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Vijay Madanlal Choudhary: An Affirmation of ED's Unbridled Powers or Harbinger of Hope?

Nikhil VARSHNEY[1] **/ *Richa SHARMA***[2]

Introduction

The Full Bench of the Hon'ble Supreme Court has recently extensively dealt with various provisions of one of the most stringent laws in India - 'The Prevention of Money Laundering Act, 2002' ("**PMLA**"). There is no gainsaying that the judgment passed by the Hon'ble Supreme Court in the case of *Vijay Madanlal Choudhary & Ors.* vs. *Union of India & Ors*[3] is no less than a book on the PMLA as constitutionality of several provisions of the PMLA were under challenge. With constitutionality of almost all the provisions of the PMLA under challenge being upheld, the Supreme Court's judgment has empowered the Enforcement Directorate ("**ED**") as an agency and has given more teeth to it. With Supreme Court upholding ED's unbridled powers, there is a strong likelihood that ED would be taking up investigations with increased alacrity.

Before adverting to notable conclusions drawn by the Hon'ble Supreme Court in a 545 page judgment, it is apposite to mention the background that has led to passing of the judgment. A total of 241 petitions were filed before the Supreme Court on several grounds challenging the constitutionality of several provisions of the PMLA. The Full Bench of the Hon'ble Supreme Court clubbed the petitions and heard them together. The matter was reserved for orders in the month of March, 2022 and the judgment was passed in the last week of the senior-most

1) Nikhil Varshney, Advocate is a Principal Associate with White Collar Crimes, Investigation & Compliance team at Saraf and Partners (Law Offices), Noida. Mr. Nikhil Varshney could be reached at Nikhil.varshney@sarafpartners.com

2) Dr. Richa Sharma is Deputy Director, Indian Council of Social Science Research, Ministry of Education, Government of India. She was Visiting Researcher (May-June 2015) and Specially Appointed Associate Professor at the Graduate School of Law and Politics, Osaka University (Japan) (May-September 2016, May-September 2018, May-December 2019, May 2020-March 2021 and May-December 2021). Dr. Richa Sharma could be reached at rsharma 261210@gmail.com

3) 2022 SCCOnline SC 929

judge on the Bench, Justice A.M. Khanwilkar, in office.

The Supreme Court dealt with nineteen issues and there is barely any issue decided against ED. The message that has gone out from the corridors of the Supreme Court to the outside world is loud and clear that India is committed on augmenting the domestic policies and framework relating to money laundering. The judgement has stressed on India's global commitment to combat the menace of money laundering and the Court has called PMLA a *sui generis* legislation whose provisions have to be interpreted keeping in mind the international framework. In strive towards securing India a distinction of being compliant with international framework on money laundering, the Court seems to have compromised with fundamental rights of citizens at certain points. This issue, however, becomes all the more pertinent as the Supreme Court itself is a guardian of fundamental rights of citizens.

Issues Decided by the Supreme Court

The present article delineates the prominent issues that have been dealt with by the Hon'ble Supreme Court in the judgment and also sets out the safeguards that have been put in place by the Supreme Court. Below are the notable conclusions drawn by the Supreme Court in the judgment:

a) Challenge to amendments of the PMLA being passed as money bills

On the question of amendments to the PMLA being enacted as money bills so as to avoid the scrutiny of Rajya Sabha, the Supreme Court has left it open for examination as the issue is pending before seven judges' bench of the Supreme Court in *Rojer Mathews* case[4].

b) Widened the scope of 'money laundering'

The Supreme Court has widened the definition of offence of 'money laundering'. Till now, an offence of money laundering required projection of tainted property as untainted property. However, the Supreme Court has broadly construed the definition of the offence of money laundering in the judgment and has read 'and' as 'or' occurring in section 3 of the PMLA thereby widening the ambit of offence of money laundering.

