An overview of PMLA, 2002

Money Laundering

- ***Money Laundering*** *while facially appears to comprise one or more clear and simple financial transactions, involves and comprises a* ***complex web*** *of financial and other transactions. A money laundering transaction usually involves three stage:*

(i) ***The placement stage:-*** *The malfeasant place when the crime money enters into the formal financial system. This may be done by breaking of large amount of cash into smaller sums and depositing these amounts into bank accounts or by purchasing a series of monetary instruments (cheques, money orders) and collection and depositing these instruments at different locations or using mobile payments through internet or transfer using hawala route to another country and then transferring the PoC to financial system in different jurisdictions.*

Money Laundering

(ii) ***The Layering stage:-*** *The money induced into the financial system is layered and spread out into several transactions within the financial system with a view to concealing the origin or original identity of the money and to make this origin, identity virtually disappear. By engaging in series of conversion or complex movement of funds using multiple entities located in different places in and outside India to distant PoC from their source. Offshore financial centers and the sector having low risk of detection are most favored layering routes.*

(iii) ***The integration stage:-*** *The money is thereafter integrated into the financial system in such a way that its original association with crime is totally obliterated and the money could be used by the malfeasant and/or the accomplices to get it as untainted/clean money. Re-entry of layered funds in the legitimate economy by making investments in the real estate, luxury assets or business venture, etc.*

Overview of presentation

- History and Objectives
- Money Laundering- Meaning, Process and Punishment
- Powers of the Investigating Officers
- Attachment, adjudication and confiscation
- Constitutionality
- Special Court
- Recent Amendments

History

- PML Bill introduced in *Lok Sabha* on 04 August 1988. Referred to Standing Committee on Finance. Report on 04 March 1989.
- Presidential Assent on 17 January 2003; Came into force w.e.f. 1 July 2005.
- PMLA implements the Political Declaration adopted by the Special Session of the UN General Assembly, 1999 which called upon the Member-States to adopt money-laundering legislation and programmes.

OBJECTS

- **Statement of Objects and Reasons (SOR) of the Act states that PMLA is enacted:**

  - **to prevent and control money laundering,**
  - **to provide of confiscation of property derived or obtained from money laundering, and**
  - **matters connected therewith.**

Objects and reasons

- **The SOR took note of:**
  - **Basel Statement of Principles, 1989, that outlined basic policies and procedures that banks should follow in order to assist LEAs in tackling the problem of money-laundering.**
  - **Recommendations of the Financial Action Task Force (FATF) in 1989 which *inter alia* recommended that a comprehensive legislation be enacted to combat money-laundering.**

Amendments

- **PMLA amended through:**
  - **The Finance Act 2015,**
  - **The Finance Act 2016**
  - **the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act 2015 (the Black Money Act) &**
  - **The Finance Act 2019.**

Authorities under PMLA

Directorate of Enforcment

Director /

Additional Director / Joint Director

Deputy Director

Assistant Director

Officers

Section 48, 49 (Appointed by the Central Government)

Directorate of Enforcement

- Responsible for investigating cases of money laundering, initiate proceedings for attachment of property and to launch prosecution in the Special Court.
- Powers and functions include:
  - survey, search, seizure, arrest, attachment, prosecution against offender;
  - providing and seeking mutual legal assistance to/from contracting states in respect of attachment/confiscation of proceeds of crime and transfer of accused persons;
  - rendering cooperation to foreign countries in matters related to money laundering and restitution of assets.

Binod Kumar Vs State of Jharkhand, Manu/SC/0277/2011

Issues involved:

(i)Whether the CBI has any authority to investigate the offences which are the sole domain of Enforcement Directorate in the light of section 45(IA) read with sections 43 and 44 of PMLA?

(ii) Whether the High Court was right in directing investigations by CBI?

Held that Enforcement Directorate is the sole Authority to investigate the offence of money laundering under PMLA.

Proceeds of crime

- “**S. 2. (1)(*u*) “proceeds of crime**” means **any property derived or obtained, directly or indirectly, by any person** as a result of **criminal** activity relating **to a scheduled offence** or the value of any such property or **where such property** is taken or **held outside the country**, then the **property equivalent** in value held **within the country**;”
- 'Explanation (Added through FA 2019).—*For the removal of doubts, it is hereby clarified that "proceeds of crime" include property* ***not only derived or obtained*** *from the scheduled offence* ***but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence;'.***

Property

- "Section **2. (1)(*v*)** "**property**" means any property or assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and includes deeds and instruments evidencing title to, or interest in, such property or assets, wherever located;"

Section 3: The offence of Money Laundering

- "*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*** *including its* ***concealment, possession, acquisition or use*** *and projecting it or* ***claiming it as untainted property*** *shall be guilty of offence of money-laundering*."

