

## RIGHT TO BAIL IN MONEY LAUNDERING CASES

*-by Abhay Kumar*

The aim of this paper is to study and bring the concept of Right to bail in the Money laundering cases in India and its law enforcement. Lots of Money laundering cases happens in almost every country in the world.

This paper initially develops with the idea of money laundering along with introduction, definition. Then it goes on to discuss objective against money laundering, the issue of money laundering, Stages in the Money Laundering and its harmful effect. It then discusses the Judicial Intervention related cases to prevent money laundering with special emphasis on the concept of Right to bail in Money laundering cases. It discusses, with case references, the status and efforts put in by the law enforcement agencies and where they lack. An attempt is made to identify the problems or the loopholes in the law enforcement and thus suggestive measures are given in order to improve them.

### **1. Introduction to money-laundering**

Money is the one of prime reason for engaging in most of the criminal activity. Money-laundering is the way by which criminals disguise the illegal origins of their wealth and protect their asset bases or harming the nation, so as to avoid the suspicion of law enforcement agencies and government body, prevent leaving a trail of incriminating the evidence.<sup>1</sup>

Money laundering that involves many criminal proceeds and disguising their illegal source in anticipation of ultimately using the criminal proceeds to perform legal and illegal activities. Simply to put, money laundering is the process of by

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<sup>1</sup> *Introduction to money-laundering*, UNODC (10 Oct. 2019 11:50 PM), <https://www.unodc.org/unodc/en/money-laundering/introduction.html?ref=menuaside>.

which converting dirty money to look clean money.<sup>2</sup> The money evidently gained through the crime is a "dirty" money, and money that has been "laundered" to appear as if it came from a legitimate source is converted to "clean" money. Money can be laundered by many methods, which vary in complexity process and sophistication step. Cash that proceeds and came from illegal activities may be physically disposed or channelled through a very complex layer of financial transactions to disguise the money audit trail and provide anonymity to the source of such funds. The integration schemes that return the "laundered" proceeds back into the economy in a way that they re-enter in to the financial system appearing to be like normal business funds.<sup>3</sup> Anonymity in the transactions and funds transfers is the main risk that will facilitates money laundering.<sup>4</sup> Any financial institutions, payments system and any medium of exchange has the potential to be exploited for money laundering and terrorist financing. Since, the potential that used in money laundering risks are significantly reduced by the anti-money laundering regulation, financial supervision of money, examination, and enforcement of law agency.<sup>5</sup>

The Prevention of Money Laundering Act, 2002 has come into force from 1st July 2005. Necessary Notifications and Rules that said under this Act have been

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2 *Risks and Methods of Money Laundering and Terrorist Financing*, ASSOCIATION OF CERTIFIED ANTI-MONEY LAUNDERING SPECIALISTS (10 Oct. 2019 1:00 PM), [http://files.acams.org/pdfs/English\\_Study\\_Guide/Chapter\\_2.pdf](http://files.acams.org/pdfs/English_Study_Guide/Chapter_2.pdf).

3 *Revised DOP AML KYC for MTSS and Forex*, DEPARTMENT OF POSTS, MINISTRY OF COMMUNICATIONS (10 Oct. 2019 2:15 PM), [https://www.indiapost.gov.in/Financial/DOP\\_PDFFiles/DOP\\_AML\\_KYC\\_for\\_MTSS\\_and\\_Forex13112018.pdf](https://www.indiapost.gov.in/Financial/DOP_PDFFiles/DOP_AML_KYC_for_MTSS_and_Forex13112018.pdf).

4 *National Money Laundering Risk Assessment*, U.S. DEPARTMENT OF THE TREASURY (10 Oct. 2019 3:50 PM) [https://home.treasury.gov/system/files/136/2018NMLRA\\_12-18.pdf](https://home.treasury.gov/system/files/136/2018NMLRA_12-18.pdf).

