


# **SEARCH, SEIZURE & ATTACHEMENT OF PROPERTY UNDER PMLA**

# SECTION 5 — ATTACHEMENT OF PROPERTY INVOLVED IN MONEY LAUNDERING

(i) Where *the Director, or any other officer not below the rank of Deputy Director authorised* by the Director *has reasons to believe (the reason for such belief to be recorded in writing)*, on the basis of material in his possession, that—

- (a) *any person is in possession of any proceeds of crime* and
- (b) *such proceeds of crime or 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, by an order in writing, provisionally attach such property for a period not exceeding 180 days from the date of the order, in such manner as may be prescribed.

(ii) *No such order of attachment shall be made unless*, in relation to the scheduled offence, *a report has been forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, 1973*, or a complaint has been filed by a person authorized to investigate the offence mentioned in the Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be or a similar report or complaint has been made or filed under the corresponding law of any other country.



(iii) Further any property of any person may be attached, if the Director or any other officer not below the rank of Deputy Director authorized by him has reason to believe (reasons for such belief to be recorded in writing), on the basis of material in his possession, that if such property involved in money laundering is not attached immediately the non-attachment of the property is likely to frustrate any proceedings under this Act.

- Every order of provisional attachment shall cease to have effect after 180 days from the date of the order, if no order is passed by the Adjudicating Authority under PMLA that the said property is involved in money laundering. However, within said 180 days, if the Adjudicating Authority, by an order, records a finding that properties are not involved in money laundering, the order of provisional attachment shall cease to have effect from the date of such order of the Adjudicating Authority
- The persons claiming or entitled to claim any interest in the enjoyment of immovable property can enjoy the property during the period of provisional attachment.

# ***M.SARASWATHY VS THE REGISTRAR 2012 SCC ONLINE MAD 2583***

*“24. From the provisions of Section 5(1) of P.M.L.A., 2002 five conditions are pre-requisite for attaching the proceeds of crime provisionally without issuing notice prior to the attachment. They are:*

- i. The Director, or any other officer, who provisionally attaches any property, shall have reasons to believe on the basis of materials in his possession;*
- ii. The person, against whom proceedings under P.M.L.A., 2002 has been initiated, must be in possession of any proceeds of crime;*
- iii. Such person must be charged of having committed any scheduled offence;*
- iv. Such proceeds of crime are likely to be concealed, transferred or dealt with in any manner; and*
- v. If the provisional attachment is not ordered immediately such concealment or transfer of such proceeds of crime may result in frustrating the proceedings relating to confiscation of such proceeds of crime.”*

# SECTION 16- POWER TO SURVEY

Where an authority , on basis of material in his possession , has reason to believe(*the reason for such belief to be recorded in writing*) that an offence under Section 3 has been committed, he may enter any place

Within the limits of the area assigned to him

OR

In respect of which he is authorized for the purpose of this section by such other authority, who is assigned the area within which such place is situated

At which any act constituting the commission of such offence is carried on, and may require any proprietor, employee or any other person who may at that time and place be attending in any manner to, or helping in , such act so as to, -

(i) afford him the necessary facility to inspect such records as he may require and which may be available at such place;

(ii) afford him the necessary facility to check or verify the proceeds of crime or any transaction related to proceeds of crime which may be found therein; and

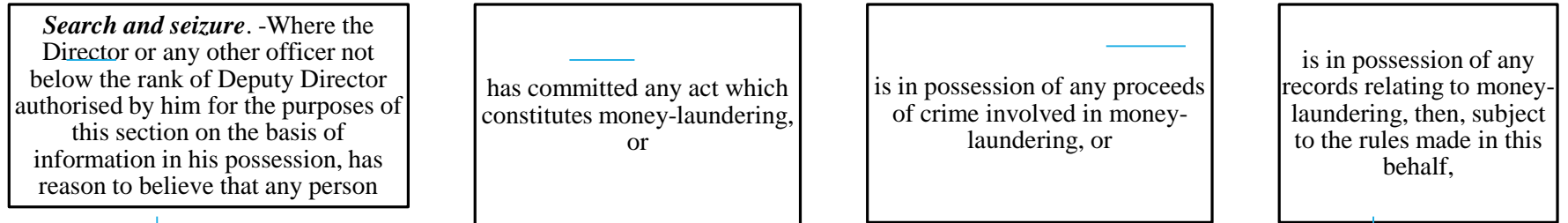
(iii) furnish such information as he may require as to any matter which may be useful for, or relevant, to any proceedings under this Act.

