

INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION

[ISSN 2581-9453]

Volume 6 | Issue 3

2024

© 2024 *International Journal of Legal Science and Innovation*

Follow this and additional works at: <https://www.ijlsi.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com>)

This Article is brought to you for free and open access by the International Journal of Legal Science and Innovation at VidhiAagaz. It has been accepted for inclusion in International Journal of Legal Science and Innovation after due review.

In case of **any suggestion or complaint**, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at International Journal of Legal Science and Innovation, kindly email your Manuscript at editor.ijlsi@gmail.com.

The Legislative Evolution and Implications of PMLA Act

SANKALP TIWARI¹

ABSTRACT

The enactment of the Prevention of Money Laundering Act was a response to international programs that have aimed at fighting the menace of money laundering— which not only poses large risks to financial institutions but also tends to undermine the sovereignty and integrity of nations. The programme got further impetus when the UN convention against Illicit Drug Traffic came into being, which called for taking away funds and assets from drug-related organizations on a mandatory basis as well as putting into place mechanisms that would assist in combating money laundering. In a resolution adopted in February 1990, the UN General Assembly asked that member states enact legislation to outlaw money laundering and prevent financial institutions from being misused for illegal purposes. In light of this, the PMLA was approved in 2003 and enacted on July 1st, 2005. The PMLA's primary objectives are to prevent money laundering, confiscate the proceeds of crime, and establish agencies and mechanisms to coordinate anti-money laundering measures. The Act defines money laundering as any process or activity connected to the proceeds of crime, including concealment, possession, acquisition, or use of such proceeds, projecting or claiming them as untainted property. The Act has been changed many times to ensure the quality of its provisions. The biggest amendments happened in 2012 and 2019 when the former changed the definition of money laundering under the Act to include individuals who aid, abet or participate in such crimes.

In 2019, this amendment passed by the parliament sought to expand the powers of ED that provides for searching and attaching properties by the officers without going through a magistrate. Some have been concerned about abuse of power with them; the legality of its provisions has been questioned. In particular, the constitutionality on its section 45(1) which makes bail almost impossible and not providing accused with information in ECIR is in question. Yet landmark cases such as Nimesh Tarachand Shah v. Union of India highlight this delicate balance between upholding constitutional validity while meeting law enforcement objectives with safeguarding fundamental rights, including recent pronouncements by the Supreme Court of India.

Recent rulings have underscored the importance of transparency and procedural safeguards. The Delhi High Court, in cases such as Neeraj Singal v. ED, has reinforced

¹ Author is a student at OP Jindal Global University, Sonapat, India.

the necessity of providing written reasons for arrest to ensure fairness and due process. The ongoing judicial scrutiny highlights the need for rigorous oversight to prevent misuse of power and maintain public trust in the legal system.

Keywords: PMLA, Enforcement Directorate, Draconian, Misuse, Safeguards.

I. INTRODUCTION

The Act regarding the Prevention of Money Laundering was established as a result of a sequence of collaborative initiatives undertaken by several nations, during which the global community acknowledged and identified the peril that money laundering presents to financial institutions, in addition to national sovereignty and integrity. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, together with other national efforts, requires the seizure of profits from drug-related offenses and the implementation of further measures to prevent the laundering of illicit funds. In response, the United Nations General Assembly adopted a resolution on 23.2.1990, which mandated member states to enact additional legislation to prevent money laundering and establish a mechanism to prevent financial institutions from being used for money laundering (FATF).² The purpose of this resolution was to investigate the issues surrounding money laundering. Furthermore, during a special session of the United Nations devoted to the '**Countering World Drug Problem Together**' conference, member states were urged to develop such legislation. Despite initial opposition from several stakeholders, this bill was ultimately approved, culminating in the enactment of the Act in 2003. The Act was implemented on July 1, 2005, subsequent to the issuance of a notification by the Central Government.

