

# **Jurisprudence of PMLA under CrPC, IPC, Indian Evidence Act & other Acts**

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# Jurisprudence

- Overview of the following laws with respect to Anti Money Laundering Compliances & Procedures
  - Code of Criminal Procedure, 1973
  - Civil Procedure Code, 1908
  - The Indian Evidence Act, 1872
  - Indian Penal Code, 1860

# Prevention of Money Laundering Act, 2002 (PMLA)

- PMLA is an Act of the Parliament of India enacted by the government to prevent money-laundering and to provide for confiscation of property derived from money-laundering.
- PMLA and the Rules notified there under came into force with effect from July 1, 2005.
- The Act and Rules notified there under impose obligation on banking companies, financial institutions and intermediaries to verify identity of clients, maintain records and furnish information in prescribed form to Financial Intelligence Unit - India (FIU-IND).
- The act was amended in the year 2005, 2009 and 2012.

# Objectives

The PMLA seeks to combat money laundering in India and has three main objectives:

- To prevent and control money laundering
- To confiscate and seize the property obtained from the laundered money; and
- To deal with any other issue connected with money laundering in India

# Key Terms

- **Attachment:** Prohibition of transfer, conversion, disposition or movement of property by an appropriate legal order.
- **Proceeds of crime:** Any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence.
- **Money-laundering:** Whosoever directly or indirectly attempts to indulge or assist other person or actually involved in any activity connected with the proceeds of crime and projecting it as untainted property.
- **Payment System:** A system that enables payment to be effected between a payer and a beneficiary, involving clearing, payment or settlement service or all of them. It includes the systems enabling credit card, debit card, smart card, money transfer or similar operations

# Punishment

- The act prescribes that any person found guilty of money-laundering shall be punishable with rigorous imprisonment from three years to seven years and where the proceeds of crime involved relate to any offence under paragraph 2 of Part A of the Schedule (Offences under the Narcotic Drugs and Psychotropic Substance Act, 1985), the maximum punishment may extend to 10 years instead of 7 years.

# Presumption in inter-connected transactions

Where money laundering involves two or more inter-connected transactions and one or more such transactions is or are proved to be involved in money laundering, then for the purposes of adjudication or confiscation, it shall be presumed that the remaining transactions form part of such inter-connected transactions.

# Financial Intelligence Unit – India (FIU-IND)

- Financial Intelligence Unit – India (FIU-IND) was set by the Government of India on 18 November 2004 as the **central national agency** responsible for receiving, processing, analyzing and disseminating information relating to suspect financial transactions.
- FIU-IND is also responsible for coordinating and strengthening efforts of national and international intelligence, investigation and enforcement agencies in pursuing the global efforts against money laundering and related crimes.
- FIU-IND is an independent body reporting directly to the Economic Intelligence Council (EIC) headed by the Finance Minister.

# Code of Criminal Procedure, 1973

- The Code of Criminal Procedure (CrPC ) is the main legislation on procedure for administration of substantive criminal law in India.
- It was enacted in 1973 and came into force on 1 April 1974.
- It provides the machinery for the investigation of crime, apprehension of suspected criminals, collection of evidence, determination of guilt or innocence of the accused person and the determination of punishment of the guilty.
- Additionally, it also deals with public nuisance, prevention of offences and maintenance of wife, child and parents.
- At present, the Act contains 484 Sections, 2 Schedules and 56 Forms. The Sections are divided into 37 Chapters.

# Section 5 of Cr P C

- Section 5 of the Code of Criminal Procedure, 1973 clearly lays down that the provisions of the Code of Criminal Procedure will not affect any special statute or any local law.
- In other words, the provisions of any special statute will prevail over the general provisions of the Code of Criminal Procedure in case of any conflict.

# Overriding Title

- There is no doubt that the conditions laid down under Section 45A of the PMLA, would bind the High Court as the provisions of special law having overriding effect on the provisions of Section 439 of the Code of Criminal Procedure for grant of bail to any person accused of committing offence punishable under Section 4 of the PMLA, even when the application for bail is considered under Section 439 of the Code of Criminal Procedure.
- Gautam Kundu Vs Manoj Kumar ( SC) 2016 CRLJ 666

# Section 45 of PMLA

- Section 45 of PMLA makes the offence of money laundering cognizable and non-bailable and also provides that notwithstanding the provisions of Criminal Procedure Code, 1973, no person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule shall be released on bail or on his own bond, unless the Public Prosecutor has been given an opportunity to oppose the application for such release

# Section 45 of PMLA

- Section 45 of the PMLA imposes following two conditions for grant of bail to any person accused of an offence punishable for a term of imprisonment of more than three years under Part-A of the Schedule of the PMLA: (i) That the prosecutor must be given an opportunity to oppose the application for bail;
- (ii) That the Court must be satisfied that there are reasonable grounds for believing that the accused person is not guilty of such offence and that he is not likely to commit any offence while on bail.

