

## Questionable searches under the Money Laundering Act

**T**he enforcement of the Prevention of Money Laundering Act, 2002 (passed in the background of India's commitment to the international community to fight the drug menace and terrorism) has caused much consternation especially after its unusual interpretation by the Supreme Court of India in *Vijay Madanlal Choudhary and Ors vs Union of India and Ors*. (2022). The Supreme Court of India limited its application to "on the wrongful and illegal gain of property as a result of criminal activity relating to a scheduled offence". It also held that "the property must qualify the definition of "proceeds of crime" under Section 2(i)(u) of the 2002 Act". It went on to hold that "the authority of the Authorised Officer... to prosecute any person for offence of money-laundering gets triggered only if there exists proceeds of crime within the meaning of Section 2(i)(u) of the 2002 Act and further it is involved in any process or activity".

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

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

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

The Court, while setting aside the arrest orders along with orders of remand passed by the Sessions Judge Panchkula, and affirmed by the High Court of Punjab and Haryana, made damning observations: "This chronology of events reflects rather poorly, if not negatively, on the ED's style of functioning. The ED, mantled with far-reaching powers under the stringent Act of 2002, must be seen to be acting with utmost probity, dispassion and fairness. In the case on hand, the ED failed to exercise its powers. The Court added, "Surprisingly, no consistent and uniform practice seems to be followed... as written copies of the grounds of arrest are furnished to arrested persons in certain parts of the country but in other areas, the grounds of arrest are either read out to them or allowed to be read by them." In November 2023, Justices Abhay



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The abuse of authority by the central investigating agencies and the abuse of the process of court raise disturbing questions

S. Oka and Pankaj Mithal, in *Pavana Dibbur vs The Directorate of Enforcement*, 2023 INSC 1029, addressed key aspects of the PMLA: "On a plain reading of Section 3, unless proceeds of crime exist, there cannot be any money laundering offence," and "To constitute any property as proceeds of crime, it must be derived or obtained directly or indirectly by any person as a result of criminal activity relating to a scheduled offence". Because, the existence of "proceeds of crime" is "sine qua non" for the offence under Section 3 of the PMLA.

### Damaging to federalism

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

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

Clearly, the process of the court was abused. The alleged petitioner, once out of jail, sought withdrawal of the petition. The High Court refused permission on August 8, 2023, and the next day delivered the judgment transferring the police cases to the CBI. It immediately registered the preliminary inquiry, and subsequently FIR,

while a special leave petition (SLP) was filed by the alleged offenders before the Supreme Court stating that they had not been heard by the High Court before passing the judgment, besides contending that neither the CBI nor the ED had any jurisdiction in the matter.

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

In subsequent judicial developments, between September and November 2023, there were violations of procedure, such as the notice issuing Bench being changed contrary to the Supreme Court Rules, 2013 and the *Handbook on Practice and Procedure and Office Procedure*. Further, the later Bench was not persuaded by the arguments put forth by the senior advocate for the alleged offender to grant interim relief in a very deserving case where, besides questions of jurisdiction, there were pointers to the violation of natural justice.

### A selective targeting

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

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

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

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

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

EVA

## Subaltern Hindutva and the crucial social justice test

In the recent Assembly elections in Rajasthan, Madhya Pradesh and Chhattisgarh, statistical analysis by the Centre for the Study of Developing Societies shows that a significant section among the Scheduled Castes (SCs), Scheduled Tribes (STs) and Other Backward Classes (OBCs) backed the Bharatiya Janata Party (BJP), thus making the party a formidable force in democratic battles. It is an important development as just a decade ago, the BJP was often cornered by the Opposition as being the party of the social elites. With the arrival of Narendra Modi as the Prime Minister of India, there has been an elevation of the party as one for the socially marginalised Hindu masses – a phenomenon now understood under the 'Subaltern Hindutva' rubric.