According to the Prevention of Money Laundering Bill's statement of purposes, "among other things, it aimed to enact comprehensive legislation to prevent money laundering and related activities, confiscate criminal proceeds, establish agencies and mechanisms to coordinate anti-money-laundering measures, and so forth."³ The Act's Chapter II includes measures addressing the crime of money laundering. Money laundering is defined in Section 2(p) of the Act as having the meaning assigned to it in Section 3. The Prevention of Money-Laundering (Amendment) Act, 2012, which became operative on January 3, 2013, modified Section 3 of the Act. The Act's Section 3, before the proposed amendment stated as follows: "Individuals

² What is Financial Action Task Force (FATF): FATF objectives: FATF Pakistan News Business Standard, <https://www.business-standard.com/about/what-is-fatf#:~:te~xt=The>

³ Compilation Of Relevant Judgements Related to Arrest And Bail Tripura Judicial Academy, https://tja.tripura.gov.in/sites/default/files/Compilation_of_some_relevant_Judgments_relating_to_Arrest_and_Bail_-_PART-II.pdf.

who intentionally or indirectly aid, conspire, or participate in any procedure or undertaking associated with it as untainted property shall be deemed guilty of the crime of money laundering."⁴ "Whoever directly or indirectly attempts to indulge, knowingly assists, knowingly is a party to, or is actually involved in any process or activity connected to proceeds of crime, including concealment, possession, acquisition, or use, and projects or claims it as untainted property, shall be guilty of the offence of money-laundering,"⁵ as amended in January , 2013.

II. AMENDMENTS AND LEGAL CHALLENGES TO PMLA

The Act's constitutionality, including the terms of bail covered in Section 45(1) (Act of 2002), have been contested several times in various courts, the bench has generally upheld the Act's constitutionality each time. This 'draconian' provision was ruled to be unconstitutional in the landmark case of *Nikesh Tarachand Shah v. Union of India*⁶ and was said to be violative of Articles 14 and 21 of the Indian Constitution. According to Section 45(1) of the PMLA 2002, an accused person who has been arrested for a crime that carries a sentence of more than three years under Part A of the Schedule and demands bail must fulfill a number of extra requirements in addition to those listed in the applicable CrPC, 1973 provisions. The 2019 Amendment to the PMLA saw the repeal of Sections 17(1) and 18(1), and the extension of the Enforcement Directorate (ED) officers' powers. This includes the ability to conduct searches of the accused or their property, as outlined in Section 157 of the Code of Criminal Procedure, 1973, without filing a report with the magistrate. This could lead to the accused suffering under the whims of the officers. The constitutional validity of these provisions is being examined by the court.⁷

The Act's constitutional legality, particularly the bail requirements outlined in Section 45(1) of the PMLA, 2002, has been repeatedly challenged in numerous cases. However, courts have generally sustained and authorized it. In the case of *Nikesh Tarachand*, the provision was contended to be oppressive and was deemed unlawful since it contravened Articles 14 (Equality Before Law) and 21 (Right To Life And Personal Liberty) of the Indian Constitution. Section

⁴ Section 3 PMLA(2002), https://www.indiacode.nic.in/show-data?actid=AC_CEN_2_2_00035_200315_1517807326550&mp=§ionId=25469§ionno=3&mp=&orderno=3

⁵ Prevention of Money Laundering Act in India: The ECIR and Presumption of Innocence ISAS.NUS.EDU.SG, <https://www.isas.nus.edu.sg/papers/prevention-of-money-laundering-act-in-india-the-ecir-and-presumption-of-innocence/>

⁶ *Nikesh Tarachand Shah v. Union of India* 2017 INSC 1137

⁷ (PDF) Financial Crimes in India with special reference to Prevention of Money Laundering Act 2002 ResearchGate, https://www.researchgate.net/publication/375866459_Financial_Crimes_in_India_with_special_reference_to_Prevention_of_Money_Laundering_Act_2002

45(1) of the Prevention of Money Laundering Act (PMLA) 2002 states that if a person is suspected of a crime that can result in a prison sentence of more than three years under Part A of the Schedule and they must meet certain further requirements in order to be granted bail. These requirements were additional and were over and beyond than what was already specified in the pertinent provisions of the Code of Criminal Procedure (CrPC) 1973.

