

**COMMERCIAL AND ALLIED LAW COMMITTEE
OF CHAMBER OF TAX CONSULTANTS**

WEBINAR ON FRIDAY, 15 SEPTEMBER 2022

SC DECISION: VIJAY MADANLAL CHOUDHARY

CONSTITUTIONAL VALIDITY OF PMLA PROVISIONS

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INCREASING SIGNIFICANCE OF PMLA

- BASIC FEATURES
 - CAME INTO FORCE ON 1-7-2005
 - HAS 75 SECTIONS
 - SCHEDULE COVERS 30 OTHER LAWS
- AMENDMENTS MADE
 - 2005, 2009, **2013**, 2015, 2016, 2018, **2019**
- ACTION UNDER PMLA – HOW FREQUENT ?
 - CERTAIN ILLUSTRATIVE PRESS REPORTS
- IMPORTANT DEFINITIONS EXAMINED BY SUPREME COURT
 - *“investigation”*
 - *“proceeds of crime”*
 - *“offence of money-laundering”*

APPROACH OF SUPREME COURT

- MATTERS BROUGHT BEFORE SUPREME COURT [241]
 - 128 WRIT PETITIONS (Criminal)
 - 96 SPECIAL LEAVE PETITIONS
 - 10 CRIMINAL APPEALS
 - 6 TRANSFERRED PETITIONS (Criminal)
 - 1 TRANSFERRED PETITION (Civil)
- SUPREME COURT **CONFINED** TO MATTERS OF CHALLENGE TO CONSTITUTIONAL VALIDITY OF CERTAIN IMPORTANT PROVISIONS OF PMLA AND THEIR INTERPRETATION.
- SLPs WITH PRAYER FOR GRANT OF BAIL OR QUASHING OR DISCHARGE WERE **REJECTED**.
- QUESTION WHETHER SOME AMENDMENTS TO PMLA COULD NOT HAVE BEEN ENACTED BY WAY OF FINANCE ACT WAS **NOT EXAMINED** BUT WAS **LEFT OPEN** FOR EXAMINATION BY LARGER BENCH ALONGWITH *ROGER MATHEW* CASE.

MATERIAL ASPECTS OF PMLA

EXAMINED BY SUPREME COURT

- IMPORTANT DEFINITIONS
 - “*investigation*”
 - “*proceeds of crime*”
- OFFENCE OF MONEY-LAUNDERING
- CONFIRMATION OF PROVISIONAL ATTACHMENT
- SEARCH AND SEIZURE
- ARREST
- BURDEN OF PROOF [***SUBJECT TO REVIEW***]
- SPECIAL COURT TO TRY OFFENCE OF MONEY-LAUNDERING
- OFFENCES TO BE COGNISABLE AND NON-BAILABLE
- POWERS OF AUTHORITIES REGARDING SUMMONS AND PRODUCTION OF DOCUMENTS AND EVIDENCE
- ENFORCEMENT CASE INFORMATION REPORT (ECIR)
[***SUBJECT TO REVIEW***]

IMPORTANT DEFINITIONS

“*investigation*” [2(1)(na)] includes all the proceedings under this Act conducted, by

- the Director; or
- by an authority authorized by the Central Government under this Act for collection of evidence.”

SC CONCLUSIONS

1. THE TERM “*PROCEEDINGS*” MUST BE GIVEN EXPANSIVE MEANING TO INCLUDE INQUIRY PROCEDURE FOLLOWED BY
 - THE AUTHORITIES OF ENFORCEMENT DIRECTORATE
 - THE ADJUDICATING AUTHORITY
 - THE SPECIAL COURT
2. THE TERM “*INVESTIGATION*” IS INTERCHANGEABLE WITH THE FUNCTION OF “*INQUIRY*” TO BE UNDERTAKEN BY PMLA AUTHORITIES.

“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 or abroad.

Explanation – 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.

SC CONCLUSION

THE *EXPLANATION* (INSERTED W.E.F 1-8-2019) DOES NOT TRAVEL BEYOND THE MAIN PROVISION PREDICATING TRACKING AND REACHING UPTO THE PROPERTY DERIVED OR OBTAINED DIRECTLY OR INDIRECTLY AS A RESULT OF CRIMINAL ACTIVITY RELATING TO A SCHEDULED OFFENCE.

