAT) Joint Experts' Meeting on Terrorism Financing. This engagement with the private sector to identify TF risks has also laid the groundwork for future initiatives to

develop risk indicators which will be helpful to both private and public sectors.

This report was developed in a short timeframe to provide a snapshot of the TF risks we see today. It is not a comprehensive assessment of those risks and the issues discussed in the report should be subject to further study. **This report serves to raise awareness among FATF members and the private sector on the underlying issues that need to be addressed by policy and operational responses.** This research is intended to complement FATF's work to enhance countries' implementation of the FATF standards on TF."

102. FATF also underlines the complex challenges which have arisen on account of the adoption of internet-based payment services across the globe. While dealing with this aspect it has observed as under: -

"INTERNET-BASED PAYMENT SERVICES

Internet-based payment services provide mechanisms for customers to access, via the Internet, pre-fundedaccounts which can be used to transfer the electronic money or value held in those accountsto other individuals or businesses which also hold accounts with the same provider. Pre-fundedaccounts that consumers use for online auction payments are among the most dominant Internet-basedpayment services. Recipients may or may not be required to register with the paymentservice provider to receive a funds transfer. Some TF cases involving low-value transactions via online payment systems such as PayPal have also been linked to a number of terrorism suspects.The extent to which these transactions have been used to finance terrorism is unclear.

Terrorism suspects have been observed using multiple online payment accounts, combining bothverified and guest accounts. Payments appear to be linked to online purchases of equipment and clothing prior to the departure of individuals travelling to conflict zones rather than direct payments to associates to fund terrorist activities.

The use of online payment systems for these purchases is unremarkable given the ages of most terrorism suspects and their familiarity with online purchasing. Approximately half of all terrorism financing suspicious transaction reports concern customers

aged between 21 and 35 years. The use of an online payment system to assist in financing terrorism is more a reflection of the prevalence of this payment system in the wider financial system rather than any indication that online payment systems are more vulnerable to terrorism financing.

Case study 25: **PayPal accounts used for fundraising**

A charity, set up in 2010, whose chairman is specialised in e-marketing, offers on its website several options to make donations by credit card, PayPal, cash transfers, checks.

Over a year and a half, bank accounts of this charity received numerous donations by checks and wire transfers below EUR 500. Of the EUR 2 million collected, EUR 600 000 came from a few PayPal transactions from another country.

Personal PayPal accounts were also used to collects funds, then to be withdrawn by cash, or transferred to other accounts.

Source: France

Case study 26: **CashU**

Law enforcement identified the use of CashU accounts to anonymously engage in transactions for illicit purposes. CashU is a prepaid online and mobile payment method available in the Middle East and North Africa, a region with a large and young population with very limited access to credit cards. Because of this, CashU has become one of the most popular alternative payment options for young Arabic online gamers and e-commerce buyers. CashU was established in 2003 by Maktoob in Amman, Jordan but when Yahoo! acquired Maktoob in November 2009, the ownership of CashU was transferred to Jabbar Internet Group. Today, CashU has established offices in Dubai, Amman and Cyprus. CashU uses courier companies in the UAE to collect cash from customers. CashU is mainly used for paying for online games, VoIP, matrimonial, IT services, FX trading and download of music and software. They have a strict policy to not accept merchants providing gambling and sexual content. CashU also provides a parental control feature allowing parents to limit and control where their kids spend money online.

Source: United States

CHALLENGES ASSOCIATED WITH NEW PAYMENT PRODUCTS AND SERVICES

> The rapid development, increased functionality, and growing use of new payment products and services (NPPS) globally have created AML challenges for countries and private sector. Notwithstanding the known vulnerabilities, the actual prevalence and level of exploitation of these technologies by terrorist groups and their supporters is not clear at this time and remains an ongoing information gap to be explored."

103. It becomes relevant to note that while dealing with this subject, FATF has specifically referred to a case study involving the financing of terrorist activities by usage of the platform of the petitioner here. The **United Nations Office on Drugs and Crime**[29] in its 2012 report had also taken note of the growing challenges stemming from the misuse of the internet for terrorist purposes. The Court deems it apposite to extract the following passages from that report: -

> "Technology is one of the strategic factors driving the increasing use of the Internet by terrorist organizations and their supporters for a wide range of purposes, including recruitment, financing, propaganda, training, incitement to commit acts of terrorism, and the gathering and dissemination of information for terrorist purposes. While the many benefits of the Internet are self-evident, it may also be used to facilitate communication within terrorist organizations and to transmit information on, as well as material support for, planned acts of terrorism, all of which require specific technical knowledge for the effective investigation of these offences.
>
> It is a commonly accepted principle that, despite the heinous nature of their acts, alleged terrorists should be afforded the same procedural safeguards under criminal law as any other suspects. The defence of human rights is a core value of the United Nations and a fundamental pillar of the rule-of-law approach to the fight against terrorism. The present publication accordingly highlights the importance of respect for the principles of human rights and fundamental freedoms at all times and, in particular, in the context of

[29]UNODC

the development and implementation of legal instruments related to countering terrorism.

The United Nations Office on Drugs and Crime (UNODC), as a key United Nations entity for delivering counter-terrorism legal and related technical assistance, actively participates in the Counter-Terrorism Implementation Task Force, thus ensuring that the counter-terrorism work of UNODC is carried out in the broader context of, and coordinated with, United Nations system-wide efforts. In January 2010, the Task Force's Working Group on Countering the Use of the Internet for Terrorist Purposes initiated a series of conferences involving representatives from Governments, international and regional organizations, think tanks, academia and the private sector to evaluate the use of the Internet for terrorist purposes and potential means to counter such use. The objective of the Working Group initiative was to provide Member States with an overview of the current nature of the challenge and to propose policy guidelines, projects and practical guidance regarding legal, technical and counter-narrative aspects of the challenge. Working Group conferences were held in Berlin in January 2010, Seattle (United States of America) in February 2010 and Riyadh in January 2011.

In furtherance of its mandate "to develop specialized legal knowledge in the area of counter-terrorism … and to provide assistance to requesting Member States with regard to criminal justice responses to terrorism, including … the use of the Internet for terrorist purposes," the Terrorism Prevention Branch of UNODC, in collaboration with the Organized Crime and Illicit Trafficking Branch of UNODC and with the support of the Government of the United Kingdom of Great Britain and Northern Ireland, undertook to contribute to the Working Group project through the development of the current technical assistance tool on the use of the Internet for terrorist purposes. The current UNODC publication builds upon the conclusions of the Working Group conferences, and in particular the conference held in Berlin in January 2010, relating to Internet-specific legal aspects of terrorism.

In connection with the development of the present publication, UNODC convened two expert group meetings in Vienna, in October 2011 and February 2012, to provide a forum for counter-terrorism practitioners, from a geographically diverse group of Member States, to share their experiences relating to the use of the Internet for terrorist purposes. Experts from a total of 25 Member States participated in these meetings, including senior prosecutors, law enforcement officers and academics, as well as representatives from

several intergovernmental organizations. The present publication draws heavily on the discussions and expertise shared during those meetings, and is intended to provide practical guidance to Member States to facilitate the more effective investigation and prosecution of terrorist cases involving the use of the Internet.

104. While dealing with the subject of financing, it noted as follows: -

"2. Financing

14. Terrorist organizations and supporters may also use the Internet to finance acts of terrorism. The manner in which terrorists use the Internet to raise and collect funds and resources may be classified into four general categories: direct solicitation, e-commerce, the exploitation of online payment tools and through charitable organizations. Direct solicitation refers to the use of websites, chat groups, mass mailings and targeted communications to request donations from supporters. Websites may also be used as online stores, offering books, audio and video recordings and other items to supporters. Online payment facilities offered through dedicated websites or communications platforms make it easy to transfer funds electronically between parties. Funds transfers are often made by electronic wire transfer, credit card or alternate payment facilities available via services such as PayPal or Skype.

15. Online payment facilities may also be exploited through fraudulent means such as identity theft, credit card theft, wire fraud, stock fraud, intellectual property crimes and auction fraud. An example of the use of illicit gains to finance acts of terrorism can be seen in the United Kingdom case against Younis Tsouli (see para. 114 below).Profits from stolen credit cards were laundered by several means, including transfer through e-gold online payment accounts, which were used to route the funds through several countries before they reached their intended destination. The laundered money was used both to fund the registration by Tsouli of 180 websites hosting Al-Qaida propaganda videos and to provide equipment for terrorist activities in several countries. Approximately 1,400 credit cards were used to generate approximately £1.6 million ofillicit funds to finance terrorist activity.

