

Pay Perform India Private Limited vs The Union Of India on 31 January, 2024

Bench: Sanjay V.Gangapurwala, D.Bharatha Chakravarthy

W.P.No.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31.01.2024

CORAM :

THE HON'BLE MR.SANJAY V.GANGAPURWALA, CHIEF JUSTICE
AND

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

Writ Petition No.12925 of 2023
and W.M.P.Nos.12709 & 12710 of 2023

Pay Perform India Private Limited
Represented by its Director Srinivasa Vijayaraghavan
Urban Square, S.F.No.278/3A1, 278/3A2 & 278/9A
OMR, Kandanchavadi, Kottivakkam
Rajiv Gandhi Salai
Chennai – 600 041.

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Versus

1. The Union of India
Ministry of Finance
Represented by its Secretary
North Block
New Delhi – 110 001.

2.Assistant Director
Enforcement Directorate
Dimapur Sub-Zonal Office
Guwahati Zonal Office
Guwahati.

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Prayer : Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Declaration, to declare that Sections 6 (2),

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<https://www.mhc.tn.gov.in/judis>

(3) (a) (ii) and Section 6 (5) (b) of the Prevention of Money Laundering Act, 2002, are unconstitutional for violating Article 14 of the Constitution

For the Appellant : Mr.S.R.Raghunathan
for Mr.Manjunath Karthikeyan

For the Respondents: Mr.A.R.L.Sundaresan
Additional Solicitor General of India
Assisted by
Mr.N.Ramesh
Special Public Prosecutor for R2

ORDER

(Order made by the Hon'ble Mr.Justice D.Bharatha Chakravarthy) A. The Writ Petition:

This Writ Petition is filed to declare that the Sections 6 (2), 6 (3)(a)(ii) and 6 (5)(b) of the Prevention of Money Laundering Act, 2002 (Act No. 150 of 2003) as unconstitutional for violating Article 14 of the Constitution of India.

B. The Brief Facts:

2. The facts in brief are that a case in Cr. No.3 of 2021 was registered on the file of the Cyber Crime Police Station, Kohima, Nagaland for the <https://www.mhc.tn.gov.in/judis> alleged offenses under Sections 420, 120B of Indian Penal Code, 1860 read with Section 66 (D) of the Information Technology Act, 2000. The gist of allegations in the above case is that HPZ token, an application based token promised users, of large gains against investment by investing in mining machines for Bitcoin and other crypto currencies. The investors were assured that their invested money was being used to buy various mining machines by which crypto currencies were being mined and they were receiving or will receive gains against sale of such crypto currencies. However, the application stopped working and the investors were not allowed to withdraw the money.

Total credits/debits in UPI linked accounts in relation to the case were approximately Rs. 115 crores which were transferred to various entities/individuals.

2.1. Since the offences were Schedule Offences under the Prevention of Money Laundering Act, 2002 (hereinafter 'PMLA'), upon conduct of preliminary enquiry, a case for money laundering as defined under Section 3 punishable under Section 4 of PMLA was made out and a case in ECIR No. GWZO-II/09/2022 was registered on 12.04.2022 and was taken up for <https://www.mhc.tn.gov.in/judis> investigation. Investigation revealed that a web of companies and individuals were involved in laundering the above proceeds of crime. The respondents had reason to believe that the petitioner herein, namely, Pay Perform India Private Limited and its Directors and Officers were also involved in money laundering.

2.2 Between 09.02.2023 to 11.02.2003 search was conducted in the premises of the petitioner and certain materials were seized. Bank accounts were freezed. The Directors were summoned and inquired. Subsequently an application was filed in O.A. No. 822 of 2023 before the Adjudicating Authority under PMLA for retention of the records and materials seized as per Section 17(4) of the PMLA. After recording the reasons as per Section 8(1) of the PMLA, a show cause notice dated 16.03.2023, was issued to the petitioner to file a reply.

C. The Case of the Petitioner:

3. It is at this stage, while keeping open its defence on merits to be taken up before the Adjudicating Authority, the vires of the provisions mentioned in para 1 above are challenged. It is the case of the petitioner that <https://www.mhc.tn.gov.in/judis> the Adjudicating Authority acts as a Tribunal and it has the trappings of a Court deciding the rights of the parties. It cannot be without a judicial member and thus the very constitution is illegal. The impugned provision also enables constitution of single Member Bench by which there can be a Bench without the legally qualified Member, which is per se illegal. D. The Case of the Respondents:

4. The Writ Petition is resisted by filing a counter affidavit on behalf of the respondents. It is submitted that the members of the Indian Legal Service are qualified to be appointed as Judicial Members. The Adjudicatory Authority is not a Tribunal but is in the form of an additional internal safe guard. The Adjudicatory Authority is like the original authority under the Income Tax Act, Customs Act etc., and the deciding of lis starts only at the Appellate Tribunal, which is constituted with qualified Judicial Member. The validity of PMLA including the present provisions has been upheld by the Hon'ble Supreme Court of India and various High Courts. The power of the Chairperson to constitute single Member Bench cannot also be termed as illegal. <https://www.mhc.tn.gov.in/judis> E. The Submissions:

5. We have heard Mr. S.R. Raghunathan, the Learned Counsel for the Petitioner and Mr. AR.L. Sundaresan, the learned Additional Solicitor General of India on behalf of the respondents.

