
ABUSE OF DISCRETIONARY POWER BY ENFORCEMENT DIRECTOR PREVENTION OF MONEY LAUNDERING ACT

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1. ABSTRACT

The Enforcement Directorate (ED) in India, empowered by the Prevention of Money Laundering Act (PMLA), 2002, has been entrusted with investigating and enforcing laws related to money laundering. However, concerns have been raised regarding the potential abuse of discretionary powers vested in the ED. This study critically examines the extent and implications of such abuse, highlighting instances of arbitrary arrests, selective targeting, and disproportionate penalties. The research investigates the causes of abuse, including vague legislative provisions, inadequate oversight mechanisms, and external pressures. It also analyzes judicial decisions and international best practices to identify reforms necessary to prevent abuse of power.

Keywords: Enforcement Directorate, Prevention of Money Laundering Act (PMLA), discretionary powers, abuse of power, money laundering, judicial decisions, reforms.

2. Introduction

The Prevention of Money Laundering Act, 2002 (PMLA) was enacted in India with the primary objective of preventing and controlling money laundering and confiscating properties derived from criminal activities. The Enforcement Directorate (ED), a key agency tasked with enforcing the PMLA, is vested with wide-ranging powers, including attachment of property, arrest of individuals, and summoning persons for investigation. However, the extensive discretionary powers granted to the ED have sparked concerns over potential misuse and abuse, particularly in the absence of stringent checks and balances. Allegations of arbitrary enforcement, political targeting, and prolonged investigations without due process have fueled debates on whether these powers are being exercised fairly or are being used as a tool of coercion. This raises critical questions about safeguarding individual rights, ensuring judicial oversight, and maintaining the rule of law in the fight against financial crimes.

3. What is money laundering

¹Definition of money laundering: Section 3 defines money laundering as any attempt, assistance, or involvement in processes connected to the proceeds of crime to project it as untainted property.

Offences and Penalties: Section 4 underlines punishment for money laundering.

The offence of money laundering shall be punishable with rigorous imprisonment for a term not less than three years extending to seven years and shall also be liable to a fine.

Attachment and Confiscation of Property: It allows for the attachment and confiscation of property involved in money laundering. provides for the establishment of an Adjudicating Authority to oversee these proceedings.

4. Objectives of PMLA

Prevention: To prevent money laundering by implementing stringent measures and monitoring financial transactions.

¹ <https://www.pmfias.com/money-laundering-pmla-act/>

Detection: To detect and investigate instances of money laundering through proper enforcement and regulatory mechanisms.

Confiscation: To confiscate properties derived from money laundering activities to deter offenders and disrupt illicit financial flows.

International Cooperation: To facilitate international cooperation in combating money laundering and terrorist financing activities.

5. ED discretionary power under PMLA

Section 16 (Power of Survey): The ED has the power to conduct surveys of any place where it has reasons to believe that an activity related to money laundering is taking place.

Section 17 (Search and Seizure): The ED can search premises and seize property (movable or immovable) if it has reason to believe they are related to the offense of money laundering. No prior court permission is required.

Section 19 (Power to Arrest): The ED can arrest individuals involved in money laundering if the officer has reasons to believe, based on material evidence, that the person is guilty.

Section 20 (Retention of Property): Seized property can be retained by the ED if the Adjudicating Authority permits, after it is satisfied with the evidence provided by the ED.

Section 5 (Provisional Attachment of Property): The ED can provisionally attach property suspected of being the “proceeds of crime” for a period of 180 days, subject to confirmation by the Adjudicating Authority.

Powers of the Adjudicating Authority

Section 8 (Adjudication): The Adjudicating Authority is responsible for confirming the attachment of properties provisionally attached by the ED. It has the discretion to confirm or reject such attachments depending on the evidence submitted.

Section 8(6) (Confiscation of Property): After the confirmation of attachment, the Adjudicating Authority can order the confiscation of property if it finds that the property is linked to money laundering.

Powers of Special Courts

Section 45 (Offenses Cognizable and Non-Bailable): Special Courts have the power to grant or deny bail, but with strict conditions. Bail can only be granted after hearing the Public Prosecutor and if the court is satisfied that the accused is not guilty.

Section 44 (Trial of Offenses): The Special Court is empowered to try offenses under the PMLA and impose sentences if the accused is convicted of money laundering.

