DSK Legal
True Value. True Values

White-Collar Crime & Corporate Investigations Monthly Newsletter

PREVENTION OF MONEY LAUNDERING ACT

PMLA PROCEEDINGS CANNOT CONTINUE ONCE THE PREDICATE OFFENCE HAS CEASED TO SUBSIST

In a batch of writ petitions challenging proceedings initiated by the Directorate of Enforcement **(ED)** under the Prevention of Money Laundering Act, 2002 **(PMLA)**, the ***Delhi High Court*** dealt with inter alia the question whether after closure of the scheduled offence, proceedings under PMLA could be continued by ED on the basis of an addendum to incorporate an earlier FIR as a scheduled offence. The court reiterated the legal position that proceedings under an ECIR cannot continue once the underlying scheduled offence has ceased to subsist upon acceptance of a Cancellation Report by the competent Court, unless the predicate offence is subsequently revived by a superior Court.

It was held that the subsequent incorporation of an earlier FIR into the ECIR, after the original predicate offence had ceased to exist, could not be used to resurrect the proceedings. Notably, the first FIR, on allegations of wrongful confinement, theft of ornaments, and offences under the Passports Act was registered for materially different offences than the second FIR, which related to the alleged fraudulent transfer of shares and monies by forging signatures on various documents. Applying the test for "same transaction", proximity of time or place, unity of purpose and design, or continuity of action, the Court held that the allegations forming the substratum of the two FIRs were materially different, the accused persons were not identical, and there was no direct nexus between the two sets of offences beyond the common complainant. In the facts before it, the addendum was found to suffer from illegality and procedural impropriety and to bear the imprint of a colorable exercise of power, particularly since the earlier FIR had existed for several years but had not previously been treated as an independent basis for PMLA proceedings. The Court accordingly quashed the ECIR proceedings and coercive actions, while preserving the possibility of revival if the predicate offence was subsequently revived by a superior Court.

Kanchana Rai v. Directorate of Enforcement

NON-ACCUSED PERSONS MAY APPROACH SPECIAL COURT FOR INTERIM SUSPENSION OF LOC TO TRAVEL ABROAD

A writ petition and interim applications were filed before the ***Delhi High Court*** by persons who had not been arrayed as accused seeking temporary suspension of Look-Out Circulars **(LOCs)** under Article 226 of the Constitution, where a prosecution complaint was pending before the Special Court, PMLA. The Court held that, although non-accused status is relevant to the substantive challenge to the LOC, it does not prevent the Special Court from considering an application for temporary permission to travel abroad. Relying upon the judgment in *Sumer Singh Salka v. Asstt. Director 2010 SCC OnLine Del 2699*, the court reiterated that an LOC may be sought to be rescinded by the "person concerned", without requiring that person to have been arraigned as an accused.

The Court further held that an application for temporary suspension of an LOC for foreign travel involves assessment of the purpose and duration of travel, stage of proceedings, likelihood of the person remaining available for investigation, and appropriate safeguards. Since the Special Court was already seized of the prosecution complaint arising from the ECIR, it was considered the appropriate forum to undertake that assessment. Accordingly, the High Court granted liberty to both petitioners to approach the Special Court for temporary suspension of the LOCs, while expressly keeping their substantive challenge to the issuance and continued operation of the LOCs open before the High Court.

Sanjay Dangi & Anr. v. Union of India & Ors.

CRIMINAL PROCEDURE CODE

REJECTION OF AN APPLICATION UNDER S. 156(3) CRPC DOES NOT BAR SUBSEQUENT REGISTRATION OF AN FIR

The ***Supreme Court***, in proceedings concerning the registration of a subsequent FIR following rejection of an application under S. 156(3) of the Code of Criminal Procedure, 1973 **(CrPC)**, held that an order accepting or rejecting an application under S. 156(3) is confined to directing or declining investigation and does not constitute an adjudication on the merits of the allegations. Consequently, rejection of such an application does not attain the finality necessary to attract the doctrine of res judicata and cannot, by itself, bar the subsequent registration of an FIR or continuation of criminal proceedings based on the same or substantially similar allegations. The Court clarified that the statutory duty of the police to register and investigate a cognizable offence flows independently from S. 154 and S. 156 of CrPC and is not dependent upon an order under S. 156(3).