5.1 Mr. S.R. Raghunathan, would submit that Section 6(2) insofar as it enables members from the field of administration, finance or accountancy to be members of Adjudicating Authority and Section 6(3)(a)(b) insofar as it enables a person from the Indian Legal Service to be appointed as a member from the field of law, is violative of the doctrine of separation of powers and is offensive of Article 14 of the Constitution.

5.2 The Adjudicating Authority exercises powers under Section 8 of the PMLA which are essentially judicial functions. It has all the trappings of a Court/Tribunal. It has the powers of a Civil Court as per Section 11. It can summon persons under Section 11 (2) and the proceedings are deemed to be Judicial Proceedings under Section 11(3). Section 41 bars jurisdiction of Civil Courts in respect of matters to be decided by Adjudicating Authority. <https://www.mhc.tn.gov.in/judis> 5.3 A preview of Regulations framed for the exercise of power more specifically from Regulation 3 to 26, it would be clear that a detailed procedure for filing of applications and complaints, signing and attestation of pleadings, cases being registered and numbered, printing of daily cause list, Bench to be assisted by

Court Master, procedure of issue of summons and notices, bringing of legal representatives on record, inspection of records on payment of fees, issue of certified copies of orders, witness examination and recording of deposition, procedure for marking documents and pronouncement of orders in open court, all of which categorically establish the judicial nature of power exercised by the Adjudicating Authority.

5.4 In support of his submissions, the Learned Counsel placed strong reliance on various paragraphs of the Judgment of Supreme Court of India in Union of India and Anr. Vs. Madras Bar Association¹ and finally the conclusions reached in paragraph 120, to contend that when judicial functions are entrusted to any Tribunal, their composition must contain Judicial Members and appointment of Technical members is only an exception. To contend that 1 (2010) 11 SCC 1 <https://www.mhc.tn.gov.in/judis> the Adjudicating Authority is not a regulatory body but a Tribunal exercising judicial functions, he would rely upon the Judgment of the Hon'ble Supreme Court in State of Gujarat Vs. Utility Users Welfare Association² more particularly to paragraph Nos. 104, 110, 117, 118, 120 and 121.

5.5 Mr. S.R. Raghunathan, would press into service the Judgment in Associated Cement Companies Ltd Vs. P.N. Sharma and another³, more specifically to paragraph Nos. 7 and 8 to demonstrate the difference between administrative and judicial functions and the manner in which the State is expected to discharge the judicial functions. Further relying upon paragraph No.33 of the Judgment, he would contend that the functions discharged if are inherently judicial functions, then the authority is deemed to be a Tribunal.

5.6 Adverting the Judgments relied upon by the respondents, Mr.S.R. Raghunathan, would submit that the Judgment of the three Judge Bench in Pareena Swarup Vs Union of India⁴ is in the context of the defects 2 (2018) 6 SCC 21 3 AIR 1965 SC 1595 4 (2008) 14 SCC 107 <https://www.mhc.tn.gov.in/judis> highlighted in paragraph No. 8 of the judgment which are different than that of the present claim and further the Bench passed orders accepting the undertaking that through the proposed amendments the defects would be cured. Similarly before the Delhi High Court in J. Sekar Vs Union of India & ors⁵, the petitioner did not raise the grounds regarding including of members of the fields of finance, administration or Indian Legal Service. This Court is entitled to consider the constitutional validity of the provisions in the light of Madras Bar Association Case (cited supra).

5.7 Per contra, Mr.ARL. Sundaresan, learned Additional Solicitor General of India would submit that PMLA is a special law enacted to deal with the offences of money-laundering and matters incidental thereto. The scheme of the Act is that Section 3 defines the offence of money-laundering, Section 4 prescribes the punishment for money-laundering, Section 5 defines provisional attachment of property involved in money-laundering and Section 6 provides for composition and powers of Adjudicating Authority. The manner of adjudication is provided under Section 8. As against the orders passed by the Adjudicating Authority under Section 8, an appeal is provided before the 5 (2018 SCC Online Del 13481) <https://www.mhc.tn.gov.in/judis> Appellate Tribunal under Section 26 of the Act. The constitution of Tribunal is as per Section 25 of the Act and all orders of the Tribunal are further appealable to the High Court under Section 42 of the Act. This

apart, for trial of offences, Special Courts are constituted under Section 43 of the Act. The properties, which are attached by the adjudicating authority, subject to further appeals would be ultimately dealt with by the Special Court at the time of final adjudication of the matter, as per Section 44 of the Act. As against the decision of the Special Court, again a right of appeal / revision is provided to the High Court under Section 47 of the Act.

5.8 Mr. ARL Sundaresan, would further submit that a perusal of the scheme as referred above would show that the power is conferred on the Director or any other Officer not below the rank of Deputy Director to pass provisional orders of attachment. The said provisional order of attachment cannot be beyond 180 days. Within 30 days of passing of such provisional order, a complaint in the prescribed format should be filed before the Adjudicating Authority and on receipt of the same, the Adjudicating Authority would pass orders confirming the order of attachment if it is satisfied that the <https://www.mhc.tn.gov.in/judis> property is involved in money laundering. If it is not satisfied, it will order release of the property. The Adjudicating Authority constituted under Section 6 of the Act is neither judicial nor quasi judicial Tribunal, but is an authority which is created for the purpose of having checks and balances within the system so as to review and confirm the orders of the provisional attachment made by the Officers of Enforcement Directorate.

