

CIVIL IMPLICATIONS OF PMLA: ENVISAGING THE FINANCIAL DEATH OF AN ACCUSED

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Abstract

The Prevention of Money Laundering Act, 2002, serves as a critical legal framework in India's efforts to combat money laundering. The Act empowers the Enforcement Directorate to attach, retain, and confiscate 'proceeds of crime'. The scope of the PMLA extends beyond mere criminal prosecution, incorporating civil measures that include freezing of bank accounts and retention of properties. Therefore, civil implications of the statute could lead to prolonged financial deprivation of people long before their guilt is established in a court of law. Sections 5, 17, and 18 of the PMLA have been subject to constitutional scrutiny, particularly regarding the attachment of untainted properties and concerns over potential misuse of the ED's powers. Furthermore, systemic deficiencies plague the adjudication process under the PMLA. Judicial interpretations of these provisions continue to shape the application of the PMLA, balancing the need for effective law enforcement with the protection of individual rights.

Keywords: Money Laundering - Proceeds of Crime - Attachment of Property - Enforcement Directorate

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INTRODUCTION

The Prevention of Money Laundering Act, 2002 (PMLA) was brought into force on 1st July 2005¹ to prevent money laundering and facilitate confiscation of property derived from or involved in money laundering. It was enacted to meet India's international obligations under the Vienna² and Palermo³ Conventions, the Political Declaration and Global Programme of Action (1990) adopted by the UN General Assembly,⁴ and to give effect to the recommendations made by the Financial Action Task Force (FATF) for combating money laundering.⁵

The PMLA encompasses regulatory, preventive, and penal measures, employing a dual-focused strategy targeting both assets and offenders to achieve its objectives. Firstly, it institutes civil proceedings to identify, provisionally attach, confirm, and eventually confiscate properties upon conviction for money laundering.⁶ Secondly, it prosecutes the accused before a special court for money laundering offences.⁷ The Act deems a person guilty of money laundering if they engage directly or indirectly in any process or activity related to proceeds of crime—such as concealing, possessing, acquiring, or using the proceeds—and try to present it as legitimate property.⁸ The Directorate of Enforcement (ED) is empowered to carry out investigations and also to attach the property involved in money laundering.⁹

This article aims to examine the civil dimensions of the legislation by analysing the provisions relating to the attachment and retention of properties, termed as 'proceeds of crime' under the PMLA. The authors contend that the cumulative impact of these

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- 1 Department of Economic Affairs, 'Notifications & Rules under PMLA' available at <<https://dea.gov.in/sites/default/files/moneylaunderingrule.pdf>> accessed 4 August 2024.
 - 2 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95 (Vienna Convention).
 - 3 United Nations Convention against Transnational Organized Crime and the Protocols Thereto (adopted November 15, 2000) 2225 UNTS 209 (Palermo Convention).
 - 4 The Political Declaration and Global Programme of Action, annexed to the resolution S-17/2 was adopted by the General Assembly of the United Nations at its 17th special session on February 23, 1990.
 - 5 The FATF Recommendations, 'International Standards On Combating Money Laundering And The Financing Of Terrorism & Proliferation' (November 2023) <<https://www.fatf-gafi.org/content/dam/fatf-gafi/recommendations/FATF%20Recommendations%202012.pdf.coredownload.inline.pdf>> accessed 4 August 2024.
 - 6 Prevention of Money Laundering Act 2002, ss 5, 8, 17 and 26.
 - 7 Prevention Of Money Laundering Act 2002, ss 3, 4, 44, 45 and 47.
 - 8 Prevention Of Money Laundering Act 2002, s 3.
 - 9 Prevention Of Money Laundering Act 2002, ss 48-54; Department of Economic Affairs (n 1).

provisions—enabling provisional attachment, retention, confirmation, and eventual confiscation of properties—results in the financial demise of the accused long before their guilt is established in a court of law.

