

QUESTIONABLE SEARCHES UNDER THE MONEY LAUNDERING ACT

Relevant for: Developmental Issues | Topic: Government policies & interventions for development in various Sectors and issues arising out of their design & implementation incl. Housing

To enjoy additional benefits

CONNECT WITH US

December 22, 2023 12:16 am | Updated 02:20 am IST

COMMENTS

SHARE

READ LATER

'The CBI and the ED have absolute freedom to do what is not authorised under the judgments of the Supreme Court' | Photo Credit: KAMAL NARANG

The enforcement of the Prevention of Money Laundering Act, 2002 (passed in the background of India's commitment to the international community to fight the drug menace and terrorism) has caused much consternation especially after its unusual interpretation by the Supreme Court of India in *Vijay Madanlal Choudhary and Ors vs Union of India and Ors.* (2022). The Supreme Court of India limited its application to "on the wrongful and illegal gain of property as a result of criminal activity relating to a scheduled offence". It also held that "the property must qualify the definition of "proceeds of crime" under Section 2(1)(u) of the 2002 Act". It went on to hold that "the authority of the Authorised Officer... to prosecute any person for offence of money-laundering gets triggered only if there exists proceeds of crime within the meaning of Section 2(1)(u) of the 2002 Act and further it is involved in any process or activity".

The Court emphatically held that "Not even in a case of existence of undisclosed income and irrespective of its volume, the definition of 'proceeds of crime' under Section 2(1)(u) will get attracted, unless the property has been derived or obtained as a result of criminal activity relating to a scheduled offence".

The law thus declared by the Court, which binds one and all under Article 141, is clear — "If the offence so reported is a scheduled offence, only in that eventuality, the property recovered by the Authorised Officer would partake the colour of proceeds of crime under Section 2(1)(u) of the 2002 Act, enabling him to take further action under the Act...". In clarity, the Court declared, "Absent existence of proceeds of crime, as aforesaid, the authorities under the 2002 Act cannot step in or initiate any prosecution".

The media has reported many cases of Enforcement Directorate (ED) searches, seizures and arrests — which are outside the ED's powers, as held by the Court. Naturally, the conduct of the ED in this regard has resulted in severe criticism from the Supreme Court, as seen in *Pankaj Bansal vs Union of India*, recently.

The Court, while setting aside the arrest orders along with orders of remand passed by the Sessions Judge Panchkula, and affirmed by the High Court of Punjab and Haryana, made

damning observations: “This chronology of events reflects rather poorly, if not negatively, on the ED’s style of functioning. The ED, mantled with far-reaching powers under the stringent Act of 2002, must be seen to be acting with utmost probity, dispassion and fairness. In the case on hand, the ED failed to exercise its powers. The Court added, “Surprisingly, no consistent and uniform practice seems to be followed... as written copies of the grounds of arrest are furnished to arrested persons in certain parts of the country but in other areas,... the grounds of arrest are either read out to them or allowed to be read by them.” In November 2023, Justices Abhay S. Oka and Pankaj Mithal, in *Pavana Dibbur vs The Directorate of Enforcement*, 2023 INSC 1029, addressed key aspects of the PMLA: “On a plain reading of Section 3, unless proceeds of crime exist, there cannot be any money laundering offence,” and “To constitute any property as proceeds of crime, it must be derived or obtained directly or indirectly by any person as a result of criminal activity relating to a scheduled offence” Because, the existence of “proceeds of crime” is “sine qua non” for the offence under Section 3 of the PMLA.

Yet, what is happening in some States that are governed by the Opposition is damaging to federalism. The Mines and Minerals (Development and Regulation) Act, 1957 is not covered by the Schedule of the PMLA Act and offences in relation thereto are not “Scheduled Offences”. Yet, the ED in these States is conducting inquiries with respect to the alleged illegal mining of sand, a minor mineral under the control of States and not the Union. The Mines Act has extensive provision to curb evasion and enables penalty and prosecution for any illegal extraction of minerals . But, that power is with the State government.

