



ORIGINAL RESEARCH PAPER

Law

THE EVOLVING JURISPRUDENCE OF ANTI MONEY-LAUNDERING LAW IN INDIA

KEY WORDS:

Dr. Navditya Tanwar Kaundal

Assistant Professor of Law, Himachal Pradesh National Law University

INTRODUCTION:

Money-laundering poses a serious threat not only to the financial systems of countries, but also to their integrity and sovereignty. To obviate such threats international community has taken some initiatives. It has been felt that to prevent money-laundering and connected activities a comprehensive legislation is urgently needed. To achieve this objective the Prevention of Moneylaundering Bill, 1998 was introduced in the Parliament. The Bill was referred to the Standing Committee on Finance, which presented its report on 4th March, 1999 to the Lok Sabha. The Central Government broadly accepted the recommendation of the Standing Committee and incorporated them in the said Bill along with some other desired changes.

The Act was enacted to address the urgent need to have a comprehensive legislation inter alia for preventing money-laundering, attachment of proceeds of crime, adjudication and confiscation thereof including vesting of it in the Central Government, setting up of agencies and mechanisms for coordinating measures for combating money-laundering and also to prosecute the persons indulging in the process or activity connected with the proceeds of crime. This need was felt world over owing to the serious threat to the financial systems of the countries, including to their integrity and sovereignty because of money-laundering. The international community deliberated over the dispensation to be provided to address the serious threat posed by the process and activities connected with the proceeds of crime and integrating it with formal financial systems of the countries. The issues were debated threadbare in the United Nation Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Basle Statement of Principles enunciated in 1989, the FATF established at the summit of seven major industrial nations held in Paris from 14th to 16th July, 1989, the Political Declaration and Noble Programme of Action adopted by United Nations General Assembly vide its Resolution No.S-17/2 of 23.2.1990, the United Nations in the Special Session on countering World Drug Problem Together concluded on the 8th to the 10th June, 1998, urging the State parties to enact a comprehensive legislation.

In view of an urgent need for the enactment or a comprehensive legislation inter alia for preventing moneylaundering and connected activities confiscation of proceeds of crime, setting up of agencies and mechanisms for coordinating measures for combating money-laundering, etc., the Prevention of Money-Laundering Bill, 1998 was introduced in the Lok Sabha on the 4th August, 1998. The Bill was referred to the Standing Committee on Finance, which presented its report on the 4th March, 1999 to the Lok Sabha. The recommendations of the Standing Committee accepted by the Central Government are that (a) the expressions "banking company" and "person" may be defined; (b) in Part I of the Schedule under Indian Penal Code the word offence under section 477A relating to falsification of accounts should be omitted; (c) 'knowingly' be inserted in clause 3(b) relating to the definition of money-laundering; (d) the banking companies financial institutions and intermediaries should be required to furnish information of transactions to the Director instead of Commissioner of Income-tax (e) the banking companies should also be brought within the ambit

of clause II relating to obligations of financial institutions and intermediaries; (f) a definite time-limit of 24 hours should be provided for producing a person about to be searched or arrested person before the Gazetted Officer or Magistrate; (g) the words "unless otherwise proved to the satisfaction of the authority concerned" may be inserted in clause 22 relating to presumption on inter-connected transactions; (h) vacancy in the office of the Chairperson of an Appellate Tribunal, by reason of his death, resignation or otherwise, the senior-most member shall act as the Chairperson till the date on which a new Chairperson appointed in accordance with the provisions of this Act to fill the vacancy, enters upon his office; (i) the appellant before the Appellate Tribunal may be authorised to 84 engage any authorised representative as defined under section 288 of the Income-tax Act, 1961, (j) the punishment for vexatious search and for false information may be enhanced from three months imprisonment to two years imprisonment, or fine of rupees ten thousand to fine of rupees fifty thousand or both; (k) the word 'good faith' may be incorporated in the clause relating to Bar of legal proceedings. The Central Government have broadly accepted the above recommendations and made provisions of the said recommendations in the Bill. 3. In addition to above recommendations of the standing committee the Central Government proposes to (a) relax the conditions prescribed for grant of bail so that the Court may grant bail to a person who is below sixteen years of age, or woman, or sick or infirm, (b) levy of fine for default of noncompliance of the issue of summons, etc. (c) make provisions for having reciprocal arrangement for assistance in certain matters and procedure for attachment and confiscation of property so as to facilitate the transfer of funds involved in money-laundering kept outside the country and extradition of the accused persons from abroad.

