

# Important Challenges in implementation of PMLA

Sanjay Kumar Mishra

Director, Directorate of Enforcement

# Important ingredients of Section 3 of PMLA

- “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.”

[Explanation.-For the removal of doubts, it is hereby clarified that-

(i) A person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely:-

(a) Concealment; or

(b) Possession; or

# Important ingredients of Section 3 of PMLA

- (c) Acquisition; or
- (d) Use; or
- (e) Projecting as untainted property; or
- (f) Claiming as untainted property,  
in any manner whatsoever;

(ii) The process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever].

- Scope of provisions of section 3 is quite wide to include whosoever directly or indirectly:
  - Attempts to indulge or
  - Knowingly assists or

# Important ingredients of Section 3 of PMLA

- Knowingly is party or
  - Is actually involved
- in one or more of six processes as explained and clarified in section 3 and explanation to section 3.
- Six processes or activities connected with proceeds of crime namely concealment; or possession; or acquisition; or use; or projecting as untainted property; or claiming as untainted property are relevant for offence u/s 3.
  - The meaning of the term 'possession of proceeds of crime' in section 3 include ownership, control or possession.

# Important ingredients of Section 3 of PMLA

- In order to define the term 'offence of money laundering' in section 3, the word 'include' has been used instead of the word 'mean', accordingly, the definition of the term 'offence of money laundering' is prima facie extensive as held by Hon'ble Supreme Court in its several judgements.
- The word 'include' is generally used in interpretation of clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute and those words or phrases must be construed as comprehending not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. In this context, it would be relevant to examine the term 'in any manner whatsoever' used in explanation to section 3.

# Important ingredients of Section 3 of PMLA

- In other words, any process or activity akin to the six categories as included in section 3 may also be included u/s 3 of PMLA.
- It is amply clear from the wordings of section 3 that any of such six processes/ activities carried on after the provisions of PMLA were brought in force, the provisions of section 3 can legally be invoked irrespective of date of scheduled offence which may be prior to operation of PMLA.
- The time of commission of the scheduled offences is therefore not relevant in the context of the prosecution under the Act. What is relevant in the context of the prosecution is the time of commission of the act of money laundering. (A.K. Samsuddin v. Union of India 2016 SCC Online Ker 24144)

# Important ingredients of Section 3 of PMLA

- *... what is being targeted by Section 3 and another provisions of the Act is the “laundering of money” acquired by committing the scheduled crimes and therefore, it would be the date of “laundering” which would be relevant. (Hari Narayan Rai v. Union of India 2010 SCC Online Jhar 1066)*
- Thus the relevant date of generation of proceeds of crime by an offence mentioned in the schedule of PMLA but the dates of which such money is being processed using the processes or activities as mentioned in section 3.

# Important ingredients of Section 3 of PMLA

- Even if an offence is included in the schedule of the PMLA at later date any act of money laundering after the date of inclusion in the schedule shall be offence u/s 3.
- In cases where POC is generated and some of the processes or activities as included in section 3 have been carried out prior to operation of PMLA but other processes/ activities as included in section 3 have been carried out after the operation of PMLA, it shall be the case of continuing offence.



# Important ingredients of Section 3 of PMLA

- The main difference between scheduled offence and offence u/s 3 of PMLA is the nature of offence. The criminal scheduled offence is static offence which end at the time of filing of the FIR whereas offence u/s 3 is continuing offence even after recording of ECIR for the reason that the accused can continue to engage in processes/ activities connected to proceeds of crime as defined in section 3 till the proceeds of crime are traced and attached/ confiscated.
- In case of a continuing offence, the ingredients of the offence continued i.e. endure even after the period of consummation. Since, concept of continuing offence does not wipe out the original guilt, accordingly, if any of the process or activity as defined in section 3 continue after the PMLA was brought in force could be sufficient to invoke provisions of section 3.

# Important ingredients of Section 3 of PMLA

- In order to remove the doubts if any the clause (ii) of explanation to section 3 has clarified the issue of continuing offence.
- A person may be guilty of offence of money laundering u/s 3 even if the predicate offence has been committed prior to the commencement of PMLA or offence has been committed prior it was included in the schedule to the PMLA provided:
  - The accused is directly or indirectly connected with one or more of six processes and activities included section 3 of PMLA after the commencement of PMLA.
  - The accused is directly or indirectly connected with one or more of six processes and activities included section 3 of PMLA after the inclusion of the offence in the schedule to PMLA.

# Proceeds of Crime

- “proceeds of crime” means **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 [or where such property is taken or held outside the country, then the **property equivalent in value** held within the country] [or abroad] – 2(1)(u)**
- The provisions of section 2(1)(u) clearly stipulates that proceeds of crime may be derived or obtained directly or indirectly:
  - as a result of scheduled offence; or
  - as a result of any criminal activities relatable to scheduled offence.
- During the course of enquiry Investigating Officer may come across the proceeds of crime from identical scheduled offence for which no FIR has been registered by LEA. The provision enables the IO to continue enquiry under PMLA.

# Proceeds of Crime

- “property” means **any property or assets of every description**, whether corporeal or incorporeal, movable or immovable, tangible or intangible and includes deeds and instruments evidencing title to, or interest in, such property or assets, wherever located – 2(1)(v)
- “value” means the fair market value of any property on the date of its acquisition by any person, or if such date cannot be determined, the date on which such property is possessed by such person – 2(1)(zb)
- It is evident from the definition of property that it includes all types of properties having some value.
- The value of POC under PMLA represents the value of property on the date of acquisition by the person under investigation/ accused and not at the time when the property is provisionally attached u/s 5 of PMLA.

# Proceeds of Crime

- Section 2(1)(u) incorporates concept of alternate attachable property equivalent in value of proceeds of crime in the cases where POC is consumed/ taken/ held outside the country.
- The alternate attachable property equivalent to POC located either in India or abroad are covered u/s 2(1)(u) of PMLA.

# First Information Report (FIR) vs. Enforcement Case Information Report (ECIR)

- Section 154(1) of Cr.PC provides that every information relating to commission of a cognizable offence shall be reduced to writing by the Police Authority and shall be entered in a book. This report known as FIR.
- FIR is the earliest version of a cognizable offence given to the Police by informant which set the law in motion under Cr.PC.
- Section 154(2) of Cr.PC imposes duty on Police to supply a copy of FIR to the informant free of cost.
- The legislative intent of section 154 of Cr.PC is to maintain a proper record of information about the cognizable offence before initiating investigation under Cr.PC.

