

PAREENA SWARUP

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v.

UNION OF INDIA

(Writ Petition No. 634 of 2007)

SEPTEMBER 30, 2008

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**[K.G. BALAKRISHNAN, CJI, LOKESHWAR SINGH  
PANTA AND P. SATHASIVAM, JJ]**

*Constitution of India, 1950:*

*Article 32 – Provisions of Prevention of Money-laundering Act, 2002 and the Rules framed thereunder regarding constitution of Adjudicating Authorities and Appellate Tribunal – Challenged as violative of constitutional scheme of separation of powers and constitutional guarantee of independent judiciary – Union of India filing amended/proposed provisions incorporating the required safeguards – HELD: Independence and impartiality are to be secured not only for courts but also for tribunals and their members entrusted with judicial powers – Amended/proposed provisions of the Act and the Rules approved – Judicial Review – Administration of justice – Tribunals entrusted with judicial powers – Independence of – Prevention of Money-laundering Act, 2002 – ss. 28 and 32 – Prevention of Money-laundering (Appointment and Conditions of Service of Chairperson and Members of Adjudicating Authorities) Rules, 2007 – r. 3 – Prevention of Money-laundering (Appointment and Conditions of Service of Chairperson and Members of Appellate Tribunal) Rules, 2007 – rr. 4 and 6 – Public Interest Litigation.*

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*Basic structure theory – Doctrine of separation of powers, and independence of judiciary – Applicability of, to tribunals entrusted with judicial powers – Explained.*

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**The petitioner filed the instant writ petition under Article 32 of the Constitution of India, by way of public inter-**

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- A est litigation, challenging the provisions of Prevention of Money-laundering Act, 2002, Prevention of Money-laundering (Appointment and Conditions of Service of Chairperson and Members of Adjudicating Authorities) Rules, 2007 and Prevention of Money-laundering (Appointment and Conditions of Service of Chairperson and Members of Appellate Tribunal) Rules, 2007 in so far as they related to constitution of the Adjudicating Authorities and the Appellate Tribunal. It was contended that the Adjudicating Authorities and the Appellate Tribunal under the Act were to perform judicial functions, but their Members and Chairperson were to be selected by a Selection Committee headed by the Revenue Secretary and, thus, the relevant provisions of the Act and the Rules were violative of the Constitutional scheme of separation of powers and constitutional guarantee of a free and independent judiciary.

- E During the course of hearing, amendment to the Act and the Rules were suggested and, accordingly, the Union of India filed amended/proposed provisions of the Act and the Rules, which were approved by the Court.

Disposing of the writ petition, the Court

- F HELD: 1.1 The Independence in judicial function and impartiality are to be secured not only for courts but also for tribunals and their members, entrusted with judicial powers, though they do not belong to the 'Judicial Service'. [para 8] [1224,C]

- G 1.2 While creating new avenue of judicial forums, it is the duty of the Government to see that they are not in breach of basic constitutional scheme of separation of powers and independence of the judicial function. There is substance in the apprehension of the petitioner that the provisions of Prevention of the Money-laundering Act, 2002 are so provided that the Members and the Chairperson of the Adjudicating Authorities and Appellate Tribu-

nal would be selected by the Selection Committee headed by Revenue Secretary and, that there may not be independent adjudicatory machinery to decide the cases under the Act. [para 8] [1223,F-H]

1.3 Power of judicial review over legislative action vested in the High Courts under Article 226 as well as in this Court under Article 32 of the Constitution is an integral and essential feature of the Constitution constituting part of its structure. The Constitution guarantees free and independent judiciary and the constitutional scheme of separation of powers can be easily and seriously undermined, if the legislatures were to divest the regular courts of their jurisdiction in all matters and entrust the same to the newly created Tribunals which are not entitled to protection similar to the constitutional protection afforded to regular courts. [para 8] [1223,H; 1224,A-B]

*L Chandra Kumar vs. Union of India and Ors.* 1997 (2) SCR 1186 = (1997) 3 SCC 261 – relied on.

2. Inasmuch as the amended/proposed provisions, as mentioned in para 9 of the judgment are in tune with the scheme of the Constitution as well as the principles laid down by this Court, the same are approved and the respondent-Union of India is directed to implement them, as expeditiously as possible. [para 9-10] [1231,A-B]

#### Case Law Reference

1997 (2) SCR 1186      relied on      para 8

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 634 of 2007

(Under Article 32 of the Constitution of India)

K.K. Venugopal, V. shekhar, Ameet Singh and Pramod Swarup for the Petitioner.

Gopal Subramaniam, A.S.G., M. Chandrashekharan,

- A A.S.G., Satyakam, Vikas Sharma (for B.V. Balaram Das) and Dinesh Kr. Garg for the Respondent.

