DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume I Issue V is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis
EDITORIAL TEAM

EDITORS

Ms. Ezhiloviya S.P.
Nalsar Passout

Ms. Priya Singh
West Bengal National University of Juridical Science

Mr. Ritesh Kumar
Nalsar Passout

Mrs. Pooja Kothari
Practicing Advocate

Dr. Shweta Dhand
Assistant Professor

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS
ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 is an Online Journal is Quarterly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.
RETROSPECTIVE APPLICABILITY OF PREVENTION OF MONEY LAUNDERING ACT, 2002.

(By Parv Gupta)

INTRODUCTION

Money laundering is the process through which proceeds of a crime or unlawful activity are filtered in a way that the source of their origin is disguised. Therefore, it involves transferring money through various conduit in order to obscure its origins. The proceeds from the criminal activities further propel crimes and create a parallel economy resulting in these illegal transactions going unnoticed. It is any act or attempted act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from legitimate sources.\(^1\) If left unchecked, money-laundering can destabilise the financial system and undermine development efforts in emerging markets. It weakens the social fabric and collective ethical standards. Criminals have to disguise the origin of the proceeds of crime if they want to acquire properties and other assets or make investments out of the proceeds of crime.

There are three stages of money laundering as laid down by the High Courts in *B. Rama Raju Vs. Union of India, Ministry of Finance, Department of Revenue and Ors.*\(^2\) and *Mahanivesh Oils & Foods Pvt. Ltd., V. Directorate of Enforcement*\(^3\) namely:

a. **The Placement Stage**- It is a stage where the accused who has held unaccountable money/proceeds of crime places it into the normal financial system.

b. **The Layering Stage**- The money that has been introduced into the financial system is layered and spread out into several transactions within the financial system with the intent to conceal the origin of the original identity of the money and to make this origin/identity virtually disappear; and

c. **The Integration Stage**- the money is thereafter integrated into the financial system in such a way that its original association with crime is totally obliterated and the money could be used by the malfeasant and/or the accomplices to get it as untainted/clean money.

---

1 Interpol General Secretariat Assembly in 1995 http://www.interpol.int/Crime-areas/Financial-crime/Money-Laundering
3 (2016) 1 High Court Cases (Del) 265.
The Prevention of Money Laundering Act, 2002, hereinafter referred to it as “the Act” was enacted with the objective of preventing money laundering and activities connected with it and to confiscate proceeds of crime. There have been several amendments to the Act in the past decade and a half. The ambit and the applicability of the Act has been widened by adding various offences to the list of scheduled offence in the Schedule of the Act. The recent amendment to the Act through the Finance Act, 2019 has been an attempt to make the existing provisions of the Act stricter and better armoured than ever before. These amendments which would be dealt with in detail (Finance Act, 2019 amendment) in the course of the paper would make the interpretation of various provisions of the Act less ambiguous and more coherent.

Apart from issues which the Hon’ble Supreme Court is yet to address inter alia double jeopardy, whether the prosecution under the Act would continue despite the accused being exonerated against the charges levelled against it for the scheduled offence, one such major issue the author would try to delve into during the course of the paper is about the Retrospective Applicability of the Act.

**JURISPRUDENCE ON WHEN A STATUE CAN BE RETROSPECTIVE OR PROSPECTIVE IN NATURE**

It is cliched and yet bears repetition that a statute is generally prospective in nature unless stated otherwise. Every law that takes away or impairs rights vested agreeably to existing laws is retrospective and is generally unjust and may be oppressive. Any statute or provision which infuses or vests rights or imposes restrictions shall be construed as prospectively applicable. There have been plethora of judgments by the Hon’ble Supreme Court and various High Courts on when a statue can be retrospective or prospective in nature. It is essential to discuss in detail various judgements which have formulated the fundamental jurisprudence on retrospective and prospective applicability of a statue. The Hon’ble Court in Satyam Computer Services Limited vs. Directorate of Enforcement, Government of India and Ors. referred to two judgments while discussing the applicability of the amendment to a statute. First being a judgement where the Hon’ble Supreme Court held that where there is no hint of retrospectivity in the statute itself, it is not possible to read it retrospectively. In the second judgement referred, the Hon’ble Supreme Court indicated the distinction between a

