CHAPTER - 6

ORIGIN & DEVELOPMENT OF MONEY LAUNDERING

LEGISLATION IN INDIA

6.1 Forfeiture laws in India

6.1.1 Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (SAFEMA)

In the year 1976 during continuance of emergency, the Indian Parliament enacted Smugglers & Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (SAFEMA). The Act applies to persons convicted under Sea Customs Act, 1878/Customs Act, 1962, FERA 1947, and to those detained under COFEPOSA whose detention orders were neither revoked by Government nor set aside or quashed by courts of competent jurisdiction. This Act is directed towards forfeiture of illegally acquired properties of a person falling under Clause (a) or (b) of Section 2(2), that is of a convict or a detenue. Under the Act, the relatives and associates of such persons are brought in for the purpose of ensuring that the illegally acquired properties of the convict or detenue, which are transferred or held in the name of such associates do not escape the lattice of the Act.740 The scope of SAFEMA is restricted inasmuch as the fact that it does not cover the following eventualities (i) the properties acquired by the persons from internal drug trafficking which does not fall within the meaning of smuggling under Sec.2(39) of the Customs Act, 1962 and (ii) does not lay down any measures for identification, tracing, freeing and seizure of assets. Therefore keeping in mind the above drawbacks, and restrictive application of SAFEMA and to implement

the Convention of 1988 (adopted by UN Plenipotentiary Conference) Chapter VA of NDPS Act providing for tracing, identifying, seizure or freezing and forfeiture of illegally acquired property derived from drug crimes was incorporated in Sec.19 of NDPS act by amending Act 1988. As per the Scheme of this Chapter illegally acquired properties held by the persons to whom the Chapter applies, is liable to be traced, identified and seized or frozen by officers empowered under Sec.53 of the Act. The SAFEMA does not prescribe any time limit for initiating proceedings. The proceedings under SAFEMA for forfeiting the illegally acquired properties which commences within shortest possible time on issueof detention orders, while such proceedings on conviction of the persons under customs laws commence after very long time and in the interregnum, before notice under Sec.6 of SAFEMA is issued the illegally acquired properties are sold out, or transferred or concealed by offenders. SAFEMA and COFEPOSA deal with the same set of offenders, that is smugglers and foreign exchange violators. The definition of the term ‘illegally acquired properties’ under SAFEMA and NDPS are comparatively wider as they also include such properties that are not only obtained or derived from, but also ‘attributable’ to the illegal activity. The definition of illegally acquired property as per Section 2 (c) of SAFEMA is very wide, as it follows the objects set out in the preamble of the Act. Under the Act, the properties of smugglers and foreign exchange manipulators even if not wholly or partly attributable to smuggling /foreign exchange manipulation, but are attributable or traceable to violations of other enactments including criminal laws which allows such forfeiture. The provisions defining ‘illegally acquired property’ under SAFEMA are thus deeming provisions, and quite a lot is presumed against the ‘affected persons’.

While dealing with the question whether the forfeiture of property as enunciated in the Statute is violative of Art.20 of Constitution of India, in a reported case the Constitutional Bench of the Hon’ble Supreme Court held as follows “…..Section 6 of”

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741 supra note 740; p52
742 Preamble of the Act, which reads “such persons have been augmenting their gains by violation of wealth tax, income tax or other laws, or by other means with a view to increasing their resources for operating in a clandestine manner”
743 Biswanath Bhattacharya Vs Union of India (2014 (301) ELT 593 S.C)
the Act (SAFEMA) authorizes the competent authority to initiate proceedings of forfeiture only if it has reasons to believe (such reasons for belief are required to be recorded in writing) that all or some of the properties of the persons to whom the Act is applicable are illegally acquired properties. The conviction or the preventive detention contemplated under Section 2 is not the basis or cause of the confiscation but the factual basis for a rebuttable presumption to enable the State to initiate proceedings to examine whether the properties held by such persons are illegally acquired properties. 

It is notorious that people carrying on activities such as smuggling to make money are very clandestine in their activity. Direct proof is difficult if not impossible. The nature of the activity and the harm it does to the community provide a sufficiently rational basis for the legislature to make such an assumption. More particularly, Section 6 specifically stipulates the parameters which should guide the competent authority in forming an opinion, they are; the value of the property and the known sources of the income, earnings, etc., of the person who is sought to be proceeded against. Even in the case of such persons, the Act does not mandate such an enquiry against all the assets of such persons. An enquiry is limited to such of the assets which the competent authority believes (to start with) are beyond the financial ability of the holder having regard to his known and legitimate sources of income, earnings, etc. Connection with the conviction is too remote and, therefore, in our opinion, would not be hit by the prohibition contained under Article 20 of the Constitution of India…” SAFEMA being an old enactment it followed the pattern of prescribing value limit as per Sec.135 of the Customs Act, 1962 which prescribed value limit of offending goods. while experience shows that not many cases have been initiated in respect of lesser value property, it is necessary to increase the limitThe Apex Court in the case of Amenabai Toyabaly Vs Competent Authority (AIR 1998 SC 484) has held that the sale of property after forfeiture shall amount to selling of government property by a stranger in favor of a purchaser, and no title passé on to the purchaser. The basic principle of application of Sec.11 of SAFEMA, whether the transfer of property has taken place before the issue of notice under Sec.6 of the Act, or not. All transfers effected after issue of notice is
null and void even if such transactions are for adequate consideration and purchased in good faith by transferee.  

6.1.2 Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act)

Under Chapter VA of the NDPS Act there is no provision to initiate proceedings against properties held by a person, outside India. However once India enters into bilateral agreement with contracting parties to Vienna Convention 1988 the mechanism provided under Para 4 of Art.5 will come into play, to cover such eventualities. In any case there is a need to incorporate enabling provision to facilitate conduct of proceedings under Chapter VA of NDPS Act on par with Chapter IX of PMLA 2002.

Sec.68J of NDPS Act the provisions of which is borrowed from SAFEMA, is internbased on the provisions contained in Sec.103 of Evidence Act, which while laying down the general rule governing the burden of proof lies on the person who asserts in affirmative of the issue, also makes an exception that the onus of proving may shift on any person if such a provision has been made by any law. Therefore the shifting of onus of proof on the person affected is not a new concept. Sec.123 of the Customs Act, 1962 also containssuch provision, in respect of certain specified goods casting burden on the alleged offender. Shifting the onus of proof on the person affected, facilitates speedy adjudication of the cases under fiscal laws. Such a concept which is predominantly an Indian concept has also been incorporated under Art.5 of Vienna Convention 1988 in Para 7 which reads as “Each party may consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation, to the extent that such action is consistent with the principles of its domestic laws and with the nature of judicial and other proceedings”

On the other hand unlike PMLA the money laundering definition under NDPS Act, fully corresponds with the Convention as well as Regulation 1 of FATF. Punishment for money laundering offences is rigorous imprisonment of three years to seven years while it extends to ten years for narcotics offences. However for money laundering offences relating to drug offence under NDPS Act, it is covered by Sec.32 of NDPS Act which

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744 supra note 740; p136
745 ibid page-176
imposes a standard penalty, unlike specified sanction under Sec.8A of NDPS Act, and consequently the maximum penalty for money laundering under NDPS Act, is only 6 months regardless of the amount of money laundered.\footnote{APG Mutual Evaluation Report (2010) “Anti Money Laundering and Combating the Financing Of Terrorism- India” APG/FATF; p41} Legal persons (entities) are liable to be fined upto INR 5 lakhs under Sec.4 of PMLA,\footnote{threshold limit stands omitted by Act No.2 of 2013 with effect from 15th February 2013} while under Sec.8A of NDPS Act a legal person is punished with an undefined fine (read with Sec.32) the amount of which is left to the sovereign appreciation of the court. The money laundering provision under NDPS Act has become outdated consequent on coming into force of PMLA, it is advised to do away with the redundancy\footnote{supra note 746; p41,45} The NDPS Act specifically criminalizes the laundering of proceeds of drug trafficking and does not require a conviction for predicate offence. Under Section 8A of the NDPS Act, while the person charged with money laundering need not have been convicted of a predicate offence, it is essential that nexus with predicate crime is proved.

6.1.3 **Benami Transactions Prohibition Act, 1988**

The Act was introduced by the Government of India for reasons such as acquisition of property by persons to avoid land ceiling regulations, transfer of property in others name to avoid taxation issues, and used as a means to conceal black money. The term ‘benami’ appears to have originated from the Persian vocabulary which means ‘property without a name’ and the term is often used in the Indian scenario, especially those amassing and possessing illicit wealth, by evading and avoiding law. Due to lack of machinery provisions the Act could not be effectively implemented. Further the scope of the Act is also restricted. Even after three decades after passing of the Act, it has made absolute or no impact in the minds of common people, leave alone those holders of benami properties. As the rampant prevalence of such benami activities across the country would point out the abuse of the ill managed act. Thought the Act contains

\footnote{supra note 746; p41,45}
One of the important initiatives taken by the Government is the introduction of the Benami Transaction (Prohibition) Bill 2011. This comprehensive legislation was introduced in the Lok Sabha on 18 August 2011 and is currently being examined by the Standing Committee on Finance. It will iron out the infirmities in the Benami Transaction (Prohibition) Act, 1988 and formalize the procedure for implementing the benami law, including the procedure for determination, confiscation, prosecution, and other related requirements. This Bill defines ‘benami property’ and a ‘benami transaction’ in terms of a transaction or agreement where a property is transferred to or held by a person for a consideration provided/paid by another person, and such a property is held for the immediate or future benefit, directly or indirectly, on behalf of the person ‘providing the consideration’. The definition of benami transaction is wide in its ambit, as it also covers a transaction or arrangement in respect of a property carried out or made in a fictitious name or where the owner of the property is not aware of or denies knowledge of such ownership.749

The Benami Transactions (Prohibition) Bill, 2011 was introduced by the Ministry of Finance in the Lok Sabha on August 18, 2011 to enact a new legislation to prohibit benami transactions. This Bill replaces the existing Benami Transactions (Prohibition) Act, 1988. The Bill defines benami transaction as an arrangement where (a) property is held by a person (other than in fiduciary capacity) on behalf of another person who has paid for it; or (b) the transaction is made for a property in a fictitious name; or (c) the owner of the property is not aware of or denies knowledge of such ownership. A benamidar is a person or fictitious person in whose name the property is held or transferred. 750 The Bill has however lapsed at present.751

749 surpa note 45; p36
751 http://www.prsindia.org/billtrack/ accessed 15/01/2015
6.1.4 Unlawful Activities Prevention Act, 1967 (UAPA)

The Act provides for effective jurisdiction of certain unlawful activities of individuals and associations, especially those dealing with terrorist activities, and such other matters as specified under the Act. The Act makes it a crime to support any secessionist movement or to support claims by an external/foreign power, to what India claims as a territory. Besides establishing jurisdiction over the whole of India, UAPA extends its ambit to any person who commits an offence beyond India, which is punishable under the Act, that is citizens of India who are outside India. Penalties under the Act, include imprisonment from five years to life imprisonment upto life and fine for offence of holding proceeds of terrorism, an imprisonment upto 14 years and fine unde for financing terrorism organizations. Provisions of UAPA allow for initial attachment or seizing of property to prevent dealing with property subject to confiscation.

