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Prevention of Money Laundering Act in India: The ECIR and Presumption of Innocence

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Summary

In a significant decision, the Supreme Court of India has decided to review its earlier order, passed on 27 July 2022, relating to permitting the Enforcement Directorate powers to arrest without providing a copy of the enforcement case information report and reversal of the presumption of innocence. The judgement had upheld the amendments passed by the government to the Prevention of Money Laundering Act 2002 and clarifications pertaining to Section 3 of the Act. In recent years, the Enforcement Directorate's frequent use of the provisions of this Act has come up for concern in public circles and among political parties alleging that it is utilised to harass opponents of the government.

Introduction

The Prevention of Money Laundering Act (PMLA) was enacted by the then National Democratic Alliance government in 2002 and came into force in 2005. Its primary goal was to prevent money laundering, providing for the confiscation of property derived from or involved in money laundering and punishing those who commit money laundering offences. The Act was India's attempt to align with global efforts to curb drug trafficking proceeds used to finance terrorist activities. The Vienna Convention in 1988 had exhorted countries to adopt national laws to combat the menace of drug trafficking. The intention was to block the 'laundering' of such ill-gotten funds to buy property. At the G7 Summit in 1989, the Financial Action Task Force was established to combat the scourge of money laundering. Later, in 2002, the Palermo Convention similarly urged nations to adopt legislative measures to criminalise the proceeds of crime.

The PMLA went through several amendments, the last of which was in 2019. This amendment proposed to close gaps in the earlier provisions of money laundering and make the regulations more stringent and better equipped to identify questionable transactions. The amendment was to address a major ambiguity which existed in the clause concerning what constitutes 'proceeds of crime'. To plug such gaps, the amended Act amplified Section 3.[1]

Over 240 petitions were submitted in different courts, arguing that the amendments passed in recent years have widened the scope of the Act and undermined the initial intention of the legislature. The challengers claimed the amendments violated personal liberty, procedures of law and the constitutional mandate and that the process itself was the

[1] Section 3 of the PMLA defines the offence of money laundering as whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime and projecting it as untainted property shall be guilty of offence of money-laundering.

punishment under the PMLA. They contended that the powers of the Enforcement Directorate (ED) are akin to that of the police and must be subject to the provisions of the Code of Criminal Procedure (CrPC). It was maintained that the PMLA, unlike other penal statutes, does not require the ED to adhere to procedures for arrest and investigation as stated in the CrPC. Thus, it allows the ED to operate without procedural safeguards to protect the rights of accused persons and thereby compromises fundamental rights as enshrined in the Indian Constitution.

A major ground for the challenge was against the 2019 amendment to clarify the scope of Section 3 of the Act. It was also argued that the original intent of the Act was against the projection of tainted money as untainted and that its integration into the economy constituted an offence. However, the ED was booking cases solely based on original crimes without any proof that the money was laundered. Further, the amendments to the PMLA, introduced through the Finance Act 2019, brought a whole gamut of offences under the ED's purview,[2] whilst the PMLA was created to prevent and punish a narrow set of offences which mostly dealt with large-scale money laundering. Thus, the Parliament's widening scope of the PMLA facilitated a more rampant use of the ED's powers, regardless of the gravity of the offence. It had also been contended that the amendments introduced to the PMLA in 2015, 2016, 2018 and 2019 were made through the Finance Act where these amendments do not qualify as a money bill, as defined under Article 110 of the Constitution.

A three-judge bench of the Supreme Court heard all the petitions filed by individuals and other entities questioning various provisions of the PMLA, a law which the opposition has often claimed has been weaponised by the government to harass its political adversaries. The Supreme Court has rejected the challenge to the various provisions and upheld the ED's powers to search, arrest, attach and seize property under this Act. At the same time, the Supreme Court maintained that the explanation of Section 3 provided in the 2019 amendment was merely clarificatory and did not expand the scope of the original definition. Section 3 defines the offence of money laundering, and it currently reads, inter-alia:

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

As specified above, the word 'and' clearly suggests that unless a tainted property is projected or claimed as untainted, there cannot be any money laundering offence.

The Supreme Court has accepted the government's submission that a drafting error had occurred and that the expression 'and' should be read as 'or' in Section 3 of the Act. The

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2 Ministry of Law and Justice, The Finance (No. 2) Act 2019, https://egazette.nic.in/WriteReadData/2019/209695.pdf.

3 "Section 3: Offence of money-laundering", India Code: Digital Repository of All Central and State Acts, https://www.indiacode.nic.in/show-data?actid=AC_CEN_2_2_00035_200315_1517807326550&sectionId=25469&sectionno=3&orderno=3.

Supreme Court replaced the word 'and' with 'or' and has indulged in judicial legislation, ostensibly in exercise of its powers under Article 142 of the Constitution.
The justification for radically altering the scope, purport and clear wordings of the Parliament for this scope expansion of Section 3, which is the backbone of the legislation, has been faulted by legal experts as it now expands the scope of the provision.