5.9 The nature of power is as the original authority and the lis / adjudicatory function starts only at the appellate stage. The Appellate Tribunal is constituted by having a Judicial Member and the same is in consonance with the dictum of the Judgment of the Hon'ble Supreme Court in the Madras Bar Association Case (cited supra). As far as the Adjudicating Authority is concerned, it is neither a Tribunal nor any power of the Court which is vested in the said authority. There are such original authorities / Adjudicating Authorities under various enactments such as the Income Tax Act, Customs Act, Foreign Exchange Management Act, etc.,. All the adjudication in those cases are done only by the concerned Officers of the same Department and not by Judicial Officers. As a matter of fact, in the Income Tax Act, even the First <https://www.mhc.tn.gov.in/judis> Appeal, viz., Appellate Assistant Commissioner is only a departmental Officer and only at the level of Income Tax Appellate Tribunal, there is a presence of Judicial Member. Thus, on a careful perusal of nature of powers exercised by the Adjudicating Authority, it would be clear that it is not a Tribunal.

5.10 Mr.ARL Sundaresan, learned ASGI would submit that all these have been duly considered by the Division Bench of the Delhi High Court in J.Sekar's case (cited supra). The issues have been more particularly decided in paragraph Nos.79 to 87 of the said Judgment. The self same issue was again considered by the Division Bench of the Calcutta High Court in R.P.Infosystems Limited and Anr., Vs. Adjudication Authority and Anr.,6 more specifically in paragraph Nos.17,20,21, 26 to 29.

5.11 Merely because the power has been given to the Chairman to constitute Benches, which include Single Member Bench, the same would not be illegal. There is a presumption of constitutional validity to the Act and Section 6 as such. As a matter of fact, the issue of constitutional validity of PMLA was raised before the Hon'ble Supreme Court in Pareena Swarup's 6 2023 SCC OnLine Cal 2391 <https://www.mhc.tn.gov.in/judis> case (cited supra) and perusal of the paragraph Nos.1, 4, 8 (7), 11 (7) and 12 of the said Judgment would show that the constitutionality as to the composition and qualification of the members of the Adjudicating Authority were all specifically raised and gone

into and already decided by the Hon'ble Supreme Court. The submissions of the respondents regarding the functions and power of the Adjudicating Authority are specifically considered and accepted in paragraph No.11 (7). The further amendments to the section were also considered and it was held by the Hon'ble Supreme Court that the provisions are valid and therefore, on this ground also the challenge made to Section 6 cannot be stalled and has no legs to stand.

5.12 The learned Additional Solicitor General of India (ASGI) would further rely upon the Judgment of the Supreme Court in *Maqbool Hussain Vs. State of Bombay*⁷ to contend that even the customs authority exercising power under Customs Act, though exercise the functions such as confiscation, determination of duty, imposition of penalty, etc and pass orders adversely affecting the rights of the parties, that by itself would not make them a Tribunal.

⁷ (1953) 1 SCC 736 <https://www.mhc.tn.gov.in/judis> 5.13 The learned ASGI would submit that a reading of the Judgment by the Constitution Bench in *Shayara Bano Vs. Union of India and Ors.*,⁸ would make it clear that the plenary legislation can be challenged only on the grounds of legislative incompetence, violation of fundamental rights or manifest arbitrariness. He would submit that no such grounds are made out in the present challenge. The learned ASGI would also place reliance on the Judgment of the Hon'ble Supreme Court of India in *Union of India Vs. Namit Sharma*⁹ to contend that in the wake of presumption of constitutionality, the provisions of an enactment cannot also be read down which would amount to re-writing the law. For all the above reasons, he would submit that the challenge to Section 6 should fail.

F. The Points for Consideration:

6. We have considered the rival submissions made on either side and perused the material records of the case. The following questions arise for consideration in this Writ Petition,

(i) Whether the composition of Adjudicating Authority is bad in law, ⁸ (2017) 9 SCC 1 ⁹ (2013) 10 SCC 359 <https://www.mhc.tn.gov.in/judis> in as much as it is not manned by a Judicial Officer/person eligible to be appointed as Judicial Officer ?

(ii) When the Adjudicating Authority is considered to be a single entity / institution, whether the power conferred on the Chairman to constitute single / two member Benches which can be even without a legal Member is illegal ?

G. Question No.(1):-

7. The entire Section 6 of PMLA is extracted hereunder for ready reference, “6. Adjudicating Authorities, composition, powers, etc.— (1) The Central Government shall, by notification, appoint [an Adjudicating Authority] to exercise jurisdiction, powers and authority conferred by or under this Act.

(2) An Adjudicating Authority shall consist of a Chairperson and two other Members: Provided that one Member each shall be a person having experience in the field of law, administration, finance or

accountancy.

(3) A person shall, however, not be qualified for appointment as Member of an Adjudicating Authority,—

(a) in the field of law, unless he— (i) is qualified for appointment as District Judge; or (ii) has been a member of the Indian Legal Service and has held a post in Grade I of that service;

(b) in the field of finance, accountancy or administration unless he possesses such qualifications, as may be prescribed. (4) The Central Government shall appoint a Member to be the Chairperson of the Adjudicating Authority.