In Jharkhand, the ED purportedly registered an enforcement case investigation report (No. 07/2023) on January 30, 2023 against an MLA of the ruling party and his associates based on certain first information reports (FIR) filed by some persons. While these complaints were under investigation, a writ petition was filed in the High Court by one Bijay Hansda (who was apparently in jail, and who later, on oath, told the High Court that he had not authorised anyone to file that petition) to refer these police cases to the Central Bureau of Investigation (CBI). Curiously, the ED was also made a party in this writ petition. The petition stated that the ED had started investigation “pertaining to illegal mining and on the laundering of the tainted monies generated from it” and that the petitioner was issued a summons, where he appeared and offered assistance on the modus operandi of the alleged offenders, based on which the ED had apparently prepared a prosecution report. The ED affidavit said, “The suspects of the ECIR 07/2023 ... are habitual offenders who are a party in the activities connected with the proceeds of crime”. The ED claimed that “... illegal mining is being done in a rampant manner and the proceeds ... dealt in cash.” The ED, at that stage, was neither investigating a scheduled offence nor did it have any property of crime.

Clearly, the process of the court was abused. The alleged petitioner, once out of jail, sought withdrawal of the petition. The High Court refused permission on August 8, 2023, and the next day delivered the judgment transferring the police cases to the CBI. It immediately registered the preliminary inquiry, and subsequently FIR, while a special leave petition (SLP) was filed by the alleged offenders before the Supreme Court stating that they had not been heard by the High Court before passing the judgment, besides contending that neither the CBI nor the ED had any jurisdiction in the matter.

Even more shocking is the order of the Bench on September 18, 2023: “Permission to file Special Leave Petition is granted. Issue Notice.”

In subsequent judicial developments, between September and November 2023, there were violations of procedure, such as the notice issuing Bench being changed contrary to the Supreme Court Rules, 2013 and the Handbook on Practice and Procedure and Office Procedure. Further, the later Bench was not persuaded by the arguments put forth by the senior

advocate for the alleged offender to grant interim relief in a very deserving case where, besides questions of jurisdiction, there were pointers to the violation of natural justice.

So now, the CBI and the ED have absolute freedom to do what is not authorised under the judgments of the Supreme Court. Interestingly, the ED in its affidavit before the High Court said that the “the Accused Pankaj Mishra is the MLA representative of Jharkhand Chief Minister and is a very influential person.” So, the design is clear. Clearly, the process of the law is being abused in an innovative and lethal manner to target the political party ruling Jharkhand. Efforts are on by the ED to implicate other governments in some States including Tamil Nadu. The ED is singularly inactive in States run by the Bharatiya Janata Party, where the incidents of illegal mining are far more serious. In Maharashtra, Haryana, Uttar Pradesh, Gujarat and Madhya Pradesh, the cases of illegal mining are 6,743, 324, 23,787, 8,713, and 9,361, respectively.

This raises extremely disturbing questions not only about the abuse of authority by central investigating agencies but also the abuse of the process of court being permitted all along.

If mines and minerals are not part of “scheduled offences” and in a case where “proceeds of crime” are non-existent, it is shocking that courts should allow such investigations to be carried out by the CBI and the ED. It is even more sad that the courts do not ask these agencies about such actions in other States but are ever so willing to condemn the administration in Opposition-governed States.

Federalism is a part of the basic structure of the Constitution of India, but its foundation is being slowly chipped away through such processes.

Everybody, including constitutional institutions, appears to have forgotten what the Constitution stands for. Let us hope and pray that these machinations are curbed forthwith to save the further down slide of our cherished democracy.

Dushyant Dave is a Senior Advocate in the Supreme Court of India

COMMENTS

SHARE

[laws](#) / [money laundering](#) / [judiciary \(system of justice\)](#) / [investigation](#) / [democracy](#) / [minerals](#) / [Jharkhand](#) / [police](#) / [Maharashtra](#) / [mining](#) / [Haryana](#) / [Uttar Pradesh](#) / [Gujarat](#) / [Madhya Pradesh](#) / [constitution](#)

BACK TO TOP

[Terms & conditions](#) | [Institutional Subscriber](#)

Comments have to be in English, and in full sentences. They cannot be abusive or personal. Please abide by our [community guidelines](#) for posting your comments.

We have migrated to a new commenting platform. If you are already a registered user of The Hindu and logged in, you may continue to engage with our articles. If you do not have an account please register and login to post comments. Users can access their older comments by logging into their accounts on Vuukle.

END

Downloaded from **crackIAS.com**

© **Zuccess App** by crackIAS.com

CrackIAS.com