# FIR vs. ECIR

- Contrary to Cr.PC, the trigger for investigation under the PMLA is registration of scheduled offence by the Law Enforcement Agency and generation of proceeds of crime from the offence which is already in the record of the Police as well as before the Competent Court. For aforesaid reason, provisions of PMLA do not provide for recording of FIR as stipulated u/s 154 of Cr.PC before the initiation of investigation.
- However for administrative convenience, to identify a particular case and nature of offence leading to proceeds of crime a document known as ECIR is recorded i.e. ECIR is administrative document and not a public document.

# FIR vs. ECIR

- The provisions of PMLA do not stipulate for recording of FIR before initiation of investigation under the PMLA.
- However, some powers of the Investigating Officer u/s 5, 17, 18, 19, 20 are subject to certain conditions and recording of reason to believe whereas other powers of the Investigation Officer u/s 50 is subject to administrative control device in this regard.
- The power of the Investigating Officer u/s 19 also has additional requirement of disclosing basis of material in his possession for reason to believe to the suspect/ accused.



# Whether supply of copy of ECIR is mandatory?

- The ECIR essentially reproduce or summarize predicate offence and depending upon facts and circumstances of the case, it may also contain other information/ evidence as gathered by the LEA subsequent to FIR and made available to ED.
- Since, recording ECIR is not a condition precedent to initiate investigation under PMLA a question arises whether a copy of ECIR which is an internal administrative document of ED could legally be sought by an accused?
- If answer to the above questions is affirmative, this leads to another question at what stage copy of ECIR should be shared with the accused?

# Whether supply of copy of ECIR is mandatory?

- It is pertinent to mention here that provisions of PMLA specifically provide disclosure of reason to believe, copy of grounds/ reasons, etc. in certain circumstances. In this context, reference may be made to section 19 of PMLA.
- As per administrative procedure, in cases where provisional attachment of POC is made u/s 5 of PMLA, the copy of ECIR along with provisional attachment order is sent to Adjudicating Authority for reference of the case who in turn supply the same to the accused.

# Whether supply of copy of ECIR is mandatory?

- Since, the accused gets the copy of ECIR once action under the PMLA is taken against the accused, the only remaining legal issue could possibly be raised about timing of supply of ECIR i.e. whether the copy of ECIR should be made available to the accused at the beginning of investigation or at the time when some action is taken against the accused under the PMLA?
- Hon'ble Supreme Court has admitted SLP of the ED in case of H.D. Chaturvedi in SLP (Crl.) No. 5621-5627/2016 as well as granted stay on directions of Delhi High Court to provide the copy of ECIR to the accused vide order dated 22.07.2016.

# Whether supply of copy of ECIR is mandatory?

- Later on, Hon'ble Supreme Court dismissed the SLP of the ED on the ground that the accused was provided the copy of ECIR by the Adjudicating Authority, accordingly, the SLP has become infructuous. However, Hon'ble Apex Court has formulated following question of law on the issue which have been left open:
  - Whether the Hon'ble High Court has grossly erred in directing to provide the copy of ECIR to the petitioner in the above mentioned orders?
  - Whether the ECIR which is meant for identification of individual case and normally mentions the contents of Schedule office FIR, can be treated as public document within the meaning of Section 74 of Indian Evidence Act, 1872?

# Whether supply of copy of ECIR is mandatory?

- Issues for discussion:
  - Whether accused is entitled to get copy of ECIR which is an internal administrative document at the initial stage of investigation under PMLA?
  - As long as the accused is getting a copy of ECIR at the stage when action is initiated against him by way of provisional attachment of the property, whether the issue can still be raised before Hon'ble Court specially under the writ jurisdiction?
  - Many a times, the ECIR contains confidential information gathered by Law Enforcement Agency (LEA) during investigation as sequel to FIR, accordingly, the supply of ECIR at beginning of investigation under PMLA will lead to disclosure of confidential information at the initial stage of investigation leading to destruction of evidence by the accused.

# Whether ECIR can be quashed?

- Investigation under the provisions of PMLA can only be initiated as sequel to predicate offence resulting into Proceeds of Crime (POC), and involvement of the accused in any process/ activity connected to POC, accordingly, initiation of investigation can only be challenged in case of absence of predicate offence which is a trigger for PMLA investigation.
- Since, ECIR, an internal administrative document, captures relevant details of predicate offence, it does not give any cause of action against the accused which could legally be questioned before the competent Court particularly when the writing of ECIR is not part of PMLA.

# Whether ECIR can be quashed?

- The provisions of PMA do not stipulate recording of ECIR as mandatory condition before initiation of investigation under PMLA.
- Action against the accused under the various provisions of the PMLA u/s 5, 16, 17, 18, 19, 20, 21 requires specifically formation of reason to believe and certain provisions of PMLA also provide for recording of reason to believe in writing and its forwarding to Adjudicating Authority.

# Whether ECIR can be quashed?

- The action under above referred to provisions of PMLA many a time require approval by Adjudicating Authority under PMLA and can also be questioned under writ jurisdiction in extraordinary circumstances. However, the ECIR, an internal administrative document which is recorded prior to investigation under PMLA for reference purpose cannot be challenged in the Court of Law under the existing legal framework for following reasons:
  - It is an administrative document devised to identify the case and predicate offence and is not part of provisions of PMLA,
  - Provisions of PMLA do not stipulate recording of ECIR either as a legal or administrative requirement before initiation of investigation under PMLA.
  - Recording of ECIR per se does not cause prejudice to the accused.



# Whether reason to believe recorded for taking certain actions require supply of the same to accused?

- Provisions of section 5(1), 16(1), 17(1), 18(1), 19(1), 20(1), 21(1) of PMLA require formation of reason to believe by authorized officer to invoke these provisions as well as recording of such reason to believe for the actions except for section 21(1).
- Except for section 19(1), provisions of all other sections do not require communication of reason to believe recorded by authorized officer. However, communication of reason to believe recorded under above referred to sections to the accused is one of the areas of litigation.

# Whether reason to believe recorded for taking certain actions require supply of the same to accused?

- As on date, there is no decision of Hon'ble Apex Court mandating communication of reason to believe recorded to the accused under those provisions of PMLA where communication of reason to believe has not been specifically provided. The operation of decision of Hon'ble Delhi High Court in case of J. Shekhar directing supply of reasons recorded to invoke section 5(1) has been stayed by Hon'ble Supreme Court in the SLP filed by the ED.
- Since, provisions of section 5(1), 16(1), 17(1), 18(1), 20(1), 21(1) of PMLA [except for section 19(1)] do not require for providing copy of reason to believe recorded to invoke these provisions, the admission of the legal claim would tantamount to amendment to existing language of sub-section (1) of section 5 of PMLA.

