CHAPTER 3

THE PREVENTION OF MONEY LAUNDERING ACT, 2002

*K.N. Chandrasekharan Pillai**

1. INTRODUCTION

The Parliament has enacted the Prevention of Money Laundering Act, 2002 to give effect to the resolution adopted by the General Assembly of the United Nations on the Political Declaration and Global Programme of Action in February 1990 which calls upon the Member States to enact money laundering legislation and progammes.

In 1996 Ministry of Finance, Government of India, appointed an Inter-Ministerial Committee to look into all aspects of money laundering and to suggest suitable legislation, if necessary. The Committee in its report suggested enactment of a comprehensive legislation to deal with this problem.

Accordingly, the Prevention of Money-Laundering Bill, 1998 was introduced in the 12th Lok Sabha on the 4th August 1998. The Bill was referred by the Hon'ble Speaker to the Department related Parliamentary Standing Committee of Finance on the 5th August 1998 for examination and report. The Standing Committee in its report dated the 28th January 1999 recommended certain modifications in the Bill and before the revised Bill could be submitted for consideration, the 12th Lok Sabha was dissolved and the Bill lapsed.

Subsequently, a new Bill incorporating the recommendations of the Parliamentary Standing Committee was introduced in the 13th Lok Sabha on the 29th October 1999. After the Bill was passed by the Lok Sabha on the 2nd December 1999, the Bill was referred by the Chairman of the Rajya Sabha to a Select Committee of the Rajya Sabha on the 8th December 1999 for its examination. The Select Committee presented its report on the 24th July 2000 and the present Act came to be enacted in 2002.

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* Director, Indian Law Institute.

2. SALIENT FEATURES OF THE ACT

The salient features of the Act, which came into force on the 1st July 2005, are as follows: -

> Just as the concept of money laundering cannot be cabined in the traditional criminal law theory, the Prevention of Money Laundering Act 2002 cannot fit in the framework of an ordinary statute. Till recently money laundering could take place in our society without anybody's prying eyes on it. There have been jurisdictions, which did not consider money laundering as something undesirable. On the contrary, techniques of money laundering used to be referred to as asset management structures or tax beneficial operations. They were never considered unusual. Nor did they attract the attention of the Government as they were treated normal. It is the process of homogenization of laws through various international measures that has brought pressure on these jurisdictions to conform to the standards desired by the international community. It is interesting and important to see that the present legislation is the outcome of suggestions from the U.N.

To be sure, money laundering detrimentally affects the efficient operation of markets. It results in concentration of wealth in the hands of criminals. It encourages perpetrators of crime to repeat offences so as to make more money and masquerade as powerful individuals corrupting the society. It is done with the ulterior motive of pocketing money safely and secretly. The secretive nature of its operations coupled with the feeling in some quarters that it is not criminal makes it a multifaceted phenomenon to be tackled by a multipronged approach.

The investigation has necessarily to be intrusive. Investigative authorities have to be vigilant in keeping the balance between societal interest and the individual rights. The association of money laundering with serious offences involving drug trafficking, terrorism etc. with international dimensions and with potential for employing preventive and pre-emptive measures by the enforcement agencies make this crime more complex and challenging in terms of enforcement. The enforcement agencies have to be vested with administrative and adjudicative powers unlike in the case of other criminal statutes. Investigation may have to be quasi judicial. Naturally the need for protecting the rights of accused may have to be taken care of. This is possible only if appellate authorities have been appointed to oversee investigation. The present enactment rightly incorporates provisions safeguarding the interests mentioned above.

The power for attaching the properties initially and then in case of adverse funding to confiscate them is to be exercised carefully. This is subject to appeal to the High Courts. Special courts have also been envisaged to be in position along with the investigative and appellate authorities. Thus the Act presents the picture of a comprehensive enactment with multipronged provisions.

3. OFFENCE OF MONEY LAUNDERING:

Section 3 describes the offence of money laundering thus:

> "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."

And the punishment for money laundering has been prescribed in Section 4. The type of punishment depends on the seriousness of the offence committed by the offender. The Act envisages attachment of the tainted property as the first step towards adjudication and confiscation of property of the offender.

4. ATTACHMENT AND CONFISCATION:

The Act authorizes the officers to attach the property pending decision of adjudication and confiscation. Indeed this power is given with a lot of caution. However, this was considered necessary for the proper enforcement of the provisions[1]. Section 8(6) authorizes the adjudication authority to make the order of confiscation.