Pramod Kumar Shukla v. State of Uttar Pradesh

PREVENTION OF CORRUPTION ACT

DEMAND MUST BE PROVED BEFORE INVOKING PRESUMPTION UNDER THE PC ACT

The ***Supreme Court*** has held that the statutory presumption under Section 20 of the Prevention of Corruption Act, 1988 **(PC Act)** can be invoked only after the prosecution proves the foundational fact of demand beyond reasonable doubt. Section 20 of PC Act provides that- "Where, in any trial of an offence punishable under section 7 or under section 11, it is proved that a public servant accused of an offence has accepted or obtained or attempted to obtain for himself, or for any other person, any undue advantage from any person, it shall be presumed, unless the contrary is proved, that he accepted or obtained or attempted to obtain that undue advantage, as a motive or reward under section 7 for performing or to cause performance of a public duty improperly or dishonestly either by himself or by another public servant or, as the case may be, any undue advantage without consideration or for a consideration which he knows to be inadequate under section 11."

In this case, the appellants, a Talati-cum-Mantri and a Peon, were convicted for demanding and accepting a bribe in connection with issuance of an income certificate. The Supreme Court found material contradictions in the complainant's testimony regarding the amount allegedly demanded and noted that the complainant had paid INR 20/- to the Peon only after receiving the income certificate, while the Peon himself had not made any demand. The Court held that mere recovery of the tainted amount, in the absence of proof of demand, could not attract the presumption under Section 20 or sustain the conviction and acquitted both appellants.

Rafikmiya Ahmedmiya Malek & Anr. v. State of Gujarat

CORPORATE PROSECUTION CANNOT BE QUASHED MERELY FOR NON-ARRAIGNMENT OF A NATURAL PERSON

The ***Supreme Court*** has held that a criminal prosecution against a corporate entity cannot be quashed solely on the ground that no natural person has been identified or arraigned alongside the company. In this case, the Petitioner company was prosecuted for offences involving mens rea arising from alleged irregularities in the procurement of pharmaceutical products by BARC, although none of its employees or officials had been arraigned as accused.

The Court held that a corporation could possess mens rea through the process of attribution, whereby the acts and state of mind of natural persons may, depending on the circumstances and statutory purpose, be attributed to the corporation. The Court further held that identification and arraignment of a natural person are not mandatory at the threshold for maintaining prosecution against a corporation, and the question of attribution is ordinarily one to be examined at trial. However, the allegations must prima facie disclose that natural persons acted on behalf of the corporation in relation to the alleged offence and that the surrounding circumstances do not render the

existence of mens rea patently absurd or inherently improbable. Since the allegations and material on record in the present case disclosed such circumstances, the Supreme Court declined to quash the proceedings and dismissed the appeal.

Sanofi India Ltd. v. Central Bureau of Investigation

Disclaimer: ***This newsletter does not purport to be and should not be treated as professional guidance or a legal opinion on any subject. The information has been compiled from different sources and does not reflect the opinions/views of DSK Legal. If you no longer wish to receive such emails from us, feel free to write to us at Knowledge.Management@dsklegal.com. Thank you for your cooperation and understanding.***

White-Collar Crime and Corporate Investigations Practice

We have a skilled team specialized in criminal law, corporate/ transactional law, Intellectual Property and technology law, with considerable experience in criminal defence and regulatory enforcement.

Our knowledge of the enforcement landscape and understanding of the approach employed by regulators and investigating agencies enables us to anticipate the litigation trajectory and take steps to avoid/mitigate liability where possible.

The WCC team also works closely with the larger litigation practice to combat the substantial civil litigation risks that often accompany criminal and regulatory issues.

Competencies

Our subject matter competencies include the following:

- Fraud and Business Crime
- Money Laundering and FEMA
- Anti-Bribery, Anti-Corruption, and Investigations
- Securities Fraud
- Data Protection and Cyber Security
- Licensing Control
- Sanctions

Agencies/Authorities

We have represented clients before the following agencies:

- Directorate of Enforcement (ED)
- Central Bureau of Investigations (CBI)
- Serious Fraud Investigation Office (SFIO)
- Crime Branch/ Economic Offence Wing (EOW)
- Police Cyber Units
- Adjudicating Authorities and Appellate Tribunals under PMLA
- State Adjudicating Authorities (appointed under the Information Technology Act, 2000)
- Securities and Exchange Board of India (SEBI)
- Reserve Bank of India (RBI)
- Directorate of Revenue Intelligence (DRI)

Key Contacts:



Mr. Vikrant Singh Negi | Partner
vikrantsingh.negi@dsklegal.com



Ms. Ekta Tyagi | Partner
ekta.tyagi@dsklegal.com

Contributors:

Priyamvada Singhania, Sneha Barange, Parag Kabra, Shreedhar Joshi, Aishwarya Pawar, Srishti Srivastav and Aarya Deshpande.