# POWER OF AUTHORITY DURING SURVEY

An authority during the survey may—

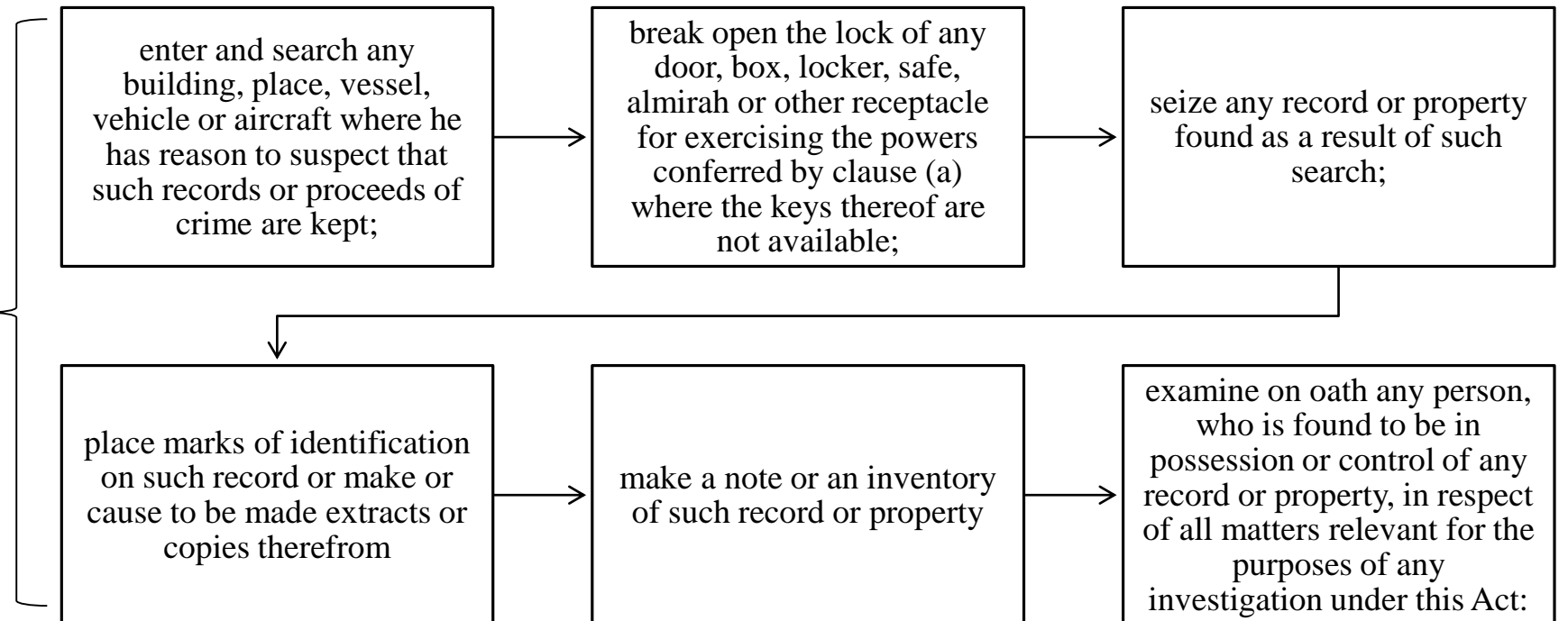
- (i) place marks of identification on the records inspected by him and make or cause to be made extracts or copies therefrom;
- (ii) make an inventory of any property checked or verified by him; and
- (iii) record the statement of any person present in the place which may be useful for, or relevant to, any proceeding under this Act .

# Section 17 Search & Seizure



he may authorise any officer subordinate to him to—

*Powers of officers / authority during search and seizure.*



# SEARCH OF A PERSON- SECTION 18

- If an authority, authorized by the Central Government by general or special order, has a *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 records or proceeds of crime which may be useful for or relevant to any proceedings under this Act, he may search that person and seize such records or property which may be useful for or relevant to any proceeding under this Act.
- The authority who has been authorized, immediately after search and seizure forward a copy of the reasons so recorded along with material found from his possession, to the Adjudicating Authority in a sealed envelope.