The Supreme Court has observed that every process or activity indulged into

4) *Rojer Mathew vs South Indian Bank Ltd. and Ors.*

by anyone i.e., concealment or possession or acquisition or use constitute an offence of money-laundering on its own. Projection or claiming proceeds of crime to be untainted property has been held to be an independent activity constituting offence of money-laundering. The act of projecting or claiming proceeds of crime to be untainted property presupposes that the person is in possession of or is using the same (proceeds of crime).

c) ED can make police authorities register an FIR

A yet another critical aspect dealt with by the Supreme Court deals with attachment of property in absence of a First Information Report (FIR) under scheduled offence. The Supreme Court has held that the ED can attach property belonging to a person if they have enough reasons to believe that the person is in possession of proceeds of a crime and in such a scenario, the ED can send information to jurisdictional police for registration of FIR under cognizable or non-cognizable offence. This essentially would imply that ED could dictate the police authorities if an FIR should be necessarily registered in a particular case. There is thus a dichotomy in the Supreme Court's observations as this contradicts with the other pertinent observation of the Supreme Court that registration of scheduled offence is necessary before the authorities under the PMLA prosecute a person under the PMLA. Effectively, ED could now make police authorities register an FIR when there does not exist one in a particular case and later prosecute a person for commission of offences under the PMLA.

d) Registration of ECIR not mandatory and a copy of the same need not be provided

In yet another grim development, the Supreme Court has held that there is no need to formally register an Enforcement Case Information Report (ECIR) unlike registration of an FIR by the jurisdiction police in respect of cognizable offence under the ordinary law. Further, the Apex Court has held that supply of ECIR in every case to person concerned is not mandatory.

These observations will have a deleterious impact on the rights of accused persons. Formally not registering an ECIR will practically make it extremely difficult for the accused person to apply for anticipatory bail under section 438 of the Code of Criminal Procedure, 1973 (the "**CrPC**") as it will be difficult to demonstrate apprehension of arrest to the Special Court (under PMLA) or the High Court hearing the matter. Even otherwise, the accused would have to pass the twin test laid down in section 45 of the PMLA, as detailed below, for securing

bail from the court. Additionally, non-registration of ECIR would dilute the distinction between inquiry and investigation being undertaken by ED and non-availability of a copy of ECIR would prevent the accused from availing the remedy of quashing of proceedings under section 482 of the CrPC.

e) Distinction between inquiry and investigation diluted

It is noteworthy that the distinction between 'inquiry' and 'investigation' which is pivotal in a criminal trial has been absolutely diminished by the Supreme Court. The Supreme Court has used the two terms together at several places across the judgment thereby rendering the unique distinction in the two terms completely nugatory. Further, the expression "proceedings" occurring in clause (na) of section 2(1) of the PMLA has been given an expansive meaning to include 'inquiry' procedure followed by the authorities of the ED, the Adjudicating Authority, and the Special Court. *Furthermore*, as stated above, the Supreme Court has dispensed with the requirement of registration of ECIR in every case and therefore, the point of beginning og investigation could never be known to an accused. The judgment also holds that statements recorded by authorities under the PMLA for the purposes of inquiry/investigation cannot be hit by the vice of Article 20(3) or Article 21 of the Constitution of India, 1950 thereby implying that statement made to ED at any stage could be used against the person.

Thus, with distinction between inquiry and investigation completely obliterated, the provisions of the PMLA have been made quite stringent.

f) Twin tests for bail laid down in section 45 of the PMLA upheld

A development that would have a potential impact of impinging upon the liberties of an individual is the upholding of twin conditions of bail laid down in section 45 of the PMLA. The twin conditions as laid down in section 45 of the PMLA are as follows:

a. There are reasonable grounds for believing that the accused person is not guilty of offence; and

b. The accused person is not likely to commit any offence on bail.

The aforestated conditions that were brought back by the Parliament by way of the amendments made to PMLA in 2018 after the twin test was struck down by the Division Bench of the Hon'ble Supreme Court in the case of *Nikesh Tarachand Shah* vs. *Union of India & Another*[5)], would make it a herculean task

5) (2018) 11 SCC 1

for an accused to secure bail as the conditions levied are onerous and harsh. This was also noted by the Division Bench of the Supreme Court in *Nikesh Tarachand* case but this time, the Full Bench of the Supreme Court has found the conditions to be reasonable and having direct nexus with the purposes and objects sought to be achieved by PMLA.