[Section 3]

3 . 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 or claiming it as untainted property shall be guilty of offence of money-laundering.

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,

(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.”*

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MONEY- LAUNDERING IS CONCEPT PIVOTAL TO ALL OTHER PMLA PROVISIONS

AFTER EXAMINING VARIOUS ASPECTS, WHAT WAS CONCLUSION OF SC?

1. MONEY-LAUNDERING HAS WIDER REACH SO AS TO CAPTURE EVERY PROCESS AND ACTIVITY (DIRECT OR INDIRECT) IN DEALING WITH THE PROCEEDS OF CRIME.
2. NOT LIMITED TO HAPPENING OF FINAL ACT OF INTEGRATION OF TAINTED PROPERTY IN FORMAL ECONOMY
3. *EXPLANATION* IS ONLY CLARIFICATORY
 - DOES NOT EXPAND PURPORT OF SECTION 3.
 - PROJECTING OR CLAIMING THE PROPERTY AS UNTAINTED CONSTITUTES OFFENCE ON STAND-ALONE BASIS BEING AN INDEPENDENT PROCESS OR ACTIVITY.
 - OFFENCE OF MONEY-LAUNDERING DEPENDENT ON ILLEGAL GAIN RESULTING FROM CRIMINAL ACTIVITY RELATING TO SCHEDULED OFFENCE.
 - SUCH OFFENCE MUST BE REGISTERED WITH JURISDICTIONAL POLICE

CONFIRMATION OF PROVISIONAL ATTACHMENT

[Sections 5 & 8(4)]

- SECTION 5 (PROVISIONAL ATTACHMENT) IS CONSTITUTIONALLY VALID.
- PROVISIONAL ATTACHMENT IS BALANCING ARRANGEMENT
 - SECURES INTEREST OF PERSON BY PROCEDURAL SAFEGUARDS
 - ENSURES THAT PROCEEDS OF CRIME REMAIN AVAILABLE TO BE DEALT WITH AS PER PMLA.
- CHALLENGE TO VALIDITY OF SECTION 8(4) REJECTED.

SEARCH AND SEIZURE

[Sections 17 & 18]

- CHALLENGE TO CONSTITUTIONAL VALIDITY OF SECTIONS 17 & 18.
 - ON THE GROUND THAT REPORT OF COMPLAINT TO MAGISTRATE IS DISPENSED WITH
- SUPREME COURT **REJECTED** THE CHALLENGE
 - ON THE GROUND THAT STRINGENT SAFEGUARDS PROVIDED
 - HENCE, PROVISIONS NOT ARBITRARY.

ARREST

[Section 19]

- CONSTITUTIONAL VALIDITY OF SECTION 19 CHALLENGED
- SUPREME COURT **REJECTED** THE CHALLENGE
 - THERE ARE STRINGENT SAFEGUARDS
 - HENCE, SECTION 19 DOES NOT SUFFER FROM THE VICE OF ARBITRARINESS

BURDEN OF PROOF

[Section 24]

“24. Burden of proof.

In any proceeding relating to proceeds of crime under this Act,—

- 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.”

- SECTION 24 HAS REASONABLE NEXUS WITH PURPOSES AND OBJECTS OF PMLA.
- CANNOT BE REGARDED AS MANIFESTLY ARBITRARY

[SUBJECT TO REVIEW BY LARGER BENCH]

SPECIAL COURTS TO TRY OFFENCE OF MONEY-LAUNDERING

[Section 44]

- SECTION 44 CHALLENGED AS ARBITRARY/UNCONSTITUTIONAL
- CHALLENGE DOES NOT HAVE ANY MERIT
- EVENTUALITIES REFERRED TO IN SECTION 44
 - TO BE DEALT WITH BY THE CONCERNED COURT/AUTHORITY IN ACCORDANCE WITH THE INTERPRETATION GIVEN BY SC.