I. UNDERSTANDING PROCEEDS OF CRIME

The offence of money laundering under Section 3 of the PMLA centres around laundering the 'proceeds of crime'. The term 'proceeds of crime,' defined under Section 2(1)(u) of the Act, has undergone significant changes since its inception, particularly in the years 2015, 2018, and 2019. As per the original definition, 'proceeds of crime' meant any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property. The definition was amended in 2015 to also include the property equivalent in value held within the country for any property taken or held outside the country.¹⁰ The ambit of the definition was further expanded in 2018 to include property equivalent in value held both within the country and abroad if the original property is taken or held outside the country.¹¹ Finally, an explanation was also added to it through the 2019 amendment, which clarified that 'proceeds of crime' include property not only derived or obtained from the scheduled offence but also any property that may be directly or indirectly derived or obtained as a result of any criminal activity relatable to the scheduled offence.¹² The explanation inserted in 2013 clarifies that the term 'property' includes any property used in the commission of an offence under the PMLA or any scheduled offence.¹³ It is common for proceeds of crime to be converted, or siphoned off into different assets, frustrating attempts to locate and attach original proceeds of crime. To account for this, the lawmakers adopted a broad definition of “proceeds of crime” that enabled the ED to also attach properties of the accused equal in value to the actual proceeds of crime, which may have become untraceable. Thus, the ED has powers to order a debit freeze on bank accounts of accused persons.

Additionally, the Act specifies that the proceeds of crime must arise from a scheduled offence listed under Section 2(1)(y) or from criminal activity relating to such an offence. These are also referred to as predicate offences, as they constitute the basis for the commission of money laundering offences. Consequently, proceeds of crime attributable to scheduled offences listed under the Act which are subject to seizure, freezing, attachment, confirmation, and confiscation.

10 Finance Act, 2015.

11 Finance Act, 2018.

12 Finance Act, 2019.

13 The Prevention of Money Laundering (Amendment) Act 2012, s 2.

While the initial list of Scheduled Offences included only 6 legislations,¹⁴ subsequent amendments have now increased the Scheduled Offences list to cover offences under 29 different legislation – thereby ensuring that the PMLA net is cast much wider when compared to what was originally envisaged in 2002. Interestingly, in addition to serious infractions under the NDPS Act 1985, UAPA 1967, Arms Act 1959, Prevention of Corruption Act 1988, Section 447 of the Companies Act, 2013, and others, even relatively minor contraventions under the Copyright Act, 1957, Trade Marks Act, 1999, Biological Diversity Act, 2002, Wild Life (Protection) Act, 1972, etc., have also been brought under the Act's ambit.

In essence, the following categories of properties are categorized as proceeds of crime - (a) property directly or indirectly derived or obtained by any person as a consequence of criminal activity related to a scheduled offence, (b) the value associated with such property and (c) property of equivalent value held within the country, in instances where the property is situated or held outside the country. Property has been defined to include corporeal or incorporeal, movable or immovable, tangible or intangible property or assets.¹⁵ Therefore, the “proceeds of crime” that ED can attach under PMLA could either be:

- tainted property, i.e., the actual “proceeds of crime”; and
- untainted property, i.e., property not derived from the proceeds of crime but having a value equal to the tainted property of the concerned accused.

II. QUANTIFICATION OF PROCEEDS OF CRIME

The term 'value' holds pivotal importance under the PMLA regime, as it defines the scope of asset attachment by the ED. The PMLA defines 'value' as the fair market value of any property at the time of acquisition or if such date cannot be determined, the date on which such property is possessed by such person.¹⁶ A plain reading of the definitions of “value” and “proceeds of crime” leads to the understanding that “value” as used in the definition of “proceeds of crime” refers to the value of the tainted property, and does not apply to valuing untainted properties sought to be attached.¹⁷ Therefore, if the period of offence is 2020-2024 and the ED alleges laundering of Rs. 50 crores of money, it could attach a property acquired by the accused in 2022 valued at Rs. 50 crores.