16. Financial support provided to seemingly legitimate organizations, such as charities, may also be diverted for illicit purposes. Some terrorist organizations have been known to establish

> shell corporations, disguised as philanthropic undertakings, to solicit online donations. These organizations may claim to support humanitarian goals while in fact donations are used to fund acts of terrorism. Examples of overtly charitable organizations used for terrorist ends include the innocuously named Benevolence International Foundation, Global Relief Foundation and the Holy Land Foundation for Relief and Development, all of which used fraudulent means to finance terrorist organizations in the Middle East. Terrorists may also infiltrate branches of charitable organizations, which they use as a cover to promote the ideologies of terrorist organizations or to provide material support to militant groups."

105. The extent and reach of payment facilitation platforms and the exponential increase in transactions accomplished thereon is also evident from the disclosures made by FIU-IND in these proceedings. FIU-IND had, with the aid of data disclosed on the record of these proceedings drawn the attention of the Court to the increase in the value of transactions completed on the PayPal platform between 2020 to March 2022 and stated that the transactional value which stood at Rs. 9951 crores in 2020 had increased to Rs. 12327 crores in 2021 and as of March 2022 that figure stood at Rs. 3048 crores. It is in the aforesaid backdrop that FIU-IND had asserted that the platform of the petitioner had been utilised as a financial channel on which transactions of Rs. 12,000 crores came to be fulfilled in 2021. The grievance of the FIU-IND essentially is, and in its own words, described to be that of an *"impaired visibility"* with respect to transactions which are completed on PayPal's platform.

106. While the Court has taken note of the global trends and the multifaceted complexities which emerging technologies and tools

have brought on in the fight against money laundering and terror financing, it has done so only to broadly note the scenario which prevails and which appears to have prompted FIU-IND to require the petitioner to comply with reporting obligations under the PMLA. However, the aforesaid discussion is neither liable to be viewed as being a valid reason with has weighed with the Court in arriving at its conclusions which stand recorded hereinafter nor should the same be misunderstood as having clouded its vision and obligation to independently evaluate whether PayPal can be said to have constructed a payment system as defined under the PMLA and thus be liable to be recognised as a payment system operator. However, and before proceeding to deal with the principal question which arises and the answer to which must be founded solely on an interpretation of the provisions of the PMLA, it would be apposite to deal with some of the central issues which arise.

J. CENTRAL THEME OF THE PSS ACT

107. As was noticed in the preceding parts of this decision, PayPal had strongly relied upon the affidavit filed by RBI in the *Abhijit Mishra* proceedings in support of its submission that it is not legally permissible for the respondents to assert that it administers a payment system. It had in this connection also placed reliance upon the similarity with which the PSS Act and PMLA defined a payment system. In order to evaluate this contention, it would, at the outset, be necessary to advert to the scheme and the relevant provisions of the

PSS Act.

108. The PSS Act, as would be evident from its Preamble, is an Act which is concerned with the regulation and supervision of payment systems in India. The expression "*electronic fund transfer*" is defined by Section 2(c) to mean any transfer of funds through electronic means through the modes specified therein. It includes transfer, deposit or withdrawal of funds via the internet. The expression gross settlement system as per the definition extracted hereinabove is defined to mean a payment system on the basis of which settlement is accomplished on the basis of separate or individual transactions. The word netting is then specified to mean the amount of money or securities due, payable or deliverable. Sections 2(n), 2(p) and 2(q) define the expressions "*settlement*" "*system participant*" and "*system provider*" as set out hereinabove. In terms of Section 3, RBI has been anointed as the Designated Authority for the purposes of regulation and supervision of payment systems. Section 4 of the PSS Act proscribes any person from commencing or operating a payment system except under and in accordance with an authorisation issued by the RBI. In terms of Section 10, the RBI stands empowered to determine standards relating to various aspects pertaining to payment systems. That provision reads as follows: -

> **"10 Power to determine standards. —**
>
> (1) The Reserve Bank may, from time to time, prescribe—
>
> (a) the format of payment instructions and the size and shape of such instructions;

(b) the timings to be maintained by payment systems;

(c) the manner of transfer of funds within the payment system, either through paper, electronic means or in any other manner, between banks or between banks and other system participants;

(d) such other standards to be complied with the payment systems generally;

(e) the criteria for membership of payment systems including continuation, termination and rejection of membership;

(f) the conditions subject to which the system participants shall participate in such fund transfers and the rights and obligations of the system participants in such funds.

(2) Without prejudice to the provisions of sub-section (1), the Reserve Bank may, from time to time, issue such guidelines, as it may consider necessary for the proper and efficient management of the payment systems generally or with reference to any particular payment system."

109. Sections 17 and 18 confer authority upon the RBI to issue directions either to a specific payment system operator or to cover the activities of payment systems in general. Undisputedly the various directives and circulars pertaining to PAs' and OPGSPs' which have been referred to hereinabove owe their genesis to Section 18. Provisions have been incorporated in Section 23 to cover and regulate the subject of settlement and netting. In terms of Section 23A, RBI is conferred the authority to create a protective fund if public interest or the interest of customers of designated payment systems, so require. As would be evident from a close reading of the aforesaid provisions, the PSS Act essentially appears to regulate PAs who receive, retain or hold funds of a customer before its onward transmission to a beneficiary. This clearly flows from the definition of a "*payment system*" which describes the same to be one which enables payment to

be effected by a payer for its onward transmission to a beneficiary and involves clearing, payment, settlement services. A payment system in terms of that definition may be one which provides either one of those services or performs all of those functions compendiously.

110. Of equal significance is Section 2(1)(n) which defines the expression "*settlement*" to mean settlement of payment instructions. The reach of the PSS Act can also be gathered from Sections 10 and 23 of the said enactment and which, while empowering RBI to determine standards, enables it to prescribe the format of payment instructions, timing to be maintained by payment systems as well as the manner of transfer of funds within the payment system itself. The settlement and netting procedure which is governed by Section 23 of the PSS Act relates to the distribution of funds between system participants and the payment system itself. All of the aforesaid provisions and the scheme of the PSS Act clearly appears to indicate that it recognises an authorised payment system operator to be one which dons the role of a repository of funds received from a customer and those funds being retained before their onwards transmission to the beneficiary.

111. The scope of the PSS Act may also be gathered from the Intermediary Directions dated 24 November 2009. The said Intermediary Directions recognise the basic structure of a payment system as comprising of intermediaries who receive funds from customers for the settlement of e commerce/ bill payment transactions

which come to be credited to the accounts of those intermediaries before they are transferred to the account of merchants in final settlement of obligations. Para 1.3 of the Intermediary Directions evinces the intent of RBI of framing directives for the purposes of safeguarding the interest of customers and to ensure that payments are duly accounted for by the intermediaries who receive the same. Clause 2.1 defines Intermediaries as under: -

> "2.1 **Intermediaries:** Intermediaries would include all entities that collect monies received from customers for payment to merchants using any electronic/online payment mode, for goods and services availed by them and subsequently facilitate the transfer of these monies to the merchants in final settlement of the obligations of the paying customers.
>
> Explanation: For the purpose of these directions, all intermediaries who facilitate delivery of goods/services immediately/simultaneously (e.g. Travel tickets/movie tickets etc) on the completion of payment by the customer shall not fall within the definition of the expression "intermediaries". These transactions which are akin to a Delivery versus Payment (DvP) arrangement will continue to be facilitated as per the contracts between the merchants and the intermediaries as hitherto and banks shall satisfy themselves that such intermediaries do not fall within the definition of the "intermediaries" when they open accounts other than internal accounts."

112. Para 3 then contemplates the opening of internal accounts to which all monies either collected or received in connection with transactions entered into by customers with intermediaries would be credited. The permitted credits/debits in those accounts are clarified to be of the following nature: -

> "3.3 For the sake of further clarity, the permitted credits/debits in these accounts are set out below:

i. Credits

a) Payments from various persons towards purchase of goods/services.

b) Transfers from other banks as per pre-determined agreement into the account, if this account is the nodal bank account for the intermediary.

c) Transfers representing refunds for failed/disputed transactions.

ii. Debits

a) Payments to various merchants/service providers.

b) Transfers to other banks as per pre-determined agreement into the account, if that account is the nodal bank account for the intermediary.

c) Transfers representing refunds for failed/disputed transactions.

d) Commissions to the intermediaries. These amounts shall be at predetermined rates/frequency.