The 2019 Amendment to the Prevention of Money Laundering Act (PMLA) resulted in the removal of Sections 17(1) and 18(1), and the expansion of the authority of Enforcement Directorate (ED) officials. This included the capacity to do searches on the accused or their belongings, as stipulated in Section 157 of the Code of Criminal Procedure, 1973, without any need to submit a report to the magistrate. This could result in the accused suffering at the hands of the authorities. These clauses are undergoing examination by the courts regarding their constitutional legality.

The PMLA had many revisions, with the most recent one being in 2019. With this amendment, it was intended to strengthen the money laundering laws' existing shortcomings and improve their ability to spot dubious activities. There were many petitions filed in various courts, contending that the latest revisions have expanded the Act's reach and compromised the legislature's original objective. The opponents argued that the process itself constituted punishment under the PMLA and that the revisions breached constitutional mandate, legal procedures, and individual liberty. They argued that the Code of Criminal Procedure must apply to the Enforcement Directorate since its powers are similar to those of the police. It was argued that the ED is not required under the PMLA, in contrast to other penal acts, to follow the arrest and investigation protocols outlined in the CrPC. Consequently, it undermines basic rights guaranteed by the Indian Constitution by enabling the ED to function without procedural safeguards to protect the rights of accused individuals.⁸

The clarification regarding the scope of section 3 of the 2019 amendment was a major ground of petition. Additionally, it was contended that the Act's original intention was to prevent the portrayal of illegal or black money as legal or white and had made incorporation of black money into the economy as illegal. However, the ED was not providing any evidence that the money was later laundered; instead, it was just bringing charges based on the original violations. In addition, the PMLA was created with the intention of stopping and prosecuting a certain range of crimes, the majority of which included extensive money laundering.

⁸ Prevention of Money Laundering Act in India: The ECIR and Presumption of Innocence ISAS.NUS.EDU.SG, <https://www.isas.nus.edu.sg/papers/prevention-of-money-laundering-act-in-india-the-ecir-and-presumption-of-innocence/>.

However, under the Finance Act 2019, the PMLA's modifications brought a wide variety of charges into the ED's purview. As a result, the Parliament's extension of the PMLA's jurisdiction made it possible for the ED to utilize its power more widely, irrespective of the gravity of the violation. Furthermore, it has been maintained that the modifications to the PMLA that were implemented in 2015, 2016, 2018, and 2019 did not qualify as money bills under Article 110 of the Constitution since they were passed through the Finance Act.⁹

A number of changes were made to the PMLA; the most recent one was made in 2019. The amendment's goal was to clear up a huge uncertainty in the section about what was meant by "proceeds of crime." To cover these gaps, Section 3 was enlarged in the modified Act.

III. CONSTITUTIONAL CHALLENGES AND CRITICISMS

Sections 2(1)(u), 8, and 23 of the Act were contested and challenged as unconstitutional in the case of *B Rama Raju v. Union of India and Ors*¹⁰. Primary objection was regarding the ED's power to take and seize property, including that which does not belong to the accused, was brought up in this case. Furthermore, the petitioner had argued that even properties acquired before to the Act's formation would be considered unlawful if they were later found to have violated the Act's provisions and were seized and confiscated. Moreover, an application was filed asking the court to determine on the validity of Section 23, which places the accused under a presumption of guilt (rather than innocence). The court upheld the constitutional validity of the aforementioned portions and underlined the Parliament's ability to adopt the retroactive law.¹¹

Another subsequent issue that was put to challenge was that the ED files an Enforcement Case Information Report (ECIR), which is similar to a First Information Report (FIR) in criminal cases. The Enforcement Case Information Report is purportedly not released since it is an internal document, in contrast to the First Information Report, which is given to the accused. The Supreme Court heard arguments supporting the idea that the ED may hold someone only on the basis of an ECIR without disclosing its contents, which would be unreasonable and violates the accused's basic rights. With this approach, the accused person is not made aware of the allegations against them while applying for bail because there is no chance for the court to review the case.¹²

