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**Whether Property with No Link to alleged Criminal
Activity can be attached under Prevention of
Money Laundering Act, 2002**



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On March 6, 2020, a landmark judgement was passed by the Hon'ble High Court of Punjab & Haryana comprising of the bench of Justice Jaswant Singh and Justice Sant Parkash (**Bench**), in the matter of *Seema Garg Versus The Deputy Director, Directorate of Enforcement, Govt. of India (Judgment)*¹ . The Court has held that property acquired prior to commission of scheduled offence or introduction of Prevention of Money Laundering Act, 2002 (**PMLA/Act**) cannot be attached unless property obtained or acquired from scheduled offence is held or taken outside the country. While allowing the appeals, the Bench further held that Director or any other officer authorised by him is bound to record reasons which must be specific and mere reproduction of wording of Section 5 of PMLA is not sufficient.



¹ *Seema Garg Versus The Deputy Director, Directorate of Enforcement, Govt. of India decided on March 6, 2020 by the Hon'ble High Court of Punjab & Haryana* .

It has made clear by this judgment that the property obtained through a legitimate source cannot be attached by Enforcement Directorate (**ED**) on the ground that the property acquired/obtained through criminal activity, is not available for the attachment.

Before we understand the highlights of the judgment, it is necessary to run through the important aspects and anti- money laundering mechanism prescribed under PMLA.

PMLA was enacted in January, 2003 and has come into force with effect from July 1, 2005 along with the Rules framed thereunder. PMLA seeks to combat money laundering in India with three main objectives (i) to prevent and control money laundering, (ii) to confiscate and seize the property obtained from the laundered money and (iii) to deal with any other issue connected with money laundering in India. The enforcement of PMLA is through the instrumentality of the Central Government. PMLA empowers ED to investigate offence under Section 4 and specially excludes interference of police officer to investigate an offence unless specifically authorised by the Central Government.

'Proceeds of Crime'

This is one of the most important term under PMLA. Section 2(1)(u) of the Act has defined this term as "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" The proceeds of crime may be employed or parked in a property either directly or indirectly.

Here, the term 'property' means movable, immovable, tangible, intangible, corporeal and incorporeal property and includes deeds, instruments evidencing title to or interest in such property or assets wherever located.



The Finance Act, 2019 has widened the scope of "proceeds of crime" under the Act by adding "*Explanation*" to Section 2(1)(u) which reads as:

Explanation.—For the removal of doubts, it is hereby clarified that "proceeds of crime" include property not only derived or obtained from the scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relating to the scheduled offence.

By virtue of this explanation, the "proceeds of crime" will also cover those properties which are derived/obtained out of any criminal activity related to the scheduled offence, and not just directly out of the scheduled offences.

'Money-Laundering'

The term 'Money-Laundering' has not been defined in the traditional sense under PMLA. Money laundering means any financial transaction generating any asset or value as a result of an illegal act. According to the Webster's New World Finance and Investment Dictionary, money laundering is "Making money that is generated through criminal activities appear as if it was earned through legitimate business activities" Detecting money laundering activities is often very difficult because the money is transferred between several accounts in order to conceal its true origins.



Section 3 of PMLA describes what amounts to the offence of money laundering. It covers not only the person who has committed scheduled offence i.e. predicate offence but also every person who is directly or indirectly concerned with concealment, possession, acquisition, use, projecting as untainted property or claiming as untainted property. As per Explanation (ii) of Section 3, 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. Section 4 prescribes punishment which shall not be less than three years but may extend to seven years.

MECHANISM TO ATTACH PROCEEDS OF CRIME

The Act provides a detailed procedure for attachment of proceeds of crime. Under PMLA, the term "Attachment" means prohibition of transfer, conversion, disposition or movement of property by an order issued under Chapter III of the Act [Section 2(1)(d)].

Provisional attachment

As per Section 5 of PMLA, any property of any person involved in money laundering may be provisionally attached. The Director or other authorised officer can provisionally attach any property derived or obtained directly or indirectly by any person as a result of criminal activity relating to scheduled offences or the value of such property as per procedure prescribed under Section 5 of the PMLA.



Section 5 (1) of PMLA makes provision to the effect that the Director or any other officer not below the rank of Deputy Director authorised by the Director having reasons to believe on the basis of material in his possession, with respect to the fact that any person is in possession of proceeds of crime and such proceeds of crime are likely to be concealed, transferred or dealt with in any manner, which may result in frustrating any proceedings relating to confiscation of such proceeds of crime. The

Director has a power to make an order in writing provisionally attaching such proceeds of crime. The period of such attachment shall not be exceeding 180 days.