OFFENCES TO BE COGNISABLE AND NON-BAILABLE

[Section 45]

- SC DECISION IN NIKESH TARACHAND SHAH
 - DID NOT OBLITERATE SECTION 45

- SC DOES NOT AGREE WITH TWO OBSERVATIONS IN NIKESH TARACHAND
 1. DISTINGUISHING RATIO OF CONSTITUTION BENCH IN KARTAR SINGH
 2. DOUBTING PERCEPTION OF PARLIAMENT REGARDING SERIOUSNESS OF OFFENCE OF MONEY-LAUNDERING POSING SERIOUS THREAT TO SOVEREIGNTY AND INTEGRITY OF COUNTRY

- SECTION 45, AS APPLICABLE POST-2018 AMENDMENT
 - IS REASONABLE AND HAS DIRECT NEXUS WITH PURPOSES AND OBJECTS OF PMLA
 - DOES NOT SUFFER FROM VICE OF ARBITRARINESS

- IRRESPECTIVE OF NATURE OF PROCEEDINGS INCLUDING THOSE UNDER SECTION 438 OF CRPC (ANTICIPATORY BAIL) OR EVEN INVOKING JURISDICTION OF CONSTITUTIONAL COURTS
 - UNDERLYING PRINCIPLES AND RIGORS OF SECTION 45 APPLY

- BENEFICIAL PROVISIONS OF SECTION 436A OF CRPC (MAXIMUM PERIOD FOR WHICH AN UNDERTRIAL CAN BE DETAINED)
 - CAN BE INVOKED BY THE ACCUSED ARRESTED FOR PMLA OFFENCE.

POWERS OF AUTHORITIES REGARDING SUMMONS AND PRODUCTION OF DOCUMENTS AND EVIDENCE

[Section 50]

- PROCESS ENVISAGED BY SECTION 50 IS:
 - IN NATURE OF INQUIRY AGAINST PROCEEDS OF CRIME
 - NOT “*INVESTIGATION*” IN STRICT SENSE OF TERM FOR INITIATING PROSECUTION
- AUTHORITIES UNDER SECTION 48 ARE NOT POLICE OFFICERS
- STATEMENT RECORDED BY PMLA AUTHORITIES NOT HIT BY:
 - ARTICLE 20(3) [NO PERSON ACCUSED OF ANY OFFENCE SHALL BE COMPELLED TO BE WITNESS AGAINST HIMSELF]
 - ARTICLE 21 [PROTECTION OF LIFE AND PERSONAL LIBERTY]

ENFORCEMENT CASE INFORMATION REPORT (ECIR)

[SUBJECT TO REVIEW]

- IN VIEW OF SPECIAL MECHANISM ENVISAGED BY PMLA
 - ECIR CAN NOT BE EQUATED WITH FIR UNDER CRPC

- ECIR IS AN INTERNAL DOCUMENT OF ED
 - HENCE, FACT THAT FIR IN RESPECT OF SCHEDULED OFFENCE HAS NOT BEEN RECORDED DOES NOT COME IN THE WAY OF COMMENCING INQUIRY/INVESTIGATION FOR INITIATING “*CIVIL ACTION*” OF PROVISIONAL ATTACHMENT OF PROPERTY BEING PROCEEDS OF CRIMES.

- SUPPLY OF ECIR COPY TO ARRESTED PERSON IS NOT MANDATORY IN EVERY CASE
 - IT IS SUFFICIENT THAT GROUNDS OF ARREST ARE DISCLOSED AT THE TIME OF ARREST

- IT IS OPEN TO THE SPECIAL COURT TO LOOK INTO RECORDS PRESENTED BY ED TO ASCERTAIN THE NEED OF CONTINUED DETENTION OF PERSON IN CONNECTION WITH OFFENCE OF MONEY-LAUNDERING

- ED MUST EXPLORE DESIRABILITY OF PLACING INFORMATION ON ITS WEBSITE GIVING BROAD OUTLINE OF
 - THE SCOPE OF AUTHORITY OF FUNCTIONARIES UNDER PMLA
 - MEASURES TO BE ADOPTED BY THEM
 - REMEDIES AVAILABLE TO THE PERSON BEFORE AUTHORITY AND SPECIAL COURT

WAY FORWARD

- WHAT NEXT AFTER SC RULING ?
- FOLLOWING INTERIM MEASURES SUGGESTED BY SC
- The private parties in the transferred petitions:
 - are at liberty to pursue the proceedings pending before the High Court.
 - the contentions other than those dealt with in this judgement, regarding validity and interpretation of the concerned PMLA provision, are kept open, to be decided in those proceedings on its own merits.
- Writ petitions which involve issues relating to Finance Bill/Money Bill:
 - to be heard alongwith *Rojer Mathew* case.
- Writ petitions praying further relief of bail, discharge or quashing:
 - the private parties are at liberty to pursue further reliefs before the appropriate forums, leaving all contentions in that regard open, to be decided on its own merits.
- Writ petitions challenging the validity and interpretation of other statutes:
(such as, Indian Penal Code, CrPC, Customs Act, Prevention of Corruption Act, Companies Act, 2013, CGST Act)
 - Directed to be placed before appropriate Bench “group-wise or Act-wise”.
- The parties are at liberty to mention for early listing of the concerned case including for continuation/vacation of the interim relief.

