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Prevention of Money Laundering Act: Draconian Yet?

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A three-judge Bench led by Justice A.M. Khanwilkar is holding back-to-back hearings on petitions filed by people from all walks of life and across the country complaining of the alleged subversion of the Prevention of Money Laundering Act (PMLA) by the government and the Enforcement Directorate (ED)[1]. The following article examines and refers to the various provisions of the PMLA and their arbitrary nature. As for post-2014, the need for PMLA seems to be on the rise its nature has also been called for questioning. The use of PMLA in the contemporary period is being looked at as a tool to harass and achieve political goals or promote specific propaganda. Provisions of the act, its birth, its chilling effect on fundamental rights, and the way it is used as a tool are summed up in the article.

Keywords: *money, directorate, laundering.*

INTRODUCTION

The Act arose through a series of cooperative actions by a number of countries, in which the international community identified and recognized the threat that money laundering poses to financial institutions as well as national sovereignty and integrity. The United National

[1] Krishnadas Rajgopal, 'Supreme Court examines allegations of rampant misuse of PMLA' (*The Hindu,* 13 February 2022) <https://www.thehindu.com/news/national/sc-examines-allegations-of-metamorphosis-of-an-anti-money-laundering-law/article65046294.ece> accessed 14 March 2022

Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was one of several initiatives launched by nation-states to combat the problem, with a request for the confiscation of proceeds of drug-related crime and further measures to prevent money laundering. Accordingly, the Financial Action Task Force (FATF) was established[2] to investigate the problems of money laundering, and on 23.2.1990, the United Nations General Assembly passed a resolution [3]calling on member states to develop a mechanism to prevent financial institutions from being used for money laundering and to enact further legislation to prevent money laundering; and in a special session of the United Nations held for 'Countering World Drug Problem Together' held in, the UN General Assembly passed a resolution calling on member states to develop a mechanism to India, which is a signatory to some of the aforementioned measures, introduced the Prevention of Money Laundering Bill, 1999[4], in accordance with worldwide views. This Bill was first faced with a number of complaints, but it was eventually passed, resulting in the Act's enactment in 2003. The Act took effect on July 1, 2005, as a result of a notification issued by the Central Government. The Prevention of Money Laundering Bill's statement of objects and reasons states that the "objective was to enact a comprehensive legislation, inter alia for preventing money laundering 1 and related activities, confiscation of proceeds of crime, the establishment of agencies and mechanisms for coordinating measures for combating money-laundering, and so on." The provisions of Chapter II of the Act deal with the crime of money laundering. Money laundering is defined in Section 2 (p)[5] of the Act to have the meaning assigned to it in Section 3. With effect from 03.01.2013, the Prevention of Money-Laundering (Amendment) Act, 2012 altered Section 3 of the Act. Section 3[6] of the Act read as follows prior to the stated Amendment: "*Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually*

2 'What is FATF' (*Business Standard*) <https://www.business-standard.com/about/what-is-fatf#:~:text=The%20Financial%20Action%20Task%20Force,develop%20policies%20against%20money%20laundering> accessed 14 March 2022

3 'Political Declaration and Global Programme of Action Adopted by the General Assembly at its 17th special session, devoted to the question of international co-operation against illicit production, supply, demand, trafficking and distribution of narcotic drugs and psychotropic substances : Resolution / adopted by the General Assembly' (*UN Digital Library,* 15 March 1990) <https://digitallibrary.un.org/record/87622?ln=en> accessed 14 March 2022

4 Prevention of Money Laundering Bill, 1999

5 Prevention of Money Laundering Bill, 1999, s 2(p)

6 Prevention of Money-Laundering (Amendment) Act, 2012, s 3

involved in any process or activity connected it as untainted property shall be guilty of the offense of money-laundering." Following the amendment, which took effect on January 3, 2013, the following section now reads: "*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 proceeds of crime including concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of the offence of money-laundering*"

