IN THE SUPREME COURT OF INDIA

W.P.(Crl.) No. 323/2021

Mohit Sharma … Petitioner

Versus.

Union of India and Ors. … Respondents

WRITTEN SUBMISSIONS ON BEHALF OF MR. AMIT DESAI, SENIOR. ADVOCATE.

ON RETROSPECTIVE APPLICATION OF PREVENTION OF MONEY LAUNDERING ACT, 2002 ("ACT")

1. The Act has its genesis to joint initiatives taken by several nations wherein the international community acknowledged and recognised the threat posed by the vice of money laundering to the financial systems as well as sovereignty and integrity of nations. One amongst several initiatives taken by the nation states towards eradication of the problem was The United National Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances wherein a call was made for the confiscation of proceeds of crime related to drugs and further measures for preventing money laundering.

2. Accordingly, Financial Action Task Force (FATF) was established to examine the problems of money laundering and on 23.2.1990, the United Nations General Assembly by its Resolution called upon the Member States to develop a mechanism to prevent financial institutions from being used for money laundering and further enact legislations for prevention of money laundering; and in a special session of the United Nations held for 'Countering World Drug Problem Together' held in June 1998, a declaration was made with respect to combating and prevention of money laundering.

3. India being signatory to some of the aforesaid initiatives, in conformity with the international opinion, introduced the Prevention of Money Laundering Bill, 1999. This Bill was met with a number of objections at various stages but was subsequently passed leading to the enactment of the Act in 2003. Pursuant to a notification issued by the Central Government, the Act came into force with effect from 1st July, 2005. The statement of objects and reasons appended to the Prevention of Money Laundering Bill indicates that the "objective was to enact a comprehensive legislation inter alia for preventing money laundering

and connected activities confiscation of proceeds of crime, setting up of agencies and mechanisms for coordinating measures for combating money-laundering, etc". It was also indicated that the proposed Act was "an Act to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto".

4. Chapter II of the Act contains provisions relating to the offence of money-laundering. Section 2 (p) of the Act defines money-laundering to have the meaning assigned to it in Section 3 of the Act. Section 3 of the Act was amended by Prevention of Money-Laundering (Amendment) Act, 2012 with effect from 03.01.2013. Prior to the said Amendment, Section 3 of the Act read as under:

> "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 it as untainted property shall be guilty of offence of money-laundering."

5. After the amendment effective from 03.01.2013, the said Section reads as under:-

> "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 concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering"

6. Section 2(u) of the Act defines proceeds of crime and reads as under:-

> "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;"

7. The scheme of the Act pre supposes commission of an offence ("**predicate offence**") mentioned to the Schedule of the Act. The Question that arises consideration of this Hon'ble Court is:

   A. Whether the authorities under the Act could proceed against the Petitioner under the Act when the commission of the predicate offence (S 13(1)(e) and 13(2) of the PC Act) pre-dates the addition of the said offences to the Schedule of the Act?

B. Whether the authorities could proceed against properties that were obtained/projected by the Accused prior to the Commission of the offence under the Act?

C. Whether the authorities under the Act could proceed when the commission of the predicate offence and the / "projection" pre dates the commencement of the Act?

D. Whether the jurisdiction under the Act could be exercised as against an offence where no cognisance of the offence has been taken by the concerned court/ the accused is discharged or acquitted/the offence is compounded?

E. Whether the rigour of twin conditions as contemplated under Section 45 is incongruent with the general principles of bail under Section 437 and 439 of CrPC and is therefore ultra-vires?

8. It is trite of law that in order to bring an accused within the mischief of the penal statute/provision, ingredients of the offence have to be satisfied on the date of the commission of offence. The above said right of the Accused finds its constitutional basis in Article 20(1) of the Constitution of India that reads as follows:

20. Protection in respect of conviction for offences
(1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence

9. In the case in hand, a bare perusal of the contents of the Complaint filed by the ED against the Petitioner shall indicate that the property acquired by the Petitioner prior to 2009 are sought to be attached and proceeded against, when the Commission of the offence is dated 2013. Section 13 of Prevention of Corruption Act, 1988 was inserted in Act for the first time in the year 2009 by way of Prevention of Money Laundering (Amendment) Act, 2009, Prior to which offence under section 13 of the PC Act, was not the schedule offence for the purposes of PMLA. That being so, any property alleged to have been acquired by indulging in offence under Section 13 of PC Act, purportedly committed prior to 2009 cannot be termed as "proceeds of crime" within the meaning of Section 2(1)(u) of PMLA and therefore cannot be proceeded against under the Act. The amended provisions of Prevention of Money Laundering Act, 2009 came into operation on the appointed date in 01st of June 2009. It is submitted that for the purposes of determining commission of offence of money laundering u/s 3/4 of PMLA or for any other provision under the Act, **the relevant time has**

to be time of the commission of the schedule offence, since only if there is a scheduled offence under the PMLA, can there be proceeds of crime and resultantly, commission of offence u/s 3/4 PMLA, which is also necessarily related to and arising from proceeds of crime.