Pertinently, at para no. 127 at page no. 431 of the judgment, the Supreme Court has justified the onerous and harsh conditions by holding that the Court (High Court/Special Court (PMLA)) is not required to record a positive finding that the accused had not committed an offence under the PMLA. The Courts have been asked to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. The Supreme Court has observed that the duty of the Court hearing a bail application is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. While the Supreme Court has reduced the level of satisfaction that the Court hearing a bail application needs to arrive at, before granting bail to an accused person, but given the fact that the onerous twin conditions have been upheld, it will certainly make securing bail a long-drawn process in the Court.

At this juncture, it is relevant to note that there are certain scheduled offences under the PMLA that are bailable in nature. However, if ED makes an arrest of an accused person basis the said FIR under scheduled offences that are bailable in nature, the accused person would have to pass the twin tests as laid down in Section 45 of the PMLA, which otherwise make a bail difficult. Therefore, while from the perspective of one penal legislation, a bail could be given in a matter, however, from the perspective of PMLA, there are stringent rigours to pass through before bail can be granted to the same accused.

Hopes Crept in and Avenues for Securing Relief, in the Judgment

Having stated the main issues that are covered in the judgment, a question then arises for consideration as to whether the judgment is a complete setback or the Supreme Court has tried to draw some balance keeping rights of an accused person in mind. It would be highly incorrect if the judgment is projected as a complete loss from an accused's perspective. There do exist certain positives in the judgment and it is imperative to set them out, so that a complete picture could be put forth. Below are certain positives that lie in the judgment and would be helpful from an accused's perspective at the time of trial before the Special Court (under PMLA):

a) Strict interpretation of the term 'proceeds of crime'

The offence of money laundering is peculiar in nature as the existence of money laundering is predicated on the commission of a scheduled offence. The Supreme Court has strictly interpreted the definition of the term 'proceeds of crime'. The Supreme Court has held that the definition of proceeds of crime under section 2(1)(u) of the PMLA must be strictly construed i.e., a property must necessarily be derived or obtained, directly or indirectly, "as a result of" criminal activity relating to a scheduled offence. To explain this in detail, the Supreme Court has given an illustration of a vehicle in para no. 31 of the judgment. It states that while a vehicle used in commission of scheduled offence may be attached as property in the concerned case (crime), it may still not be proceeds of crime within the meaning of section 2(1)(u) of the PMLA. Thus, in order to be proceeds of crime, a property must necessarily be derived or obtained as a result of criminal activity i.e., it must have been acquired after the commission of the scheduled predicate offence. The Supreme Court has harped on the point that it is only such property which is derived or obtained, directly or indirectly, as a result of criminal activity relating to a scheduled offence that can be regarded as proceeds of crime.

This observation will be helpful from an accused's perspective as at times, it has been noticed that ED does not keep the distinction of property bought by clean money and the one bought by proceeds of crime in mind and mechanically attaches all properties belonging to a particular person.

b) Money laundering not a standalone offence:

The Hon'ble Supreme Court has further held that if the person is finally discharged/acquitted of the scheduled offence or the criminal case against him is quashed by the Court of competent jurisdiction, there can be no offence of money-laundering against him.

This indeed is a major respite as there were conflicting judgments by various High Courts on this proposition. The Hon'ble Delhi High Court had recently confirmed its earlier view that proceedings under PMLA would not survive in the event the scheduled offence gets quashed/discharged in the case of *Prakash Industries Limited & Another* vs. *Directorate of Enforcement*[6]. It is apposite to note that the position taken by Delhi High Court and Allahabad High Court[7] was

6) 2022 SCC OnLine Del 2087 l 2087

7) *Sushil Kumar Katiyar vs Union of India and Ors*., 2016 SCC OnLine All 2632

similar on this proposition, however, the position taken by the Madras High Court[8] and the Karnataka High Court[9] was contrary to this. Thus, the Apex Court has set the controversy at rest.

