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PMLA Verdict: A *Sui-Generis* Legislation and a Great Schism From the General Principles of Criminal Law

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India's criminal justice system is put up on several recognized axioms that are intrinsic to the fundamental principles of justice and fairness. The idea that a person is innocent in the absence of proof to the contrary; the idea that a detained person until accused of the offense, is entitled to bail pending the trial; the idea that criminal law is ex post facto law, the rule that law does not have retrospective effect; the idea that a person has the right to be informed about the charges made against him; and the idea which is the fundamental rule followed in criminal jurisprudence that a suspect has a privilege against self-incrimination. Each of these principles is taken over by a plethora of exceptions that their foundations have lost all vigor. Regrettably, this disenchantment and disillusionment in our values have time and again received the approbation of the Supreme Court of India. Recently, the Supreme Court in 2022 issued a landmark judgment wherein it upheld several provisions concerning the Prevention of Money Laundering Act, 2002 including the steps taken by the ED in registering the ECIR. Further, the two bail requirements listed in Section 45(1) of the Act have got the judicial stamp. Since the conditions reverse the presumption of innocence at the bail stage, they have been criticized, which is per se opaque, arbitrary, unjust, and unconstitutional. Unfortunately, the Supreme Court has given its imprimatur to what is considered 'draconian' provisions, rejecting strong challenges to their validity.

Keywords: *money laundering; enforcement directorate; self-incrimination, predicate offense, pmla.*

INTRODUCTION

The Prevention of Money Laundering Act, 2002[1] ('PMLA') and the rules made under it become operational on July 1st, 2005.[2] The Act and regulations require financial institutions, banks, and other intermediaries to authenticate the identity of their clients and give records and information to the Financial Intelligence Unit.[3] The existence of the need for such a law, which seeks to confiscate the proceeds of certain crimes and penalize those who deal with them, was the impetus for the creation of such legislation.

The Directorate of Enforcement ('ED'), a financial investigation unit of the Department of Revenue of the Union Government, is accountable for upholding the Act's obligations.[4] To undertake investigations, the ED has the legal authority to issue a summons,[5] obtain statements,[6] make arrests,[7] carry out searches, and seize property.[8] Despite having investigative powers, the ED is not considered a 'police agency' and is not compelled to comply with The Code of Criminal Procedure, 1973 (CrPC).

Money laundering is per se not a standalone offense and it has a three-part schedule of offenses (or predicate offenses) for which the primary sources of unlawful proceeds of crime are terrorism, drug trafficking, and corruption, as well as white-collar crimes like tax, business crimes, fraud, embezzlement, and crimes related to intellectual property. The resultant criminal activity gives rise to tainted money and the subsequent act of transforming criminal gains into money that appears to be legitimate is money laundering.[9] Thus, the Act aims to criminalize certain actions by designating them as economic offenses.

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[1] Prevention of Money Laundering Act 2002
[2] Prevention of Money Laundering (Maintenance of Records) Rules 2005
[3] *Pareena Swarup v Union of India* (2008) 14 SCC 107
[4] Prevention of Money Laundering Act 2002, s 48-49
[5] Prevention of Money Laundering Act 2002, s 50
[6] Prevention of Money Laundering Act 2002, s 50 (3)
[7] Prevention of Money Laundering Act 2002, s 19
[8] Prevention of Money Laundering Act 2002, Ch IV
[9] Prevention of Money Laundering Act 2002, s 3

The Act of 2002 which was created to curb the scourge of organized crime, has fast degenerated into interpretation chaos as a result of contradictory judicial decisions that extend its otherwise reasonable restrictions. Nearly eleven amendments to the Act have not reduced the law's unpredictability; rather, they have only increased it.[10] The most deleterious effect of the PMLA's instability is the interpretation disparity, which has obfuscated the PMLA's basic penal provisions.

It is unsurprising that, throughout the history of independent India, our constitutional courts have endorsed these initiatives, expressing a similar disgust for those who indulge in criminal profiteering, regardless of the size of their earnings. As a result, the measures taken to deal with everyone affected by these laws — tougher bail provisions, reduced protections against self-incrimination, and potential retroactive forfeitures of property, have all been upheld as legal.