10. The above said position is no more res-integra. In Soni Devrajbhai Babubhai Vs. State of Gujarat and Ors 1991 (4) SCC 298 this Hon'ble Court laid down as follows:

> It follows that the view taken by the High Court that the respondents cannot be tried and punished for the offence provided in section 304-B of the Indian Penal Code which is a new offence created subsequent 'to the commission of the offence attributed to the respondents does not suffer from any infirmity.

11. This Hon'ble Court in the case of *CBI v. Mahipal Singh,* (2014) 11 SCC 282[1] while discussing the scope and ambit of Article 20 (1) of the Constitution has held as follows:

> "14. We have given our most anxious consideration to the rival submissions and in the light of what we have observed above, the submissions advanced by Mr Subramanium commend us. It is trite that to bring an accused within the mischief of the penal provision, ingredients of the offence have to be satisfied on the date the offence was committed. Article 20(1) of the Constitution of India permits conviction of a person for an offence for violation of law in force at the time of commission of the act charged as an offence. ……There may be a case in which the investigating agency does not know exactly the date on which the crime was committed; in our opinion, in such a case the date on which the offence comes to the notice of the investigating agency, the ingredients constituting the offence have to be satisfied. In our opinion, an act which is not an offence on the date of its commission or the date on which it came to be known, cannot be treated as an offence because of certain events taking place later on. We may hasten

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1. The said thought process is reflected in various judicial pronouncements of this Hon'ble Court and of High Courts:
   A. Ganesh Gogoi v. State of Assam (2009) 7 SCC 404;
   B. Varinder Singh v. State of Punjab and Anr. – (2014) 3 SCC 151;
   C. State of Andhra Pradesh and others vs. Ch.Gandhi - (2013) 5 SCC 111;
   D. Tej Prakash Pathak and others vs. Rajasthan High Court and others - (2013) 4 SCC 540;
   E. State of Maharashtra v. Kaliar Koil Subramaniam Ramaswamy (1977) 3 SCC 525;

> to add here that there may not be any impediment in complying with the procedural requirement later on in case the ingredients of the offence are satisfied, but satisfying the requirement later on to bring the act within the mischief of penal provision is not permissible. In other words, procedural requirement for prosecution of a person for an offence can later on be satisfied but ingredients constituting the offence must exist on the date the crime is committed or detected. Submission of charge-sheets in more than one case and taking cognizance in such number of cases are ingredients of the offence and have to be satisfied on the date the crime was committed or came to be known."

12. The Hon'ble Appellate Tribunal for Prevention of Money Laundering has also dealt with the principle of Ex-post facto law in *Gadi Nagavekata Satyanarayana Vs Deputy Director Directorate of Enforcement* (2017 SCC Online ATPMLA) decided on 28/11/2017, wherein the following was held:

> *19….. It is settled principle of law that no person can be prosecuted on the allegation which occurred earlier by applying the provision of law which has come into the force after the alleged incidence. In other words, there can be no retrospective application of criminal liability for the incident occurred prior to introduction of such liability in the state book.*

13. While dealing specifically in the context of the Act, the High Court of Andhra Pradesh in Tech Mahindra Ltd. vs. Joint Director of Enforcement"[2], in Writ Petition No.17525/2014 decided on 22.12.2014 observed as under: -

> "70. It is settled principle of law that no person can be prosecuted on the allegation which occurred earlier by applying the provision of law which has come into force after the alleged incident. In other words, there can be no retrospective application of criminal liability for the incident occurred prior to introduction of such liability in the statute book.
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> 71. Admittedly, prior to Amendment Act, 2009, none of the provisions which are now invoked by the Enforcement Directorate were on the statute book except Section 467 IPC. Thus, the petitioner cannot be prosecuted by invoking those provisions."

14. In the case of Arun Kumar Mishra vs Directorate of Enforcement, the Hon'ble High Court of Delhi observed as follows:

> 19. At the outset it may be mentioned that the ECIR discloses the commission of the alleged offences during the period from November,

[2] WP 17525/2014 of A.P High Court

> 2005 to December, 2006. Section 3 of the PMLA specifically mandates that the act of money laundering should be intentional, therefore, it has to be traced to the point of time when the actual transaction took place. The offence punishable under Section 120B IPC and Section 13 of the PC Act were inserted in the schedule of PMLA w.e.f. 01.06.2009 i.e. after the period in which the alleged offences have been committed.
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> …
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> 21. It is settled principle of law that the provisions of law cannot be retrospectively applied, as Article 20(1) of the Constitution bars the ex-post facto penal laws and no person can be prosecuted for an alleged offence which occurred earlier, by applying the provisions of law which have come into force after the alleged offence.