# Rajbhushan Omprakash Dixit (Background)

- Director of Sterling Biotech Limited (Rs 5383 Crores outstanding to banks)
- During the income tax raid various documents were stated to have been
- seized. The documents are said to have revealed that —huge amount of cash had been given to various government servants.|| Following this the Central Bureau of Investigation (CBI) registered an FIR on 30th August 2017 for commission of offences under Section 13 (2) read with Section 13 (1) (d) of the Prevention of Corruption Act, 1988 (PC Act) read with Section 120 B of IPC.
- Since the offences were also those mentioned in the Schedule to the Prevention of Money Laundering Act, 2002 (PMLA), the DOE recorded an Enforcement Case Information Report (ECIR)

# Background of Case (Dixit)

- Dixit moved a writ of habeas corpus for his release and sought a declaration that issuance of a non-bailable warrant, his arrest pursuant thereto and the consequent remand orders passed by the Additional Sessions Judge, (PMLA) is without the authority of law and in violation of Articles 14, 21 and 22 of the Constitution of India ( D K Basu (1 SCC 416)).

# Rajbhushan Omprakash Dixit

- Are the offences under the Prevention of Money Laundering Act (PMLA) cognizable or non cognizable?
- Do the provisions of Chapter XII CrPC (information to the police and their powers to investigate) apply to PMLA insofar as the offences under the PMLA?
- A division bench of the Delhi High Court in Feb, 2018 has referred these questions and some others to the Chief Justice of high court to be placed before a larger bench for answers

# Procedure to be followed

- If the offences under the PMLA were non-cognizable, compliance with the procedure under Section 155 (1) Cr PC was mandatory but not followed in the instant case.
- The investigation could not have commenced except upon information being entered in a book, and the informant being referred to the competent Magistrate.
- Further, no order for investigation into such non-cognizable offence was obtained from the Magistrate as mandated by Section 155 (2) Cr PC.
- No application was filed before the Magistrate under Section 155 (3) Cr PC for issuance of a warrant of arrest in a non-cognizable case.

# Procedure to be followed

- The corresponding procedure of entering the substance of such information in a book as mandated by Section 154 Cr PC,
- Forwarding a report to the Magistrate empowered to take cognisance as mandated by Section 157 Cr PC,
- Maintaining a case diary in a duly paginated volume entering therein the day-to-day proceedings in the investigation and other material particulars as mandated by Section 172 Cr PC and
- Producing such case diary before the Magistrate upon arrest of the accused as mandated by section 167 Cr PC had to be followed.
- In the present case, that procedure was not followed either.
- This is expressly recognised and acknowledged by Section 65 of PMLA.
- It is, therefore, not open to the ED to choose to not follow the Cr PC in an area where the PMLA is silent.

# Chapter XII of Cr PC has to be followed

- Ashok Munilal Jain v. Assistant Director, DoE
- DoE v. Deepak Mahajan 1994 (3) SCC 440
- Om Prakash v. Union of India (2011) 14 SCC 1.
- Asmita Agarwal v. Enforcement Directorate ILR (2001) II Del 643 and of the learned Single Judge of the Kerala High Court in M.K. Ayoob v. Superintendent, Customs Intelligence Unit, Cochin 1984 CrI LJ 949 .

# Vakamulla Chandrashekhar

- Vakamulla Chandrashekhar matter, a coordinate bench of the high court had held that even post amendment, Section 45 of the PMLA Act was cognizable
- The instant bench was also of the view that whether the offences under the PMLA were cognizable or non-cognizable, the CrPC has to be followed
- Since the bench was of the view that the decision of the coordinate bench in Vakamulla Chandrashekhar v Enforcement Directorate required reconsideration, it referred the questions to a larger bench

# NBW Argument (Dixit)

- The trial Court erroneously issued the NBW at the very first instance without first issuing summons followed by bailable warrant.
- The order directing issuance of NBW straight away was in the teeth of the decision of
- The Supreme Court in *Inder Mohan Goswami v. State of Uttaranchal* (2007) 12 SCC 1.

# NBW Argument (Dixit)

- If the offence is non-cognizable the procedure under Sections 155, 167 (1) and 172 of Cr PC would have to be followed.
- The law in this regard has further been made clear in the decisions of the Supreme Court in Deepak Mahajan and Om Prakash v. Union of India and of Delhi High Court in Asmita Agarwal

# Argument (Dixit)

- That offences under Section 3 PMLA were non-cognizable as was evidenced by the PMLA Amendment Act of 2005 by which Section 45 of the PMLA stood amended with effect from 1st July 2005.
- The failure to amend the heading of Section 45 of PMLA to bring it in line with the amendment was perhaps inadvertent

# Argument (Dixit)

- Dixit also referred to the Statement of Objects and Reasons (SOR) for the 2005 Amendment and the Lok Sabha Debates during which the Finance Minister explained the reason for making the offences under the PMLA non-cognizable
- He argued that non-communication of the grounds of arrest either at the time of arrest or immediately thereafter was in violation of Section 19 of the PMLA.

