

INTERNATIONAL JOURNAL OF LEGAL STUDIES AND SOCIAL SCIENCES [IJLSSS]

ISSN: 2584-1513 (Online)

Volume 2 | Issue 2 [2024] | Page 45- 54

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PMLA: A DRACONIAN LEGISLATION AND THE BIGGEST THREAT TO DEMOCRACY

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ABSTRACT

In this Article, we will critically analyse the various provisions of the Prevention of Money Laundering Act, 2002 and its interpretation by courts around India, in order to lay bare the various flaws in the legislation that go against basic human rights. We will also analyze how the government in India is misusing this legislation to settle scores with leaders of the opposition and to quash any voice of dissent. In this article we will get a profound understanding of the history of the legislation, the procedure required to be followed by the concerned authority (Enforcement Directorate) while using its power under the various provisions of the Act and how the Act has deviated from its original purpose and has become a mechanism to harass and strongarm citizens. I will also critically analyze various precedents in order to shed light on the conflicts between rulings of various courts and how certain judges of both the High Court and the Hon'ble Supreme Court of India have pointed out the draconian nature of certain provisions of the Act. I will conclude the article by providing certain insights as to how we can improve the legislation in order to ensure that there is exploitation of the innocent

INTRODUCTION

Economic offences have the potential to cripple or destabilize a country's economy, not only do these offences lead to unauthorized cash inflow or outflow but also reduces the confidence of foreign and domestic investors in the future of that country's economy. Hence, it is imperative for any nation to create stringent laws to protect the economic interest of the nation and its people. India like many countries has an array of legislation to safeguard itself from economic offences, one such legislation is the Prevention of Money Laundering Act, 2002. However, while it is necessary to protect the economic interests of the nation, it is equally essential that we do so

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while abiding by the rights set out in the Constitution of India and by ensuring that no legislation gives authorities overarching powers which might be used by political parties or the said authorities themselves to oppress and strongarm citizens. In this paper I will critically analyze the Prevention of Money Laundering Act, 2002 and how various provisions of the said legislation have proven to be draconian in nature and are not only a threat to the fundamental rights of the citizens but also the human rights. Further, I will also discuss and analyze the alleged misuse of the Enforcement Directorate by the government. Lastly, the analysis will be concluded with an analysis of India's commitment towards implementation of International Money Laundering Frameworks and if India has complied with those requirements effectively.

A CRITICAL ANALYSIS OF PMLA PROVISIONS IN THE BACKDROP OF VIJAY MADANLAL CHOUDHARY CASE

Now, before we delve into this topic, it is important to understand the offence of money laundering. Money laundering is the process by which unauthorized funds, which are obtained from illegal activities is disguised as authorized money and is slowly integrated with the white money that is flowing in an economy.² To put it simply money laundering is a crime wherein black money is injected into the cash stream of an economy in such a way that it seems to be white money. This deception of portraying unauthorized funds as authorized funds is achieved by converting and transferring the said unauthorized funds through various channels to give the said funds a sort of deceptive legality. It is pertinent to note that the PMLA, 2002 was enacted to deal with such unauthorized funds. However, in the recent past the Enforcement Directorate, which has been bestowed with the jurisdiction to deal with matter related to PMLA has been accused of using such powers arbitrarily, which in turn has brought into question the legality of various provisions of the PMLA, 2002.³ To analyze these provisions we will critically analyze the judgement of *Vijay Madanlal Choudhary V/s Union of India*,⁴ as in this case the said draconian provisions were analyzed by the Hon'ble Supreme Court of India. Now, it is pertinent to note that section 3 of the Act clarifies who can be an accused in a money laundering offence.⁵ The

² Garg R, "Prevention of Money Laundering Act (PMLA), 2002 - IPLeders" (*iPleaders*, March 29, 2023) <https://blog.iplayers.in/prevention-of-money-laundering-act-pmla-2002/>.