Preamble of the Act:

An Act to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto. The Preamble of the Act reinforces the background in which the Act has been enacted by the Parliament being commitment of the country to the international community. It is crystal clear from the Preamble that the Act has been enacted to prevent money-laundering and to provide for confiscation of property derived from or involved in money-laundering and for matters connected therewith or incidental thereto. It is neither a pure regulatory legislation nor a pure penal legislation. It is amalgam of several facets essential to address the scourge of money-laundering as such. In one sense, it is a sui generis legislation.

As aforesaid, it is a comprehensive legislation dealing with all the related issues concerning prevention of money-laundering, attachment of proceeds of crime, adjudication and confiscation thereof including vesting of it in the Central Government, setting up of agencies and mechanisms for coordinating measures for combating money-laundering and also to prosecute the persons indulging in the process or activity connected with the proceeds of crime. While considering the challenge to the relevant provision(s) of the 2002 Act, we cannot be oblivious to the objects and reasons for enacting such a special legislation and the seriousness of

the issues to be dealt with thereunder including having transnational implications. Every provision in the 2002 Act will have to be given its due significance while keeping in mind the legislative intent for providing a special mechanism to deal with the scrouge of money-laundering recognised world over and with the need to deal with it sternly.

Process of money-laundering:

There are three stages of money laundering. These three stages in money laundering are: 1. Placement Stage: The first stage is the physical disposal of cash. The launderer introduces his illegal profits into the financial system. This placement is accomplished by depositing the cash in domestic banks or in other types of formal or informal financial institutions. This is done by breaking up large amounts of cash into less conspicuous smaller sums that are then deposited directly into a bank account, or by purchasing a series of monetary instruments (cheques, money orders, etc.). The cash is usually siphoned off across borders for deposit in foreign financial institutions, or used to buy high-value goods, such as artwork, airplanes, and precious metals and stones, that can then be resold for payment by cheque or bank transfer. 2. Layering Stage: The second stage in money laundering is known as layering. "Layering" refers to the separation of illicit proceeds from their source by creating complex layers of financial transactions. Layering conceals the audit trail and provides anonymity. The launderer engages in a series of conversions or movements of the funds to distance them from their source. The funds might be channeled through the purchase and sale of investment instruments such as bonds, stocks, and traveler's cheques or the launderer might simply wire the funds through a series of accounts at various banks across the globe, particularly to those jurisdictions that do not cooperate in anti-money laundering investigations. 3. The Integration Stage: "Integration" refers to the reinjection of the laundered proceeds back into the economy in such a way that they re-enter the financial system as normal business funds. The funds re-enter the legitimate economy. The launderer might choose to invest the funds into real estate, luxury assets, or business ventures.

Proceeds of Crime:

The "proceeds of crime" being the core of the ingredients constituting the offence of money-laundering, that expression needs to be construed strictly. In that, all properties recovered or attached by the investigating agency in connection with the criminal activity relating to a scheduled offence under the general law cannot be regarded as proceeds of crime. There may be cases where the property involved in the commission of scheduled offence attached by the investigating agency dealing with that offence, cannot be wholly or partly regarded as proceeds of crime within the meaning of Section 2(1)(u) of the 2002 Act — so long as the whole or some portion of the property has been derived or obtained by any person "as a result of" criminal activity relating to the stated scheduled offence. To be proceeds of crime, therefore, the property must be derived or obtained, directly or indirectly, "as a result of" criminal activity relating to a scheduled offence. To put it differently, the vehicle used in commission of scheduled offence may be attached as property in the concerned case (crime), it may still not be proceeds of crime within the meaning of Section 2(1)(u) of the 2002 Act. Similarly, possession of unaccounted property acquired by legal means may be actionable for tax violation and yet, will not be regarded as proceeds of crime unless the concerned tax legislation prescribes such violation as an offence and such offence is included in the Schedule of the 2002 Act. For being regarded as proceeds of crime, the property associated with the scheduled offence must have been derived or obtained by a person "as a result of" criminal activity relating to the concerned scheduled offence. This distinction must be borne in mind while reckoning any property referred to in the scheduled offence as proceeds of crime for the purpose of the