Before the implementation of the PMLA, the Supreme Court attempted to endeavor various controversies regarding the issues that arose under the Act. Besides this, the jurisdictional authority of specialized investigation teams that focus on financial crimes, like ED, such as the SFIO and the Directorate of Revenue Intelligence, has recently been called into question by nearly around 200 petitioners. More than 80 of these petitions centered on the PMLA.[11]

Dealing with these petitions the Supreme Court confined itself to the question of law raised by the petitioners regarding several provisions of the PMLA. Thus, the Supreme Court affirmed a series of provisions of the PMLA on July 27, 2022, in the case of Vijay Madanlal Chaudhary v Union of India ('Vijay Madanlal') including those that deal with ED's power over arrest, attachment, search, and seizure.[12] Further, the presumption of innocence being the golden thread of all criminal proceedings[13] was eliminated from Section 45 of the PMLA through the 2019 amendment.[14] As a consequence of this ruling, the ED is now allowed to continue utilizing a variety of audacious authorities in the course of their inquiry.

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[10] Prevention of Money Laundering (Amendment) Act 2005

[11] *Vijay Madanlal Choudhary & Ors v Union of India & Ors* (2022) 3 SCC 353

[12] *Ibid*

[13] *Arnab Manoranjan Goswami v State of Maharashtra and Ors* (2021) 2 SCC 427

[14] Finance Act 2019

Moreover, the three-judge bench in the judgment dismissed concerns regarding the misuse of power by the authority by praising numerous safeguards in the framework of Sections 17 to 19 of the PMLA. The seniority of the authorized official, along with the inclusion of a clause condemning the vexatious exercise of power, is supposed to instill fears of misuse.[15] The same reasoning was put up when coercive powers granted by other socio-economic laws were contested in the past, thus none of this is novel.[16] What is worth noting, though, is the Court's uncritical, almost loving way of reaffirming the view. The petitioners argued that the safeguards did not adequately reduce the risk of abuse and misuse by pointing to the biased character of enforcement authority under the Act, the inherent limitations of provisions prohibiting abuse of authority (such as the fact that doing so would require an internal discipline, which only occurs infrequently), and the pitiful rate of convictions. The bench did not even blink when it heard this criticism, and its notion of trusting the officials would leave some quarters bewildered, regardless of how conservative this viewpoint may be.

From this viewpoint, this paper aims to address the rebuff created and seeks to present a critique of Vijay Madanlal. **Part II** deals with the uncanalized power of the ED regarding the procedures laid down in Chapters III and V of the PMLA. The effect of these powers is emphasized upon in this part which violates the various constitutional safeguards provided by the Constitution of India. **Part III** discusses the twin bail requirements provided under the Act. In consonance with this, it also discusses the bail jurisprudence and the restoration of this provision through an amendment of 2018 and 2019 of the Act post the decision of the SC which found this provision to be unconstitutional. **Part IV** seeks to establish why the PMLA is classified as a *Sui Generis Legislation*. Further, this part also aims to outline the interpretative chaos created by the deliverance of various judgments in analyzing the application of CrPC over the PMLA. Lastly, **Part V** concludes with suggestions and highlights the critique of this controversial law which is recently authored by the SC.

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[15] Prevention of Money Laundering Act 2002, s 62
[16] *R.S. Seth Gopikisan Agarwal v R N Sen Assistant Collector of Customs and Central Excise* (1967) SC 1298

UNCANALIZED POWER OF THE ED: ARRESTS MADE AND ATTACHMENT, SEARCH, AND SEIZURE OF THE PROPERTY

The Supreme Court's decision in Vijay Madanlal reads like a greatest-hits compilation of the court's prior efforts to determine whether or not certain socio-economic crimes are constitutional. The Court ruled that ED's ability to make arrests, issue summons, and conduct searches and seizures is constitutional and that the provisions are not tainted by the vice of arbitrariness. Further, the statute's safeguard prevented the ED from misusing or abusing its authority.[17] The petitioners raised several constitutional issues, including the Finance (No. 2) Act of 2019, which amended section 17 of the PMLA by removing the last safeguards provided in the proviso clause.[18] Before the amendment, the procedure of search and seizure was only conducted when a chargesheet is filed for the offense relating to PMLA.[19] Thus, by eliminating this anchor of the scheduled offense, it was argued that the entire rationale of the PMLA had been flipped upside down.