Thus, in the event of acquittal/discharge of the person concerned or quashing of proceedings in a scheduled offence, there can be no offence of money laundering against him or anyone claiming such property being the property linked to stated scheduled offence through him.

c) ED not to hasten taking possession of properties under section 8(4) of the PMLA

A very pertinent observation by the Supreme Court in the judgment is about the exercise of taking of possession of properties by ED after the provisional attachment order is confirmed by the Adjudicating Authority (under PMLA). The Supreme Court has passed directions against the hastened process of taking possession of properties by ED. The judgment, in para no. 73, brings out another extremely relevant safeguard against possession of property, which is different from attachment of a property. Possession entails a transfer of rights over the property from the accused to the ED while attachment merely freezes the property of the accused and prevents them from dissipating the property. The Apex Court has dissuaded ED from taking possession of properties after confirmation of attachment and observed that possession of properties of accused are to be taken only in exceptional circumstances keeping in mind peculiar facts of a particular case, so as to invoke the option available under sub-section (4) of section 8 of the PMLA.

This portion of the judgment would be of immense significance as accused persons could now sturdily challenge the swift action of ED in taking possession of properties soon after the confirmation of a provisional attachment order by the Adjudicating Authority (under PMLA). This would protect the accused from being deprived of their livelihood or home, at least until the time a final decision of their innocence is taken by the Special Court (under PMLA).

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8) *K. Sowbaghya vs Union of India*, (2016) 338 ELT 65

9) *VGN Developers Pvt Ltd. and Anr. vs Deputy Director, Directorate of Enforcement,* 2019 SCC OnLine Mad 13270

d) Provisional attachment order to operate only for a period of one hundred and eighty days

The judgement in para no. 72 holds that any order of provisional attachment of property can only operate for a period of one hundred and eighty (180) days. This observation is quite relevant from the perspective that there are plethora of writ petitions[10] pending before different High Courts seeking release of properties in view of the fact that the Adjudicating Authority had failed to confirm provisional attachment orders within a stipulated period of one hundred and eighty (180) days during the period when COVID-19 was at its peak.

While the Supreme Court has refrained from deciding that very aspect in the present batch of petitions, it would be interesting to see as to how the High Courts and possibly, even the Supreme Court deal with this peculiar aspect in light of the fact that the Full Bench has now specifically held that a provisional attachment order cannot operate beyond a period of one hundred and eighty (180) days.

e) ***Existence of proceeds of crime to be first established by prosecution thereby balancing reverse burden of proof under PMLA***

Section 24 of the PMLA deals with burden of proof in proceedings relating to proceeds of crime under the PMLA. The said provision effectively establishes a presumption of guilt against the accused and thereby places burden of proof on the accused to prove his innocence. In doing so, the law effectively places the offence of money laundering on a similar standing to other heinous crimes such as terrorism and narcotics. However, the Supreme Court has recognized the foundational flaw in this approach and has attempted to remedy this in para no. 99 of the judgement. The Supreme Court has held that only after the foundational facts are established by prosecution i.e., only after it is established by prosecution that proceeds of crime exist, can the burden of proof be shifted to the accused to rebut the legal presumption that the proceeds of crime are not involved in money-laundering.

This is a significant development in right direction to ensure that the entire procedure of trial in a Special Court (under PMLA) is not onerous for an accused.

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10) This issue is pending for decision by the Division Bench of the Delhi High Court in the case of *Directorate of Enforcement and Anr.* vs. *M/s. Vikas WSP Ltd. &Ors.*, LPA No. 362/2020

f) Applicability of Article 20(3) of the Constitution and Section 25 of the Indian Evidence Act, 1872 to statements by accused have not completely been sidelined

While it is true that the basic principles of self-incrimination have, to a significant extent, been sidelined in relation to recording of statements under section 50(2) of the PMLA, however, it would be incorrect to state that the Supreme Court has completely given a go-by to constitutional mandate of right against self-incrimination recognized under Article 20(3) of the Constitution of India, 1950 (and indirectly under Section 25 of the Indian Evidence Act, 1872). It is worthwhile to note that in para no. 159 at page no. 479 of the judgment, the Supreme Court has noted as follows:

> "*However, after further inquiry on the basis of other material and evidence, the involvement of such person (noticee) is revealed, the authorised officials can certainly proceed against him for his acts of commission or omission. In such a situation, at the stage of issue of summons, the person cannot claim protection under Article 20(3) of the Constitution. However, if his/her statement is recorded after a formal arrest by the ED official, the consequences of Article 20(3) or Section 25 of the Evidence Act may come into play to urge that the same being in the nature of confession, shall not be proved against him.*"
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> [Emphasis supplied]

In subsequent paragraphs, the Supreme Court has, however, taken a view inconsistent to the view taken in para no. 159 at page no. 479 of the judgment. In para no. 172 at page no. 499 of the judgment, the Supreme Court has noted as follows:

> "*Thus, it must follow that the authorities under the 2002 Act are not Police Officers. Ex-consequenti, the statements recorded by authorities under the 2002 Act, of persons involved in the commission of the offence of money-laundering or the witnesses for the purposes of inquiry/investigation, cannot be hit by the vice of Article 20(3) of the Constitution or for that matter, Article 21 being procedure established by law. In a given case, whether the protection given to the accused who is being prosecuted for the*

> *offence of money laundering, of Section 25 of the Evidence Act is available or not, may have to be considered on case-to-case basis being rule of evidence.*"

As is underlined in the aforestated paragraph, the said observation runs contrary to the prior observation of the Supreme Court in para no. 159 at page no. 479 of the judgment.

Later, in conclusion section of the judgment, at para no. 187(xv)(b), the Supreme Court has concluded as follows:

> "*The statements recorded by the Authorities under the 2002 Act are not hit by Article 20(3) or Article 21 of the Constitution of India.*"

In view of the fact that in the conclusion section, the Supreme Court has held that the statements recorded by authorities uder the PMLA are not hit by Article 20(3) or Article 21 of the Constitution of India, 1950, the ED would argue during trial in a case that defence of section 25 of the Indian Evidence Act, 1872 or Article 20(3) of the Constitution of India, 1950 is not available to an accused person. At this point, it is noteworthy that the Supreme Court has expressly noted that defences of section 25 of the Indian Evidence Act, 1872 or Article 20(3) of the Constitution of India, 1950 may be available with the accused and the accused persons therefore, would rely on the said observations to argue that the defences available under law do apply in PMLA cases as well.

Conclusion

While the judgement has provided much needed clarity on various contested issues and has strengthened the backbone of PMLA, the long-term impacts will be realized only in times to come. A primary fact that one has to bear in mind is that in the batch petitions that were before the Supreme Court for consideration, it was the constitutionality of provisions of the PMLA that was under challenge. It was not a case wherein the high-handedness of ED as an agency was the issue for consideration.

While the judgment is certainly a setback for persons facing proceedings under the PMLA, however, the Supreme Court has, at certain places, tried to draw a balance and certain safeguards have been put in place in favour of accused persons. The positives in the judgment cannot be glossed over.

The PMLA does in fact, have a laudable objective and the Supreme Court places a lot of emphasis on this all across the judgement and in doing so, the Supreme Court has attempted to balance the two competing considerations — consideration of state to curb the menace of money laundering and at the same time, the consideration of securing fundamental and legal rights of accused persons.

It is a known fact that India has not seen many convictions under the PMLA despite the fact that there exists a provision in the legislation creating reverse burden of proof for accused persons. With the Supreme Court judgment empowering ED in full force, it would be interesting to see if it would also change the conviction landscape in India in PMLA matters.

It is also noteworthy that Karti Chidambaram filed a review petition before the Supreme Court challenging the judgment passed in *Vijay Madanlal Choudhary* matter. The Supreme Court has not only allowed hearing in open court of the matter (which is also quite rare as the review petitions are generally heard in chambers by the Supreme Court), but has also identified at least two issues which require reconsideration. While the two issues are not recorded in the order dated August 25, 2022, however, the two issues that were discussed during the Court proceedings dated August 25, 2022 are - providing copy of ECIR to accused persons and the reverse burden of proof that exists in the PMLA.

While it would be interesting to witness if the Supreme Court takes a different position on several issues that constituted part of judgment, but it could be said with certainty that there seems to be a long road ahead before the sundry issues relating to PMLA are settled for entirety.