India signed the International Convention or the Suppression of the Financing of Terrorism (FT Convention) on 8th September 2000 and submitted the instrument of ratification on 22nd April 2003. The UAPA, 1967 as amended is the main domestic implementing legal instrument, as far as suppression of terrorism is concerned. With UAPA India has implemented the S/RES/1267(1999) its successor resolution and S/RES/1373 (2001). India is signatory to all 13 terrorism related UN Convention. UAPA deviates from the TOC in respect of the following issues (a) all relevant offences are not covered (Art.2.1 (a)) (b) international organizations not covered (Art.2.1 (b)) (c) terrorist financing is only partly criminalized (Art.2.4) India has signed the International Convention for the Suppression of the Financing of Terrorism (FT Convention) on 8th September 2000 and ratified it on 22nd April 2003. India is also party to treaties listed in the Annex to the FT Convention. Combined application of provisions contained in Sec.15, 17 and 40 of the UAPA, meets the international requirement of criminalization of terrorist financing. Sec.15 of UAPA meets the requirement under Art.2 of FT Convention, though it does not adopt the specific terminology used in treaties/conventions. In other words Sec.15 of UAPA contains a

752 supra note 746; p228
mixture of diverse clauses from the FT convention without actually following its specific structure, and such a method is perfectly acceptable as long as the principles and substance of FT convention are fully observed. Section 16 of UAPA relating to offence of making demands for nuclear material etc., should be include in the list of Sec.15 as terrorist acts. Similarly terrorist acts of international organizations should also be covered under Sec.15. UAPA 1967 was enacted to prevent certain unlawful activities of certain individual and associations. Under the Act, anybody who participates in an unlawful association or its activities or deals with the funds, in contravention of orders of the government, are liable to be punished with imprisonment. As per Sec.24 of the Act, it is an offence to hold terrorist funds or the proceeds of terrorism, and the provisions also empowers forfeiture of proceeds of terrorism.

6.1.5 **History & Development of Forfeiture laws in India**

After becoming an industrialized nation, India was one of the first to pass money laundering laws. To be precise, in 1939, before the outbreak of World War II, India enacted a set of rules to limit capital flight. While its main purpose was to preserve capital, it was an effective deterrent to financial crime. The UAPA 1967 tackles the matters relating to terrorism and its financing. It was amended in 2004 to criminalize, inter-alia, terrorist financing. It was further amended in 2008 to strengthen the fight against terrorism and terrorist financing. The UAPA was amended in December 2008 to change the scope of the provisions of funds, to ensure a broader coverage of the financing of terrorism offence, and to change the definition of property in an effort to bring the legislation more in line with the requirements of UN Convention for Suppression of Financing of Terrorism. A new Section 51A has been inserted to give

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753 ibid; p50
effect to the UNSCRs 1267 and 1373 and to complete its administrative freezing system.  

There are laws in India which exclusively deal with preventive detention, which is meant to tackle organized criminals, as by preventive detention the criminals who are deprived of normal life for sufficient time, loses contact with criminal activity and society, which indirectly puts an end to their activities. COFEPOSA paves way for immediate measures by resorting to preventive detention of offenders with a view to preventing them from indulging in prejudicial activities. Generally the period of detention is for one year but within 5 weeks from the date of detention of a person, a reference is made to the Advisory Board which has to consider whether there is sufficient cause for detention for the purpose of Art.22 of Constitution of India, and the Board is required to send its report within 11 weeks of date of detention. Under this Act there is no bail and it has been used very extensively against smugglers. The National Security Act, 1980 also provides for preventive detention by Central or State Government. The detention under this Act is for one year, and has been used though scarcely against anti-national elements and hard core gangsters. Detention is an executive action and hence the subject does not go to court for trial. Similarly the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 provides for detention of persons involved in drug trafficking.

India is an active member of G 20 and has played a key role both in identifying issues and drafting communiqués. In the G 20 Seoul Summit, held in November 2010, a clause “countries to further enter into Tax Information Exchange Agreements wherever required by the partnercountry” was incorporated at India’s instance. Under Foreign Exchange Management Act (FEMA) which came into force with effect from 1 June 2000, the statistics for the period 1 June 2000 to 31 March 2012 are as follows.

755 supra note 746; p33
756 FATF – Mutual Evaluation of India – 8th Follow-up Report
758 supra note 45; p50
(a) No. of Cases Registered : 23,118

(b) No. of Show Cause Notices Issued : 4,819

(c) No. of Cases Adjudicated : 3,259

(d) Amount of Penalties Imposed : 1,678 crore

Very often the proceeds of crime are converted into different forms and is systematically introduced into the financial and economic stream, which is detrimental to the economy of a nation. The offending acts leading to and having nexus with such conversion, are not dealt with directly by such legislations. A need to create a special legislation comprehensively dealing with the evil was therefore felt and the PMLA is the result of endeavor made in this regard. In 1998 India was actually identified by the FATF as strategically important and was invited to make its application for becoming a member. The Prevention of Money Laundering Bill was first introduced in the Lok Sabha on 5th August 1998, when it was referred to a Joint standing Committee of Parliament which submitted its report in March 1999. As stated in Statement of objects and Reasons appended to PMLB 1999 when it was introduced in Lok Sabha, there has been a growing realization in the world community that money laundering poses a serious threat not only to the financial systems of the countries but also to their integrity and sovereignty, and various initiatives have been taken at the international fora from time to time to grapple with this menace. The main feature of the Bill is that the nexus between the crime as per the list contained in the Schedule and the money which has been laundered is to be proved. In other words, the offence of money laundering will be subject to substantive offences mentioned in the Schedule being proved. The Government in accordance with its international obligations felt the urgent need for enactment of a comprehensive legislation to prevent money laundering and appointed an inter-ministerial committee. However the Bill (ML Bill 1999) lapsed due to the dissolution of 12th Lok Sabha. The Bill was re-introduced in October 1999, in the

759 supra note 32; p52
760 Report of Select Committee on Money Laundering Bill, Rajya Sabha
The 13th Lok Sabha after incorporating most of the recommendations of the Joint Standing Committee. The 13th Lok Sabha passed the bill in December 1999, and when the bill went to Rajya Sabha, it was referred to a Select Committee for examination, which after examining the bill in detail submitted a fairly comprehensive report on 24th July 2002. After deliberating at considerable length on the JSC report the government reintroduced the bill in Parliament when it was finally approved by Parliament and has now become law The Prevention of Money Laundering Bill 1999 as passed by the Lok Sabha was referred to the Select Committee comprising of 10 members of Rajya Sabha through a motion adopted on 8th December 1999. The Committee held 12 sittings in all, and adopted its draft Report on the Bill at its sitting held on 20th July 2000.

Clause 3 of Prevention of Money Laundering Bill 1999, when introduced defines the offence of money laundering reads as under

Whoever

(a) Acquires, owns, possesses or transfers any proceeds of crime; or

(b) Knowingly enters into any transaction which is related to proceeds of crime either directly or indirectly; or

(c) Conceals or aids in the concealment of proceeds of crime, commits the offence of money laundering

The Rajya Sabha Select Committee felt that sub-clause (a) and (c) above, viewed in the context of the provisions contained in Clause 23 of the bill may lead to harassment of innocent persons who bonafidely and unknowingly deal with the persons who have committed the offence of money laundering and enter into transactions with them. Such innocent persons who had purchased property (which are born out of proceeds of crime) without having any inkling whatsoever about the proceeds or the underlying crime, are liable to be prosecuted if the sub-clause (a) and (c) remain in the bill in existing form.761

761 supra note 760
Clause 23 of the Bill read as follows “where money laundering involves two or more inter-connected transactions and one or more such transactions is or are to be proved to be involved in money laundering, then for the purpose of adjudication or confiscation under Sec.8, it shall unless otherwise proved to the satisfaction of the adjudicating authority, be presumed that the remaining transaction form part of such inter-connected transactions”

The Committee noted that under Clause 23762 of the Bill, the existence of culpable mental state on the part of the accused is presumed and the onus lies on the accused to prove that he had no such mental state with respect to the act in respect of which he is charged. But under other Acts which are part of Schedule (containing scheduled offences) in certain cases burden of proof lies on prosecution. The Committee felt that two sets of provisions, one under the bill and another under the Acts mentioned in Schedule, seems to militate against each other and the judges trying the scheduled offences concurrently with the offence of money laundering may have a problem in deciding upon whom to place the onus for proving the charge. Therefore the committee was of the view that provision regarding burden of proof in the relevant acts mentioned in Schedule should apply for its offence of money laundering as well, and it should be co-extensive with the main offence with he has been charged, subject to the following proviso. The suggestion of the Committee as regards Clause-23 makes the entire legislation meaningless. The standard practice in economic offence is the existence of culpable mental state on the part of the accused is presumed, and the onus lies on the accused to prove that he had no such mental state with respect to the act in respect of which he has been charged. If the presumption of the existence of mental state is removed from such economic offences, it would be extremely impossible to successfully prosecute money launderers.