# RIGHTS OF PERSONS BEING SEARCHED DURING SEARCH AND DUTIES OF AUTHORIZED OFFICER CONDUCTING SEARCH- SECTION 18

- Where an authority is about to search any person, he shall, if such person so requires, take such person within twenty-four hours to the nearest Gazetted Officer, superior in rank to him, or a Magistrate. (Period of 24 hours shall exclude the time necessary for the journey undertaken to take such person to the nearest Gazetted Officer, superior in rank to him, or Magistrate's Court.)
- If the requisition is made, the authority shall not detain the person for more than twenty-four hours prior to taking him before the Gazetted Officer, superior in rank to him, or the Magistrate referred to in that sub-section. The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge such person but otherwise shall direct that search be made . (Period of 24 hours shall exclude the time necessary for the journey undertaken from place of detention to the office of Gazetted Officer, superior in rank to him, or Magistrate's Court.)
- Search shall be made in the presence of two or more persons.
- No female shall be searched by any one except a female
- The authority is to prepare the list of record or property seized in the course of search and obtain signature of the witness on the list
- The authority shall record the stamen of the person searched in respect of records or proceeds of crime found or seized in the course of search.
- The authority seizing any record or property shall within 30 days from such seizure is to file an application to adjudicating authority for retention of record or seized property.

# SECTION 8- ADJUDICATION

## ***Remedy available to aggrieved person, where the property is provisionally attached***

- On receipt of a complaint, if the Adjudicating Authority has a reason to believe that any person has committed an offence under Section 3 or is in possession of proceeds of crime he may serve a notice of not less than thirty days calling upon him to indicate
  - the source of his income,
  - Earning or assets,
  - out of which or by means of which he has acquired the property attached under Section 5(1), seized or frozen under Section 17 or 18,
  - 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 by Central Government.



Where the Adjudicating Authority decides that any property is involved in money-laundering, he shall, by an order in writing, confirm the attachment of the property. Such attachment shall—

(a) continue during investigation for a period not exceeding 365 days or the pendency of the proceedings relating to any offences under this Act before a court or under the corresponding law of any other country, before the competent court of criminal jurisdiction outside India, as the case may be; and

(b) becomes final after an order of confiscation is passed

# STATUS OF THE ATTACHED PROPERTIES AFTER CONCLUSION OF TRIAL FOR THE OFFENCE OF MONEY LAUNDERING

Where on conclusion of a trial of an offence under this Act, the Special Court finds that the offence of money-laundering has been committed, it shall order that such property involved in the money-laundering or which has been used for commission of the offence of money-laundering shall stand confiscated to the Central Government.

Where on conclusion of a trial under this Act, the Special Court finds that the offence of money-laundering has not taken place or the properties not involved in money-laundering, it may order release of such property to the person entitled to receive it.

Where the trial under this Act cannot be conducted, by reason of the death of the accused or the accused having been declared a proclaimed offender or for any other reason or having commenced but could not be concluded, the Special Court, on an application moved by the Director or a person claiming to be entitled to possession of a property in respect of which an order has been issued by the Adjudicating Authority confirming the provisional attachment of the property, pass appropriate orders regarding confiscation or release of the property, as the case may be, after having regard to the material before it

***SECTION 9 : After an order of confiscation, all the rights and title in such property shall vest absolutely in the Central Government free from all encumbrances***

# ***SMT. K.SOWBAGHYA VS UNION OF INDIA (2016 SCC ONLINE KAR 282)***

- *The vires and validity of Sections 17, 18 and 19 , of the Act, which provide for Search and seizure, Search of persons and Arrest, respectively, were challenged*
  - **Held** – Valid, merely because the provisions contemplate measures relating to search, seizure and arrest, the same cannot be considered draconian. In our considered view, the provisions of the Act which clearly and unambiguously enable initiation of proceedings for attachment and eventual confiscation of property in possession of a person not accused of having committed an offence under Section 3 as well, do not violate the provisions of the Constitution including Articles 14, 21 and 300-A and are operative proprio vigor.

*“115. ....However, with the Amendment Act of 2013, by the inclusion of the phrase "or for the trial of the money laundering offence" after the words "for the purpose of adjudication or confiscation under Section 8" - the offence of money laundering is sought to be treated as not being dependent on the result of the trial of the scheduled offence. Such a presumption is now possible by virtue of the 2013 Amendment. As already noticed, the offence of money laundering is no more inextricably linked to the proceeds of crime of a scheduled offence.”*

*“119. Under the Amendment Act of 2013 there is an initial presumption that the alleged proceeds of crime on the basis of which an offence under Section 3 of the Act is alleged, are involved in money laundering. In a proceeding under Section 8(1) of the Act , the defendant is not an accused. It is now possible for the Adjudicating Authority in construing the provisions of Section 24 as applicable to proceedings under Section 8(1) as well. This places a person being proceeded against under Section 8(1) at some disadvantage. This construction, by virtue of the impugned amendment, cannot be held to be violative of Article 14 of the Constitution of India, merely on the ground that it may cause hardship on account of such proceedings being initiated.*