- RECONSIDERATION OF TWO ISSUES ORDERED BY SC ON 25 AUGUST 2022
 - REVERSE BURDEN OF PROOF (SECTION 24)
 - ECIR (SECTION 19)
- SCOPE OF REVIEW AND IMPLICATIONS

1. SC CONCLUSION ON SECTION 24

- SECTION 24 HAS REASONABLE NEXUS WITH PURPOSES AND OBJECTS OF PMLA
- HENCE, CANNOT BE REGARDED AS MANIFESTLY ARBITRARY
 - IN REVIEW BY LARGER BENCH OF SC, ONLY ABOVEMENTIONED RATIO CAN BE CONSIDERED – NOTHING BEYOND THAT.
 - IN ANY CASE, INTERIM DIRECTION OF SC (27-7-22) HAS CATEGORICALLY INDICATED THAT ARGUMENTS ON MERITS ARE TO BE MADE ONLY BEFORE HIGH COURT

2. SC CONCLUSIONS ON ECIR

- ECIR CANNOT BE EQUATED TO FIR UNDER CRPC
- SUPPLY OF ECIR TO ARRESTED PERSON – NOT MANDATORY
- EVEN IF FIR NOT FILED REGARDING SCHEDULED OFFENCE, INQUIRY/INVESTIGATION CAN BE INITIATED FOR PROVISIONAL ATTACHMENT
 - IN REVIEW BY LARGER BENCH OF SC, ONLY ABOVEMENTIONED RATIOS CAN BE CONSIDERED
 - NOTHING MORE THAN THAT
 - IN ANY CASE, INTERIM DIRECTION OF SC (27-7-2022) CATEGORICALLY INDICATES THAT FURTHER RELIEF OF BAIL, DISCHARGE OR QUASHING IS TO BE PURSUED ON MERITS ONLY BEFORE APPROPRIATE FORUMS.

CRUCIAL ISSUES

1. WHETHER “*INVESTIGATION*” UNDER PMLA CAN AUTOMATICALLY BE EXTENDED UNDER OTHER STATUTES LIKE THE BLACK MONEY ACT OR THE FUGITIVE OFFENDERS’ ACT BY THE AUTHORITIES UNDER PMLA ?
2. WHETHER FEES RECEIVED BY A CHARTERED ACCOUNTANT OR A LAWYER FROM AN OFFENDER UNDER PMLA CAN BE REGARDED AS “*PROCEEDS OF CRIME*” ?
3. CAN A LEGITIMATE PROPERTY ACQUIRED BY A PERSON BE ATTACHED OR APPROPRIATED BY THE AUTHORITIES, IF LATER IT IS FOUND THAT THE SAID PROPERTY WAS ACQUIRED BY THE SELLER FROM THE PROCEEDS OF CRIME? TO WHAT LAYERS THE OFFICERS CAN GO TO ATTACH THE PROPERTY ?
4. IN THE EVENT IT IS FOUND THAT THE LEGITIMATE PROPERTY ACQUIRED BY AN INNOCENT PERSON WAS OUT OF THE PROCEEDS OF CRIME, WHAT REMEDIES DOES HE HAVE? HOW CAN A PERSON OR A CONSULTANT SAFEGUARD HIS INTEREST FROM HANDLING PROCEEDS OF CRIME ?
5. WHAT ARE THE BENEFICIAL PROVISIONS OF SECTION 436A OF CRPC THAT CAN BE INVOKED BY THE ACCUSED ARRESTED FOR AN OFFENSE PUNISHABLE UNDER PMLA ?
6. AFTER THIS SC DECISION, WHAT DEFENSES ARE STILL AVAILABLE TO LITIGANTS ? ARE THEY TOTALLY DEFENSELESS ?
7. WHAT IS THE FINAL TAKE OF THIS SUPREME COURT DECISION ?