The ECIR not Equated to the FIR

The ED registers an Enforcement Case Information Report (ECIR), which is akin to a First Information Report (FIR) in criminal cases. Unlike the FIR, which is shared with the accused, the ECIR is not shared purportedly on the ground that it is an internal document. Another ground for the challenge in the Supreme Court was that the ED could arrest an individual on the basis of an ECIR without informing him of its contents, which is arbitrary and violative of the accused's constitutional rights. This process does not provide the accused person with any scope for judicial oversight such that while seeking bail, he is unaware of the charges against him.

The Supreme Court held that the ECIR could not be equated with an FIR, which must be recorded and supplied to the accused. It maintained that revealing a copy of an ECIR, if made mandatory, may defeat the purpose sought to be achieved by the Act, including frustrating the attachment of property. The ECIR may contain details of the material in possession of the authority and, if revealed before the inquiry/investigation, may have a deleterious impact on the final outcome of the inquiry/investigation. It thus held that non-supply of ECIR – essentially an internal document of the ED – cannot be cited as a violation of constitutional right.

This ruling has been criticised on the ground that if an investigation commences against a person, he need not be informed of the grounds of investigation, or some vague grounds could be made known to him. The person may not even know whether he is summoned as a witness or an accused. Even while applying for bail, the 'twin conditions' of hearing the prosecution and proving innocence have to be satisfied, and the Supreme Court should be satisfied that he is not likely to commit an offence while on bail. This is seen as disturbing since it upends the first principles in criminal law viz the presumption of innocence of the accused unless proven otherwise. This is a stringent feature of the law since an arrest can be made without the accused knowing the grounds of arrest; bail may be difficult to obtain, and the property gets confiscated until the proof of innocence. Considering that these cases drag on for years in India, these conditions are very damaging.

Minuscule Rate of Conviction

The efficacy of the use of the PMLA needs to be analysed in the context of the number of people who have actually been successfully prosecuted under the Act. Till 31 March 2022, the ED recorded 5,422 cases under the PMLA, attached proceeds of crime approximately worth ₹1.05 trillion (S$18.5 billion) and filed prosecution complaints (charge sheets) in 992 cases. These cases resulted in the confiscation of ₹86.9 billion (S$1.5 million) and the conviction of 23 accused as per the written response of the Union Minister of State for

Finance Pankaj Chaudhary in the Lok Sabha.[4] This implies that the remaining ₹1.04 trillion (S$18.3 billion) worth of assets which has been wrongfully attached would have to be released. The rate of conviction in PMLA is thus barely 0.5 per cent. In light of such miniscule rate of conviction, there has been widespread concern over the use of the ED's powers under the Act. It has been seen as a weapon to intimidate the voice of the opposition.

The Political Aspect

Whilst the verdict of the Supreme Court has drawn comments depending on which side of the political divide the commentator lies; it is a fact that all parties are complicit in framing and making the law more stringent. None of them desired to relinquish the arbitrary power that the state could exercise. However, it is also true that the use of the law in the last eight years has increased dramatically.

While there have been many legislations passed by the Parliament which seemed to transgress on the fundamental rights of the citizen, it was always the Supreme Court which emerged as the protector of such rights and declared such laws as violative of fundamental rights. By the verdict of July 2022, legal experts maintain that the Supreme Court seems to have lowered the bar by permitting the state to encroach upon a citizen's fundamental rights.

The Decision to Review its Earlier Verdict

Taking these petitions on record, the Supreme Court issued a notice on a petition filed inter alia by Congress Member of Parliament, Karti P Chidambaram, on 25 August 2022 which seeks to review its 27 July judgment that upheld the power of arrest, attachment, search and seizure, conferred on the ED by the PMLA. A bench, headed by the then Chief Justice N V Ramana, opined that prima facie, two aspects of the judgment upholding the provisions of the PMLA must be reconsidered. The first provision is the absence of a legal requirement to provide an ECIR copy to the accused. Whether a person being arrested can be denied a copy of the ECIR – the equivalent of an FIR in a criminal case – on the ground that it is just an internal document of the ED. The second provision is on the reversal of the presumption of innocence or whether the law can ascribe the presumption of guilt on an accused as against the presumption of innocence in contrast to the cardinal common law principle of being innocent till proven guilty.[5]

Conclusion

It may be noted that a ruling by the Supreme Court is final in ordinary circumstances. However, Article 137 of the Constitution grants the apex court the power to review its own

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[4] "Only 23 convicted in 5,422 cases under PMLA till date: Govt to Lok Sabha," *Hindustan Times*, 26 July 2022, https://www.hindustantimes.com/india-news/only-23-convicted-in-5-422-cases-under-pmla-till-date-govt-to-lok-sabha-101658774947795.html.

[5] "PMLA Review: Supreme Court Agrees to Relook into Aspects of Providing ECIR to Accused & Negation of Presumption of Innocence," *Live Law*, 25 August 2022, https://www.livelaw.in/top-stories/pmla-review-supreme-court-agrees-to-relook-into-aspects-of-providing-ecir-to-accused-negation-of-presumption-of-innocence-207439.

judgements. A review petition must be filed within 30 days of the original order. Usually, review petitions are considered by judges through circulation in their chambers. In this particular case, considering the public nature of the issue, the bench has decided to hear it in an open court, where the counsels representing different parties made their submissions. The final verdict of the Supreme Court on a review of the aforementioned issues is anxiously awaited.

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