The order of attachment can only be made when a report with respect to scheduled offence, of which these proceeds are believed, has been forwarded to a Magistrate under Section 173 of the Code of Criminal Procedure, 1973 or a complaint has been filed by an authorized person before a magistrate or court.

During attachment, the interested person can enjoy the immovable property under attachment. The complaint with respect to that is required to be forwarded to Adjudicating Authority within 30 days.

Confirmation of provisional attachment

As per Section 8 of PMLA, the Adjudicating Authority shall serve notice upon the person whose property has been attached calling upon him to indicate source of his income, earning or assets out of which or by means of which he has acquired attached property.



The Adjudicating Authority after considering representation, shall record a finding whether properties are involved in money laundering or not. The attachment shall continue during investigation for a period not exceeding 365 days or pendency of criminal proceedings relating to offence under PMLA before Competent Court.

Where the attachment of property becomes final by the reason of Special/Trial Court's order becoming final, all the rights/entitlement in the property shall vest absolutely in the Central Government free from all encumbrances. If on the conclusion of trial, Special Court finds that offence of money laundering has not taken place or property is not involved in money laundering, it shall release the property.

HIGHLIGHTS OF THE JUDGMENT

The present judgment has been passed in respect of three Appeals filed under Section 42 of PMLA seeking quashing of order passed by the

Appellate Tribunal for SAFEMA, FEMA, NDPS, PMLA & PBPT Act, New Delhi whereby appeals of the Appellants assailing confirmation of provisional attachment order had been dismissed.

The Bench was hearing a case wherein one M/s Jaldhara Exports was facing allegations of fraudulently availing VAT refund in February-March 2013 without actual export of goods. The properties held by the Appellants in Ludhiana and Mohali were attached by the ED in the year 2017 and confirmed by the Adjudicating Authority in the year 2019 despite the fact that they were purchased in the years 1991 and 2012, respectively. The Bench vide the present judgment, has set aside the Tribunal's order by which the confirmation of provisional attachment was upheld.



The judgment throws light on the true interpretation of 'proceeds of crime' as defined under Section 2(1)(u) PMLA and also of the ED's powers

to attach properties under PMLA. Some of important questions of law before the Division Bench were:

- Whether property acquired prior to enactment of PMLA i.e. prior to 1.7.2005 can be provisionally attached under Section 5 of PMLA ?;
- Whether phrase 'value of such property' occurring in definition of 'proceeds of property' includes any property of any person irrespective of source of property?;
- Whether officer attaching property is required to record reason that property is likely to be concealed, transferred or dealt with in any manner which may frustrate proceedings relating to confiscation?

While adjudicating upon questions related to phrase 'value of such property' and the attachment of property acquired prior to enactment of PMLA, the Bench has extensively discussed three components of the definition of 'proceeds of crime' in detail which are :

- i) Any property derived or obtained directly or indirectly as a result of criminal activity relating to scheduled offence;
 - ii) Value of property derived or obtained from criminal activity;
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iii) Property equivalent in value held in India or outside where property obtained or derived from criminal activity is taken or held outside the country.

The first component deals with property directly or indirectly obtained from criminal activity. With regard to the second component, the Bench has defined it as 'Value of such property' means property which has been converted into another property or has been obtained on the basis of property derived from commission of scheduled offence. For instance, cash is received as bribe and invested in purchase of some house. House is value of property derived from scheduled offence.

The Bench held that the cash or any other form of property movable or immovable, tangible or intangible would be 'value of property' derived from commission of scheduled offence. It further held that 'value of property' does not mean and include any property which has no link direct or indirect with the property derived or obtained from commission of scheduled offence i.e. the alleged criminal activity.

The third component is applicable where property obtained from criminal activity is held or taken outside India. In case property derived/obtained from criminal activity is held or taken outside India, property of equivalent value held in India or abroad would be proceeds of crime.