Section 3 Amendment through FA 2019

- "Explanation.—For the removal of doubts, it is hereby clarified that,— (i) a person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely:—
  (a) concealment; or
  (b) possession; or
  (c) acquisition; or
  (d) use; or
  (e) projecting as untainted property; or
  (f) claiming as untainted property, in any manner whatsoever;

Section 3 Amendment through FA 2019

(ii) the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever.".

Offence and Penalties
Section 4

- Any person who commits the offence of money laundering shall be punishable with rigorous imprisonment (between 3 to 7 years), and also liable to fine. [10 years where the proceeds of crime relate to an offence under the NDPS Act.]
- Scheduled Offences:
  - Part A - offence under several statutes including the IPC (e.g. criminal conspiracy, cheating etc.), PC Act, *Benami* Act, SEBI Act (e.g. insider trading), Customs Act, etc.
  - Part C - offences of cross border implications
  - No monetary threshold

Power to Attach property [Section 5]

- The Director (or any person authorized him), has the power to provisionally attach any property suspected to be derived from the proceeds of crime.
- If the Director "*has reason to believe (the reason for such belief to be recorded in writing), on the basis of material in his possession*", that:
  - any person is in possession of proceeds or crime, and
  - such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime,
- He may, after filing a report with the Magistrate, by order in writing, to provisionally attach the property for a period up to 180 days.
- Notwithstanding the above, the property may be provisionally attached if the Director has reason to believe that non-attachment shall frustrate the proceedings.

Reason to believe

- Under Section 5 of the Act, “reason to believe” serves two purposes: that
  a) any person is in possession of any proceeds of crime; and
  b) such proceeds of crime are likely to be concealed, transferred, or dealt with in any manner that may frustrate any proceedings to confiscate such proceeds of crime.

Madras High Court in *Dr. V.M. Ganeshan* v. *Joint Director*

- **Held that** there are three categories of persons who come within the ambit of the second proviso to Section 5(1) PMLA:

  "(i) person who is not accused of any offence, but who was merely come to possess, under fortunate or unfortunate circumstances, a property that represents the proceeds of crime;

  (ii) person against whom a complaint is lodged, but the investigation is not yet complete and a final report under Section 173 of the Code of Criminal Procedure not yet filed; or

  (iii) a person who is accused of committing an offence and against whom a final report has been filed under Section 173 of the Code of Criminal Procedure before the competent Court."

B. Ramaraju Vs Union of India, 2011, High Court of AP

Issue involved: Constitutional validity of Sections 5 (1), 8 (1), 8 (2), 8 (3), 8 (4), 23 and 24 of PMLA was challenged.

- Constitutional validity of PMLA was upheld.
- Further held that the property at the hands of any person can be attached other than a person charged of having committed a scheduled offence .
- The burden of proving that the proceeds of crime are untainted property is applicable not only to prosecution but also to proceedings for attachment and confiscation.

Adjudicating Authority [Section 6]

- The adjudicating authority consists of a Chairperson and 2 members. It functions within Department of Revenue, Ministry of Finance.
- The Adjudicating Authority is not bound by the procedure laid down in the CPC but ***"shall be guided by the principles of natural justice"*** and shall be entitled to regulate its own procedure.
- The role of adjudicating authority is to consider attachments made by authorities and grant of refuse permission for retention and confiscation of seized property.

Adjudication (Section 8)

- The Adjudicating Authority shall consider the material and reply filed and and thereafter and hear the noticee and director and then record a finding whether all or any of the properties are involved in money laundering.
- Where the adjudicating authority decides that any property is involved in money-laundering, it shall confirm the attachment of the property, or otherwise order release.
- Upon confirmation of attachment, the director shall take possession of the property.
- However, the Director may withhold the release of any property until filing of appeal (under S.26) or 45 days from the date of order (whichever is earlier) .
- If the adjudicating authority finds that the property is not involved in money laundering, he shall direct release of it to the person entitled.