# Arrest

- Section 19 PMLA requires certain conditionalities to be fulfilled prior to the arrest read with the relevant PML Arrest Rules and Form III.
- In particular the reasons to believe have to be recorded in writing in the file.
- The second aspect of Section 19 of PMLA is the communication of the grounds of arrest.
- Although Section 19 uses the word “inform” in the context in which it appears a mere communication of the grounds would not suffice.
- Merely reading out the grounds of arrest to the detenu would defeat the very object of requiring the reasons to believe to be recorded in writing and communicated to the detenu.
- C.B. Gautam ( SC) & D.K. Basu v. State of West Bengal (SC)

# Guntaiah v Hambamma

- Side notes cannot be used as an aid to construction.
- They are mere catchwords and I ( Supreme Court) have never heard... that an amendment to alter a side note could be proposed in either House.
- So side notes cannot be said to be enacted in the same sense as the long title or any part of the body of the Act
- (2005) 6 SCC 228

# Nikesh Tarachand Shah v. Union of India

- Supreme Court has in its decision dated 23rd November 2017 in W.P. No. 67 of 2017
- The Supreme Court struck down the restrictive conditions in Section 45 (1) PMLA as regards the grant of bail to be unconstitutional.

# Section 65 & 71 of PMLA

- Section 65 requires that the provisions of Cr.P.C. shall apply in so far as they are not inconsistent with the provisions of this Act and Section 71 provides that the provisions of the PMLA shall have overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.
- PMLA has an overriding effect and the provisions of Cr.P.C. would apply only if they are not inconsistent with the provisions of this Act.

# Section 24 of PMLA

- The provisions of Section 24 provides that unless the contrary is proved, the Authority or the Court shall presume that proceeds of crime are involved in money laundering and the burden to prove that the proceeds of crime are not involved, lies on the appellant.

# Article 21 of the Constitution of India

- *No person shall be deprived of his life or personal liberty except according to a procedure established by law*
- Article 21 can only be claimed when a person is deprived of his “life” or “personal liberty” by the “State” as defined in Article 12. Violation of the right by private individuals is not within the preview of Article 21.

# Code of Civil Procedure, 1908

- The Code of Civil Procedure, 1908 is a procedural law related to the administration of civil proceedings in India.
- The Code is divided into two parts: the first part contains 158 sections and the second part contains the First Schedule, which has 51 Orders and Rules.
- The sections provide provisions related to general principles of jurisdiction whereas the Orders and Rules prescribe procedures and method that govern civil proceedings in India.

# PMLA & CPC

The Director shall, for the purposes of section 13, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:

- (a) discovery and inspection;
- (b) enforcing the attendance of any person, including any officer of a banking company or a financial institution or a company, and examining him on oath;
- (c) compelling the production of records;
- (d) receiving evidence on affidavits;
- (e) issuing commissions for examination of witnesses and documents; and
- (f) any other matter which may be prescribed.

# PMLA & CPC

The Adjudicating Authority shall, for the purposes of PMLA, have the same powers as are vested in a civil court under the Code of civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:

- (a) discovery and inspection;
- (b) enforcing the attendance of any person, including any officer of a banking company or a financial institution or a company, and examining him on oath;
- (c) compelling the production of records;
- (d) receiving evidence on affidavits;
- (e) issuing commissions for examination of witnesses and documents; and
- (f) any other matter which may be prescribed.

# PMLA & CPC

- The Adjudicating Authority shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908, (5 of 1908) but shall be guided by the principles of natural justice and, subject to the other provisions of PMLA, the Adjudicating Authority shall have powers to regulate its own procedure.

# PMLA & CPC

- The Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908) but shall be guided by the principles of natural justice and, subject to the other provisions of PMLA, the Appellate Tribunal shall have powers to regulate its own procedure.

# PMLA & CPC

The Appellate Tribunal shall have, for the purposes of discharging its functions under PMLA, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit, in respect of the following matters, namely:—

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavits;
- (d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or copy of such record or document from any office;
- (e) issuing commissions for the examination of witnesses or documents;
- (f) reviewing its decisions;
- (g) dismissing a representation for default or deciding it ex parte;
- (h) setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and
- (i) any other matter, which may be, prescribed by the Central Government.

# The Indian Evidence Act, 1872

- The Indian Evidence Act, originally passed in India by the Imperial Legislative Council in 1872, during the British Raj, contains a set of rules and allied issues governing admissibility of evidence in the Indian courts of law.