With reference to this, the Bench has recorded in the judgment that "***The question arises that if phrases 'value of such property' and 'property equivalent in value held within the country or abroad' are of same connotation and carry same meaning, there was no need to insert third limb in the definition of 'proceeds of crime'. The amendment made by legislature cannot be meaningless or without reasons. Use of different words and insertion of third limb in the definition cannot be ignored or interpreted casually. Every word chosen by legislature deserves to be given full meaning and effect.***"

The Bench has clarified that while adding "Explanation" to Section 2(1)(u) of the Act, the legislature did not intend to include any property in the hands of any person within the ambit of proceeds of crime. The words 'value of such property' and 'property equivalent in value held within the country or abroad' cannot be given same meaning and effect.

One of the key paragraphs of the judgment reads as follows:

"If property purchased prior to commission of alleged offence or property not derived or obtained from commission of scheduled offence is declared as proceeds of crime, every person who is concerned with sale, purchase, possession or use of said property would be guilty of offence of money laundering.....There would be total chaos and uncertainty. The authorities would get unguided and unbridled powers

and may implicate any person even though he has no direct or indirect connection with scheduled offence and property derived from thereon but has dealt with any other property (not involved in scheduled offence) of the person who has derived or obtained property from scheduled offence. It would amount to violation of Article 20 and 21 of Constitution of India. "

The Bench while elaborating on the phrase 'value of such property', in the judgment has held that the property derived from legitimate source cannot be attached on the ground that property derived from scheduled offence is not available. The phrase 'value of such property' does not mean and include any property which has no link direct or indirect with the property derived or obtained from commission of scheduled offence i.e. the alleged criminal activity. The Bench further observes that as per Section 24 of the PMLA, burden to prove that property is not involved in money laundering is upon the person whose property is attached. There is no sense on the part of any person to discharge burden qua source of property if any property may be attached, irrespective of its source.

With regard to the question of law related to the non-compliance of the requirement of recording of reasons prior to provisional attachment of property, the Bench has taken a view that **".....an authority required to record reasons prior to initiating any action is duty bound to record reasons in writing which cannot be mere formality but should be**

germane and relevant to the subjective opinion formed by authority. Reasons recorded are subject to judicial review and court may look into material which made basis of reasons recorded. "



As per Section 5 of PMLA, Director or any other Officer authorised by him is duty bound to record reasons on the basis of material in his possession that proceeds of crime are likely to be concealed or transferred or in any other way dealt with which may frustrate any proceedings relating to confiscation. While deciding upon this issue, the Bench has referred the judgment passed by the Hon'ble Supreme Court of India in the matter of *Bhikhubhai Vithalabhai Patel and others Vs State of Gujarat*² wherein it has been held that the construction placed on the expression "reason to believe" will equally be applicable to the expression "is of opinion" employed in the proviso to Section 17 (1) (a) (ii) of the Act.

² *Bhikhubhai Vithalabhai Patel and others Vs State of Gujarat AIR 2008 SCC 1771*

The Indian Penal Code, 1860 defines 'Reasons to Believe' under Section 26 as – "a person is said to have' Reason to Believe" a thing if he has sufficient cause to believe that thing but not otherwise. It has been held that the reason to believe is not purely subjective satisfaction on the part of the officer, it must have rationale connection or an element bearing in the formation of that belief.³

Sufficiency of reasons to believe is open for challenge by the affected party to establish that there was in fact no belief or belief was not bonafide belief or was based on vague, irrelevant and non-specific information. As such the court can find whether there is material on record on which requisite belief could be formed by the officer and that material has rational connection with or a line link for the formation of the requisite belief.⁴



³ *M.P. Industries Ltd. v. IPC (1970) 2 SCC 32*

⁴ *Phool Chand Bajrang Lal v. ITO (1993) 203 ITR 456 (SC)*

In the judgment, the Bench has held that Director or any other Officer authorised by him is bound to demonstrate or show on record that if property is not attached, the proceedings of confiscation would be frustrated. They are required to be specific while exercising power conferred under Section 5 of the PMLA and cannot just reiterate words and phrases used in the Section which is source of power.

CONCLUSION:

The judgment itself is the analysis of the entire scheme of PMLA which states that the scheme of PMLA must be read as a whole and every provision should be read in such a manner that it makes other provisions and scheme of Act coherent and meaningful.

In order to understand the true meaning of the definition and interpretation of 'proceeds of crime', one must read it together with Section 3 and Section 8 of the PMLA. A clear nexus must be shown to exist between the criminal activity and the property which has been derived or obtained by any person. Further, the Director or any other officer authorised by him is bound to record reasons which must be specific and a mere reproduction of wording of section 5 is not sufficient.

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