Appellate Tribunal

- Established by Central Government and consists of Chairperson and two other members to hear appeals against the decision of Adjudicating Authority and other authorities under the Act
- Appeals to the Tribunal can be made by the Director, or any person aggrieved by an order of the Adjudicating Authority, or any banking institution or allied institution within 45 days from the date on which the order is received.
- Further appeal can be made against the order of the Tribunal to High Court within 60 days.
- Appellate Tribunal vested with powers of a civil court. Can also review its decisions and decide cases ex parte.

Appellate Tribunal and Special Court

- **Appellate Tribunal:** is empowered to hear appeals against the decision of Adjudicating Authority and other authorities under this Act. It consists of a Chairperson and two other members.
- **Special Court:** is set up by the Central Government for trial of offences of money laundering.
- **Jurisdiction of civil courts is barred.** The offence of money laundering is triable only by a special court constituted for the area in which the offence has been committed.

Powers of Investigating Officers

1. **Power of Survey [S. 16]**
2. **Power to Search, Seize and Freeze [S. 17]**
3. **Power to Search Persons [S. 18]**
4. **Power to Arrest [S. 19]**
5. **Power to summon, production of documents and give evidence [S. 50]**
6. **Power of retention of property and records [Ss. 20 & 21]**
7. **Power to Attach property [Section 5]**
   - After exercise of the above powers, the authority shall forward the "*reasons so recorded"* or "*order*", "*along with material in his possession*", to the Adjudicating Authority.
   - The authority seizing any record or property shall file an application for retention thereof before the Adjudicating Authority within 30 days.

Power of Survey [Section 16]

- Where an authority "*on the basis of material in his possession, has reason to believe (the reasons for such belief to be recorded in writing)*", that an offence of money laundering has been committed,
- He may enter any place and :
  - inspect records,
  - check or verify the proceeds of crime or any transaction relating to the proceeds of crime which may be found therein,
  - furnish such information as is required.
- The Authority may:
  - place marks of identification on the records inspected and make copies thereof,
  - make an inventory of the property inspected,
  - record the statement of any person present in the place which may be useful to any proceeding under the Act.

Power to Search, Seize & Freeze [Section 17]

- Where a Director "*on the basis of material in his possession, has reason to believe (the reason for such belief to be recorded in writing)*", that any person has:
  - committed any act which constitutes money laundering, or
  - is in the possession of any proceeds of crime involved in money laundering, or
  - is in possession of any records relating to money laundering,
  - is in possession of any property related to crime,
- Then he may authorize any officer subordinate to him to enter into and search any building, place, etc. where he has reason to suspect that such records or proceeds of crime are kept, and
  - break open the lock of any door, box etc. if the keys are not available
  - seize any record or property found as a result of such search
  - place marks of identification on the records inspected and make copies of the same
  - make note or an inventory of such record or property
  - examine on oath any person, who is found to be in possession or control of any record or property as may be relevant for the purpose of any investigation.

Power to Search Persons [Section 18]

- If an authority "*on the basis of material in his possession, has reason to believe (the reason for such belief to be recorded in writing)*", that any person has:
  - secreted about his person or in anything under his possession, ownership or control,
  - any record or proceeds of crime which may be relevant for proceedings under the Act,

  he may search that person and seize such record or property.
- When such an authority is about to search a person, he shall, if the person requires, take him to a magistrate within 24 hours, who may, either discharge such person or direct that search be made.
- CrPC provisions to be followed

Power to Arrest [Section 19]

- If the director / officer authorised, has "*on the basis of material in his possession, has reason to believe (the reason for such belief to be recorded in writing)*", that any person has been guilty of an offence punishable under the Act, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.
- Every such person arrested shall be taken to a judicial magistrate or a metropolitan magistrate, who has jurisdiction in the matter) within 24 hours of such arrest.

Power to summon, production of documents and give evidence [Sections 11 and 50]

- The adjudicating authority and the director have the same powers as are vested in a civil court while trying a suit in respect of the following matters, namely:
  - discovery and inspection
  - enforcing the attendance of any person, including any officer of a banking company or a financial institution or a company, and examining him on oath
  - compelling the production of records
  - receiving evidence on affidavits
  - issuing commissions for examination of witnesses and documents,
  - any other matter which may be prescribed.
- All such proceedings are deemed to be "judicial proceedings".

Power of retention of property and records [Section 20 & 21]

- Where any property or records have been seized and the officer concerned ***"has reason to believe"*** that
  - the property is required to be retained for adjudication,
  - the property may be retained for a period of 3 months from the end of the month in which the property was seized.
  - On expiry of the period above, the property shall be returned to the person from whom it was seized, unless, the adjudicating authority permits retention of such property beyond the said period.