2002 Act. Dealing with proceeds of crime by way of any process or activity constitutes offence of money-laundering under Section 3 of the Act. The definition clause includes any property derived or obtained "indirectly" as well. This would include property derived or obtained from the sale proceeds or in a given case in lieu of or in exchange of the "property" which had been directly derived or obtained as a result of criminal activity relating to a scheduled offence. In the context of Explanation added in 2019 to the definition of expression "proceeds of crime", it would inevitably include other property which may not have been derived or obtained as a result of any criminal activity relating to the scheduled offence. As noticed from the definition, it essentially refers to "any property" including abroad derived or obtained directly or indirectly. The Explanation added in 2019 in no way travels beyond that intent of tracking and reaching upto the property derived or obtained directly or indirectly as a result of criminal activity relating to a scheduled offence. Therefore, the Explanation is in the nature of clarification and not to increase the width of the main definition "proceeds of crime". The definition of "property" also contains Explanation which is for the removal of doubts and to clarify that the term property includes property of any kind used in the commission of an offence under the 2002 Act or any of the scheduled offences.

Projection as untainted property not mandatory:

Section 3 of the 2002 Act, the same defines the offence of money-laundering. The expression "money-laundering", ordinarily, means the process or activity of placement, layering and finally integrating the tainted property in the formal economy of the country. the rudimentary understanding of 'money-laundering' is that there are three generally accepted stages to money-laundering, they are: (a) Placement: which is to move the funds from direct association of the crime. (b) Layering: which is disguising the trail to foil pursuit. (c) Integration: which is making the money available to the criminal from what seem to be legitimate sources. However, Section 3 has a wider reach. The offence, as defined, captures every process and activity in dealing with the proceeds of crime, directly or indirectly, and not limited to the happening of the final act of integration of tainted property in the formal economy to constitute an act of money-laundering. Hon. Apex Court in Vijay Madanlal Chaudhary vs Union of India has held that the expression "and" in Section 3 as "or", to give full play to the said provision so as to include "every" process or activity indulged into by anyone, including projecting or claiming the property as untainted property to constitute an offence of money-laundering on its own. The act of projecting or claiming proceeds of crime to be untainted property presupposes that the person is in possession of or is using the same (proceeds of crime), also an independent activity constituting offence of money-laundering. In other words, it is not open to read the different activities conjunctively because of the word "and". If that interpretation is accepted, the effectiveness of Section 3 of the 2002 Act can be easily frustrated by the simple device of one person possessing proceeds of crime and his accomplice would indulge in projecting or claiming it to be untainted property so that neither is covered under Section 3 of the 2002 Act.

Concept of alternative attachable property:

A person engaged in criminal activity intending to convert the proceeds of crime into assets that can be projected as legitimate (or untainted) would generally be in a hurry to render the same unavailable. The entire contours of the crime may not be known when it comes to light and the enforcement authority embarks upon a probe. The crime of such nature is generally executed in stealth and secrecy, multiple transactions (seemingly legitimate) creating a web lifting the veil whereof is not an easy task. The truth of the matter is expected to be uncovered by a detailed probe which may take long time to undertake and conclude. The total wrongful gain from the criminal activity cannot be computed till the

investigation is completed. The authority for —provisional attachment of suspect assets is to ensure that the same remain within the reach of the law.

Among the three kinds of attachable properties mentioned above, the first may be referred to, for sake of convenience, as —tainted property in as much as there would assumably be evidence to prima facie show that the source of (or consideration for) its acquisition is the product of specified crime, the essence of —money-laundering being its projection as —untainted property (Section 3). This would include such property as may have been obtained or acquired by using the tainted property as the consideration (directly or indirectly). To illustrate, bribe or illegal gratification received by a public servant in form of money (cash) being undue advantage and dishonestly gained, is tainted property acquired —directly by a scheduled offence and consequently —proceeds of crime. Any other property acquired using such bribe as consideration is also —proceeds of crime, it having been obtained —indirectly from a prohibited criminal activity within the meaning of first limb of the definition.