Powers of the Director or Authorized Officers

Section 50 (Powers to Summon, Compel Attendance, and Produce Documents): The Director or any authorized officer has the discretion to summon individuals, compel attendance, and demand documents for investigation purposes. Failure to comply can result in fines or penalties.

Section 60 (Freezing of Accounts): The Director or other officers can freeze bank accounts or transactions if they believe that funds are connected to proceeds of crime. This power can be exercised without a court order but must be justified during investigations.

Freezing and Confiscation of Property

Section 20 (Retention of Seized Property): The officer who seized the property can retain it for further investigation with authorization from the Adjudicating Authority.

Section 9 (Vesting of Confiscated Property): Once property is confiscated by the Special Court, it vests with the central government, following the decision of the Adjudicating Authority.

6. Abuse of discretionary power under PMLA

The Prevention of Money Laundering Act (PMLA), 2002, grants The Enforcement Directorate (ED) significant powers to investigate and prevent money Laundering. However, these powers have been misused, leading to abuse of discretionary Powers, particularly in the exercise of arrest powers. The ED's power to arrest is governed by Section 19 of the PMLA, which allows the Director or any other officer authorized by him to Arrest an individual suspected of committing an offence under the Act. However, this power Has been misused, with the ED

arresting individuals without sufficient evidence or grounds for arrest.

In this case Of Arvind Kejriwal vs. Enforcement Directorate, the Supreme Court raised concerns About the misuse of arrest powers under the Prevention of Money Laundering Act (PMLA). The court held that the power of arrest given to ED officers under Section 19(1) of the PMLA Is drastic and can violate an individual's right to life and liberty under Article 21 of the Constitution if misused. The court emphasized that ED officers' subjective opinions should not be based on mere suspicion, but on fair consideration of evidence. The court also stated that Accused individuals should be provided with written reasons for their arrest and that ED officers Must consider both incriminating and absolving material. This judgment highlights the need for checks on the ED's arrest powers to prevent misuse and ensure that arrests are fair and not Arbitrary.²

The Supreme Court granted interim bail to Delhi CM Arvind Kejriwal in a money laundering Case, but asked him to consider stepping down due to allegations. Kejriwal was arrested by ED Under PMLA, but the court questioned the necessity of the arrest, noting it came nearly two Years after the case was registered without new evidence. The court referred to a larger bench Questions on whether an arrest under Section 19 of PMLA could be quashed, highlighting ED's Misuse of power. ED alleged Kejriwal's involvement in channeling 45 crore in kickbacks, but Kejriwal's lawyer countered that ED had no evidence. The court's intervention suggests ED's Actions were unnecessary and potentially driven by ulterior motives, abusing its discretionary Power.

³Karti Chidambaram vs. Enforcement Directorate Karti Chidambaram, son of former Finance Minister P. Chidambaram, was arrested by the ED in connection with the INX Media case. Critics argued that the arrest was politically motivated and unnecessary, as Karti could have Been questioned without being detained. This case highlights the ED's potential misuse of arrest Powers, targeting high-profile individuals for political purposes. Also, in Satyendar Jain vs. Enforcement Directorate Satyendar Jain, former Delhi Health Minister, was arrested by the ED in connection with a money laundering case. Critics argued that the ED had overreached Its powers and that Jain's arrest was unnecessary, as he was already cooperating with the

² Krishnadas Rajagopal, SC Grants Interim Bail to Arvind Kejriwal in PMLA Case, Says He Should Take a

³ Says-he-should-take-a-call-on-stepping-down-as-chief-minister/article68395779.ece (Visited Aug. 26, 2024)
P. Chidambaram vs Directorate of Enforcement 2019 (9) SCC 24

Investigation. This case demonstrates the ED's tendency to misuse its arrest powers, targeting Political opponents and overreaching its authority.