The Committee note that all the offences listed in Pars I to V of the Schedule carry punishment of not less than 3 years and it is, therefore, imperative that the minor

762 Clause 23 which reads as “when a person is accused of having committed the offence under Sec.3, the burden of proving the proceeds of crime are untainted property shall be on the accused”
offences are kept out of the purview of this Act. This can be done by prescribing a minimum threshold monetary limit for proceeds of crime. Two members Shri S. Ramachandra Pillai, and Shri J. Chitharanjan however were against any threshold limit being prescribed for proceeds of crime. The threshold limit now stands deleted with effect from 15th February 2013. The Committee notes that the words “has reasons to believe” occurring in Clause 5 (1) have considerable scope for the Director and other officers concerned to act subjectively and in the process there is an apprehension that the powers vested in them might be misused. The Committee also finds that the words “has reasons to believe” occur in Clause 15 (1), 16 (1), 17 (1), 18(1) and 19(1) of the Bill as well. The Committee, is, therefore of the view that some safeguards have to be provided to prevent misuse of the powers and to ensure a fair deal to the persons who may be victims of malicious prosecution.  

Economic offences should be brought under the purview of money laundering bill. If they are excluded large number of cases involving money laundering will go unnoticed. Responding to a query from the Committee whether all the economic offences could also be brought within the ambit of the Bill, the Finance and Revenue Secretary said that they had reservations about it as the intention of the Ministry was to have a focused Act only covering a limited number of serious crimes. The proposal made under Clause 43 for concurrent trial of the substantive offence and the offence of money laundering, is a correct move. If the case of money laundering is found after the trial of substantive offence is committed, the offence of money laundering can be tried separately by a special court. There should be provision for that. The attachment provisions contained in the bill was very stringent and before the Committee considered them at clause by clause stage, it would be immensely useful if the feed back from Ministry of Finance was received as regards the efficacy of attachment provisions under SAFEMA is terms of number of cases decided, attachment of properties made/upheld the number of cases pending at trial stage.  

763 supra note 760  
764 supra note 760 Committee 3rd meeting
The Central Vigilance Commissioner welcomed the broad framework of the Bill but stressed the desirability of amending the definition of the offence of money laundering, as contained in Clause 3 by including, economic offences as well within the ambit of the Bill. The Secretary RAW dwelt on the problem of money laundering in general and referred to the flow of money in the country through transactions following the Hawala route which seemingly were not covered by the present Bill. He stated that the one of the important adjuncts of money laundering was that it was connected very often with the funding of militancy and terrorism, and the existing legal framework was too weak. 765

Shri K.K. Venugopal, Sr Advocate while drawing reference to the Basel Statement of Principles, stated that it was important that the banking system be not available for money laundering. To avoid two parallel proceedings in regard to same set of facts – one Court trying the accused for the substantive offence, say under the IPC and the other trying him for the offence of money laundering, and to minimize scope for any conflict between the two courts, concurrent trial by the same court for both the offences to be provided for in the bill.

The Committee noted that prosecution for the offence of money laundering under Clause 4 would have to wait the final outcome of prosecution for the substantive scheduled offences which may take years and the very purpose of the bill may be defeated. The committee therefore felt that it has to be provided in the Bill that Special Court or other court trying a substantive offence, say of murder, shall also try concurrently the offence under Clause 4 read with Clause 3 of the Bill and the evidence in one would be evidence in the other except that there may be additional accused in the prosecution under clause 4 such as those who aided in the concealment of proceeds of crime subsequent to the crime being committed. The offences under India Wild Life Protection Act 1972 should also be brought within the ambit of Bill. The Criminal Law Amendment Ordinance 1994 which came into force on 23-08-1944 and continue to be in force deals with preventing disposal or concealment of property procured by means

765 ibid Committee 9th meeting
of certain scheduled offences. The provisions of Sec.121 of the Customs Act, 1962 enables the adjudicating authorities constituted under the Act, to confiscates the sale proceeds of smuggled goods. Similarly, Sec.13 of the FEMA 1999 enables the adjudicating authority to direct confiscation of the property which has resulted out of the conversion of the property in respect of which the contravention has taken place. Sec.8 of the Prevention of Terrorism Act 1987- POTA (since repealed) reads as under (a) Where a person has been convicted of any offence punishable under the said Act or any rule made there under, the Designated Court may, in addition to awarding punishment, by order in writing, declare that any property, moveable or immovable or both, belonging to the accused and specified in the order, shall stand forfeited to the Government free from all encumbrances and (b) Where any person is accused of any offence under this Act or any rule made thereunder, it shall be open to the Designated court trying him to pass an order that all or any properties, moveable or immovable or both belonging to him, shall, during the period of such trial be attached, and were such trial ends in conviction, the properties so attached shall forfeit to the Government free from all encumbrances.  

The PMLA is one of the few pieces of legislation that has been passed by the Indian Parliament pursuant to a UN Resolution. During its deferment in the Parliament, India was under considerable pressure from various international forums and expert groups to enact a law to counter money laundering considering the seriousness of the problem it posed worldwide. The amendment to PMLA enacted in 2009 were brought in specifically to meet the requirements of Vienna and Palermo Convention. India has joined as the 34th member of Financial Action Task Force (FATF) on 25th June 2010. FATF membership is important as it will help India to build the capacity to fight terrorism and trace terror funds and also assist in successful investigation and prosecute money laundering and terrorist financing offences. On 5 May 2011, India ratified the United Nations Convention against Transnational Organized Crime (Palermo Convention), which was earlier signed on 12 December 2002. The

766 supra note 26; p59
Convention will help India get international cooperation in tracing, seizure, freezing, and confiscation of the proceeds of crimes under a wide range of mutual legal assistance clauses, even with countries with which it has no mutual legal assistance treaties. India has signed the International Convention for the Suppression of the Financing of Terrorism on 8 September 2000 and ratified it on 22 April 2003. India has joined the Asia Pacific Group (APG) against Money laundering. In the 14th annual Plenary of Asia Pacific Group (APG) was held in Kochi from 18-22 July, 2011, more than 320 delegates from 41 jurisdictions, observers and various organizations attended the Plenary. India is the co-chair of this forum till July 2012. India has gained Membership of the Eurasian Group (EAG) in December 2010. India has joined the Egmont Group which is an international network fostering improved communication and interaction among Financial Intelligence Units (FIU).

6.2 Overview and Critical Analysis of PMLA

6.2.1 Predicate Crime

India has criminalized money laundering both under PMLA and the NDPS Act. While the money laundering provisions under the NDPS Act are confined to drug related offences, the PMLA applies to a much broader range of predicate offences, including narcotics. The drug related predicate offence under NDPS Act only confine to the offences under Act committed within India, as Section 8A (c) of NDPS Act did not specifically refer to drug offences occurred in other countries, or contain a provision that the Act applies to offences committed elsewhere. As PMLA had included drug related predicate offence under NDPS Act and has extra-territorial jurisdiction, the provisions under the said Section 8A of NDPS Act has become redundant, but is yet to be repealed. The PMLA money laundering offence applies to “whoever” a term that includes a person who commits the predicate offence, if that person is knowingly involved in the laundering of proceeds of his crime., while the NDPS Act money laundering provision simply refers to “no person” without any exception. Furthermore
no legal principle in India prevents the application of ML provisions to the predicate offender.\textsuperscript{767} India has signed the UN Convention against corruption (Also known as Merida Convention) on 9\textsuperscript{th} December 2005. Corruption is one of the predicate offence for money laundering.

6.2.2 Proceeds of Crime

The term proceeds of crime bears direct reference to the ‘Scheduled Offence’ The words ‘as a result of criminal activity relating to a scheduled offence’ are wider in effect when compared to using the words ‘as a result of commission of the scheduled offence’. As per the definition, even though a property is not derived from commission of the scheduled offence but if it is derived from a criminal activity relating to the scheduled offence, the same would be ‘proceeds of crime’.

An area which may be subject to dispute is when the scheduled offence itself is not committed or is not complete, whether the proceeds received in the process of such commission due to criminal activity relating to a scheduled offence, would be covered under the definition Taxing the proceeds of crime is legitimate weapon in the arsenal of enforcement because, as far as taxation is concerned there is no difference between legal income and illegal income according to taxation laws of most countries.\textsuperscript{768}

6.2.3 Property

While defining Property – under the Act, (Section 2 (v)) the words ‘wherever located’ used in the definition are very significant. Not only property of every description is intended to be covered by the definition given in the Act, it further amplifies that the property need not be necessarily within the geographical limits of India, and would cover property situated beyond the territorial limits of India

\textsuperscript{767} supra note 746; p37, 40, 41
\textsuperscript{768} supra note 26; p216. Under Income Tax Act the term ‘income’ also includes illegal income.
also. However the definition of ‘property’ under PMLA is restricted to property ‘related to scheduled offence’.

6.2.4 Offence of Money Laundering

The term ‘money laundering’ has not been defined directly in the Act. Sec. 3 only exposes as to who would be guilty of an offence of money laundering. The definition of term money laundering does not reflect true position of the money laundering offence as cast upon under Art. 3 (1) (b) of Vienna Convention 1988, and therefore the act does not follow internationally accepted concept while defiling the term. \(^{769}\) For establishing an offence of money laundering it has to be proved that attempt, assistance in commission of a scheduled offence or actual commission of scheduled offence to derive the proceeds of crime has not only been done, but the proceeds of crime are projected as untainted property. While the definition of offence under Section 8A of NDPS Act is almost faithful transposition of the money laundering provisions contained in Vienna Convention, the PMLA adopts a broader wording taking into account the provisions under both Vienna Convention and Palermo Convention. \(^{770}\) There is no formal or express statutory conditions which require conviction of predicate offence, as a precondition to money laundering, though some experts felt that prior conviction for predicate offence would meet the evidentiary requirement for money laundering. It is to be observed that when even the projection of proceeds of crime as ‘untainted’ has taken place before the commencement of the provisions of the Act then the charge of an offence punishable under the Act, cannot be leveled in respect of such transactions. \(^{771}\) During Mutual Evaluation of India, it was pointed out by FATF that concealment, possession, acquisition and use of the proceeds of crime are not criminalized by PMLA. Article 6 of Palermo Convention requires that such activities

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\(^{769}\) supra note 740; p226

\(^{770}\) supra note 746; p38

should also to be criminalized. Hence Section 3 of PMLA has been proposed to include these activities under offence of money-laundering.772