The Judgment of the Court was delivered by

- B **P. SATHASIVAM, J.** 1. Ms. Pareena Swarup, member of the Bar, has filed this writ petition under Art. 32 of the Constitution of India by way of Public Interest Litigation seeking to declare various sections of the Prevention of Money Laundering Act, 2002 such as Section 6 which deals with adjudicating authorities, composition, powers etc., Section 25 which deals with the establishment of Appellate Tribunal, Section 27 which deals with composition etc. of the Appellate Tribunal, Section 28 which deals with qualifications for appointment of Chairperson and Members of the Appellate Tribunal, Section 32 which deals with resignation and removal, Section 40 which deals with members etc. as *ultra vires* of Arts. 14, 19 (1)(g), 21, 50, 323B of the Constitution of India. It is also pleaded that these provisions are in breach of scheme of the Constitutional provisions and power of judiciary.

2. Brief facts in a nutshell are:

- E The Prevention of Money Laundering Act, 2002 (hereinafter referred to as "the Act") was introduced for providing punishment for offence of Money Laundering. The Act also provides measures of prevention of money laundering. The object sought to be achieved is by provisional attachment of the proceeds of crime, which are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds under the Act. The Act also casts obligations on banking companies, financial institutions and intermediaries to maintain record of the transactions and to furnish information of such transactions within the prescribed time. In exercise of powers conferred by clause (s) of sub-section (2) of Section 73 read with Section 30 of the Prevention of Money-Laundering Act, 2002 (15 of 2003), the Central Government framed rules regulating the appointment and conditions of service of persons appointed as Chairperson and

Members of the Appellate Tribunal. These rules are the Prevention of Money-Laundering (Appointment and Conditions of Service of Chairperson and Members of Appellate Tribunal) Rules, 2007. The Central Government has also framed rules called the Prevention of Money Laundering (Appointment and Conditions of Service of Chairperson and Members of Adjudicating Authorities) Rules, 2007.

3. It is highlighted that the provisions of the Act are so provided that there may not be independent judiciary to decide the cases under the Act but the Members and the Chairperson are to be selected by the Selection Committee headed by the Revenue Secretary. It is further pointed out that the Constitutional guarantee of a free and independent judiciary, and the constitutional scheme of separation of powers can be easily and seriously undermined, if the legislatures were to divest the regular Courts of their jurisdiction in all matters, entrust the same to the newly created Tribunals. According to the petitioner, the statutory provisions of the Act and the Rules, more particularly, relating to constitution of Adjudicating Authority and Appellate Tribunal are violative of basic constitutional guarantee of free and independent judiciary, therefore, beyond the legislative competence of the Parliament. The freedom from control and potential domination of the executive are necessary pre-conditions for the independence. With these and various other grounds, the petitioner has filed this public interest litigation seeking to issue a writ of certiorari for quashing the abovesaid provisions which are inconsistent with the separation of power and interference with the judicial functioning of the Tribunal as *ultra vires* of the Constitution of India.

4. The respondent-Union of India has filed counter affidavit repudiating the claim of the petitioner. The Department highlighted that the impugned Act has not ousted the jurisdiction of any courts and sufficient safeguards are provided in the appointment of officers of the Adjudicating Authorities, Members and Chairperson of the Appellate Tribunal.

A        5. We have carefully verified the provisions of the Act and the Rules, particularly, relating to constitution and selection of Adjudicating Authorities, Members and Chairperson of the Appellate Tribunal. Considering the stand taken by the petitioner with reference to those provisions, we requested Mr. K.K. Venugopal, learned senior counsel, to assist the Court. Pursuant to the suggestion made by the Court, Mr. K.K. Venugopal and Mr. Gopal Subramaniam, learned Additional Solicitor General, discussed the above issues and by consensus submitted certain proposals.

C        6. The petitioner has highlighted the following defects in the Adjudicating Authority Rules, 2007 and the Appellate Tribunal Rules, 2007:-

- D                    1. Rule 3(3) of Adjudicating Authority Rules, 2007 does not explicitly specify the qualifications of member from the field of finance or accountancy.
- E                    2. Rule 4 of Appellate Tribunal Rules, 2007 which provided for Method of Appointment of Chairperson do not give adequate control to Judiciary.
- F                    3. Rule 6(1) of Appellate Tribunal Rules, 2007 which defines the Selection Committee for recommending appointment of Members of the Tribunal, would undermine the constitutional scheme of separation of powers between judiciary and executives.
- G                    4. Rule 32(2) of PMLA which provides for removal of Chairperson/Members of Tribunal under PMLA does not provide adequate safety to the tenure of the Chairperson/Members of the Tribunal.
- H                    5. Rule 6(2) of Appellate Tribunal Rules is vague to the extent that it provides for recommending names after "inviting applications thereof by advertisement or on the recommendations of the appropriate authorities."

