POSTSCRIPT IV

SIT ON BLACK MONEY: THE FIRST DECISION OF THE MODI GOVERNMENT

I resume the thread I left in Chapter 28 of the Memoir

After telling you something about the world, I now come to pick up the thread which I had left in Chapter 28 Section 'C'. I have told you how the UPA Government made the sad mistake of questioning the directions in *Ram Jethmalani & Ors. v. Union of India & Ors.* [2011] 8 SCC 1 that had appointed the SIT to function under the two eminent former judges of the Supreme Court. It is good that the Narendra Modi-led BJP Government's first decision was to set up the SIT on Black Money, to pursue its objective with all commitment. But before I come to brace up with the SIT at work, I would deal with some apprehensions, the awareness of which will help us forge appropriate course of actions.

II

The Problem in the raw : the chiaroscuro of Hope and Gloom

I agree with Prof. Arun Kumar of Jawaharlal Nehru University, Delhi, that black money is a tiny component of the huge black economy. Black money is the illegal income in legal business, or illegal income in illegal business. It is the money acquired causing wrongful gains to the recipients, and wrongful loss to others. At several places in my Memoir, I have reflected on 'black money' [see Chapter 10 under the sub-heading: 'The Problem of Black-money: the Art of pretending to solve the problem without ever solving it,' (at pp. 130-131)]. Prof. Kumar's answer to the question [How can the foreign-based black money be retrieved?] is worth consideration.

> "First of all, I think going after just the foreign component of black money is a diversion. The bulk of the money is right here in the country! It is very difficult to get money out of foreign tax havens unless someone has been really stupid. Let me clarify that all Indians with foreign accounts are not criminals. If it is untaxed, unreported income then it needs to be tracked and brought to book. No amount of agreements to avoid double taxation, or information sharing will yield information on real account holders. There are devious means by which money is transferred through several layers of shell companies. If you ask a Swiss bank, they might tell you the 'names' they have but these are not the real people. It will require a great deal of

> meticulous work here to get the right persons. This is what the US did in the case of its citizens who had stashed money in UBS. They prepared a case in US and presented it to the Swiss. That's what India should do. The only other way is to wait for somebody to steal the data as happened in the case of LGT — the Lichtenstein based trust."

Prof Kumar bewails the lack of political will, and the conspiratorial nexus of a triad: business, politicians and the executive arm of the government. These two morbid features have existed, since long. Various committees and commissions noticed how corruption generates black money but no worthwhile effective step has been taken yet. People have a lot of hope from this SIT. It is good as the Supreme Court is supervising this SIT. And we have a dynamic government in power that has assured us that good days are now just round the corner. But the proof pudding is only in eating. I know Prof Arun Kumar well. I cannot dismiss his doubts about the success of the SIT. He says:

> 'My feeling is that the Special Investigation Team (SIT) set up by the government under Supreme Court pressure will be of limited use. So, there has never been a political will to tackle the black economy in the past, and I doubt that the present government has it.'

In the context of Chapter 29, when I read what Prof Arun Kumar apprehends, the story that I had narrated at page 491 of this Memoir, comes to mind to make me suffer deep agony. He seems to say precisely what Bertrand Russell said (*Autobiography* p. 629): " Like Cassandra, I am doomed to prophesy evil and not be believed. Her prophecies came true. I desperately hope that mine will not." But for the philosophical repose of Prof. Kumar, I would refer to what Freud had told Einstein when he had been dismayed by mankind's failure to respond to the challenge that could have saved us from the devastation of World War II. And the valiant PIL Petitioner, Shri Ram Jethmalani can have his peace reflecting on the pregnant *shloka* from the *Panchtantra* which I have quoted after enjoying its wholesome effect on my own much ruffled self (see p. 345 of the Memoir).