In contrast, the second and third kinds of properties mentioned above would ordinarily be —untainted property that may have been acquired by the suspect legitimately without any connection with criminal activity or its result. The same, however, are intended to fall in the net because their owner is involved in the proscribed criminality and the tainted assets held by him are not traceable, or cannot be reached, or those found are not sufficient to fully account for the pecuniary advantage thereby gained. This is why for such untainted properties (held in India or abroad) to be taken away, the rider put by law insists on equivalence in value. From this perspective, it is essential that, before the order of attachment is confirmed, there must be some assessment (even if tentative one) as to the value of wrongful gain made by the specified criminal activity unless it be not possible to do so by such stage, given the peculiar features or complexities of the case. The confiscation to be eventually ordered, however, must be restricted to the value of illicit gains from the crime. For the sake of convenience, the properties covered by the second and third categories may be referred to as —the alternative attachable property or —deemed tainted property.

if the enforcement authority under PMLA has not been able to trace the “tainted property” which was acquired or obtained by criminal activity relating to the scheduled offence for money-laundering, it can legitimately proceed to attach some other property of the accused, by tapping the second (or third) above- mentioned kind provided that it is of value near or equivalent to the proceeds of crime. But, for this to be a fair exercise, the empowered enforcement officer must assess (even if tentatively), and re-evaluate, as the investigation into the case progresses, the quantum of —proceeds of crime derived or obtained from the criminal activity so that proceeds or other assets of equivalent value of the offender of money-laundering (or his abettor) are subjected to attachment to such extent, the eventual order of confiscation being always restricted to take over by the Government of illicit gains of crime, the burden of proving facts to the contrary being on the person who so contends.

If such other property as above (the alternative attachable property or deemed tainted property) is owned by, or held in the name of, the accused, objections to attachment (or confiscation) would generally concern the material on which reasons to believe about money-laundering and acquisition of proceeds of crime are founded or the value of the property which has been attached. Again, the possibility of conflict involving interest of a third party comes in for which the bonafides of the acts through which such third party may have acquired interest in the targeted property, as indeed of the

lawfulness and adequacy of consideration for such acquisition, would need scrutiny.

69. Axis Bank has taken the view that the first limb would comprise of tainted property and which would essentially be property in respect of which there would, at least prima facie, be evidence to establish that the source of its acquisition was the product of a specified crime. Axis Bank then proceeds to hold that this nature of property would also include that asset which may have been obtained or Signature Not Verified Digitally Signed By:NEHA Signing Date:19.07.2022 13:45:15 acquired by using the tainted property as its consideration whether directly or indirectly. The second kind of property which Axis Bank has recognised as falling within the ambit of Section 2(1)(u) was described to be untainted property and was explained to be that which may have been acquired "by the suspect legitimately without any connection with criminal activity or its result". According to the learned Judge, such property would also fall within the scope of the Act since the person holding an interest in such property is found involved in the proscribed criminal activity and in a situation where the tainted assets held by him are either not traceable or cannot be reached. These properties were described in Axis Bank to be "alternative attachable property" or "deemed tainted property". Axis Bank appears to take note of an exigency where an asset or property which may be directly or indirectly connected to criminal activity may not be traceable. It is in the aforesaid backdrop that the learned Judge appears to have interpreted the phrase —or the value of any such property and thus enabling the Directorate to proceed even against such property in which the accused may have had an interest notwithstanding the fact that the same may not have a direct or indirect relationship with the criminal activity itself.

Seema Garg case principally holds that the phrase “value of any such property” and “property equivalent in value held within the country or abroad” cannot be ascribed the same meaning and effect. Insofar as the judgement of the Punjab and Haryana High Court in Seema Garg is concerned, although the Special Leave to Petition preferred against the same came to be dismissed, while doing so the Supreme Court recorded that the petition was being rejected in the peculiar facts and circumstances of the case. The dismissal of the aforesaid Special Leave Petition cannot in any case be interpreted or understood as being an affirmation of the view as expressed by the Punjab and Haryana High Court.