# PMLA & The Indian Evidence Act, 1872

The Appellate Tribunal shall have, for the purposes of discharging its functions under PMLA, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit, in respect of the following matters, namely

- subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or copy of such record or document from any office;

# Section 123 of Indian Evidence Act

- No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

# Section 124 of Indian Evidence Act

- No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

# Indian Penal Code

- The Indian Penal Code (IPC) is the main criminal code of India.
- It is a comprehensive code intended to cover all substantive aspects of criminal law.
- The code was drafted in 1860 on the recommendations of first law commission of India established in 1834 under the Charter Act of 1833 under the Chairmanship of Thomas Babington Macaulay.
- It came into force in British India during the early British Raj period in 1862.
- However, it did not apply automatically in the Princely states, which had their own courts and legal systems until the 1940s.
- The Code has since been amended several times and is now supplemented by other criminal provisions.
- After the partition of the British Indian Empire, the Indian Penal Code was inherited by its successor states, the Dominion of India and the Dominion of Pakistan, where it continues independently as the Pakistan Penal Code.

# PMLA & IPC

Power regarding summons, production of documents and evidence, etc

- Every proceeding under this section shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code (45 of 1860).

# Section 193 of IPC

- Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine, and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine

# Section 228 of IPC

- Whoever intentionally offers any insult, or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

# PMLA & IPC

- The Director, Additional Director, Joint Director, Deputy Director or Assistant Director shall have power to summon any person whose attendance he considers necessary whether to give evidence or to produce any records during the course of any investigation or proceeding under this Act.
- All the persons so summoned shall be bound to attend in person or through authorised agents, as such officer may direct, and shall be bound to state the truth upon any subject respecting which they are examined or make statements, and produce such documents as may be required

# PMLA & IPC

## Procedure and powers of Appellate Tribunal

- All proceedings before the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code, 1860 (45 of 1860) and the Appellate Tribunal shall be deemed to be a civil court for the purposes of sections 345 and 346 of the Code of Criminal Procedure, 1973 (2 of 1974).

# PMLA & IPC

- Members, etc., to be public servants.—The Chairperson, Members and other officers and employees of the Appellate Tribunal, the Adjudicating Authority, Director and the officers subordinate to him shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code, 1860 (45 of 1860).

# SCHEDULE OFFENCES UNDER THE INDIAN PENAL CODE, 1860

- Section & Description of offences
  - 120B Criminal conspiracy.
  - 121 Waging or attempting to wage war or abetting waging of war, against the Government of India.
  - 121-A Conspiracy to commit offences punishable by section 121 against the State.
  - 255 Counterfeiting Government stamp.
  - 257 Making or selling instrument for counterfeiting Government stamp.

# OFFENCES UNDER THE INDIAN PENAL CODE, 1860

- Section & Description of offences
  - 258 Sale of counterfeit Government stamp.
  - 259 Having possession of counterfeit Government stamp.
  - 260 Using as genuine a Government stamp known to be counterfeit.
  - 302 Murder.
  - 304 Punishment for culpable homicide not amounting to murder.
  - 307 Attempt to murder.
  - 308 Attempt to commit culpable homicide.
  - 327 Voluntarily causing hurt to extort property, or to constrain to an illegal act.

# OFFENCES UNDER THE INDIAN PENAL CODE, 1860

## Section & Description of offences

- 329 Voluntarily causing grievous hurt to extort property, or to constrain to an illegal act.
- 364A Kidnapping for ransom, etc.
- 384 to 389 Offences relating to extortion.
- 392 to 402 Offences relating to robbery and dacoity.
- 411 Dishonestly receiving stolen property.
- 412 Dishonestly receiving property stolen in the commission of a dacoity.

# OFFENCES UNDER THE INDIAN PENAL CODE, 1860

## Section & Description of offences

- 413 Habitually dealing in stolen property.
- 414 Assisting in concealment of stolen property.
- 417 Punishment for cheating.
- 418 Cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect.
- 419 Punishment for cheating by personation.

# OFFENCES UNDER THE INDIAN PENAL CODE, 1860

## Section & Description of offences

- 420 Cheating and dishonestly inducing delivery of properties.
- 421 Dishonest or fraudulent removal or concealment of property to prevent distribution among creditors.
- 422 Dishonestly or fraudulently preventing debt being available for creditors.
- 423 Dishonest or fraudulent execution of deed of transfer containing false statement of consideration

# OFFENCES UNDER THE INDIAN PENAL CODE, 1860

## Section & Description of offences

- 424 Dishonest or fraudulent removal or concealment of property.
- 467 Forgery of valuable security, will etc
- 471 Using as genuine a forged document or electronic record.
- 472 and 473 Making or possessing counterfeit seal, etc., with intent to commit forgery.
- 475 and 476 Counterfeiting device or mark.
- 481 Using a false property mark.

# OFFENCES UNDER THE INDIAN PENAL CODE, 1860

## Section & Description of offences

- 482 Punishment for using a false property mark.
- 483 Counterfeiting a property mark used by another.
- 484 Counterfeiting a mark used by a public servant.
- 485 Making or possession of any instrument for counterfeiting a property mark.
- 486 Selling goods marked with a counterfeit property mark.