S.8 (6) enacts thus:

> "Where the attachment of any property or retention of the seized property or record becomes final under clause (b) of sub-section (3), the Adjudicating Authority shall, after giving an opportunity of being heard to the person concerned, make an order confiscating such property."

The Act vests adequate power with the Central Government. Management shall be arranged to be done by the Central Government. The officers of the directorate are empowered to act as civil courts for the

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1. Please see Prevention of Money-laundering (the manner of forwarding a copy of the order of Retention of seized property along with the material to the Adjudicating Authority and the period of its Retention) Rules, 2005 and S.5 of PML Act 2002 which signify the safeguards the enforcement officers have to take before the property is attached/confiscated.

purpose of production of documents and collection of evidence[2]. Section 10 obligates the banking companies to purvey details of transactions. S.12A/ 12B specifically deal with the requirements to be satisfied by the banking companies. Failure on the part of the companies to comply with the instructions may invite imposition of fine by the directorate[3].

5. Surveys, Searches and Seizures

The directorate has power to make surveys, searches and seizures for the collection of materials. The directorate can also effect search of a person. Power for making arrest has also been given. The Directorate should report the arrest. The arrested person will have to be produced before the Magistrate within 24 hours. (Section 9). Provisions enabling retention of property and records exists in the Act. The authorities are also enabled by way of provisions in Section 22 and 23, which allow presumption as to records, and interconnected transactions in certain cases.

6. Burden of Proof

Section 24 categorically declares that the burden of proof lies with the accused. It enacts thus:

> Burden of proof – 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.

In cases involving economic offences it becomes difficult for the prosecution to prove the cases beyond reasonable doubt. It is only fair that in offences involving money-laundering committed in secrecy the burden of proof is shifted on to the accused.

7. Authorities

The Act presents machinery blending executive and judicial functions with respective wings. The Directors, Additional Directors, Deputy Directors, Assistant Directors are the executive authorities who are to initiate steps for adjudication, confiscation and prosecution in the special courts established for the purpose. There could be an appeal from the adjudication

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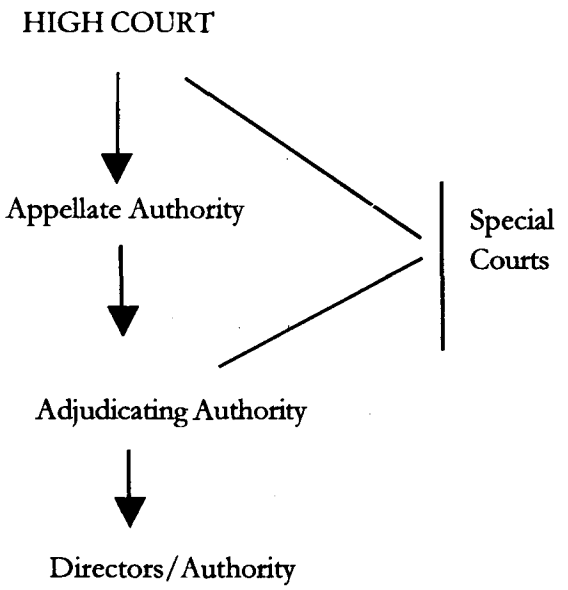
2. See Sections 10 and 11
3. The international legal regime requires the banking companies and financial institutions to cooperate with the authorities in keeping them with information and keeping a watch on their customer's business practices.
   See FATF 40 Recommendations and the Guidelines and notifications issued by the Reserve Bank of India entitled know your customer.

authority's decision to the appellate authority. And beyond the appellate authority the High Court can exercise appeal and revisional jurisdiction. The structure of the authorities can be depicted by way of the following diagram:



It is so comprehensive that all aspects of prevention of money laundering have been captured and provisions made to deal with them.

8. Powers of Authorities

It is interesting to see that the officers – authorities under the enactment such as the Directors, Addl. Directors etc. shall have power to issue summon etc. to carry out their duties. Section 50 (2) lays down thus:

> The Director, Additional Director, Joint Director, Deputy Director or Assistant Director shall have power to summon any person whose attendance he considers necessary whether to give evidence or to produce any records during the course of any investigation or proceeding under this Act.