³ The Prevention of Money Laundering Act, 2002

⁴ *Vijay Madanlal Choudhary V/s Union of India*, 2022 SCC ONLINE SC 929

⁵ Section 3, The Prevention of Money Laundering Act, 2002

court while adjudicating upon the said section stated that if a person is acquitted in the predicate offence then he can not be prosecuted under the offence of money laundering, as money laundering in itself is not a stand alone offence. To put it into simpler terms let's take an example, let's say someone is dealing drugs and the money that person makes out of that business is the proceeds of crime, now, it is pertinent to note that proceeds of crime includes any asset bought using such money or given in relation to that criminal activity will also be termed as proceeds of crime. However, I believe that the Hon'ble court here did not take into consideration the fact that a person who may be acquitted in the predicate offence might still have a role to play in money laundering and may have acquired proceeds of crime in the process. For e.g., say A is a smuggler who sells products in the black market and B is his friend who helps him in providing the proceeds of crime with a deceptive legality (concealing the illegal character), then in such a scenario while B is not involved in the predicate offence he is still involved in the process of money laundering and should be apprehended with along with any gains he has made by indulging in the said activity. It is pertinent to note that a similar view was taken by the Madras High Court in the case of *P. Rajendran V/s The Assistant Director, Directorate of Enforcement*,⁶ wherein the court while hearing a quashing petition moved by a man accused of voluntarily lending his name for purchase of property using tainted money held that while a person may not be involved in the original criminal activity that had resulted in the generation of proceeds of crime, such person may have later helped the main accused in laundering the proceeds of crime. Now, while such analysis of the judgement does not point to the overreaching powers of the ED it is still necessary to analyze such issues with the PMLA, 2002. If these issues are not dealt with, it would allow a lot of criminals to walk free who would then use such a loophole to continue their crime.

Now when we talk about section 19(1) of the PMLA, 2002 it is pertinent to note that the said section gives ED the power to arrest a person provided the ED on the basis of the material in their possession reasonably believes that the person is guilty of an offence under this Act.⁷ In the *Vijay Madanlal Choudhary V/s Union of India*,⁸ it was held that the Enforcement Case Information Report (ECIR) the registration of which marks the beginning of the investigation is an internal document and need not be shared with the person under investigation. Now, it is pertinent to note that both Section 19(1) of PMLA, 2002 and Article

⁶ *P. Rajendran V/s The Assistant Director, Directorate of Enforcement*, 2022 CrI.M.P. Nos. 13073 & 13076 of 2022.

⁷ Section 19, The Prevention of Money Laundering Act, 2002

⁸ *Vijay Madanlal Choudhary V/s Union of India*, 2022 SCC ONLINE SC 929

22(1) of the Indian Constitution mention that the accused must be informed of the grounds on which the accused is being arrested. The problem here is that the mode in which such communication is to be made is not given. Now, the problem with this is that if the ED arrests someone there is always a chance that they might not convey the grounds of arrest within a reasonable time or may not convey the same at all, this would lead to a gross miscarriage of the system. Recently in the case of *Pankaj Bansal V/s Union of India*,⁹ the Hon'ble Supreme Court made slight variations to the Vijay Madanlal Chaudhary judgement (supra) the Hon'ble Court held that the ED must inform the accused of the grounds of arrest in written form and non-compliance with the same would vitiate the arrest and entitle the accused to be set free unconditionally. Interestingly, the court gave two reasons for its decision firstly, it cannot be ascertained that the accused was informed of the grounds of arrest in verbal form as in such cases it is the word of the accused against the word of the ED. Secondly, and more importantly, the court cited the fact that the Bail regime of the PMLA is so stringent that it prevents a person's release for as long as is reasonably possible, in such case the accused must have full knowledge of the case against him to be able to prepare a proper defense. Interestingly, the court in this case allowed for future deliberation on the matter relating to furnishing of the ECIR to the accused.

Now, it is important to note that section 50 of PMLA, 2002 allows for the proceedings initiated by ED to be conducted in the form of judicial proceedings.¹⁰ Section 50(1) of the Act bestows on the director of ED the same powers as are vested in a civil court under CPC, 1908. It is also pertinent to note that non-compliance with the ED's demand to produce evidence might attract fines under section 63(2) of the PMLA, 2002. Now these provisions were challenged in the case of *Vijay Madanlal Choudhary V/s Union of India*,¹¹ the court however, upheld the validity of the said provisions stating that the person undergoing questioning is not formally an accused at the summons stage. This essentially means that the right against self-incrimination under Article 20(3) of the Constitution is inapplicable, the court further noted that the said interrogation assumes a judicial character which effectively renders section 25 of the evidence act which states that confessions made to the police are inadmissible useless. This is particularly concerning as someone might be summoned by ED, while not

