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INDIA'S FIGHT AGAINST DIRTY MONEY: EXAMINING THE EFFICACY OF ANTI-MONEY LAUNDERING LAWS

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ABSTRACT

Money laundering not only undermines good governance but also fuels organized crime and threatens India's financial stability. This research paper examines the effectiveness of India's anti-money laundering (AML) regime through a novel approach: analysing a timeline of landmark cases and their impact on legislation and enforcement. By delving into pivotal events like the enactment of the Prevention of Money Laundering Act, 2002, and analysing landmark cases, the paper identifies key regulatory challenges, including fragmented oversight and data

sharing hurdles. It also assesses enforcement gaps, such as resource constraints and lack of inter-agency coordination. Employing legal analysis of case law, regulatory review of AML frameworks, and empirical data on enforcement actions, this research reveals the inherent complexities in combating money laundering in India. Ultimately, it seeks to provide constructive recommendations for strengthening the AML regime and fostering a cleaner financial ecosystem.

INTRODUCTION

While globalisation has facilitated global trade, the criminals have mastered exploiting the intricate global network to launder money and evade capture. In simple words money laundering means disguising the proceeds from illegal activities to make them appear legitimate. The world has witnessed bank collapses and economic instability due to money laundering scandals. The alarming growth in illicit trade in India is a threat to the economy and security of the nation. *"Based on UNODC estimates, when the Indian economy surpassed*

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the $3 trillion mark in 2021, the quantum of money laundering in India can be estimated at $159 billion which is around 5 percent of GDP. This accentuates the magnitude of the problem driven by the rise in illicit markets (trade, illegal drugs, arms etc.) and non-market actors."[3]

Considering the seriousness of the threat that money laundering poses to the economic stability and good governance global efforts were made to combat it. The connection between illicit trade such as drug trafficking and terrorism organisations is a known fact. In 1988, the Vienna Convention urged nations to adopt national laws to combat the menace of drug trafficking. A year later in 1989, the FATF was established with the prime objective of combating money laundering. In addition to the above stated events, the Political Declaration and Global Programme of Action, annexed to the resolution S-17/2 adopted by the UN General Assembly at its 17th special session in February 1990 as well as the Political Declaration adopted by the special session of the UN General Assembly in June 1998 called upon the Member States (including India) to adopt national money-laundering legislation and programme. It was thus considered necessary to implement the afore mentioned resolution and Deceleration[4]. These events led to the enactment of the Prevention of Money Laundering Act in 2002 which came into force in 2005.

The PMLA stands as a significant legislative tool designed to combat money laundering, it can be understood as an intersection of financial regulations, criminal justice principles and ethical considerations. The objectives of enacting PMLA are two-fold, firstly to confiscate the property derived from and/or involved in money laundering and secondly to punish those who commit the offense of money laundering. Various authorities have been entrusted with

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[3]("Money laundering", 2023.09.28). Money laundering via illicit trade hovering at 5% of India's GDP: FICCI study, Zee Business, Market News, p.https://www.zeebiz.com/market-news/news-money-laundering-via-illicit trade-hovering-at-5-percent-of-indias-gdp-ficci-study-256733

[4]Prevention of Money Laundering Act, 2002, Preamble. https://dea.gov.in/sites/default/files/moneylaunderingact.pdf

the enforcement of the PMLA, with the ED playing the major role.

This research paper examines the judiciary's role in development of the AML regime in India through the study of landmark case laws. These legal determinations along with clarifying the intricacies surrounding money laundering and its consequences has also offered guidance for policymakers to bring legislative amendments that strike a balance between prosecuting financial offenses and safeguarding individual liberties. By examining judgements, amendments and emerging challenges this paper aims to provide an analysis of the key provisions of PMLA. It is through this critical lens; this paper seeks to contribute to the understanding of the AML laws in India.

WHAT CONSTITUTES "MONEY-LAUNDERING"?

Before we proceed it is essential to understand what does the term "money-laundering" implicate. A concise working definition was adopted by Interpol General Secretariat Assembly in 1995, which defines money laundering as: "*Any act or attempted act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from legitimate sources*"[5].