14 The original 6 legislations were the following – (i) Indian Penal Code, 1860; (ii) Narcotic Drugs and Psychotropic Substances Act, 1985; (iii) Arms Act, 1959; (iv) Wild Life (Protection) Act, 1972; (v) Immoral Traffic (Prevention) Act, 1956; (vi) Prevention of Corruption Act, 1988.

15 Prevention of Money Laundering Act 2002, s 2(v).

16 Prevention of Money Laundering Act 2002, s 2(zb).

17 Aditya Mukherjee and Krishna Tangirala, 'Asset attachment under Prevention of Money Laundering Act – What is the right approach?' (MoneyControl, 12 February 2024) <<https://www.moneycontrol.com/news/opinion/asset-attachment-under-Prevention of Money Laundering Act-what-is-the-right-approach-12245101.html>> accessed 4 August 2024.

However, as per the ED's interpretation, the phrase "fair market value of the property as on date of acquisition" extends even to untainted property completely unconnected to the 'proceeds of crime.' Interpreting the PMLA in such a manner allows the ED to attach property based on its historical acquisition value rather than its contemporary market value.

For instance, if the alleged period of offence is 2020-2024 and an individual inherited land in 1990 (untainted property), ED may be entitled to attach the property at its 1990 value rather than its current market worth. This interpretation could lead to significant anomalies, where properties with substantially higher current values are attached at comparatively negligible historical values. A more critical implication is that, under this interpretation, multiple properties of the accused, if not all, may sought to be attached to match the total alleged proceeds of crime, considering their value at the time of acquisition. For example, the ED alleges Rs 50 crore as proceeds of crime accrued between 2020 and 2024, and the individual possesses 10 inherited properties in Delhi, each valued at Rs 5 crore in 1970 but currently worth Rs 50 crore each. If tainted properties are untraceable, the ED could attach all these inherited properties at their 1970 value. This would result in the attachment of properties worth over Rs 500 crore today to cover alleged crime proceeds of Rs 50 crore, thereby illustrating a significant disparity due to the depreciated historical valuation.

This raises concerns about fairness and proportionality of the scope of powers of the ED to attach properties, potentially resulting in the attachment of properties at depressed values, especially when acquired many years before the alleged criminal activity.¹⁸ This could lead to the virtual denudation of individuals' assets, irrespective of their connection to any criminal activity, leading to irrevocable ramifications for the accused.

III. ATTACHMENT, ADJUDICATION AND CONFISCATION

Section 5 of the Act provides for provisional attachment of property by the ED during investigation by issuance of a Provisional Attachment Order (PAO).¹⁹ Once a PAO is passed, the property shall remain attached for 180 days from the date of passing of such order and pending the confirmation of the attachment order by the Adjudicating Authority constituted under Section 6(1) of PMLA.²⁰ Within 30 days of issuing such PAO, the ED is mandatorily required to file a Complaint and give its 'reasons to believe' that such provisional attachment is necessary in the given facts and circumstances, before the adjudication. Upon receiving the complaint, if the adjudicating authority is of

18 *Vijay Madanlal Choudhary v Union of India* (2022) SCC Online SC 929 [4]; *ibid*.

19 Prevention of Money Laundering Act 2002, s 5(1).

20 Prevention of Money Laundering Act 2002, s 6.

the opinion that a person has committed an offence under the PMLA, or is in possession of the POC, it has to issue a 'Show Cause Notice' upon such a person in terms of Section 8(1) of PMLA, calling upon him to indicate the sources of his income, earning or assets, out of which or by means of which he has acquired the property attached by ED, giving them an opportunity to file a reply before hearing both parties. If the Adjudicating Authority finds that the property is involved in money laundering, it confirms the PAO.²¹ Once an order confirming attachment has been passed the property remains attached for 365 days or till the pendency of proceedings related to offence under the Act.²² The Appellate Tribunal hears appeals against the order of the Adjudicating Authority.²³

