

NATIONAL JUDICIAL ACADEMY



REFRESHER COURSE ON PREVENTION OF MONEY LAUNDERING ACT, 2002

[P-1297]

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PROGRAMME REPORT

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OVERVIEW OF THE PROGRAMME

The Refresher Course was designed with the objective of identifying the challenges that judges face in adjudicating money laundering cases and highlighting pertinent issues and best practices in the conduct of the trial. The programme facilitated discussion on various topical issues including overview of the modus of money laundering process and multifarious use of the proceeds of crime including terror financing, attachment of property, search and seizure, bail and challenges relating to cross border money laundering. The participants were provided a forum to discuss challenges and assimilate best practices.

DAY 1

Session 1 - Money Laundering: Concept and Modalities

Session 2 - Nuances and Intricacies of Bail

DAY 2

Session 3 - Burden of Proof and Appreciation of Evidence

Session 4 - Search, Seizure, Attachment and Disposal of Property

DAY – 1

Session 1

Theme - Money Laundering: Concept and Modalities

Panel – Justice Manmohan Singh, Mr. Amit Desai & Dr. Menaka Guruswamy

The session commenced by outlining the scheme of the Prevention of Money Laundering Act, 2002 (PMLA). The literal meaning of the term ‘laundering’ as washing of linen in order to keep its texture intact and its correlation with ‘money’ was highlighted. The purpose of bringing about the said legislation as part of the obligation towards the global community and to deal with the menace of ‘organized crime’ impacting the financial integrity of the nation was deliberated. The object of the PMLA is to prevent illicit gains by the crime syndicates to be integrated into the legitimate economy of the nation. Further, the meaning of the term ‘proceeds of crime’ as mentioned in Section 2 (1) (u) of the Act was discussed. Also, provisions entailed under Section(s) 3, 4, 5, 8, 17-21, 24, 42 were briefly referred.

The context of origin of the offence of ‘money laundering’ was delineated by referring to the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 and Financial Action Task Force (FATF) which comes to being in 1989. FATF is an intergovernmental policy making body of 40 countries which aims to bring legislative changes. India is up for evaluation of its activities, consonance with the agreed set of values and legislative improvements in September, 2022. It is important from the perspective of the international community’s concern with organised crime that flows across borders.

It was asserted that the law is in an evolutionary phase. The true nuances of any legislation come about effectively at the trial stage and therefore, the role of judges presiding over the special court assumes greater significance. In this context, paragraph 58 of *Kavitha G. Pillai v. The Joint Director, Directorate of Enforcement, Government of India*¹, was cited. Further, the decision in *J. Sekar v. Union of India*², was discussed wherein it was laid that ‘reason to believe’ must be in writing.

¹ 2018 CriLJ 1110

² 2018 SCC OnLine 6523

It was stressed that contrary to the general principles of criminal jurisprudence the entire process of enquiry and investigation till the issuance of show cause notice takes place *ex parte*. It was opined that a balance need to be struck between the letter and intent of the legislation in consonance with the constitutional mandate. However, on the other hand it was asserted that the constitutionality of these provisions relating to non-disclosure of information at the initial stage can be justified on the grounds that the crime syndicate tentacles run wide and have the potential to destroy evidence and control witnesses. Therefore, in order to protect the integrity of the investigation, the legitimacy of such provisions can be argued.

It was highlighted that the gravamen of the offence under Section 3 constitutes three basic elements i.e. placement, layering and integration. One of the fundamental challenges is to construe and interpret the scope of 'offence' under Section 3 which, if appreciated properly can significantly mitigate the hardships faced due to the draconian nature of the Act. In this regard, the distinction between predicate offences and organized crime activities was reflected upon indicating that cases involving bank frauds, bank disputes, corruption etc. cannot be brought within the purview of the PMLA regime. It was pointed that the banking sector is being impacted by the attachments issued by the PMLA authorities as the ability to auction the attached property in order to recover the money becomes difficult as proceedings under PMLA casts a cloud on the title of the property.