Note: No payment other than the commissions at the pre-determined rates/frequency shall be payable to the intermediaries. Such transfers shall only be effected to a bank account intimated to the bank by the intermediary during the agreement."

113. Para 4 prescribes the system of settlement which is to be adhered to. It reads as follows: -

"4. Settlement

4.1 The final settlements of funds to the merchants are presently guided by business practices followed by the intermediaries/merchants. In order to increase the efficiency of the payment process, it is necessary that banks transfer funds to the ultimate beneficiaries with minimum time delay. It is therefore mandated that banks shall implement the following settlement cycle for all final settlements to merchants. This settlement arrangement shall be implemented within three months of issuance of this circular:-

i. All payments to merchants which do not involve transfer of funds to nodal banks shall be effected within a maximum of T+2

> settlement cycle (where T is defined as the day of intimation regarding the completion of transaction).
>
> ii. All payments to merchants involving nodal banks shall be effected within a maximum of T+3 settlement cycle."

114. The aforesaid Intermediary Directions were followed by circulars dated 16 November 2010, 11 June 2013 and 24 September 2015. The circulars dated 16 November 2010 and 11 June 2013 had dealt with the facility of AD Category I Banks entering into standing arrangements with OPGSPs' in order to facilitate repatriation of export related remittances. In terms of the circular of 24 September 2015, the said facility was also extended to import related payments. Pursuant to the directions embodied in the circular of 24 September 2015, AD Category I Banks were required to maintain separate export and import collection accounts in India for each OPGSP. Para 2.1 (iv) places those banks under the obligation to submit all relevant information relating to transactions to RBI. In terms of Para 2.2, foreign entities desirous of operating as an OPGSP were required to open liaison offices in India with the approval of the RBI. Insofar as export transactions are concerned, the 24 September 2015 circular made the following provisions: -

> **"4. Export transactions**
>
> As already notified vide our A. P. (DIR Series) Circular No.109 dated June 11, 2013 and A.P. (DIR Series) Circular No. 17 dated November 16, 2010 referred to earlier:
>
> (i) the facility shall only be available for export of goods and services (as permitted in the prevalent Foreign Trade Policy) of value not exceeding USD 10,000 (US Dollar ten thousand) per transaction.

(ii) AD Category-I banks providing such facilities shall open a NOSTRO collection account for receipt of the export related payments facilitated through such arrangements. Where the exporters availing of this facility are required to open notional accounts with the OPGSP, it shall be ensured that no funds are allowed to be retained in such accounts and all receipts should be automatically swept and pooled into the NOSTRO collection account opened by the AD Category-I bank.

(iii) The balances held in the NOSTRO collection account shall be repatriated to the Export Collection account in India and then credited to the respective exporter's account with a bank in India immediately on receipt of the confirmation from the importer and, in no case, later than seven days from the date of credit to the NOSTRO collection account.

(iv) The permitted debits to the OPGSP Export Collection account maintained in India will be:

a) payment to the respective Indian exporters' accounts;

b) payment of commission at rates/frequencies as defined under the contract to the current account of the OPGSP; and

c) charge back to the overseas importer where the Indian exporter has failed in discharging his obligations under the sale contract.

(v) The only credit permitted in the same OPGSP Export Collection account will be repatriation from the NOSTRO collection accounts electronically."

115. Of equal significance are the **Guidelines on Regulation of Payment Aggregators and Payment Gateways**[30] which came to be issued by RBI on 17 March 2020. The aforesaid circular assumes added significance since the same clearly acknowledges and accepts the distinction between PAs' and OPGSPs'. This is clearly evident from Para 1.1.1 of the Guidelines which defines PAs' to be entities

[30]Guidelines

which act as facilitators between e-commerce sites and merchants to accept various payment instruments of customers and for completion of payment obligations thus obviating the necessity of merchants creating a separate payment system of their own. It also accepts the working model of PA's to entail the receiving of payments from customers, pooling the same till they are ultimately transferred to merchants. OPGSPs', on the other hand, are recognised to be entities that merely provide the technology infrastructure for the purposes of routing and facilitating online payment transactions. It is, however, specifically acknowledged that OPGSPs' are not involved in actual handling of funds. This clearly flows also from Para 3.7 which accept OPGSPs to be merely *"technology providers"* or *"outsourcing partners"*.

116. Para 7 then deals with the subject of onboarding of merchants by PAs'. The settlement and escrow system liable to be put in place by PAs' is dealt with in paragraph 8 which reads as follows: -

> "8. **Settlement and Escrow Account Management**
>
> 8.1. Non-bank PAs shall maintain the amount collected by them in an escrow account with any scheduled commercial bank. An additional escrow account may be maintained with a different cheduled commercial bank at the discretion of the PA. For the purpose of maintenance of escrow account, operations of PAs shall be deemed to be 'designated payment systems' under Section 23A of the PSSA (as amended in 2015).
>
> 8.2. In case there is a need to shift the escrow account from one bank to another, the same shall be effected in a time-bound manner without impacting the payment cycle to merchants, under advice to RBI.

8.3. Amounts deducted from the customer's account shall be remitted to the escrow account maintaining bank on Tp+0 / Tp+1 basis. The same rules shall apply to the non-bank entities where wallets are used as a payment instrument.

8.4. Final settlement with the merchant by the PA shall be effected as under:

8.4.1. Where PA is responsible for delivery of goods / services the payment to the merchant shall be not later than on Ts + 1 basis.

8.4.2. Where merchant is responsible for delivery, the payment to the merchant shall be no tlater than on Td + 1 basis.

8.4.3. Where the agreement with the merchant provides for keeping the amount by the PA till expiry of refund period, the payment to the merchant shall be not later than on Tr + 1basis.

8.5. Credits towards reversed transactions (where funds are received by PA) and refund transactions shall be routed back through the escrow account unless as per contract the refund is directly managed by the merchant and the customer has been made aware of the same.

8.6. At the end of the day, the amount in escrow account shall not be less than the amount already collected from customer as per 'Tp' or the amount due to the merchant.

8.7. PAs shall be permitted to pre-fund the escrow account with own / merchant's funds. However, in the latter scenario, merchant's beneficial interest shall be created on the pre-funded portion.

8.8. The escrow account shall not be operated for 'Cash-on-Delivery' transactions.

8.9. Permitted credits / debits to the escrow account shall be as set out below; where an additional escrow account is maintained, credit and debit from one escrow account to the other shall also be permitted. However, inter-escrow transfers should be avoided as far as possible and if resorted to, auditor's certification shall clearly mention such transactions.

8.9.1.1. Credits

a) Payment from various customers towards purchase of goods / services.

b) Pre-funding by merchants / PAs.

c) Transfer representing refunds for failed / disputed / returned / cancelled transactions.

d) Payment received for onward transfer to merchants under promotional activities, incentives, cash-backs etc.

8.9.1.2. Debits

a) Payment to various merchants / service providers.

b) Payment to any other account on specific directions from the merchant.

c) Transfer representing refunds for failed / disputed transactions.

d) Payment of commission to the intermediaries. This amount shall be at pre-determined rates / frequency.

e) Payment of amount received under promotional activities, incentives, cash-backs, etc.

8.10. For banks the outstanding balance in the escrow account shall be part of the 'net demand and time liabilities' (NDTL) for the purpose of maintenance of reserve requirements. This position shall be computed on the basis of the balances appearing in the books of the bank as on the date of reporting.

8.11. The entity and the escrow account banker shall be responsible for compliance with RBI instructions issued from time to time. The decision of RBI in this regard shall be final and binding.

8.12. Settlement of funds with merchants shall not be co-mingled with other business, if any, handled by the PA.

8.13. A certificate signed by the auditor(s), shall be submitted by the authorised entities to the respective Regional Office of DPSS, RBI, where registered office of PA is situated, certifying that the entity has been maintaining balance(s) in the escrow account(s) in compliance with these instructions, as per periodicity prescribed in Annex 3. In case, an additional escrow account is being maintained, it shall be ensured that balances in both accounts are considered for the above certification. This shall also be indicated in the certificate. The same auditor shall be employed to audit both escrow accounts.