⁹ *Pankaj Bansal V/s Union of India*, 2023 SLP(Crl.) Nos. 92200-21 of 2023

¹⁰ Section 50, the Prevention of Money Laundering Act, 2002

¹¹ *Vijay Madanlal Chaudhary V/s Union of India*, 2022 SCC ONLINE SC 929

knowing whether or not they are an accused in the matter and might give self-incriminating evidence that might be used against them in case they are attached as an accused in the matter. Further, if at this point the person refuses to comply with ED's demands they might be fined for the same this in a way compels a person to give evidence against themselves. Further, it is important to note that in the case of *Santosh v State of Maharashtra*,¹² the court held that the conceptualization of undertrial interrogation such that it was wholly for the purpose of extracting confessions was an unconstitutional expectation, this is because Article 20(3) possessed an exalted status in the constitutional scheme. It is also important to note that a similar view was taken in the case of *Pankaj Bansal V/s Union of India* the Hon'ble SC held that ED cannot expect an admission of guilt during the summons stage and that the accused is not bound to incriminate themselves. The above-mentioned two judgments effectively point to the fact that the right against self-incrimination will apply even during summons issued under section 50 PMLA, 2002.

Now, let us talk about section 45 of the PMLA, 2002 which deals with the bail of an accused in PMLA matters. It is important to note that the threshold of bail under PMLA is higher than that in other cases. Here apart from the usual standards of granting bail, there is also a need to satisfy twin conditions of bail enshrined under section 45 of the PMLA which states that bail will be granted only when firstly, the public prosecutor has been given an opportunity to oppose the application for such release and where the Public Prosecutor opposes the application and where the court is satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail. The fact that the court must reasonably ascertain that the accused is guilty of the offence might require the court delve into the facts of the case. As per established case laws the court at the time of default bail is not required to go into the merits of the case. A similar view was held by the Madras High Court in the case *Kannan v. State rep. by the Deputy Superintendent of Police and others*.¹³ Further, it was rightly laid down in the case of *State of Rajasthan v Balchand*,¹⁴ that bail is the rule and incarceration is the exception. However, the twin conditions of bail under PMLA, do the opposite they aim at keeping a person in jail for as long as possible. Further, from a more humanitarian perspective incarceration might affect the social standing of a person which

¹² *Santosh v State of Maharashtra, CA, No, 1759 of 2017*

¹³ *Kannan v. State rep. by the Deputy Superintendent of Police and others, HCP (MD) Nos. 211 & 213 of 2022.*

¹⁴ *Rajasthan v Balchand, 1977 AIR 2447.*

might in turn affect his self-esteem this is detrimental to an individual's mental health and right to live freely. A similar view was also held in the case of *Convict prisoner v state*,¹⁵ where the court held that prisoners are at the risk of prisonization as a prisoner "loses his identity. He is known by a number. He loses personal possessions. He has no personal relationships. Psychological problems result from loss of freedom, status, possessions, dignity and autonomy of personal life. The inmate culture of prison turns out to be dreadful. The prisoner becomes hostile by ordinary standards. Self-perception changes. These psychological effects must be kept in mind by both the lawmakers and the judiciary and I believe a radical change in the applicability of section 45 is the need of the hour as the parameters set in the said section might cause more harm than good. It is pertinent to note that the Hon'ble Supreme Court in the case of *Y. Balaji v. Karthik Desari & Anr.*,¹⁶ refused to refer to the Judgement of Vijay Madanlal Chaudhary(supra) as the same is subject to be reviewed by a larger bench. One can only hope that there will soon be more clarity with regards to these provisions and the review of the said judgement might also be accompanied by radical changes in the PMLA legislation.

EXPLOITATION OF POWER BY ENFORCEMENT DIRECTORATE

Now, that we have thoroughly analysed the various provisions of the PMLA, it is essential that we analyze the workings of the organisation, entrusted with ensuring its implementation. India has seen a drastic uptick in arrests by the Enforcement Directorate (ED), India's primary enforcement wing for the prevention of money laundering. ED is primarily tasked with combating economic crimes. It operates within the jurisdiction of the Department of Revenue, Ministry of Finance, Government of India. The ED is essentially a multi-disciplinary organization mandated to enforce two pivotal fiscal laws: the FEM Act, 1999 and the PML Act, 2002. It is pertinent to note that As per a report carried out by the Indian Express in September, 2022 wherein it was disclosed that since the BJP came to power cases registered by ED against