# Whether reason to believe recorded for taking certain actions require supply of the same to accused?

- The legislature in their wisdom thought it appropriate to provide communication of reason to believe only in the case of arrest of the accused, accordingly, the same claim cannot legally be made under provisions of other sections of PMLA.
- The issue whether recording of reason to believe should be made in the case file or in the order of provisional attachment or in both has also been subject matter of dispute. The provisions of section 5(1) do not stipulate about manner in which the reason to believe shall be recorded, accordingly, the recording of reason to believe to invoke provisions of section 5(1) in provisional attachment order may be sufficient compliance of provisions of section 5(1) of PMLA even in cases where reason to believe has not separately been recorded in the case file.

# Whether sufficiency of reason to believe recorded can legally be questioned?

- The sufficiency of reason to believe recorded by the Authorized Officer to invoke provisions of section 5(1), 16(1), 17(1), 18(1), 19(1), 20(1), 21(1) of PMLA is also a subject matter of litigation.
- Hon'ble Supreme Court examining the issue of sufficiency of reason to believe in the context of section 147 of the Income Tax Act, 1961 has laid down a ratio decidendi that sufficiency of reason is not justifiable and the Courts can only examine if there was some material basis for the formation of reason to believe. It is to clarify that reason to believe is different from final conclusion reached by Investigating Officer after the completion of the investigation.

# Power of summon by IO u/s 50

- Provisions of section 50 grant power to officer of the rank of Assistant Director and above to summon any person whose attendance is necessary to give evidence or to produce any record during the course of any investigation or proceeding under PMLA, however, there is no requirement for recording reason to believe at the time of issue of the summon.
- The Authorized Officer has power to summon any person whether accused or not.
- The power of summon is for discovery/ inspection, enforcing the attendance of any person and examining him on oath, compelling the production of records, receiving evidence on affidavits, issuing commission for examination of witness and documents and any other matter as may be prescribed.

# Power of summon by IO u/s 50

- Persons so summoned shall be bound to attend in person or through Authorized Agent and shall bound to the state truth upon any subject respecting of which they are examined or make statement and produce requisite documents u/s 50(3).
- Every proceeding u/s 50(2) and 50(3) shall be deemed to be a judicial proceeding within meaning of section 193 and 228 of Indian Penal Code.
- The power of the Competent Officer to impound any record under sub-section (5) of section 50 will require recording of reason for so doing and will also require prior approval of Joint Director in case retention of the record exceeds the period of three months.
- The provision of section 50 do not provide any exception as stipulated in first proviso to sub-section (1) of section 45 of PMLA.

# Power of summon by IO u/s 50 vis-à-vis 160/161/ 162 of Cr.PC

- U/s 50 of PMLA, the Authorized Officer has same powers as are vested in Civil Court under CPC whereas power u/s 160, 161 and 162 of Cr.PC is available with the Police Officer. Since, Officers under the PMLA are not Police Officers, these relevant provisions of Cr.PC will not apply.
- Power u/s 160-162 of Cr.PC is for investigation under Cr.PC whereas power u/s 50 is for the purpose of investigation under PMLA.
- Scope of power u/s 50 of PMLA is much wider. It includes not only examination of a person but also impounding of record and its retention.

# Power of summon by IO u/s 50 vis-à-vis 160/ 161/ 162 of Cr.PC

- Exception of not answering a question which would expose accuse of a criminal charge or a penalty or forfeiture as provided u/s 161(2) of Cr.PC is excluded from section 50 of PMLA.
- The provision under the PMLA provides for attendance of persons himself in certain circumstances through authorized agents.
- The process of recording of statement has not specifically provided under the provisions of section 50 of PMLA.
- Exceptions with regard to male person under age of 15 or over the age of 65 or woman as stipulated u/s 160/ 161 of Cr.PC are also excluded from section 50 of PMLA.
- Contrary to the provisions of Cr.PC, the statement recorded u/s 50 of PMLA is legally admissible evidence.



# Power of summon by IO u/s 50

- The power of the Authorized Officer to issue summon u/s 50 to a woman (accused/ witness/ abetter) has invited judicial scrutiny.
- Unlike Cr.PC no exception has been provided to any category of persons u/s 50.
- Section 65 of PMLA provides that provisions of Cr. PC shall apply in so far as they are not inconsistent with the provisions of the Act to arrest, search & seizure, attachment, confiscation, investigation, prosecution and all other proceedings under PMLA. Accordingly, powers of section 50 cannot be diluted by other relatable provisions of Cr. PC.

# Power of summon by IO u/s 50

- Some of the woman accused relying on the decision of Hon'ble Delhi High Court in case of Asmita Agarwal vs. The Enforcement Directorate and Ors. have contended for interrogation at their residence in terms of section 160 of Cr. PC is legally not tenable for following reasons:
  - U/s 50, the Authorized Officer has the same powers as are vested in Civil Court under CPC and the power cannot be equated with the power available with the Police Officer u/s 160 of Cr. PC.
  - Since, no exception is provided u/s 50, the provisions of section 160 of Cr. PC having exception for the woman are inconsistent with the provisions of section 50 of PMLA, accordingly, as per provisions of section 65 of PMLA, provisions of Cr. PC shall not apply.
  - The relied upon decision was not rendered under the PMLA, accordingly, the scheme of the Act has not been examined in this context.

# Power of summon by IO u/s 50

- Hon'ble Madras High Court in case of Nalini Chidambaram v. Directorate of Enforcement 2018 SCC Online Mad 5924 has held that there is no requirement to read provisions of section 160 of Cr.PC in to section 50 of PMLA.
- Delhi High Court in case of Virbhadra Singh v. Enforcement Directorate 2017 SCC Online Del 8930 has held that power u/s 50(2) cannot be acquitted with power of Police Officer u/s Cr.PC and General Criminal Law will not overwrite the specific power u/s 50 of PMLA.
- Delhi High Court in case of Ratul Puri v. Directorate of Enforcement 2019 SSC Online Del 9739 has held that denial of copy of statement at the initial stage of investigation is justified and that copy of the statement u/s 50 should be supplied once prosecution complaint is filed making the person accused.

# Power of summon by IO u/s 50

- Hon'ble Patna High Court in case of Rajendra Yadav v. Union of India 2014 SSC Online Pat 6688 has held that power of Authorized Officer u/s 50 is not hit by Article 20(3) of the Constitution.
- In case of Dalmia Cement (Bharat) Ltd. v. Assistant Director of Enforcement Directorate, 2016 (4) ALD 47 mere registering of ECIR would not render any person as an accused, accordingly, issue of summon requiring a person to appear and make statement is not violative of constitutional protection under Article 20(3).