6.2.5 Forfeiture/Confiscation

Anthony Kennedy conceptualized the civil forfeiture regime in the following words “Civil forfeiture represents a move from a crime and punishment model of justice to a preventive model of justice. It seeks to take illegally obtained property out of the possession of organised crime figures so as to prevent them, first, from using it as working capital for future crimes and, secondly, from flaunting it in such a way as they become role models for others to follow into a lifestyle of acquisitive crime. Civil recovery is therefore not aimed at punishing behavior but at removing the ‘trophies’ of past criminal behavior and the means to commit future criminal behavior. While it would clearly be more desirable if successful criminal proceedings could be instituted, the operative theory is that ‘half a loaf is better than no bread’.”773 PMLA, UAPA, NDPS and CrPC, all the four statutes allow for attachment of property seized, subject to confiscation of the same at the culmination of proceedings. All the four statutes does not provide for issue of notice before such attachment of seized property. Properties which are seized under provisions of Sec.17 or 18 of PMLA are attached under Sec.5 of the Act. In terms of Section 68A (2) of the NDPS Act, property can be confiscated from person charged with a drug offence, their relatives or associates, or anyone who holds the property that was previously held by someone charged, unless they acquired it in good faith for adequate consideration. Similarly, Sec.24 (2) of the UAPA states that proceeds of terrorism whether held by a terrorist or terrorist organization or terrorist gang or by any other person and whether or not prosecuted or convicted shall be confiscated. Sec.33 (1) further provides for attachment of property of a person accused of an offence under Chapter V or Chapter VI of the UAPA. Section 105 A to 105J of

772 Gururaj B.N et al. (2005) “Commentary on FEMA, Money Laundering Act, and COFEPOSA” Wadhwa Publications; p8
773 supra note 743. The observation is reproduction of a quote in Hon’ble Apex Court judgment.
CrPC provides for identification, attachment or seizure or confiscation of property derived or obtained directly or indirectly, by any person as a result of criminal activity. In terms of Sec.65 of PMLA, the provisions of Cr PC will apply so far as they are not inconsistent with provisions of PMLA. The predicate offence conviction condition creates fundamental difficulties when trying to confiscate the proceeds of crime in the absence of a conviction of predicate offence particularly in a stand-alone money laundering case, where the laundered assets become the and should be forfeitable as such. In the international context the predicate conviction requirement also seriously affects the capacity to recover criminal assets where the predicate offence has occurred outside India and the proceeds are subsequently laundered in India.  

The definition of proceeds of crime allow for value confiscation, regardless of whether the property is held or owned by a criminal or a third party. As Sec.65 of the PMLA refers to the rules in the CrPC, instrumentalities and intended instrumentalities can be confiscated in accordance with Sec.102 and 451 of CrPC. However there is no reported decision in this regard to analyze the provisions and its efficaciousness. Though definition of proceeds of crime is broad enough to allow confiscation of corresponding value, and confiscation which is possible after conviction of predicate offence, can confine only to proceeds of predicate crime. In other words property of corresponding value cannot be confiscated under UAPA and NDPS act except in certain limited circumstances. These shortcomings also affect the possibilities to provide Mutual Legal Assistance. The effectiveness of confiscation provisions under PMLA, NDPS and the UAPA cannot be assessed due to the low numbers of confiscation under these Acts. However confiscation of proceeds derived from predicate offences are frequently carried out under the IPC and other laws. There has not been any court case where proceeds of crime or instrumentalities have been confiscated as a result of conviction for drug related money laundering. There have been a number of confiscation action under NPDS but none of those cases relate to money laundering offences The absence of a regulation to take care of a situation when the defendant has died may have a negative

774 supra note 746; p60,61
775 ibid p233
impact on the effectiveness of the confiscation regime in place in India. Non conviction based asset forfeiture which is also known as civil forfeiture legislations are prevalent in countries such as USA, Italy, Ireland, South Africa, Australia. The Andhra Pradesh High Court while examining the challenge of confiscation under PMLA held that “In our considered view, the provisions of the Act which clearly and unambiguously enable initiation of proceedings for attachment and eventual confiscation of property in possession of a person not accused of having committed an offence under section 3 as well, do not violate the provisions of the Constitution including Articles 14, 21 and 300-A and are operative proprio vigore.”

6.2.6 Critical Review of other important provisions of PMLA

Under the then existing provisions (prior to 15th February 2013) the offences specified in Part A of the Schedule do not prescribe any monetary threshold. Whereas the offences specified in Part B of the Schedule are considered Offence of Money laundering only if the total value involved in such offences is thirty lakhs rupees or more. The FATF standards do not envisage monetary threshold for investigating the offence of money laundering. To conform to the FATF standards it was proposed by government to move the offences listed in Part B of the Schedule to Part A. The threshold based exemption was justified by perseverant authorities on the ground that deleting the same would over-burden the enforcement authority who are supposed to target serious crimes. However this provision goes against FATF standard apart from leaving a gap in the AML regime and have negative impact on deterrence.

Section 2(u) proceeds of crime is analogous to Section 105 A (c) of Cr PC 1973. Proceeds of crime seems to mean in the process of unlawful activity done by person concerned directly or indirectly some unlawful benefit monetary or non monetary is

776 supra note 746; p 62,63
777 Brahma Reddy K Vs UOI, Hon’ble Andhra Pradesh High Court
http://indiankanoon.org/doc/117874529 - accessed on 1st May 2014
achieved which benefit may be termed as proceeds of crime. If the proceeds of crime which has been declared as scheduled offence on the day on which the ‘projection of such proceeds’ as ‘untainted’ is attempted or undertaken, the provisions of PMLA would apply, and would not amount to retrospective operation of the legislation. It is also not violative of Art.20 of Constitution.

In Section 3 of the Act, attempt has also been criminalized. Attempt is a stage where the offence is not fully complete. In the sequence of a criminal event, ‘attempt’ falls between ‘preparation’ and ‘fulfillment’ of criminal activity. Fulfillment of criminal activity involves completion of scheduled offence and to derive directly or indirectly the proceeds of crime, and thereafter the attempts to project the proceeds of crime to appear as untainted property. If money laundering offence is not proved against a person, that is to say if he is not found in projecting the tainted property to appear as untainted property, even though he was found involved in drug offence and also inacquiring property from the money derived from such offence, the prosecution proceedings launched against such a person under PMLA may not culminate into a conviction. However for the offence of committing the crime under NDPS Act, and for acquisition of property from such crime, proceedings will necessarily be launched under NDPS Act, resulting in a dichotomy. It is felt that while framing Sec.3 and 4 of PMLA the legislature has not taken into account the overlapping areas of jurisdiction of PMLA and that of NDPS Act, which is crucial issue to be studied. The mens rea threshold under Section 3 of PMLA is lower than Art.6 (1)(a) of TOC Convention in that no specific purpose or intention is required. The substantive element of “projecting it as untainted property” carries the notion of knowing disguise, as required by Convention, but does not appear to cover all concealment activity such as the physical hiding of the assets. As Sec.3 of the Act does not adopt ‘all crimes’ approach, it is generally interpreted (in the absence of any precedent case laws) as requiring a very minimum positive proof of the predicate offence, for conviction for the laundering offence. Sec.3 of the PMLA is construed in such a way to encompass, beside the actual dealing with criminal proceeds,

778 supra note 740; p228,232
any attempt, assistance, or being a party and actual involvement in a money laundering process or activity, and therefore it generally covers all ancillary offences, including – although not expressly stated, such as conspiracy. Criminal Conspiracy is an offence under Section 120 A and 120 B of the IPC and abetment under Sec.107 of IPC also attract PMLA. Extra territorial jurisdiction where the proceeds of crime are derived from conduct of Indian citizen occurring in another country, is applicable a the predicate offence is listed in one of the three parts in Schedule. 779 Sec.3, however falls short on actus reus aspects, as follows. The physical element in all cases includes the substantive condition of “projecting the proceeds of crime as untainted property” so although the broad formulation of “any process or activity” covers any conduct involving criminal proceeds, such conduct is only criminalized as money laundering when the property is concurrently projected as untainted. While this “projection” circumstances may correspond with the notion of “disguise” as contemplated in Art.6.1 (a) (ii) of the TOC Convention, it does not cover acts of physical concealment without any “projecting”, for example deposit in safe, even for argument sake such deposit also would fall under the category of and attempt to project. With the imposition of “projecting” condition the PMLA offence does not extend to the activity of sole “acquisition, possession or use” of criminal proceeds as stated in Art.6.1 (b) (i) of TOC convention, although this would not be contrary to the basic concept of the India legal system 780. While examining the provisions of Sec.3 of the Act, the Hon’ble Jharkhand High Court held that “…In the context of the submission, one needs to have notice of the provision as contained in Section 3 of the Prevention of Money Laundering Act which reads as follows:

"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."

\[779\] supra note 746; p41
\[780\] ibid; p43,44
From its perusal it does appear that even a person, who falsely lay claim over the tainted money as untainted, he would come within the mischief of the provision of Section 3.\textsuperscript{781}

Under Section 5 of PMLA, the provisions such as denial of opportunity of hearing, are brought in with an intention mitigating factors requiring urgent attention in situations where concealment, transfer or dealing of the proceeds of crime is made to thwart confiscation proceedings. If a provision is to be made for giving opportunity before passing of the order of provisional attachment, it would defeat the very purpose of such a provision, as proceeds of crime may be converted or may change hands, and tracing it would be very difficult. In other words the reason for Sec. 5 containing no provision to issue notice prior to provisional attachment is due to immediate necessity, urgency or imminence that unless and until the property is not attached it will frustrate proceedings under the Act.

Investigators often find the proceeds of crime not available with the person alleged to have committed the scheduled offence, but available with another who is neither charged or against whom no complaint is made. However the second part of newly introduced Proviso provides an answer to such a situation, stipulating either a report under Sec.173 of CrPC or Complaint is filed against another person who is in possession of proceeds of crime. In other words the proviso enables attachment of property involved in laundering even from a person who is not charged of having committed a scheduled offence. Proceeds of crime under Section 5 of the PMLA can be attached and can remain under attachment for a period of 90 days but under the rules framed (As per Prevention of Money Laundering Search Seizure rules 2005) the properties seized or frozen can remain in the same status for an indefinite period or until a fiscal order regarding their confiscation is passed under Section 8 of the Act. It therefore appears that the provisions contained in the rules, traverse beyond the scope of

\textsuperscript{781} Sujith Kumar Vs Directorate of Enforcement, Hon’ble Jharkhand High Court http://indiankanoon.org/doc/16191623 accessed 1\textsuperscript{st} May 2014

\textbf{251}
the provisions of Section 5 of the Act, and therefore may be subject to challenge. This a very weak area in the PMLA.