(5) Subject to the provisions of this Act,— <https://www.mhc.tn.gov.in/judis>

(a) the jurisdiction of the Adjudicating Authority may be exercised by Benches thereof;

(b) a Bench may be constituted by the Chairperson of the Adjudicating Authority with one or two Members as the Chairperson of the Adjudicating Authority may deem fit;

(c) the Benches of the Adjudicating Authority shall ordinarily sit at New Delhi and such other places as the Central Government may, in consultation with the Chairperson by notification, specify;

(d) the Central Government shall, by notification, specify the areas in relation to which each Bench of the Adjudicating Authority may exercise jurisdiction.

(6) Notwithstanding anything contained in sub-section (5), the Chairperson may transfer a Member from one Bench to another Bench.

(7) If at any stage of the hearing of any case or matter it appears to the Chairperson or a Member that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members, the case or matter may be transferred by the Chairperson or, as the case may be, referred to him for transfer, to such Bench as the Chairperson may deem fit.

(8) The Chairperson and every Member shall hold office as such for a term of five years from the date on which he enters upon his office: Provided that no Chairperson or other Member shall hold office as such after he has attained the age of 2 [sixty-five] years.

(9) The salary and allowances payable to and the other terms and conditions of service of the Member shall be such as may be prescribed: Provided that neither the salary and allowances nor the other terms and conditions of service of the Member shall be varied to his disadvantage after appointment. (10) If, for reasons other than temporary absence, any vacancy occurs in the office of the Chairperson or any other Member, then the Central Government shall appoint another person in accordance with the provisions of this Act to fill the vacancy and the proceedings may be continued before the Adjudicating Authority from the stage at which the vacancy is filled. (11) The Chairperson

or any other Member may, by notice in <https://www.mhc.tn.gov.in/judis> writing under his hand addressed to the Central Government, resign his office: Provided that the Chairperson or any other Member shall, unless he is permitted by the Central Government or relinquish his office sooner, continue to hold office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is the earliest.

(12) The Chairperson or any other Members shall not be removed from his office except by an order made by the Central Government after giving necessary opportunity of hearing.

(13) In the event of the occurrence of any vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the senior-most Member shall act as the Chairperson of the Adjudicating Authority until the date on which a new Chairperson appointed in accordance with the provisions of this Act to fill such vacancy, enters upon his office.

(14) When the Chairperson of the Adjudicating Authority is unable to discharge his functions owing to absence, illness or any other cause, the senior most Member shall discharge the functions of the Chairperson of the Adjudicating Authority until the date on which the Chairperson of the Adjudicating Authority resumes his duties.

(15) The Adjudicating Authority shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908, (5 of 1908) but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Adjudicating Authority shall have powers to regulate its own procedure.” 7.1 It is also essential to note that originally Section 6 (1) of the Act envisaged more than one Adjudicatory Authority to exercise jurisdiction, powers and authority conferred under this Act. The said provision has been amended to make the Adjudicating Authority as a single entity and the current <https://www.mhc.tn.gov.in/judis> provision is extracted in paragraph No.7, which establishes now a single Adjudicating Authority for the entire country.

7.2 Section 8 of PMLA which delineates the powers and functions exercised by the authority is extracted hereunder:-

“8. 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 subsection (10) of section 18, if the Adjudicating Authority has reason to believe that any person has committed an 1 [offence under section 3 or is in possession of proceeds of crime], he 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 2 [or frozen] 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 involved in money-

laundering and confiscated by the Central Government:

Provided that where a notice under this sub-section specifies any property as being held by a person on behalf of any other person, a copy of such notice shall also be served upon such other person:

Provided further that where such property is held jointly by more than one person, such notice shall be served to all persons holding such property.

(2) The Adjudicating Authority shall, after—

(a) considering the reply, if any, to the notice issued under subsection (1);

(b) hearing the aggrieved person and the Director or any other officer authorised by him in this behalf, and

(c) taking into account all relevant materials placed on record <https://www.mhc.tn.gov.in/judis> before him, by an order, record a finding whether all or any of the properties referred to in the notice issued under sub-

section (1) are involved in money-laundering:

Provided that if the property is claimed by a person, other than a person to whom the notice had been issued, such person shall also be given an opportunity of being heard to prove that the property is not involved in money-laundering. (3) Where the Adjudicating Authority decides under sub-

section (2) that any property is involved in money-laundering, he shall, by an order in writing, confirm the attachment of the property made under sub-section (1) of section 5 or retention of property or [record seized or frozen under section 17 or section 18 and record a finding to that effect, whereupon such attachment or retention or freezing of the seized or frozen property] or record shall—

(a) continue during the pendency of the proceedings relating to any [offence under this Act before a court or under the corresponding law of any other country, before the competent court of criminal jurisdiction outside India, as the case may be; and] [(b) become final after an order of confiscation is passed under subsection (5) or sub-section (7) of section 8 or section 58B or sub-section (2A) of section 60 by the Adjudicating Authority] (4) Where the provisional order of attachment made under sub-section (1) of section 5 has been confirmed under sub- section (3), the Director or any other officer authorised by him in this behalf shall forthwith take the 4 [possession of the property attached under section 5 or frozen under sub-section (1A) of section 17, in such manner as may be prescribed:

Provided that if it is not practicable to take possession of a property frozen under sub-section (1A) of section 17, the order of confiscation shall have the same effect as if the property had been taken possession of.] [(5) Where on conclusion of a trial of an

offence under this Act, the Special Court finds that the offence of money- laundering has been committed, it shall order that such property involved in the money-laundering or which has been used for commission of the offence of money-laundering shall <https://www.mhc.tn.gov.in/judis> stand confiscated to the Central Government.] [(6) Where on conclusion of a trial under this Act, the Special Court finds that the offence of money-laundering has not taken place or the property is not involved in money- laundering, it shall order release of such property to the person entitled to receive it.] [(7) Where the trial under this Act cannot be conducted by reason of the death of the accused or the accused being declared a proclaimed offender or for any other reason or having commenced but could not be concluded, the Special Court shall, on an application moved by the Director or a person claiming to be entitled to possession of a property in respect of which an order has been passed under sub-section (3) of section 8, pass appropriate orders regarding confiscation or release of the property, as the case may be, involved in the offence of money laundering after having regard to the material before it.] [(8) Where a property stands confiscated to the Central Government under sub-section (5), the Special Court, in such manner as may be prescribed, may also direct the Central Government to restore such confiscated property or part thereof of a claimant with a legitimate interest in the property, who may have suffered a quantifiable loss as a result of the offence of money laundering:

Provided that the Special Court shall not consider such claim unless it is satisfied that the claimant has acted in good faith and has suffered the loss despite having taken all reasonable precautions and is not involved in the offence of money laundering:] [Provided further that the Special Court may, if it thinks fit, consider the claim of the claimant for the purposes of restoration of such properties during the trial of the case in such manner as may be prescribed.]” 7.3 The Hon'ble Supreme Court of India in *Madras Bar Association Case* (cited *supra*) considered the issue of any statute entrusting adjudicatory <https://www.mhc.tn.gov.in/judis> functions to Tribunals in detail. It held that the independence of judiciary and the doctrine of separation of powers are part of the basic structure of the Constitution. The State has powers to constitute Tribunals. If a judicial function traditionally performed by Courts is entrusted to a Tribunal, the same should only be judicial Tribunal. That would mean that the Tribunal should have members who should have independence and security of tenure associated with judicial Tribunals. There can also be technical members, when it is essential to have technical expertise. Therefore, only Judges and Advocates can be considered for appointment as Judicial Members of the Tribunals. The Supreme Court specifically considered the qualification of the Judicial Members and the Technical Members in the NCLT and NCLAT and laid down the qualifications in detail thereto, holding that the provisions in the Companies Act as *ultra vires*.

7.4 The Hon'ble Supreme Court of India in *State of Gujarat Vs. Utility Users Welfare Association*¹⁰ considered the composition of the State Electricity Commission and held that even though the State Electricity commission had regulatory and advisory

functions, it also had adjudicatory 10 (2018) 6 SCC 21 <https://www.mhc.tn.gov.in/judis> functions to be performed. Once it has adjudicatory functions to be performed, it becomes a quasi judicial Tribunal, having the trappings of a Court. Once any authority / Tribunal has trappings of the Court, then such authority should be manned only by a person who is or has been holding a judicial office or of a person possessing qualification in law and has the requisite qualification to be appointed as a Judge of the High Court or as a District Judge. Even the presence of the Appellate Tribunal would not obviate such a need.

7.5 The Hon'ble Supreme Court of India in Associated Cement Company's case (cited supra) had explained the meaning of judicial powers and functions and the distinction between administrative and judicial functions.

It is essential to extract the relevant portion of paragraph Nos.7 and 8 which are hereunder:-

“ 7. A sovereign State discharges legislative, executive and judicial functions and can legitimately claim corresponding powers which are described as legislative, executive and judicial powers. Under our Constitution, the judicial functions and powers of the State are primarily conferred on the ordinary courts which have been constituted under its relevant provisions. The Constitution recognised a hierarchy of courts and to their adjudication are normally entrusted all disputes between citizens and citizens as well as between the citizens and the State. These courts can be described as ordinary courts of civil judicature. They are governed by their prescribed rules of procedure and they deal with questions of fact and law raised before them by adopting a process which is described as judicial process. The powers <https://www.mhc.tn.gov.in/judis> which these courts exercise, are judicial powers, the functions they discharge are judicial functions and the decisions they reach and pronounce are judicial decisions.