# Power of summon by IO u/s 50

- The person called for interrogation u/s 50 has no right to have his lawyer present during interrogation. Hon'ble Supreme Court in case of Poolpandi vs. Superintendent, Central Excise 1992CriLJ2761 has held that accused had no constitutional right to claim luxuries and company of his choice when called for interrogation.
- The statement recorded u/s 50 of PMLA is admissible evidence and the same makes out a formidable case about the involvement of the accused in commission of offence of money laundering – para 27 – – Rohit Tondon vs. ED (Supreme Court) 2017.

# Article 20(3) of The Constitution Vs S.50PMLA

- Article 20(3) of the Constitution reads as “(3) *No person accused of any offence shall be compelled to be a witness against himself.*”
- Hon’ble Supreme Court has held that following conditions must be satisfied prior to operation of Article 20(3):
  - The person must be accused of an offence.
  - The element of compulsion to be a witness should be there, and
  - it must be against himself.
- Article 20(3) requires formal accusation of a person to invoke it. However, Section 161 (2) r.w.s. 161 (1) of Cr.PC expand the scope and protects “*any person supposed to be acquainted with facts and circumstances of the case.*” Since, Section 50 of PMLA specifically exclude provision analogous to Section 161 (2), only accused can invoke Article 20 (3) i.e. the right against self incrimination is not available under Section 50 of PMLA as is available u/s 161 of Cr.PC.

# Article 20(3) of The Constitution Vs S.50PMLA

- Since the purpose of examination of any person u/s 50 is to gather evidence to identify an accused or witness, the protection provided under Article 20(3) will not be applicable. The decision to hold any person accused of witness is taken after conclusion of investigation and at the time of filing of the prosecution complaint.
- The immunity against the self incrimination under Article 20 (3) does not extend to any voluntary statement made in exercise of free will or volition even in custody.
- The self incrimination means conveying information in form of statement based on personal knowledge of a person and can not include mechanical process of producing document and other material.

# Article 20(3) of The Constitution Vs S.50PMLA

- Hon'ble Supreme Court in case of Kanhiyalal v. Union of India (2008) 4 SCC 688 has held that as long as such statement made by the accused at the time when he was not under arrest, the bar u/s 24 to 27 of Indian Evidence Act could not operate nor would be the provisions of Article 20(3) of the Constitution be attracted.
- Under the law there is no automatic presumption that custodial statement have been extracted through compulsion. In fact Section 27 of Indian Evidence Act permits use of custodial statement in ordinary course of the event.
- As per existing legal jurisprudence there can be no absolute rule that a retracted confession can not be acted upon unless it is corroborated with the material facts. However, as a matter of caution, a retracted confession can not be made solely the basis of conviction unless it is corroborated.



# Article 20(3) of The Constitution Vs S.50PMLA

- It is not necessary that each and every fact mentioned in the confession regarding complicity of the accused should be separately or independently corroborated nor is it essential that corroboration must come from facts and circumstances discovered after confession, but it would be sufficient if the general trend of confession is substantiated by some evidence which would tally with what is contained in the confession.
- A confession is not to be regarded as involuntarily merely because it has been retracted by the maker, at the trial. Before using the retracted confession, it should be proved as voluntary and true.

# Issues relating to Section 5 of PMLA

- Provisions of section 5 provides for attachment of POC in possession of **any person** who may neither be accused of scheduled offence nor is accused of having committed of an offence u/s 3 of PMLA – Sri Ramalinga Raju vs. UOI & ED.
- Attachment and eventually confiscation of property in possession of a person not accused of an offence u/s 3 do not violate article 14, 21 and 300-A of Constitution – refer Kalakalapudi Brahma Reddy and Ors. vs. Union of India W.P. No. 38314 of 2013.
- Second proviso to section 5(1) is applicable to the property acquired even prior to coming of the force of this provision (w.e.f. 06.03.2009) and it cannot be a case of retrospective penalization – Sri Ramalinga Raju vs. UOI & ED.

# Whether assets not forming the part of POC could legally be attached u/s 5(1) of PMLA?

- The provisions of section 2(1)(u) stipulate that POC may also include property of equivalent in value in the cases where POC is not reachable, however, this issue has also attracted litigation.
- Examining the issue, Hon'ble Delhi High Court in case of Deputy Director, ED vs. Axis Bank and Ors. in Appeal No. 143/2018 has held that in certain circumstances (where POC was expended or located outside the country) other alternative attachable property not forming part of POC i.e. deemed tainted property can be subject matter of section 5(1). The relevant parts of the judgement reads as under:

# Whether assets not forming the part of POC could legally be attached u/s 5(1) of PMLA?

*‘(iii). The empowered enforcement officer has the authority of law in PMLA to attach not only a "tainted property" - that is to say a property acquired or obtained, directly or indirectly, from proceeds of criminal activity constituting a scheduled offence - but also any other asset or property of equivalent value of the offender of money - laundering, the latter not bearing any taint but being alternative attachable property (or deemed tainted property) on account of its link or nexus with the offence (or offender) of money-laundering.’*

*(iv). If the "tainted property" respecting which there is evidence available to show the same to have been derived or obtained as a result of criminal activity relating to a scheduled offence is not traceable, or the same for some reason cannot be reached, or to the extent found is deficient, the empowered enforcement officer may attach any other asset ("the alternative attachable property" or "deemed tainted property") of the person accused of (or charged with) offence of money-laundering provided it is near or equivalent in value to the former, the order of confiscation being restricted to take over by the government of illicit gains of crime.’*

# Whether mortgaged POC or mortgaged alternative attachable property could legally be attached u/s 5(1) of PMLA?

- It is judicially held that an order of attachment under the PMLA is not illegal only because a secured creditor has a prior secured interest (charge) in the mortgaged property forming part of POC or mortgaged alternative attachable property.
- The objective of PMLA being distant from purpose of RDBA, SARFAESI Act and Insolvency Code, the later three legislation do not prevail over former.
- The PMLA by virtue of section 71 has overriding effect over other existing laws in the matter of dealing with money laundering and POC relating thereto.
- POC as a result of criminal activity relating to scheduled offence falls within mischief of PMLA only.

# Whether mortgaged POC or mortgaged alternative attachable property could legally be attached u/s 5(1) of PMLA?

- Bonafide third party claim in a POC subjected to attachment must be proved by cogent evidence, that it has acquired interest in such property lawfully and for adequate consideration and the party was neither privy to nor complicit in the offence of money laundering and that it has made all compliance with the existing law.
- In order to prove legitimate third party claim in a deemed tainted property (an alternative attachable property) which was acquired at the time around or after the commissioning of criminal activity should be proved that it had taken due diligence (taking reasonable precaution and after due enquiry) to ensure that it was not a tainted asset and transaction was legitimate.

