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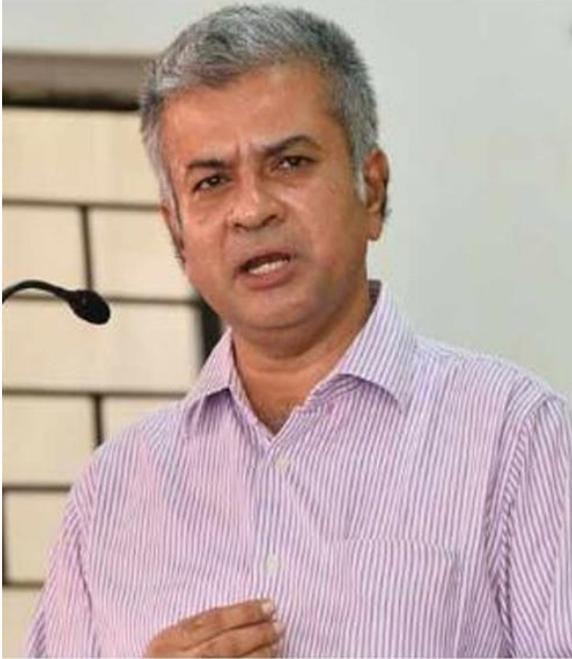
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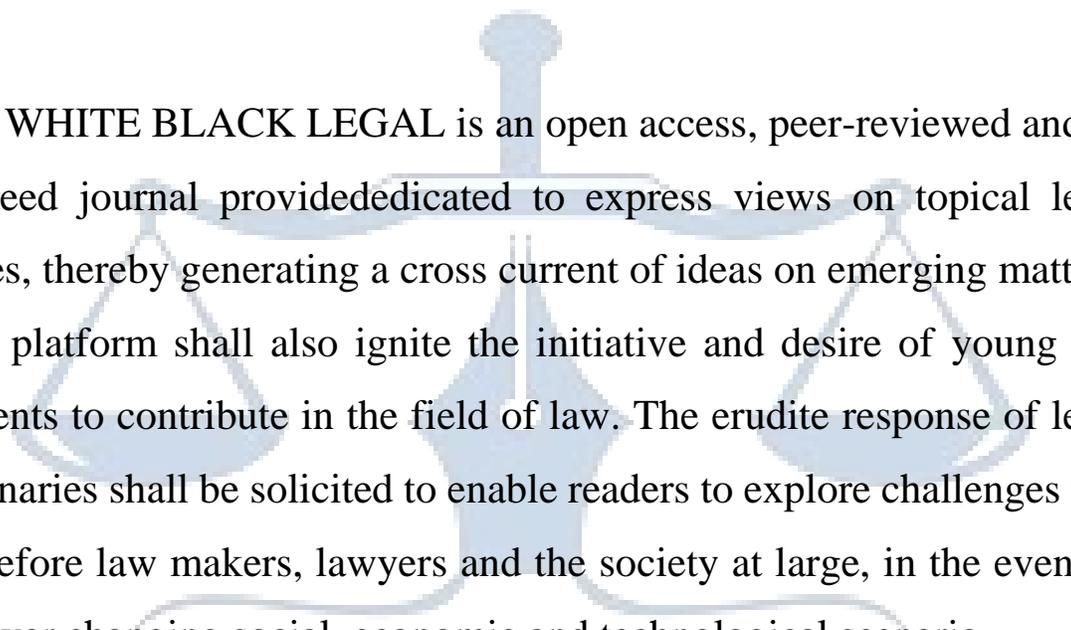
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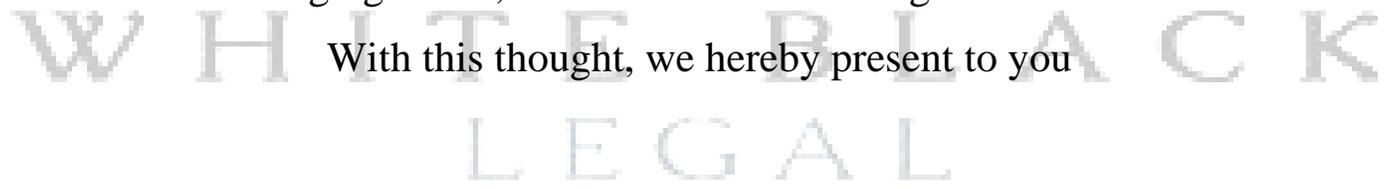
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ABOUT US



WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you



VIJAY MADANLAL CHOUDHARY v. UNION OF INDIA: REPRIMANDING MONEY LAUNDERING

AUTHORED BY - RIYA GOEL¹

INTRODUCTION

The Prevention of Money Laundering Act 2002 aims to combat money laundering and reclaim unlawfully acquired assets. Introduced as the first legislation of its kind in India, its primary objective is to safeguard the Indian financial system and address the issue of money laundering. To achieve these goals, the Act implements stringent measures that grant extensive authority to the Enforcement Directorate (ED), the agency responsible for investigating complaints under the Act. However, the ED's broad powers have recently faced increased scrutiny and constitutional challenges.

India's commitment to combating money laundering on the international stage is the driving force behind the enactment of the PMLA, which came into effect on July 1, 2005. This commitment is evident in the preamble of the statute and the Supreme Court's interpretation of its provisions.

Since its inception, individuals facing charges under the PMLA have argued that certain provisions of the law are arbitrary, disproportionate, and violate the rights guaranteed to accused persons under the Indian Constitution. Over the past decade and a half, a range of legal actions, including special leave petitions, appeals, and writ petitions, have been filed before the Supreme Court challenging various provisions of the PMLA, including their constitutional validity. Some of these challenges arose from orders issued by High Courts or lower courts rejecting applications for discharge, bail, or quashing.

Without delving into the specifics of each case, the Supreme Court focused on addressing the legal questions surrounding the provisions of the PMLA. The challenges to these provisions and the Supreme Court's decisions are discussed in this article.

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In light of the Vijay Madanlal Choudhary judgment², where the Supreme Court upheld the Enforcement Directorate's broad and restrictive powers regarding search and seizure, as well as the stringent conditions for bail under the act, this article analyzes aspects of the judgment that could potentially encroach upon citizens' liberty.

ISSUES TO DISCERN

1. ECIR v. FIR: DRAWING PARALLELS

A question was raised about whether there could be a legal procedure where penal proceedings could be initiated against an individual without informing them of the charges. It was argued that under the current situation, the Enforcement Directorate (ED) can arrest someone based on an Enforcement Case Information Report (ECIR) without disclosing its contents, which is inherently arbitrary and violates the constitutional rights of the accused. The right of the accused to receive a copy of the First Information Report (FIR) early on, as well as the right to know the allegations, are seen as integral parts of Article 21³.

Furthermore, according to the procedure outlined in the 1973 Code, the officer in charge of a police station is obligated to record information related to the commission of a cognizable offence under Section 154 of the 1973 Code. However, there is no equivalent provision in the 2002 Act requiring the registration of offences related to money laundering.

The court determined that no comparison could be drawn between the mechanisms for prevention, investigation, or trial regarding scheduled offences governed by the provisions of the 1973 Code, as an ECIR is an internal document created by the department before initiating penal action or prosecution against individuals involved in processes or activities connected with proceeds of crime. Thus, an ECIR is not a statutory document, nor does the 2002 Act require the authority referred to in Section 48 to record an ECIR or furnish a copy thereof to the accused, unlike Section 154 of the 1973 Code. The absence of such a recorded ECIR does not hinder the authorities referred to in Section 48 of the 2002 Act from commencing an inquiry or investigation to initiate civil action for the attachment of property deemed to be proceeds of crime, following the prescribed procedure.

² 2022 LiveLaw (SC) 633.

³ *No person shall be deprived of his life or personal liberty except according to procedure established by law.*

Regarding the furnishing of a copy of the ECIR to the person concerned, either apprehending arrest or at least after arrest, Section 19(1) of the 2002 Act specifies that after arrest, the person should be informed about the grounds for such arrest as soon as possible. This requirement aligns with the mandate of Article 22(1)⁴ of the Constitution. As long as the person has been informed about the grounds of their arrest, it constitutes sufficient compliance with the mandate of Article 22(1) of the Constitution.