---

5 MANU/HY/0428/2018.
6 STO vs. Oriental Coal Corporation, 1988 (Suppl) SCC 308.
statute dealing with substantive rights and a statute which relates to procedure or evidence or is declaratory in nature. While a statute dealing with substantive rights is prima facie prospective unless it is expressly or by necessary implication made to have retrospective effect, a statute concerned mainly with matters of procedure or evidence or which is declaratory in nature has to be construed as retrospective unless there is a clear indication that such was not the intention of the legislature. The obvious basis of the principle against the retrospectivity is the principle of ‘fairness’, which must be the basis of every legal rule.\(^7\)

While discussing the power of the legislature to alter the service conditions of the employees, the Hon’ble Supreme Court in *J.S Yadav vs. State of U.P & Ors.*\(^8\) held that the legislature is competent to unilaterally alter the service conditions of the employees and that it can be done with retrospective effect. However, the intention of the legislature to apply the amended provisions with retrospective effect must be evident from the Amendment Act itself expressly or by necessary implication. In another landmark judgment, the Hon’ble Supreme Court held that unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights, it is deemed to be prospective only.\(^9\) The Latin phrase “*nova constitutio futuris formam imponere debet non praeteritis*” which essentially means a new law ought to regulate what is to follow, not the past.\(^10\) Therefore, it is not necessary that an express provision be made to make a statute retrospective and the presumption against retrospectivity may be rebutted by necessary implication especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole.\(^11\) A clarificatory amendment to clear a meaning of the provision of the principle Act will have retrospective effect.\(^12\)

The Hon’ble Supreme Court\(^13\) drew important observations with respect to the law on retrospectivity. It observed that:

i. Every litigant has a vested right in substantive law but no such right exists in procedural law.

---


\(^8\) (2011) 6 SCC 570.


\(^12\) Ibid at pp. 468-469.

ii. A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

iii. A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.

In essence, by looking at various judgments of the Hon’ble Courts, it can be perhaps be stated that generally an amendment to a statute is supposed to be prospective in nature unless stated or intended otherwise.

**EX POST FACTO LAW**

It is a settled position in law that any law which retroactively changes the legal consequences of acts committed or the legal status of the facts and relationships that existed prior to the enactment of the statute or the law would be held unconstitutional.\(^14\) Moreover, it has also been engrained in our Constitution through Article 20(1) which states that:

*Art 20(1): no person shall be convicted of any offence except for violation of a law in force at that time of the commission of the act charged as an offence, nor be subject to a penalty greater than what might have been inflicted under the law in force at the time of the commission of the offence.*

Therefore, Article 20 of the Indian Constitution contains one of the most basic guarantees to the subjects of the Republic of India. It states that no person shall be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.\(^15\) It is also a well-settled principle of constitutional law that sovereign legislative bodies can make laws with retrospective operation and can make laws whose operation is dependent upon facts or events anterior to the making of the law.\(^16\) However, criminal law is excepted from such general rule, under another equally well-settled principle of constitutional law i.e. no ex post facto legislation is permissible with respect to criminal law.\(^17\) Article 20 contains such exception to the general authority of the sovereign legislature functioning under the Constitution to make retrospective or retroactive laws.\(^18\)

---

\(^{14}\) Rao Shiv Bahadur Singh & Another Vs. State of Vindhya Pradesh, AIR 1953 SCR 394.

\(^{15}\) Soni Devraj Bhai Babubhai vs. State of Gujarat & Others, 1991(4) SCC 298.

\(^{16}\) Virendrer Singh Vs. State of Punjab & Another, 2014 (3) SCC 151.

\(^{17}\) Sukhdev Singh vs. State of Haryana, 2013 (2) SCC 212.

principle has also been reiterated in *Tej Prakash Pathak and others vs. Rajasthan High Court and others*\(^\text{19}\) where the Hon’ble Supreme Court held that:

"*Under the scheme of our Constitution an absolute and non-negotiable prohibition against retrospective law-making is made only with reference to the creation of crimes...*" It is settled principle of law that no person can be prosecuted on the allegation which occurred earlier by applying the provision of law which has come into force after the alleged incident. In other words, there can be no retrospective application of criminal liability for the incident occurred prior to introduction of such liability in the statute book."

The immunity extends only against punishment by courts for a criminal offence under an ex post facto law and cannot be claimed against preventive detention\(^\text{20}\), or demanding a security from a press under press law\(^\text{21}\), for acts done before the relevant law is passed. Also, only conviction or sentence is prohibited under Article 20(1) of the Constitution of India but not trial. The objection does not apply to a change of procedure or a court. A trial under a procedure different from what obtained at the time of the commission of the offence, or by a court different from that which had competence at the time cannot ipso facto be held unconstitutional.