# Whether mortgaged POC or mortgaged alternative attachable property could legally be attached u/s 5(1) of PMLA?

- If it is shown by cogent evidence that third party has a legitimate claim in a deemed tainted property (an alternative attachable property) which was acquired at the time anterior to commission of criminal activity, the property to the extent of third party will not be subjected to confiscation so long as the charge of third party subsist and attachment under the PMLA shall be valid or operative subject to satisfaction of charge of third party and restricted to such part of the value or the property as is in excess of claim of the third party.
- The bonafide third party claim secured or otherwise shall be accountable to the enforcement authorities for the excess value of property subjected to PMLA attachment.

# Whether mortgaged POC or mortgaged alternative attachable property could legally be attached u/s 5(1) of PMLA?

- If third party claimant is secured creditor pursuing enforcement of secured interest in deemed tainted property sought to be attached which was acquired from accused of money laundering or from any other person through such transaction involved in criminal activity prior to the order of attachment under the PMLA, the direction of such attachment under PMLA shall be valid and operative subject to satisfaction of the charge of third party but shall be restricted to such part of value of property which is in excess of claim of third party.
- If order confirming attachment has attained finality or if order of confiscation has been passed, or if trial of a case u/s 4 of PMLA has commenced, the claim of third party of bonafide or legitimate interest in the attached property will be inquired into and adjudicated upon only by Special Court.



# Onus to prove in respect of properties subject to section 5 of PMLA

- If a person accused of or charged with the offence of money laundering object to attachment, his claim that property attached was not acquired or obtained directly or indirectly from criminal activity, the burden of proving facts in support of such claim is to be discharged by him.
- If the property of a person other than one accused of or charged with the offence of money laundering i.e. third party is sought to be attached and there is evidence available to show that such property before its acquisition was held by the person accused of money laundering or is abettor or it was involved in transaction which has interconnection with transaction of money laundering, the burden of proving facts to the contrary so as to seek release of such property from attachment is on the person who so contends.

# Important issues relating to reason to believe u/s 5 of PMLA

- The basic requirement for provisional attachment of property u/s 5(1) are:
  - Any person is in possession of any POC; and
  - Such POC are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceeding relating to confiscation of such POC.
- No order of attachment shall be made unless a charge sheet has been filed in relation to scheduled offence, however, the exception is provided in second proviso to section 5(1) of PMLA - in the case competent authority has reason to believe recorded in writing on the basis of material in his possession that non-attachment of property is likely to frustrate any proceedings under this Act.

# Important issues relating to reason to believe u/s 5 of PMLA

- The sufficiency of reason to believe is non-justifiable as held by Hon'ble Apex Court in several cases. However, Hon'ble Courts may examine whether there was a material for formation of reason to believe.
- The reason to believe that non-attachment of property is likely to frustrate any proceedings under the PMLA as stipulated in second proviso to section 5(1) can only be tested in light of the legal principle as noted above. In other words, sufficiency of reason cannot be examined but presence of material based on which reason to believe has been recorded could be subject to judicial scrutiny.

# Important issues relating to section 5 of PMLA

- High Court will ordinarily not entertain petition under Article 226 against the order u/s 5(1) as remedies are available under the PMLA.
- Violation of principle of natural justice and provisions attachment stays does not arise as statute has not made provision of opportunity of hearing prior to provisional attachment – Sri P. Trivikrama Prasad vs. ED, Hyderabad 2014 SCC Online Hyd 819.

# IBC vs S5 of PMLA

- Section 32 A which has been brought to the IBC Act by way of ordinance is effective from 28.12.2019. Accordingly, attachment under Section 5 which has been made prior to 28.12.2019 can not legally be hit by amendment to IBC Act, since, the amendment has not been made retroactively.
- This further clarifies that prior to this ordinance provisions of IBC were not applicable to any proceeding under the PMLA.
- The newly inserted Section 32 A of IBC provides for
  - No action under the PMLA against the entity in respect of which the resolution plan has been approved by NCLT.
  - The new management which has taken over the entity as per resolution plan approved by NCLT shall also not be subject to any proceeding under the PMLA in respect of any offence committed by the entity taken over by the new management.

# IBC vs S5 of PMLA

- The immunity as stipulated in Section 32 A of IBC shall not be extended in case entity going for resolution and the new management which has taken over the entity as per resolution plan approved by NCLT are related party as per Section 5 (24) of IBC Act.
- The benefit as stipulated under Section 32 A(1) of IBC shall only be available in case entity subject to resolution and new management taken over the entity are not the related party.
- Definition of associated party as per Section 5 (24) of IBC read with Section 2 (6) of Companies Act, 2013 is quite wide and it even covers entities having significant influence over each other and even joint ventures.
- It is evident from Section 32 A r.w.s. 5 (24) of IBC that even after approval of resolution plan by the NCLT the benefit of Section 32 A can legally be denied if the ED is of view that both the parties are related/associated party.

# IBC vs S5 of PMLA

- The company under the resolution subject to fulfilment of condition as provided under Section 32 A of IBC may not be proceeded for criminal prosecution. However, the Director/officers of the company or partners of LLP shall not be entitled for immunity for their role in the offence under prosecution by the criminal agencies. This have been clarified in further proviso to sub section (1) of Section 32 A of IBC.
- It is amply clear from the above analysis that the IO can proceed against the company/LLP in resolution process in IBC till date of approval of resolution.
- In this context following steps need to be taken at the earliest

# IBC vs S5 of PMLA

- In the cases where IO has identified PoC which represent assets of the company/LLP under the resolution, the provisional attachment under Section 5 must be made immediately before resolution is approved by NCLT keeping in view that resolution under IBC is a time bound process (180 days-Section 12 of IBC).
- An intimation in this regard may be made to the bench concerned of NCLT at the earliest that proceeding against the company/LLP under PMLA is at advanced stage.
- In case the company or LLP under resolution and resolution applicant (the company acquiring such company) are related party, the fact may be formed to the NCLT along with evidence so that effort and energy invested in the resolution process is avoided.



# IBC vs S5 of PMLA

- In case IO has an evidence that resolution applicant is also involved in the offence of money laundering committed by company/LLP in resolution, the same may be brought to the NCLT.
- Since resolution process under IBC is a time bound event, it is suggested that each Region will take following steps:
  - A Nodal Officer may be appointed in each Zone who will ascertain from the website of NCLT whether any case under investigation has opted for resolution process under IBC.
  - As soon as the resolution process has started the JD concerned will ensure that investigation under the PMLA is taken in time bound manner and proceeds of crime if any pertaining to a company under resolution should be attached prior to approval of resolution plan by NCLT.