2. PROPERTY WHICH IS THE MAIN SUBJECT OF MONEY LAUNDERING

It was argued that according to the definition in Section 3 of the Prevention of Money Laundering Act (PMLA), an individual can engage in money laundering either directly or indirectly if they are involved in any process or activity connected to the proceeds of crime and have represented or asserted such proceeds as untainted property. In light of this, it was suggested that the investigation should focus on these alleged proceeds of crime. To do so, facts must be gathered, and there must be a clear determination as to whether these proceeds of crime have indeed been generated from the scheduled offence.

The definition of 'Money Laundering' as outlined in Section 3 of the PMLA argues that the Enforcement Directorate (ED) must ensure that the proceeds of crime have been represented as untainted property for the registration of an Enforcement Case Information Report (ECIR) or the application of the PMLA. It has been strongly contended that the offence of money laundering necessitates the proceeds of crime to be explicitly 'projected or claimed' as 'untainted property.' This implies that Section 3 applies specifically to the generation of proceeds of crime, where such proceeds are projected or claimed as untainted property.

The PMLA, 2002 has a broad ambit which includes every process and activity, whether done directly or indirectly, involving the proceeds from the crime and is not confined to the final act of integrating tainted property into the official economy. The Explanation inserted into Section 3 through an amendment in 2019 does not expand the scope of Section 3 but merely provides clarification. It interprets the word "and" preceding the expression "projecting or claiming" as "or." Since this is a clarificatory amendment, its introduction through the Finance Act or any other means would not make

⁴ *No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.*

a difference.

Apart from the arguments presented earlier, the hon'ble supreme court opined that the term "and" in Section 3 should be interpreted as "or" to fully encompass every process or activity undertaken by any individual. Thus, projecting or claiming the property as untainted would independently constitute an offence of money laundering, as it represents a distinct process or activity. The interpretation proposed by the petitioners, which suggests that the offence under Section 3 of the 2002 Act is only complete when the property in question is projected or claimed as untainted, has been dismissed.

The offence under Section 3 of the 2002 Act is contingent upon the illegal acquisition of property resulting from criminal activity related to a scheduled offence. It pertains to the process or activity associated with such property, which constitutes the offence of money laundering. The authorities under the Act cannot prosecute/criminalise any person on a mere speculation or under an assumption that a scheduled offence has been committed, unless it is being formally registered with the jurisdictional police and/or is under investigation or trial, including through a criminal complaint before the appropriate forum. If the individual is ultimately discharged or acquitted of the scheduled offence, or if the criminal case against them is quashed by the competent court, there can be no offence of money laundering against them or anyone claiming such property linked to the stated scheduled offence through them.

3. PROVISIONS OF ATTACHMENT: WHETHER ARIBITARY OR IN ALIGNMENT WITH THE OBJECT?

The next set of arguments challenges the legality of the second proviso of Section 5(1), which permits attachment of property without the existence of a predicate offence, potentially resulting in the attachment of property that may not even be proceeds of crime. It is argued that this provision allows for the attachment of property belonging to any individual without any limitations, thus depriving them of their property rights without due process, which is deemed unconstitutional. Additionally, the duration of attachment under Section 8(3)(a) of the PMLA is criticized as arbitrary and unreasonable.

However, the Court made the following observation in response to these contentions and asserted that

Section 5 of the 2002 Act is constitutionally sound. It provides a balanced mechanism to safeguard the interests of individuals while ensuring that proceeds of crime remain available to be handled according to the provisions of the Act. Section 5 allows for provisional attachment in regular situations and in urgent circumstances where immediate attachment is necessary, bypassing certain safeguards.

4. SEARCH, SEIZURE AND SCENARIO

The counsel for the petitioners contended that enforcement directorate has unfettered powers to commit searches and seizures without any formal investigation having been done in the predicate offence and in some cases even without an FIR has been registered. There are no prerequisites or safeguards as the ED can now simply walk into a premises. Even for the non-cognizable crimes, the directorate need not wait for the filing of complaint before the Court. So, in the absence of any credible information to investigate, the ED cannot be allowed to use such draconian powers. The magisterial role cannot be replaced by the minimal role of the Adjudicating Authority, because they have no apparent or real control over the ED, especially in case of criminal investigations. Thus, it can be said that such lack of proper checks and balances is unreasonable and an infringement of [Articles 14⁵](#) and [21](#) of the Constitution.