⁹ *Ibid.*

¹⁰ *B Rama Raju v. Union of India and Ors* [2011] 108 SCL 491

¹¹ (PDF) Financial Crimes in India with special reference to Prevention of Money Laundering Act 2002 ResearchGate, https://www.researchgate.net/publication/375866459_Financial_Crimes_in_India_with_special_reference_to_Prevention_of_Money_Laundering_Act_2002

¹² *Supra* note 8

In response, the Apex Court decided that an ECIR cannot be regarded as the same as a FIR as the former needs to be formally recorded and given to the accused. The court found that if disclosure of an ECIR is determined to be necessary, it might jeopardize the Act's intended goals, including the attachment of property. Information about materials possessed by the authority may be included in the ECIR. If this information is revealed before the inquiry or investigation begins, it may negatively impact the investigation's conclusion. As a result, it was decided that there could be no constitutional rights violated by the ED's internal document, the ECIR, being withheld.

This decision has faced criticism on the basis that the agency does not require informing a person of the specific reasons for an investigation against them. The individual would be unaware of whether they have been summoned as a witness or as a defendant. When seeking bail, it is necessary to fulfill the requirements of both listening to the prosecution and demonstrating innocence. Additionally, the Supreme Court must be convinced that there is no likelihood of the individual committing a crime while on release. This is considered unsettling because it challenges the fundamental concepts of criminal law, including the assumption of innocence for the accused till proven guilty. This is a strict provision of the law as it allows for an arrest to be made without informing the accused of the reasons for the arrest. Obtaining bail may be challenging, and the accused's property is seized until they can prove their innocence. Given the protracted duration of many instances in India, these circumstances have a highly detrimental impact.¹³

Another provision that has been a topic of discussion is Section 50. As per the said provision, the Enforcement Directorate possesses the authority to summon individuals who are suspected of engaging in money laundering and get recorded statements from them in accordance with said position. Nevertheless, the Supreme Court determined that officials from the ED do not qualify as law enforcement personnel. Further, in the case of *Vijay Madanlal Choudhary v. Union of India*¹⁴, it was said that the procedure outlined in Section 50 of the PMLA is more of a form of an "inquiry" into the funds obtained through criminal activities, rather than a thorough "investigation" in the strictest sense, with the purpose of commencing legal proceedings. Moreover, there can be additional distinctions that can be noted between the officials from the ED and the police. The authorities of the Enforcement Directorate initiate search procedures and commence their investigation by issuing summons for the purposes of collecting evidence

¹³ Misusing Enforcement Directorate for Political Benefits Outlook India, https://www.outlookindia.com/national/misusing-enforcement-directorate-ed-for-political-benefits-weekender_story-305095

¹⁴ *Vijay Madanlal Choudhary v. Union of India* 2022 INSC 757

and trace the "proceeds of crime" (i.e, assets or property obtained directly or indirectly through illegal means or activities). On the other hand, the police are obligated to file a First Information Report for a cognisable offense before commencing their investigation. Unlike a statement provided to an ED authority, any statement made by a suspect to the police is not permissible as evidence in a court of law. The defendant has the right to acquire a duplicate of the First Information Report, while the Enforcement Case Information Report is seldom accessible.¹⁵

Later in June 2023, there was a plea contending that that arrest of the accused was in violation of his fundamental rights including right to equality, life and protection and thereby was unconstitutional. The accused had argued that just telling them of the reasons for their arrest, by having them read and sign the grounds at the time of arrest, does not constitute providing reasonable grounds of arrest in written form. The said plea was rejected by the Delhi HC.

According to Section 19(1) of the PMLA and Article 22(1) of the Constitution of India, it is mandatory to tell the accused about the reasons for their arrest. However, both legislative instruments fail to specify the method by which these reasons must be conveyed. The decision in *Vijay Madanlal* by the Supreme Court did not provide a clear answer about how the accused would be notified of the reasons for their arrest without being given the ECIR and as such the question was left to be open ended.