¹⁵ *Convict prisoner v state*, 1993 Cri LJ 3242

¹⁶ *Y. Balaji v. Karthik Desari & Anr* Special Leave Petition (Criminal) No. 12779-12781 of 2022

opposition party members has increased fourfold.¹⁷ Further the report also disclosed that 121 prominent politicians had come under ED probe between 2014 and 2022 and out of these 121 politicians 115 were opposition leaders. The supposed misuse of ED has increased in recent months especially since the General Elections are around the corner.¹⁸ The most recent arrest of Aam Aadmi Party leader Arvind Kejriwal has sent shockwaves around not just India but the world. The arrest by ED was on the grounds that Mr. Kejriwal had made illicit gains through the Delhi Liquor Policy and had duped the public in the process. It is unclear whether the allegations have any ground to stand on or not. However, what must be questioned is the timing of the arrest, which took place a few months before voting for the General elections began. This arrest is particularly concerning as Mr. Kejriwal is the leader of one of the three national parties in India. It is pertinent to note that a similar observation was also made by the Hon'ble Supreme Court, the court during the proceedings questioned the timing of the arrest by the ED and sought a reply from the Central Probe Agency in this regard.¹⁹ It is pertinent to note that as per the ED circular the agency is mandatorily required to take up cases where the amount involved is Rs. One Crore in Prevention of Corruption Cases, however, in the National Herald Case the only agency that has so far established any loss to the exchequer is the Income Tax Department which has pegged a loss of Rs. 39 Lakh.²⁰ What makes the allegations of ED being a conduit of the ruling party is that fact many of the opposition leaders who were earlier under the ED scanner have now, been given the greenlight by the ED one such example is Himanta Biswa Sarma, who was under both ED and CBI's scanner in 2014 and 2015 over the Sharda Chit

¹⁷ Standard B, 'Decoding the ED: Understanding Its History, Powers, and Criticism' (*Business Standard*, 22 November 2023) https://www.business-standard.com/india-news/decoding-the-ed-understanding-its-history-powers-and-criticism-123112200730_1.html. accessed 1 May 2024

¹⁸ Standard B, 'Decoding the ED: Understanding Its History, Powers, and Criticism' (*Business Standard*, 22 November 2023) https://www.business-standard.com/india-news/decoding-the-ed-understanding-its-history-powers-and-criticism-123112200730_1.html. accessed 1 May 2024

¹⁹ 'Supreme Court Questions Ed on Timing of Arvind Kejriwal's Arrest' (*The Wire*) <https://thewire.in/law/supreme-court-questions-ed-on-timing-of-arvind-kejriwals-arrest>. accessed 1 May 2024

²⁰ 'Editorial: Ed Should Exercise Its New Powers with Responsibility' (*BusinessLine*, 2 December 2022) <https://www.thehindubusinessline.com/opinion/ed-should-exercise-its-new-powers-with-responsibility/article66215847.ece>. accessed 1 May 2024

Fund Scam when he was part of Congress.²¹ It is pertinent note that the CBI even raided his house in 2014 in this regard. However, since he has become a part of the BJP there has been no development in the matter.²² The ED's exploitation of its jurisdiction to allegedly conduct the bidding of the ruling party has forced many of the opposition leaders to jump ship and join the ruling party. The Court's in India have pointed out the issue but however, have not been able to effectively deal with it, while the Hon'ble Supreme Court has raised the issue of ED exploiting its powers under the PMLA, 2002 however, have no active steps have been taken in this regard to plug the issue. This misuse of power by the ED has been further fueled by the extent of difficulty in getting bail in ED matters. The twin conditions of bail under section 45 of the PMLA, 2002 as discussed above ensure that a person does not get bail easily, this allows the ruling party enough time to strongarm the opposition leaders into either jumping ship or to thwart any kinds of protests or threat to their regime. The fact that high-ranking opposition leaders such as Senthil Balaji, Hemant Soren, Arvind Kejriwal is a testament to the fact that the government through ED has not only tried to kill the competition but has also tried to destroy their credibility by ensuring that the media and the ED label them as corrupt politicians even before they get a chance to have a fair trial. The ED very tactfully exercised a lot of leeway in choosing what information it chooses to act on and what it would much rather ignore. To further press on this point lets take the example of the Augusta case, wherein the ED had informed in its first and second complaints that certain funds had been transferred to a Singapore based entity, Gudami International PTE Ltd. pursued the case relentlessly, however, the moment they got to know that the company is linked to Gautam Adani all investigations were dropped.²³ This incident perfectly sums up ED's activities over the past decade where ED has relentlessly and mercilessly and sometimes without any cause pursued deemed enemies of

