ISSN: 2582-2942

LEXFORTI

Legal Journal

Vol-II Issue- II

December, 2020

I S S N : 2 5 8 2 - 2 942

DISCLAIMER

ISSN: 2582-2942

EDITORIAL BOARD

ISSN 2582 2942

ISSN: 2582-2942

EDITORIAL BOARD

ISSN: 2582-2942

ABOUT US

LexForti Legal News and Journal offer access to a wide array of legal knowledge through the Daily Legal News segment of our Website. It provides the readers with latest case laws in layman terms. Our Legal Journal contains a vast assortment of resources that helps in understanding contemporary legal issues. LexForti Legal News and Journal also offers Certificate courses. Whoever register for the course is provided the access to the state of the art E-portal. On completion of all the module and Test, candidate will be given Certificate of Accomplishment of Course. Be sure to make the most of it. LexForti Legal News and Journal is also proud to announce that we have made India's first Legal News android application which contains Daily Legal News, Legal Journal and Certificate Courses, everything in 4 MB.

Pre-Trial Blitzkrieg as an Exercise of Executive Suspicion, Under the Prevention of Money Laundering Act, 2002

Yash Sinha (Adv.)

ABSTRACT

The Prevention of Money Laundering Act, 2002 in its present form is constitutionally suspect on its operative parts. The charging section is overbroad for its lack of specificity. The law requires a minimal degree of certitude in the applicability of a charging provision, which is absent in its case. The burden of discerning a criminal intent is also not absent, rendering it an unreasonable pre-trial procedure. This executive suspicion translating into a charge extends to a third party under the Act, in the form of a reverse onus. This presumption of guilt emanates from a vague suspicion and without any initial proof from the executive. Both the charging provision and the reverse onus clause were made with the intent of capturing a special offence. However, departure from the Code of Criminal Procedure, 1973 has certain judicial tests. Both the charging and reverse onus clauses do not pass these tests and the resultant procedure becomes unconstitutional. These infirmities apart, the Act has provisions for re-examining evidence in pending cases of a predicate offence, along with a relaxation on disclosure of grounds of arrest. The paper, therefore, attempts to establish the disparate impact of these provisions on the legality of the Act.

INTRODUCTION

The Prevention of Money Laundering Act, 2002[1] ('PMLA') in its present form has several gaps in its operation at a pre-trial stage. The lack of safeguards combined with vague impositions make it wholly unconstitutional. This research paper is an attempt to highlight the constitutional grounds the Act ought to be struck down on.

It is argued that the Act has its premise in its charging provision, coupled with other procedurally relevant provisions such as those imposing a reverse burden of proof and non-disclosure of grounds of arrest. In analyzing these, the paper states that, *firstly*, s. 3[2] of the Act is wholly beyond the *vires* of the Constitution. *Secondly*, the reverse onus introduced by s. 24[3] lacks the judicially required safeguards, violating art. 14[4] at the same time. *Thirdly*, the joint trial provision of the Act violates the right to speedy trial.

S. 3 OF THE PMLA HAS NO BASIS IN THE CONSTITUTION.

If a prosecution takes place under the PMLA, a charge under s. 3 is to be mandatorily made out. The provision is manifestly arbitrary and overbroad in its application.

S. 3 reads as follows:

'*3. Offence of money-Laundering.-Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering.*'

The provision in its current form gives no reasonable opportunity to warn a person of the act that is prohibited and the legal consequences that follow. It is established that not only there should be a procedure established by law to deprive a person of his/ her protections under art. 21[5] of the Constitution, but also that the procedure has to be *just* when tested on the anvil of art. 14.

It is submitted that the provision violates art. 14. *Firstly*, the provision is overbroad insofar as it doesn't attempt to isolate cases that would fall in the category of the targeted offence. *Secondly*, the deliberate removal of *mens rea* as a pre-requisite for the charge is wholly arbitrary.