The Apex Court on the above contended arguments observed that Section 17 of the statute is constitutionally valid and provides for the in built safeguards, not only mandating the exercise of power by high-ranking officials, of the rank of Director or Deputy Director authorised by the Director in that regard, but also to adhere to other stipulations of recording of reasons regarding the belief formed on the basis of information in his possession about the commission of the offence of money laundering and possession of proceeds of crime involved in money-laundering. Further these recorded reasons along with material are needed to be forwarded by the three member Adjudicating body that's appointed u/s 6 of PMLA headed by an individual qualified for appointment as a DJ (District Judge) in a sealed cover to be kept preserved for a specified period of time and thus, guaranteeing fairness, transparency and accountability of the entire process and procedure of search and seizure.

⁵ The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

5. **ACTORI INCUMBIT ONUS PROBANDI (BURDEN OF PROOF)**

Every criminal trial is based on the presumption of innocence of accused until proven guilty and it is for the prosecution to establish the guilt of the accused beyond reasonable doubt. In the Vijay Madanlal case, the parties contested the constitutionality of Section 24 of the Prevention of Money Laundering Act (PMLA), which places a reverse burden of proof on the accused under the PMLA. The significance of the presumption of innocence is eloquently articulated in the words of Bradner:

*“The presumption of innocence is not a mere phrase without meaning; it is in the nature of the evidence for the defendant; it is as irresistible as the heavens till overcome; it hovers over the prisoner as a guardian angel throughout the trial; it goes with every part and parcel of the evidence.”*⁶

In this context the apex court observed: *“Only because the burden of proof under certain circumstances is placed on the accused, the same, by itself, would not render the legal provision unconstitutional.”*

The principle that the reverse burden of proof alone does not render a law unconstitutional has been upheld by the Supreme Court in numerous cases. A landmark case in this regard is *Noor Aga v. State of Punjab*⁷, which establishes that the presumption of innocence is not a fundamental right but rather qualifies as a human right.

6. **JAIL, BAIL AND THE TWIN CONDITIONS**

The PMLA 2002 mandates compliance with twin conditions in order to secure bail for a person accused under the Act. These conditions require that the Public Prosecutor be given an opportunity to oppose the application for release, and there should be reasonable grounds to believe that the accused is not guilty of any offence and is unlikely to commit any offence while on bail. The petitioners in the case argued that these twin conditions are unconstitutional, violating Articles 14 and 21 of the Constitution of India. They contended that these conditions place an irrebuttable burden on the accused, as once charges are framed, the accused loses the opportunity to seek bail, contradicting the fundamental principle of criminal jurisprudence that "bail is the rule, jail is the exception," and imposing an absolute restriction on the Fundamental Right to Life guaranteed under Article 21. Furthermore, they argued that Section 45 of the PMLA 2002, governing bail, is more stringent compared to bail provisions under the Cr.P.C., and it violates Article 14 by establishing distinct laws

⁶ Bradner, Rules of Evidence as Prescribed by the Common Law: For the Trial of Actions and Proceedings, 460 (7th ed., 2015).

⁷ 2008 (3) R.C.R. (Criminal) 633.

for essentially the same act or omission.

It's noteworthy that the Supreme Court had previously declared these twin conditions unconstitutional in *Nikesh Tarachand Shah v. Union of India*⁸ in 2017. However, the Union Government subsequently amended Section 45 in 2018, claiming it was done in line with the Nikesh Tarachand Shah judgment. The petitioners contended that this amendment undermined the Nikesh Tarachand Shah judgment and reinstated the original twin conditions.

The safeguards provided before effecting arrest, as contained in Section 19 of the enactment, are equally rigid and of a severe standard. These safeguards ensure that authorized officers do not act arbitrarily but are held accountable for their judgment regarding the necessity to arrest any person involved in the offence of money laundering even before filing a complaint.