The central government has the power to issue directives under section 52 which enacts thus:

> *Power of Central Government to issue directions, etc.* The central government may, from time to time, issue such orders, instructions and directions to the authorities as it may deem fit for the proper administration of this Act and such authorities and all other persons

employed in execution of this Act shall observe and follow such orders, instructions and directions of the Central Government;

Provided that no such orders, instructions or directions shall be issued so as to-

i. require any authority to decide a particular case in a particular manner; or

ii. interfere with the discretion of the Adjudicating Authority in exercise of his functions.

The officers of various departments have been mentioned in section 54. They are ordained to help the directorate to enforce the legislation by way of rendering assistance in making enquiries

9. Adjudication

The adjudicating authority shall consist of a Chairperson and two members.

Section 8 provides for adjudication thus:

"Adjudication – (1) On receipt of a complaint under sub-section (5) of section 5, or applications made under sub-section (4) of section 17 or under sub-section (10) of section 18, if the Adjudicating Authority has reason to believe that any person has committed an offence under section 3, it may serve a notice of not less than thirty days on such person calling upon him to indicate the sources of his income, earning or assets, out of which or by means of which he has acquired the property attached under sub-section (1) of section 5, or, seized under section 17 or section 18, the evidence on which he relies and other relevant information and particulars, and to show cause why all or any of such properties should not be declared to be the properties in involved in money-laundering and confiscated by the Central Government."

10. Appellate Tribunal

Provisions enabling the establishment of Appellate Tribunal have also been made in the enactment. The chairman of this Authority should be either a Supreme Court Judge or a High Court Judge. There should be two other members. Their qualifications, terms of office and condition of service have also been prescribed in the enactment. As regards, the procedure to be followed by the Appellate Tribunal section 35 enacts thus: -

Procedure and powers of Appellate Tribunals – (1) The Appellate Tribunal shall not be bound by the procedure laid down by the Code

of Civil Procedure, 1908 but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Appellate Tribunal shall have powers to regulate its own procedure.

The decision of the Appellate Tribunal shall be made by majority and authorized representatives are permitted to participate in the Appellate proceedings. It has been declared in the Act that civil courts will not have jurisdiction.

Section 42 which make provision for appeals to be made to the High Court lays down thus:

> Appeal to High Court – Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law or fact arising out of such order;
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> Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.
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> The Act thus envisages a machinery, which simultaneously makes attachment of property, adjudication of issues and confiscation of property on the initiation of proceedings by the executive authority, the directorate.

11. Special Courts

It is also of interest to note that along with the enforcement machinery Special Courts of the status of Sessions courts have been established for the prosecution of the offenders.

Section 44 enacts thus:

> Offences triable by Special Courts – (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) – (a) the scheduled offence and the offence punishable under section 4 shall be triable only by the Special Court constituted for the area in which the offence has been committed:

It has been laid down that the criminal procedure code shall be applicable to the proceedings of the special courts and that there would be public prosecutor to prosecute the case. Appeal and revisions from the decisions of the special courts have also been provided for to the High

Courts[4]. It is thus a comprehensive machinery which has been designed by the Act.

12. INTERNATIONAL COOPERATION:

Considering the international dimensions the offence of money laundering has of late assumed a lot of importance. The enactment makes detailed provisions for reciprocal arrangements for ensuring assistance from other countries under Section 56. Section 61 lays down the provisions enabling the Indian authorities to render/receive assistance to the authorities in other contracting states in carrying out measures of provision of money laundering Act 2002.

13. MISCELLANEOUS PROVISIONS:

In a legislation of this ilk chances for abuse abound. Realizing this possibility the Act makes provision for punishing authorities who resort to vexations searches[5]. Similarly it provides for punishing those who abuse the process by furnishing false information. It is also punishable not to furnish information required for prosecution[6]. But Section 64 very categorically lays down that no offence under these provisions would be taken cognizance of without the prior sanction of the Central Government[7]. Civil suits are barred. It is also interesting to see that enactment provides for punishment of companies vide section 70 which runs thus:

> Offences by companies – (1) Where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made there under is a company, every person who, at the time, the contravention was committed, was in charge of and was responsible to the company, for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

It is the Central Government, which has been authorized to make rules under the enactment, which should be laid before Parliament.