²¹ Tiwary D, 'Kejriwal Arrest: 95% of Ed Cases since BJP Came to Power in 2014 against Opposition Leaders' (*The Indian Express*, 22 March 2024) <https://indianexpress.com/article/political-pulse/kejriwal-arrest-bjp-liquor-policy-case-modi-9227288/>. accessed 15 May 2024

²² Tiwary D, 'Kejriwal Arrest: 95% of Ed Cases since BJP Came to Power in 2014 against Opposition Leaders' (*The Indian Express*, 22 March 2024) <https://indianexpress.com/article/political-pulse/kejriwal-arrest-bjp-liquor-policy-case-modi-9227288/>. accessed 15 May 2024

²³ 'Tracking the ED Case by Case, Puzzling Questions Emerge in Its Handling of Opposition Leaders' (*The Wire*) <https://thewire.in/government/tracking-the-ed-case-by-case-puzzling-questions-emerge-in-its-handling-of-opposition-leader>. accessed 15 May 2024

the ruling party while turning a blind eye to the illegal activities of the ruling party's allies. It is pertinent to note that the support to the ED by the Centre is so immense that it has started counter-attacking state governments where the opposition is in power, whenever the said government tries to hold any member of the ED liable. One such example is the incident that took place in Tamil Nadu, wherein the local police arrested a member of the ED in a bribery case and what followed was a string of baseless raids and arrests of members or allies of the state government.²⁴

One of the ways in which the overreaching powers of the ED can be tackled with is if the Court declares that preventive detention and attachment of properties under the PMLA is illegal and unconstitutional, while this may have economic ramifications and might allow those really guilty of money laundering to escape, however, it will ensure that the political influence of ED is significantly reduced. While post the *Pankaj Bansal case* (supr.) the ED is required to provide the grounds of arrest, the furnishing of ECIR should also be made mandatory. Moreover, attachment of property and the twin conditions of bail should be done away with. The reason I say this is because as seen in the Kejriwal case the ED arrested Kejriwal right before the elections, which turn handed the ruling party a significant advantage in the upcoming elections. Further, Kejriwal's reputation and party economic resources took a severe hit as ED had attached certain properties that were owned by AAP as well. Hence, if the Courts decide to follow the maxim that bail is the rule and jail is the exception as enshrined in the case of *State of Rajasthan V/s Balchand*.²⁵ While I understand that the court on numerous occasions has treated PMLA cases as an exception to this rule, given the graveness of the offence, however, the far-reaching powers of the ED are now causing a significant threat to the democracy of our nation, further the fact that the ruling party has a complete majority in the parliament, it is unlikely that we will see any amendments in the PMLA that will try to curb the ED'S power, hence, it is upon the judiciary to take a stand against the biased tactics of the ED and read down certain provisions of the PMLA, 2002 in the interest of democracy and principles of natural justice.

²⁴ India TO, 'Ed vs Tamil Nadu Cops: Agency Shifts Case to Delhi Headquarters: India News - 'Times of India' (*The Times of India*, 26 December 2023) <https://timesofindia.indiatimes.com/india/ed-vs-tn-cops-agency-shifts-case-to-delhi-hq/articleshow/106276481.cms>. accessed 15 May 2024

²⁵ *State of Rajasthan V/s Balchand*, 1977 AIR 2447.

CONCLUSION

In conclusion, it can be asserted that certain provisions of the PMLA, 2002 are draconian in nature and run against the Constitutional scheme. Now, while the courts have tried to reduce the overreaching powers of the ED by providing an interpretation of the legislation in a manner that creates parity between the rights of the accused and the power of ED to investigate, there is still however, a dire need to revamp the PMLA, 2002 in order to ensure that economic offences are curtailed while at the same time individual's rights are not infringed upon. It is pertinent to note that the *Vijay Madanlal Choudhary case (supra.)* which affirmed the powers given to the ED as legitimate under the constitutional parameters is under review before the Hon'ble Supreme Court. It is up to the Hon'ble Supreme Court now, to radically change certain draconian provisions of the PMLA, 2002 to ensure that the ED's powers are curbed, as, if the Court fails to do so, the exploitative use of powers by the ED will act as a death knell for free and fair elections in India.