# OFFENCES UNDER THE INDIAN PENAL CODE, 1860

## Section & Description of offences

- 487 Making a false mark upon any receptacle containing goods.
- 488 Punishment for making use of any such false mark.
- 489 A Counterfeiting currency notes or bank notes.
- 489 B Using as genuine, forged or counterfeit currency notes or bank notes.

## B. Rama Raju v. Union of India

- The money laundering transaction involves three stages which have been held to be quintessential ingredients of money laundering by High Court of Andhra Pradesh in **B. Rama Raju v. Union of India**, MANU/AP/0125/2011 / [2011] 164 Comp Cas 149 (AP)]

# B. Rama Raju v. Union of India

- (i) **The Placement Stage:** the malfeasant, who is holding the money generated from criminal activities, places the crime money into the normal financial system;
- (ii) **The Layering Stage:** the money introduced into the financial system is layered-spread out into several transactions within the financial system with a view to concealing the origin of the original identity of the money and to make this origin/identity virtually disappear; and
- (iii) **The Integration Stage:** the money is thereafter integrated into the financial system in such a way that its original association with crime is totally obliterated and the money could be used by the malfeasant and/or the accomplices to get it as untainted/clean money.

# **Release Of Property Attached Under PMLA: Where Proceeds Of Crime Is Not Established In Trial**

- In the matter of P. Vijayalakshmi Vs. The Deputy Director Enforcement Directorate Bangalore
- The issue before the PMLA Appellate Tribunal was whether a property shall be attached as proceeds of crime if the scheduled offences under which one is charged for having proceeds of crime is not established after the trial?

# P. Vijayalakshmi Vs. The Deputy Director Enforcement Directorate Bangalore

- The Adjudicating Authority has to consider if there is a case of money laundering and whether the property being attached is involved in money laundering.
- The Adjudicating Authority held that the husband of the Appellant has been involved in five criminal cases of various offences punishable under sections 399 and 402 of IPC along with offences under Arms Act.
- Thus he is involved in the cases in which some of the sections the applied against him are scheduled offences under the PMLA.

# P. Vijayalakshmi Vs. The Deputy Director Enforcement Directorate Bangalore

- It was also further stated that the cases cited by the respondent wherein the appellants husband had been the accused, all the decisions were taken in favour of the appellants husband thereby acquitting him.

# P. Vijayalakshmi Vs. The Deputy Director Enforcement Directorate Bangalore

- In the facts and circumstances, the above noted appeal was allowed and the impugned order attaching the property were set aside and the property as described herein above was released from attachment.
- It was directed that incase the possession of the property has been taken by the ED, the same is restored to the appellant forthwith along with any consequential benefit, if accrued and possessed by the respondent.

# SECTIONS INVOLVED:

- Arms Act 1959 – section 25, 30
- Code of Criminal Procedure 1973 (CrPC) – Section 173
- Indian Penal Code 1869 (IPC) – 399, 402
- Prevention of Money Laundering Act 2002 – Section 2(1), 3, 50(2) and 8(5).

# **Mahanivesh Oils & Foods Pvt. Ltd. vs. Directorate of Enforcement**

- That there cannot be any question of attachment of the property under Section 8(5) of the PMLA as the petitioner cannot be prosecuted under the provisions of the PMLA for the offence of money laundering since the date of commission of the offence is prior to the date when the PMLA came into force, i.e., 01.07.2005

# Section 4 & Hasan Ali Khan

- The provisions of Section 4 of PMLA providing for punishment for offence of money laundering are not retrospective in nature in as much as the charge of offence punishable under the Act cannot be levelled for transactions of projecting the proceeds of crime as an untainted property before the commencement of the Act.
- Hon'ble High Court of Bombay while deciding on the criminal bail matter of *Hasan Ali Khan*, held that a person cannot be prosecuted for an offence committed before the enactment of the Act.

# Hasan Ali Khan

- Hasan Ali Khan S/o. Ghousudin Ali Khan vs. Union of India (UOI), Thru' Asst. Director, Directorate of Enforcement and Anr., 2012 *BomC R(C ri)807*, has held that the offence of money laundering is not a continuing offence and once, proceeds of crime has been projected as ‘untainted property”, the offence of money laundering is over.

# Gautam Khaitan and Anr v. Union of India

- That there is no fetter on the officer concerned in exercising his powers of provisional attachment qua such persons, prior to the filing of a charge sheet with a competent court qua scheduled offences under section 173 of the Cr.P.C., as long as he has reasons to believe, on the basis of material in his possession, that if the property, which is involved in money laundering, is not attached immediately, the non-attachment could lead to frustration of proceedings under the Act

# Gautam Khaitan and Anr. v. Union of India

- Adjustment between clause (1) and (5) of section 5 of PMLA lays down that though the provisional order of attachment is valid for 180 days, it is required by the designated/ authorized officer to file a complaint before the Adjudicating Authority within a period of 30 days from the date on which the attachment is ordered.
- Thereafter, the Adjudicating Authority issues notice on the said complaint, if it believes that the person has committed an offence under section 3 of the Act within 30 days.