By Section 18 of the Act,[20] the investigative agency is empowered to search a person and confiscate such document or property, if it has probable cause to think that the person has concealed his possession, ownership, or has been in control of the proceeds made from the crime. Money laundering, however, is a cognizable offense,[21] which means that an arrest of a person can be made by investigating officer without a warrant.[22] Section 19 sets out the power to arrest by the investigating officers.[23] The ED, as per the current setup, is now able to arrest based on an ECIR (Enforcement Case Information Report) individual without telling him about the substance of the report. This is in and of itself arbitrary and infringes upon the constitutional rights of the accused; nevertheless, the requirement to inform forms an integral component in light of the constitutional mandate of Article 21 of the Constitution of India.[24] Consequently,

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[17] Prevention of Money Laundering Act 2002, s 62
[18] Finance Act 2019
[19] *Ibid*
[20] Prevention of Money Laundering Act 2002, s 18
[21] Finance Act 2019, s 45(2)
[22] *Chhagan Chandrakant Bhujbal v Union of India* (2016) Bom 938
[23] Prevention of Money Laundering Act 2002, s 19
[24] *Youth Bar Association of India v Union of India & Ors* (2016) SC 4136

based on such ECIR, an abnormal scenario is formed, wherein the ED can summon accused people and demand information on financial transactions, and as a result; the accused remains ignorant of the charges that have been made against him throughout the entire process.[25]

Two provisions in the PMLA deal with the property; either you can search and take someone's property[26] or you can attach the property[27]. The second proviso of section 5(1) of the Act,[28] sets out the procedure for the seizure of property by the ED even before the commission of the underlying offense or the accumulation of the illicit gains from that crime. Foremost, the legislative history is concerned, the second proviso to section 5(1) was not part of the Act.[29] This proviso was added in 2013 to prevent the proceedings from becoming frustrating.[30] Section 3 of the Act is directly related to the usage of the word 'any' about persons and property, as opposed to the term 'proceeds of crime'.[31] When carefully read, section 3 makes it apparent that it is not to be coupled with any other offense; rather, it is only to be combined with scheduled offenses. As a result, the ED makes improper use of this term to seize and attach property that was acquired far in advance for the commission of Scheduled offenses. The difficulty that emerges is that assuming someone's property is attached, they will most likely be unable to utilize it for six to seven years because the preliminaries or the litigation likewise will generally extend and drag on for years. Given this context, there must be some connection between the second proviso of section 5(1) about the proceeds of the crime and the offenses which are part of the schedule of the PMLA that are being investigated by the ED following the ECIR registration.[32]

Owing to how the property is seized and attached by the ED for such a long time as per Section 17 and Section 5 of the PMLA, the courts were required to intervene, however, they chose to stay out of it, disregarding the right to property under Article 300-A of the Constitution.[33] At

[25] *Ibid*
[26] Prevention of Money Laundering Act 2002, s 17
[27] Prevention of Money Laundering Act 2002, s 5
[28] Prevention of Money Laundering Act 2002, s 5(1)(2)
[29] Prevention of Money Laundering Act 2002, s 5(1)
[30] *Ibid*
[31] Prevention of Money Laundering Act 2002, s 3
[32] *Dwarka Prasad v Dwarka Das Saraf* (1975) SC 1758
[33] Constitution of India 1950, art 300A

present, the ED has the authority to seize up to ten of a person's properties, including four of their residencies, it just however needs to prove beyond a reasonable doubt that these properties are connected to the predicate offense. As a result of this, the accused and the property owners remain defenseless, and the burden of proving, therefore, falls entirely on the person accused to show that there is no connection.

Regarding arrests, Section 19 of the PMLA authorized arrests without achieving the basic safeguards that the conventional criminal proceedings under the CrPC permitted.[34] Unlike the other laws in place, there is no system to register the FIR in the PMLA, and thus, there is no way for an accused individual to know the specifics of the case that was being brought against him. If section 19 had to be preserved, the court would have to rule that the detained individual was entitled to a copy of the ECIR, as it includes the same information as the FIR; the reasons for the arrest, and specifics about the alleged crimes. Without this information, the arrested individual would be unable to effectively defend himself at the bail hearing and may be hampered in his capacity to prepare for trial.[35]