The accused should have the benefit of a retrospective or retroactive criminal legislation reducing punishment for an offence.\(^\text{22}\) Thus, under Article 20 of the Constitution of India, all that has to be considered is whether the ex-post-facto law imposes a penalty greater than that which might be inflicted under the law in force at the time of commission of the offence.\(^\text{23}\)


After receiving assent from the President of India, through the Finance Act, 2019 various amendments have been made to the Prevention of Money Laundering Act, 2002. This section would deal with few important amendments which have resulted in impacting the retrospective applicability of the Act. As discussed in the earlier section, it is a settled principle of law that a person cannot be punished for an offence that was not penalized at the time of commission. However, as a result of the recent amendment to the Act, the issue is

---

\(^{19}\) (2013) 4 SCC 540.


\(^{21}\) State of Bihar vs. Shailabala, AIR 1952 SC 329.

\(^{22}\) T. Barai vs. Henry Ah Hoe, (1983) 1 SCC 177.

\(^{23}\) Maya Rani vs. I.T. Commr., Delhi, (1986) 1 SCC 455.
thorny as the amendment has incorporated the concept of continuing offence in the case of money laundering.

Through the amendment, an explanation was inserted under Section 2(u) of the Act which reads as hereunder:-

Section 2(u): "proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property [or where such property is taken or held outside the country, then the property equivalent in value held within the country [or abroad]];

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

With the help of the above-mentioned explanation, the legislature has intended to clarify that proceeds of crime not only includes property derived or obtained through scheduled offence but also includes the property derived or obtained as a result of any criminal activity relatable to the scheduled offence. Since the term, ‘any criminal activity’ has not been defined under the Act, it is likely to include any activity relatable to scheduled offence including concealment, possession, acquisition, use, projecting or claiming as untainted property, of the property obtained from scheduled offence.

Furthermore, Section 3 of the Act was also amended through the Finance Act, 2019. Explanation added to Section 3 of the Act through the amendment is stated hereunder-

"Explanation.- For the removal of doubts, it is hereby clarified that,-

i. a person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely:-
(a) concealment; or (b) possession; or (c) acquisition; or (d) use; or (e) projecting as untainted property; or (f) claiming as untainted property, in any manner whatsoever;

ii. the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever."

However, there is evident inconsistency with Section 3 of the Act and the amended Explanation (i) inserted to Section 3 of the Act through the Finance Act, 2019. Section 3 of the Act states as under:

"Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the 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."

The wording of the provision of Section 3 includes the word "and" after the word "use", the impact of which is that until the person who has done any activity relating to concealment, possession, or acquisition, or use will not be guilty of offence of money laundering, unless he tries to project or claim it untainted, or assist in such activities. In the explanation inserted to the Section 3 of the Act, use of the word "or" after the point (d), leads to the conclusion that a person will be guilty of offence of money laundering when he commits any of the activity mentioned in the explanation. There appears to be evident conflict between the substantive provision and the explanation inserted to it. Now, it is a principle of law that when an explanation is added to a statutory provision, it is merely meant to explain or qualify certain ambiguities which may have crept in or arisen in the statutory provision. Thus, an explanation cannot in any way interfere with or change the enactment or any part thereof.

The most important amendment to the Act has been done by inserting explanation (ii) to the Section 3 of the Act. This insertion has introduced a new concept that the offence of money laundering would continue till the benefits are not completely exhausted by the person who is concerned with the tainted property. Therefore, it can be inferred that the intent of the

24 S. Sundaram Pillai, Etc vs. V.R. Pattabiraman, 1985 AIR 582.
legislature behind this explanation is that an accused who has committed an act of money laundering prior to the Act coming into force can still be prosecuted under the provisions of the Act as long as the prosecution can prove that the accused is continuing to derive benefits from the proceeds of crime even after the commencement of the Act.

This afore-mentioned explanation is in clear contravention to the cardinal rule of law enshrined under Article 20(1)25 of the Constitution of India and as also held by the High Court in Hasan Ali Khan S/o. Ghausudin Ali Khan vs. Union of India (UOI), Thru’ Asst. Director, Directorate of Enforcement and another26.