15. Subsequently, in the case of M/S Ajanta Merchants Pvt. Ltd. vs Directorate of Enforcement[3] it was further held that:

> 22. It is a settled principle of law that the provisions of law cannot be retrospectively applied as Article 20(1) of the Constitution bars the ex-post facto penal laws and no person can be prosecuted on the allegations which occur earlier by applying the provisions of law, which has come into force after the alleged incident.

16. In a more authoritative pronouncement, the Hon'ble High Court of Delhi in M/S Mahanivesh Oils & Foods Pvt. vs Directorate of Enforcement[4] it was observed as follows:

> 29. The Act is a penal statute and, therefore, can have no retrospective or retroactive operation. Article 20(1) of the Constitution of India expressly forbids that no person can be convicted of any offence except for the violation of a law in force at the time of the commission of the act charged as an offence. Further, no person can be inflicted a penalty greater than what could have been inflicted under the law at the time when the offence was committed. Clearly, no proceedings under the Act can be initiated or sustained in respect of an offence, which has been committed prior to the Act coming into force. However, the subject matter of the Act is not a scheduled offence but the offence of money-laundering. Strictly speaking, it cannot be contended that the Act has a retrospective operation because it now enacts that laundering of

[3] The decision was assailed by ED before this Hon'ble court in SLP (crl) No 18478/2015 wherein an order of Status-quo came to be passed.

[4] The judgement however was challenged by ED in LPA before the DB wherein it was held that the same shall not be treated as precedent

proceeds of crime committed earlier as an offence. In The Queen v. The Inhabitants of St. Mary, Whitechapel (1848) 12 QB 120, the Court pointed out that "The Statute which in its direct operation of prospective cannot be properly be called a retrospective statute because a part of the requisites for that action is drawn from the time antecedent to its passing". Thus, with effect from 1st June, 2009 laundering proceeds of crime under Section 420 of the IPC is enacted as an offence of money-laundering punishable under Section 4 of the Act. It is important to note that the punishment under Section 4 of the Act is not for commission of a scheduled offence but for laundering proceeds of a scheduled crime. The fact that the scheduled crime may have been committed prior to the Act coming into force would not render the Act a retrospective statute as only the offence of money-laundering committed after the enforcement of the Act can be proceeded against under the Act.

30. The respondent's contention that the relevant date would be the date of offence of money-laundering and not that of the commission of the scheduled offence is merited and the impugned order cannot be set aside only on the ground that it has been issued in respect of proceeds of a scheduled crime which was allegedly committed prior to 1st July, 2005.

17. In the above said judgement, the Court also dealt with the continuing nature of the offence in the following terms:

32. Although, the Respondent has not contended so in clear terms, it appears that the respondents are proceeding on the basis that an offence under Section 3 of the Act is a continuing offence. According to the respondent, the possession of any property linked to a scheduled offense irrespective of when it was acquired would itself constitute the offence of money-laundering. It is important to understand the import of such interpretation. This would mean that a person who has committed a scheduled crime; acquired proceeds therefrom; and thereafter, projected it as untainted money, prior to the Act coming into force, would nonetheless be guilty of the offence of money-laundering only for the reason that he is in possession of some property. This is so because the definition of proceeds of crime also includes the value of any property derived or obtained as a result of criminal activity relating to a scheduled crime. Further any such property - even in the hands of a person not accused of the scheduled crime or offense of money-laundering - would also be subject to the proceedings under the Act. Thus, practically, a person guilty of a scheduled offence who has acquired any benefit in relation to the scheduled offence would in effect also be guilty of the offence of money-laundering immediately on the Act coming into force. If such an interpretation is sought to be provided, the grievance of the petitioner that a penal provision is sought to be given a retrospective operation would be justified and this would clearly

offend Article 20(1) of the Constitution of India as an offender of a scheduled crime would now be visited with a greater punitive measure than as could be inflicted at the time when the scheduled offence was committed. Given the wide definition of "proceeds of crime" it would be contended that irrespective of how far back in the past a scheduled offence was committed, the authorities could nonetheless try persons for an offence of money-laundering as well as confiscate the value of the property alleged to have been derived or obtained by criminal activity relating to the scheduled offence. This would be notwithstanding that the proceeds derived from a scheduled offence have undergone significant changes and have been integrated in legitimate economic activity. The properties could also be traced in the hands of persons unconnected with the scheduled offence. There is no indication from the express language of the Act, that the Legislature intended the Act to be retroactive or operative with retrospective effect.