8.14. PAs shall submit the list of merchants acquired by them to the bank where they are maintaining the escrow account and update the same from time to time. The bank shall ensure that payments are

made only to eligible merchants / purposes. There shall be an exclusive clause in the agreement signed between the PA and the bank maintaining escrow account towards usage of balance in escrow account only for the purposes mentioned above.

8.15. No interest shall be payable by the bank on balances maintained in the escrow account, except when the PA enters into an agreement with the bank maintaining the escrow account, to transfer "core portion" of the amount, in the escrow account, to a separate account on which interest is payable, subject to the following:

8.15.1. The bank shall satisfy itself that the amount deposited represents the "core portion" after due verification of necessary documents.

8.15.2. The amount shall be linked to the escrow account, i.e. the amounts held in the interest-bearing account shall be available to the bank, to meet payment requirements of the entity, in case of any shortfall in the escrow account.

8.15.3. This facility shall be permissible to entities who have been in business for 26fortnights and whose accounts have been duly audited for the full accounting year. For this purpose, the period of 26 fortnights shall be calculated from the actual business operation in the account.

8.15.4. No loan is permissible against such deposits. Banks shall not issue any deposit receipts or mark any lien on the amount held in such form of deposits.

8.15.5. The core portion shall be calculated separately for each of the escrow accounts and will remain linked to the respective escrow account. The escrow balance and core portion maintained shall be clearly disclosed in the auditors' certificates submitted to RBI on quarterly and annual basis.

Note: For the purpose of this regulation, "Core Portion" shall be computed as under:

Step 1: Compute lowest daily outstanding balance (LB) in the escrow account on a fortnightly (FN) basis, for 26 fortnights from the preceding month.

> Step 2: Calculate the average of the lowest fortnightly outstanding balances [(LB1 of FN1+LB2 of FN2+ .....+ LB26 of FN26) divided by26].
>
> Step 3: The average balance so computed represents the "Core Portion" eligible to earn interest."

117. As would be evident from the aforesaid discussion, the PSS Act essentially appears to regulate the functioning of Intermediaries and PAs' who are directly engaged in handling funds and acting as a conduit between customers and e-commerce sites/merchants. This is also evident from the activities relating to settlement and netting which are spoken of in Section 23 of the Act, the opening of separate and independent import/export collection accounts by AD Category I Banks, the opening of NOSTRO accounts, all of which deal with the range of activities which are undertaken by Intermediaries and PAs' while being directly engaged in the handling of funds received from customers.

118. The aforesaid conclusion is further fortified from Para 8 of the Guidelines which obligates non-bank PAs' to maintain a separate escrow account to which all monies collected by them would be credited. The said escrow account is to be opened and maintained with a scheduled commercial bank. This is apart from the requirement of an additional escrow account being maintained with a different scheduled commercial bank at the discretion of the PA. Paras 8.4 and 8.5 also indicate that the aforenoted directions and guidelines principally regulate the activities of Intermediaries and PAs' who

directly receive funds from customers in their accounts before they are transmitted onwards to merchants or other beneficiaries.

119. What the Court seeks to emphasise is that the PSS Act is a legislation which appears to be principally concerned with regulating the activities of Intermediaries who are engaged in the receipt and handling of funds from customers, their onward transmission and the account settlement and reconciliation process which is to be undertaken as a consequence of those activities. The aforesaid process also entails settlement and netting practices being adopted since undisputedly the funds received from customers would, at least for some period of time, be held in the hands of the Intermediary or the PA. OPGSPs', on the other hand, are in clear terms acknowledged to be merely technology providers. OPGSPs' are accepted to be entities who are not involved in the direct handling of funds. It becomes significant to note that the Guidelines also reiterates this distinction which is recognised to exist between PAs and OPGSPs.

120. The fact that the PSS Act was never intended to extend to OPGSPs' is also evident from paragraph 2 of the covering letter under which the aforesaid Guidelines were circulated and the same is reproduced hereinbelow: -

> "2. A reference is also invited to the discussion paper placed on the RBI website on guidelines for regulation of Payment Aggregators (PAs) and Payment Gateways (PGs). Based on the feedback received and taking into account the important functions of these intermediaries in the online payments space as also keeping in view their role vis-à-vis handling funds, it has been decided to (a)

> regulate **in entirety** the activities of PAs as per the guidelines in Annex 1, and (b) **provide baseline technology-related recommendations to PGs** as per Annex 2."

121. As is evident from the above, the guidelines were intended to regulate the activities of PAs *"in entirety"* and to merely provide *"baseline technology related recommendations"* insofar as OPGSPs were concerned. When one proceeds to Annexure-2 which contains the baseline technology related recommendations, the Guidelines yet again prescribe that the adoption thereof would be mandatory for PAs' and merely recommendatory for OPGSPs'. The aforesaid deliberation indubitably leads one to recognise and acknowledge the distinction between PAs' and OPGSPs' which is statutorily accepted as well as to discern and identify the principal domain within which the PSS Act is intended to operate.

122. The Court thus comes to the firm conclusion that the PSS Act is concerned with PAs' and Intermediaries who are engaged in the direct handling of funds received from customers and the various aspects connected therewith including the settlement and netting of such funds. The PSS Act does not appear to control technology platforms, interfaces and facilitators, who though not directly concerned with the handling of funds, may yet constitute an intermediary in the movement of funds, though a *"cog in the wheel"* yet constituting a critical functional element in the remittance of funds.

K. THE PARI MATERIA QUESTION

123. The PSS Act, thus appears to extend its coverage only to those payment systems which are directly engaged in the handling of funds, entities which constitute a direct bridge between the customer and the beneficiary. The said enactment clearly intends to regulate only those payment systems which as part of a money transfer operation actually retain funds received from payers till its ultimate remittance to the identified and chosen recipient. It is for the regulation of these activities that the PSS Act mandates the maintenance of settlement and escrow accounts, a process of netting and settlement being undertaken periodically, the creation of a consumer protection fund and other regulatory measures embodied therein.

124. The circulars and directives of the RBI referred to and noticed above, and which have undisputedly been issued with reference to the powers conferred on it by virtue of being the Designated Authority under the PSS Act, also seek to regulate and extend to the activities of Intermediaries, PAs' and AD Banks, all of which are directly engaged in the handling and movement of funds. It is for the aforesaid reason that those circulars while peripherally noticing the activities of OPGSPs' only mandate certain "baseline" measures to be adopted. The stand as was taken by RBI in the *Abhijit Mishra* proceedings when it asserted that PayPal was not recognised to be a payment system operator must therefore and consequentially be understood in the aforesaid light.

125. Regard must also be had to the fact that the remittance of funds electronically is comprised of various sub-elements and may involve numerous parties and entities who participate in and facilitate the culmination of a particular transaction. These elements, as was observed earlier, though constituting a *"cog in the wheel"* are part of an entire ecosystem which enables the execution and culmination of an electronic transaction. The collaborative and enabling functions performed by such entities, no matter how miniscule, nonetheless constitutes a significant component without which the transaction may not achieve fruition.

126. On a foundational plane, therefore, it would be imprudent to disregard their existence or the role that they discharge merely because those entities may not be covered under the PSS Act. One would also have to bear in mind that a legislative measure need not necessarily be viewed as being encyclopaedic or an all-encompassing essay on a particular subject. The Legislature may choose to regulate only a few facets relating to a wide spectrum of economic activity by enacting a particular statute. It is for this reason that the Court comes to conclude that the mere fact that the PSS Act did not extend its regulatory net to cover OPGSPs' would not, of its own, constitute a plausible basis for rejecting the contention which was advanced by FIU-IND. Accordingly, and for the aforesaid reasons, this Court finds itself unable to accept the submission of PayPal that since it was not considered to be a payment system operator under the PSS Act, it

must ipso facto be held to fall outside the dragnet of the PMLA.

127. For reasons which follow, the Court also finds itself unable to accept the submission that the similarity of the definition clause in the two enactments would lead to PayPal being held to fall outside the ambit of Section 2(1)(rb) of the PMLA. The conclusions aforenoted, however, do not rest merely on the interpretation accorded on the provisions of the PSS Act, its discernible scheme, the regulatory regime embodied therein or the circulars and directions issued by the RBI noticed hereinabove. This since the Court is of the considered opinion that the answer to the principal question posited must necessarily be answered bearing in mind the objectives and the legislative policy underlying the PMLA and the various provisions incorporated therein. What the Court seeks to underline is that the meaning to be ascribed to the phrase "payment system" must necessarily be ascertained bearing in mind the theme and ethos of the PMLA as opposed to an answer that is beclouded by how that subject is treated under the PSS Act. Approaching the issue from any other angle would in fact fall foul of certain well accepted tenets of statutory interpretation as would be manifest from the discussion which follows in the latter parts of this decision.