Procedure following attachment of property by the Director (Confirmation and adjudication)

- The director shall, immediately after attachment:
  - forward a copy of the order of attachment along with supporting material to the adjudicating authority, and
  - within 30 days of the attachment, file a complaint before the adjudicating authority, stating the facts of such attachment.
- On receipt of the complaint, if the adjudicating authority has reason to believe that any person is guilty of money laundering or is in possession of proceeds of crime, it may serve a notice of at least 30 days on such person calling upon him to indicate:
  - the sources of his income, and means of which he has acquired such property,
  - the evidence on which he relies and other relevant information and particulars, and
  - to show cause why all or any of such properties should not be declared to be the properties involved in money- laundering and confiscated.

Special Court

- The Special court can take cognizance of any offence of money upon a complaint is made by an authority, without the accused being committed to it for trial.
- The provisions of the CrPC shall apply to the proceedings before a Special Court.
- Applications for bail should be made before the High Court having jurisdiction.

Two Parallel Streams

1. the investigation/attachment proceedings before the Director and/or the Adjudicating Authority, and
2. trial proceedings before the Special Court

- In proceedings before the Special Court, proof of guilt of the accused 'beyond reasonable doubt' and the '*mens rea*' must be established by the prosecution.
- For attachment of property the authority needs to show that there is "substantial probable cause" to form opinion that the property under attachment is proceeds of crime.

Obligation of reporting entities Section 12

- Reporting Entity” means a banking company, financial institution, intermediary or a person carrying on a designated business or profession.
- Every Reporting entity to maintain record of all ‘transactions’ to enable it to reconstruct individual transactions, furnish to FIU information on such transactions, maintain records evidencing identity of clients.
- Such record to be maintained for a period of 5 years after the business relationship with the reporting entity has ended or closed, whichever is later

Bail Provisions Section 45

- Earlier: *No person accused of an offence for a period of more than 3 years under Part A shall be released without the public prosecutor being given a chance to oppose the release and there are grounds for believing he is not guilty except a person under the age of 16 years or a woman or a sick and infirm person*
- *Stuck down by Supreme Court in Nikesh Tarachand Shah v. UOI*

Section 45 of PMLA in *UoI v. Varineder Singh*

- Section 45 of the PMLA starts with a non obstante clause which indicates that the provisions laid down in Section 45 of PMLA will have overriding effect on the general provisions of the Code of Criminal Procedure in case of conflict between them.
- Section 45 of PMLA imposes the following two conditions for grant of bail to any person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule to PMLA:
- (*i*) That the Prosecutor must be given an opportunity to oppose the application for bail; and
- (*ii*) That the court must be satisfied that there are reasonable grounds for believing that the accused person is not guilty of such offence and that he is not likely to commit any offence while on bail.

Bail in PMLA
UoI v. Varineder Singh

- Section 65 requires that the provisions of CrPC shall apply insofar as they are not inconsistent with the provisions of this Act and
- Section 71 provides that the provisions of PMLA shall have overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.
- Thus, PMLA has an overriding effect and the provisions of CrPC would apply only if they are not inconsistent with the provisions of this Act.
- Therefore, the conditions enumerated in Section 45 of PMLA will have to be complied with even in respect of an application for bail made under Section 439 CrPC.
- That coupled with the provisions of Section 24 provides that unless the contrary is proved, the Authority or the Court shall presume that proceeds of crime are involved in money laundering and the burden to prove that the proceeds of crime are not involved, lies on the appellant.

Supreme court in *Nikesh Tarachand Shah*

- It is obvious that the twin conditions set down in Section 45 are a much higher threshold bar than any of the conditions laid down in para 18 of the aforesaid judgment. In fact, the presumption of innocence, which is attached to any person being prosecuted of an offence, is inverted by the conditions specified in Section 45, whereas for grant of ordinary bail the presumption of innocence attaches, after which the various factors set out in para 18 of the judgment are to be looked at. Under Section 45, the Court must be satisfied that there are reasonable grounds to believe that the person is *not guilty* of such offence and that he is *not likely to* commit any offence while on bail.

PML (Maintenance of Records) Rules, 2005

- Every reporting entity to have a Designated Director who has to ensure overall compliance with the obligations imposed under the Act and Rules.
- Rule 3 requires to maintain records and report:
- cash transactions of over Rs. 10 lakhs,
- 'suspicious transactions',
- cross border wire transfers exceeding Rs. 5 lakhs,
- purchase/sale of immovable property valued at Rs. 50 lakhs or more etc.