Another concern that was perpetuated was expansion of scheduled offences in view of consistent amendments to the PMLA which was seen as a departure from the original intent of the statute. The purported reason for such expansion post 2009 amendment was to gain membership of the FATF in 2010. The amendment brought about in 2012 removed the element of 'money' from scheduled offences by shifting all offences under Part B to Part A. Prior to 2012 amendment offences that were not necessarily serious but had a financial element embedded into it to make it a predicate offence. Therefore, the regime neither conformed to the historical primacy given to serious offences nor to the supposed purpose of deterring financially illicit activities. In view of this, the scheduling of offences under the PMLA was cautioned. Further, the Fugitive Economic Offenders Act, 2018 which is often cited in tandem with the PMLA was briefly discussed while focusing upon the extradition arrangements between India and other countries.

The discussion further focused upon the manner in which PMLA compromises established constitutional values, in particular, the right against self-incrimination. In this regard, the decision

of the Apex Court in *Selvi v. State of Karnataka*³, was highlighted wherein it was categorically stated that the right against self-incrimination must be examined in respect of its relationship with multiple dimensions of personal liberty under Article 21 which includes right to fair trial and substantive due process. The PMLA however, by virtue of Section 24, 50 and 53 carves exception to this well founded principle of the constitution and lays a distinct scheme for the alleged offenders. It was reflected that such exceptions encroach dangerous territory especially in the ever evolving legislative landscape.

It was reiterated that PMLA, in its current form sees well-established principles of the constitutional law and criminal law at its cross roads. This is primarily due to the phenomenon of the statute and its reach being expanded consistently to implicate and involve an enormous array of offences which perhaps, the context, origin and rationale of the statute never intended to take within its gamut. The session concluded with the remark that PMLA is an extremely important legislation for the nation and its economy, however, it must not fail in its spirit due to the manner in which it gets implemented.

Session 2

Theme - Nuances and Intricacies of Bail

Panel - Justice Ashutosh Kumar & Mr. Vikram Chaudhri

The session outlined the power of arrest granted to special investigation agencies, provisions relating to bail and the safeguards thereto under the Prevention of Money Laundering Act, 2002 (PMLA). It was asserted that presumption of innocence is a fundamental principle of our legal system bearing its roots in Article 21 of the Constitution. In *P. Chidambaram v. Directorate of Enforcement*⁴, the Supreme Court laid down three crucial parameters for grant of bail which included that the accused is not at “flight risk”; the possibility of tampering the evidences is negligible; and the probability of influencing the witnesses in the matter is minuscule. Recently, the Supreme Court in *Satender Kumar Antil v. CBI & Another*⁵, has laid down extensive guidelines for grant of bail. It was further iterated that power to arrest and pre-requisites for the

³ AIR 2010 SC 1974

⁴ (2020) 13 SCC 337

⁵ (2021) 10 SCC 773

same have been provided under Section 19 of PMLA and a contrast of the same was drawn with Section 41(1) of the CrPC.

It was stated that Section 45 of PMLA furnishes two pre-conditions to be fulfilled for grant of bail. The first condition mentions that the Public Prosecutor has been given an opportunity to judicially oppose the application for such release and the second being that, the court is satisfied there are reasonable grounds for believing that the accused is not guilty and shall not commit any offence while out on bail. Thus, the provision gives wide discretion to courts in matters of bail. It was pointed that historically the twin conditions under Section 45 were only applicable to Part A scheduled offences that included precisely only two offences i.e. waging or attempting to wage war or abetting waging of war against the Government of India and conspiracy to commit such offences. Part B listed heinous offences that were also dealt under the IPC and were waived off from abiding by the twin conditions of bail. However, the amendment of 2012 amalgamated the offences under Part B of the Schedule with Part A which made the twin bail conditions applicable to both the parts.