The PMLA has u/s 2 (p) defined that *"Money laundering" has the meaning assigned to it in section 3.*[6] Section 3 of the PMLA reads 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."*[7]

To simplify PMLA defines money-laundering as any activity connected with the 'proceeds of crime' which in turn is defined as any property or value of such property derived as a result of

[5]International Criminal Police Review. Number 454-455/ 1995. https://www.interpol.int/en/Resources/Documents#General-Assembly

[6]Prevention of Money Laundering Act, 2002, Section 2, sub-section (p). https://dea.gov.in/sites/default/files/moneylaunderingact.pdf

[7] Prevention of Money Laundering Act, 2002, Section 3. https://dea.gov.in/sites/default/files/moneylaunderingact.pdf

criminal activity relating to a 'scheduled offence'.[8]

The schedule to the Act is in two parts:

1. Part A lists waging of war against the government of India (Sections 121 and 121A of Indian Penal Code) and several offences under the Narcotics Drugs and Psychotropic Substances Act, 1985.
2. Offences listed in Part B have now been subjected to a monetary limit of Rs. 3 million or more which was not there in the original Bill. These offences include murder, extortion, kidnapping, robbery and dacoity, forgery of security, counterfeiting currency and banknotes, offences under the Arms Act, 1959 (Sections 25 to 30), offences under the Wild Life (Protection) Act, 1972 (Section 51), offences under the Immoral Traffic (Prevention) Act, 1956 (Sections 5 to 9) and offences under the Prevention of Corruption Act, 1988 (Sections 7 to 10).

"PROCEEDS OF CRIME" IS THE FOUNDATIONAL FACT FOR THE OFFENCE OF MONEY-LAUNDERING THE 2G SPECTRUM ALLOCATION SCAM

After a series of scandals that exposed powerful politicians and their cronies in billions of dollars' worth of corruption, from the Commonwealth Games to 2G Spectrum, India saw an unprecedented level of popular protest against corruption. Greed leads to corruption and to fight corruption it is required that the greed remains unsatisfied. Therefore, the confiscation of property derived from money-laundering becomes critical.

In the infamous 2G Spectrum scam, in the year 2008, the then Union Telecom Minister Andimuthu Raja, instead of auctioning 2G spectrum insisted on a 'First Come, First Serve' policy whereby applicants were to be evaluated according to the order in which they apply. As per the chargesheets filed in the case, Raja privately arranged a process whereby certain insiders were granted preferential treatment as part of an alleged *quid pro quo* for kickbacks. Overall, 122 licenses were sold at 2001 prices and 85 of them were granted to companies not

[8] Prevention of Money Laundering Act, 2002, Section 2, sub-section (u). https://dea.gov.in/sites/default/files/moneylaunderingact.pdf

deemed eligible to receive licenses. The eligible applicants had been disqualified and information about new application window was leaked and licenses were sold at outdated prices to ineligible companies that bribed him. The 2G Spectrum scam which came out in 2011 was stated by the Times Magazine to be the second biggest abuse of power at the global level. It was a fraud of 1.76 lac crores.

There were three cases registered in the 2G Spectrum scam, one by ED and two by CBI. In 2012, the Supreme Court declaring the allocation of 2G Spectrum on a First Come, First Serve basis as illegal quashed 2G licenses granted by the Union of India and imposed a fine of Rs. 5 Crores each on Unitech Wireless, Swan Telecom and Tata Teleservices.[7]

In 2017, the Special Court of CBI acquitted all accused amongst whom former telecom minister A. Raja and DMK MP Kanimozhi are also included. The verdict was delivered on the basis of the charge-sheet framed by CBI and the ED. In the 105-page long judgment, the Bench of O.P. Saini, J. observed that in order to constitute the offence of money-laundering three ingredients namely, (a) commission of a scheduled offence; (b) "proceeds of crime" and (c) such "proceeds of crime" are projected as untainted property must be in the affirmative. The Court further noted that since in a separate judgment all the accused have been acquitted in the case relating to schedule offence, there are no "proceeds of crime" and hence there is no basis for the case to stand and the accused had to be acquitted.[8]

The acquittal in the money laundering case due to the absence of a conviction in the "scheduled offence" case exposes a potential legislative gap in the PMLA. Ideally, the PMLA should allow for independent prosecution of money laundering even if the predicate offence conviction is challenged or unsuccessful. The Special court's judgment has narrow interpretation of money laundering in India, requiring a direct link between the "proceeds of crime" and the predicate offence making it difficult to prosecute complex money laundering schemes that involve multiple layers of obfuscation.