L. PAYMENT SYSTEM UNDER THE PMLA

128. That takes the Court to the heart of the matter, namely, the interpretation of the relevant provisions of the PMLA. As was noted

hereinabove Section 2(1)(rb) defines a "*payment system*" to be one which enables payment to be effected between a payer and a beneficiary. On a plain reading of Section 2(1)(rb) and bearing in mind that it uses the expression "*enables*" it would appear that any system which facilitates the transfer of funds from a payer to a beneficiary would fall within the sweep of that provision. It becomes imperative to further note that Section 2(1) (rb) further stipulates that such a system may involve either clearing, payment or settlement services or for that matter all of them compendiously. A system which facilitates a transaction between a payer and a beneficiary may thus involve elements of clearing, payment or settlement. However it is not mandatory for a system to be recognised to fall within the ambit of 2(1)(rb) to necessarily be one which performs all the three functions as generally understood.

129. The Explanation then stipulates that the expression "payment system" would include various well recognised modes of transfer of funds between parties including significantly *"money transfer operations or similar operations"*. Section 2(1)(rb) as well as the Explanation is couched in expansive terms which aspect stands highlighted by the use of the expressions "*includes*" "*enabling*" and "*similar operations*". The use of the expression "*enable*" and "*involve*" clearly appears to be suggestive of the legislative intent to cast a wide net in order to enable the provisions of the PMLA to operate effectively and thus regulate a whole spectrum of activities

connected with the movement of funds between two parties.

130. It was in the aforesaid context that Mr. Hossain had invited our attention to the following pertinent observations as appearing in the decision of the Supreme Court in *Rasila S. Mehta*:-

> "75. The object of the Act is not merely to bring the offender to book but also to recover what are ultimately public funds. Even if there is a nexus between a third party, an offender and/or property the third party can also be notified. The word "involved" in Section 3(2) of the Special Court Act has to be interpreted in such a manner so as to achieve the purpose of the Act. This Court in Ashwin S. Mehta v. Custodian [(2006) 2 SCC 385], has observed as under : (SCC p. 400, para 34)
>
> > "34. Although, we do not intend to enter into the correctness or otherwise of the said contention of the appellants at this stage, however, there cannot be any doubt whatsoever that they being notified persons, all their properties would be deemed to be automatically attached as a consequence thereto. For the said purpose, it is not necessary that they should be accused of commission of an offence as such."
> >
> > (emphasis supplied)
>
> 76. In Jyoti H. Mehta v. Custodian [(2009) 10 SCC 564 : (2010) 2 SCC (Cri) 1494] , this Court from paras 33 to 38 has held that the Special Court Act is a special statute and is a complete code in itself. The purpose and object for which it was created was to punish the persons who were involved in the act for criminal misconduct in respect of defrauding banks and financial institutions and its object was to see that the properties of those who were involved shall be appropriated for the discharge of liabilities of not only banks and financial institutions but also other governmental agencies. In construing the statute of this nature the court should not always adhere to a literal meaning but should construe the same, keeping in view the larger public interest. For the said purpose, the court may also take recourse to the basic rules of interpretation, namely, ut res magis valeat quam pereat to see that a machinery must be so construed as to effectuate the liability imposed by the charging section and to make the machinery workable.

> 77. The statutes must be construed in a manner which will suppress the mischief and advance the object the legislature had in view. A narrow construction which tends to stultify the law must not be taken. Contextual reading is a well-known proposition of interpretation of statute. The clauses of a statute should be construed with reference to the context vis-à-vis the other provisions so as to make a consistent enactment of the whole statute relating to the subject-matter. Furthermore, even in relation to a penal statute any narrow and pedantic, literal and lexical construction may not always be given effect to. The law would have to be interpreted having regard to the subject-matter of the offence and the object of the law it seeks to achieve. The purpose of the law is not to allow the offender to sneak out of the meshes of law. The courts will reject the construction which will defeat the plain intention of the legislature even though there may be some inexactitude in the language used.
>
> 78. Reducing the legislation (sic to a) futility shall be avoided and in a case where the intention of the legislature cannot be given effect to, the courts would accept the bolder construction for the purpose of bringing about an effective result. The courts, when rule of purposive construction is gaining momentum, should be very reluctant to hold that Parliament has achieved nothing by the language it used when it is tolerably plain what it seeks to achieve."

131. As was aptly observed in *Rasila S. Mehta*, special statutes which are aimed at tackling crimes and offences must be construed and interpreted so as to ensure an effective implementation of relevant provisions as well as to avoid the spectre of the offender sneaking out of the *"meshes of the law"*. The said decision bids us to bear in mind the well-known maxim of *"ut res magis valeat quam pereat"* and thus interpret the provisions of a special statute in a manner which effectuates its objectives and enables the authorities to effectively combat the mischief that it seeks to address. As was noticed hereinbefore, the PMLA is concerned with preventing the acts of

money laundering. Money laundering is principally aimed towards obfuscating the origins of proceeds of crime. Anti-money laundering or "AML", as it is commonly known, actions are aimed at disentangling the layers under which the origins of those proceeds may be shrouded. Those actions are aimed at uncovering and interdicting methods and devices used to surreptitiously integrate and induct money generated from illegal activities into legitimate financial systems.

132. The PMLA thus constructs various regulatory measures and safeguards to aid and assist the jurisdictional authorities in uncovering proceeds of crime. It must be remembered that the said enactment is not concerned merely with meting out punishment for commission of the crime created by Section 3 thereof. The various declarations, disclosures and reporting measures put in place by Sections 11A, 12, 12A, 12AA are all aimed towards discovery and prevention of fraudulent and suspicious transactions. Those provisions are concerned with collation of data, a centralized analysis thereof all of which would then enable the authorities to detect patterns of suspicious financial flows and assist in eradicating the scourge of money laundering. Of equal significance are the provisions comprised in Chapter IX which deals with reciprocal arrangements and gives teeth to the collaborative resolve of nations to tackle the complexities surrounding money laundering. The aspect of collaboration backed by cohesive and collective action amongst various agencies forms the

subject matter of Section 72A when it provides for the constitution of an Inter-Ministerial Coordination Committee. The aforesaid discussion indubitably brings to the fore the regulatory aspects of the legislation and establishes that the PMLA goes far beyond being intended to be a mere penal statute. This aspect has also been noticed by the Supreme Court in *Vijay Madanlal*. It is these salutary objectives of the statute which must be borne in mind while seeking to unravel the intent and scope of its various provisions.

133. The Stroud's Judicial Dictionary defines the word "*enable*" to mean the conferment of a power to do something. Similarly, **P. Ramanathan Aiyar** in **The Major Law Lexicon** defines the words "*enables*" and "*involves*" as follows:-

> "**Enable.** Authorise; empower; supply person with means. In the case of a person under any disability as to dealing with another, the term has the meaning of removing that disability, not of conferring compulsory power as against that other.
>
> To render able.
>
> Involve. To comprise, to contain, to include by rational or logical construction; to connect with something as a natural or logical consequence or effect; to include necessarily; to imply (*Webster Dict.*); entangle, implicate in charge or crime; implying financial embarrassment (as) "Involved circumstances" A thing is only said to be "involved" in another when it is a necessary resultant of that other. In its more exact and literal signification, the word is synonymous with "comprise" or "embrace" (*St. John v. West*, 4 How. Pr. N.Y. 329, 332; *see also* 23 All 94 (98): 21 AWN 8. A point *involving* a substantial question of law.] This word is also used, according to the context, as synonymous with "affected."
>
> The primary signification of the word 'involve' is 'to roll up or envelop; and it also means to comprise, to contain, to include by

rational or logical construction; and its exact synonym may not be found in a single word.'

"SUBJECT MATTER INVOLVED IN THE LITIGATION"

means the possession, ownership or title to the property or other valuable thing which is to be determined by the result of the litigation. (*Dr. Joeger's Sanitary Woollen System Co. v. Le Boutilier*, 63 Hun. N.Y. 297, 299.)