The present Act in section 5 stipulates that the person from whom property is attached must “have been charged of having committed a scheduled offence”. There was proposal to delete the above sentence, as property may come to rest with someone, who has nothing to do with the scheduled offence or even the money-laundering offence, and the amendment was carried out through Act No.2 of 2013 with effect from 15th February 2013. Further the 2nd Proviso to Section 5 (1) has overriding effect as no report under CrPC is essential.

Prior to Amendment of Section 5 (1) (a) & (b) read as follows

5 (1) (a) any person in possession of any proceeds of crime

(b) such person has been charged of having committed a scheduled offence

By Act 2 of 2013 w.e.f 15/2/2013 Section 5 has been amended and 5 (1) (b) removed. In other words the condition which stipulated that “persons having proceeds of crime should have committed the offence” has been removed paving way for attachment of property in the hands of any person

In a decision rendered the Hon’ble Madras High Court held that

“…By virtue of 2nd proviso to Section 5 (1) of PMLA, the proceeds of crime can be attached even if it is possession of any other person, provided the property is considered to have been involved in money laundering. The first condition is that the person charged of having committed a scheduled offence is in possession of any proceeds of crime. The alternative condition is that the

property is involved in money laundering though the person in possession is not charged under the Act.” 783

On fair reading of Sec.5 (1) read with Section 8 of the Act, it postulates two categories of persons against whom action of attachment of property can be proceeded with. The first category is any person who is in possession of any proceeds of crime. The second category is of a person who has been charged of having committed a scheduled offence. Besides being charged of having committed a scheduled offence the person is found to be in possession of any proceeds of crime. Procedure for attachment is at present done as provided in the Second Schedule to the Income Tax Act, 196. Now it is proposed in section 5(1) that the procedure will be prescribed separately. 784

“Having regard to the intent and scheme of the Act, 2002 as well as the Rules, 2013, this Court is of the opinion that the Adjudicating Authority has the power to issue a provisional attachment order so that during the pendency of the proceedings, the property is neither transferred nor disposed of or parted with or dealt with in any manner. Subsequently, if upon a complaint being filed by respondent No.1, the provisional attachment order is confirmed, then the authority has the power to take over possession. However, only if a tenant prior to passing of the provisional attachment order is in possession of the same, respondent No.1 by virtue of Rule 5(3) cannot take over possession of the property. According to the said Rule, on such a circumstance, respondent No.1 has the power only to attach the rent that means, issue a direction to the occupant to pay the lease amount or rent in the form of demand draft to respondent No.1……This Court is further of the view that after a provisional attachment order has been passed, no noticee-owner can create a tenancy or transfer possession or create third party rights to defeat an ultimate order of taking over possession under the Act, 2002 and Rules, 2003.

783 Kamarunnisa Ghori Vs UOI & others, Hon’ble Madras High Court decision reported in http://indiankanoon.org/doc/192872964 accessed on 1st May 2014
784 supra note 782; p10
The Committee recommend that the prescribed onus of proof that the property in question is not out of proceeds of money-laundering crime, being not only on the accused but also on anyone who is in possession of the proceeds of crime, should be subject to adequate safeguards to protect the innocent. A new sub section 7 is proposed to be inserted in section 8 to address confiscation or release of property by the Special Court when a trial cannot take place in a case on account of death or accused being declared proclaimed offender or for any other reason. Similarly a new sub-section 60 (2A) has been added to address the issue when trial takes place outside India or the case initiated abroad is closed and the property is to be confiscated.\footnote{supra note 783; p12, 28. Amendments are in place from 15\textsuperscript{th} February 2013}

While elaborating the rationale behind the amending proposal the Ministry of Finance, in the background note submitted as follows “The existing proviso (i) of sub-section (1) of Sec.5 and proviso (a) of sub-section (9) of Sec.18 of PLA provide that a report under Sec.173 of CPC is to be forwarded to Magistrate before action is being taken by the investigating agency under PMLA. ASimilar provision exists under proviso (iii) of sub-section (1) of Sec.5 and proviso (b) to sub-section (9) of Sec.18 provide for a ‘police report’ or a ‘complaint’ being filed for taking cognizance of an offence by the Special Court constituted under sub-section (1) of Sec.36 of NDPS Act 1985 before initiating attachment proceedings under sub-section (1) of Sec.5 and search proceedings against any person under sub-section (9) of Sec.18. \footnote{supra note 32; p282} In respect of the scheduled offences where the police authorities are authorized to investigate, the Magistrate or court will take cognizance of the offence on receipt of a report under Sec.173 of CRPC. However in respect of scheduled offences which are investigated by agencies other than Police, there is a clear provision in some of the Acts, such as NDPS act, Wildlife Act, SEBI act, to the effect that courts will take cognizance upon receipt of complaint from authorized persons. Hence the proviso to sub-section (1) of Sec.5 and sub-section (9) of Sec18 of PMLA are proposed to be substituted by a new formulation to enable the investigating agency under this act to take up the matter at the stage of filing of report by police authorities under Sec.173 of CRPC in those offences where the police
authorities are investigating agencies, and at the stage of filing complaint before the Magistrate or court by authorized persons in respect of these offences in which non-police are the investigating agencies. This will also take care of the anomaly in the existing law that attachments and search of persons cannot be carried out under PMLA in cases where the predicate offence is under the Wildlife Protection Act, wherein only non-police agencies carry out investigation and no report under Section 173 of CRPC is filed by them. By way of amendment to Sec.18- a Proviso in Sub Section (1) has been inserted. The amendment has in effect not changed the legal position and the same is on the line as in the earlier Act, stipulating forwarding of a report to a Magistrate under Sec.173 of CRPC or filing of a complaint for taking cognizance of an offence. As the amending Act has included several offences, in the Schedule of the Act, and more particularly in part B of the schedule which offences are required to be investigated by the authority appointed under such special Act, where a complaint in respect of commission of such offence is required to be filed by such investigating officer under the relevant provisions of such Act, the language of the proviso is modified to include the requirement of filing of complaint by a person authorized to investigate the offence before a Magistrate or Court.  

At present PMLA provides for attachment of property after charge sheet u/s 173 CrPC has been filed in scheduled offence case and seizure of property after FIR u/s 157 CrPC has been filed in scheduled offence case. However, in a number of situations it may not be practicable to seize a record or property. In such cases, there has to be a provision for freezing such property, so that it can be seized or attached and confiscated later. The new sub-section 17(1A) is proposed to be added for this purpose. Consequential changes are also proposed in a number of places in the Act, where “seizure” under section 17 or 18 is referred to. At present under PMLA search & seizure can be done only after filing of an FIR u/s 157 CrPC has been forwarded to a Magistrate (in scheduled offence cases where FIRs are required). However, in cases where FIR is

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787 supra note 32; p306. The amendment has also shifted the position of Proviso from the earlier place, after sub-section (9) to the position at the end of sub-section (1) of Sec.18 making it contextually more relevant.
not required (for example, violation under the Forest Act, Copyright Act, etc.), search and seizure can take place only after a charge sheet is filed. This may happen after a prolonged gap and chances of disappearance of proceeds of crime cannot be ruled out. To obviate this problem, it is now proposed in the proviso to section 17(1) to undertake search & seizure in such cases (where there is no requirement to file FIR) after the investigating officer files a report (similar to FIR) to a superior officer. At present, attachment of property becomes final under section 8(3) “after the guilt of the person is proved in the trial court and order of such trial court becomes final”. Problems are faced in such cases where money-laundering has been done by a person who has not committed the scheduled offence or where property has come to rest with someone who has not committed any offence. Therefore, it is proposed to amend section 8(5) to provide for attachment and confiscation of the proceeds of crime, even if there is no conviction, so long as it is proved that predicate offence and money laundering offence have taken place and the property in question (i.e., the proceeds of crime) is involved in money laundering. PMLA provides for confiscation of attached property which will be done by Adjudicating Authority, after conviction in the scheduled offence case. Appeals against such orders lie with Appellate Authority, then High Court and Supreme Court, which implies that there can be another set of appeals after confiscation. To streamline the process, power to confiscate attached property is proposed to be given to the Special Court, who shall pass the order to confiscating or release the attached property, along with judgment in the predicate offence/money-laundering case.

In terms of Sec. 8 (1) of PMLA, read with Sec. 24 of the Act, the onus is on the accused to prove that the same does not represent proceeds of crime. Therefore a property which is attached without direct link to a predicate offence cannot be confiscated in the absence of conviction for predicate offence. Section 24 of the Act, which seeks to shift the onus on the accused person to prove that the proceeds of crime are untainted, is not happily worded. By employing the words proceeds of crime it is demonstrated beyond any doubt that the proceeds of crime would always be a tainted

788 supra note 782; p11
property, and no proceeds of crime under any circumstances bean untainted property. The accused person would be deriving the tainted gains only and one cannot visualize as how any gain connected with the scheduled offence would be a clean money. Therefore the onus under Sec.24 cannot be discharged under any given circumstances. The existing provision in section 24 reads as follows “When a person is accused of having committed the offence under Section 3, the burden of proving that proceeds of crime are untainted property shall be on the accused.” There can be situations where the accused may ingeniously pass off the property to someone to avoid confiscation. To take care of these eventualities section 24 is proposed to be amended as below-

Section 24: In any proceedings relating to proceeds of crime under this Act, unless the contrary is proved, it shall be presumed that such proceeds of crime is involved in money-laundering.