However, Section 5 is not the only provision that facilitates legal deprivation of an accused of their property. Section 17 of the Act empowers the ED to carry out a search and to seize any record or property found as a result of such search. Where the seizure of such record or property is not practicable, for example, a bank account, an order of freezing such property/account can be passed.²⁴ Section 18 provides for the search of a person and seizure of any record or property. The retention or freezing of property under Sections 17 and 18 continues for 180 days²⁵ and within 30 days from such seizure or freezing, an application has to be filed in writing before the adjudicating authority, requesting for the continuation of the order beyond the 180 days.²⁶ A show cause notice is thereafter issued by the adjudicating authority to any person deprived of such property, after recording "reasons to believe" that they have committed an offence under Section 3 or have proceeds of crime.²⁷ This highlights a two-tier process mandated by the Act, where the ED first satisfies itself of the need for retention, followed by independent verification and satisfaction by the Adjudicating Authority before issuing a show cause notice.

Once a property has been attached/seized by the ED, such attachment can continue for a period of 180 days or until a date when such attachment is confirmed under Section 8(3) by the adjudicating authority, whichever is earlier.²⁸ At such stage, the only right available to the accused and the claimant is to continue enjoyment of property if it is

21 See, Prevention of Money Laundering Act 2002, s 8(2).

22 See, Prevention of Money Laundering Act 2002, s 8(3).

23 Prevention of Money Laundering Act 2002, s 26.

24 Prevention of Money Laundering Act 2002, s 17(1A).

25 Prevention of Money Laundering Act 2002, ss 20 and 21.

26 Prevention of Money Laundering Act 2002, s 17(4).

27 Prevention of Money Laundering Act 2002, s 8(1).

28 Prevention of Money Laundering Act 2002, s 5(1).

immovable.²⁹ However, Section 8(4) states that once attachment or freezing is confirmed, the ED is empowered to take possession of the property.³⁰ So, the opportunity to continue enjoyment of right in an immovable property is effectively discretionary in the hands of the ED. Such an order becomes final after an order of confiscation is passed by the Special Court.³¹

The Supreme Court has clarified that the attachment under Section 5(1) is merely notional, emphasising that even if an order confirming the attachment under Section 8(3) is passed,³² the property does not stand confiscated until an order of confiscation is passed, therefore, the right to enjoy the property under Section 5(4) continues. The Court advised against taking possession prior to confiscation, as a matter of rule, because of the possibility that the accused may eventually be acquitted — in which case the property would stand released. There is however, lack of sufficient safeguards in the statute itself.

In case of moveable properties and bank accounts, however, the accused/claimant are immediately deprived of their use/possession or debarred from making debit transactions, respectively, till such attachment/retention/freezing is set aside by the concerned court/tribunal or upon acquittal, whichever is earlier. Such swift freezing of accounts of individuals and companies can have a cascading impact on their financial capabilities and could potentially jeopardize their financial continuity. In July 2022, the ED had frozen bank accounts of Vivo India bringing a standstill to its business activities, while also making it impossible for the company to meet immediate payments to be made towards statutory dues, salaries, rent and even refunds due to consumers. As an urgent conditional relief, the Delhi High Court had allowed Vivo to operate its bank accounts.³³ In most cases however, the accused/claimant has no choice but to go through the stipulated process of opposing the confirmation of attachment/retention before the Adjudicating Authority, appealing before the PMLA Appellate Tribunal both of routinely pass order confirming the attachment or retention of properties by the ED. This makes the appropriate High Court the first effective recourse to reversing any dispossession or freeze.

While the power of attachment u/s 5 PMLA extends to 'proceeds of crime' as defined u/s 2(1)(u) PMLA to include untainted properties, the power to seize properties Section 17 PMLA is limited to property being 'proceeds of crime' involved in the money

29 Prevention of Money Laundering Act 2002, s 5(4).

30 Prevention of Money-laundering (Taking Possession of Attached or Frozen Properties Confirmed by the Adjudicating Authority) Rules, 2013.