Action of search and attachment without pre-registered scheduled offence:

In case the scheduled offence is not already registered by the jurisdictional police or complaint filed before the Magistrate, it is open to the authorised officer to still proceed under Section 5 of the 2002 Act whilst contemporaneously sending information to the jurisdictional police under Section 66(2) of the 2002 Act for registering FIR in respect of cognizable offence or report regarding non-cognizable offence and if the jurisdictional police fails to respond appropriately to such information, the authorised officer under the 2002 Act can take recourse to appropriate remedy, as may be permissible in law to ensure that the culprits do not go unpunished and the proceeds of crime are secured and dealt with as per the dispensation provided for in the 2002 Act. Suffice it to say that the amendment effected in 2015 in the second proviso has reasonable nexus with the object sought to be achieved by the 2002 Act.

It is essential for ED that before the provisional order of attachment is passed or the same is confirmed there must be some assessment as to the value of wrongful gain made from the said criminal activity. The confiscation which can be eventually ordered must be restricted to the approximate value of the wrongful gain by the crime and cannot be made on assumptions. The ED cannot attach all and every property suspecting it to be “proceeds of the crime”, but must examine

and be satisfied that such property is derived or obtained from the criminal activity and that there must be some live nexus or link between such property on one hand and the person accused of a charge of offence of money laundering on the other. Any and every property having no link, direct or indirect with the property derived or obtained from the submission of the scheduled offence, because of a criminal activity, cannot be attached arbitrarily.

Scheduled offence being the foundation upon which rests the superstructure of offence of money-laundering:

The Apex Court in Vijay Madanlal Case held that in the event the accused in the PMLA or whose allegations are linked to any persons in the predicate offence such accused in the predicate offence gets a clean chit on three circumstances, one by acquittal after a full blown trial; two on discharge by the competent Court and three on the proceedings being quashed by the High Court in exercise of its jurisdiction under Section 482 of the Cr.P.C. In all these cases, there can be no offence of money laundering against the accused. If the scheduled offence is the foundation, and the proceedings under the PMLA are the super structure, the foundation having been obliterated, the super structure would tumble down, so to say, that the proceedings under the PMLA will vanish owing to its sustenance only on the predicate offence.

Uncertainty ahead:

The petitioners in Vijay Madanlal case have questioned the amendments brought about by the Parliament by taking recourse to Finance Bill/Money Bill. It was made clear by the Apex Court to all concerned that the said ground of challenge will not be examined in those proceedings as it is pending for consideration before the Larger Bench of Apex Court (seven Judges) in view of the reference order passed in Rojer Mathew. We are conscious of the fact that if that ground of challenge is to be accepted, it may go to the root of the matter and amendments effected vide Finance Act would become unconstitutional or ineffective. Despite that, it had become necessary to answer the other contentions which may otherwise require consideration in the event of the principal ground of challenge is answered against the petitioners. In any case, until the larger Bench decides that issue authoritatively, the authorities and the Adjudicating Authority as well as the Courts are obliged to give effect to the amended provisions. Resultantly, the other issues raised in this batch of cases being recurring and as are involved in large number of cases to be dealt with by the authorities and the Adjudicating Authority under the Act and the concerned Courts on daily basis, including the Constitutional Courts, it has become necessary to answer the other grounds of challenge in the meantime. On that understanding, we proceeded with the hearing of the batch of cases before us to deal with the other challenges regarding the concerned provision(s) being otherwise unconstitutional and ultra vires.

REFERENCES

1. Statement of Objects and Reasons of PMLA, 2002.
2. https://www.raijmr.com/ijrhrs/wp-content/uploads/2017/11/ IJRHS_2015_vol03_issue_07_11.pdf
3. 2(1)(u) "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 3 [or where such property is taken or held outside the country, then the property equivalent in value held within the country] 4 [or abroad]; 5 [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;]
4. "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 456 [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. 457[Explanation.—For the removal of doubts, it is hereby clarified that,— (i) a person shall be guilty of offence of moneylaundering 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.

5. SLP (Cri.) 4634 of 2014 decided on 27.07.2022.
6. Deputy Director, Directorate of Enforcement vs. Axis Bank, 2019 SCC Online Del 7854
7. Seema Garga vs Deputy Director, 2020 SCC Online P&H 738
8. SLP © No.14713-14715/2020
9. Footnote 4 (Supra)
10. Rojer Mathew vs. South Indian Bank Limited and Ors (2020) 6 SCC 1