8. In every State there are administrative bodies or authorities which are required to deal with matters within their jurisdiction in an administrative manner and their decisions are described as administrative decisions. In reaching their administrative decisions, administrative bodies can and often do take into consideration questions of policy. It is not unlikely that even in this process of reaching administrative decisions, the administrative bodies or authorities are required to act fairly and objectively and would in many cases have to follow the principles of natural justice; but the authority to reach decisions conferred on such administrative bodies is clearly distinct and separate from the judicial power conferred on courts, and the decisions pronounced by administrative bodies are similarly distinct and separate in character from judicial decisions pronounced by courts.” 7.6. Apart from the above Judgments, useful reference on the point as to the necessity of maintaining the standards as the higher Courts and appointment of Judicial Members who have the qualification to function as Judicial Officers can be made to the Judgment of the Hon'ble Supreme Court of India in Madras Bar Association Vs. Union of India and Anr.¹¹ In this matter the Hon'ble Supreme Court of India has dealt with the constitutional validity of the National Tax Tribunal Act, 2005. The law on the point is once again recapsulated and elucidated by the Hon'ble Supreme Court of India in Rojer

11 (2014) 10 SCC 1 <https://www.mhc.tn.gov.in/judis> Mathew Vs. South Indian Bank Limited¹², wherein it has considered the constitutional validity of Part XIV of the Finance Act, 2014 and the Tribunal / Appellate Tribunal and other authorities (Qualification Experience and Other Conditions of Service of Members) Rules 2017.

7.7 This Court also considered the issue in the context of qualifications of the members of the Intellectual Property Appellate Board constituted under the Trademarks Act, 1999 in Shamnad Basheer Vs. Union of India¹³.

7.8 Thus, upon consideration of the above decisions, it would be clear that any law providing for the constitution of any authority would be legal if only it is manned by Judges/Judicial Officers or persons who were or eligible to be appointed as Judicial Officers (i) if it is a Judicial Tribunal created under Article 323A or 323B of the Constitution of India; (ii) if it transfers any adjudicatory functions hitherto exercised by the Courts in India; (iii) if it adjudicates the rights of parties has the trappings of a Court/Tribunal. 12 (2020) 6 SCC 1 13 (2015) 2 LW 941 (Mad) (DB) <https://www.mhc.tn.gov.in/judis> 7.9 In the instant case, the Adjudicating Authority is constituted under Section 6 of the PMLA. Admittedly, the said authority is not a Tribunal, constituted under Article 323-A or 323-B of the Constitution of India. It cannot also be said that any power which was being hitherto exercised by the Courts are transferred to the authority. The submission made on behalf of the petitioner is that since a complaint is filed and the authority hears the aggrieved person whose properties are attached, decides the lis and as such discharges judicial function.

7.10 In this context, it is essential to advert to the functions of the Adjudicating Authority. PMLA deals with the economic offence of Money Laundering. Therefore it is not enough that the guilty is punished, but at the same time, focus is also on the recovery of the proceeds of the crime, which is laundered. Therefore, confiscation of such proceeds of crime or properties purchased out of such crimes becomes essential. Until the ultimate confiscation to be made after the finding of the guilt in the Trial, Section 5 of the PMLA authorises the Director or any other Officer not below the rank of Deputy <https://www.mhc.tn.gov.in/judis> Director to pass an order of provisional attachment of any property which shall be valid for a period of 180 days. Immediately after an order of attachment is passed, the said order along with the materials gathered in support of the decision has to be forwarded to the Adjudicating Authority. Thereafter, within a period of 30 days from the provisional attachment, a complaint stating the facts of the attachment shall also be filed before the Adjudicating Authority.

7.11 Upon receipt of the complaint under sub-section (5) of Section 5, the Adjudicating Authority if it has reasons to believe that a person has committed an offence under Section 3 or is in possession of proceeds of crime, will serve a notice of not less than 30 days, calling upon him to indicate the sources of income, earning or assets, out of which or by means of which he has acquired the property attached and show cause as to why all or any of such properties should not be declared to be the properties involved in money- laundering and to be confiscated to the Central Government. After considering the reply and hearing the aggrieved person as well as the Officer who made the provisional attachment, the Adjudicating Authority has to record a finding, whether the properties are involved in money-laundering. If the Adjudicating <https://www.mhc.tn.gov.in/judis> Authority

decides that the property involved in money-laundering then an order confirming the provisional attachment is made. Such attachment shall be till the pendency of the proceedings before the Special Court and a final order of confiscation or release, as the case may be, will be passed by the Special Court. Thus, it can be seen that the primary function of the Adjudicating Authority is to form an initial opinion as to the existence of 'reason to believe' that an offence that whether the property is involved in the offence of money- laundering and thereafter to make the order of attachment absolute, until the disposal of the case by the Special Court. Similar function is exercised in respect of retention/freezing of any property if the Investigating Authority, viz., the Director or any other Officer under the Act, after seizure and search under Section 17 of the Act, forward any record or property or when they freeze any record or property. Further, upon search of persons under Section 18, if any record or property are seized shall be forwarded to the Adjudicating Authority, within a period of 30 days, with a prayer requesting for retention of such record or property. Upon receipt of the above requests, the Adjudicating Authority again if it has reason to believe that the same are related to the commission of offence of money-laundering or proceeds of crime, will pass similar orders <https://www.mhc.tn.gov.in/judis> extending the retention until the Trial.

7.12 Thus, on a closer scrutiny, it can be seen that the function of the Adjudicatory Authority is that of the original authority exercising the administrative function under the Act, that is, formation of an opinion as to 'reason to believe' and making the orders absolute after satisfying as to the correctness of its opinion after hearing the parties. It can be seen that the Adjudicating Authority itself is in place as a check and balance so that the power is not exercised solely by the investigating officer. To ensure fairness, the Adjudicating Authority is required to comply with the principles of natural justice and the Director or the other Officer making the order of provisional attachment or searching the person, is required to make an application putting forth such materials gathered in his investigation. The entire purpose is to form a proper and fair opinion.