31 Prevention of Money Laundering Act 2002, ss 8(5), 8(7), 58B, 60(2A).

32 *Vijay Madanlal Chaudhary* (n 18) [304-305].

33 *Vivo Mobile India Pvt Ltd v Directorate of Enforcement* (2023) SCC OnLine Del 1901.

laundering or property related to crime. For the scope of power of attachment, the purpose of which is to secure the identified value of proceeds of crime till the conclusion of trial, is wider than the scope of power Section 17 PMLA which is limited to power of search and seizure.

IV. RESTORATION OF PROPERTY

Upon the conclusion of a trial of the offence of money laundering, if the Special Court finds that the offence of money laundering has been committed, it shall order for confiscation of the property by the Central Government.³⁴ However, if the Special Court finds that the offence of money laundering has not taken place or the property is not involved in the offence of money laundering, the Special Court shall pass an order for releasing the property to the person who is entitled to receive it.³⁵ If the trial of the offence of money laundering cannot be conducted due to the death of the accused person or the person being declared a proclaimed offender or for any other valid reason, the Special Court has the authority to consider an application by the Director or any other person claiming entitlement to the possession of the property can pass an order for confiscation or release of the property based on the material before it.³⁶

In a significant amendment, Section 8(8) was added stating that if a property has been confiscated by the Central Government u/s 8(5) of the PMLA, the Special Court may direct the Central Government to restore the confiscated property to a claimant who has a legitimate interest in the property and has suffered a quantifiable loss as a result of an offence of money laundering.³⁷ The Central Government notified the Prevention of Money-Laundering (Restoration of Property) Rules, 2016 which contains the procedure to be followed by the Special Court for restoration of the property to give effect to the amended provision. Thereafter, vide an amendment introduced in 2018, the second proviso was added to Section 8(8) which has additionally facilitated the restoration of property to a claimant during the trial of the case if the Special Court thinks it fit.³⁸

34 Prevention of Money Laundering Act 2002, s 8(5).

35 Prevention of Money Laundering Act 2002, s 8(6).

36 Prevention of Money Laundering Act 2002, s 8(7).

37 Act 20 of 2015, s. 147

38 Finance Act, 2018, S. 208.

V. KEY ISSUES AND INTERPRETATIONS

The constitutionality of Sections 5, 8, 17 and 18 of the PMLA was *inter alia* challenged before the Supreme Court for being violative of Article 14, 19, 21 and 300A of the Constitution.³⁹ The intention of the legislature in progressively widening the scope of these provisions was particularly suspect since the amendments of 2015, 2018 and 2019, expanding the scope and powers of the ED, were introduced by way of Finance Acts.⁴⁰ This becomes significant since Finance Bills are certified as Money Bills in the Parliament, meaning the Upper House (Rajya Sabha) has no power to amend or reject these Bills.⁴¹ While the Upper House has the power to recommend amendments to the Finance Bill, it is for the Lower House (Lok Sabha) to accept or reject the recommendations. It has been argued that the government exploits this loophole in the legislative process, choosing the Money Bill route when anticipating setbacks like rejection, amendments, or serious discussions on bills in the Upper House.⁴² Though the constitutionality of the provisions was eventually upheld in *Vijay Madanlal Choudhary v. Union of India*,⁴³ the persistent issues remain unresolved. The issue of judicial review of certification of money bills by speaker has been referred to a 7-judge Constitution Bench of Supreme Court in *Roger Mathew v. South Indian Bank*, which will have the final say the validity if the amendments. It needs to be borne in mind that the rampant exercise of the sweeping powers by the ED can have irrevocable consequences, which would be impossible to undo if the court holds the amendments invalid.