In contrast, the Supreme Court did not identify any such flaw in the provisions about the power of search and arrest. When the latter was the case, the court agreed with the change and decided that it adequately conveyed the legislature's stance toward the seriousness of money laundering. To ensure that the PMLA procedure is not hampered in the case that the scheduled offense is not prosecuted, it made sense to detach it from the prosecution of the scheduled offense. This allowed the ED to take action and then request that the police officers take action as well. Even though the legislation used the term 'investigation' to describe the process of ED, it was fair to interpret it as 'inquiry instead, because the PMLA had several dimensions beyond examining the conduct of crime. Concerning the provisions of PMLA, the court took the stance that comparing the PMLA to a criminal code was inappropriate since it was not a penal statute but a *Sui Generis* law meaning thereby that the law can, according to the Court, overlook several constitutional safeguards including the right against self-incrimination.

[34] *Arnesh Kumar v State of Bihar* (2014) SC 2756
[35] *Youth Bar Association of India v Union of India & Ors* (2016) SC 4136

In this context, it was believed that the PMLA contained several protections that rendered concerns about misuse unfounded: the powers could only be employed by particularly senior officers, with the obligation of recording reasons in writing and transmitting them to a different authority, and by a legal provision penalizing malicious searches or arrests.[36] The court determined that an ECIR in an arrest situation was not an FIR but rather an internal document; nonetheless, the duty under Section 19 to disclose the basis for an arrest satisfied the need to tell the arrested individual of the charges against her.

Wherefore, the effect is that in the present situation, the powers of the ED are not restricted while conducting search and seizure. Meaning thereby that now the ED is empowered by the Act to conduct search and seizure without an FIR and investigation into the predicate offense. Due to this unfettered power in the hands of ED, there is no restriction on them entering any property and conducting a search for the Act. Regarding the investigation into the non-cognizable cases, the ED is not required to hold off on conducting its investigation until a complaint has been brought before the special court. Thus, in the absence of any credible information to conduct the investigation, the ED cannot be granted investigative liberty. The administrative jurisdiction cannot be substituted by the limited monitoring of the adjudicating body, as the latter does not influence the ED, particularly in the case of criminal investigations. There is no judicial oversight in checking the mechanism of the ED and hence it breaches Article 14 as well as 21 of the Indian constitution and is per se opaque, arbitrary, and unjust.

SECTION 45: BAIL JURISPRUDENCE AND STRENGTHENING THE POWERS OF ED

Intermittently, the Supreme Court has time and again firmly defended the fundamental legal principle that 'Bail, not jail' should apply to our criminal justice system[37]. Section 45(1) of the Act[38] sets out the relevant provision of bail for an individual charged with a money laundering offense. It begins with a non-obstante clause, which states that, regardless of what is stated in the CrPC, it is required that, before a person's release on bail or bond, the twin conditions must

[36] Prevention of Money Laundering Act 2002, s 62
[37] *State of Rajasthan, Jaipur v Balchand alias Baliay* (1977) 4 SCC 308
[38] Prevention of Money Laundering Act 2002, s 45(1)

be fulfilled, *firstly,* when a bail application is filed, the public prosecutor must be allowed to file an objection,[39] and *secondly,* if the application is opposed, the opposing party must persuade the court that there are sufficient grounds to believe that the accused is innocent of the charge and is unlikely to commit another crime if released on bail.[40]

This anomalous provision containing twin conditions for bail was taken into consideration recently by the Supreme Court in Nikesh Tarachand Shah v Union of India,[41] wherein the validity of these requirements under Section 45 was referred to a division bench and it was ruled that the provision being in contravention to the Article 14 and 21 of the Constitution it required to be declared unconstitutional. Regarding, the grant of bail, it is a well-established law that crimes punishable with a maximum sentence of seven years require a person to be released on bail,[42] and since Article 21 of the Constitution sets out the liberty which cannot be defeated by any such Act.[43]

Despite being declared as unconstitutional, section 45 could not have been restored through the subsequent amendment of 2018 and 2019 into the Act.[44] However, if a statute or any provision of the Act is found to be unconstitutional, it ought to be regarded as defunct and void, and it could not be restored at a later amendment into the Act that aims to eliminate the constitutional objective, re-enacting it is necessary.[45] Further, the twin conditions are manifestly arbitrary, and these conditions flipped the right to the premise of innocence on its head and incurred severe intrusions into the accused's liberty despite the existence of a clear constitutional position guaranteed by Article 21. Historically, the presumption of innocence which was typically granted to the accused parties under criminal jurisprudence is removed from Section 45 of the PMLA,[46] which was seen as a fundamental aspect of the right to a fair trial in the pre-