An implied trust which arises because the law imposes trust-like consequences on certain transact tions where, for example, an agent breaches his fiduciary duty and buys property in his own name which rightfully should have been purchased for the benefit of his principal (constructive trust) or A supplies the funds for purchase of property by B with the understanding that A will own it but title will be taken in the name of B (resulting trust).

To enwrap in anything, to enfold or envelop, to contain or imply. *Additional Commissioner Income-tax v. Surat Art Silk Cloth Manufacturers Association*, AIR 1980 SC 387.

To include; to contain; to imply.

134. The **Oxford English Dictionary [Second Edition**] ascribes the following meaning to the words "enable" and "involve": -

"enable (E'neib(ə)l), *v.* Forms: 5-6 enhable, -bel, 6 enhabile, inhable, -bile, 6-8 inable, 5- enable. [f. EN-+ABLE a.: cf. ABLE *v.*]

2. To authorize, sanction, empower; to give legal power or license to. Const. to with *inf.*

+3. a. To give power to (a person); to strengthen, make adequate or proficient. *Obs.* or arch.

b. To impart to (a person or agent) power necessary or adequate for a given object; to make competent or capable. Const. *for, to, unto. rare* in mod. use.

c. To supply with the requisite means or opportunities to an end or for an object. Const. to with *inf.*

5. a. To make possible or easy; also to give effectiveness to (an action).

enablement (e'neib(ə)lmənt). [f. ENABLE *v.* + -MENT.] The action or means of enabling.

2. a. The process of rendering able, competent, or powerful; the state of being so; *concr.* something by which one is enabled, a qualification.

b. Support, sustenance, maintenance. *rare.*

3. An equipment, implement. Cf. ENABLE *v.* **3. 1495** *Act 11 Hen. VII. c.* 64 Armours Defensives, as..Crosbowes and other enhabilmentis of Werres.

involve (in'volv), *v.* Also 4-8 en-.

b. *fig.* To join as by winding together or intertwining; to 'wrap up' *with.*

6. *trans.* To include; to contain, imply. **+a.** Of a person, or with reference to personal action: To include covertly *in* or *under* something; to wrap up. Also in indirect passive. *Obs.*

b. Of a thing: To include within its folds or ramifications; to contain, comprise, comprehend. Now chiefly *Math.*, or passing into c.

c. *esp.* To contain implicitly; to include as a necessary (and therefore unexpressed) feature, circumstance, antecedent condition, or consequence; to imply, entail.

d. To include or affect in its operation."

135. The word "*enable*" as explained in the aforesaid lexicons would mean as empowering a person to achieve a particular objective, capacitate or facilitate. Thus any system which assists, makes possible or advances the objective of a payment between a payer and a beneficiary would on a plain reading of the provision fall within the ambit of a payment system. Understood on plain etymological principles, the word *"involve"* or *"involving"* would mean any facet or feature comprised or comprehended in the course of a payment being effected between a payer and a beneficiary. Thus all elements of the transaction comprised or connected with a payment being effected between two parties would appear to fall within the scope of the

expression "payment system" as defined under Section 2(1)(rb) of the PMLA.

136. It also becomes relevant to note that the Explanation thereto is itself couched in expansive terms and uses the expression "includes". Of equal significance is the use of the expressions "*money transfer operations*". The Court finds itself unable to accord a restrictive construction to this expression or read it so as to be confined only to a system which may be literally or in actuality concerned with handling funds between a payer and a beneficiary. Any system which enables the transfer of money between two ends would thus appear to fall within the ambit of the expression "payment system". The Court thus finds no justification to restrict the application of the expression "*payment system*" only to those entities which may be directly or undeviatingly engaged in the handling or transferring of funds. Any interpretation contrary to what has been noted above, would not only scuttle and impede the measures liable to be deployed but also obstruct and hamper data collection and analysis which constitute critical elements of AML measures. The imperatives of those measures being borne in consideration is clearly merited in light of the interpretative principles which were commended for the consideration of the Court by FIU-IND.

137. Undoubtedly, the technology on which the platform of PayPal rests enables the transfer of money between parties at different ends. The mere fact that the said platform also interacts with AD Category

Banks or other PAs' would not detract from the platform of PayPal being otherwise understood and recognised to be a system which enables payment and one which is concerned with money transfer operations. The Court deems it apposite to emphasise that bearing in mind the objectives underlying the promulgation of PMLA and the activity that it seeks to regulate and penalise, there appears to be no legal justification to interpret Section 2(1)(rb) to embrace only those entities which are directly engaged in the handling, retention or transfer of funds.

138. Regard must be had to be fact that money laundering is concerned with obfuscating the trail of funds and its integration into legitimate systems and thus enabling money obtained from the commission of offences being washed of all taints of illegality. In order to effectively fight against money laundering, it is imperative that regulatory authorities are empowered to view and analyse all aspects of data connected with a particular transaction. The analysis of a transaction undoubtedly depends on the data generated and captured at different stages and points of the process and being available to be scrutinised and examined. The analysis of the data would necessarily entail each step of the transaction and the data pertaining thereto being captured and made available to a FIU. This would necessarily require the identity of the remitter and the beneficiary, the accounts between which the funds travel and all other attendant details being duly obtained and stored. Unless these essential and critical data points are

duly tracked and details thereof made available to the FIU, its scrutiny and evaluation will not only be impeded, it would also deprive it of the right to assess and analyse the genuineness of a transaction.

139. The Court must necessarily bear in mind that with the march of technology and the speed with which transactions are accomplished on the internet, there are pressing imperatives for the data being shared, if not in real time, at least with expedition. If data be not periodically presented for evaluation to a FIU, it may become redundant or obsolescent if made available only upon demand. It is these aspects which clearly appear to inform the reporting obligations that have been prescribed. From a financial intelligence perspective, data analysis is key to identifying correlated events and transactions which may appear to be suspicious when tested against evolved parameters. It is these primary objectives which appear to drive and inform the efforts of FIUs' across the globe. Section 2(1)(rb) must therefore be construed in a manner which subserves this legislative objective. The above factors would constitute a significant and relevant indicator to discern and identify the true scope of that provision.

140. It would be pertinent to recall that the principal argument of PayPal in its challenge to the invocation of Section 2(1)(rb) rested on its assertion that it neither onboards the importer nor is it engaged in the actual handling of funds. Insofar as the latter aspect is concerned, this Court has come to the definitive conclusion that the actual

handling of funds cannot be decisive of whether an entity would fall within the ambit of 2(1)(rb). This is notwithstanding certain facts which have been alluded to by the FIU-IND and stem from the exchange of e-mails between it and Citibank.

141. It would be pertinent to recall that Citibank acts as the nodal bank of PayPal in accord with the Guidelines as framed by the RBI. In its email of 20 July 2019, Citibank had apprised FIU-IND that payments due to Indian exporters are transferred from a PayPal "offshore account" to a Citibank NOSTRO USD Export Collection Account. In yet another e-mail dated 20 January 2021 it apprised FIU-IND that the details of actual remitter did not form part of the original fund transfer instructions received by it and therefore could not be included in the CBWTR reports submitted for the relevant period. It also apprised FIU-IND that it has now put in place a system to obtain end remitter data for all reportable transactions from PayPal.

142. These emails would appear to cast a doubt on the categorical and unqualified assertion of PayPal of it not handling funds at any stage of a transaction between an Indian beneficiary and a foreign importer. However and since the diagrammatical representation of the various elements comprised in a transaction on the PayPal platform was not seriously questioned or doubted by FIU-IND, the Court refrains from entering any further observation in this respect. This more so since in any case it has come to the conclusion that even if the assertion of PayPal of it actually not being engaged in the handling of

funds at any stage of the transaction be correct, it would still be liable to be recognised as a payment system operator as defined under the PMLA.

143. Apart from what has been found by the Court to be the true meaning to be assigned to the phrase "payment system" as utilised in the PMLA, the Court additionally finds merit in the contention addressed by Mr. Hossain and Mr. Tripathi, when it was submitted that mere similarity in the definition of a payment system under the PSS Act and the PMLA would not be decisive of the question that stands raised. As was eloquently explained by the Supreme Court in *D.N. Banerjee,* even though a definition of a word or phrase may be more or less the same in two different statutes, it would be the object and the preamble of the two competing legislations which would be of import. It was explained that same words may have a different connotation depending upon the context in which they are placed. This aspect assumes greater significance when one bears in mind the indubitable fact that PMLA is a special statute dealing with money laundering as opposed to the PSS Act which is essentially concerned with regulating the functioning of PAs' and safeguarding the interest of consumers and merchants.