7.13 It is trite that even in an administrative actions, principles of natural justice are to be followed. The Administrative Authority conducts a statutory hearing and in that process, it only deals with the 'administrative <https://www.mhc.tn.gov.in/judis> case'. The enquiry is limited to confirmation of prima facie opinion / reason to believe. The same does not manifest into a lis.

7.14 Similarly it does not also conclusively decide as to whether any property or thing is part of / proceeds of crime or out of any involvement in money-laundering. It is ultimately the Special Court which decides the rights of the parties. The Officer making the provisional attachment, and the party, is heard, only in compliance of principles of natural justice and ensuring fairness in its own inquiry in confirming of its opinion and it is not deciding any lis between the Officer making the provisional attachment and the person whose property is attached.

7.15 The Adjudicating Authority is vested with powers to issue summons and production of documents etc. under Section 11 which is extracted hereunder:-

Section 11. Power regarding summons, production of documents and evidence, etc.

1. The Adjudicating Authority shall, for the purposes of this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a <https://www.mhc.tn.gov.in/judis> suit in respect of the following matters, namely:

(a) discovery and inspection;

(b) enforcing the attendance of any person, including any officer of a banking company or a financial institution or a company, and examining him on oath;

(c) compelling the production of records;

(d) receiving evidence on affidavits;

(e) issuing commissions for examination of witnesses and documents; and

(f) any other matter which may be prescribed.

(2) All the persons so summoned shall be bound to attend in person or through authorised agents, as the Adjudicating Authority may direct, and shall be bound to state the truth upon any subject respecting which they are examined or make statements, and produce such documents as may be required. (3) Every proceeding under this section shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code (45 of 1860).

7.16 It can be seen that in order to aid the Adjudicating Authority in the process of its formation of its opinion and of making an ad-interim attachment, the powers of discovery and inspection, enforcement of attendance of any person, compelling the production of records, receiving evidence on affidavits, issuing commission for examination of witnesses and documents, are granted. Ultimately it is for the purpose of dealing with the 'administrative case' and that by itself will not in any manner alter the Adjudicating Authority as 'the Tribunal or the Court'. As a matter of fact Section 11(3) clearly states <https://www.mhc.tn.gov.in/judis> that the proceedings shall be deemed to be judicial within the meaning of Section 193 and 228 of the IPC only. Thus it is concerned with ensuring truth in statements made before the Adjudicating Authority.

7.17 We have already extracted paragraph 8 of the Judgment of the Hon'ble Supreme Court of India in Associated Cement Company's case (cited supra). We are of the opinion that the same squarely covers the powers and functions of the Adjudicating Authority under Section 8 of the PMLA. Thus, we do not find that the Adjudicating Authority is a judicial or quasi judicial Tribunal deciding the rights of the parties or that it has the trappings of a Court / Tribunal. In the absence of the same, we are of the view that the principles enunciated by the Hon'ble Supreme Court of India that the Tribunal / authority exercising judicial functions should be manned by Judicial Officers, cannot be extrapolated to the Adjudicating Authority under PMLA. Just because more and more 'judicial colour' is given to the procedure to be followed, that by itself will not alter the nature of power

exercised by the Adjudicating Authority.

7.18 As rightly contended by the learned ASGI such Adjudicating <https://www.mhc.tn.gov.in/judis> Authorities / Competent Authorities exercising such similar powers are constituted in many other legislations such as the Customs Act, 1962 (Section

122), Income Tax Act, 1961 (Section 6), Benami Transaction (Prohibition) Act, 1988 (Section 8), Tamilnadu Protection of Interest of Depositors (in Financial Establishments) Act, 1997 (Section 3), etc.. These authorities are there to ensure administrative fairness and prevalence of natural justice in the ad-interim decisions which are made pending final decision of the concerned Courts/Tribunals and they are manned by mostly by the Departmental Officers and not by Judicial Officers.

7.19 The term 'Adjudicating Authority' by itself or the detailed procedure laid down for hearing will not alter the nature of action. The provisional attachment originates from the Officer concerned and after the process, metamorphosing into an ad-interim attachment, even though the aggrieved person is also heard in the process. In the scheme of PMLA, it transforms the issue into a 'lis' only from the stage of appeal to the Appellate Tribunal, thus, the Adjudicating Authority remains the Original Authority which makes the decision¹. Accordingly, we answer the Question No.1, that 1 Useful reference can be made in this regard to Chapter -14 , titled "Right to Fair Hearing", on the sub-topics 'Administrative Cases' and 'Statutory Hearings' at page 308, 401 etc of the book, 'Administrative Law' by <https://www.mhc.tn.gov.in/judis> the constitution of Adjudicating Authority as such by Section 6 is not illegal for want of Judicial Officers/persons qualified to be appointed as Judicial Officers or who were Judicial Officers.