# Gautam Khaitan and Anr. v. Union of India

- Through this notice, the Adjudicating Authority calls upon the addressee to indicate the sources of his income, earning or assets out of which or by means of which he acquired the property so attached along with the evidences, relevant information and other particulars on the basis of which he would prove that the property in question does not attracts the offence of money-laundering

# PMLA – Section 52

- Section 52 of PMLA does provides power to the enforcement directorate to attach the property *suo-moto*, for a maximum period of 180 days, if he on the basis of the material in possession has a reason to believe that a person is in possession of any proceeds of crime and such property or proceeds of crime is likely to be concealed, transferred or dealt in any manner which may frustrate the proceedings relating to confiscation of such property later down the line

# PMLA – Section 5

- Albeit, the First Proviso to Section 5 of the Act provides that an order for attachment, in relation to a scheduled offence, can be made only after a charge sheet has been forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, 1973, or a complaint has been filed by a person, authorized to investigate the offence mentioned in the Schedule, before a magistrate or Court for taking cognizance of the scheduled offence, as the case may be, the Act also empowers the authority to attach property/ proceeds of crime, even before submission of the police charge sheet under section 173 of the Code of Criminal Procedure, if there has been reason to believe that if the property is not attached, it is likely to obstruct any proceeding under the Act.

# Reasons

- The reason to believe must be based on some material or tangible information that aid in formation of such belief, else the whole process is liable to be negated

# Mr. Vijay Mallya

- Properties have been confiscated on the premise that such properties reflect the proceeds of crime made out of a scheduled offence.
- Kingfisher defaulted in repayment of loans worth Rs. 9,091.4 crore to a consortium of banks.
- In such a scenario, complaints, FIRs are filed and registered against Mr. Mallya on account of fraud and/or breach of trust, thereby establishing an offence under the scheduled offences under the Act and hence invoking the provisions of provisional attachment of the property under the Act

# PMLA – Section 5

- The idea behind provisional attachment as prescribed in sub-section (1) of Section 5 of PMLA is to prevent frustration of the criminal proceeds as they might be gradually converted and transformed with a view to inject them in the economy as clean money.
- Before any such damage is done, the urgency of the situation requires the provisional attachment to be made.

# Public Interest

- If an opportunity of hearing is given prior to the attachment, the proceeds of crime may change its hands and form and tracing therefore may become difficult.
- Also, having regard to the exigency of the public interest involved in attaching the property believed to be the proceeds of crime involved in money laundering, the possession of the property is not disturbed

# Principles of Natural Justice?

- The severity of the instant provision is also evident from the fact that Section 5 does not entail the principles of natural justice.
- Section 5 of PMLA, does not specifically provide an opportunity of being heard to the affected person, prior to passing the order of such attachment.
- Such denial of affording an opportunity of hearing is considered as a violation of the principles of natural justice.

# A. Kamarunnisa Ghorl v. The Chairperson, Prevention of Money Laundering

- The Government can always ensure that the proceedings for confiscation are not frustrated by retaining symbolic, legal and constructive possession of the property.
- That once a property is attached and necessary encumbrances are entered in the records of Sub Registrar and once a prohibitive order is also passed, no alienation can take place and therefore the provisions of the Act are not frustrated

# Smt. P. Vijayalakshmi v. Deputy Director, Enforcement Directorate and Adjudicating

## Authority

- When there is an appellate remedy against the substantive order, all subsequent actions of the authority under the statutory provision will remain subject to the result of the decision that would be taken by the appellate authority.
- When the petitioner pleaded that there is a residential house in the property and immediate physical possession of the same would affect her rights, the Court held that the authorities shall retain the constructive possession but shall not physically dispossess them for a period of three weeks till the petitioner files the appeal before the appellate authority

# Section 63 & Providing False Evidence

- Provisions of the PMLA not only penalize and punish the person involved in the process of money laundering, but also provides for penalty and punishment in a scenario, wherein, a person acts maliciously and provide false or incorrect information/ documentation to the Authorities.
- Section 63 of PMLA provides for Punishment in the aforesaid scenario, but is divided into two segments, one providing for the penalty and punishment in a scenario where a person willfully and maliciously provides wrong information and other where the person, though legally bound to state the truth, refuse to answer any questions or sign any statement made by him.

# Deliberate failure

- For deliberate failure to acknowledge the summons issued under Section 50 of PMLA it may result into a simple imprisonment for a term which may extend to six months or fine or both in terms of the provisions of Section 174 of the Indian Penal Code, 1860.
- Scheme of the Section makes it imperative for the authority to give a reasonable opportunity of being heard to the person concerned before imposing any penalty or launching any prosecution proceedings.

# Cognizable Offence

- Any offence in terms of the provisions of Section 3 of PMLA is a cognizable and a non-bailable offence.
- In view of Section 2(c) of the Code of Criminal Procedure 'Cognizable Offence' is an offence for which a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant.
- Thus, if a complaint is made against a person or the police considers that a person is involved in the proceeds of crime and reflecting the same as an untainted property, the said person can be arrested on such suspicion without any requirement of FIR, or warrant.