It was emphasized that the judicial discretion through this provision can have cascading effect on the final outcome of the case while being heard at the merit stage. Even though the bail stage is confined to preliminary determination, this provision necessarily allows the court to decide on the prima facie guilt of an accused. In *Nikesh Tarachand Shah v. Union of India*⁶, the Supreme Court held the twin bail conditions to be unconstitutional and arbitrary. Subsequently, Section 45 was amended by the Finance Act, 2018 and the impact of the amendment on the revival of the twin conditions has been the subject matter of adjudication before various High Courts and the issue is also pending adjudication before the Supreme Court. Some important pronouncements in this regard are *Vinod Bhandari v. Assistant Director, Directorate of Enforcement*⁷, *Deepak Virendra Kochhar v. Directorate of Enforcement*⁸; *Sai Chandrashekhar v. Directorate of Enforcement*⁹; *Okram Ibobi Singh v. Directorate of Enforcement*¹⁰, etc.

⁶ (2018) 11 SCC 1

⁷ 2018 SCC OnLine MP 1559

⁸ Criminal Bail Application No.1322 OF 2020

⁹ 2021 SCC OnLine Del 1081

¹⁰ 2020 SCC OnLine Mani 365

The session further expounded upon the guidelines for grant or refusal of anticipatory bail under PMLA. It was asserted that this provision leads to an incongruous position with respect to anticipatory bail. In this regard, the decision in *P. Chidambaram v. Directorate of Enforcement*¹¹, was discussed wherein it was held that the privilege of pre arrest bail should be granted in exceptional cases. Anticipatory bail is not to be granted as a matter of rule and it has to be granted only when the court is convinced that exceptional circumstances exist to resort to that extraordinary remedy. A number of judicial pronouncements were discussed such as *State of M.P. v. Ram Kishan Balothia*¹²; *Jai Prakash Singh v. State of Bihar*¹³; *Y.S. Jagan Mohan Reddy v. CBI*¹⁴, etc.

The session concluded with the remark that it is for the legislature to give effect to the amending provisions prospectively or retrospectively. However, it cannot be a reason for not giving effect to the amending provisions of the Act. Thus, having regard to the fact that twin conditions in the amended Section 45 of the PMLA have not been struck down till date, twin conditions as mentioned therein are required to be made applicable to bail applications filed before courts. In contrast, it was also opined that the twin conditions as imposed by Section 45 cannot be looked into while deciding the bail application as the same violates Articles 14 and 21 of the Constitution.

¹¹ 2019 SCC OnLine SC 1143

¹² (1995) 3 SCC 221

¹³ (2012) 4 SCC 379

¹⁴ (2013) 7 SCC 439

DAY – 2

Session 3

Theme - Burden of Proof and Appreciation of Evidence

Panel - Justice P.N. Prakash & Dr. Jyoti Dogra Sood

It was stated that the PMLA should be in consonance with the fundamental principles of criminal law and strict interpretation should be undertaken. The principle of legality was highlighted and it was stated that a penal statute should provide for maximum certainty. Thereafter, two types of criminal process model were discussed which included crime control and due process models. Subsequently, it was opined that statutory presumptions under Section 24 of the PMLA are vague and do not fulfill the test of maximum certainty. The judgments in *Upendra Rai v Enforcement Directorate*¹⁵; *Kavitha G. Pillai v. Joint Director*¹⁶; and *J. Sekar v. Directorate of Enforcement*¹⁷ were also elaborated to focus upon the ambit of presumptions under Section 24. In respect of Section 50 of the Act, it was opined that it erodes the basic tenet of protection against self-incrimination and the judgment of the court in *Rohit Tandon v Enforcement Directorate*¹⁸, was also referred. The power of authorities under section 50 was elaborated and it was highlighted that confessions recorded under Section 50 of Act are admissible as evidence in court.