Section 5 has undergone amendments in 2005, 2009, 2013 and 2015. Before the amendments, attachment could take place only if the person was in possession of any proceeds of crime, was charge sheeted as an accused in the predicate offence and such proceeds were likely to be concealed or transferred. Currently, under the terms of the first proviso, no provisional attachment could be affected before the filing of a chargesheet in the predicate offence. However, the second proviso to Section 5, substituted by the 2015 amendment, allows the attachment of property without the filing of a chargesheet in a predicate offence or even to attach the property standing under the name of any person other than those accused under the scheduled offence.⁴⁴ This

39 *Vijay Madanlal Choudhary* (n 18).

40 *ibid.*

41 The Constitution of India 1950, art 109.

42 *K.S. Puttuswamy v Union of India* (2019) 1 SCC 1; *Vijay Madanlal Choudhary* (n 18). The issue of judicial review of certification of money bills by speaker has been referred to Constitution Bench of Supreme Court in *Roger Mathew v South Indian Bank* (2020) 3 SCC 63.

43 *Vijay Madanlal Choudhary* (n 18).

44 *B Rama Raju v Union of India* (2011) 108 SCL 491 (AP).

proviso, envisaged as an emergency procedure, allows for immediate attachment to prevent frustration of proceedings relating to confiscation under the PMLA. It therefore enables attachment of any property without any link to the scheduled offence or the proceeds of crime, facilitating arbitrary and unjust attachment of even untainted property that could be temporally unconnected with the predicate offence.

The inclusion of “value thereof” properties has raised several contentious issues, particularly regarding whether properties acquired from legitimate income can be attached if they are considered equivalent in value to proceeds of crime. The High Court of Delhi in *The Deputy Director, Directorate of Enforcement, Delhi v. Axis Bank and Others*,⁴⁵ held that untainted property would also fall within the ambit of the Act in a situation where the tainted assets held by them are nor traceable or cannot be reached since the person holding such property was found involved in criminal activity. The Punjab and Haryana High Court in *Seema Garg v. Deputy Director, Directorate of Enforcement*,⁴⁶ however, categorically held that property derived from a legitimate source cannot be attached on the ground that property derived from a scheduled offence is not available. It principally holds that the phrase —value of any such property and —property equivalent in value held within the country or abroad cannot be ascribed the same meaning and effect. The court took into account the fact that there could be scheduled offences where property may or may not be involved because every scheduled offence is not committed for the sake of property, e.g. murder or offences under the Arms Act.⁴⁷ The court explained that to understand the true meaning of the second limb of the definition of 'proceeds of crime,' it must be read in conjunction with Sections 3 and 8 of the PMLA.⁴⁸ Such a reading makes it abundantly clear that “value of such property” merely means property that has been converted into another property or has been obtained based on property derived from the commission of the scheduled offence.⁴⁹ For instance, if an accused buys gold after selling immovable property that was originally obtained by committing cheating, the gold would amount to “proceeds of crime.” However, such an amount of gold that was purchased by an accused before the alleged period of offence through legitimate sources of income would not constitute “proceeds of crime.” The Delhi High Court, in *Prakash Industries v. Directorate of Enforcement*,⁵⁰ discarded the line of reasoning adopted in *Seema Garg* and reiterated the principles laid down in *Axis Bank*. Most recently, the Kerala High Court⁵¹, followed the

45 (2019) SCC OnLine Del 7854.

46 (2020) SCC OnLine P&H 738.

47 *Seema Garg v Deputy Director, Directorate of Enforcement* (2020) SCC OnLine P&H 738 [37].

48 *ibid* [35].

49 *ibid*.

50 (2022) SCC OnLine Del 2087.

51 *Satish Motilal Bidri v Union of India* WP(Crl) No 406 of 2024 (Order dated 28 June 2024, Kerala HC).

Seema Garg line of reasoning holding that the term proceeds of crime would not include the value of property which had been acquired even earlier.