CONTINUING OFFENCE

With the recent amendment to the Act through the Finance Act, 2019 amendment as discussed hereinabove, the ambit of interpretation of the term ‘continuing offence’ has become wider and crucial in deciding whether a person can be attributed to an offence of money laundering committed prior to the commencement of the Act.

At the outset, it is imperative to lay down the definition of the term ‘continuing offence’. It can be described as a type of a crime which is committed over a span of time.27 It is susceptible of continuance and is distinguishable from the one which is committed once and for all, and therefore never repeated, each wrong giving rise to a distinct and separate cause of action.28 A continuing offence constitutes a fresh offence every time or occasion on which it continues.29 To decide whether a particular offence is a continuing offence, it must necessarily depend upon the language of the statute which creates the offence, the nature of the offence and, above all, the purpose/ objective which is intended to be achieved by constituting the particular act as an offence.30 Thus, it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the injury.31 If the wrongful act causes an injury which is complete, there is no continuing wrong though the damage resulting from the act may continue.32 The ingredients of the

25 Art. 20(1): no person shall be convicted of any offence except for violation of a law in force at that time of the commission of the act charged as an offence , nor be subject to a penalty greater than what might have been inflicted under the law in force at the time of the commission of the offence.
26 2012 Bom CR(Cri)807.
31 Sankar Dastidar vs. Banjula Dastidar, 2006 (13) SCC 470.
offence continue, i.e endure even after the period of consummation, whereas in the case of an instantaneous offence, the offence taken place once and for all. i.e when the same actually takes place. In such cases, there is no continuing offence, even though the damage resulting from the injury may itself continue.\(^{33}\) Therefore, the continuing offence does not wipe out the original guilt, but it keeps the contravention alive day by day.\(^{34}\)

However, the Hon’ble Bombay High Court in *Hasan Ali Khan S/o. Ghausudin Ali Khan vs. Union of India (UOI), Thru’ Asst. Director, Directorate of Enforcement and another*\(^{35}\) held that the offence on money laundering is not a continuing offence and once, the proceeds of crime has been projected as ‘untainted property’, the offence of money laundering comes to an end. It wouldn’t continue any further. The crucial date would be the date on which the proceeds of crime has been projected as ‘untainted property’, and if it has taken place before the commencement of the Act, then a person cannot be prosecuted or tried for the offence punishable under Section 4\(^{36}\) of the Act. Thus, once the third stage of integration comes to an end, the offence of money laundering is also over, prior to the year of 2005 when the Act came into force. The Court, therefore, held that most transactions of the petitioner have taken place before the Act came into force, they cannot be a subject matter of prosecution under the Act.

In another judgment by the Hon’ble Delhi High Court\(^ {37}\), the Court while discussing the concept of money laundering and its retrospective applicability, disagreed that money laundering is a continuing offence. The relevant excerpt from the judgment is stated herein below:

> “Although, the Respondent has not contended so in clear terms, it appears that the respondents are proceeding on the basis that an offence under Section 3 of the Act is a continuing offence...The words “concealment, possession, acquisition or use” must be read in the context of the process or activity of money-laundering and this is over once the money is laundered and integrated into the economy...”

34 Golak Patel Volkart Ltd. vs. Dundayya Gurushiddaiah Hiremath, 1991 SCC (2) 141.
35 2012 Bom CR(Cri)807.
36 S.4. 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.
37 Mahanivesh oils and foods private limited vs. Directorate of Enforcement, (2016) 1 High Court Cases (Del) 265.
However, by an order dated 30.11.2016, the division bench of the Hon’ble Delhi High Court in the above-mentioned matter has stated that-

“...the findings so recorded by the learned Single Judge shall not be construed as conclusive and binding precedent until further orders.”

Thus, through various diverging views and findings by Hon’ble Courts, it can be safely deduced that the definition of the term ‘continuing offence’ is subjective and would vary on case to case basis. The amendment to Section 3 of the Act has empowered the judges to construe the definition of the term and apply it in cases, leaving a wider discretion and autonomy in the hands of the judges.