33. The Act was enacted as the international community recognised the threat of money-laundering whereby money generated from illegal activities such as trafficking and drugs etc. was finding its way into the economic system of a country and funding further criminal activity. The expression money-laundering would ordinarily imply the conversion and infusion of tainted money into the main stream of economy as legitimate wealth. According to the respondent, there are three stages to a transaction of money-laundering: The first stage is Placement, where the crimnals place the proceeds of the crime into normal financial system. The second stage is Layering, where money introduced into the normal financial system is layered or spread into various transactions within the financial system so that any link with the origin of the wealth is lost. And, the third stage is Integration, where the benefit or proceeds of crime are available with the criminals as untainted money. There is much merit in this description of money-laundering and this also indicates that, by its nature, the offence of money-laundering has to be constituted by determinate actions and the process or activity of money-laundering is over once the third stage of integration is complete. Thus, unless such acts have been committed after the Act came into force, an offence of money-laundering punishable under Section 4 would not be made out. The 2013 Amendment to Section 3 of the Act by virtue of which the words "process or activity connected with proceeds of crime and projecting it as untainted property" were substituted by the words "any process or activity connected with proceeds of crime including concealment, possession, acquisition or use and projecting or claiming it as untainted property". The words "concealment, possession, acquisition or use" must be read in the context of the process or activity of money-laundering and this is over once the money is laundered and integrated into the economy. Thus, a person concealing or coming into possession or bringing proceeds of crime to use would have committed the offence of money-laundering when he came into possession or concealed or used the

proceeds of crime. For any offence of money-laundering to be alleged, such acts must have been done after the Act was brought in force. The proceeds of crime which had come into possession and projected and claimed as untainted prior to the Act coming into force, would be outside the sweep of the Act.

18. To constitute an offence of Money Laundering under the Act, the ingredient of 'projection' or 'claiming' it as 'untainted property' is imperative. The offence of money laundering requires 'proceeds of crime' (which are generated from the commission of the predicate offence), and for a person to 'project or claim' such proceeds of crime as 'untainted property'. Therefore, in order for a cause of action to commence an investigation under the PMLA can arise only if the commission of the alleged predicate offence has resulted in generation of 'proceeds of crime', and such proceeds of crime are projected or claimed as untainted property subsequent to the inclusion of such offence to the Schedule of the Act.

19. In view of the above, in case the Act of "projection" as contemplated under Section 3 of the Act, has taken place prior to the date of the inclusion of the offence to the Schedule, the same could never said to be "continuing". The Projection of the offence on any subsequent date is therefore "still born" for the purpose of proceeding under the Act.

20. The Legislative intent, be it giving powers to the Magistrates to grant bail or avoidance of arrest in case of offences which are punishable for less than 7 years , has always been to release a person on bail/ not arrest for such offences. Liberty being a concomitant of Art 21, the law must provide for a remedy to secure and protect liberty. However, if the threshold to the grant of bail are unreasonable and arbitrary it defeats the very object of bail. The very essence of securing liberty would be rendered non-existent and in such a case render the provision ultra-vires Article 21 of the Constitution of India. It is submitted that in the case of Section 45 (2), the laying down of the twin test as a condition precedent to the grant of bail runs contrary to the legislative intent and also the general principles of grant of bail as evolved over years and is therefore violative of Article 21 of the constitution of India.

21. While interpreting the provisions of CrPC concerning bail, Sections 437 and 439 of CrPc, this Hon'ble Court has time and again reiterated that securing the

presence of the bail accused should be the paramount consideration[5]. Section 437 that imposes conditions similar to that of Section 45 (2) of the Act restrict it to offences where the punishment extends to either life imprisonment or death. Under no circumstances could the imposition of such conditions to an offence where the maximum punishment leviable is 7 years could be set to be reasonable. Therefore, without prejudice to the contentions that the provision is ultra vires, the rigours of S. 45 (2) is applicable only to the bail application that are being considered by the special Court and that the Special Powers under Section 439 CrPc that rests with the High Court is still saved.

22. It is further submitted that the Special Court, that is presided by a Senior Judge (Sessions Judge) be vested with the power to grant bail for offences where the maximum sentence prescribed under the Act is for seven years. It is submitted that only in offences of serious nature including the one contemplated under TADA, POTA, MCOCA & NDPS where the act is orchestered by persons whose presence is difficult to secure, the imposition of conditions for bail like the one in Sec 45 (2) could be held to be reasonable.

23. It is therefore submitted that unless the offences under Section 3 of the Act is restricted to acts committed by "Organised crime syndicate" , which was the real intent behind the enactment, the imposition of conditions for grant of bail under S 45 (2) is unreasonable , excessive and therefore is liable to be struck down.

Filed by

Dated: 10.02.2022

Place: New Delhi

Ms. Jaikriti S.jadeja

Advocate for the Petitioner