The amended Section 24 presently reads as follows

Section 24 Burden of Proof – In any proceeding relating to proceeds of crime under the Act,

(a) in the case of person charged with the offence of money laundering under Sec.3, the authority or court shall unless the contrary is proved, presume that such proceeds of crime are involved in money laundering; and

(b) in the case of any other person the Authority or Court may presume that such proceeds of crime are involved in money laundering

When the Committee expressed their concern that the onus of proof that the property is not proceeds of crime being on the accused was rather stringent, it was clarified that as per existing section 24 of PMLA, there is already a provision that when a person is accused of having committed the offence of money laundering under

\footnote{supra note 740; p261}
section 3, the burden of proving that proceeds of crime are untainted property shall be on the accused. This section is being amended to provide that in any proceedings relating to proceeds of crime under PMLA, unless the contrary is proved, it shall be presumed that such proceeds of crime is involved in money laundering. By virtue of this amendment, the burden of proof would not only be on the accused but on anyone who is in possession of the proceeds of crime. In this context, the Committee desired a specific clarification as to whether this Act can distinguish between bonafide and malafide transactions of property so that innocent persons, who end up with any property, are not penalized. 790

The Hon’ble Supreme Court (Pareena Swarup Vs UOIJT 2008 (11) 343) while agreeing with the apprehension that the provisions of PMLA are so provided that there may not be independent judiciary to decide the cases under the Act, as the Members and the Chairpersons are to be selected by the Selection Committee headed by Revenue Secretary, approved the suggestions made during the hearing of the petition which are in tune with the Scheme of the constitution as well as principles laid down by the Supreme Court, to the effect that the independence and impartiality which are to be secured not only for the Court but also for the Tribunals and their members, though they do not belong to the judicial service are entrusted with judicial powers. In Accordance with the suggestions approved by the Supreme Court, Section 29 omitted and Service of Chairperson and Members of Appellate Tribunal Rules stand amended. 791

Under the existing provision in Section 42, an appeal against the order of the Appellate Tribunal lies before High Court within the jurisdiction of which the aggrieved party resides or carries on its business. Since the attached properties may be located in different parts of the country in a particular case, the appeals can be filed in various High Courts in the country in the same case, leading to forum shopping. Such a provision is also likely to lead a situation where order of the Tribunal might be reversed by one High Court and upheld by another High Court. In order to obviate this difficulty,

790 supra note 782; p27
791 supra note 32; p375
it is proposed in section 42 that the appeal may lie before the Supreme Court. Concurrently it is also proposed in section 28 to raise the status of the Appellate Tribunal on the lines of the Appellate Tribunals under the SEBI Act.\footnote{supra note 782; p13. Suggestions yet to be implemented}

In terms of Section 43 (1) of PMLA, the Central Government in consultation with the Chief Justice of the High Court, shall for trial of offence punishable under Sec.4, designate one or more Courts of Session as Special Court or Special Courts for such area, or case, or group or class of case, as notified. In terms of Section 43 (2), while trying an offence under this Act, the Special Court shall also try an offence other than an offence referred under Section 43 (1) (offence punishable under Sec.4 of PMLA) with which the accused may under CrPC be charged at the same trial. While examining the provisions of Sec.43 of the Act, with reference to powers of Special Courts, the Hon’ble Gujarat High Court, in a reported case held as follows “…The intention of the legislature seems to be that for the same transaction there shall not be two different trials by two different Courts. Even otherwise, considering Section 220(3) and (4) of the Code of Criminal Procedure read with Section 43(2) of the Act with respect to all offences under the Indian Penal Code as well as Scheduled offences under the Act, the accused persons are to be tried at one trial and by the Special Court constituted under Section 43 of the Act……. Considering the aforesaid facts and circumstances of the case, present application deserves to be allowed and the proceedings of Criminal Case No.2887 of 2008 pending in the Court of learned Chief Judicial Magistrate, Rajkot are required to be transferred to the Special Court, Ahmedabad (Rural) and the original accused are to be tried for all offences for which they are chargesheeted by Special Court, Ahmedabad (Rural) along with PMLA Case No.1 of 2010. In view of the above and for the reasons stated above, present application is allowed and proceedings of Criminal Case No.2887 of 2008 pending in the Court of learned Chief Judicial Magistrate, Rajkot are ordered to be transferred to the Special Court, Ahmedabad (Rural), constituted under Section 43 of the Prevention of Money Laundering Act, 2002 and the accused persons are ordered to be tried along with
PMLA Case No.1 of 2010 by the Special Court, Ahmedabad (Rural). Rule is made absolute to the aforesaid extent.” 793

The Hon’ble Mumbai High Court in a reported case while examining the provisions relating to Special Court held as follows “….If the scheme of the PML Act is examined, it is clear that the Scheduled Offence and the offence of money-laundering, both, shall be tried by the Special Court constituted under the PML Act. Section 44 of the PML Act is clear on this. Similarly, the provisions of Section 45, which curtail the discretion of the Court in the matter of release of an accused person, interestingly, refer not to an offence punishable under Section 4 of the PML Act, but refer to a scheduled offence of a certain category. This leads to no other conclusion except that the commission of a Scheduled Offence must necessarily be alleged before the Special Court, and that such offence/s must also be tried by the Special Court in the trial in respect of the offence of Money-Laundering. Needless to say that there should be material before the Special Court in respect of the Scheduled Offences also, so as to enable it to frame a charge in respect of such offence and try it. In the present case, the complaint is only in respect of an offence punishable under Section 4 of the PML Act. As regards the Scheduled Offences, no charge-sheets have been filed as yet” 794

Yet another view was taken by Hon’ble High Court of Jharkhand, in a reported case while examining the trial of predicate offence and offence of money laundering. It was held by the Hon’ble High court “….Thus, in spite of the provision being there under sub-clause (a) of sub-section (1) of Section 44 of the P.M.L. Act that the scheduled offence can be tried along with the offence under Section 4 of the Act by the Special Court but that does not seems to be mandatory in view of overriding effect of Section 4 of the Prevention of Corruption Act. It is only the Special Judge empowered under the provision of the Prevention of Corruption Act, who can try offence under the Prevention of Corruption Act along with other offences, if it is being charged in terms of the

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793 UOI Vs Thakur Chaturbug Shingala – reported in http://indiankanoon.org/8331774 accessed on 2nd May 2014
794 Hasan Ali Khan Vs UOI reported in http://indiankanoon.org/744839 accessed on 2nd May 2014
provision of the Code of Criminal Procedure. Perhaps the Legislature by contemplating such situation has come with sub-clause (b) of sub-section (1) of Section 44 of the P.M.L. Act stipulating therein that the Special Court may proceed with the trial for the offence for which cognizance has been taken. Thus, in the circumstances as stated above, it can never be said that the provision as contemplated under Section 44(1) (a) of the P.M.L. Act is mandatory so far trial of the offence under Section 4 with other scheduled offences is concerned rather that depends upon the situation. If the Special Court appointed under the Prevention of Corruption Act is seizing with the matter relating to scheduled offence, he may proceed with the trial of the said offences along with any other offences which under the Code of Criminal Procedure is triable in a same trial and the Special Court as appointed under the PML Act may proceed with the trial of offence under which cognizance has been taken. Where Special Court under the Prevention of Corruption Act is not in seisin with the matter relating to scheduled offence or offences giving rise to a case relating to the offence under Sections 3/4 of the PML Act. The Special Court appointed under the PML Act may proceed with the trial of the offence under section 4 as well as scheduled offence or any other offence which can be charged together in terms of the provision of the Code of Criminal Procedure. Thus, I do not find any merit in the submission advanced in this respect. Hence, this writ application is dismissed.”

The rationale behind corporate criminal liability is to take care of situations where it is impossible to proceed against natural persons or in cases where the natural persons cannot be identified. The practice of making corporate criminal liability contingent upon prosecution of natural person, is a matter of concern. A difficulty may arise in the application of the provisions of this Sec.70 of PMLA while the offender is a company for which the minimum sentence as prescribed for the contravention is an imprisonment of not less than three years. The definition of person under 2(s) of PMLA 2002 includes company. Therefore a crucial question as to whether company can

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796 supra note 32; p518
be prosecuted and punished with imprisonment may crop up. A combined reading of Section 4 and Sec.70 of PMLA, with Section 38 of NDPS Act, experts feel that no charge can be brought against a company without concurrently prosecuting the natural person responsible for the act, for the laundering offence. Additional or parallel proceedings can be initiated under other relevant statutes against a legal person prosecuted under PMLA, such as confiscation of assets under Sec.388B of the Companies Act, which provides for impoverishment of managerial personnel of company indulging in fraudulent practices, apart from dissolution of Company by Court. The fine of rupee five lakhs for transgression of PMLA, provided for legal persons is rather very low compared to the scale of laundering activity and financial capacity of the corporate entities.  

Predicate offences are investigated by agencies such as Police, Narcotics Control Bureau, CBI, SEBI and Customs under their respective Acts. As per Sections 48 & 49 of the PMLA, the officers of the Directorate of Enforcement have been given powers to investigate cases of Money Laundering. The officers have also been authorised to initiate proceedings for attachment of property and to launch prosecution in the designated Special Court for the offence of money laundering.

6.2.7 Extra Territorial & Mutual Legal Assistance (MLA)

According to Indian authorities proceeds of crime committed in India have been laundered in foreign jurisdictions. PMLA 2002 was amended in June 2009 to make the offence of cross border implications a scheduled offence without any monetary threshold. While strict evidentiary standard of proof of predicate offence, though in the absence of jurisprudence on the issue is manageable when the predicate and money laundering offence occurred in Indian jurisdiction, as regards foreign predicate offences, it poses greater challenge. There has been only one outgoing request for MLA.

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797 supra note 746; p42,45. The provision for fine has since been removed from Statute.
concerning terrorist financing and seven outgoing requests only MLA concerning money laundering. There were nine incoming requests on MLA relating to money laundering and no incoming request for MLA concerning terrorist financing. India has reported an average turnaround time for incoming requests on MLA amounting to six to seven months and for the last year only three months. There are however some countries who have encountered problems with international co-operation through formal legal channels, due to delay in providing MLA, and therefore it is recommended that the country gives top priority to MLA issues.\textsuperscript{799}

6.2.8 Regulation and Enforcement under PMLA

In terms of Sec.49(1) of the Act, the Central Govt by notification No. GSR 440(E) w.e.f 1/7/2005 has appointed Director FIU, as Director to exercise exclusive power under Sec.12 (1) (b) and its proviso, Sec.13, Sec.26 (2), Sec.50 (1) of the Act. Director FIU is also empowered to concurrently exercise powers under Section 26 (3) and Sec.26(5), Sec.39 to Sec.42 and Sec.49 (2) and Sec.66, Sec.69 of the Act. Similarly in terms of Sec.49(1) of the Act, the Central Government by notification No. GSR 441(E) w.e.f 1/7/2005 has appointed Director of Enforcement, as Director to exercise exclusive power under Sec.5, Sec.8, Sec.16 to Sec.21, Sec.26(1), Sec.45, Sec.50, 57, 60, 62 and 63 of the Act. The Director is also empowered concurrently powers under Sec.26 (3) to (5), Sec.39 to 42, Sec.48,49,66,69 of the Act.