III

Things demanding prompt attention from the SIT

(a)

Introduction

I would have restrained myself from the comments on the SIT appointed by the Supreme Court. But I would set forth some of my legitimate expectations from it. I am sure, over the passage of time, the Supreme Court's directions would be subjected to creative narrowing. It would, of course, be unfortunate. The reach of the directions of the Court should be read in the light of the ideas so powerfully stated in the first Part of the order in *Ram Jethmalani's Case* discussed in Chapter 28. There would also be attempts to narrow down the reach of the judicial directions subjecting them to the confines of the Prayers in the Writ Petition. I would not be surprised if there are attempts to eclipse the Part 'A' of the said order as mere judicial effervescence of solemn judicial wrath at the ways the authorities have acquitted themselves in recent years. There may even be an attempt to read the words of the order in the light of the Notification dated May, 2014 [The

Gazette of India Extraordinary of May 29, 2014]. I do not wish to go into their details. I wish the SIT discovers the deeds of Khans and Tapurias. I hope these creatures are not found mere figments of delight, or their wealth does not turn out camphor that could vanish in the thin air. I hope the SIT would discover how the authorities made castles in thin air, and would explore what made them build castles that way. When such things happen, people's trust in administration reaches its vanishing point. Someone abler than me would help find out strategies to frustrate the devices for resorting to intricate corporate structuring to make the clouds formed in India shower only outside India. It is good that the SIT will have the powers to supervise till the matters are taken to logical conclusion. It is hoped that this body would be well equipped to explore the origin of the tainted wealth, to examine the process of concealed transmissions through space or the virtual world. It would also gather information as to the destination of such wealth through all the intricate process of transformations, and its odyssey outside India; and again its intrusion into India in many ways one of which is round tripping. Even a little work done in that noble pursuit is great.

I think the most important work assigned to the SIT is mentioned in these words:

> "The special Investigation Team shall also be charged with the responsibility of *preparing a comprehensive action plan*, including the *creation of necessary institutional structures* that can enable and strengthen the country's *battle against generation of unaccounted monies, and their stashing away in foreign banks or in various forms domestically*." [italics supplied]

Whilst, as a citizen of the Republic of India, I wish the SIT to succeed at all fronts, I would be satisfied if a permanent institution for pursuing the aforementioned three objectives are created in our country. This would involve the study and analysis of some of the great institutions of the West in order to see how they are structured, and what sustains them. A lot of light can be drawn from critically studying all that produced Bernard Lawrence Madoff in the US economy, and all that led to the discovery of his dark deeds leading to his imprisonment for 150 years and forfeiture of $17.179 billion. It may be good to gather information how things are creatively managed from the Ugland House in the Cayman Islands, or from the Cathedral Square in Mauritius. The ways of the Stock-Market must be understood. It is wonderful that Raja Parikshit allowed the Kaliyuga only five places of repose from his wrath: of the five places one is *dyut* (speculation) that rules in the Stock-Markets!

This body must be independent, its expenditure wholly charged on the Consolidated Fund, it must be accountable only to the Supreme Court. Its structure should be a honeycomb of hexagonal cells manned by persons of competence from different services and professions out to study all that is happening on the planet, or in the virtual world, having bearing on the work assigned to the SIT. They should operate on the pattern of Conseil d'Etat of France having jurisdiction on functionaries in the matter of "all disputes touching recruitment, pay, promotion, duties and discipline within" '*la fonction publique*'. Public confidence in the institution had been built over years. This faith was not

'ruffled by a decision of the Counseil d'Etat against his government'.[1] Can't we too have a body like that? Straw boats cannot help us cross the tempestuous oceans to find out our stolen treasures !

(b)

I SUGGEST SOME POINTS FOR THE SIT TO CONSIDER

I know persons abler than me would help the SIT with ideas to determine its zone of operations. Within the constraints of this Postscript of my Memoir, I mention the following without claiming that they are exhaustive or final.

1. Some measure of regulated exchange rates and control, as required under the Bretton Woods system, had kept certain vital segments of economy under government vigilance, but its dismantling removed close public vigilance. This triumph of the neoliberal strategy, going on in this phase of Globalisation, has, in effect, destroyed public vigilance from the private and corporate acts. [see Chap. 23 p. 345 and Chap. 26 p. 416 of this Memoir]. Measures of public vigilance must be established.