It was stated that commission of the scheduled/predicate offence is necessary for initiation of proceedings under the Act. It is also necessary that the proceeds of crime are portrayed as untainted. It was also highlighted that under section 54 of the Act, the enumerated authorities are statutorily bound to provide all the necessary assistance to the authorities. It was stated that the trial under the Act should be conducted as session court trial and it was emphasized that the trial initiated under the Act is not dependent on the outcome of the trial in the predicate offence. It was stressed that different presumptions have been provided for different category of individuals under Section 24(a) and (b) of the Act. Varied issues which were raised and deliberated upon during the session included right of accused to E.C.I.R; scope of the term “any other person” under Section

¹⁵ (2019) 262 DLT 382

¹⁶ 2018 Cri LJ 1110

¹⁷ Criminal Appeal No. 738 of 2022, Judgment dated 06.05.2022, Supreme Court of India

¹⁸ (2018) 11 SCC 46

24(b); effect/impact on rights of *bona fide* purchaser of property when property has been derived from proceeds of crime by the seller.

Session 4

Theme - Search, Seizure, Attachment and Disposal of Property

Panel - Justice Joymalya Bagchi & Justice Ashutosh Kumar

An overview of the national and international response to the menace of money laundering was provided along with a brief background of the creation of the Financial Action Task Force (FATF). The definition of ‘attachment’ (Section 2(d)), ‘transfer’ (Section 2 (za)) and ‘property’ (Section 2(v)) was highlighted and it was opined that the definition of ‘property’ is very wide and it may also include cryptocurrency or other intangible assets. Thereafter, the entire scheme for attachment of property was elaborated upon. The procedure of provisional attachment provided under Section 5 of the Act was discussed and it was stated that such provisional attachment does not affect the enjoyment of the property. The order of provisional attachment of property under the Act will be valid for 180 days. However, if attachment is confirmed by Adjudicating Authority, the attachment will continue during the pendency of proceedings. The second proviso to Section 5(1) was emphasized upon and it was stated that it provides the procedure wherein immediate attachment of property is required. The proviso was challenged in *J. Sekar v. Union of India*¹⁹, wherein the constitutionality of the proviso was upheld. The power of the special court under Section 8 with respect to restoration of property to a claimant with legitimate interest was also discussed along with the procedure provided under Rule 3A of The Prevention of Money Laundering (Restoration of Property) Rules, 2016.

Thereafter, it was stated that search can be undertaken by the officer authorized under the Act which has also been provided power to freeze property or records. However, it is strictly provided that the order freezing the assets should be a reasoned one. It was stated that a multi-pronged approach is provided under the Act to deal with the offence of money laundering. The issue relating to scope of “proceeds of crime” and attachment of “property equivalent in value” was discussed with reference to judgment of *Deputy Director Directorate of Enforcement, Delhi v. Axis Bank*²⁰

¹⁹ 246 (2018) DLT 610

²⁰ 2019 SCC OnLine Del 7854

and *Seema Garg v. Deputy Director, Directorate of Enforcement*²¹. The schemata of appeal under the Act was highlighted and it was stated that appeal against order of Adjudicating Authority is provided to Appellate Tribunal under section 26 of the Act from which appeal is provided to the High Court under Section 42. However, the appeal from the order of the special court is provided under Section 47. It was opined that the entire Act provides various safeguards against the arbitrary exercise of power by the officers and it was opined that all the provisions were in consonance with the object and scheme of the Act.

The judgment of *M/s. Mahanivesh Oils & Foods Pvt. Ltd. v. Directorate of Enforcement*²² was also referred during the course of the session. Furthermore, the conflict between the Act and Insolvency and Bankruptcy Code, 2016 was highlighted through the judgment of *Nitin Jain Liquidator PSL Limited v. Enforcement Directorate*²³. Subsequently, the judgment in *Opto Circuit India Limited v. Axis Bank and Others*²⁴ was elaborated upon with respect to freezing of bank accounts. Thereafter, the judgment of *M/s Kaushalya Infrastructure Development Corporation Limited v. Union of India and Another*²⁵ was also discussed. The session also involved deliberation on various issues including transfer of case to special court; effect of non-obstante clauses in two special legislations and ambit of power of special courts to provide interim relief.

²¹ 2020 SCC OnLine P&H 738

²² AIR 2016 Del 54

²³ 2021 SCC OnLine Del 5281

²⁴ (2021) 6 SCC 707

²⁵ Special Leave to Appeal (Crl.) No(s). 565/2022, Order Dated 07.02.2022 (Supreme Court of India)