In north India's Rajasthan, Madhya Pradesh, Uttar Pradesh, Haryana and Chhattisgarh, the BJP is now a dominant political force. These are also the States where the population of OBCs, SCs and the STs is above the national average. In the last two decades, the BJP has successfully mobilised these groups through innovative political strategies and by curating influential cultural events. However, the actual benefits of economic developments and political change have been overtly controlled by the conventional social elites, a development that often relegates the Dalit-Bahujan masses as passive peripheral spectators in the rapid elevation of the right-wing. With the general election to be held next year, the party should address the issues of social discrimination and economic injustice more sensitively.

### Outlining the party's strategy

There are three fronts to the BJP's mobilisation strategies towards the Dalit-Bahujan masses. First, marginalised social groups will benefit from general welfare measures (freebies, loan waivers, women-centric policy benefits) and the government will provide basic amenities to the poor (free food grains) without identifying them



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The BJP's 'subaltern Hindutva' plan, while strategic in ensuring the party its key electoral victories, has no mandate to meet the aspirations of the worst-off social groups

on the basis of caste. Second, the BJP has alleged that dominant OBC castes (Yadavs in Uttar Pradesh and Bihar) have exploited social justice policies, and, therefore, a special reservation quota should be mooted for the Extremely Backward Classes (EBCs). Third, the BJP engages the lower strata through curating emotive narratives about their history, icons and caste pride, using various religious events and cultural fronts influenced by the BJP. On the flip side, the actual issues of substantive land distributions for the landless communities, representation of the Dalit-Bahujan groups in the high echelons of power and their participation in the neo-liberal economic growth as major shareholders do not form the mainstream discussions within the BJP's 'Subaltern Hindutva' strategies.

### The Bihar caste report

Bihar's Caste Survey report, that was released recently, shows that the worst-off social groups, especially EBCs, still face precarious economic conditions, social insecurities and are distanced from the basic human entitlements. It is apparent that EBCs and Dalits in other States face similar conditions. However, the BJP is yet to engage with these issues and has not offered much resolutions to contest the prevalent issues of poverty, social backwardness and landlessness. The 'Subaltern Hindutva', while appearing to be mainly strategic in ensuring the BJP's electoral victories, offers no mandate to satisfy the aspirations of the worst-off social groups.

With Vishnu Deo Sai and Mohan Yadav as the Chief Ministers of Chhattisgarh and Madhya Pradesh, respectively, the BJP has demonstrated its willingness to promote new leadership from the subaltern groups, initiating a process of democratisation of the top political positions. Such initiatives should also be supplemented by effective policies for the empowerment and participation of the marginalised social groups in the economic development and social change.

The BJP must pass the social justice test as

sections among the historically disadvantaged have moved to the BJP with deep expectations for their economic welfare and elevated political participation. In Madhya Pradesh and Chhattisgarh, while the combined population of Dalits and Adivasis is close to 40%, their share in political power (cabinet ministership and other important portfolios) is negligible. Similarly, EBCs are another neglected group when it comes to the distribution of important political assets. The social elites, though small in number, remain the torchbearers of Hindutva's developmental agenda.

Second, the BJP should also ensure that a new impressive class among Dalits and Adivasis should emerge as the new leaders, business entrepreneurs and influencers in the economic sphere. Such a directive will radicalise the conventional social justice policies that often address Dalit-Adivasi groups as the passive recipients of the state's welfare packages. Instead, Dalits and Adivasis should be identified as the essential components of neo-liberal economic development and have an equitable share in the profits of urbanisation, industrial production and technological development. More policy directives and affirmative action policies are required so that the Dalit-Adivasi class emerges as the crucial influencers in the global economy.

### The possibility of a democratisation

One can expect that the new arrival of the subaltern social groups into the right-wing platform to curtail the BJP's aggressive communal rhetoric and force the state to deal with the concerns of social justice. The development has the possibility to make the right-wing platform conducive to the values of social reforms, to understand the ecological perspectives of Adivasis, and to democratise the higher strata of power. Such assurances and their effective implementation will make the BJP a substantive democratic party, responsible for the welfare and empowerment of India's subaltern masses.

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