2. At several places in this Memoir, I have mentioned how indiscriminate welcome of FDI is bad for our country. It has been seen that in the passionate pursuits for more and more FDI, corruptions flourish, black economy is patronized, and black money flourishes. It is not the right place for me to go into such details, it would be sufficient to quote from *Globalization and its Discontents* wherein, with much perspicacity, Joseph Stiglitz has written thus (at pp. 71-72):

> "There is more to the list of legitimate complaints against foreign direct investment. Such investment often flourishes only because of special privileges extracted from the government. While standard economics focuses on the*distortions* of incentives that result from such privileges, there is a far more insidious aspect: often those privileges are the result of corruption, the bribery of government officials. The foreign direct investment comes only at the price of undermining democratic processes. This is particularly true for investments in mining, oil, and other natural resources, where foreigners have a real incentive to obtain the concessions at low prices." — "The international financial institutions tended to ignore the problems I have outlined. Instead, the IMF's prescription for job creation – when it focused on that issue – was simple: Eliminate government intervention (in the form of oppressive regulation), reduce taxes, get inflation as low as possible, and invite foreign entrepreneurs in. In a sense, even here policy reflected the colonial mentality described in the previous chapter: of course, the developing countries would have to rely on foreigners for entrepreneurship. Never mind the remarkable successes of Korea and Japan, in which foreign investment played no role. In many cases, as in Singapore, China, and Malaysia, which kept the abuses of foreign investment in check, foreign direct investment played a critical role, not so much for the capital (which, given the high savings rate, was not really needed) or even for the entrepreneurship,

1 H.M. Seervai, *Constitutional Law* (4th ed.) p. 3059.

but for the access to markets and new technology that it brought along."

This process of privatization and corporatization makes a country lose twice, to say in the words of Stiglitz, "first from the unfair contract or privatization, and then from the political turmoil and adverse attention from the international investment community when an attempt is made to set things right."[2]

3. They all swear by transparency, yet they all desire and work for 'darkness'. I have shown in Chapter 27, why and how 'darkness' is needed for corruption and black money to grow more and more. We had seen in Chapter 23, the Delhi High Court struck down CBDT's Circular 789 holding:

"An abuse of the treaty or treaty shopping is illegal and thus necessarily forbidden."

"No law encourages opaque system to prevail".

The Union of India went on appeal to the Supreme Court. The long story has been told in short in Chapter 23 of the Memoir. The Supreme Court reversed the High Court. Read the Chapter for yourself and ask your conscience whether what had happened was good for our people. The Supreme Court did not provide any remedy against the fraud. It made a solemn cry to Parliament to think about the step that was needed (see p. 416). Parliament has done nothing till now. The abuse is continuing to help the crooks to generate black wealth, and to shuffle that from jurisdictions to jurisdictions most of them created with ignoble motives. Instead of eradicating this evil, the Direct Taxes Code Bill, 2010, sought to incarnate the Circular in a statutory form (see Chapt 17 p. 232, & Chapt. 26 p.415). But the things have exceeded all bounds of decency when the provisions of the Bilateral Investment Treaties, which, in effect, seek to override our laws and oust our superior courts' jurisdiction, grant the benefit of Treaty Shopping to all the foreign investors in ways most morbid and fraudulent ! How this globe-trotting fraud has been crafted would be discussed in the Postscript 7 of this Memoir. If our Government has sincere desire to take steps against black economy and black money, it must work sincerely to withdraw the Circular 789 from retrospective effect, abandon the idea to provide for the issue of a *Carte de Sejour*, and consider all the 80 and odd BITs domestically inoperative (for the reasons see Postscript 7 of the Memoir). I have written about the Noah's ark in which crooks of all lands could sail across to loot India hoisting the Mauritian Certificate of Residence (see p.348 of the Memoir). I had asked Dr. M. L. Upadhyaya[3] to examine its propriety, The concluding paragraph of the said Opinion by Dr. Upadhyaya considers Treaty Shopping a fraud on our law and constitution: to quote -