# The meaning of term 'forthwith' as used in section 8(4)

- Sub-section (4) of section 8 of PMLA provides for that Authorized Officer shall forthwith take the possession of the property attached u/s 5(1A) as and when attachment made u/s 5(1) is confirmed by the Adjudicating Authority.
- The meaning of term 'forthwith' has invited judicial scrutiny – whether possession of the property should be taken immediately or after period of appeal provided against the order of the Adjudicating Authority?
- The meaning of term 'forthwith' has been examined by Hon'ble Supreme Court in several cases wherein Hon'ble Court has held as under:

# The meaning of term 'forthwith' as used in section 8(4)

- As soon as possible; without any delay – Gopal Mondal vs. State of West Bengal, AIR 1975 SC 1807.
- The expression 'forthwith' would mean 'as soon as may be', that the action should be performed by the authority with reasonable speed and expedition with a sense of urgency without any unavoidable delay - Navalshankar Ishwarlal Dave v. State of Gujarat, AIR 1994 SC 1946.
- The word 'forthwith' means with all reasonable quickness and reasonable prompt time - Rao Mahmood Ahmed Khan v. Ranbir Singh, AIR 1995 SC 2195.
- The expression 'forthwith' used in Section 157 of the Code means promptly and without any undue delay – Aquel Ahmed v. State of U.P., AIR 2009 SC 1271, 1273.

# Provisions of section 17(4) vs. section 21

- Provisions of section 17(1) provides for seizure of record or property whereas sub-section (1A) of section 17 provides for freezing of the property which is not practicable to seize.
- Provisions of sub-section (4) of section 17 stipulates filing of an application by an Authorized Officer to the Adjudicating Authority within 30 days from such seizure or freezing of any record or property for continuation of retention of the record or property seized and continuation of order of freezing.

# Provisions of section 17(4) vs. section 21

- Section 21 gives power to the Investigating Officer to retain the record seized u/s 17/ 18 or frozen u/s 17(1A) for period not more than 180 days subject to a condition recording of reasons to believe that such records are required to be retained for any enquiry under this Act.
- A question has been raised with regard to so called contradiction between power of the Adjudicating Authority u/s 8 r.w.s. 17(4) and the power of the Investigating Officer u/s 21. Such controversy is needless for the following reasons:
  - The pendency of the application of the Authorized Officer to the Adjudicating Authority will not legally allow the retention of record.
  - There could be time gap between application made by the Authorized Officer and permission of retention of the record by the Adjudicating Authority and in order to retain the record during this time gap, power has been given to the IO u/s 21(1) of the Act.

# Provisions of section 17(4) vs. section 21

- However, the power to retain the records for period more than 180 days is with the Adjudicating Authority and there is no contradiction between provisions of section 17(4) and section 21 of PMLA.
- Since, the person from whom the record seized or frozen is entitled to obtain the copies of the record u/s 21(2), no prejudice is caused by the retention of the record and whole legal façade on the issue is unnecessary.

# Conduct of the accused

- Most of the cases under investigation involve introduction, layering and integration of POC through multiple structures incorporated in several jurisdictions/ countries. The accused in most of these cases has fled the country just before or immediately after the crime committed by him is known to law enforcement agencies.
- In the cases of the fugitive offender, the collection of information is a real challenge. In these cases, requisite information is being collected through a time consuming process of Letter of Request (LR) and early extradition of these accused to India is another serious challenge.

# Conduct of the accused

- Even in the cases where accused is traceable in India, they deliberately withhold the information about money trails as well as details of multiple structures in several countries used for layering and integration of POC. The non-cooperation in furnishing the information by the accused in most of the cases has led to collection of information through time consuming LR process.
- However, in practice, these fugitive and non-cooperative accused are using multiple legal avenues by way of filing several applications before Special Court and by invoking writ jurisdiction before Hon'ble High Court. The real purpose of the legal façade is to delay investigation under PMLA.



# Issues relating to reverse burden u/s 23 and 24 of PMLA

- Presumption of innocence is no rule of law. It is only a rule of evidence. If a person has not been made an accused and arraigned to answer incriminating issues, he cannot avail himself of this benefit.
- Article 20(3) of the Constitution mandates that “no person accused of any offence shall be compelled to be a witness against himself”.
- Section 24 of PMLA casts the reverse burden on accused and is applicable in the proceedings before the **Authority** or **Court** – Smt K. Sowbaghya vs. ED & 02 Others (2016 SCC Online Kar 282) and Usha Agarwal vs. Union of India & Others (2017 SCC Online Sikh 146).
- Section 50 of PMLA compels a persons (who may be accused or witness) to speak truth.
- The fundamental right u/s 20(3) is subject to restriction as may be imposed under exceptional circumstances.

# Issues relating to reverse burden u/s 23 and 24 of PMLA

- The inherent power u/s 482 of Cr.PC cannot be exercised to do something which is expressly barred under another code and it is not for the Court to exercise its inherent power – M. Saraswati & R. Devadoss v. E.D. (2012 SCC Online Mad 2583 Para 74c).
- Where a property is owned or possessed by a person not accused of an offence u/s 3 and where such property is part of inter connected transaction involving money laundering presumption enjoined in section 23 comes into the operation. However, burden of proof enjoined by section 24 cannot be imposed on a person who is not accused u/s 3 of PMLA – B. Rama Raju vs. UOI & Others (2011 SCC Online AP 152).

# Issues relating to bail to accused under PMLA

- The twin conditions are:
  - Public Prosecutor to be given an opportunity to oppose the application for release of accused on bail.
  - Where Public Prosecutor oppose the bail – the Court is satisfied that there are reasonable grounds for believing that accused is not guilty of such offence **and** that he is not likely to commit any offence while on bail.
- Following exceptions are provided:
  - A person who is under the age of 16 years, or
  - Is a woman, or
  - Is sick, or
  - In firm, or
  - Is accused either on his own or along with other co-accused of money laundering of sum of less than Rs. 1 crore,  
If the Special Court so directs

# Issues relating to bail to accused under PMLA

- The provisions of section 45(1) of PMLA stipulates twin conditions for granting the bail even in respect of application u/s 439 of Cr.PC (that should be r.w. provisions of section 24 of PMLA) – refer Gautam Kundu vs. ED (2015) 16 SCC 1.
- Hon'ble Supreme Court in case of Nikesh Tarachand Shah vs. Union of India has held that condition to grant the bail was applicable to certain category of scheduled offence which is violative of article 21. Hon'ble Apex Court has further clarified that every statute that incorporate the twin test for bail such as TADA or NDPS the twin test is applied for offence under those respective acts and not for other scheduled offence. Keeping in view the judgement of Hon'ble Apex Court, the amendment was brought to section 45(1) making twin condition applicable for all the offence under the PMLA w.e.f. 19.04.2018.