Drawing upon precedent, such as *Ranjitsingh Brahamjeet Singh Sharma v. State of Maharashtra*⁹ (under MCOCA), it has been argued that while the twin conditions under Section 45 restrict the right of the accused to obtain bail, they do not impose an absolute restraint on the grant of bail. The discretion vested in the court is not arbitrary or irrational but judicial, guided by established principles.

7. PMLA, 2002 vis a vis Cr.P.C,1973 (GENERALIS SPICIALIBUS NON DEROGANT)

An anomalous situation arises where based on an Enforcement Case Information Report, the Enforcement Directorate (ED) can summon accused persons and request details of financial transactions under Section 50 of the PMLA. The accused is summoned to provide statements, which are treated as admissible evidence. Throughout this process, the accused may remain unaware of the allegations against them. It's evident that the Criminal Procedure Code (Cr.P.C.) has separate provisions for summoning accused persons under Section 41A and for witnesses under Section 160. It's argued that the application of the Cr.P.C. is necessary since it constitutes a procedure established by law, and investigations should not occur outside the purview of Section 154 or 155 of the Cr.P.C. Reference is made to constitutional safeguards of reasonability and fairness. Section 65 of the PMLA itself provides for the applicability of the Cr.P.C. It's noted that several procedural safeguards are being violated, such as the non-registration of an FIR, absence of a case diary, restricted access to the

⁸ WP (Criminal) No. 67 of 2017.

⁹ (2005) 5 SCC 294.

ECIR, violation of Section 161 of the Cr.P.C., Section 41A of the Cr.P.C., and the lack of magisterial permission under Section 155 of the Cr.P.C. The unguided use of power to investigate and prosecute any person is argued to violate Articles 14 and 21 of the Constitution.

Regarding the interpretation and constitutionality of Section 50 of the PMLA, attention is drawn to Section 50(2), which pertains to recording statements of summoned individuals during investigations. Section 50(3) mandates that the person summoned must state the truth, sign the statement, and face consequences for providing incorrect information under Section 63(2)(b), including the threat of penalty under Section 63(2) or arrest under Section 19.

It's argued that compared to constitutional law, the Cr.P.C., and the 1872 Act, the provisions under the PMLA are draconian and thus violate Articles 20(3) and 21 of the Constitution. Section 160 of the Cr.P.C. is referenced when a person is summoned as a witness or under Section 41A as an accused or a suspect. In all the scenarios, the statement is recorded in accordance with Section 161 of the Cr.P.C, 1973. Petitioners contended that the Safeguards established by the Supreme Court in *Nandini Satpathy vs. P.L. Dani & Anr*¹⁰. are overlooked, along with the protection under Section 161(2) of the Cr.P.C. Therefore, based on Sections 161 and 162, it's argued that such evidence is inadmissible in the trial of an offence unless it is used solely for the purpose of contradiction, as articulated in Section 145 of the Indian Evidence Act.

The statements recorded by authorities under the 2002 Act are not in violation of Article 20(3) of the Constitution, which protects against self-incrimination, or Article 21, which safeguards the right to life and personal liberty. These statements are considered as procedure established by law and are conducted within the framework of the legal system. Therefore, they are deemed lawful and do not infringe upon constitutional rights.

CONCLUSION

The Prevention of Money Laundering Act was initially introduced to combat the serious issue of money laundering and to safeguard national interests. However, with subsequent amendments and judicial interpretations, the Act has seen a gradual erosion of the safeguards meant to protect the

¹⁰ AIR 1978 SC 1025.

liberties of citizens. So, it is imperative to address the loopholes in the status quo of the enactment and the unfettered powers conferred on the ED. The Supreme Court, as the final guardian of rights, has a responsibility to safeguard the rights of individuals, yet its decisions have not adequately protected these rights. The current state of the law has the potential for blatant misuse, particularly by those in positions of power, as cautioned by the Supreme Court itself, leading to the oppression of individuals who dare to oppose such power, though a review petition against the said decision is pending before the hon'ble bench of Supreme Court but that too is confined to particularly 2 issues. Therefore, it can be observed that there is a pressing need to review and amend the law to ensure that it effectively combats money laundering while respecting the rights of individuals in the society.



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