[39] Prevention of Money Laundering Act 2002, s 45(1) (*i*)
[40] Prevention of Money Laundering Act 2002, s 45(1) (*ii*)
[41] *Nikesh Tarachand Shah v Union of India* (2018) 11 SCC 1
[42] Code of Criminal Procedure 1973, s 437-439
[43] *Sanjay Chandra v Central Bureau of Investigation* (2012) SC 830
[44] Finance Act 2019
[45] *Saghir Ahmad v State of Uttar Pradesh* (1954) SC 728
[46] Finance Act 2019

constitutional era.[47] Additionally, these rights have also been recognized under the ICCPR,[48] alongside by the Supreme Court in the case of Babu v State of Kerala.[49]

Furthermore, it was observed citing the court's earlier decision in Kartar Singh v State of Punjab[50], wherein the court upheld similar twin conditions for bail under other statutes, including the TADA Act, 1987; the MCOCA Act, 1999; and the NDPS Act, 1985 citing that such stringent conditions are only necessitated in certain types of cases involving terrorist offenses, which, in contrast to the PMLA, constitute an offense that is distinct and incompatible with it.

Under the judgment in Nikesh Tarachand Shah, the flaw recognized in section 45 had been ruled unconstitutional and was modified by the legislature through an Amendment in 2018,[51] in which the language of the clause was modified from *"no person accused of an offense punishable for a term of imprisonment of more than three years under Part A of the Schedule"* to *"no person accused of an offense under the Act"*, meaning thereby that now the requirements of bail set out in Section 45 of the Act will only apply to the cases involving money laundering.

In Vijay Madanlal Case, the bench noted that there is a significant state interest behind having this provision in the statute book in tackling the severity and horrific nature of the crimes related to money laundering, and therefore, it bolstered the constitutional validity of these provisions. Regarding the presumption of innocence when bail is being granted, there are only two possibilities for seeking a review of this judgment, *firstly,* that there is unreasonableness in the Act's twin conditions, and, *secondly,* the implementation of these conditions for the offense of money laundering under the purview of the act is arbitrary and unjustified.

Taking into consideration the first possibility, it could not be examined by a bench of three judges and needs to be directed to a seven-judge bench, as for these twin requirements, it has been previously affirmed by a bench of five judges of the Supreme Court in Kartar Singh's case.[52]

[47] *Attygalle v The King* (1936) PC 169
[48] International Covenant on Civil and Political Rights 1966
[49] *Babu v State of Kerala* (2010) 9 SCC 189
[50] *Kartar Singh v State of Punjab* (1994) 3 SCC 569
[51] Finance Act 2018, s 45
[52] *Kartar Singh v State of Punjab* (1994) 3 SCC 569

However, in the legal system, it is a well-established principle that larger benches, until they can be determined otherwise, have the power to reverse judgments rendered by smaller ones.[53]

In furtherance of the second possibility, to get the relief sought, the petitioner seeking review must persuade the court that there is no significant state interest to justify the Act's application of the twin conditions of the money laundering offense. Considering the grounds for review of a judgment or orders as provided under Article 137 of the Constitution, it seems unlikely that the court would accept such an argument. However, the Supreme Court Rules of 2013 particularly Order 47 Rule 1,[54] outlines the conditions under which a judgment may be reviewed or contested. Moreover, the extent of this kind of error that necessitates examining a judgment has been laid forth by the Supreme Court in a series of decisions.

In the case of '*Sheonandan Paswan v State of Bihar*',[55] the Apex Court held that until an error is not self-evident and necessitated further investigation or justification, it is not an error evident on the face of the record. Furthermore, in the case of '*Lily Thomas v Union of India*',[56] the bench relied on its previous decision in the Sarla Mudgal case wherein it reiterated that the possibility of having two opinions on a similar subject does not provide a basis for reconsidering a prior decision rendered by a bench of similar strength.