# Issues relating to bail to accused under PMLA

For aforesaid reasons after the amendment to provisions of section 45(1) of PMLA, the decision of Hon'ble Apex Court cannot be relied upon to contest that provisions of section 45(1) is violative to article 21.

- The twin conditions of granting bail as specified in section 45(1) is in addition to limitation under Cr. PC or any other law for time being enforced on granting of bail-refer section 45(2).
- Hon'ble Jharkhand High Court in case of ED vs. Harinarayana Rai in B.A. No. 6829 of 2010 has held that bail is to be granted u/s 45 only on satisfaction that there are reasonable grounds for believing that the petitioner is not guilty of such offence and he is not likely to commit such offence while on bail. Hon'ble Supreme Court has dismissed the SLP against the order on 19.02.2010 in SLP (Cr.) No. 9586 of 2009.

# Issues relating to bail to accused under PMLA

- In order to clarify object and intent of the legislature an explanation has been included below section 45 of PMLA in The Finance (No. 2 ) Bill, 2019 which reads as under :
- “Explanation-For the removal of doubts, it is clarified that the expression “Offences to be cognizable and non-bailable” shall mean and shall be deemed to have always meant that all offences under this Act shall be cognizable offences and non-bailable offences notwithstanding anything to the contrary contained in the Code of Criminal Procedure, 1973, and accordingly the officers authorised under this Act are empowered to arrest an accused without warrant, subject to the fulfilment of conditions under section 19 and subject to the conditions enshrined under this section.”

# Issues relating to bail to accused under Cr.PC/ PMLA

- For the purpose of considering an application for grant of bail although detailed reasons are not necessary to be assigned, the order granting bail must demonstrate application of mind as to why the applicant was granted or denied the bail. Recording of finding on twin conditions is essential requirement in case of bail order – *Ranjitsing Brahmajeetsing Sharma vs. State of Maharashtra* (2005) 5 SCC 294.
- The duty of court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities that
  - Accused has prima facie has not committed such offence,

# Issues relating to bail to accused under Cr.PC/ PMLA

- Possibility of accused committing the crime which is an offence under the Act after granting the bail keeping in view antecedents of the accused, is propensities and the nature and manner in which he is alleged to have committed the offence – refer *Ranjitsing Brahmajeetsing Sharma vs. State of Maharashtra* (2005) 5 SCC 294 and *Rohit Tondon vs. ED* (Supreme Court) 2017.
- If the Court does not advert to these relevant considerations and mechanically grants bail, the said order would suffer from vice of non-application of mind, rendering it to be illegal [*Prasanta Kumar Sarkar vs. Ashis Chatterjee and Another* (2010) 14 SCC 496, para 10].



# Issues relating to bail to accused under Cr.PC/ PMLA

- The findings recorded by the Court while granting or refusing the bail undoubtedly could be tentative in nature which may not have any bearing on merit of the case and Trial Court would thus be free to decide the case on the basis of the evidence adduce at the trial, without any manner being prejudice thereby – Ranjitsing Brahmajeetsing Sharma vs. State of Maharashtra (2005) 5 SCC 294.
- It is well settled that amongst other circumstances following factors to be borne in mind while considering an application for bail:
  - Whether there is any prima facie or reasonable ground to believe that the accused had committed the offence.
  - Nature and gravity of the accusation.

# Issues relating to bail to accused under Cr.PC/ PMLA

- Severity of the punishment in the event of conviction.
- Danger of the accused absconding or fleeing, if released on bail.
- Character, behaviour, means, position and standing of the accused.
- Likelihood of the offence being repeated.
- Reasonable apprehension of the witnesses being influenced.
- Danger, of course, of justice being thwarted by grant of bail.

Refer para 9 of the judgement in case of Prasanta Kumar Sarkar vs. Ashis Chatterjee and Another (2010) 14 SCC 496.

# Appeal against the order of granting the bail

- In the cases where special court has granted bail to an accused u/s 3 of PMLA, the appeal against the order can be filed before Hon'ble Jurisdictional High Court.
- If a Court of Sessions had admitted an accused person to bail, State has two options:
  - It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily therefore to that Court.
  - State may as well approach the High Court u/s 439(2) for cancellation of bail.

However, it is futile for State to move the Sessions Judge if there are no new circumstances that have cropped up except those already existing [refer Gurcharan Singh vs. State (Delhi Admn.) (1978) 1 SCC 118, para 16].

# Appeal against the order of granting the bail

- The provisions of Cr.PC which is applicable for filing appeal has invited judicial review by Hon'ble Supreme Court in case of *Puran vs Rambilas & Anr.* (2001) 6 SCC 338 and Hon'ble Apex Court has held as under:
  - Appeal for cancellation of the bail can be filed u/s 439(2) of Cr.PC and Hon'ble High Court can exercise power to cancel the bail in respect of order passed by Court of Sessions. An argument that High Court could not sit in appeal or revision over an order of the Court of Session was rejected.
  - High Court has inherent jurisdiction u/s 482 of Cr.PC, however, Hon'ble Court may refuse to exercise its jurisdiction u/s 482 on the basis of self-imposed restriction.
  - High Court's inherent jurisdiction u/s 482 is not affected by provisions of section 397(3) of Cr.PC even if bail is an interlocutory order.

# Important factors governing grant or refusal of bail

- Concept of setting aside an unjustified, illegal or perverse order of granting bail is totally different from concept of cancelling the bail on the ground that the accused has misconducted himself or because of some new facts requiring such cancellation [refer para 11 in case of *Puran vs. Rambilas* (2001) 6 SCC 338].
- There is no absolute rule that once bail is granted, it can only be cancelled if there is likelihood of misuse of bail because that factor is not only factor, there are several factors relevant for taking decision to cancel the bail.

# Important factors governing grant or refusal of bail

- Question whether to cancel the bail given to an accused the Court has also to consider the gravity and nature of offence and in case there are very serious allegations against the accused, the bail can be cancelled even if the accused had not misused the liberty of bail granted to him.
- Ground for cancellation of bail u/s 437(5)/ 439(2) are identical namely for bail granted u/s 437(1) or (2)/ 439(1) which may be summarized as under:
  - The accused misuses his liberty by indulging in similar criminal activity,
  - Interferes with the course of investigation,
  - Attempts to tamper with evidence or witnesses,
  - Threatens witnesses or indulges in similar activities which would hamper smooth investigation,

# Important factors governing grant or refusal of bail

- There is likelihood of his fleeing to underground or becoming unavailable to the investigating agency,
- Attempts to place himself beyond the reach of his surety, etc.