---

[1] Prevention of Money Laundering Act, 2002 (Act 015 of 2003).

[2] *Id.*, s. 3.

[3] *Id.*, s. 24.

[4] The Constitution of India (1950), art. 14.

[5] *Supra* note 4, art. 21.

A. S. 3 IS OVERBROAD FOR LACKING CERTITUDE

S. 3 extends to any person who directly or indirectly meddles with the property that has some relation to proceeds of crime from a scheduled offence (as to what 'relation' exists is to be determined by the authorities). The operation of this provision is best described in the case *Sanjay Kumar Choudhary* v. *Government of India through the Director, Directorate of Enforcement and Anr.*,[6] wherein the scope of Section 3 was discussed. The Jharkhand High Court ratiocinated that the provision does not require a person to be *found* guilty of a crime. Any ancillary relation to the property related to the proceeds of crime is sufficient to initiate the operation of the Act as against the suspect.

There is no determining principle for its application, which in its current form applies equally to a money launderer as well as a person laying her hand accidentally on such proceeds or value derived from it. The probability of the laundered money having simply passed through the hands of an individual is high, since the offence is known for a stage of layering. Layering includes conversion of the acquired tainted sum into several negotiable instruments or passing the money as it is through several transactions.[7] The absence of any distinction between people in conscious and involuntary possession of laundered proceeds of crime certainly exposes the statute to overbreadth. In the case of *Shreya Singhal* v. *Union of India*,[8] it was further held that:

'*...it was not possible to predicate with some kind of precision the different categories of instigation falling within or without the field of constitutional prohibitions. It further held that the Section must be declared unconstitutional as the offence made out would depend upon factors which are uncertain*.'[9]

The Supreme Court has previously held that if an innocent person gets associated with the act criminalized without *consciously knowing about it*, then the statutory provision criminalizing such conduct violates the constitution.

The consequence of overbreadth is vagueness in applicability. The test laid down by the Supreme Court is that in the absence of clear prohibitions in a criminal statute, shall be declared as void for vagueness.

In *Shreya Singhal*,[10] the Court had recognized this very principle in its para 59. It states that a penal provision would be void if it lacks certitude. This is primarily because subjects of the law have to

---

[6] 2009 SCC OnLine Jhar 1871.

[7] Syed Azhar Hussain Shah, Syed Akhter Hussain Shah and Sajawal Khan "Governance of Money Laundering: An Application of the Principal-agent Model" *The Pakistan Development Review* 45(4) 1117-1133 (2006).

[8] (2013) 12 SCC 73.

[9] *Supra* note 8, ¶ 90.

[10] *Supra* note 8.

be aware of the prohibited conduct before-hand. The court noted that this certitude is equally necessary for preventing arbitrariness on part of the enforcement agencies. At a later point in the judgment, this morphed into the definition of the chilling effect. (When the subject of legislation indulges in self-censorship due to lack of specificity and his fear of *possibly* violating the same)

B. NO BURDEN ON THE PROSECUTION TO ESTABLISH *MENS REA* IS PROCEDURALLY UNFAIR ON THE SUSPECT AND *HENCE*, ARBITRARY.

The crux of the infirmity of vagueness in the provision is premised in the absolute lack of a *mens rea* requirement. However, this significant gap is another individual ground of contention in itself. It is to be stated that the absence thereof is an accepted legislative practice, but only for certain offences. The landmark in this context would be *Kartar Singh* v. *State of Punjab*.[11] The relevant part is wherein a provision in the Terrorist and Disruptive Activities (Prevention) Act[12] ('TADA') relating to abetment (the erstwhile cl. (i) of s. 2(1)(a)[13] of the Act subjected to challenge) was struck down by the Supreme Court. The utter lack of *prohibitions* in the provision leads it to its vagueness.[14] It then adds that a reasonable man ought to have an opportunity to know about the prohibited conduct, and act accordingly. The Court demonstrates this by dwelling upon 'innocent persons' getting dragged in the net of the provision.[15] It says that there is a huge possibility that an innocent person unknowingly interacts or cooperates with another person engaged in some terror activity. These *prohibitions* as hinted in *Kartar Singh* have been jurisprudentially included the onus of proving *mens rea* by the prosecution. Without such a safeguard in place, the concerned provision gives unfettered and unguided discretion to an authority to launch an investigation.