"Let us assume that two states have entered into a bilateral beneficial treaty securing certain benefits and advantages for their nationals only. There is no express or implied provision or suggestion to extend the benefits arising out of such treaty to the nationals of third States. In reality, the nationals of the third states pretending to be national entities of one of the contracting states claim such benefits. Objections

2 Stiglitz, *Making Globalization Work* p. 144.

3 Prof. (Dr.) M.L. Upadhyaya, former Professor & Dean of the University of Calcutta, and later Professor & Vice President, Amity Law School, New Delhi.

> are raised to such claims. If one of the Contracting States wants to condone this apparent illegal or unethical practice, how should it go about it. There are two courses open. One either the two states by consent amend the terms of the treaty and provide for by an express term in the treaty and then amend its laws, if the said amendments have financial implications affecting its revenues. But if the executive without amending the laws gives a clarification of the provision of the treaty and the law and by executive fiat condones the manifestly illegal practice and does what was not initially intended by the treaty, it would certainly be a fraud on the Constitution and a colourable exercise of power. This is clearly an attempt to do indirectly what it could not do directly."

4. All the statutory provisions in various Acts introduced in the recent years should be reviewed. Most of the provisions, through studied omissions and commissions, have been devised to make things easier for the looters and crooks. From 1990s various legal provisions have been altered to adapt to the demands of the neoliberal agenda. We all know how many laws were altered because of the WTO commitments. The Foreign Exchange Regulation Act was replaced by the Foreign Exchange Management Act after subjecting it to changes to make it compliant with the neoliberal policy of the WTO-IMF-World Bank. It was the same strategy that was afoot crafting the provisions of the Prevention of Money Laundering Act 2002. All the laws deserve to be considered to see if by omissions and commissions, through their tilts and tenor, they favour, or facilitate, the evil of black money, and its concealed movements within and outside India. I understand that the SIT is already on this track.

5. I have already told you in Chapter 23 of the Memoir, the circumstances under which the Circular 789 had been *got issued*. (It is my view as none knowing the tax law and tax administration, would have issued that). If you want to go deeper and wider you may see my *Judicial Role in Globalised Economy* now placed on my website: www.shivakantjha.org. If the Circular was right, and the officers who passed nearly 20 orders denying the Mauritian residents the benefits under the Indo-Mauritius DTAA were wrong, the statutory and constitutional authorities could have granted them the right remedy. To allow pressure groups and the lobbyists to bend the course of law is clear subversion of the Rule of Law. The CBDT was excusably wrong by forgetting the right role of the Assessing Officers. The role of the Assessing Officers has been well explained by Delhi High Court in *Gee Vee Enterprise v Addl. CIT*[4]

> "The civil court is neutral. It simply gives decision on the basis of the pleading and evidence, which comes before it. The Income-tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return, which apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry."

6. The SIT may consider setting up some mechanism to keep under surveil-

4 (1975) 99 ITR 375 at 386.

lance the domestic operators under the 'opaque system' of the present-day Rogue Finance. This topic is not manageable to be dealt with here. You may go through Chapter 2 of my *Judicial Role in Globalised Economy*. But effective steps would require measures of international coercion, and diplomatic pressure; or, a mix of both. I do not wish to flog these points here because I find will to do so totally absent both in the domestic sphere and at international fora. True the USA and the UK have succeeded in making certain dirty jurisdictions disgorge their wrongfully acquired wealth, but this cannot be treated as the present-day international norm. They are mighty countries so their writs could run. They have selectively shown will to act, but we have yet to demonstrate the political will to do that.