After delivering the judgment in Vijay Madanlal, seeking its review, the SC on 25th Aug 2022 issued notice on a review petition.[57] This is a positive development, as the judgment in the Vijay Madanlal case confirmed the ED's Uncanalised discretion to initiate proceedings under the Act even where there is neither act nor intention to project tainted funds as untainted. Further, the arguments presented by the petitioners in the Vijay Madanlal case concerning the twin conditions have been considered by the court at length, however, it is unclear that the review petitioner will be successful unless he or she can convince the court of a manifest and patent error in the earlier judgment. Given the fact that the review petitioner wants a distinct view to

[53] *State of Uttar Pradesh v Ram Chandra Trivedi* (1976) AIR 2547
[54] Supreme Court Rules 2013
[55] *Sheo Nandan Paswan v State of Bihar* (1983) 1 SCC 438
[56] *Lily Thomas Etc v Union of India & Ors* (2000) 6 SCC 224
[57] *Karti P. Chidambaram v The Directorate of Enforcement* R P Crl No 000219/2022

be made is not sufficient to bring the case within the ambit of 'error apparent on the face of the record.' Thus, the order allowing the petitioner for judicial consideration appears to be misguided and a squander of time. The only option left for the SC is to create or appoint a larger bench for evaluating the legality of the provisions of the PMLA and the procedure followed by the ED.

SUI GENERIS LEGISLATION: PMLA'S DEFIANCE OF THE REQUIREMENTS OF CRPC

The CrPC being a procedural law governs the criminal machinery in a state regarding police investigations, detection and arrest of alleged offenders or suspects, evidence collection, trial, and enforce appropriate penalties.[58] The various provisions, including those governing the applicability of the CrPC to the PMLA, are outlined in Chapter 10 of the PMLA. Being a special law, the Act might have stipulated its processes for proceedings under it, apropos, it only addresses a few procedural aspects.

According to Section 65 of the Act,[59] all arrests, searches, seizures, attachments, confiscations, investigations, prosecutions, and other processes under the PMLA shall apply, subject to the requirements of CrPC unless they are inconsistent with the requirements of the Act. To this, section 4 of the CrPC also becomes relevant for establishing whether the provisions of the CrPC apply to the PMLA.[60] Perhaps, the harmonious reading between section 65 of the PMLA and section 4 of the CrPC reveals that the procedure as provided in Chapter 12 of the CrPC, would be applicable under the PMLA barring the required modifications as provided by the Act.[61] Although the PMLA includes provisions controlling the ED's ability to arrest and the Special Court's authority to issue bail,[62] there are no specific provisions about how the ED must conduct its investigation.[63]

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[58] KN Chandrasekharan Pillai, *R V Kelkar's Criminal Procedure* (6th edn, Eastern Book Company 2014)
[59] Prevention of Money Laundering Act 2002, s 65
[60] Code of Criminal Procedure 1973, s 4
[61] *Gautam Kundu v Directorate of Enforcement* (2015) 16 SCC 1
[62] Prevention of Money Laundering Act 2002, s 46
[63] Prevention of Money Laundering Act 2002, s 2

To fall under the iniquity of Section 3 of the Act, the presence of the predicate offense is a de rigor requirement for classifying the assets as 'Proceeds of Crime' under the PMLA.[64] The umbrage of the criminalization of money laundering is not separate, since its very inception, its commission depends upon the criminal proceeds of the associated predicate offense. That being so, for the commission of a money laundering offense: *first,* there must be an occurrence of the predicate offense thereby producing proceeds from the crime or tainted assets from it, and then *secondly,* such person (or even a third person) directly or indirectly projects such proceeds as untainted, 'launders' the said proceeds violating section 3 of the PMLA.

Concerning the predicate offense, generally, the investigation is carried out by the police in the manner provided by the CrPC. However, in the case of some specific offense, the investigation is carried out by special authorities which have the exclusive power as conferred by the statute that provides for *sui generis* arrangement for the investigation procedure.[65] Against this background, it is *sine qua non* to mention that under the PMLA Act, the investigative authority rests in the exclusive realm of the ED.[66] Unfortunately, Chapter 12 of the CrPC is not being ensured by the ED and thus, there are no overarching principles to govern investigation, no set of rules, or guiding concepts that must be followed. For that reason, the investigation carried out by the ED suffers from the constitutional bulwark of Article 14 as it hampers the liberty of the citizen being investigated.[67]

Thus, considering this, the question that needs to be emphasized is the application of CrPC to PMLA. Of the peculiarity of the issues and the obscurity of the available precedents to the larger debate concerning the interplay between the CrPC and the PMLA, finding the panacea in judicial opinions regarding the issue is useless. Therefore, it is of utmost importance to thrust upon the interpretive part of this legal dilemma.