In *State of Madhya Pradesh and Ors.* v. *Baldeo Prasad*[16] a definition central to the prosecution (the term "goonda" in the Goonda Act) under the concerned state legislation was successfully challenged. After looking at the absence of *mens rea* in the definition, it states how serious an infirmity it is in view of art. 19(5). It is left to the unfettered discretion of the enforcement agencies for determining who happens to be a "goonda". The restrictions on fundamental rights under art. 19(1)(d) and (e) in such a case were concluded to be unreasonable.

---

[11] (1994) 3 SCC 569.

[12] Terrorist and Disruptive Activities (Prevention) Act, 1987 (Act No. 28 of 1987).

[13] *Id.*, s. 2.

[14] *Supra* note 8, ¶ 130.

[15] *Id.*, ¶ 131.

[16] 1961 AIR 293.

The criminalized act of *any direct or indirect association* with the proceeds of crime under PMLA, depends upon factors that are uncertain. As submitted earlier, the proceeds in the hand of the accused or even having just passed through *could be a result* of money laundering under the Act, *or the cause*. But this distinction is set aside and the *mens rea* element required to bring about this distinction is also, as a necessary consequence, given a go-by. Hence, in its current form, a requirement of the *mens rea*, per se, and its concomitance with the *actus reus* are completely missing in s. 3. This exception is upheld only in cases of extremely heinous crimes.

Another feature is that s. 3 defines the offence and creates a charge in the same breath. In *Joseph Shine* v. *Union of India*,[17] while discussing the provision on adultery, it was stated that an offence would be manifestly arbitrary if it captures both these possibilities. In other words, a penal provision targeting an act which could be either cause or result for the offence would be hit by art. 21.[18] This unfairness in procedure maybe legally permissible but PMLA does not fit in the judicially established criteria.

This includes the intrinsic harm the offence involves. That is, the nature of the targeted offence is such that an object's circulation or mere exposure to general populace could cause harm. However, the subject of the PMLA, unlike subjects of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act')[19] or TADA, is an innocuous substance (which is ill-gotten monetary proceeds in its various forms). Consequently, such an object does not raise apprehension in the mind of the possessor of legal consequences that may follow. This is what makes the element of intention significant in those cases.

At this juncture, it is pertinent to note the original intent as espoused by the Statement of Object and Reasons of the Act.[20] It was introduced to curb money laundering generated due to drug trafficking. It was stated that this enactment was in compliance with a resolution as adopted by the General Assembly of the United Nations on tackling drug trafficking. The same states as follows: '*devoted to the question of international co-operation against illicit production, supply, demand, trafficking and distribution of narcotic drugs and psychotropic substances*.'[21] Subsequent amendments have only expanded the net of these provisions without necessary qualifications.

---

[17] 2018 SCC OnLine SC 2.

[18] *Id.*, ¶ 67.

[19] Narcotic Drugs and Psychotropic Substances Act, 1985 (Act no. 61 of 1985).

[20] *Supra* note 1.

[21] UN General Assembly, *Political Declaration and Global Programme of Action*, GA Res S-20/2, GAOR, UN Doc A/RES/S-20/2 (July 21, 1998).

A pertinent judicial observation would be that of the Bombay High Court's judgment in the case of *Zahid Mukhtar and Ors.* v. *The State of Maharashtra and Ors.*[22] The court recognizes the difference between acts dealing with *harmful substances*, and restricts presumption of *mens rea* as a requirement to these cases.[23] It cites the difference between arms and psychotropic substances on the one hand, and bovine flesh on the other. Consequently, it discards such a presumption in the latter case.