# Section 45

- Section 45 of PMLA clearly states that notwithstanding the provisions contained in the Code of Criminal Procedure, no police officer shall investigate into an offence under PMLA, unless specifically authorized by the Central Government by a general or special order.
- The provisions of PMLA have given an over-riding effect upon any other law and further explicitly mentions that any provisions of the Code of Criminal Procedure which are inconsistent with the provisions of this Act which deal with attachment, confiscation, investigation and prosecution shall not apply.

# Writ Petitions

- The recent judicial pronouncements, highlight that although, the Hon'ble High Courts are not accepting the Writ Petitions pertaining to attachment of properties, since an alternate remedy is available under the law, however, if the authorities act in an preconceived, arbitrary manner without giving due regard to the evidences on record and the principles of natural justice, Hon'ble Court may act upon its discretionary power under Article 226 of the Act.
- The decision of the Hon'ble High Court shall also depend upon the type of the writ application, being Habeas Corpus, Mandamus, Certiorari, Prohibition and Quo-Warranto.

# Barik Biswas vs Union of India & Ors

- The High Court Dismissed the writ petition and held that *"the action of coming to this Court is premature and therefore, this Court is of the view that since the petitioners have effective and efficacious remedy under PMLA, necessitating institution of the petition by invoking extraordinary jurisdiction of this Court is not appropriate at this stage. If this Court were to enter into the merits of this case at this stage, it would amount to scuttling the statutorily engrafted mechanism i.e. PMLA"*

# A.Kamarunnisa Ghorri and Others

- The High Court accepted the Writ Petition on a limited point, where the Enforcement Directorate and Adjudicating Authority interpreted the law in a way different from the view point of the Hon'ble Court.
- Against the argument of presence of alternate remedy, the Hon'ble Court held that "*in view of the fact that the order of the Appellate Tribunal is ultimately subject to an appeal to this Court under Section 42 of the Act.*
- *By the time the petitioners go before the Appellate Authority and thereafter come up before this Court under Section 42, the petitioners would have long lost possession of their properties"* and hence prejudiced.

# Whirlpool Corpn. v. Registrar of Trade Marks

- Supreme Court in the case of ***Whirlpool Corpn. v. Registrar of Trade Marks***, laid down the triple test for entertaining a writ petition despite availability of the remedy of an appeal in contractual matters i.e., firstly if the action of the respondent is illegal and without jurisdiction, secondly if the principles of natural justice have been violated and thirdly if the petitioner's fundamental rights have been violated

# Special Court

- Scheme of the Act, provides power to a Special Court for trial of offence of Money Laundering as provided in Section 3 read with Section 4 of PMLA.
- Special Court is nothing but Courts of Session which are designated as a Special Court for the purposes of such Act by the Central Government in consultation with the Chief Justice of High Court.

# Special Court

- By virtue of Section 44 of PMLA, the Special Court is entitled to try the offences under Section 3 read with Section 4 of the Prevention of Money Laundering Act as well as the connected scheduled offences.
- Thus, the Special Court shall undertake the trial of the Scheduled Offence along with the offence under the Act.

# A. R. Antulay v. R.S. Nayak & Anr.

- The special Court is a court of original criminal jurisdiction and to make it functionally oriented some powers are conferred by the statute.
- It has to function as a court of original Criminal jurisdiction not being bound by the terminological status description of magistrates or a Court of Sessions except those specifically conferred and specifically denied.
- Under the Code, it will enjoy all powers which a Court of original criminal jurisdiction enjoys save and except the ones specifically denied.

# Hari Narayan Rai v. State of Jharkhand

- The Special Judge empowered under this Act, can try offences under the Prevention of Money Laundering Act along with Scheduled Offences.
- The said power of the Special Court to try an offence under the PMLA along with the scheduled offence was upheld by Jharkhand High Court in one of the matter while discussing the provisions of Section 44 of PMLA.

# Section 47

- The section provide for the appellate and revisionary remedy.
- In terms of the provision of Section 47 of PMLA, the aggrieved party can avail the remedy of appeal to the High Court and the Supreme Court respectively against the orders of the Special Court, in terms of the powers and procedure laid down by Chapter XXIX or Chapter XXX of the Code of Criminal Procedure, 1973.

# Section 47

- Thus, instead of providing a specific procedure, as laid down for the attachment orders passed by the Adjudicating Authority, PMLA provides for the procedure laid down under the Code of Criminal Procedure, 1973 for appeal against the order of the Special Court.