The same position was reiterated by the Supreme Court in *Vijay Madanlal Choudhary v. Union of India*.⁵² The court held that the definition of “proceeds of crime” in section 2(1)(u) of the PMLA is common to all actions under the Act, namely, attachment, adjudication and confiscation being civil in nature as well as prosecution or criminal action. It also clarified that the explanation added in 2019 which includes any property which may, directly or indirectly, be derived as a result of any criminal activity relating to scheduled offence is only a clarificatory amendment that does not transcend beyond the original provision. Property derived from proceeds of crime, even if subsequently acquired, is considered tainted and actionable under the Act. In other words, property in whatever form mentioned in section 2(1)(v), that is or can be linked to criminal activity relating to or relating to scheduled offence, must be regarded as proceeds of crime for the Act. However, the Court did not address the specific issues regarding the valuation and attachment of assets, leaving room for continued debate and scrutiny. In *Pavana Dibbur v. Directorate of Enforcement*⁵³ it was observed that properties acquired prior to commission of scheduled offence cannot constitute proceeds of crime. The law however largely remains unsettled with different High Courts giving differing interpretations to the second limb of the definition of 'proceeds of crime'. It is pertinent that appeals had been preferred against the Axis Bank and Seema Garg judgments before the Supreme Court. While the Seema Garg appeal was dismissed,⁵⁴ the Axis Bank appeal is pending with the court directing the parties to maintain status quo vide an interim order.⁵⁵ The larger question of whether ED can attach ancestral assets as proceeds of crime is pending adjudication before the Supreme Court of India.

The concerns regarding expansive powers of the ED extend to matters of seizure of property as well. The PMLA as it was originally enacted only allowed for the search and seizure under sections 17 & 18 to be conducted after the filing of a chargesheet or a complaint in the predicate offence. This requirement was gradually diluted by amendments, culminating in the 2019 Finance Act, which removed these safeguards entirely. Sections 17 and 18 as they now stand, allow officers of the ED to conduct searches and seizures without the necessary preliminary steps such as registering an FIR for cognizable offences or filing a complaint before a competent court. This absence of

⁵² *Vijay Madanlal Choudhary* (n 18).

⁵³ (2023) SCC OnLine SC 1586.

⁵⁴ *Deputy Director, Directorate of Enforcement v Seema Garg* Nos 14713-14715/2020.]

⁵⁵ *SBI v Dr Kewal Krishan Sood* SLP No 6554/209.

⁵⁶ *Directorate of Enforcement v KS Nandhini* SPL (Crl) No 6236-6237/2021.

procedural safeguards contrasts with the Code of Criminal Procedure, which mandates certain safeguards for similar actions.⁵⁷ Sections 17 and 18 lack magisterial oversight, instead relying on limited oversight by the Adjudicating Authority. The Adjudicating Authority exercises no control over the ED, – it is only an ex post facto safeguard. Therefore, right of the accused to their property, is solely hinged on the expectation that the Adjudicating Authority may subsequently correct any egregious exercise of power, severely hampering the financial liberties of an accused.

Lastly, Section 8(4) allows the ED to take possession of attached property with simply one stage of confirmation by the Adjudicating Authority. Initially, the PMLA mandated that attachment would continue during the proceedings related to the scheduled offence.⁵⁸ Subsequent amendments extended this period and decoupled it from the scheduled offence. The current scheme allows the ED to take possession without even filing a chargesheet in the predicate offence,⁵⁹ for 365 days during an investigation of the offence during the pendency of proceedings under the PMLA. Furthermore, the statute does not clarify the consequences if the ED fails to file a complaint within 365 days of confirmation of the PAO.