The standards for the provision to take effect are unjustifiably unreasonable in terms of procedure. *It is this digression from a reasonable procedure specifically in the case of money laundering that* violates art.s 14. In *Shreya Singhal*,[24] it was categorically stated that if safeguards like those provided s. 199[25] of the Code of Criminal Procedure, 1973[26] ('Cr.P.C.') (no court shall take cognizance of such an offence except upon a complaint made by some person aggrieved by the offence…) or other similar provisions of the statute (s. 95[27] and 96[28], for instance) are not present for the application of s. 66A[29] of the Information Technology Act,[30] ('IT Act') it is procedurally unreasonable. It then states that the entire class of computer-related offences under Section 66[31] of the IT Act have another safeguard in the form of *mens rea*, expressed by the words 'dishonestly' and 'fraudulently'.

It is this infirmity mars the body of s. 3. Probative words such as dishonestly or fraudulently are nowhere to be seen. Hence, apart from grounds of manifest overbreadth, the drafting is hit by lack of a qualifier, as well as, arguably, procedural unreasonableness.

Hence, Section 3 has two major infirmities that violate art. 14. Namely, the width that negates the possibility of isolating cases of laundering and the arbitrary absence of intention as a requirement for the charge.

II. REVERSE ONUS UNDER S. 23 VIOLATES ART.S 14 AND 21

S. 24 of the Act has an avuncular presence for s. 3. S.24(a) places a reverse onus of proof on the person charged with the offence of money laundering. Consequently, this is in violation of the

---

[22] 2016 SCC OnLine Bom 2600.

[23] *Id.*, ¶ 217.

[24] *Supra* note 8, ¶ 103.

[25] Code of Criminal Procedure, 1973 (Act no. 02 of 1974), s. 199.

[26] Code of Criminal Procedure, 1973 (Act no. 02 of 1974).

[27] *Id.*, s. 95.

[28] *Id.*, s. 96.

[29] Information Technology Act, 2000 (Act no. 21 of 2000), s. 66A.

[30] Information Technology Act, 2000 (Act no. 21 of 2000).

[31] *Id.*, s. 66.

Constitution. The presence of this provision is unjustified when viewed in light of cognate and similar offences, culminating in arbitrariness for the purposes of art. 14. This is in turn because, the reverse onus is not to be prompted by the proof of an initial fact by the authorities (procedural unfairness).

The provision reads as follows:

'*24. Burden of Proof.-In any proceeding relating to proceeds of crime under this Act,-*

(a) in the case of a person charged with the offence of money-laundering under section 3, the Authority or Court shall, unless the contrary is proved, presume that such proceeds of crime are involved in money-laundering; and

(b) in the case of any other person the Authority or Court, may presume that such proceeds of crime are involved in money-laundering.'[32]

Before getting into details, taking note of an anomaly in the framework is significant. In very elementary terms: The authority will charge an individual with Section 3 on any perceived relation with a process or activity connected to the proceeds of crime (provision targets acts more than simple possession). The presumption was already in place. The primary issue is to then discern the intent behind including s. 24 and its actual implication.

It is submitted that the intent was more than putting the pre-existing presumption of suspicion in explicit terms. As regards its stage of operation, it is to be noted that the Delhi, Bombay and Gujarat High Courts have put it to be trial stage-exclusive. That is, at the pre-trial stages, the presumption does not operate.[33] However, most other judicial authorities hold to the contrary.[34] It is submitted that the use of the word 'Authority' in clause (b) of the provision is rendered otiose if this were to be the case. The term 'Court' can only include a judicial figure trying such cases, leaving out the Enforcement Directorate to be the 'Authority'. The intention was to have this presumption from the pre-trial stages.