H. Question No.2:

8. After the amendment to Section 6, vide Act 21 of 2009, now only a single Adjudicating Authority is envisaged. We have already held that the functions of the Adjudicating Authority is that of the original authority making an ad-interim order of attachment and the conduct of hearing is to ensure fairness. In this context, if the parties are heard by a quorum less than all the three Members of the Authority, including Single Member Bench, who can be a non law member, it will not run offensive or in any manner affect the functioning of the Authority. Such a provision cannot be termed as manifestly arbitrary. The second limb of the argument made in this regard is that when Section 6 (1) creates a single Adjudicating Authority, Section 6 (2) mandates that it shall consists of Chairperson and two other members and of the three persons, one should be from the field of law, the second member should be in the field of administration and the third member should be in the field of H.W.R. Wade & C.F. Forsyth, XI Edition-2014, Oxford University Press <https://www.mhc.tn.gov.in/judis> finance/ accountancy. As such, it is the contention of the learned counsel for the petitioner that in the teeth of Section 6 (2), Section 6 (5) providing that the jurisdiction shall be exercised by Benches and that the Bench may be constituted by the Chairperson with one or two members as he deem fit are

self-contradictory and inherently incompatible to each other.

8.1 The provisions of a statute have to be read harmoniously. A careful reading of Section 6, would make it clear that the statute creates one Adjudicating Authority with a Chairperson and two members. All the three of them have to be from the three different fields of expertise. The provision only envisages that in a given case, that the expertise of the persons in these fields, namely, law, administration and finance/accountancy would be relevant in forming an opinion. The Chairperson is given the discretion as to whether in a given case, the authority would make its decision with a full quorum or in Benches including single member Bench would decide the matter. Such discretion does not make the provisions incongruous or self contradictory.

8.2 Even in the context of a Judicial Tribunal, when similar provision <https://www.mhc.tn.gov.in/judis> under the Administrative Tribunals Act, 1985, that is Section 5(2) prescribing a Bench of Judicial Member and an Administrative Member and Section 5(6) granting powers for the Chairman to authorise Single Member Bench came for consideration, the Hon'ble Supreme Court of India in Mahabal Ram Vs. Indian Council of Agricultural Research¹⁴ held that the provisions have to be read harmoniously. Later, when the constitutional validity of the said provision was challenged in L. Chandrakumar vs. Union of India¹⁵, the constitutional validity of Section 5(6) was upheld in view of the proviso contained therein that if at any stage of the case, it appears to the Single Member or the Chairman, that the case has to be heard by the Bench of Two members then the same shall be transferred. The same view was reiterated in All India Institute of Medical Sciences Vs. Sanjiv Chaturvedi¹⁶. A similar proviso exists in Section 6(7) of PMLA also. Thus, it is for the Chairman and Members of the Adjudicating Authority to exercise their powers as Single Member Bench or Two Member Bench or Full Bench, by keeping in mind the purpose of Section 6(2) and depending on the questions or intricacies involved in the particular case. The Chairman or the Member/Members of the Bench hearing the matter ¹⁴ 1994 2 SCC 401 ¹⁵ 1997 3 SCC 261 ¹⁶ 2020 17 SCC 602 <https://www.mhc.tn.gov.in/judis> can refer the matter to the Bench of Two/Three Members. Therefore, we do not find any Constitutional infirmity on this score also.

8.3 Further, as rightly contended by the learned ASGI, the constitutional validity of Section 6 was specifically considered by the Delhi High Court in J.Sekar's case (cited supra). The matter was also argued in detail and considered by the Hon'ble Supreme Court of India in Pareena Swarup's case (cited supra). However, considering the fact that the amendment has been brought after the Judgment in Pareena Swarup's case and that the grounds raised herein required to be specifically dealt with, we considered the matter on merits. This apart, the object and scope of PMLA has been considered in detail by the Hon'ble Supreme Court of India in Vijay Madanlal Choudhary and Ors Vs. Union of India and Ors.,¹⁷. Sections 5 and 8 of PMLA were considered in detail and it is categorically held that confiscation takes place only after

Trial upon conviction and held that the decision of the Adjudicating Authority is also subject to appeal. Therefore, since the petitioner has ample opportunity to contest before the Adjudicating Authority and even if the ad-interim order of attachment is made, a right of appeal is provided to a Appellate Tribunal and ultimately all contentions that the properties or materials are not the proceeds 17 2022 SCC OnLine SC 929 <https://www.mhc.tn.gov.in/judis> of the crime are not involved in money-laundering etc., has to be established and finally determined only by the Special Court and when such remedy is wide open to the Writ Petitioner herein, we do not find any reason to grant any other relief to the petitioner. Accordingly we answer the question that merely because there is power to the Chairman to constitute Single Member Bench, the same will not render the provision unconstitutional.

I. The Result:

9. Accordingly, finding no merits, the Writ Petition stands dismissed.

There shall be no order as to costs. Consequently connected miscellaneous petitions are closed.

(S.V.G., C.J.,)

31.0

Index : Yes
Speaking order
Neutral Citation : Yes
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<https://www.mhc.tn.gov.in/judis>

To

1.The Secretary
Ministry of Finance
Union of India
North Block
New Delhi – 110 001.

2.The Assistant Director
Enforcement Directorate
Dimapur Sub-Zonal Office
Guwahati Zonal Office
Guwahati.

<https://www.mhc.tn.gov.in/judis>

THE HON'BLE CHIEF JUSTICE
AND
D.BHARATHA CHAKRAVARTHY, J.,

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Order made in
Writ Petition No.12925 of 2023

31.01.2024

<https://www.mhc.tn.gov.in/judis>