An Adjudicating authority has been appointed under PMLA and an Appellate Tribunal has been constituted. By various notifications 52 Courts of Sessions have been designated as Special Courts under provisions of PMLA. Whenever the predicate criminality is committed outside India, law enforcement is totally dependent on the formal and positive proof obtained from the foreign jurisdiction. Instead the Indian

\textsuperscript{799} supra note 746; p44,236
enforcement authorities themselves should investigate the foreign predicate offences, considering the nature of high evidentiary requirements.800

The Economic Intelligence Council (EIC) is the mechanism in place since 2003 for domestic co-operation and coordination. It is chaired by Minister of Finance and further comprises the most senior functionaries of various Ministries and intelligence agencies, and the Governor of RBI and Chairman of SEBI. The Department of Economic Affairs (DEA) has a coordinating role within the government of India regarding the FATF.

The Enforcement Directorate (ED) is the government agency which was established in 1956 and has been currently entrusted with investigation and prosecution of money laundering offences and attachment/confiscation of the proceeds of crime under the PMLA. The FIU-IND was set up in 18th November 2004 and became operational in March 2006. It has been designated as the central agency for receiving, processing, analyzing, and disseminating information relating to suspect financial transactions as well as large cash transactions. It is responsible for coordinating and strengthening efforts of national and international intelligence, investigation and enforcement agencies in pursuing the global efforts against money laundering, terrorist financing and other related crimes.801

The interaction between enforcement and other agencies who are engaged in prosecuting predicate offence and the money laundering offence indicate that the laundering prosecutions are delayed while the convictions for predicate offences are faster. FIU India has initiated a project titled FINnet (Financial Intelligence Network) to adopt industry best practices, and also to collect, analyze and disseminate financial information in combating money laundering and related crimes.

800 supra note 746; p44-45
801 ibid; p25-28
6.2.9 Other important issues in PMLA

Money laundering methods are diverse in India. In case of domestic crimes, the most common money laundering methods are opening multiple bank accounts, intermingling criminal proceeds with assets of a legal origin, purchasing bank cheques against cash, and routing illicit money through complex legal structures. In India apart from rampant gold smuggling, export incentive related frauds are also providing added attraction to the sought after ‘hawala’ transactions. Therefore our lawmakers need to devise laws which should not only be as potent as the new laws framed in the US and EU but also take into account our own peculiar problems. According to JPC report, SEBI expressed suspicion that some of the Indian promoters have purchased shares of their own companies through PNs issued by sub-accounts of FIIs. This mechanism enabled the holders to hide their identities and transact in the Indian capital market are popular among foreign investors since they allow these investors to earn returns on investment in the Indian market without undergoing the significant cost and time implications of directly investing in India. These instruments are traded overseas outside the direct purview of SEBI surveillance thereby raising many apprehensions about the beneficial ownership and the nature of funds invested in these instruments. Concerns have been raised that some of the money coming into the market via PNs could be the unaccounted wealth camouflaged under the guise of FII investment. SEBI has been taking measures to ensure that PNs are not used as conduits for black money or terrorist funding.

Analysts fear that money arising out of corruption is laundered to various tax havens from India and routed back into India through the Mauritius route as foreign investment. This is due to reason that under DTAA with Mauritius that there is no tax on incomes arising out of such investment, which is mostly abused by offenders. The JPC was concerned that this DTAA resulted in substantial financial inflows into India.

802 supra note 52; p24. A Participatory Note – PN is a derivative instrument issued in foreign jurisdictions by a Foreign Institutional Investor (FII) against underlying Indian securities
803 supra note 495; p9
through money laundering by Indian companies making illegitimate use of the same. The Committee was particularly disturbed to note that notwithstanding the agreement between both sides to address Indian concerns of receipt of origin, little or nothing was done. 804

Invoice manipulation on commercial transactions, is commonly known practice. One is under invoicing of imports so as to pay a lesser amount of customs duty the extent to which the import is under-invoice, which is routed through underground banking channels. Over invoicing of imports leads to excess foreign exchange released by developing countries is retained abroad in the form of capital flight, or to pay/adjust for the under invoiced imports and other illegal activities. People who wish to whisk their money away from India would place order for practically worthless books or blank CDS which they would pay the exporter of another country, through a phantom company which will cease to exist shortly after the payment is made from India. There are masses of unclaimed such shipments in India, sitting in warehouses. Open land borders with Nepal and porous land borders with Bangladesh are abused by organized criminal gangs to smuggle counterfeit notes into India. Once smuggled, the fake money is exchanged for original notes on a rough ratio of 2 note for one. 805 Another popular way of conferring legitimacy on unaccounted income is by accounting for it as one earned from agricultural income. This is simply because farm income are not taxable under the Income Tax Act in India. The age old practice is to buy farm lands in remote areas and then account for the nonexistent sale of farm products as agricultural income in the books of accounts. 806

In last 24 months, Income Tax Department have collected 7704 discrete items of information from treaty countries containing details of payments received by Indian Citizen in various countries besides information of LGT Bank Accounts. This information is in various stages of processing and investigation. Based on the

804 supra note 52; p29,34
805 supra note 746; p9
806 supra note 52; p59
prosecution by CBDT of the LGT bank accounts holders the Enforcement Directorate is also taking further necessary action under FEMA. Out of the 17 cases referred to the Directorate by the CBDT, statements in four cases have been recorded and further information/documents have been called for by the Directorate from the Income Tax Department. Efforts are also being made to record statements in other cases. The investigations in the 17 cases regarding bank accounts in LGT Bank referred to the Directorate of Enforcement by CBDT are in progress. Efforts are being made by the Directorate of Enforcement for obtaining information/material from concerned Court where prosecution complaints have been filed by the Income Tax Department. 807

The Directorate of Enforcement has so far registered 1437 cases for investigation under the PMLA. During investigation, 22 persons were arrested and 131 provisional attachment orders issued in respect of properties valued at 1,214 crore. The Directorate has filed 38 Prosecution Complaints in PMLA-designated courts for the offence of money laundering. 808 Special attention on cross border transactions and business deals has resulted in collection of taxes of Rs 22,697 crore in the last financial year. CBDT has also raised demand of Rs.11,218 crore in case of Vodafone involving a cross-border deal with a tax haven country out of which tax of Rs.2500 crore has been collected in this month. 809

The Rajya Sabha Committee further enquired on the issue of sources of money-laundering and desired to know as to which authority was mandated to determine whether the correct production level is reported by the manufacturing sector or not. The Ministry have submitted in their reply that administration of Central Excise Act, 1944 is now on self assessment and self removal basis. If there is any complaint with regard to goods being moved without any payment or under reporting of production, the Excise Department takes care of it. In this connection, the Committee also desired to know the details of cases detected by the Intelligence wing of the Income Tax Department and

807 supra note 757; p14
808 supra note 746; p236
809 supra note 757; p15
whether there were enough personnel in the Dept. to handle this. The Committee, however, failed to agree with the optimism of the department on the revenue front, as there is widespread perception of tax avoidance and evasion leading to large-scale generation of unaccounted money in the economy. Further tax-GDP ratio has also been only stagnating. It was pointed out that incidence of under-reporting of production. Under-invoicing of exports and over-invoicing of imports are also major factors behind generation of unaccounted money, which eventually leads to money-laundering. Therefore it was fled that the Government, especially the Department of Revenue, must always remain alert to the sources engendering unaccounted money in the country, if they have to counter the menace of money-laundering. Needless to emphasize, such responses require concerted planning and coordinated enforcement action on the part of all the enforcement agencies functioning under the government.

There are some active ‘casinos’ in India, eg. in Goa. Casinos have been brought within the ambit of PMLA reporting obligation by inserting a generic definition of the term in the Act, there being no existing definition of ‘casino’ in any statute. Casinos are not legal in India except in the state of Goa, where the Goa Public Gambling Act, 1976 has been amended to permit the operation in a restricted manner, of land based and off-shore casinos. The government should also extend the PMLA to include gem and precious metal dealers, real estate agents, lawyers, notaries, other independent legal professionals, accountants and commodity futures brokers. The amendments to the PMLA brought several of the Designated Non-Financial Businesses and Professions (DNFBPs) within its scope. The following DNFBPs are now subject to the PMLA, casinos; real estate agents/sub-registrars in charge of registering property; dealers in precious metals/stones; dealers in high-value goods; and safe deposit keepers. No immediate action is currently planned with respect to lawyers and accountants, who the authorities consider to pose a low risk for money laundering on the basis of two risk assessments that have been undertaken. However, the amendments to the PMLA contain a provision that will allow bringing additional DNFBPs under the PMLA at a

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810 supra note 782; p24-26
later stage. In response to the mutual evaluation report, the authorities established four inter-agency committees to review the steps needed to respond to the FATF review. They are, (a) The AML/CFT Regulatory Framework Assessment Committee (ARFAC) (b) The Casino Sector Assessment Committee (CSAC) (c) The Beneficial Owner Assessment Committee (BOAC) and (d) Non Profit Organization Sector Assessment Committee (NPOC)\textsuperscript{811}.

Since money laundering involves use of instruments of trade and commerce, violation of Income Tax Act, Customs Act and Foreign Exchange Act also takes place, simultaneously. Inclusion of FEMA in the schedule of offences would have the added advantage that in money laundering offences, foreign exchange violations would become criminalized instead of being civil offences. Though foreign exchange controls are retained to some extent, contraventions of these are being viewed as civil offences, under statutes like FEMA. In case where these exchange control violations are inserted in the schedule of offences especially in the context of developing economies, they would be criminalized enabling law enforcement tackle laundering of proceeds of exchange control violations\textsuperscript{812}.

Substantive law to counter underground banking is also required in many jurisdictions, as this system is becoming more prevalent and widespread and is increasingly being used to launder money in conjunction with conventional money laundering. The legitimate business are captured under the provisions of FEMA and Payment and Settlement System Act, 2002 (PSSA) There exists a sizeable and demonstrated informal sector that is operating illegally. There is no authentic method to estimate the correct size and scope of the informal hawala/hundi sectors\textsuperscript{813}.