However, its stage of operation is not the major concern as far as procedural rights are concerned. The significant gap is the lack of an initial burden on the authority to shove that presumption into effect. The Supreme Court in *Naresh Kumar* v. *State of Himachal Pradesh*[35] has interpreted *Noor Aga*

---

[32] *Supra* note 1, s. 24.

[33] *Jignesh Kishorebhai Bhajiawala* v. *State of Gujarat*, 2017 SCC OnLine Guj 1371; *Upendra Rai* v. *Directorate of Enforcement*, 2019 SCC OnLine DEL 9086; *Chandrakant Bhujbal* v. *Assistant Director, Directorate of Enforcement*, **2**016 SCC OnLine Bom 9938.

[34] *Gautam Kunduv. Directorate of Enforcement* (2015) 16 SCC 1; *Pradeep Nirankarnath Sharmav. Directorate of Enforcement*, 2017 SCC OnLine Guj 1372; *Rohit Tandon* v. *Directorate of Enforcement* (2018) 11 SCC 46; *Rakesh Manekchand Kothari* v. *Union of India*, 2015 SCCOnLine Guj 3507.

[35] 2017 AIR(SC) 3859.

v. *State of Punjab & Ors.*[36] and *M/s Seema Silk and Sarees* v. *Directorate of Enforcement*[37] to state that NDPS, requires the *possession* to be proved by the authorities concerned for a reverse onus to kick in. The ratio of this pronouncement cannot be extended to the its counterpart in the PMLA. The relevant provisions of the NDPS, i.e., s. 35, begins with the following words:

'*35. Presumption of culpable mental state.—(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the court shall presume the existence of such mental state*…'[38] (emphasis supplied)

This is contrary to the PMLA, which uses the words 'in any proceedings' in s. 24, PMLA. Secondly, the Court in *Naresh Kumar* relied on para 59 of the *Noor Aga* decision to state that s. 35, NDPS will kick in only when s. 54 is satisfied in the mind of the Court. S. 54, NDPS reads as follows:

'*54. Presumption from possession of illicit articles.*—…'[39] (emphasis supplied)

PMLA, however, puts the presumption without any such initial burden on the authorities. Possession as grounds of presumption is stated in the Act, but only in Section 22[40] for certain records/property and that too is yet to be judicially stated as a pre-requisite for s. 24. S. 24 specifically uses the phrase "charged with".

As stated previously, s. 3 eliminates any requirement of prior knowledge on part of the suspect. Yet, s. 24 imposes a burden similar to the one espoused by s. 106 of the Indian Evidence Act, 1872. The latter provision also imposes onus on a witness to prove any fact especially within the knowledge of his/her self. By virtue of s. 24, the accused has to now prove that the proceeds have no nexus with money laundering.

The impact of s. 24 is significant. S. 23 raises a parallel presumption for a third party. It can be used to presume a *causal connection between the act of laundering money and the proceeds* held by the third party, which in turn gives rise to a presumption of guilt on his or her part (s. 24).

It is submitted that this burden (the one under s. 24) fails the constitutional safeguards that are concomitant with reverse onus clauses since there is no burden of proof on the prosecution to prove certain *initial facts*. Even if the said presumption is said to be rebuttable on a preponderance of probabilities standard, it does not justify the imposition of a persuasive burden to prove a *negative fact*. The other constitutional qualifier required to be present in such clauses is that this *negative fact*

---

[36] (*2008) 16 SCC 417*.

[37] (2008) 5 *SCC* 580.

[38] *Supra* note 19, s. 35.

[39] *Supra* note 19, s. 54.

[40] *Supra* note 1, s. 22.

has to be in the special knowledge of the person accused of the criminalized act. In these cases, however, the accused can in no way ascertain the source of money in his possession (for the sake of argument, only "possession" is used as an instance, excluding other forms of association with the tainted proceeds), given that money laundering involves complex phases of placement, layering and integration.