# Jignesh Shah

- In a relief for 63 Moons Technologies Limited, the Bombay high court has stayed an order passed by the enforcement directorate (ED) freezing all demat accounts and investments of the Jignesh Shah-promoted company in the share market
- The court stayed the ED order primarily on the grounds of non-compliance with statutory provisions by the agency ( section 17 of PMLA & 102 of Cr P C)

# Yogesh Mittal

- The ED had arrested Mittal under the PMLA for his alleged role in the illegal conversion of demonetised currency notes worth Rs 51 crore in "connivance" with lawyer Rohit Tandon, a suspended Kotak Mahindra bank manager and another person who acted as the entry operator or illegal fund router
- The Delhi High Court in September 2017 dismissed the bail plea of Yogesh Mittal

# Yogesh Mittal

- He had also contended that he was not named in any scheduled offence listed in the Prevention of Money Laundering Act (PMLA) for him to be arrested under this law.
- Mittal had said that no enforcement case investigation report (ECIR) has been lodged against him and claimed that the ED has not followed the procedure laid down under the Criminal Procedure Code prior to arresting him.

# Kamal Sponge and Steel Power Limited (KSSPL)

- The ED had initiated the investigation in the case on the basis of an FIR registered by the Central Bureau of Investigation (CBI) against KSSPL, its directors and promoters, and others under charges of criminal conspiracy and Prevention of Corruption Act.
- The ED has attached assets worth Rs 32.175 crore of KSSPL in connection with its probe in a coal block allocation case.

# Kamal Sponge and Steel Power Limited (KSSPL)

- The KSSPL while submitting the application of allotment of coal block had misrepresented their net worth and production capacity in order to embellish its claim for the purpose of favourable recommendation for allocation of coal block.
- The Supreme Court on August 25, 2014, had ordered cancellation of allotment of coal blocks including the one allotted to the KSSPL.

# Bitcoins

- Larry Fink, CEO of the investment management company BlackRock, hammered bitcoin
- Bitcoin just shows you how much demand for money laundering there is in the world, It's an index of money laundering. That's all it is
- Fink joins JPMorgan Chase & Co. CEO Jamie Dimon in his disdain for the cryptocurrency. Dimon, who had previously compared bitcoin's rise to the tulip boom and subsequent crash in the 17th century, took shots at bitcoin
- The digital currency hit its all-time high of \$5,856 per coin on 12 October, 2017 and is currently valued at around \$5,400 a coin. Its value has increased by over 450 percent in the past year.
- Others in the finance community on Wall Street and Silicon Valley disagree with Dimon and Fink's assessments. Legendary investor Bill Miller and Josh Brown, CEO of Ritholtz Wealth Management, say they own bitcoin.
- Silicon Valley venture capital gatekeeper Marc Andreessen is also bullish on the currency, saying that he believes it will one day be seen in the same way as the internet.

# Gem & Jewellery

- There is cheer within the gem and jewellery fraternity over the Indian government's decision to take the sector out of anti-money laundering legislation
- The application of PMLA was particularly seen as onerous for compliance, as it mandated customer identification and reporting of all cash transactions.

# Shell Companies

- The government has zeroed in on 5,800 companies suspected to have laundered money after demonetisation, a government statement said , calling it the “tip of the iceberg” of corruption.
- The number was based on data submitted by 13 banks on post-demonetisation transactions by some of the more than 200,000 companies struck off the records of the Registrar of Companies earlier in 2017

# Shell Companies

- Shell firms, though not defined under the Companies Act, are those that have negligible business activity and are used as a front for money laundering and tax evasion.
- Often, these firms meet statutory requirements in letter to remain unnoticed.

# Online Gaming

- Another increasingly common way of laundering money is to use online gaming.
- In a growing number of online games, such as *Second Life* and *World of Warcraft*, it is possible to convert money into virtual goods, services, or virtual cash that can later be converted back into money

# Global Scenario

- The September 11 attacks in 2001, which led to the Patriot Act in the US and similar legislation worldwide, led to a new emphasis on money laundering laws to combat terrorism financing.
- The Group of Seven (G7) nations used the Financial Action Task Force on Money Laundering to put pressure on governments around the world to increase surveillance and monitoring of financial transactions and share this information between countries.
- Starting in 2002, governments around the world upgraded money laundering laws and surveillance and monitoring systems of financial transactions.

# AML

- Anti money laundering regulations have become a much larger burden for financial institutions and enforcement has stepped up significantly.
- During 2011–2015 a number of major banks faced ever-increasing fines for breaches of money laundering regulations.
- This included HSBC, which was fined \$1.9 billion in December 2012, and BNP Paribas, which was fined \$8.9 billion in July 2014 by the US government.
- In 2006, Australia set up the AUSTRAC system and required the reporting of all financial transactions

# Reverse money laundering

- Reverse money laundering is a process that disguises a legitimate source of funds that are to be used for illegal purposes.
- It is usually perpetrated for the purpose of financing terrorism but can be also used by criminal organizations that have invested in legal businesses and would like to withdraw legitimate funds from official circulation.
- Unaccounted cash received via disguising financial transactions is not included in official financial reporting and could be used to evade taxes, hand in bribes and pay “under-the-table” salaries

THANK YOU