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[64] *P. Chidambaram v Directorate of Enforcement* (2019) AIR 2019 SC 4198

[65] *Binod Kumar v State of Jharkhand* (2011) 11 SCC 463; *Rakesh Manekchand Kothari v Union of India* (2015) SCC Guj 3507; *Usha Agarwal v Union of India* (2007) 1 SCC 295

[66] Shree Shishya Mishra and Aishwarya Surana, 'Financial Crimes: Disturbing the Ease of Doing Business in India' (2018) 5(2) RGNUL Financial and Mercantile Law Review 285

[67] *E P Royappa v State of Tamil Nadu* (1974) 4 SCC 3; *S G Jaisinghani v Union of India* (1967) 2 SCR 703; *Nikesh Tarachand Shah v Union of India* (2018) 11 SCC 1

FINDING JUDICIAL COHERENCE IN INTERPRETATIVE VAGUENESS OF CRPC'S BEARING ON THE PMLA

In 'Hari Narayan Rai v Union of India'[68] the petitioner asserted that since his remand the ED had failed to file the police report before the 60 days and therefore, according to section 167 of CrPC he is entitled to be conditionally released on bail.[69] This was the first case wherein the Jharkhand High Court considered the extent of CrPC's applicability to the PMLA. Considering the Special Court's power to release the accused on bail,[70] the key concern that came up to the High Court pertains to the applicability of Section 167 of CrPC to PMLA. Wherefore in this regard, it ruled rejecting the accused's application that the special court could take cognizance upon the filing of the complaint by the ED and it is not required to wait until the police report or charge sheet is filed. Moreover, the application of section 167 of the CrPC was inapplicable for the release of the accused on bail under the PMLA due to the different conditions being prescribed for section 45.

Next, the Gujarat HC in the case of Rakesh Manekchand Kothari v Union of India[71] canvassed the same issue. Barring which the petitioner placed reliance upon the landmark judgment of the Constitution bench's decision in Lalita Kumari v Govt of UP,[72] wherein they argued that ED must follow all of the requirements of CrPC Chapter 12 since in Lalita Kumari, the court had emphasized the importance of Article 21 of the constitution which guarantees protection for those who have been wrongfully accused in the crime. Accordingly, the Gujarat High Court determined that the safeguards of the CrPC would apply to the investigation carried out by the ED in the sense that if it is cognizable, it must adhere to Sections 154, 157, 167, and 172 of the CrPC; however, if it is not cognizable, it must adhere particularly to sections 155, 167, and 172.

[68] *Hari Narayan Rai v Union of India* (2010) SCC Jhar 475
[69] *Dinesh Dalmia v CBI* (2007) 8 SCC 770; *Pratapbhai Hamirbhai Solanki v State of Gujarat* (2013) 1 SCC 613; *Vipul Shital Prasad Agarwal v State of Gujarat* (2013) 1 SCC 197
[70] Prevention of Money Laundering Act 2002, s 45
[71] *Rakesh Manekchand Kothari v Union of India* (2015) 3 SCC 409
[72] *Lalita Kumari v Govt of UP* AIR (2012) SC 1515

This similar question was again considered by the division bench in Karam Singh v Union of India.[73] In this again the same arguments were moved to the bench but this time, Justice GS Sandhawalia writing for the Court rejected the safeguards provided by the SC in the case of Lalitha Kumari and refused to go with the Gujarat HC's judgment while observing that the order is interim in nature and bears no precedential value. To hold this reasoning, Justice Sandhawalia held that CrPC's procedure as laid down in Chapter 12 governs the police and not the ED's power of investigation, giving an analogy that ED officers are not police officers; hence, he considered that CrPC had no application to the PMLA. Unfortunately, the Bombay HC in Chhagan Chandrakant Bhujbal v Union of India opined to the reasoning of Justice Sandhawalia's decision.[74]

The ratiocination of Justice Sandhawalia in my opinion is unequivocally fallacious. Undoubtedly, the parliament while enacting section 65 of the PMLA was conscious of the fact that the police's power to investigate the case was provided in Chapter 12 of the CrPC, regardless of this the parliament went ahead and extended CrPC provisions governing investigation to the PMLA until and unless it is inconsistent with the Act. However, Chapter 12 of the Code ought to be applied as *mutatis mutandis* even though the PMLA does not specify how the ED's investigation must proceed.