5 *National Money Laundering Risk Assessment 2015*, U.S. DEPARTMENT OF THE TREASURY (11 Oct. 2019 2:00 PM), <https://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/National%20Money%20Laundering%20Risk%20Assessment%20%E2%80%93%202006-12-2015.pdf>.

published in the Gazette of India on 1<sup>st</sup> July 2005 by the Department of Revenue, Ministry of Finance, Government of India.<sup>6</sup>

## **2. Definitions of money laundering<sup>7</sup>**

The term “money laundering” started to draw attention in the early nineties and it has been defined in different many ways. Regardless of definitions, the core meaning of the term is the process of turning illegally gained money into legal and lawful money with the purposes (i) To disguise the original source of criminal or illegal money and (ii) to eliminate the trail of flowing illicit money. In fact, the term “money laundering” is applied not only to financial transactions related to criminal activities but to any financial transaction which generates an asset as a result of illegal activities like corruption, tax evasion, false accounting, etc.

## **3. The Issue of Money Laundering**

Money laundering has been there since time immemorial. Kings used to hide their wealth in other kingdoms in fear of losing it, in case of aggression from other kingdoms. Money laundering was initially resorted to, by drug mafias and smugglers to project their illegally earned profit and wealth it as if it originated from a legitimate activity. But money laundering has gained importance after industrialization, globalization and technological advancement which have made the world smaller and transporting and circulating money around the globe has become easier. During the second half of the 20th century, with the threat of modern and complex forms of transnational criminal activity, that concern has

<sup>6</sup> *Guidelines For Anti Money Laundering Measures*, SECURITIES AND EXCHANGE BOARD OF INDIA (11 Oct. 2019 3:00 PM), [https://www.sebi.gov.in/sebi\\_data/commondocs/antimoney\\_p.pdf](https://www.sebi.gov.in/sebi_data/commondocs/antimoney_p.pdf).

<sup>7</sup> *Review Of Literature*, UNODC (11 Oct. 2019 2:00 PM), [https://www.unodc.org/documents/southeastasiaandpacific/2009/02/TOCAMLO/07-CHAPTER\\_II.pdf](https://www.unodc.org/documents/southeastasiaandpacific/2009/02/TOCAMLO/07-CHAPTER_II.pdf).

arisen over the lacks of effective national laws to combat with organized crime and the laundering of its proceeds.

If funds from illicit activities can enter an institution of the system through the intentional action or the negligence of an employee, the institution may be implicated in organized criminal activity, which will harm the reputation.<sup>8</sup>

#### 4. Stages in the Money Laundering<sup>9</sup>

Money laundering includes a complex step of transactions that are usually difficult to separate. There three phases of money laundering:

**Step First: Placement**— The physical disposal of cash or other assets derived from criminal activity.

During this initial phase or first phase, the money launderer introduces the idea of illegal proceeds into the financial system. After that, it is accomplished by placing the finance into circulation through financial institutions, casinos, market shops and other businesses, both domestic and international. This phase can involve transactions such as:

- Breaking up massive amounts of money into smaller sums and depositing them directly into different account of banks.
- Transporting the money across borders and deposit into foreign financial institutions and organisation, or to buy high value goods like artwork, stones, antiques, and precious metals that can then be reselling for payment by check or bank transfer.

<sup>8</sup> *An Overview Of Money Laundering*, SHODHGANGA (12 Oct. 2019 1:30 PM), <https://shodhganga.inflibnet.ac.in/bitstream/10603/188764/6/chapter%204.pdf>.

<sup>9</sup> *Risks and Methods of Money Laundering and Terrorist Financing*, ASSOCIATION OF CERTIFIED ANTI-MONEY LAUNDERING SPECIALISTS (12 Oct. 2019 2:00 PM), [http://files.acams.org/pdfs/English\\_Study\\_Guide/Chapter\\_2.pdf](http://files.acams.org/pdfs/English_Study_Guide/Chapter_2.pdf).