144. The said aspect was again highlighted by the Supreme Court in *Shree Baidyanath* when it was pertinently observed that the expression "Ayurvedic, siddha or unani drug" as defined under the Drugs and Cosmetics Act, 1940 cannot be mechanically applied to

another statute. It was observed that the object, purpose and scheme of the statute must necessarily be borne in mind before forming an opinion on the meaning to be ascribed to a word or a phrase. It was on those principles that it was held that the definition of expressions as embodied in the Drugs and Cosmetics Act, 1940 should not be blindly adopted for the purposes of the Excise Act.

145. This principle was lucidly explained by the Supreme Court in **Maharaj Singh v. State of U.P.**[31], as would be evident from the following passage of that decision:-

> "14. The legislative project and the legal engineering visualised by the Act are clear and the semantics of the words used in the provisions must bend, if they can, to subserve them. To be literal or be blinkered by some rigid canon of construction may be to miss the life of the law itself. Strength may be derived for this interpretative stand from the observations in a recent judgment of this Court [Thiru Manickam & Co v. State of TN, CA 1528 of 1971, decided on October 26, 1976] :
>
> > "A word can have many meanings. To find out the exact connotation of a word in a statute, we must look to the context in which it is used. The context would quite often provide the key to meaning of the word and the sense it should carry. Its setting would give colour to it and provide a cue to the intention of the legislature in using it. A word, as said by Holmes, is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used."

146. The Court further bears in mind the fact that Section 2 of the PSS Act as well as the PMLA are prefaced by the use of the

[31](1977) 1 SCC 155

expression "*unless the context otherwise requires*". The significance of the aforesaid phrase was succinctly explained by the Supreme Court in *Whirlpool Corporation* in the following terms:-

> "**28.** Now, the principle is that all statutory definitions have to be read subject to the qualification variously expressed in the definition clauses which created them and it may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to have a somewhat different meaning in different sections of the Act depending upon the subject or context. That is why all definitions in statutes generally begin with the qualifying words, similar to the words used in the present case, namely "unless there is anything repugnant in the subject or context". Thus there may be sections in the Act where the meaning may have to be departed from on account of the subject or context in which the word had been used and that will be giving effect to the opening sentence in the definition section, namely "unless there is anything repugnant in the subject or context". In view of this qualification, the court has not only to look at the words but also to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning intended to be conveyed by the use of the words "under those circumstances". (see *Vanguard Fire and General Insurance Co. Ltd.* v. *Fraser & Ross* [AIR 1960 SC 971 : (1960) 3 SCR 857])"

147. The well settled principle in this respect and which was taken note of in *Whirlpool Corporation* also finds resonance in an earlier decision of the Supreme Court in ***Jagir Singh*** where it was held as under:-

> "**20.** The general rule of construction is not only to look at the words but to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning according to what would appear to be the meaning intended to be conveyed by the use of the words under the circumstances. Sometimes definition clauses create qualification by expressions like "unless the context otherwise requires"; or "unless the contrary intention appears"; or "if not inconsistent with the

> context or subject-matter". "Parliament would legislate to little purpose," said Lord Macnaghten in *Netherseal Co.* v. *Bourne* [(1889) LR 14 AC 228 : 59 LJ QB 66 : 61 LT 125] , "if the objects of its care might supplement or undo the work of legislation by making a definition clause of their own. People cannot escape from the obligation of a statute by putting a private interpretation on its language." The courts will always examine the real nature of the transaction by which it is sought to evade the tax."

148. The aforenoted decisions thus speak of words in a statute being liable to be interpreted in the context and setting in which they are used. In fact, the aforesaid precedents also speak of situations where a particular word as occurring in a statute may be intended to be accorded a totally different meaning when used in separate provisions of the same legislation itself. In any case both *D.N. Banerjee* as well as *Shree Baidyanath* in unambiguous terms warn us of the folly of a blind ascription of meaning to words appearing in two separate statutes. The adoption of such a course would be more injudicious and unwise when the two statutes are recognised to operate over apparently different subjects or subserve separate legislative objectives.

149. The Court also bears in consideration that the PSS Act had been enacted way back in 2007 and was thus a statute in existence at a time when the **PMLA (Amendment) Act, 2009**[32] came to be promulgated. In terms of the aforesaid Amending Act, clauses (ra) to (rc) came to be inserted in Section 2(1). If it was the intent of Parliament to accord an

[32]Act No. 21 of 2009

identical meaning upon the phrase *"payment system"* as already defined in the PSS Act, it could have conveniently adopted the tool of legislation by reference/incorporation. Notwithstanding such recourse being available, it appears to have consciously introduced Section 2(1)(rb) as well as the other amendments embodied in the 2009 Amending Act being aware of the distinct scheme and objective of the PMLA. This too leads the Court to come to the irresistible conclusion that the meaning of the term "payment system" as contained in the PSS Act was not intended by Parliament to be directly infused or blindly transposed in the PMLA.

M. PAYPAL'S GLOBAL COMPLIANCES

150. Turning then to some of the additional issues which were raised, this may be an appropriate juncture to also deal with the contention of FIU-IND of PayPal being obliged to comply with reporting obligations under the PMLA in light of the compliances that it holds itself bound to fulfil in other foreign jurisdictions. It becomes pertinent to note in this regard that PayPal had by way of a detailed note set forth requisite particulars of the different foreign statutes prevailing in different jurisdictions and with which it ensures compliance. In terms of the note as well as the statutes which operate in those jurisdictions, it was submitted on behalf of PayPal that the reporting and registering obligations that it complies is by virtue of the specific statutory provisions contained in those enactments. It was additionally pointed out that the range of activities as well as the

facilities that it provides in those jurisdictions is far wider than those provided by it in India and where it functions merely as an OPGSP.

151. For instance, it was pointed out that in USA, PayPal provides debit and credit card services, balance holding accounts services as well as point of sale solutions. In Canada, apart from providing money services, it also engages in foreign exchange currency conversions, payment in person and touch free payment solutions as well as remittance and receipt of payments for commercial and personal transactions which occur both on a domestic and at the international level. Similar functions and services are provided by PayPal in Australia. In Singapore, Japan and Malaysia apart from the aforesaid services, PayPal also provides what has now come to be commonly described as digital *"wallet"* services. The submission in essence was that since there is no similarity in the nature of services that are provided by PayPal in those jurisdictions when compared with its operations as an OPGSP in India, the statutory compliances that it adheres to cannot be determinative of the question which stands raised.

152. The Court finds merit in the submission so addressed and is of the considered opinion that the question of whether PayPal is liable to be treated as a payment system operator must fundamentally be answered on a construction of Section 2(1)(rb) and (rc) of the PMLA alone and not by its conduct in other jurisdictions where the gamut of services provided by it range far wider than those that are ordinarily

extended by an OPGSP. Ultimately the question of whether it is liable to be recognised as a payment system operator would have to be answered solely on the anvil of the statutory provisions embodied in the PMLA. This is precisely what the Court has attempted to focus upon and has hopefully achieved. Its ultimate conclusions, as would be evident from the body of this decision, have remained uninfluenced by the conduct of PayPal in foreign jurisdictions.

N. PAYPAL AND TPAPs'

153. It would also be apposite to dispose of an ancillary argument which was addressed by PayPal and was founded on third party applications such as GPay and Amazon Pay not being treated as payment system operators or being required to comply with reporting obligations. Without delving into this aspect in much detail it may only be observed that the **Third-Party Applications Providers**[33] which were spoken of are those which are embedded in and are part of the **Unified Payments Interface**[34] ecosystem unrolled in India and participate within that structure through **Payment System Provider**[35] Banks. The National Payments Corporation of India is an organisation that owns and operates the Unified Payments Interface and is essentially charged with the authority of prescribing rules for and approving the participation of Customer Banks, PSPs, TPAPs and

[33] TPAP
[34] UPI
[35] PSP

Prepaid Payment Instrument issuers in the UPI. More fundamentally in terms of the UPI structure, all details relating to the remitter as well as the beneficiary are captured end to end. In fact, in order to participate on that system both the remitter as well as the beneficiary have to be pre-enrolled. Appropriate particulars of individuals and entities are thus fully captured quite apart from the transactions themselves being conducted through banking channels.