Refer Raghbir Singh vs. State of Bihar (1986) 4 SCC 481

- Reappreciation on the evidence in granting the bail is to be avoided, the Court dealing with the application of cancellation of bail u/s 439(2) of Cr.PC can consider whether irrelevant material were taken into consideration. However, the irrelevant material should be of substantial nature and not of a trivial nature [Manjit Prakash and Others vs. Shobha Devi and Another (2009) 13 SCC 785 refer para 10 & 12].

# Important factors governing grant or refusal of bail

- If superior Court finds that the Court granting bail had acted on irrelevant material, or if there was non-application of mind or failure to take note of any statutory bar to grant bail, or if there was manifest impropriety as for example failure to hear the Public Prosecutor/complainant where required, an order for cancellation of bail can in fact be made [Subodh Kumar Yadav vs. State of Bihar and Another (2019) 14 SCC 638, refer para 16].
- Superior Court would be justified in considering question whether irrelevant material were taken into consideration by the Court granting bail [Subodh Kumar Yadav vs. State of Bihar and Another (2019) 14 SCC 638, refer para 16].



# Important factors governing grant or refusal of bail

- Very cogent and overwhelming circumstances are necessary for an order directing cancellation of bail, already granted.
- Generally speaking, the grounds of cancellation of bail broadly are:
  - Interference or attempt to interfere with due course of administration of justice, or
  - Evasion or attempt to evade due course of justice, or
  - Abuse of concession granted to the accused in any manner.
- Bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused retain his freedom by enjoying the concession of bail [Dolat Ram and Ors. vs. State of Haryana Criminal Appeal No. 839 of 1994 refer para 4]

# Important factors governing grant or refusal of bail

- The right u/s 167(2) of Cr.PC to be released on bail on default if charge sheet is not filed within 90 days from the date of first remand is not an absolute or indefeasible right. The said right would be lost if charge sheet is filed and would not survive after filing of the charge sheet [Pragyna Singh Thakur vs. State of Maharashtra (2011) 10 SCC 445, para 54].
- If application for bail is filed on the ground that charge sheet was not filed within 90 days, before consideration of the same and before being released on bail if charge sheet is filed, the said right to be released on bail can only be on merit [Pragyna Singh Thakur vs. State of Maharashtra (2011) 10 SCC 445, para 58].

# Important factors governing grant or refusal of bail

- It is well settled that when an application for default bail is filed, the merit of matter are not to be gone into [Pragyna Singh Thakur vs. State of Maharashtra (2011) 10 SCC 445, para 57].
- Gravity and nature of offence should be considered while granting the bail.
- Hon'ble Court has considered that amount of Rs. 8 crore involved in forgery is a case of very serious nature resulting into refusal of bail.

# Why supplementary chargesheet?

- Since, collection of the requisite information through LR is a time consuming process, in order to meet deadline to file prosecution complaint u/s 167(2) of Cr. PC r.w.s. 8(3)(a) of PMLA, the IOs have been filing prosecution complaint accused wise and without completing full investigation in case of all the accused. This has led to filing of several supplementary prosecution complaints.
- There is a need to attach due importance to presumption u/s 23 and 24 by Adjudicating Authority, Tribunal and Hon'ble Courts particularly in case of fugitive or non-cooperative accused.

# Why supplementary chargesheet?

- In order to clarify object and intent of the legislature an explanation has been included in The Finance (No. 2) Act, 2019 which reads as under :
- “Explanation-For the removal of doubts, it is clarified that,-
  - The complaint shall be deemed to include any subsequent complaint in respect of further investigation that may be conducted to bring any further evidence, oral or documentary, against any accused person involved in respect of the offence, for which complaint has already been filed, whether named in the original complaint or not.”

# Simultaneous Trial of scheduled offence as well as offence under PMLA

- There is no embargo for the authorities/ Special Court to proceed with investigation or trial of scheduled offence as well as offence u/s 4 of PMLA simultaneously particularly when there is nothing in the Act to prohibit the same – Rohit Tondon vs. ED Delhi High Court.
- Proceedings under the PMLA are distinct from proceedings relating to scheduled offence and both investigation can continue independently – Rohit Tondon vs. ED Delhi High Court.
- Section 44 of PMLA does not envisage a joint investigation but is a provision stipulating that trial of offence u/s 3 and 4 of PMLA and scheduled offence connected to the offence may be tried only by the Special Court constituted – Rohit Tondon vs. ED Delhi High Court.

# Simultaneous Trial of scheduled offence as well as offence under PMLA

- In order to clarify object and intent of the legislature an explanation has been included in The Finance (No. 2 ) Act, 2019 which reads as under:
- Explanation-For the removal of doubts, it is clarified that,-
  - “The jurisdiction of the Special Court while dealing with the offence under this Act, during investigation, enquiry or trial under this Act, shall not be dependent upon any orders passed in respect of the scheduled offence, and the trial of both sets of offences by the same court shall not be construed as joint trial;”

# Whether filing of charge sheet for predicate offence is pre-conditioned for action under PMLA?

- Action under the PMLA, 2002 can be initiated once scheduled offence is reported by LEA by filing of FIR and proceeds of crime is derived or obtained directly or indirectly as a result of criminal activity relating to a scheduled offence.
- Filing of charge sheet by LEA is not a pre-condition for initiating enquiries by invoking provisions of section 16, 17, 18, 19 and 50 of PMLA.
- Even attachment of proceeds of crime involved in money laundering can be attached even in the cases where no charge sheet has been filed [refer to second proviso to sub-section (1) of section 5 of PMLA]



# Whether filing of charge sheet for predicate offence is pre-conditioned for action under PMLA?

- Filing of the charge sheet by the LEA in the scheduled offence is not a pre-condition for filing of prosecution complaint for offence u/s 3 of PMLA [section 44(1)(b) r.w.s. 45 of PMLA].
- An argument that investigation under PMLA u/s 16, 17, 18, 19 and 50 or action u/s 5 or section 44 r.w.s. 45 are only possible once LEA has filed charge sheet in the scheduled offence tantamounts to amendment to existing provision of PMLA which is in violation of well established principle of interpretation of statute.
- Since, filing of charge sheet by the LEA in scheduled offence generally takes long time and non-initiation of investigation under the PMLA simultaneously will not only frustrate the object of PMLA but also help the accused in consuming POC in a manner that the power of attachment and confiscation shall be rendered redundant.

# Thank you