**Step Second: Layering** — Layering is the second stage in Money Laundering. In this stage, the Money Launderer mainly engages in a chain of continuous conversions and movements of money, within the financial and banking system by way of many numerous accounts, therefore, to hide their true and real origin and to keep distance them from their criminal source.<sup>10</sup>

This stage can involve transactions such as:

- Sending or moving funds through wire from one account to another, sometimes from other institutions or organisation and jurisdictions.
- Reselling and marketing of high-value goods and prepaid access and stored the value products.
- Investing in the real estate and legitimate businesses.
- Placing or investments money such as bonds, stocks or life insurance.

**Step Third: Integration** — The Integration Stage: "Integration" refers to the reinjection of the laundered proceeds back into the economy in such a way that they re-enter the financial system as normal business funds. The funds re-enter the legitimate economy. The launderer might choose to invest the funds into real estate, luxury assets, or business ventures.<sup>11</sup> This stage entails using laundered proceeds in seemingly look like a normal transaction to create the perception of legitimacy. Integration is generally difficult to spot unless there are great difference between a person's or company's legitimate employment, investment ventures or business and a person's wealth or income or assets of the company.

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<sup>10</sup> FAQ, ENFORCEMENT DIRECTORATE GOVERNMENT OF INDIA, DIRECTORATE OF ENFORCEMENT (13 Oct. 2019 2:30 PM), [https://enforcementdirectorate.gov.in/FAQs\\_on\\_PMLA.pdf](https://enforcementdirectorate.gov.in/FAQs_on_PMLA.pdf).

<sup>11</sup> *Money Laundering in India*, RUDRA EDUCATION TRUST, (13 Oct. 2019 3:40 PM), [http://www.raijmr.com/ijrhs/wp-content/uploads/2017/11/IJRHS\\_2015\\_vol03\\_issue\\_07\\_11.pdf](http://www.raijmr.com/ijrhs/wp-content/uploads/2017/11/IJRHS_2015_vol03_issue_07_11.pdf).



## 5. Objectives of the Global Programme against Money-Laundering<sup>12</sup>

The context of United Nations standards, the Programme that globally against Money-Laundering, Proceeds of Crime and the Financing of Terrorism aims:

- To assist and help within the achievement of the aim set up by the General Assembly at twentieth special session for all the States to adopt legislation that gives unique result to the universal legal instruments against the money-laundering.
- To equip and adorn the states with the compulsory data, means that expertise to implementation national legislation and the provisions for countering money-laundering adopted by the General Assembly at its twentieth special session.
- To improve international and the regional cooperation in combating with the financing of terrorism through exchange of information and legal assistance.
- To strengthen the legal, financial and operational capacities of beneficiary States to deal effectively with money-laundering and the terrorism financing.

## 6. Judicial Intervention regarding Right to bail

### Convictions Under Sections 3 and 4 of PMLA<sup>13</sup>, 2002

*According to Section 3 of PMLA, Offence of money-laundering. —Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime and projecting it as untainted property shall be guilty of offence of money-laundering.*

<sup>12</sup> *Objectives of the Global Programme*, UNODC, (14 Oct. 2019 2:35 PM), <https://www.unodc.org/unodc/en/money-laundering/programme-objectives.html?ref=menuaside>.

<sup>13</sup> Prevention of Money Laundering Act, 2002

**According to Section 4 of PMLA, Punishment for money-laundering.—** *Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine which may extend to five lakh rupees: Provided that where the proceeds of crime involved in money-laundering relates to any offence specified under paragraph 2 of Part A of the Schedule, the provisions of this section shall have effect as if for the words “which may extend to seven years”, the words “which may extend to ten years” had been substituted.*

