

## Investigation under Prevention of Money Laundering Act

Date : September 22,2022



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The Prevention of Money Laundering Act 2005 (hereinafter referred as **PMLA**) is a stringent legislation to monitor and prevent money laundering in India. The Black's law Dictionary explains the meaning of offence of money laundering as "*the act of transferring illegally obtained money through legitimate people or accounts so that its original source cannot be traced*". In the legislation Section 3 defines the offence of money laundering which relates to the commission of "scheduled offences" defined under Section 2(1)(y) of the Act which provides the list of offences specified under Part A, Part B and Part C of the schedule in the PMLA. The primary legislations in the Schedule are offences under Indian Penal Code, Narcotic Drugs and Psychotropic Substances Act 1985, Unlawful Activities (Prevention) Act 1967, Prevention of Corruption Act 1988, Customs Act 1962, Companies

Act 2013 etc. The Hon'ble Supreme Court in **P. Chidambaram v. Directorate of Enforcement** <sup>[1]</sup> *inter alia* held that commission of the predicate offence or scheduled offence is sine qua non for the offence of money laundering which would result in the generation of the money to be laundered. The position is unaltered by the recent Hon'ble Supreme Court's judgment in **Vijay Madanlal Choudhary & Ors. v. Union of India & Ors.** <sup>[2]</sup>.

The investigating agency i.e. Enforcement Directorate (competent agency for enforcement of provision under the PMLA) (hereinafter referred as **ED**) shall register an enforcement case information report (ECIR) with regard to commission of offence of money laundering and to investigate the same on account of commission of the scheduled offence. The ED has elaborate powers under the Act including investigation and confiscation of the property arising from the "proceed of crime"<sup>[3]</sup>. Section 2(1)(na) of the PMLA defines "investigation" as:

*"Investigation includes all the proceedings under this Act conducted by the Director or by an authority authorized by the Central Government under this Act for the collection of evidence"*

The Hon'ble Supreme Court in **Vijay Madanlal** (*supra*) has *inter alia* held that:

*"(iii) The expression "investigation" in Clause (na) of Section 2(1) of the 2002 Act does not limit itself to the matter of investigation concerning the offence under the Act and is interchangeable with the function of "inquiry" to be undertaken by the Authorities under the Act."*

### **Powers of Investigating Agency (ED)**

The ED on account of an ECIR initiates investigation of the offence of money laundering. In pursuance of ECIR, the ED has primarily following powers:-

#### **1. Power to search and seizure**

The ED has power to survey (under Section 16) and search and seizure (under Section 17). In survey no record or evidence can be impounded by the ED, however, if the investigating authority deems necessary on survey that the evidence may be concealed or tampered with may seize such evidence after recording the reason in writing.

In search and seizure, under Section 17 of the PMLA, the investigating authority based upon the reason to believe which ought to be recorded in writing. The search and seizure has to be authorized by a senior official of the ED of rank not below than Deputy Director authorizing the subordinate to conduct search and seizure. In case, seizure is not practically possible then freezing of property or record is a viable alternative. The Prevention of Money Laundering (Forms, Search and Seizure or Freezing and the manner of forwarding the Reasons and Material to Adjudicating Authority, Impounding and custody of records and period of Retention) Rules, 2005 prescribe the detailed process of seizure or freezing and related proceedings.

The PMLA provides under Section 62 punishment for vexatious search. Thus, if the investigating agency fails to write a valid reason to believe, then actions can be taken against such delinquent officers for violation of the provisions of PMLA.

#### **2. Power to arrest**

The investigating agency has power to arrest the accused under Section 19 of the PMLA. The principles laid by the Hon'ble Supreme Court in landmark judgment of **D.K. Basu v State of West Bengal** <sup>[4]</sup> and **Arnesh Kumar v. State of Bihar** with regard to the guideline of arrest shall be applicable on the arrest under PMLA.

The investigating agency has power to arrest any person on account of reason to believe that the person is guilty of the offence of money laundering under Section 19 of the PMLA. The provision of arrest has been upheld by the Hon'ble Supreme Court in **Vijay Madanlal** (*supra*).

#### **3. Power to summon and record statement**

The investigating agency has power to summon under Section 50, any person to record his statement and gather further evidence and information pertaining to the offence of money laundering. The Hon'ble Supreme Court in **Paramvir Singh Saini**

**v. Baljit Singh & Ors.**<sup>[5]</sup>, the investigating agencies including ED were directed to install the camera to balance the rights of individuals during recording of statements.