O. PENALTY UNJUSTIFIED

154. That leaves the Court to consider the issue of imposition of penalty upon PayPal in terms of the impugned order under Section 13(2)(d) of the PMLA. PayPal questioned the penalties which ultimately came to be imposed upon it in terms of the order impugned. Mr. Poovayya pointed out that in terms of Section 13(2)(d), the maximum penalty which may be imposed can extend to Rs.1,00,000/- for each failure to comply. According to Mr. Poovayya, FIU-IND has arbitrarily interpreted the said provision and imposed the highest monetary penalty of Rs.1,00,000/- for each of the three alleged offences and that too for every month stretching over a period of 32 months. According to Mr. Poovayya, the quantification of penalty is thus clearly rendered unsustainable. It was additionally submitted that it is well-settled in law that the imposition of penalty would be justified only if an entity fails to discharge a statutory obligation and provided it is established that it had deliberately chosen to act in defiance of the law or was guilty of dishonest conduct.

155. Mr. Poovayya submitted that bearing in mind the nature of the challenge which was raised by PayPal and the substantive objection taken with respect to the construction to be accorded to the provisions of the PMLA, it cannot possibly be said that its conduct was either deliberate, contumacious or dishonest. To buttress the aforesaid submissions, Mr. Poovayya firstly drew the attention of the Court to the following principles as laid down in **Hindustan Steel Ltd. vs. State of Orissa**[36]:-

> "8. Under the Act penalty may be imposed for failure to register as a dealer — Section 9(1) read with Section 25(1)(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the Company in failing to register the Company as a dealer acted in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out."

156. Reliance was also placed on the following pertinent

[36] (1969) 2 SCC 627

observations as rendered by the Supreme Court in **Excel Crop Care Ltd. vs. CCI and Anr.**[37]:-

> "92. Even the doctrine of "proportionality" would suggest that the court should lean in favour of "relevant turnover". No doubt the objective contained in the Act viz. to discourage and stop anti-competitive practices has to be achieved and those who are perpetrators of such practices need to be indicted and suitably punished. It is for this reason that the Act contains penal provisions for penalising such offenders. At the same time, the penalty cannot be disproportionate and it should not lead to shocking results. That is the implication of the doctrine of proportionality which is based on equity and rationality. It is, in fact, a constitutionally protected right which can be traced to Article 14 as well as Article 21 of the Constitution. The doctrine of proportionality is aimed at bringing out "proportional result or proportionality stricto sensu". It is a result-oriented test as it examines the result of the law in fact the proportionality achieves balancing between two competing interests: harm caused to the society by the infringer which gives justification for penalising the infringer on the one hand and the right of the infringer in not suffering the punishment which may be disproportionate to the seriousness of the Act."

157. As would be evident from a reading of the impugned order, FIU-IND has found PayPal guilty of the following three violations: -

(a) Wilful avoidance of its obligations under Section 12 by not registering as a reporting entity,

(b) Failure to register and communicate the name and address of its Principal Officer to FIU-IND in violation of Rule 7 of the 2015 Rules and

(c) Failure to register and communicate the name and address of its Designated Director to FIU-IND under the aforenoted

[37] (2017) 8 SCC 47

Rule.

158. The impugned order has then proceeded to compute the penalty as being payable for each month of the 32-month period commencing from 16 March 2018 when PayPal was first placed on notice. The computation of penalty was assailed with Mr. Poovayya contending that there was no justification for PayPal being foisted with the maximum penalty provided for in that provision. Quite apart from the above, it was submitted that Section 13(2)(d) only speaks of penalty being liable to be imposed for *"each failure"*. According to learned senior counsel, the impugned order proceeds on the basis that penalty is liable to be imposed for each month of default. Mr. Poovayya had further commended for the consideration of the Court the principles enunciated by the Supreme Court in *Hindustan Steel* to submit that the imposition of penalty is rendered wholly illegal and is liable to be quashed.

159. Having duly taken the aforesaid submissions under consideration, the Court finds merit in the challenge raised by PayPal in this regard for the following reasons. On first principles, the Court notes that undisputedly the levy of penalty is imbued with a quasi-criminal characteristic. It is this aspect which was highlighted by the Supreme Court in *Hindustan Steel* when it observed that penalty would be justified provided it is established that a party had failed to comply with legal obligations deliberately, in defiance of the law or be guilty of contumacious or dishonest conduct. The Supreme Court

pertinently observed that penalty would not be leviable merely because it was lawful to do so. *Hindustan Steel* went further to hold that the imposition of penalty would also not be justified where a person is found to have proceeded on the bona fide belief that it was not covered by the provision or legally obliged to effect compliance.

160. Tested on the aforesaid principles it is manifest that the imposition of penalty is clearly unjustified in the facts of the present case. As the record would bear out, PayPal had consistently taken the position that it could not be held to be a payment system operator under the PMLA. The stand taken by the petitioner in this regard cannot possibly be said to be wholly specious or in wilful disobedience to abide by a legal obligation which was either apparent or free from doubt. The issue was further compounded by the affidavit filed by RBI in the *Abhijit Mishra* proceedings. PayPal can thus be justifiably said to have been proceeding under the bona fide belief that its operations did not fall within the ambit of the PMLA.

161. The Court further notes that even when the present writ petition was entertained, the Court had in its order of 12 January 2021 taken note of the perceptible incompatibility between the stand taken by FIU-IND and the RBI and which led to the constitution of a committee of experts. This too would seem to indicate that the issues raised by PayPal were not free from doubt and that its challenge was found to, prima facie, raise triable questions.

162. The Court also cannot lose sight of the fact that the stand of PayPal as evident from its communications with FIU-IND was essentially collaborative and a testament to its intent to arrive at a mutually acceptable solution. This is also manifest from its approach of both parties identifying a *"mutually acceptable mechanism"* and the suggestion of three models of information sharing forming part of their letter dated 20 December 2019.

163. Proceeding then to the issue of quantification, the Court notes that Section 13(2)(d) does not prescribe or stipulate the imposition of penalty for each month of default. It also does not speak of non-compliance amounting to a continued infraction or one which may warrant imposition of penalty on a monthly basis. The Court also finds merit in the challenge raised with respect to the maximum penalty being imposed on the ground of an abject failure on the part of the respondent to confer consideration on the nature of questions which were raised by PayPal. It was, in the considered opinion of this Court, imperative for FIU-IND to have recorded reasons in justification of the levy of the maximum penalty provided under the statute. For all the aforesaid reasons, the Court finds itself unable to be sustain the imposition of penalty as embodied in the impugned order. The order, would thus to the aforesaid extent be liable to be quashed.

P. THE DEEMING FICTION ARGUMENT

164. The Court also finds itself unable to sustain the impugned order

insofar as it proceeds to observe that PayPal would be *"deemed"* to be a payment system operator. A deeming fiction must stand specifically engrafted in a statutory provision. A legal fiction would be available to be invoked only in a situation where the Legislature engrafts such a measure or frames the provision in language which justifies the existence of such a fiction being recognised to operate. While we find ourselves unable to endorse the contrarian view as expressed in the impugned order, nothing further would turn on this issue in light the Court having upon an independent review of the relevant provisions come to the conclusion that PayPal is liable to be recognised to be a payment system operator.

Q. DISPOSITIF

165. Accordingly and for all the aforesaid reasons, the instant writ petition is partly allowed. In terms of the conclusions recorded hereinabove, the Court holds that PayPal is liable to be viewed as a "payment system operator" and consequently obliged to comply with reporting entity obligations as placed under the PMLA. The imposition of penalty in terms of the impugned order dated 17 December 2020 is, however and for reasons aforenoted, quashed. The impugned order shall stand set aside to the aforesaid extent.

166. In view of the above, the Bank Guarantee as submitted by PayPal shall stand discharged. The Registrar General of the Court is requested to take further steps in light of the above.

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167. The instant application had been moved for certain material in sealed cover being taken on record. While the aforesaid material was placed for the perusal of the Court, the same was neither taken on board nor PayPal apprised of its contents. The material has also not been taken into consideration by the Court while rendering the present judgment. In view of the above, the application is rendered infructuous and shall stand disposed of as such.

168. All other pending applications shall stand disposed of.

YASHWANT VARMA, J.

JULY 24, 2023
SU/*neha*