Offences by Companies
Section 70

- Where a person committing a contravention of any of the provisions of the Act or of any rule, direction or order made there under is a company:
- Every person responsible for the conduct of business, and the company itself, shall be deemed to be guilty and proceeded against,
- Provided that no person will be held liable if he proves that the contravention took place without his knowledge or he exercised all due diligence to prevent it.
- If it is proved that contravention is attributable to any consent, connivance or even neglect on the part of any director, manager, secretary or other officer, then such person shall also be deemed to be guilty.

Reciprocal arrangements Section 56

- The Central Government may enter into agreements with foreign governments to enforce provisions of the Act or exchange information etc.
- Mechanism put in place to obtain evidence required in connection with investigation into an offence or proceeding under the Act if such evidence may be available in any Contracting State

Application of CrPC

- Section 46 : Save as otherwise provided under this Act, the provisions of CrPC shall apply to the proceeding before a Special Court.
- Section 65 : The provisions CrPC shall apply, insofar as they are not inconsistent with the provisions of this Act, to arrest, search and seizure, attachment, confiscation, investigation, prosecution and all other proceedings under this Act.
- Section 71: Act to have overriding effect.

Safeguards

- Section 62 : Punishment for vexatious search may extend to two years or fine which may extend to fifty thousand rupees or both.
- Section 63 : (a) Any person wilfully and maliciously giving false information and so causing an arrest or a search to be made under this Act shall on conviction be liable for imprisonment for a term which may extend to two years or fine which may extend to fifty thousand rupees or both. (b) Failure or refusal to give information /statement shall lead to penalty between ₹ 500 to ₹ 10,000 for each such default or failure.

TRIAL BY THE SAME COURT

- Transfer of trial of scheduled offence to the special court would be from the stage at which it is committed (section 44(1)(c)).

Not a joint Trial
2019 Amendment

In Section 44 the following Explanation has been be inserted:

"Explanation.—For the removal of doubts, it is clarified that,—

(i) the jurisdiction of the Special Court while dealing with the offence under this Act, during investigation, enquiry or trial under this Act, **shall not be dependent upon any orders passed in respect of the scheduled offence, and the trial of both sets of offences by the same court shall not be construed as joint trial;**

SUBSEQUENT COMPLAINTS 2019 AMENDMENT

In Section 44 the following Explanation has been be inserted:

"Explanation.—For the removal of doubts, it is clarified that,

(ii) the complaint shall be deemed to include any subsequent complaint in respect of further investigation that may be conducted to bring any further evidence, oral or documentary, against any accused person involved in respect of the offence, for which complaint has already been filed, whether named in the original complaint or not.".

Burden of proof: Section 24

S.24 (a) In the case of a person charged with the offence of money-laundering under section 3, the Authority or Court **shall,** unless the contrary is proved, **presume** that such proceeds of crime are involved in money laundering; and

(b) In the case of any other person the Authority or Court, **may presume** that such proceeds of crime are involved in money-laundering.

A. Kamarunnisa Ghori V. ED
2011, High Court of Madras

Issue Involved: Whether Section 8(4) of PMLA confers the power to take actual physical possession ?

Held that the respondents are directed to put the petitioners back into possession of the properties. However, the legal and constructive possession shall remain with the Directorate of Enforcement. The order is under challenge before DB, High Court of Madras.

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(b) In the case of any other person the Authority or Court, **may presume** that such proceeds of crime are involved in money-laundering.

Radha Mohan Lakhotia Vs DD of Enforcement,
Manu/MH/1011/2010, High Court of Bombay

Issue involved: What is the basis for attachment under section 5(1) of PMLA?

Held that the Authority is required to show that there was "substantial probable cause" to form opinion that the property under attachment is proceeds of crime.

R.Devadoss Vs Deputy Director of Enforcement 2010, Madras High Court

Issue involved: Whether parties are entitled for notice before passing PAO?

Held that as far as the provisional attachment is concerned, the object of the same is just to prevent the concerned individual from disposing or transferring the properties in question, in any manner. Consequently, question of providing an opportunity does not arise.

A.Kamarunnisa Ghori Vs ED 2011, High Court of Madras.

Issue Involved: Whether Section 8(4) of PMLA confers the power to take actual physical possession ?

Held that the respondents are directed to put the petitioners back into possession of the properties. However, the legal and constructive possession shall remain with the Directorate of Enforcement. The order is under challenge before DB, High Court of Madras.