***In the Case ED v. Harinarayana Rai<sup>14</sup>***

In the High Court of Jharkhand at Ranchi, B.A. No. 6829 of 2010, the order on the bail petition was made by the petitioner arising out of E.C.I.R. Case No. 01/PAT/09/AD/2009 registered under section 3 read with Section 4 of the Prevention of Money Laundering Act, 2002. A S.L.P. was filed i.e. S.L.P. (Cr) No. 9586 of 2009 before Hon'ble Supreme Court, which was dismissed on 19.2.2010. The Supreme Court passed the order of rejection of the bail petition. The Special Leave Petitions were, accordingly, dismissed. However, the petitioner is given liberty to renew his prayer for bail after a period of six months. Section 45 of Money Laundering Act provides that bail is to be granted by the Court only on the satisfaction that there are reasonable grounds for believing that the petitioner is not guilty of such offence and he is not likely to commit such offence while on bail. Hence, in this case, the bail was rejected.

In the High Court of Jharkhand at Ranchi, W.P. (Cr.) No. 325 of 2010, writ petition has been filed alleging that the prosecution should be quashed, on the ground that it violates the fundamental right of the petitioner guaranteed under Article 20(1) of the Constitution of India. More specifically the said fundamental right is said to have been violated because the acts constituting the offences,

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<sup>14</sup> S.L.P. (Cr) No. 9586 of 2009

which are said to have generated money, were committed prior to 1.6.2009. Prior to that date the offences under Indian Penal Code and Prevention of Corruption Act, which are given in the impugned complaint, were not mentioned in the Schedule of the Act.

The Court found out that petitioner has not being prosecuted merely for any act which was not a scheduled offence on the date when it was committed. Therefore, the fundamental right of the petitioner guaranteed by Article 20 (1) has not being violated. In 2017, the court held that guilty Hari Narayan Rai, a former minister in the cabinet of three former CMs of the state, for laundering Rs 3.7 crore earned through corrupt means. The minister has been sentenced to seven years of imprisonment, the maximum sentence available under PMLA by the Special CBI Court in the disproportionate assets case. This is a historical judgement as this becomes the first conviction under the PMLA in the country which was enacted in 2002 and implemented from 2005 in order to check and curb black money and grave the financial crimes.

**The Ingredients of Under Section 45(1) of PMLA, 2002 Should Be Complied  
*In the Case Gautam Kundu vs Manoj Kumar Assistant Director.*<sup>15</sup>**

Held by the Hon'ble Apex court that Section 45 of the PMLA will have overriding effect on the general provisions of the Code of Criminal Procedure in case of conflict between them. There is no doubt that the conditions laid down under Section 45A of the PMLA, as the provisions of special law would bind the High Court having overriding effect on the provisions of Section 439 of the Code of Criminal Procedure for grant of the bail to any person accused of committing offence shall be punishable under Section 4 of the PMLA, even that when the application for the bail is considered under Section 439 of the Code of Criminal Procedure.

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<sup>15</sup> C.R.M. 2910 of 2016



## **Money Laundering Offender U/S 3 Need Not Be an Offender of Scheduled Offence**

### ***In the Case Amit Banrjee vs Shri Manoj Kumar<sup>16</sup>***

The main issue before the High Court was that whether Section 45 of the PMLA Act which restricts the discretion of the Court to grant bail to an accused applies to the petitioner who is accused of an offence under PMLA but is not accused of any scheduled offence.

The Calcutta High Court held that Section 45 of the PMLA Act shall not restrict the discretion of the Court while considering the prayer for bail of the petitioner in the instant case as he is not accused of commission of offence enumerated in Part-A of the schedule of PMLA which is punishable for a term of imprisonment more than 3 years.

### **CONCLUSION**

Today money laundering is the one of the biggest problems in the cycle of economy and the security of governments. In general way money laundering is called what, it is because that perfectly describes what takes place -illegal, or dirty money is put through the cycle of transactions, or washed, so that it comes out the other end as legal, or clean money. In other words, the source of the illegally obtained funds is obscured through a succession of the transfers and deals in order that those some funds can eventually be made to appear as legitimate income.

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<sup>16</sup> 017 SCC Online Cal 6146