**PREVENTION OF MONEY LAUNDERING ACT, 2002- PROSPECTIVE OPERATION**

Having discussed the principles of retrospective and prospective application and the principles of Constitutional law with respect to ex post facto laws, it is pertinent to highlight how various High Courts across the country have given their reasoning on why the Act is prospective or retrospective in nature. Under this head, the discussion would be specific and confined to judgments by various High Courts across the country which have ruled that the Act has prospective operation. To begin with, it would be imperative to discuss interpretations by various Courts on what stage the act of money laundering would trigger and come into play. In a judgement of *Narendra Mohan Singh and another vs. Directorate of Enforcement and another*38, the Hon’ble Court held that the date when one person is found to be involved in any process or activity connected with the proceeds of crime and projected as untainted property would be relevant for the purpose of prosecution under Section 339 of the Act and not the date when the scheduled offence was committed. The relevant date is not the date of acquisition of illicit money but the dates on which such money is being processed for projecting it untainted.40 In *Sanjay Kumar Choudhary vs. Govt. of India & another*41, the Jharkhand High Court held that the amplitude of Section 3 of the Act unambiguously prescribes that anyone, who directly or indirectly meddles with the property

---

38 2014 SCC OnLine Jhar 2861.
39 S.3. 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 including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering.
41 W.P.(Cr.) No.419 of 2009.
connected with the proceeds of crime projecting it as untainted property, is liable to be punished for the offence of money laundering, thereby widening the ambit of prosecution under the Act. Thus, these judgments show that there is no relevance of the date when the scheduled offence was committed or the date when the illicit money was acquired to invoke provisions or prosecuted under the Act.

A division bench of the High Court of Karnataka in the matter of *M/s. Obulapuram Mining Company Pvt. Ltd., v. Directorate of Enforcement*\(^\text{42}\) while deciding whether the writ petitioner can be tried under the Mines and Geology (Development and Regulation) Act, 1957, the Forest (Conservation) Act, 1980, the Indian Penal Code and the Prevention of Corruption Act, 1988, that were included in the Act declaring them as scheduled offences only with effect from June 1, 2009 whereas the offences were committed much prior to the insertion of the provision in the schedule of the Prevention of Money Laundering (Amendment) Act, 2009, the Hon’ble Court held that the writ petitioner cannot be tried and punished as doing so would deny the writ petitioner protection provided under Clause (1) of Article 20 of the Constitution of India and thus, such trial would have no application. Therefore, the Enforcement Case Information Report and the order of attachment are without jurisdiction and are liable to be quashed. In another judgment of the Hon’ble Delhi High Court in the case of *Mahanivesh Oils & Foods Pvt. Ltd., V. Directorate of Enforcement*\(^\text{43}\), the Court laid emphasis on the conjoint reading of Section 2(u)\(^\text{44}\) and Section 5(1) of the Act and stated that the power to attach is only with respect to the property derived or obtained directly or indirectly by any person as a result of criminal activity relating to a scheduled offence or the value of such property. It can inferred that occurrence of a scheduled offence is the substratal condition for giving rise to any proceeds of crime and consequently for the application of Section 5(a)\(^\text{45}\) of the Act to kick in. Therefore, a commission of a scheduled offence is the fundamental pre-condition for any proceeding under the Act as without a scheduled offence being committed, the question of proceeds of crime coming into existence does not arise. Elucidating this principle, the Hon’ble Court held that there is an inextricable link between the Act and the occurrence of the crime. The offence of money-laundering relates to the proceeds of crime, the genesis of which is a scheduled offence. Before any

\(^{42}\) 2017 SCC OnLine Kar 2304.

\(^{43}\) (2016) 1 High Court Cases (Del) 265.

\(^{44}\) S.2(u): “proceeds of crime” means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property;”

\(^{45}\) S. 5 (a)- any person is in possession of any proceeds of crime;
proceedings are initiated under Section 5 of the Act, it is necessary for the concerned authority to identify the scheduled offence. The Proviso to Section 5 also indicates that no order of attachment shall be made in relation to a schedule offence unless a report has been given to a Magistrate under Section 173 of the Code of Criminal Procedure, 1973 or a complaint has been filed by a person authorised to investigate the scheduled offence before a Magistrate or Court for taking cognizance of the scheduled offence. Thus, in cases where the scheduled offence is itself negated, the fundamental premise of continuing any proceedings under the Act also vanishes. Such cases where it is conclusively held that a commission of a scheduled offence is not established and such decision has attained finality pose no difficulty and thus, in such cases, the proceedings under the Act would fail. The bench also referred to a judgment of the English Court\textsuperscript{46} where the court pointed out that “The Statute which in its direct operation of prospective cannot be properly be called a retrospective statute because a part of the requisites for that action is drawn from the time antecedent to its passing.” Thus, the Court finally came to a conclusion that Section 4 of the Act is not for commission of a scheduled offence but for laundering proceeds of a scheduled crime. The fact that the scheduled crime may have been committed prior to the Act coming into force would not render the Act a retrospective statute as only the offence of money-laundering committed after the enforcement of the Act can be proceeded against under the Act. Thus, the Act cannot be read as to empower the authorities to initiate proceedings in respect of money laundering offences done prior to 1-7-2005 or prior to the related crime being included as a scheduled offence under the Act. However, by an order dated 30.11.2016, the division bench of the Hon’ble Delhi High Court in the same above-mentioned matter has stated that-