*120. Hence, Section 24 as amended by the Amendment Act of 2013 is held to be constitutionally valid.”*

# ***J. SERKAR AND OTHERS V. ED, 2018 CRI.L.J 1720***

- The second proviso to Section 5(1) PMLA is not violative of Article 14 of the Constitution of India; the challenge in that regard in these petitions is hereby negative.
- The expression 'reasons to believe' has to meet the safeguards inbuilt in the second proviso to Section 5(1) PMLA read with Section 5(1) PMLA.
- The expression 'reasons to believe' in Section 8(1) PMLA again has to satisfy the requirement of law as explained in this decision.
- There has to be a communication of the 'reasons to believe' at every stage to the notice under Section 8(1) PMLA.
- The notice under Section 8(1) PMLA is entitled access to the materials on record that constituted the basis for 'reasons to believe' subject to redaction in the manner explained hereinbefore, for reasons to be recorded in writing.
- If there is a violation of the legal requirements outlined hereinbefore, the order of the provisional attachment would be rendered illegal.
- There can be single-member benches of the AA and the AT under the PMLA. Such single-member benches need not mandatorily have to be JMs and can be AMs as well

# THE DEPUTY DIRECTOR OF ENFORCEMENT DELHI V. AXIS BANK AND ORS. 2019 SCC ONLINE DEL 7854

## IMPORTANT OBSERVATIONS AND CONCLUSIONS OF THE DELHI HIGH COURT

- a) It is not only a “tainted property” that is to say a property acquired or obtained, directly or indirectly, from proceeds of criminal activity constituting a scheduled offence which can be attached, but also any other asset or property of equivalent value of the offender of money-laundering which has a link or nexus with the offence (or offender) of money-laundering.
- b) If the “tainted property” is not traceable, or cannot be reached, or to the extent found is deficient, any other asset of the person accused or charged under PMLA can be attached provided it is near or equivalent in value, the order of confiscation being restricted to take over by the government of illicit gains of crime.
- c) The objective of PMLA being distinct from the purpose of RDBA, SARFAESI and IBC, the latter three legislations do not prevail over the former. The PMLA, by virtue of Section 71, has the overriding effect over other existing laws in the matter of dealing with “money-laundering” and “proceeds of crime” relating thereto. The PMLA, RDBA, SARFAESI and IBC must co-exist, each to be construed and enforced in harmony, without one being in derogation of the other with regard to the assets respecting which there is material available to show the same to have been “derived or obtained” as a result of “criminal activity relating to a scheduled offence” and consequently being “proceeds of crime”, within the mischief of PMLA.
- d) An order of attachment under PMLA is not illegal only because a secured creditor has a prior secured interest in the property, within the meaning of the expressions used in RDBA and SARFAESI. Similarly, mere issuance of an order of attachment under PMLA does not render illegal a prior charge of a secured creditor, the claim of the latter for release from PMLA attachment being dependent on its bonafides.
- e) In case of secured creditor pursuing enforcement of “security interest” in the property sought to be attached under PMLA, such secured creditor having initiated action for enforcement prior to the order of attachment under PMLA, the directions of such attachment under PMLA shall be valid and operative subject to satisfaction of the charge of such third party and restricted to such part of the value of the property as is in excess of the claim of the said third party.
- f) If the order confirming the attachment has attained finality, or if the order of confiscation has been passed, or if the trial of a case under Section 4 of the PMLA has commenced, the claim of a party asserting to have acted bonafide or having legitimate interest in the nature mentioned above will be inquired into and adjudicated upon only by the special court

# SECTION 26 — APPEALS TO APPELLATE TRIBUNAL

- The Director or any person aggrieved by an order made by the Adjudicating Authority under this Act, may prefer an appeal to the Appellate Tribunal.
- Any aggrieved by the order of the Director made under section 13(2), may prefer an appeal to Appellate Tribunal. (TO add Section 13(2))
- Appeal has to be filed within a period of forty-five days from the date of receipt of a copy of the order made by the Adjudicating Authority.
- Appellate Tribunal may entertain an appeal after the expiry of the period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.



# SECTION 42- APPEAL TO HIGH COURT

- Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law or fact arising out of such order. *Thus appeal can be filed before High Court on any question of law or fact.*
- High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.