7. The SIT would examine our obligations under the WTO and the Agreements under its umbrella, and the ways we have chosen to bind ourselves to behave in the globalised world through treaties. Through treaties we had been subjected to slavery, through treaties the Chinese dragon had become a meek bleating lamb, through treaties the nations have moved towards wars, Through treaties, constitutions can be made non-functional, through treaties we can create situations for collective suicide. True, some good can also be gained, but for this to happen our government needs sagacity, and our polity needs corruption-free environment. Alfred Russel Wallace wisely said in his *Bad Times:* "It is, then, by applying the teachings of a higher morality to our commerce and manufactures, to our laws and customs, and to our dealings with all other nationalities, that we shall find the only effective and permanent remedy for Depression of Trade" (see p. 54 of the Memoir). I would revisit this important point in the PS 7.

IV

A FLASHBACK: GLEANINGS FROM MY PAST EXPERIENCE

(Recalling the Judicial Monitoring of the Fodder Scam Cases by the Patna High Court)

The Judicial Monitoring of the Fodder Scam Cases had been done, in 1990s, by Hon'ble Patna High Court. It is the subject-matter of Chapter 12 of this Memoir. It comes to mind whilst I consider this SIT on Black Money. The Patna High Court had assumed jurisdiction under Article 226 of the Constitution: see *Sushil Kumar Modi & ors. vs The State of Bihar & ors* [1996 (1) PLJR 561]. I was transferred, in 1995, from the post of the Director-General (Exemption) that had, then an all-India jurisdiction, to the post of the Chief Commissioner of Income-tax, Bihar, Orissa, Assam, & the North-East. Whilst at Patna, I had to supervise the Fodder Scam Cases from the observation-post of the Income-tax Department. In this Part I reflect on certain things I had witnessed in order to help this SIT sculpt its strategy to discover, & get back black money.

The jurisdiction that the Patna High Court exercised in monitoring the Fodder Scam case, when compared with the jurisdiction of this SIT on Black Money, was both grand and narrow. It was grand because the Fodder Scam cases were monitored by one of the Division Benches of the High Court whereas this SIT is not a court but a 'court-empowered body' exercising the Court's power as granted to it for discharging its duties prescribed. It does not seem to possess the

wide creative powers of the Supreme Court exercising the powers of issuing the continuing mandamus, unless from time to time it seeks authorization for such actions from the Court. I have written something about the structure of investigation in Chapter 12. What was important was the frequent submissions of the 'Action taken reports', and their scrutiny by the High Court. All those days of hearing were the testing moments for the CBI and the Income-tax Department. Those were enlightening moments too as the High Court guided us, helped us to get over obstructions that came in plenty to delay, and distract. Even the judicial censures and sharp criticism for delay in action, or inaction or mal-action, brought to us light and delight. This continuous aggressive vigilance by the Court kept everyone on tenterhooks. Whenever the superior Delhi-based hierarchy of the CBI soft-peddled, or tried to derail the investigation, the High Court was fast and sharp in censuring such derelictions so that things could take better turns. But the CBI was, on most occasions, on the mat. In fact, the CBI's performance used to come up for criticism both in the Court, and in the media. It was only the dedication of some persons, like Dr. U.N. Biswas, Joint Director (East) / CBI, and the close and assertive monitoring by the High Court that things could come to light showing how the public institutions had broken down giving rise to the Fodder Scam (see Chap. 12 of the Memoir).

The High Court advanced its reasons for assertive monitoring by adopting pro-people and pro-justice approach[5], as our Supreme Court has done in the Part 'A' of its judgment discussed in Chapter 28 of the Memoir. The High Court's Judgment in *Modi's Case* ended with a note of solemn pensiveness: it said—-

> "The values of public life are fast declining. I do not expect that this judgment and the CBI investigation will improve the system. But, if we are only able to maintain it, by our effort, we will feel gratified."

How prophetic is the note, how sad is the tone !