However, harshness in the form of a reverse onus in case of laundering is further unreasonable in light of the Indian Penal Code ('IPC').[41] S.s 489A[42], 489B[43] or 489C,[44] IPC do not create any such presumption against the accused. They criminalize the acts of counterfeiting currency/bank notes, knowingly circulating the same and possessing counterfeit, respectively. The difference in treatment of laundering and counterfeiting is in their prescribed punishments and cognizability by the enforcement authorities. Counterfeiting and all the related offences are non-cognizable. However, an unjustified difference in procedure kicks in when large sums of money in both types of offences are concerned. The means of discerning counterfeit currency/bank notes are modified and issued from time to time by the government. Hence, simply passing through one's hands, means to discern authenticity of that money exist in the case of counterfeit. However, in spite of these means, dealing in counterfeit will raise no presumption before the framing of charges. In the case of PMLA, even before the Enforcement Directorate files a complaint under s. 50[45], the accused is presumed to have indulged in laundering. Simply stated, verifying counterfeit is easier than tracing the origins of money converted into negotiable instruments, with layered transactions in between. The only presumption relating to counterfeit is found in s. 489E(3),[46] which however requires name of the accused to be mentioned in the documents fraudulently resembling currency/bank notes.

Reverse onus on the accused in the absence of any initial burden on prosecution becomes a means to expedite trial. The Supreme Court in *The State of West Bengal* v. *Anwar Ali Sarkar*[47] stated that the object of an Act for speedier trial for certain offences is permissible. However, this object has to be justified by the existence of some element separating the targeted offences from those subject

---

[41] The Indian Penal Code, 1860 (Act 45 of 1860).

[42] *Id.*, s. 489A.

[43] *Id.*, s. 489B.

[44] *Id.*, s. 489C.

[45] *Supra* note 1, s. 50.

[46] *Supra* note 41, s. 489E.

[47] MANU/SC/0033/1952, ¶ 66.

to ordinary procedure. In this case, the suspicion of laundering oughtn't invite reverse onus when the nature of the legislation's subject is not intrinsically harmful.

The placement of the persuasive burden has to be weighed against the loss of protection that will be suffered by an accused. This test was mandated by the Supreme Court in *Noor Aga.* in those very words, found in para 63. It is submitted that the loss of the presumption of innocence is unjustified when

The concerned provision (s. 24) in PMLA fails this test and has the potential to place the burden on a guiltless party. Consequently, it reeks of arbitrariness.

In *Zahid Mukhtar*, the provision of a state enactment shifting the burden of proof on the accused found in possession of bovine flesh was held to be unconstitutional by the Bombay High Court. The grounds were similar to the ones submitted by the author. In para 220, it first reiterates the *burden of initial facts* condition for reverse onus clauses, as laid down in *Bhola Singh* v. *State of Punjab*.[48] The crucial paragraph, however, is its para 241. The Court notes that the mere act of possessing flesh would be an offence under the act. It then notes that the accused would then have the burden of proving that the flesh in possession in fact does *not* come from a cow, bull or bullock. It then compares the onus on both the sides. It concluded that the burden on the accused is absurd if she is required to prove the source of the flesh on a preponderance standard. Whereas, the court held, it is relatively easier for the executive to find out whether the meat comes from an act of slaughter barred by the Act. It goes on to make the following observation:

'*The basis of any presumption in law in a criminal trial, as we have seen above, is the substantial causal or probative connection between the facts found proved and the facts presumed. That connection is absent in this case...*'[49] (emphasis supplied)

In the next paragraph, it holds the provision to be *procedurally unreasonable*.[50] It is to be noted that the PMLA's subject matter is deemed to fall out of the extremely harmful category. In striking down s. 45[51] of the PMLA (relating to grant of bail, imposed additional restrictions), the Supreme Court in *Nikesh Tarachand Shah* v. *Union of India*[52] says that reversing the presumption of innocence violates Article 21 in the absence of a compelling state interest. It states that this is not the case

---

[48] MANU/SC/0296/2011.

[49] *Id.*, ¶ 241.