6. Section 28(1) of PMLA, which allows a person who "is qualified to be a judge of the High Court" to be the Chairperson of the Tribunal, should be either deleted or the Rules may be amended to provide that the Chief Justice of India shall nominate a person for appointment as Chairperson of Appellate Tribunal under PMLA "who is or has been a Judge of the Supreme Court or a High Court" *falling which* a person who "is qualified to be a judge of the High Court."

7. The qualifications for Legal Member of the Adjudicating Authority should exclude "those who are qualified to be a District Judge" and only serving or retired District Judges should be appointed. The Chairperson of the Adjudicating Authority should be the Legal member.

7. As regards the above defects in the rules, as observed earlier, on the request of this Court, Mr. K.K. Venugopal, learned senior counsel, Mr. Gopal Subramaniam, learned ASG as well as Ms. Pareena Swarup who has filed this PIL suggested certain amendments in the line of the constitutional provisions as interpreted by this Court in various decisions.

8. It is necessary that the Court may draw a line which the executive may not cross in their misguided desire to take over bit by bit and judicial functions and powers of the State exercised by the duly constituted Courts. While creating new avenue of judicial forums, it is the duty of the Government to see that they are not in breach of basic constitutional scheme of separation of powers and independence of the judicial function. We agree with the apprehension of the petitioner that the provisions of Prevention of the Money Laundering Act are so provided that there may not be independent judiciary to decide the cases under the Act but the Members and the Chairperson to be selected by the Selection Committee headed by Revenue Secretary. It is to be noted that this Court in the case of *L. Chandra Kumar vs. Union of India and Ors.*, (1997) 3 SCC 261 has laid down that power of judicial review over legislative

- A action vested in the High Courts under Article 226 as well as in this Court under Article 32 of the Constitution is an integral and essential feature of the Constitution constituting part of its structure. The Constitution guarantees free and independent judiciary and the constitutional scheme of separation of powers can be easily and seriously undermined, if the legislatures were to divest the regular courts of their jurisdiction in all matters, entrust the same to the newly created Tribunals which are not entitled to protection similar to the constitutional protection afforded to the regular Courts. The independence and impartiality which are to be secured not only for the Court but also for Tribunals and their members, though they do not belong to the 'Judicial Service' are entrusted with judicial powers. The safeguards which ensure independence and impartiality are not for promoting personal prestige of the functionary but for preserving and protecting the rights of the citizens and other persons who are subject to the jurisdiction of the Tribunal and for ensuring that such Tribunal will be able to command the confidence of the public. Freedom from control and potential domination of the executive are necessary pre-conditions for the independence and impartiality of judges. To make it clear that a judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by Judges who are free from potential domination by other branches of Government. With this background, let us consider the defects pointed out by the petitioner and amended/proposed provisions of the Act and the Rules.

9. Mr. Gopal Subramaniam has informed this Court that the suggested actions have been completed by amending the Rules. Even other wise, according to him, the proposed suggestions formulated by Mr. K.K. Venugopal would be incorporated on disposal of the above writ petition. For convenience, let us refer the doubts raised by the petitioner and amended/proposed provisions as well as the remarks of the department in complying with the same.



S.No.	Issues	Amended/Proposed provision	Remarks	A
1.	Rule 3(3) of Adjudicating Authority Rules, 2007 does not explicitly specify the qualifications of member from the field of finance or accountancy.	Rule 3(3) of Adjudicating Authority Rules, 2007 have been amended to specify the 'academic qualification' for the Member from the field of finance and accounting by inserting a sub-clause (b) as follows:  “(b) From among such persons, the Selection Committee shall have due regard to the academic qualifications of chartered accountancy or a degree in finance, economics or accountancy or having special experience in finance or accounts by virtue of having worked for at least two years in the finance or revenue department of either the Central Government or a State Government or being incharge of the finance or accounting wing of a corporation for a like period.”	Action completed. Amended Rule as per annexure A	B C D E F G H

A  B  C	2. Rule 4 of Appellate Tribunal Rules, 2007 which provided for Method of Appointment of Chairperson do not give adequate control to Judiciary.	Rule 4 of Appellate Tribunal Rules, 2007 has been amended to unambiguously provide that the appointment of Chairperson shall be made on the recommendation of the Chief Justice of India.	Action completed. Amended Rule as per annexure B
D  E  F  G	3. Rule 6(1) of Appellate Tribunal Rules, 2007 which defines the Selection Committee for recommending appointment of Members of the Tribunal, would undermine the constitutional scheme of separation of powers between judiciary and executives.	Rule 6(1) of Appellate Tribunal Rules, 2007 has been amended to provide that the Chairperson of Appellate Tribunal is appointed on the recommendation of the CJI and the composition of the Selection Committee to select Members of the Tribunal has been amended to provide for a Judge of the Supreme Court, nominated by the Chief Justice of India, to be the Chairperson of the Selection Committee.	Action completed. Amended Rule as per annexure C
H	4. Section 32(2) of PMLA which provides for removal of Chairperson/Mem-	Appropriate amendment to the Statute is being proposed to unambiguously provide that Chairperson/	Draft Bill is under preparation.