“…the findings so recorded by the learned Single Judge shall not be construed as conclusive and binding precedent until further orders.”

In another judgment by the Hon’ble Delhi High Court in \textit{Arun Kumar Mishra Vs. Directorate of enforcement\textsuperscript{47}}, the question that arose was whether without a predicate offence, can there be an investigation against a person for a charge of money laundering under the Act. The petitioner made two fold arguments. Firstly, that the entire basis for the ECIR was the contents of the FIR filed by the CBI for the scheduled offence. However, in light of the closure report by the CBI dated 08.08.2014, the very basis of the ECIR has ceased

\textsuperscript{46} The Queen v. The Inhabitants of St. Mary, White chapel, (1848) 12 QB 120.
\textsuperscript{47} 2015 SCC OnLine Del 8658.
to exist. In essence, without a predicate offence, there can be no question of the investigation authority under the Act to proceed with the investigation. This argument dwells from section 348, 2(u)49 and 2(y)50 of the Act which require that money laundering occurs when the proceeds of crime from a scheduled offence are sought to be projected as untainted. In the circumstances of this case where the CBI proceedings have been closed and quashed, there is no existence of a predicate offence on the basis of which the ECIR continues to be maintainable. The act of depositing money in various bank accounts and later withdrawing the same would not constitute a criminal act. Since the act of depositing and withdrawing money in the bank accounts not in the scheduled list of offences, there can be no proceedings against the petitioners whatsoever. Secondly, the offences with which the petitioner was charged under section 120B51 Indian Penal Code and section 13 of the Prevention of Corruption Act, were inserted in the Act with effect from 01.06.2009. However, ECIR itself stated that the alleged offence had taken place between November 2005 and December 2006. The Hon’ble Court also referred to Tech Mahindra Ltd. vs. Joint Director of Enforcement52 judgment where it was held that there can be no retrospective application of criminal liability for the incident occurred prior to introduction of such liability in the statute book. Thus, Hon’ble Court also stated that since there is another investigation already pending the case of disproportionate assets against the petitioners, the Enforcement Directorate shall be at liberty to initiate fresh proceedings against the petitioner in accordance with law if the investigation established the offence of money laundering against the petitioner. However, in the proceedings with respect to which closure report has already been filed, the Enforcement

48 S.3. Offence of money-laundering.—Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party to or is actually involved in any process or activity connected with the 1(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.

49 S.2(u): “proceeds of crime” means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property.

50 S.2(v): “property” means any property or assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and includes deeds and instruments evidencing title to, or interest in, such property or assets, wherever located; [Explanation.—For the removal of doubts, it is hereby clarified that the term “property” includes property of any kind used in the commission of an offence under this Act or any of the scheduled offences;

51S.120B. Punishment of criminal conspiracy.—
(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, [imprisonment for life] or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.]

52 MANU/AP/2921/2014.
Directorate shall not proceed with the investigation as no predicate offence is made out against the petitioner.

The question of whether the order of provisional attachment made and the original complaint filed before the Adjudicating Authority under the Act liable to quashed arose before the Hon’ble High Court of Madras in the matter between Ajay Kumar Gupta vs. Adjudicating Authority (PMLA) and Ors. The petitioners were being charged for offences committed prior to 01.07.2005 when the Act was also not in existence. The charge sheet filed against the petitioners was filed on 13.01.2009. It is important to mention that the offence under Section 13 Prevention of Corruption Act which was charged against the petitioners was not included in the scheduled list of offences. It was brought into existence and included in the scheduled list of offences only through an amendment to the Act dated 01.06.2009. Thus, this resulted in direct conflict with the fundamental rights of the citizen enshrined in Article 20(1) of the Constitution of India. Also, the entire set of documents and properties of the petitioners were in the custody of the Court, thus in the absence of any sufficient reason to attach the properties, such order could not have been passed by the attachment officer. Relying on M/s. Obulapuram Mining Company Pvt. Ltd., v. Directorate of Enforcement, the Court held that subsequent amendment to the Act cannot be given any retrospective effect. The Hon’ble Court laid down two important points:

i. the attaching officer should have a sufficient reason to believe (the reasons for such belief to be recorded in writing), on the basis of material in his possession, that if such property involved in money laundering is not attached immediately, the non-attachment of the property is likely to frustrate any proceedings under the Act.