ENFORCEMENT DIRECTORATE AND PREVENTION OF MONEY LAUNDERING ACT, 2002

If the object of the special statute is the prevention and detection of a crime, and in order to achieve such object, an officer under such special statute is vested with coercive powers which would facilitate the obtaining of a confession from a suspect, then such officer will be a police officer for the purposes of Section 25 and 26[7] of the Indian Evidence Act, 1872 and any confession made to such officer will be inadmissible in evidence. Section 25 of the Evidence Act deals with confessions made to police officers (with or without custody), and Section 26 deals with confessions made to any person while in the custody of a police officer. In other words, even an extrajudicial confession made while in police Section 26 of the Evidence Act states that custody cannot be used against an accused. Any criminal inquiry must be open, transparent, and conducted in conformity with the law's specified procedures. This entails alerting an accused of the nature of the investigation, the statutes, and offenses for which the accused is being investigated, as well as the allegations for which the investigation has begun. The Enforcement Directorate's procedure of recording an internal document called the Enforcement Case Information Report ("ECIR") while investigating offenses under the Prevention of Money Laundering Act, 2002 ("PMLA"), without informing a proposed accused of the contents of the ECIR and the acts for which he is being investigated is a procedure not recognized by law. This is inherently arbitrary and infringes on an accused person's constitutional rights. Even the Supreme Court has accepted this component of transparency and fairness in situations of First Information Reports (F.I.R.) under the Cr.P.C. The Supreme

[7] Indian Evidence Act, 1872, s 25 and s 26

Court has held that an accused is entitled to get a copy of the FIR at an earlier stage than the stage prescribed under Section 207 Cr.P.C.[8] [Youth Bar Association vs Union of India[9]]. Further, the Supreme Court has moved to a fully transparent approach in which the FIR against an accused is uploaded on the websites maintained by the investigating authorities or is made available to an accused upon asking for the same[10]. This is so that the accused have full knowledge of the nature of the allegations against them. This Court has also acknowledged that the right to know the allegations against an accused person is an inherent part of Article 21[11] and the right to life and liberty.

Every FIR lodged by an officer u/s 154[12], Cr.P.C. must be referred to the jurisdictional magistrate, as mandated by the Cr. P.C under Section 157[13], Cr.P.C., ensuring a higher level of judicial control in each instance. In the case of an ECIR, however, there is no such necessity. Despite the fact that the ECIR has been registered, the Enforcement Directorate refuses to provide a copy to the accused person, and since the ED refuses to comply with Section 157 Cr.P.C. and forward a copy of the ECIR to the concerned jurisdictional Magistrate, the same cannot be obtained even by filing an application with the concerned jurisdictional Magistrate. As a result, in the instance of an ECIR registered by the Enforcement Directorate, the procedure stipulated by the law in the Cr.P.C. and laid down by the Supreme Court in Youth Bar Association (above) in regard to the issuance of FIRs to an accused is completely followed. Despite the fact that the ED refuses to furnish the ECIR in most situations, it does so freely in some cases during adjudication hearings under Sections 5 and 8[14] of the Prevention of Money Laundering Act, 2002. In rare situations, the ED has consented to provide the accused with a copy of the ECIR. The ED, on the other hand, treats itself as an outlier to these principles and norms, registering an ECIR on its own whims and fancies on its own file. The ED says that this is an internal document and refuses to share it with the people identified in it. Any process can

[8] Code of Criminal Procedure, 1973, s 207
[9] *Youth Bar Association v Union of India* (2016) 9 SCC 473
[10] *Ibid*
[11] Constitution of India, 1950, art. 21
[12] Code of Criminal Procedure, 1973, s 154
[13] Code of Criminal Procedure, 1973, s 157
[14] Prevention of Money Laundering Act, 2002, s 5 and s 8

be used to access the ECIR. The ED commences after the ECIR has been registered to summon the accused and demand details of all of the accused's financial transactions as well as their relatives. Under S. 50[15], the accused is required to make statements. The 'complaint' mentioned in Section 44(1)(b)[16] is not a private complaint as defined in Section 190(1)(a)[17] of the Cr.P.C., but rather one made by an authorized authority under Section 48[18] PMLA or a police officer under Section 45(1A)[19] PMLA. Another important observation that needs careful consideration is because the complainant is a public servant acting in the discharge of his official duties, the complainant ED and the witnesses named in the complaint are excluded from examination under Section 200[20] Cr.P.C. in terms of sub-clause (a) of the First Proviso to Section 200 Cr. P.C continuing to this because the offense of money laundering is exclusively triable in a Court of Sessions – see sub-clause (a) of the Proviso to Section 202[21] Cr.P.C. r/w Section 46(1)[22] of the PMLA – the complaint is excluded from the rigors of a pre-summoning inquiry or investigation under Section 202 Cr.P.C. furthermore