	bers of Tribunal under PMLA does not provide adequate safety to the tenure of the Chairperson/members of the Tribunal.	Members appointed in consultation with Chief Justice of India, shall not be removed without mandatory consultation with Chief Justice of India.	Draft Bill is under preparation.
5.	Rule 6(2) of Appellate Tribunal Rules is vague to the extent that it provides for recommending names after "inviting applications thereof by advertisement or on the recommendations of the appropriate authorities."	Rule 6(2) of the Appellate Tribunal Rules, 2007 may be amended to delete the words "or on recommendation of the appropriate authorities", a proposal endorsed by ASG, Shri Gopal Subramaniam.	May be deleted.
6.	Section 28(1) of PMLA, which allows a person who "is qualified to be a judge of the High Court" to be the Chairperson of the	There are several Acts under which Judges and those 'qualified to be a judge' are equally eligible for selection like for Chairman under NDPS Act and SAFEMA; Judicial member under Admin	There is no requirement to amend either the Statute of the Rules.

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A		Tribunal, should be either deleted or the Rules may be amended to provide that the Chief Justice of India shall nominate a person for appointment as Chairperson or Appellate Tribunal under PMLA	Administrative Tribunal Act; Chairperson under FEMA etc. The eligibility criteria, for appointment as a judge of a High Court, provided in the Constitution of India under Article 217(2)(b), is that the person should have been "for at least 10 years as an advocate of a High Court..." Furthermore, since appointment of Chairperson of the Tribunal under PMLA is to be made on the recommendation of CJI, it is expected that an independent person would be appointed to head the Appellate Tribunal.	
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C	3.	"who is or has been a Judge of the Supreme Court or a High Court" <i>failing which</i> a person who "is qualified to be a judge of the High Court."		
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F	7.	The qualifications for Legal Member of the Adjudicating Authority should exclude "those who are qualified to be a District Judge" and only serving or	1. Persons 'qualified to be a district Judge' are treated at par with District Judges for the purposes of qualification for appointment as member in ATFE under FEMA; as President of District Forum under Consumer Protection Act, 1986 etc. The eli-	There is no requirement to amend either the Statute or the Rules.
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	<p>retired District Judges should be appointed. The Chairperson of the Adjudicating Authority should be the Legal member.</p>	<p>gibility criterion, for appointment as a District Judge, provided in the Constitution of India under Article 233(2), is that the person should have been an advocate "for not less than seven years".</p> <p>2. PMLA is a specialized and new Act and District Judges may not be available with experience in related issues whereas Advocates or officers of Indian Legal Service, who are eligible to be District Judges, may often have greater knowledge of its provisions and working.</p> <p>3. The Adjudicating Authority is a body of experts from different fields to adjudicate on the issue of confirmation of provisional attachment of property involved in money laundering. The functions of Adjudicating Authority are civil in nature to the extent that it does not decide on the criminality of the offence nor does it have power</p>	
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A		to levy penalties or impose punishment.	
B		4. Adjudication is a function which is performed by Executives under many statutes. The Competent Authority under NDPS/SAFEMA have been conducting Adjudication proceedings routinely since 1978 and in the last four years i.e. 2004-2008, Competent Authority has taken 1374 new cases, issued 275 SCNs, forfeited 162 properties and disposed of 30 properties without any judicial objections. Similar adjudications are done by Custom Authorities under Custom Act or by Authorities under FEMA/FERA.	
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G		5. The Adjudicating Authority, being a body of experts from different fields, with a role as described in para 3 above, appointment of its Chairperson should be left to the recommendation of the Selection Committee.	
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10. Inasmuch as the amended/proposed provisions, as mentioned in para 9, are in tune with the scheme of the Constitution as well as the principles laid down by this Court, we approve the same and direct the respondent-Union of India to implement the above provisions, if not so far amended as suggested, as expeditiously as possible but not later than six months from the date of receipt of copy of this judgment. The writ petition is disposed of accordingly. No costs. This Court records its appreciation for the valuable assistance rendered by Mr. K.K. Venugopal, learned senior counsel and Mr. Gopal Subramaniam, learned Addl. Solicitor General.

R.P.

Writ Petition disposed of.