ii. charged offence must be a scheduled list of offences at the time when the offence was being committed.

There have been other judgments on the issue pertaining to prospective applicability of the Act which are pending adjudication and final disposal in various Courts across the country. One such judgment by the Hon’ble Delhi High Court where the Court vide order dated 22.12.2014 has stayed the proceedings in ECIR against the petitioner after relying on the principle of Ex post facto law under Article 20(1) of the Constitution of India referred in

---

53 MANU/TN/2654/2017
54 2017 SCC OnLine Kar 2304.
55 Abhilasha Agarwal vs. Director of Enforcement Directorate & Ors, W.P (Crl) 1154/2015.
Tech Mahindra Ltd. vs. Joint Director of Enforcement\textsuperscript{56}. Similarly, few other judgements where the Courts while adjudicating relied on \textit{Tech Mahindra Ltd. vs. Joint Director of Enforcement}\textsuperscript{57} and stated that the provisions of law cannot be retrospectively applied and Article 20(1) of the Constitution bars the ex-post facto penal provisions and no person can be prosecuted for an alleged offence which occurred earlier before the enactment of the new provisions which have come into force after the alleged offence was in the case of and \textit{Ajanta Merchants Pvt. Ltd. vs. Enforcement Directorate}\textsuperscript{58}. In this matter, proceedings arising out of ECIR were stayed. The Respondent in this matter has filed Special Leave Petition in the Hon’ble Supreme Court.

\textbf{PREVENTION OF MONEY LAUNDERING ACT, 2002- RETROSPECTIVE OPERATION}

After discussing at length various judgments by High Courts across the country on the nature of the Act being prospective in nature along with their well-detailed reasoning, it is important to draw attention to noteworthy judgments of various High Courts which have held that the scheduled list of offences as defined in the Act can be applied retrospectively.

In first of its judgements by the Hon’ble Karnataka High Court in \textit{Devas Multimedia Private Limited vs. The Joint Director, Directorate of Enforcement, Bangalore Zonal Office and Ors.}\textsuperscript{59}, it was argued by the respondent ( Enforcement Directorate) that on the conjoin reading of sections 2(u), 2(y) and 5(1)(a) of the Act would show that the emphasis of section 5 of the Act is to attach property involved in money laundering regardless of whether it was in possession of person charged of having committed a scheduled offence or any other person, provided it was shown to be proceeds of crime and that such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under the Act. The Hon’ble Court stated that the underlying objective of the Act is to preventing legitimization of money earned through illegal and criminal activities. Therefore, as per section 5 of the Act, the authority concerned is entitled to pass a provisional attachment order if he had reason to believe that any person is in possession of any proceeds of crime. The purpose of a provisional attachment order is to prevent a scenario where any proceedings under the Act

\textsuperscript{56} MANU/AP/2921/2014.
\textsuperscript{57} MANU/AP/2921/2014.
\textsuperscript{58} 2015 SCC OnLine Del 8659.
\textsuperscript{59} MANU/KA/2322/2017
might get frustrated if the property was not attached immediately. However, it would be always open to the affected person to place such materials as would convince the authorities that the property attached was not involved in money laundering or that it was not part of the proceeds of crime. Hence, the Court held that the contention urged by petitioner alleging that authorities have acted against the settled principles of law by retrospectively operating penal laws thereby violating Article 20(1) of the Constitution of India, cannot be accepted, at this stage. In another judgment by the Hon’ble Kerala High Court in *A.K Samsuddin vs. Union of India*\(^6^0\), the question of investigation initiated against the petitioner unsustainable in law, in as much as the Act was not in force when the petitioner is alleged to have committed the offences under the Prevention of Corruption Act,1988. The Hon’ble Court came up with a very interesting interpretation of the Act and held that though commission of an offence is a fundamental pre-condition for initiating proceedings under the Act, the offence of money laundering is independent of the scheduled offences. The scheme of the Act indicates that it deals only with laundering of money acquired by committing the scheduled offences. Essentially, the Act deals only with the process or activity with the proceeds of the crime including its concealment, possession, acquisition or use. Article 20(1) of the Constitution prohibits conviction except for violation of a law in force at the time of the commission of the offence. In other words, there cannot be any prosecution under the Act for laundering of money acquired by committing the scheduled offences prior to the introduction of the Act. The time of commission of the scheduled offences is therefore not relevant in the context of the prosecution under the Act. What is relevant in the context of the prosecution is the time of commission of the act of money laundering.