### **Reason to believe**

In order to check the arbitrariness, the PMLA prescribed under section 16 to 21, that the investigating agency should act fairly to protect interest of revenue and have well described and predetermined reason for the exercise of the powers, hence, the PMLA provides that the powers vested ought to be exercised on "reason to believe". The Hon'ble Supreme Court in **Joti Parshad v. State of Haryana** held that 'suspicion' and 'reason to believe' are not same as 'reason to believe' is a higher state of mind.

The Hon'ble Supreme Court in **OPTO Circuit (India) Ltd. v. Axis Bank** [\[LSI-306-SC-2021\(NDEL\)\]](#) held that:-

"8. A perusal of the above provision would indicate that the prerequisite is that the Director or such other authorised officer in order to exercise the power under Section 17 of the PMLA, should on the basis of information in his possession, have reason to believe that such person has committed acts relating to money-laundering and there is need to seize any record or property found in the search. Such belief of the officer should be recorded in writing. Sub-section (1-A) to Section 17 of the PMLA provides that the officer authorised under sub-section (1) may make an order to freeze such record or property where it is not practicable to seize such record or property. Sub-section (2) provides that after search and seizure or upon issuance of a freezing order the authorised officer shall forward a copy of the reasons recorded along with material in his possession to the adjudicating authority in a sealed envelope. Sub-section (4) provides that the authority seizing or freezing any record or property under sub-section (1) or (1-A) shall within a period of thirty days from such seizure or freezing, as the case may be, file an application before the adjudicating authority requesting for retention of such record or properties seized.

10. The scheme of the PMLA is well intended. While it seeks to achieve the object of preventing money-laundering and bring to book the offenders, it also safeguards the rights of the persons who would be proceeded against under the Act by ensuring fairness in procedure. Hence a procedure, including timeline is provided so as to ensure that power is exercised for the purpose to which the officer is vested with such power and the adjudicating authority is also kept in the loop. In the instant case, the procedure contemplated under Section 17 of the PMLA to which reference is made above has not been followed by the officer authorised. Except issuing the impugned Communication dated 15-5-2020 to AML Officer to seek freezing, no other procedure contemplated in law is followed. In fact, the impugned communication does not even refer to the belief of the authorised officer even if the same was recorded separately. It only states that the officer is investigating the case and seeks for relevant documents, but in the tabular column abruptly states that the accounts have to be "debit frozen/stop operations". It certainly is not the requirement that the communication addressed to the Bank itself should contain all the details. But what is necessary is an order in the file recording the belief as provided under Section 17(1) of the PMLA before the communication is issued and thereafter the requirement of Section 17(2) of the PMLA after the freezing is made is complied with. There is no other material placed before the Court to indicate compliance with Section 17 of the PMLA, more particularly recording the belief of commission of the act of money-laundering and placing it before the adjudicating authority or for filing application after securing the freezing of the account to be made. In that view, the freezing or the continuation thereof is without due compliance with the legal requirement and, therefore, not sustainable."

The Hon'ble Supreme Court in the matter of **Radha Krishan Industries v. State of Himachal Pradesh** has *inter alia* held that the "reason to believe" must be based upon tangible material.

### **Conclusion**

The Investigating Agency has been vested with enormous powers to conduct fair and impartial investigation of offences of money laundering in order to protect the interest of revenue. The Hon'ble Supreme Court in the matter of **Vijay Madanlal Choudhary v. Union of India**<sup>[6]</sup> upheld the constitutionality of the powers of investigating agency as per the provisions of the PMLA, however, [review petition](#) has been filed before the Hon'ble Apex Court which *issub-judice*. Hence, as of now the powers of the investigating agency are intact as provided under the provisions of the PMLA.

[\[1\] \[LSI-484-SC-2019\(NDEL\)\]](#)

[\[2\] \[LSI-559-SC-2022\(NDEL\)\]](#)

[\[3\]](#) Section 2(1)(u) defines "proceeds of crime".

[\[4\]](#) AIR 1997 (SC) 610

[\[5\]](#) SLP (Criminal) No. 3543/2020, dated 02.12.2020

[\[6\] \[LSI-559-SC-2022\(NDEL\)\]](#)