[50] *Supra* note 48, ¶ 242.

[51] *Supra* note 1, s. 45.

[52] (2018) 11 SCC 1.

here. In the same paragraph it makes the following observation about the offences targeted by the PMLA:

'*…Provisions akin to Section 45 have only been upheld on the ground that there is a compelling State interest in tackling crimes of an extremely heinous nature*.'[53]

In absence of this nature in the offence, the provision has an adverse and legally impermissible effect. Under s. 24, there is a compulsion on the accused to sacrifice his/her right to silence in order to testify and rebut the presumption that takes immediate effect on discovery of possession. Interestingly, this exceeding width of s. 24 and its implications on the right to remain silent were observed by the Kerala High Court in the case of *Kavitha G. Pillai* v. *The Joint Director, Director of Enforcement, Government of India*.[54] It states that both presumption of innocence and right to silence are cognate concepts. On a reverse onus falling upon an accused (sic), his silence is nothing but acquiescence. It then becomes a constructive confession of guilt.[55] This, in turn, results in presuming establishment of a predicate offence upon the suspicion of ill-gotten proceeds. Rephrased, the machinery under PMLA could be invoked only when the proceeds have some relation to a predicate offence. Predicate offences are those specified in the schedule to the PMLA. The judgment notes that even without any formal charge under s.s 5[56] or 8,[57] (which deal with attachment of property and its adjudication in the pre-trial stage, respectively) this presumption shall operate merely when the accused is being tried for predicate offences. Simply put, *laundered money oughtn't be equated with the commission of a predicate offence by default*. The proceeds bear relation to the predicate offence. Hence, it is the conclusive proof of the latter which determines whether the proceeds have an illegal origin. It was summarized as thus:

'*In a case of money laundering, the proceeds of crime are the means; their laundering is the end: the legitimation of ill-gotten money. If the first exists, the second must be presumed. The converse, however, does not apply*.'[58]

Hence, for this reason alone, the reverse onus under PMLA does not stand constitutional tests.

The onus is further unjustified given the absence of qualifications (both judicial and statutory) unlike in the case of NDPS. This makes s. 24 procedurally unfair for the purposes of art. 21.

---

[53] *Id.*, ¶ 46.

[54] 2017 SCC OnLine Ker 10118.

[55] *Id.*, ¶ 97.

[56] *Supra* note 1, s. 5.

[57] *Supra* note 1, s. 8.

[58] *Supra* note 54, ¶ 114.

Secondly, the PMLA, enacted as a result of resolution S-17/2[59] which ought to tackle money generated through drug trafficking and similar offences as per its stated objectives, cannot do away with safeguards present in the acts of the predicate offences. The only other justification for such an onus would be when one deliberately acts as a piece of pipe. This would be presumed if the accused is shown not to have attempted tracing the source of, or authenticating whether the substance received is ill-gotten. Unlike counterfeited financial instruments, this is ordinarily not a possibility for someone charged with s. 3, PMLA. Hence, compared with similar offences, the presence of s. 24 in its current form is unjustifiably arbitrary for the purposes of art. 14.

III. THE POSSIBILITY OF A JOINT TRIAL OF PREDICATE AND PMLA OFFENCES VIOLATE THE RIGHT TO SPEEDY JUSTICE

Infirmities of s.s 3 and 24 apart, significant Constitutional problems with the statute remain. Another anomalous provision in the Act would be s. 44.[60] The provision is in gross violation of the Constitution insofar as it mandates a joint trial of both the scheduled offence as well as the offence under PMLA. It is an operative part of the act, and it is established that a prosecution under the Act can begin after a complaint under s. 44(1)(b) is filed. However, the same suffers from a Constitutional vice. A mere perusal of s. 44(1)(a) and (b) suggests that even though the trial for the scheduled offence is separate, it has to be necessarily tried with the offence under PMLA. This affects the legal rights of the accused since evidence used in the trial of the scheduled offence, even if it is independent, can be looked into and relied upon by the Special Court trying an offence under the Act. This has been previously held to be in violation of the principles of natural justice, and as a consequence, of art.s 21 and 22.