CBI and ED filed a plea at Delhi High Court seeking an early hearing challenging the acquittal of the accused. On 22.03.2024 after six years and 125 listing, the Delhi High Court admitted the appeal filed by the CBI against the acquittal, *"This court after going through the material on record, the impugned judgment and the submissions made is of the opinion that a*

prima facie case has been made out which requires deeper examination of the entire evidence," Justice Dinesh Kumar Sharma said[9]. The lengthy legal process raises concerns about potential delays in investigation and trials.

PMLA is a sui generis legislation

V. SENTHIL BALAJI v. STATE

In November 2014 a cash-for-job scam came to light when complaints were filed against the then Minister of Electricity of Tamil Nadu, V. Senthil Balaji alleging that he took bribes in return of a promise of a secured job in the Metropolitan Transport Corporation of Tamil Nadu. A case was registered in the ECIR by the State against V. Balaji in connection with the scam[10], leading to a summons for his attendance. A search was conducted at his premises invoking section 17 of PMLA on 13.06.2023, followed by an arrest on 14.06.2023 by virtue of section 19 of PMLA due to lack of cooperation. V. Balaji refused to acknowledge the grounds of arrest furnished to him. V. Balaji's brother, sister-in-law and wife were given information pertaining to the arrest. V. Balaji was taken to the hospital for chest pain, prompting his wife to file a Habeas Corpus petition in the Madras High Court on the same day. The State sought judicial custody, which was granted until June 28, 2023. V. Balaji's bail application was dismissed, and the State obtained custody for further investigation. Additional grounds were raised in the Habeas Corpus petition questioning the remand orders. The division bench delivered a split verdict on the petition and referred the matter to the Chief Justice for further orders. The Madras High Court affirmed ED's authority to seek custody and excluded the time spent in the hospital from the initial custody period. They also ruled that since no exceptional circumstances were present, the habeas corpus petition seeking relief couldn't be granted due to an existing remand order by a competent court.

V. Balaji and his wife challenged the aforesaid judgment of the Madras High Court. While disposing the said petition the Supreme Court observed the that, PMLA is a *sui generis* act and provides for independent mechanism to deal with arrest which is in line with its objectives. To that end, the law clearly provides for a comprehensive procedure for summonses, searches, seizures, etc., and only after due observance of the relevant provisions, including Section 19 of the PMLA, will an arrest be made. The Court added that section 19 of

PMLA which provides for power to arrest is not violative of Article 21 and 22(2) of the Constitution of India and if any violation is made thereof then PMLA itself under section 62 grants power to the Competent Court to initiate action. Consequently, in particular in the context of Section 65 of PMLA which reads as *"The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply, in so far 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"*[11] there is absolutely no need to follow and adopt section 41A of the CrPC, 1973.

The further clarified that since section 19 (1) of PMLA and Section 167 of the CrPC, 1973, are *pari materia* the benefits conferred u/s 167 (2) must be afforded to the arrestee, even though there is no provision for authorized officers under PMLA. Not only the police custody, but also the custody of other investigative agencies, would be covered by the term "such custody"

referred to in Section 167 of the CrPC. In addition, any plea of unlawful arrest must be brought before magistrate since custody is a judicial matter. Relying of the above noted observations the Court held that the writ of Habeas Corpus in said petition was not maintainable. However, it is important to note that the court observed that a writ of Habeas Corpus may be entertained if a challenge is specifically made to a cryptic order which ignored the mandate of section 167 of the CrPC and Section 19 of PMLA. Lastly, in dealing with the issue of permissibility of police custody beyond the first 15 days of remand dissented with the view taken in CBI v. Anupam J. Kulkarni [12]and referred the matter to a larger bench.

This case reflects the inherent tension between combating money laundering and protecting individual liberties. The judgment while clarifying the relationship between PMLA and CrPC emphasizes the "*sui generis"* nature of PMLA. No doubt, limited judicial oversight of ED's actions can create an environment where the ED has broad investigative powers with minimal checks and balance this might also lead to arbitrary arrests and thus clearer guidelines are required.

THE REVERSAL OF PRESUMPTION OF INNOCENCE

VIJAYA MADANLAL CHOUDHARY v. UNION OF INDIA

The PMLA stands as a legislative bulwark against the hidden danger of financial crime, with the goal of disrupting illegal money transfers while safeguarding individual liberties. The Act's bail provisions, in particular Section 45, which has been the focus of close examination and judicial interpretation in in landmark cases such as Nikesh Tarachand Shah v. Union of India[13]
and Vijay Madanlal Choudhary v. Union of India[14], are essential to this undertaking.