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4. S.47 enacts thus:-
   Appeal and revision: The High court may exercise, so far as may be applicable, all the powers conferred by Chapter XXIX or Chapter XXX of the Code of Criminal Procedure, 1973 (2 of 1974), on a High Court, as if a Special Court within the local limits of the jurisdiction of the High Court were a court of session trying cases within the local limits of the jurisdiction of the High Court.
5. See S.62.
6. See S.63.
7. See S.64

14. EFFECTIVENESS OF THE ACT

By limiting the scope of definition of money laundering by way of references to the scheduled offences the Act limits its scope. Money laundering upto a limited amount can still be out of range of the Act.

The proviso to the defining clause of money laundering to the effect that except in offences relating to the state or drugs, an offence can be classified as a money laundering offence only if the property involved is worth a particular amount or more, may encourage money launderers to keep the transactions below this limit and thus to be free from the clutches of law[8]. The purpose of this limitation is not understood. The technique of identifying the money laundering offences by way of the Acts being mentioned in the schedule has its limitations. This has been adopted probably to keep the offences within the scheme of the Acts already accepted and enforced by the legal system. At present the Act seems to deal with organized crime, terrorism etc by listing offences in the Indian Penal Code (IPC) such as robbery, dacoity etc. It is in fact not possible to focus these offences by way of the definitions in IPC alone. Moreover, it may lead to misuse. The provisions have been incorporated in the schedule of offences, as it is these provisions, which are often violated in the process of money laundering. Moreover, the list of schedule of offences which are the predicate crimes for the purpose of the offence of money laundering offences are very narrow and limited. The Act has adopted a list approach, which leaves out many other offences involving monetary gain.

Searches are made possible only after charges have been filed. This may hamper investigation though it is necessary to prevent harassment by enforcement officials. The provisions enabling two parallel avenues of adjudication might also lead to confusion and lack of cooperation between the agencies. The Act also does not specify the agency/authority that may investigate cases and file charges in the court for the offences committed.

Be that as it may, the provisions enabling the shifting of burden of proof and the empowering of the Directorate and Adjudicating authorities with provisions for attachment, adjudication and confiscation of properties/ records may help the government to achieve success in controlling if not containing money laundering in India. The Appellate Authority and the High Court may help the accused to have adequate protection from overreaching officials. Provisions against vexatious prosecution signify the concern of the

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8. See Section 2 (y) which defines "Schedule Offence" as follows;
   Schedule Offence means:
   (i) the offences specified under Part A of the Schedule; or
   (ii) the offences specified under Part B of the Schedule if the total value involved in such offences is thirty lakh rupees or more.

legislature for the protection of innocent people. Though the chances for frequent appeals may have the tendency of hindering the progress of enforcement it cannot be denied that it is a welcome enactment in as much as it strikes a proper balance between individual rights and societal rights.

Though the Act has been enacted pursuant to India's obligation under the International Conventions and to implement certain soft law practices, there is a large gap between the international requirements and practices and the provisions of the law.

The fact that the law has been enacted in a half-hearted manner is evident from the position that though the Parliament enacted it in the year 2002 it took 3 years for the Government to implement the same in the year 2005.

The preventive regime under the Act is very limited in its coverage. While only banks, financial institution and certain securities related services are brought under the requirement of record keeping and reporting requirement, certain business and professions are not covered. While under the FATF recommendation, and European AML provisions businesses such as casinos, certain real estate agents and dealers in jewellery and precious stones are covered, in India these activities are not covered. It has been pointed out that these activities involve large scale money laundering. The recent stock market fluctuations, the high price of gold and real estate would show that large amount of laundered money is being used in these sectors.

Hawala transactions are the frequently used channel for money laundering, especially from drug trafficking. It has been estimated that about 40 billion US Dollars are involved in money laundering every year. But, it seems, it remains out of the purview of the Act. Unless, Hawala transaction are either prevented or regulated the Act would loose its effectiveness.

Similarly there is a large gap between the policy and law. The policy of the Government is to prohibit money laundering but in the legislation a huge gap can be found.

There is a large gap between the law and enforcement. There has been a controversy as to who could initiate investigation, whether the State Government or the Central Government or both. Since the predicate crimes are state level crimes, by treating money laundering as a subject matter, which could be investigated only by the Central Government could pose serious problems for its enforcement. There is no conviction till date under the Act.

International cooperation initiated by the U.N. agencies may help our legal system to respond effectively to new situations and challenges thrown up by the multifaceted menace of money laundering.