The government should press for Presidential approval to implement the Foreign Contribution (Regulation) Act 1976 which would extend foreign contribution reporting requirements to any non-profit organization that has a political, cultural, economic,

\begin{flushright}
\textsuperscript{811} supra note 756; p7
\textsuperscript{812} supra note 26; p211-214
\textsuperscript{813} supra note 746; p30
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educational or social focus and automate notification of suspicious transactions to the FIU. Under Foreign Contribution (Regulation) Act, 1976 the Central Government regulates flow of funds to various organizations. If the government thinks any organization is acting against national interest, it can block its funds. Further to that the RBI which administers FEMA 1999 has powers under Sec.11 of the Act, to give appropriate directions to the authorized dealers to prevent violation of any laws. The FCRA 76 does not regulate individuals receiving foreign contribution, as rather those associations working in cultural, economic, educational, religious or social fields are regulated. Under FCRA these associations can receive foreign contributions only after obtaining registration or prior permission from the Government. It empowers the govt. to monitor the utilization of foreign contributions received by an association, and provides for inspection of accounts and penal provisions for violations. Non monitoring of individuals is therefore a matter of concern.

The financial services regulators have all issued an extensive range of enforceable circulars, which, together with amendments to the PMLA and the related Prevention of Money Laundering (PML) Rules, substantially address the technical deficiencies identified in relation to customer due diligence and other preventive measures. Indian authorities reported that the PML Rules are currently being revised to ensure full consistency with the recent amendments to the PMLA. The supervisory framework has been enhanced with all the regulators having amended their inspection procedures to give much greater emphasis to AML/CFT in the routine examination programme. AML/CFT compliance monitoring has been introduced for the first time for India Post’s financial services business and the inspection programme commenced in April 2011. With respect to the suspicious transactions reporting regime, the FIU has further enhanced its outreach programme to provide guidance to the financial sector on their reporting obligations, and has engaged in extensive compliance monitoring. The result has been a significant increase in the number of STRs filed both with respect to ML and TF, without any evidence that this constitutes defensive reporting.

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[814] spa note 14; p11
[815] supra note 209; p91
Approximately two-thirds of the STRs received are disseminated to law enforcement, intelligence agencies and the regulators\textsuperscript{816}.

6.2.10 FATF - MER 2010

In the Mutual Evaluation Report conducted by FATF, it was suggested the following measures (a) to abolish threshold limit of 3 million INR (since implemented) (b) the definition under Sec.3 to be brought in line with Vienna Convention, so as to fully cover the physical concealment and sole acquisition, possession and use of all proceeds of crime (c) the level of maximum punishment should be raised or left to the discretion of Court (d) the practice of making conviction of legal person for concurrent prosecution/conviction ofnatural person responsible for the offence, as a condition precedent,should be abolished. (e) to consider removal of Sec.8A of NDPS Act or to amend it on par with PMLA.\textsuperscript{817} The amendments proposed are stated to be based not only on the mutual evaluation report of the FATF but also the Government’s own experiences in the implementation of the PMLA. Amendments to Banking Laws Act were enacted by Parliament on 20 December 2012 and came into force on 18 January 2013. These amendments increase the maximum fine for breaches of the Act, which are remedial measures for the deficiencies identified in relation to Regulation\textsuperscript{17} and Regulation 29\textsuperscript{818}.

6.2.11 FATF- MER- 2013

While reviewing the situation, FATF in their MER 2013 observed that since the adoption of the MER in 2010, India has focused its attention on strengthening its AML/CFT regime based on a high-level political commitment to the Action Plan to strengthen India’s AML/CFT System adopted by the FATF in June 2010. India rectified

\textsuperscript{816} supra note 756; p7
\textsuperscript{817} supra note 746; p47
\textsuperscript{818} supra note 756; p7,8

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nearly all of the technical deficiencies identified with respect to the criminalization of money laundering and terrorist financing and the implementation of effective confiscation and provisional measures through amendments to the PMLA and the UAPA. With regard to R-1 India made clear progress to address the technical deficiencies, and the most critical shortcoming, namely the threshold condition is fully addressed. While India improved its money laundering offence, it is not fully in line with Palermo and Vienna Convention. Overall India has reached a satisfactory level of compliance with all of the core and key recommendations. As India has made sufficient progress for all core and key recommendations, it is recommended that India is removed from the regular follow-up process. The financial services regulators have all issued an extensive range of enforceable circulars, which, together with amendments to the PMLA and the related Prevention of Money Laundering (PML) Rules, substantially address the technical deficiencies identified in relation to customer due diligence and other preventive measures. The recent amendments to the PMLA brought several of the Designated Non-Financial Businesses and Professions (DNFBPs) within its scope. The following DNFBPs are now subject to the PMLA, such as casinos, real estate agents/sub-registrars in charge of registering property, dealers in precious metals/stones, dealers in high-value goods; and safe deposit keepers. No immediate action is currently planned with respect to lawyers and accountants, who the authorities consider to pose a low risk for money laundering on the basis of two risk assessments that have been undertaken. However, the amendments to the PMLA contain a provision that will allow bringing additional DNFBPs under the PMLA at a later stage. Since adoption of MER 2010 key legislative steps were taken, and amendments enacted by Parliament on 17th December 2012 (a) strengthening money laundering offences, addressing most of deficiencies pointed out (Recommendation -1/R-1) (b) strengthening confiscation and provisional measures to address R-3 (c) covering several DNFBP including commodities futures brokers (R-5, R-10 to 14, R-23, R-24, R-29) (d) broader range of sanctions including directors and employees of reporting entities (R-17) and (d) Introducing an explicit provision which will ensure that there is no longer room for

819 p756; p5-8
interpretation that the conviction of a legal person would be contingent on the concurrent prosecution or conviction of a natural person; and increasing administrative sanctions for legal persons. Amendments to Banking Laws Act were enacted by Parliament on 20 December 2012 and came into force on 18 January 2013. These amendments increase the maximum fine for breaches of the Act (and thereby the instructions issued under the Act) and remedy deficiencies identified in relation to Regulation 17 (R.17) and Regulation 29 (R.29).820

6.2.12 Positive Aspects of PMLA

India acceded to the Vienna Convention on 27th March 1990. The Palermo TOC was signed on 12th December 2002 but ratification is still pending. Most of the conventions provisions including the TOC convention have been implemented mainly through the NDPS act and PMLA. The international cooperation and extradition aspects are adequately covered by CrPC and the Extradition Act 1962. When PMLA came into force on 1st July 2005 in pursuance of Palermo TOC Convention, the scope of the law was too restrictive to withstand the test of international standards. However with the extension of list of predicate offences under Schedule A and B and the addition of Schedule C offences since 1st June 2009 India has made a serious effort to bring the criminalization of money laundering under the Act, in line with the FATF criteria821. Perhaps the most revolutionary concept under the Act is to reversal of burden of proof, that is shifting the onus onto the accused to show that the property has been legally acquired. Similarly, amendments to the UAPA were enacted by Parliament on 20 December 2012 and came into force on 1 February 2013. These amendments improve India’s CFT regime as follows: (i) strengthening the terrorist financingoffence which addresses all of the technical deficiencies in relation to SR.II. (ii) Strengthening confiscation and provisional measures which address all of the Recommendation 3, that

820 supra note 756; p8
821 supra note 746; p42
is terrorist financing-related technical deficiencies. India has joined the Task Force on Financial Integrity and Economic Development in order to bring greater transparency and accountability in the financial system.

6.2.13 Scope for improvements in PMLA

The approach of entrusting sole jurisdiction of money laundering investigation to one agency, that is Enforcement Directorate, risks preventing a more mainstream response to money laundering from a wider group of law enforcement agencies. Perhaps the most scathing criticism of the Money Laundering Act is in the sphere of procedural law. The Act lays down that search, seizure and attachment can be carried out by authorities after charges have been filed in the court of law. It refers to the common phrase of ‘locking the stable after horses have been bolted’. Moreover considering the difficulties imposed in carrying out searches and seizures, the provision of vexatious search, under the Bill is a red-herring.

The concept of stand alone money laundering is strange in Indian context as the practitioners cannot conceive the idea of pursuing laundering offence as a sui generis one, and even stress the stand that conviction of predicate offence only would meet the evidentiary requirements under PMLA effective. This attitude is due to the practice of starting money laundering investigation on the basis of a predicate offence case, though the law provides that the predicate offence and money laundering offence can be proceeded concurrently.

Section 132 of the Income Tax Act does not confer any capricious power upon the revenue officers. Since by the exercise of such powers a serious invasion is made upon the rights, privacy and freedom of the tax payer, the power must be exercised...
strictly in accordance with the law and only for the purpose of which the law authorizes it to be exercised.  

In Section 3 for the words “proceeds of crime and projecting” the words “proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming”. This is to overcome the FATF MER 2010 (Para 166-Implementation and effectiveness)Clause 2 (f) containing definition of “Financial Institution” was substituted to include an institution as defined under Sec.45-I of RBI Act, 1934, chit fund company, housing finance institution, authorized person, payment system operator, NBFC and Department of postsSec.14 is substituted to the effect that save as otherwise provided under Sec.13 of the Act, the reporting entity, its Directors and employees shall not be liable for any civil or criminal proceedings against them for furnishing information under Sec.12(1)(b).Sec.14 prior to amendment read as follows” save as otherwise provided under Sec.13, the banking companies, financial institutions, intermediaries and their officers, shall not be liable to any civil proceedings against them for furnishing information under Sec.12(1)(b) Though the amendment has added immunity from criminal proceedings also, the rationale behind omitting the entities and bringing Director and employees is not known, especially when the terminology is not used in banking sector and intermediaries.

India has an adequate system for freezing terrorist related assets. But it lacks in issuing proper instructions to regulated financial institutions in dealing with frozen assets, for example the affected person has no access to his funds even to meet his basic expenses. Instructions are to be issued to consider request for release of funds for basis expenses, in terms of mandate I UNSCR-1452.

Individual regulatory authorities such as RBI, SEBI and IRDA have issued their own circulars. However there has been only a limited attempt to standardize the circulars, with the results that there are marginal variations in the obligations imposed on different sectors. For example there is a range of circulars, all of which have similar

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825 supra note 32; p287 - ITO Vs Seth Brothers 74 ITR 836 SC  
826 supra note 746; p68
messages, but which contain different language and impose marginally different obligations. While some differences may be due to different nature of business, many simply reflect different drafting style of various agencies.