In *K. Sowbaghya v. Union of India, Ministry of Finance, North Block Department of Revenue and Ors.*,[61] the Karnataka High Court held s. 44 of the PMLA to be ultra vires of the art.s 14, 20 and 21. It states that the said provision completely robs an accused of her legal rights and has serious implications of the principles of natural justice. The reason is highlighted in the para 121 which states that the evidence looked into the first trial (for the scheduled offence) cannot be looked into again. The PMLA brings the former trial back to life and yokes it with the trial for its special offence.

Alternatively, it reasons that as per the current framework, the proceedings under the PMLA begin when a trial for the scheduled offence is put into motion. That is, when a charge-sheet is filed for

---

[59] *Supra* note 21.

[60] *Supra* note 1, s. 44.

[61] 2016 SCC OnLine Kar 282.

the scheduled offence (under s. 173, Cr.P.C.) or alternatively when a complaint is filed. As a consequence, by the time a trial under PMLA is initiated (after complying with provisions on attachment, etc.), the trial of the scheduled offence has usually reached the end of the pre-trial stage. The Special Judge, PMLA will then institute a joint trial. Implication being, the undertrial technically loses his right to appeal to a Sessions Court as against the Magistrate, in addition to hampering the former trial. The Court categorically stated, for unassailable reasons:

'*The entire scheme of this section is vague, violates the right to a speedy trial and also is ambiguous, vague oppressive, arbitrary, discriminatory, unconstitutional and offending Articles, 14, 20, 21 and Article 300 of the Constitution of India and is ultra-vires*.'[62]

This parallel proceeding and double-jeopardy slippery slope are unheard of. Yet, it exists under the current form of the PMLA.

[62] *Id.*, ¶ 121.

CONCLUSION: THE ENTIRE ACT BECOMES LIABLE TO BE STRUCK DOWN IN LIGHT OF THE INSEPARABLE INFIRMITIES

The PMLA is the prime example of poor drafting, accompanied by incongruous and anachronistic amendments. All provisions challenged above constitute, more or less, the main operative parts of the Act. This makes the entire act liable to be struck down on the grounds of being unconstitutional. The application of the doctrine of severability is precluded since rest of the PMLA is rendered useless if the charging sections, namely s.s 3, 24 and 44 are illegal.

Supreme Court has discussed the non-applicability of severability in *Kavaiappara Kottarathil Kochuni* v. *The State of Madras*[63] in para 12. This so happens when the charging sections of the statute are found to be unconstitutional.

Similar to this are rules of severability laid down in *R.M.D. Chamarbaugwalla* v. *The Union of India.*[64] The second rule in para 26 applies here. It states that the invalid provisions are inextricably coupled with the valid ones, such that the former's striking down render the act toothless.

There is no justification for the lack of safeguards in the Act for some of these provisions to kick in. The very basis of the PMLA is not a heinous substance that requires immediate deprivation of a person's liberty. These arguments become even more significant since amendments to the Finance Bill, 2019[65] in the month of July, the ambit of the Prevention of Money Laundering Act was sought to be expanded. Put succinctly, there were 8 changes, the most pertinent of which was the one expanding the definition of the phrase "proceeds of crime". As it now stands, it will include properties which will be deemed to have their origin in illegal means (explanation to Section 2(u))[66]. Given the infirmities, the amendments introduced in the year 2019 could magnify the infirmities discussed in the paper.

---

[63] AIR 1960 SC 1080.

[64] AIR 1957 SC 628.

[65] Finance Bill 2019, *available at* https://www.cbic.gov.in/resources//htdocs-cbec/Finance_Bill-2019.pdf (Last visited on November 15, 2020).

[66] *Supra* note 1, s. 2.