While monitoring the Fodder Scam, the Patna High Court had to decide quite frequently the operational problems, mostly created by those who did not want the truth to come out. Quite frequently hierarchic issues and ego-problems were out to delay the work, and to derail the mission. To solve such problems, many issues were even taken to the Supreme Court. Most of the times, the response of the CBI was unsatisfactory. The High Court had been driven to comment the following on the CBI in one of its orders passed in course of the monitoring process: it observed —

> "We are satisfied, in the circumstances, that there is clear attempt on the part of the Director, CBI, to not only interfere with the investigation but also scuttle it."

While the High Court was pursuing its duty cast on it by the Supreme Court,

5 "The people of this State, in different walks of life, have been made to suffer on the specious plea of paucity of funds. The limited funds of the State which could be utilized for the welfare of the people were allowed to be systematically plundered, assuming unparalleled proportions. In such a situation, people naturally have a 'legitimate expectation' that the guilty be punished. It is the duty of this Court in writ jurisdiction to see that these legitimate expectations are fulfilled. It is a fit case, therefore, in which direction should be issued for enquiry and investigation of the entire episode by the Central Bureau of Investigation for the period in question." *Sushil Kumar Modi&ors.vs The State of Bihar &ors.* [1996 (1) PLJR 561 para 53.

the Apex Court guided it with its judicial sagacity and authority. I quote two extracts here from *Sushil Kumar Modi's Case* : one in which the CBI is told how to behave, and the second where all officers received mandatory directions on their duties.

(*i*) "At the hearing of the matter we had expressed our plain view that the CBI with its Director at the helm of affairs is duty bound to make a fair, honest and complete investigation into the accusations and to identify all the culprits involved in the scam and to take the necessary steps in accordance with law for the trial of all accused. The ultimate responsibility to ensure a fair, honest and complete investigation into the accusations is that of the Director, CBI, and he is expected to discharge his duty and functions faithfully towards this end. It is also necessary that the Director is not merely to perform his own duty in this manner but he is also to ensure that every officer of the CBI works honestly to achieve this end. This is imperative under the "rule of law'. The learned Attorney General unhesitatingly accepted this and assured us of the same. It is not necessary for us to elaborate this obvious any further."

(*ii*) "We deem it proper to emphasise that every officer of the CBI associated with the investigation has to function as a member of a cohesive team which is engaged in the common pursuit of a fair, honest and complete investigation into the crimes alleged. It is needless to further emphasize that the exercise has to be performed objectively and fairly, mindful of the fact that the majesty of law has to be upheld and the 'rule of law' preserved, which does not discriminate between individuals on the basis of their status, position or power. The law treats everyone as equal before it and this has to be kept in view constantly in every State action to avoid violation of the 'right to equality' guaranteed in Article 14 of the Constitution."

One point more. The Hon'ble Supreme Court failed to notice the features of the criminal conspiracy at work in the generation of black money, the siphoning-off of the black money, and the stashing of black money in foreign jurisdictions. The Patna High Court had made, in the context of its examination of the Fodder Scam, a very pertinent comment. The High Court had observed: " It is clear that the excess drawals were not isolated acts ; they were manifestations and results of well-knit conspiracy to commit loot and plunder of public money in a systematic manner, which could not be possible without the support of high-ups." Not only the Government of Bihar, but all other agencies adopted the technique of 'creative delay'. It was this fact which made the High Court warn the officers involved:

> "One of the first and foremost considerations which should carry weight not only with the public functionaries but also the courts is that the Government and its functionaries must not only act but also appear to act in public interest. In my opinion, it is the legitimate right of the public to know, and feel assured about, that the investigation is done in correct perspectives and that no guilty person will be spared."

I think, this SIT on black money would cast its ken wide enough to explore

facts to see if the craft and covin of conspiracy worked: if they worked, then to what extent. We would expect from this high body to throw light on the*dramatis personne* and the theatres whereon they worked. The SIT would tell us not only what happened on the stage, but also what happened in the green-room. The nation has the right to know how our administration works. I would hope that this SIT would someday submit such an enlightening report that our nation comes to know whether the trust we reposed in our public servants was kept, or betrayed.