Post the decision of Chhagan Chandrakant Bhujbal, the Delhi HC's division bench in Gurucharan Singh v Union of India[75] released an accused on bail in a money laundering case, ruling that the ED had infringed the accused's fundamental rights by failing to follow the procedure outlined in Chapter 12 of the CrPC. The Court unequivocally remarked that despite more than 6 months of their arrest, the accused have been detained without having their names mentioned in the ECIR, for which, the Court said contemptuously that the detention was in flagrant violation of the provisions specified in the CrPC. In doing so, the Court regarded that

[73] *Karam Singh v Union of India* (2015) SCC P&H 19739
[74] *Chaggan Chandrakant Bhujbal v Union of India* (2016) Bom 9938
[75] *Gurucharan singh v Union of India* (2016) SCC Del 2493

an ECIR under PMLA is analogous to an FIR under CrPC. This ratio contradicted the rulings of the Bombay, Jharkhand, Punjab, and Haryana High Courts.

Following this case, the subject was again brought before the Supreme Court of India for consideration in the matter of Ashok Munilal Jain v Asst Director, Directorate of Enforcement.[76] Unfortunately, the Court's analysis was limited to whether or not section 167 CrPC applies to bail for PMLA violations. A decision was made by a bench consisting of Justices Ashok Bhushan and AK Sikri, that a person detained on the umbrage of money laundering has the right to bail if the ED fails to submit a complaint within 60 days under Section 167 of CrPC. The bench has not gone into the broader interpretation of CrPC's application. As a result of this, the reasoning which was made in the Karam Singh case by J. Sandhawalia appears to have been rejected here; had it been followed, the application of section 167 of CrPC can never be applied in PMLA cases as it only deals with investigations by the police and not the ED.

Most recently, in a batch of petitions before the SC, the petitioners in the Vijay Madanlal case raised concerns regarding the constitutional mandate on the validity and interpretation of certain provisions of the PMLA and the procedure followed by the ED. The PMLA's procedural analogy to Chapter 12 of the CrPC was one of the several issues examined by the three-judge panel. One would have assumed, in light of the preceding discussion on the PMLA's relationship to the CrPC, that other sections of the CrPC (including Chapter 12) would also apply to the ED's investigation procedure. But confidence in that prospect eroded when the bench persisted in drawing a line between the CrPC and the PMLA, ignoring the principles it had established in previous rulings. As long as the case is trapped in court ambiguity and uncertainty, the appalling prospect of ED abuse of authority will hover over questions of fairness and natural justice under the PMLA like a Sword of Damocles.

CONCLUSION

The PMLA's harsh restrictions were upheld by the Supreme Court, although this has the unintended consequence of undermining key constitutional safeguards against executive

[76] *Ashok Munilal Jain v Assistant Director, Directorate of Enforcement* (2018) 16 SCC 158

overreach. For its part, the bench led by Justice A.M. Khanwilkar upheld the ED's power under the PMLA, finding that the PMLA's stringent provisions for search, seizure, attachment and arrest are constitutional and bereft of arbitrary decision-making. As a result of departing from accepted legal standards and guidelines that the court had previously set in decisions, several of the PMLA's provisions have drawn scathing criticism. Thus, it is still hoped that in the future the court would take serious measures to correct this unambiguous mistake and ameliorate some of the PMLA's harsh provisions.

Due to the expansive breadth and stringent nature of its provisions, it would be ideal for at least seven judges to sit to consider this matter. For benches with just two or three judges, the problem of judges being assigned based on their personal preferences and ideologies would be an inevitable reality. The decision in the Vijay Madanlal case was a chance to trim and dump the unreasonable provisions giving extraordinary powers to the ED, and keep it from turning into another controversial law; however, for the time being, the court has authorized this outcome.