In *B. Rama Raju Vs. Union of India, Ministry of Finance, Department of Revenue and Ors.*\(^6^1\), two issues raised pertinent to subject matter were-

a. Whether property owned by or in possession of person, other than person charged of having committed a scheduled offence is liable to attachment and confiscation proceedings.

b. Retrospective applicability of second proviso Section 5 of the Act was also challenged.

The Court with respect the first issue held that considering the legislative intent and the objective behind enacting this Act was to prevent money laundering and preventing legitimising of money earned through illegal and criminal activities by investment in

---

\(^6^0\) 2016 SCC OnLine Ker 24144.

\(^6^1\) 2011 SCC OnLine AP 152.
moveable and immovable properties. The Act defined the expression “proceeds of crime” expansively to sub-serve broad objectives of the Act. Thus property owned or in possession of a person, other than a person charged of having committed scheduled offence was equally liable to attachment and confiscation proceedings under Chapter III of the Act. Now, with regards to retrospective applicability of the second proviso being applicable to the property acquired prior to enforcement of this provision and if so, whether provision is invalid for retrospective penalisation, the Court held that considering huge quanta of illegally acquired wealth corrodes vitals of rule of law; fragile patina of integrity of some of our public officials and state actors, and consequently threatens sovereignty and integrity of the nation. Thus, the Court was of the opinion that the legislature has the authority to legislate and provide for forfeiture of proceeds of crime which is a produce of specified criminality acquired prior to the enactment of the Act. Thus, the court held that second proviso Section 5 of the Act was retrospectively applicable. There was an interesting interpretation by the Court in Hari Narayan Rai vs. Union of India⁶², whereby the Court held that only the date of laundering would be relevant for the purpose of Section 3 of the Act,⁶³ therefore the date of possession of money for projecting it untainted is relevant for the purpose of law not the date of acquisition of money.

CONCLUSION

Money Laundering poses a serious threat to financial systems and their integrity and sovereignty. It destroys the social and economic fabric resulting in huge loss to the economy. However, the intent and the objective of the legislature through the amendments have compromised the fundamental principles of natural justice, fair trial and due process. The Act has transgressed upon basic rights and liberties on the citizens of the country inter alia double jeopardy, and the right enshrined under Article 20(1) of the Constitution of India. Amendments to the Prevention of Money Laundering Act, 2002 through the Finance Act, 2019 are legally and jurisprudentially tenuous and unsound and may not pass the constitutional muster. The insertion of explanation to the Act has strengthen the process of investigation and prosecution and has given unbridled power to the investigating authority.

⁶³ S.3. 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 including its concealment, possession, acquisition or use and projecting or claiming] it as untainted property shall be guilty of offence of money-laundering.
The author is of the view that a legitimate and reasonable interpretation of the recent amendment would be that if a person commits a scheduled offence and the proceeds of crime so derived from such an offence have been projected as untainted property after coming of the Act but prior to inclusion of such an offence enlisted under the scheduled offence, such an offence committed would be outside the purview of the Act and therefore, the person cannot be prosecuted for committing an offence which was not a part of the scheduled offence during the time such an offence was committed.

It is further stated that the offence of money laundering cannot be a continuing offence as it is directly in contravention to the rule embedded under Article 20(1) of the Constitution of India. The offence of money laundering would come to an end once the third stage of integration comes to an end, i.e. once the money is integrated into financial system in a way that its original association with crime is totally obliterated.

However, there have been several judgements by various High Courts on retrospective applicability of the Act, where a few of the judgements have held the Act to be retrospectively applicable, while the others were of a view that the Act cannot be retrospective in nature. This issue is yet to reach finality, as few batches of petitions are pending before the Hon’ble Supreme Court of India.