IV. NAVIGATING ARREST NORMS: A JUDICIAL PERSPECTIVE

After the court's dismissal in the *Vijay Madanlal* case, the Supreme Court, in the case of ***Pankaj Bansal v. Union of India***¹⁶ in October 2023, had emphasized upon the necessity of providing written notice of the reasons for arrest, and had given two reasons for the same. Firstly, verbal communication can lead to conflicts regarding the accurate transmission of information, resulting in a problematic situation where the arrested individual's version contradicts that of the authorized officer. According to the court this lack of clarity would make it difficult to establish the validity of the arrest and could hamper the process. In this case, the ED claimed that it verbally conveyed the reasons for the arrest in Hindi in front of witnesses, however the accused argued that no such communication occurred.

Furthermore, the Supreme Court had reiterated the features of the process of getting bail and its unique nature under the Prevention of Money Laundering Act and noted that it prevents release of the accused until a reasonable case is shown. Accordingly, in order to establish a strong defense against the arrest and apply for bail, it was deemed crucial for the accused to

¹⁵ Supra Note 13

¹⁶ *Pankaj Bansal v. Union of India* 2023 INSC 866

acquire a comprehensive understanding of the charges brought against them. Therefore, the Court determined that in every case of ED arrests, the reasons for the arrest must be given in written form to promote transparency and help the accused understand and comprehend the case, in accordance with principles of fairness.

The Delhi High Court's January 2024 ruling in the case of *Neeraj Singal v. ED*¹⁷ is in line with the principles previously set by the Supreme Court and provides valuable understanding of how these principles might be applied. In this case, the High Court noted that the Supreme Court's ruling, which mandates that the reasons for arrest be provided in writing at the time of arrest, was issued subsequent to the accused individual's arrest. The accused had then challenged his arrest and had claimed that he was merely provided with an arrest memo and not presented with the reasons for his arrest or the official document authorizing it. To this, the ED countered by stating that the reasons were conveyed verbally. The High Court upheld this contention, underlining that the lack of the petitioner's signature on every page of the "ground of arrest" does not invalidate the existence of the document or the communication of the reasons.

In addition, the High Court observed that the "remand application essentially includes the reasons for the arrest". As a result, the accused was deemed to be informed when brought before the Special Judge within 24 hours after being arrested by the ED in order to request remand. Subsequently regarding the arrest that were made after the verdict given by the Apex Court in the Pankaj Bansal case, it is important to note that even though the SC gives a 24 hour duration for the purposes for the purposes of presenting the written explanations for the arrest, it is also important to note that it is of utmost importance to effectively communicate these reasons to accused and not wait till the remand stage. The Court has stressed that issuing a remand order without confirming and assuring that the prerequisites in section 19 are properly met and that the ED followed correct arrest procedures constitutes a "failure to fulfill one's responsibilities." If such a situation arises, "the order of remand would be unsuccessful." An unlawful arrest under the PMLA cannot be justified or made legal by a remand order.

V. CONCLUSION

There are concerns about the possibility of the ED abusing its increased authority, particularly in instances that have political implications. There have been concerns that PMLA is being utilized as a means of pursuing personal vendettas rather than conducting legitimate investigations into financial crimes. The misuse of power naturally results in the erosion of public's faith in the legal system and thus, there is a need for rigorous supervision and

¹⁷ Neeraj Singal Vs. Directorate of Enforcement 2024:DHC:129

establishment of safeguards to prevent any arbitrary and unreasonable exercise of power by agencies under PMLA.

Thereby it is essential to maintain a balance between the exercise of the authority's power and the protection of constitutional rights of the people. In order to prevent misuse and ensure the protection of the core concepts of justice and individual liberty, it is important that the Act is administered with transparency, accountability with all the procedural requirements being duly followed. There should be active judicial scrutiny wherever necessary and possible changes in legislation should be established in order to guarantee that the Prevention of Money Laundering Act (PMLA) fulfills its intended objective without violating the rights of persons.