A special court In Mumbai said that people like Nirav Modi, Vijay Mallya, and Mehul Choksi Were able to leave India because the investigating agencies didn't arrest them on time. The court Was hearing a case where the Enforcement Directorate (ED) objected to an accused person's Request to travel abroad. The ED argued that if the accused was allowed to travel, it would be Like Nirav Modi, Vijay Mallya, and Mehul Choksi, who all fled the country. The court agreed That these people were able to flee because the agencies didn't arrest them when they should Have. The court also criticized the ED for not arresting the accused, Vyomesh Shah, and then Expecting the court to stop him from traveling abroad. The court said it can't do what the ED Failed to do, and allowed Shah to travel abroad during his trial.⁴

7. Preventing abuse of power

The Prevention of Money Laundering Act (PMLA) has been a crucial legislation in India's fight against financial crimes. However, its implementation has been marred by concerns of abuse of power and arbitrary actions by the Enforcement Directorate (ED). In this context, the judiciary has played a vital role in establishing safeguards to prevent such abuse of power. The Supreme Court's landmark judgment in *AK Kraipak v. Union of India*⁵ clarified that administrative orders must conform to the principles of natural justice. This means that the ED must issue well-reasoned orders, explicitly articulating the underlying reasons, to promote accountability and safeguard the individual's right to a fair trial. When it comes to attachment of assets, Section 5 of the PMLA empowers the Director or any officer not below the rank of the Deputy Director to attach property involved in money laundering. However, the ED must first apply its mind to the materials on record before recording in writing reasons to believe that provisional attachment is necessary. The Supreme Court reiterated in *Vijay Madanlal Choudhary v. Union of India*⁶ that an order passed under Section 5(1) of the Act is provisional in nature and is valid for up to 180 days, subject to confirmation by the Adjudicating Authority (AA) under Section 8 of the Act.

⁴ The Wire Staff, Investigating Agencies Failed to Probe Vijay Mallya, Nirav Modi, Mehul Choksi: Court, The Wire (June 3, 2024), <https://thewire.in/law/investigating-agencies-failed-to-arvijay-mallya-nirav-modi-mehulchoksi-court> (visited Aug. 28, 2024)

⁵ A. K. Kraipak & Ors. Etc vs Union Of India & Ors AIR 1970 SUPREME COURT 150

⁶ *Vijay Madanlal Choudhary v. Union of India*, (2022) SCC Online SC 947 (India) (July 27, 2022)

The grounds for arrest and procedure under PMLA have also been subject to judicial scrutiny. Section 19 of PMLA provides that the ED must inform the accused of the grounds of his arrest when the ED has a reason to believe that person has been guilty of an offence punishable under this Act. The Supreme Court held in *Pankaj Bansal v. Union of India & Ors*⁷ that the ED needed to provide written 'reasons for arrest' to a person arrested under the provisions of the PMLA. Furthermore, the Supreme Court has held that after the trial court takes cognisance, the investigating agency loses its authority to arrest the accused under Section 19 of the PMLA. This decision stands as a bulwark against potential abuse of power and arbitrary actions, firmly rooted in the principles of due process and fair trial enshrined in the Constitution.

These judgments highlight the importance of judicial oversight in PMLA cases to prevent abuse of power. They establish safeguards to ensure that the powers conferred under the Act are not exercised in an arbitrary or unfair manner. This is crucial in maintaining the balance between the need to combat financial crimes and the need to protect individual rights and liberties.

Conclusion

The abuse of discretionary power by enforcement directors under the Prevention of Money Laundering Act poses significant risks to justice and accountability. Such abuses can lead to wrongful prosecutions, financial ruin for innocent parties, and a general erosion of public trust in regulatory institutions. To mitigate these risks, it is crucial to implement robust oversight mechanisms, ensure transparency in enforcement actions, and uphold the principles of fairness and justice. Strengthening legal frameworks and promoting accountability can help safeguard against misuse of power, ultimately enhancing the integrity of the financial regulatory system.

Suggestion

Guidelines should be developed to delineate the appropriate use of discretionary powers, thereby reducing the potential for arbitrary decision-making. Training programs focused on ethical conduct and due process for enforcement officials can further promote integrity in their actions. Additionally, increasing transparency through public reporting and feedback mechanisms will empower citizens and foster trust in the system. Finally, regular audits of enforcement practices can help identify and rectify patterns of abuse, ensuring that the

⁷ *Pankaj Bansal v. Union of India & Ors.*, (2023) SCC Online Del (India) (July 26, 2023) (per Bahri, J.)

enforcement of the PMLA remains just and equitable. By adopting these strategies, the regulatory framework can better protect individuals' rights while effectively combating money laundering.

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