In one instance, the petitioners contended that the presumption of innocence—a cornerstone of criminal law—was reversed in Section 45 of the PMLA, unduly burdening the accused in the original text. Additionally, they argued that the twin conditions set forth in this clause for obtaining bail were illegal because they went against Articles 14 and 21 of the Indian Constitution. The widely recognized dictum "Bail is the rule, jail is the exception" in criminal law states that an accused person should be given bail unless there is a reasonable doubt as to their guilt. But under this clause, as soon as the charges are made, the accused forfeits their right to request bail. This completely restricts the Fundamental Right to Life protected by Article 21 and goes against the assumption of innocence norm. In Nikesh Tarachand Shah's case, the Supreme Court took an active role and declared this clause unlawful. The court wisely pointed out that it would be in violation of article 21 of the Constitution's due process and fairness guarantees if the accused had to establish their innocence of a different crime. This historic ruling highlighted the judiciary's responsibility to protect individual liberty against legislative excess and upheld the presumption of innocent. The court's decision was a major win for the rule of law and individual liberties, and it made it abundantly evident that the court will not permit legislative excess to compromise citizens' fundamental rights.

In 2018, in response to the Court's decision, Parliament modified the PMLA, purportedly correcting the flaws the Supreme Court had pointed out. The burden of proof was moved by the modified Section 45, which now requires the accused to prove their innocence with regard to the PMLA charge of money laundering. This purportedly more focused approach attempted

to maintain the Act's effectiveness in preventing financial crime while bringing the provision into compliance with constitutional considerations.

However, in the instance of Vijay Madanlal Choudhary, the constitutionality of the revised Section 45 was once again called into question. Here, the Supreme Court had to determine if the constitutional flaws found in Nikesh Tarachand Shah's case had been addressed by the changes. A substantial shift from the Court's earlier position was made when a bench of three judges upheld the validity of Section 45 as amended.

The Court's ruling in the matter of Vijay Madanlal Choudhary was based on a nuanced interpretation of the PMLA's objectives and the larger framework of international agreements to stop money laundering. It emphasized the transnational aspect of financial crimes and the necessity of harmonizing national laws with global norms, especially those promoted by organizations such as the FATF. By doing thus, the Court emphasized how crucial it is to enact laws that balance the interests of community security with individual rights.

Furthermore, the Court rejected the argument that, in comparison to other major crimes like terrorism, violations under the PMLA were less horrendous or without a compelling state interest in Vijay Madanlal Choudhary's case. It justified the strict bail requirements under Section 45 by recognizing the widespread threat that money laundering poses to the integrity of financial systems and national sovereignty.

Ultimately, the Supreme Court's decision in Vijay Madanlal Choudhary's case marked a departure from its earlier stance in Nikesh Tarachand Shah's case. While the former decision upheld the constitutional validity of Section 45, the latter struck it down as unconstitutional. on. This seeming contradiction highlights how difficult it is to strike a balance between conflicting interests when it comes to financial crime enforcement and how court interpretation is always changing in response to shifting social and legal contexts. In summary, how Section 45 of the PMLA is interpreted and whether it is constitutionally legitimate demonstrates a careful balancing act between fighting financial crime and defending individual rights. The divergent results of the cases of Nikesh Tarachand Shah and Vijay Madanlal Choudhary demonstrate how the legal discourse is changing and how the judiciary must adapt to new difficulties brought up by globalization and transnational crime

in order to protect constitutional norms.

CONCLUSION

The financial stability and security of the country are seriously threatened by money laundering, hence strong laws and regulations are essential. We discussed the difficulties in prosecuting money laundering offenses, including the conflict between fighting financial crimes and preserving individual freedoms as well as legal loopholes and enforcement barriers. Many legal regimes designed to solve complicated challenges like money laundering are inherently tense. The case studies presented, especially those concerning the interpretation of bail provisions in the PMLA, offer a nuanced understanding of how the judiciary grapples with balancing these competing interests.

Moreover, the dynamic character of legal discourse and the imperative for ongoing adjustment are significant. The increased interconnectivity of global financial networks has led to a rise in the sophistication of money laundering schemes, necessitating constant modifications to laws and enforcement tactics. The paper highlights how this dynamic process of legal interpretation and adjustment is reflected in the decisions made by the Supreme Court. It acknowledges the intricacies as well as areas that want improvement.