Prevention of Money Laundering Act, 2002 that are considered acceptable in court. During the course of this process, the accused is unaware of the charges leveled against him, as the only document available to him is a copy of the complaint. The ECIR contains the allegation which is not made available to the accused. The non-obstante provision in Section 44 PMLA is comparable to Section 36A(1)[23] of the NDPS Act. As a result, a Special Judge rather than a Magistrate takes cognizance of the money laundering offense. Another argument based on Section 45(1A) of the Prevention of Money Laundering Act, 2002 is that the Act allows both an Authority defined under Section 48 of the Prevention of Money Laundering Act, 2002 and a Police Officer to investigate offenses under Section 3 of the Prevention of Money Laundering Act,2002. As previously indicated, a Police Officer could investigate offenses under the

[15] Prevention of Money Laundering Act, 2002, s 50
[16] Prevention of Money Laundering Act, 2002, s 44(1) (b)
[17] Code of Criminal Procedure, 1973, s 190(1) (a)
[18] Prevention of Money Laundering Act, 2002, s 48
[19] Prevention of Money Laundering Act, 2002, s 45(1A)
[20] Code of Criminal Procedure, 1973, s 200
[21] Code of Criminal Procedure, 1973, s 2022
[22] Prevention of Money Laundering Act, 2002, s 46(1)
[23] Narcotic Drugs and Psychotropic Substances Act, 1985, s 36A (1)

Prevention of Money Laundering Act, 2002 without special authorization from the Central Government before the 2005 amendment, but following the addition of Section 45(1A), specific authorization was necessary. Furthermore, under Section 44(1)(d) of the Prevention Of Money Laundering Act,2002, a Special Court established under Section 44 is regarded to be a Court of Session for the purposes of the Cr.P.C. A Court of Session can only take cognizance as a Court of original jurisdiction if the case has been committed to it by a Magistrate under Section 193 of the Cr.P.C. A Special Court, however, may take cognizance of an offense under the Prevention Of Money Laundering Act, 2002 without the accused being committed to it for trial under section 44(1)(b) of the Prevention of Money Laundering Act, 2002.

CONCLUSION

So far the media limelight the raids receive, to too many extents it is presumed by the public at large that the accused must be guilty and thus the authorities are knocking on his doorstep. Lately, in the case of Nawab Malik and other politicians, widespread propaganda can be seen in order to kill his image in public at large. Also, the not-so-early raids on the accused in connection to the alleged crime committed back before 10-15 years shall once be dealt with by the Court. As the Supreme Court's comment to the Central Bureau of Investigation labeling the authority as '*Caged Parrot*' shall be followed again with respect to the current *Obedient Parrots* who are under the venomous protection of a law which shall be struck down. Apart from other draconian laws which take a huge amount of limelight, this one purposefully is ignored by both sides of the lower and upper houses of the parliament as both, after exchanging their seats get to use this law as a powerful tool to haunt others. There lies very less hope once a case under PMLA is set for trial, the disposal rate of these cases is worrisome for those who are already behind bars and are keeping high hopes from the trial as during bail hearing the accused is judged as guilty or not assuming it as pre-trial. The legislative goal, whether it be giving Magistrates authority to give bail or avoid arrest in cases of offenses punishable for less than seven years, has always been to release a person on bond or not arrested for such offences. Bail is still not the norm under the PMLA, which stipulates a maximum sentence of seven years. This violates the basic rule of - *Bail is ruled, and jail is an*

exception[24]laid down by Justice V. Krishna Iyer. "*Deprivation of Liberty for a single day is a day too many*"[25]as discussed at large for the past two years after the bail of Arnab Goswami is still seen nowhere to be followed when it comes to this specific law. The clash between developmental legal precedents and draconian laws is going on for decades, and every time the draconian has lost.

24 *State of Rajasthan v Balchand alias Baliya* (1977) AIR 2447

25 Sanya Talwar, 'Courts Must Ensure That Criminal Law does not become a weapon for selective harassment of citizens: SC in Arnab Goswami Judgment' (*Live Law,* 27 November 2020) <https://www.livelaw.in/top-stories/deprivation-for-a-single-day-is-a-day-to-many-courts-must-ensure-that-criminal-law-does-not-become-a-weapon-for-selective-harassment-of-citizens-sc-in-arnab-goswami-judgment-166459> accessed 15 March 2022