CONCLUSIONS AND OBSERVATIONS

The unbridled powers of the ED are not the only cause of worry for persons accused under the PMLA. The functioning of the Adjudicating Authority too has been mired in controversies. The Delhi High Court has repeatedly cautioned the Adjudicating Authority against the use of template paragraphs in its orders reflecting a non-application of mind and reducing natural justice principles to “a mere rhetoric.”⁶⁰ In another matter, the Court has asserted that the Adjudicating Authority, while issuing a Show Cause Notice under section 8, PMLA must establish separate and independent grounds to believe that an offence has occurred, and must not undermine the two-step verification provided by the act before provisional attachment or retention of property by merely relying on the reasons provided by the ED.⁶¹

57 See Code of Criminal Procedure, 1973, ss 93, 94, 99, 165.

58 Finance Act, 2012; Finance Act, 2018.

59 Prevention of Money Laundering Act 2002, s 5(1).

60 *State Bank of India v Deputy Director, Enforcement Directorate* (2023) SCC OnLine Del 1800[5]; *Kankipati Rajesh v AA, Prevention of Money Laundering Act* (2023) SCC OnLine Del 2526 [10].

61 *JK Tyre and Industries Ltd v Directorate of Enforcement* 2021 SCC OnLine Del 4836.

Strategic vacancies at the Appellate Tribunal, PMLA, lasting over two years,⁶² had rendered it non-functional, undermining the statutory right to appeal of individuals aggrieved by orders of the Adjudicating Authority.⁶³ This led to the filing of numerous writ petitions in High Courts assailing orders passed under the PMLA, on account of statutory appeals being not taken up for consideration.⁶⁴ Recognizing the urgency of the situation, the High Court intervened, directing the Central Government to promptly appoint the Chairperson and members of the Appellate Tribunal.⁶⁵ Additionally, the Delhi High Court had also directed the Union Government to take expeditious steps for the constitution of multiple benches of the Adjudicating Authority, taking judicial notice of the fact that there is a “large volume of cases” pending under PMLA.⁶⁶ Therefore, after the time-bound confirmation of a PAO or retention by the Adjudicating Authority, it takes an indefinite time for appeals against such confirmation to be heard and decided by the Appellate Tribunal. On the occasion of such an appeal being dismissed,

Hence, in addition to granting the ED unbridled powers of attachment without sufficient judicial oversight, the PMLA provisions are riddled with systemic shortcomings. Trial has only been concluded in 25 cases instituted under the PMLA so far. To quantify the financial impact, the ED has provisionally attached properties valued at ₹1,15,350 crores⁶⁷ since the Act came into force. However, the Adjudicating Authority has confirmed only ₹71,290 crores of these attachments, leaving ₹40,904 crores pending confirmation.⁶⁸ Confirmed confiscations stand at ₹12,623 crores, but there is no data on the restoration of property to those discharged, acquitted, or for whom the period for filing a prosecution complaint has lapsed. This lack of transparency and accountability raises serious concerns about the fairness and proportionality of the ED's actions. Unfortunately, these shortcomings in the legislation and the systemic deficiencies in the functioning of adjudicating authorities/tribunals enable significant financial deprivation for the accused, leading to irrevocable impacts long before their guilt is established.

62 Abraham Thomas, ‘SC issues notice on plea to fill vacancies at Prevention of Money Laundering Act Tribunal’ (The Hindustan Times, 29 January 2021) <<https://www.hindustantimes.com/india-news/sc-issues-notice-on-plea-to-fill-vacancies-at-Prevention%20of%20Money%20Laundering%20Act-tribunal-101611934634478.html>> accessed 4 August 2024; ‘Govt appoints new chairperson to Prevention Of Money Laundering Act Adjudicating Authority’ (The Print, 13 January 2022) <<https://theprint.in/india/govt-appoints-new-chairperson-to-Prevention of Money Laundering Act-adjudicating-authority/810909/>> accessed 4 August 2024.

63 Prevention of Money Laundering Act, s 26.

64 Fullerton India Credit Company Limited v Union of India W.P.(C) 7815/2021 [6].

65 *ibid* [5].

66 M/S Gold Croft Properties Pvt. Ltd v Directorate of Enforcement (2023) SCC OnLine Del 1154 WP(C) 2191/2023.

67 Directorate of Enforcement, ‘Statistics’ <<https://enforcementdirectorate.gov.in/statistics-0>> accessed 4 August 2024.

68 *ibid*.