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White Collar Crime Newsletter

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SFIO's Power to Arrest: A Legal Analysis in Light of "Rahul Modi Case"

Introduction

In this article, we will critically examine the different facets and nuances of the power to arrest under Section 212(8) of the Companies Act, 2013, as exemplified in the case of Rahul Modi and Ors. vs Union of India and Ors. The ensuing legal analysis delves into the intricacies of SFIO's arrest powers, the Delhi High Court's stance, and the subsequent ruling by the Supreme Court. In this article, we will critically examine the different facets and nuances of the power to arrest under Section 212(8) of the Companies Act, 2013, as exemplified in the case of Rahul Modi and Ors. vs Union of India and Ors. The ensuing legal analysis delves into the intricacies of SFIO's arrest powers, the Delhi High Court's stance, and the subsequent ruling by the Supreme Court.

SFIO's Power to Arrest

Section 212(8) of the Companies Act, 2013 confers SFIO officers, not below the rank of Assistant Director, authorized by the Central Government, the authority to arrest individuals if there is a reasonable belief, recorded in writing, that an offence punishable under specified sections has been committed.

The verbatim provision is reproduced below for reference:

"Section 212. Investigation into affairs of Company by Serious Fraud Investigation Office:

[If any officer not below the rank of Assistant Director] of Serious Fraud Investigation Office authorised in this behalf by the Central Government by general or special order, has on the basis of material in his possession reason to believe (the reason for such belief to be recorded in writing) that any person has been guilty of any offence punishable under sections referred to in sub-section (6), he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest."

Brief Facts of the Case

- The Central Government, in the exercise of its powers, initiated an investigation into the activities of a specific Group of Companies and Limited Liability Partnerships (LLPs) through officers designated by the Director of the Serious Fraud Investigation Office (SFIO).
- The officers were mandated to conclude their investigation and submit a comprehensive report to the Central Government within a stipulated period of three (3) months from the date of the issuance of the directive.
- The SFIO made arrest of the accused and a remand was granted by the judicial magistrate to produce the accused before special court. Thereafter, the fresh application of remand was made before the special court after the accused were produced. The accused person opposed the extension of custody inter-alia on the ground once the period of completion of investigation as stipulated in the order of central government has expired, all further proceedings were illegal. The special court rejected this argument and held that subsequent proceedings were legal and extended the police custody of the accused.
- The order of the special court was challenged by the way of a writ petition before the Delhi High Court. The petitioner, in their defence contended that once the expiry of period within which the investigation had to be completed in terms of the order of the central government, all subsequent proceedings including the arrest of the petitioners were illegal and without authority of law.
- The High Court¹ ordered release of accused person on interim bail during the pendency of the writ petition.

1. Rahul Modi vs. Union of India, Delhi High Court, 2018 SCC OnLine Del 13119

- In it the Delhi High Court applied “purposive interpretation,” deeming the prescribed investigation period as “Mandatory” rather than “Directory”. While deciding so, the High Court acknowledged the absence of a fixed investigation period in the Companies Act, contrasting it with Code of Criminal Procedure, 1973, which provides for the provision for default bail, in case the investigation is not completed within the stipulated period.
- The SFIO challenged the common interim order by the Delhi high court in the Supreme Court.
- The Supreme court² held that the prescription of a period within which a report was to be submitted by SFIO under sub section 3 of section 212 of the Companies Act, 2013 was directory in nature and it could not be said that the expiry of that period mandates that the investigation of SFIO must come to an end.
- The Supreme Court further held that if this was the intention of the government, the legislation would have contemplated certain results including re-transfer of investigation back to the original investigations that were investigating the case before it was transferred to SFIO.
- The Supreme Court went on to held that, if such an argument is accepted, it would lead to a situation where the original investigation agencies would be denuded the power to investigate and with the expiry of mandate of SFIO would also be powerless, which would lead to an incongruous situation, that serious fraud would remain beyond investigation. The Supreme Court concluded that only construction which seems logical is that the prescription of period within which a report had to be submitted to the central government under sub section 3 of section 212, was purely directory and even after the expiry of such stipulated period, the mandate in favour SFIO and assignment of investigation under sub section (1) would not come to an end.
- Consequently, the Supreme Court held that the submission of the final report in terms of section sub section (12) of section 212 and the subsequent arrest effected under the orders passed by the director SFIO was not in any way illegal or unauthorized by law.

Legal Analysis

The Supreme Court Judgement settles the legal proposition that prescription of a period by the central government under which SFIO was mandated to complete the investigation and submit a report is directory in nature rather than mandatory and any action taken by the SFIO authority including the arrest of accused person will not be vitiated by law or unauthorized on the ground that it has been effective beyond the prescribed period of time.

2. Serious Fraud Investigation Office vs. Rahul Modi, Supreme Court of India, (2019) 5 SCC 266

Recent Regulatory Developments in White Collar Crime in India


I. Ministry of Finance Notification – Prevention of Money-laundering (Maintenance of Records) Third Amendment Rules, 2023

The Ministry of Finance, through a notification dated 17th October 2023, exercised powers conferred by section 73 of the Prevention of Money-laundering Act, 2002 (15 of 2003), amending the Prevention of Money-laundering (Maintenance of Records) Rules, 2005. The amended rules, titled the Prevention of Money-laundering (Maintenance of Records) Third Amendment Rules, 2023, came into force upon their publication in the Official Gazette.

The key amendments include the insertion of the requirement to use reliable and independent sources of identification after the word “Act” in rule 2, sub-rule (1), clause (b). Rule 3A was substituted to introduce provisions for the implementation of group-wide programs against money laundering and terror financing by reporting entities that are part of a group. The amended rule 8 now mandates the principal officer of a reporting entity to promptly furnish information in writing to the Director when a transaction is deemed suspicious. Additionally, confidentiality measures regarding the maintenance of records and information sharing were introduced.

Rule 9 saw significant changes, such as the substitution of sub-rule (1) to include client identification and verification using reliable and independent sources, obtaining information on the purpose and nature of the business relationship, and understanding the customer’s business. The provisos allow flexibility for verification timing under certain conditions and stipulate norms for dealing with depositary receipts or equity shares in specific jurisdictions. Sub-rule (2) was amended to allow reporting entities to obtain client due diligence information from third parties or the Central KYC Records Registry. Further modifications were made to sub-rules (8), (12), and (14) to enhance the effectiveness of client due diligence, including the incorporation of countermeasures in response to international or intergovernmental organization calls.

The notification, signed by Manoj Kumar Singh, Director (Headquarter), provides a comprehensive overview of the amendments, emphasizing the government’s commitment to addressing money laundering and terrorist financing risks. The amendments aim to strengthen the regulatory framework and ensure compliance by reporting entities.



II. Government Grants Aadhaar Authentication Permission to 7 Reporting Entities

The Ministry of Finance, through a notification dated December 8, 2023, exercised its power under the proviso to sub-section (1) of section 11A of the Prevention of Money-laundering Act, 2002. The Central Government, satisfied with the compliance of certain reporting entities with the standards of privacy and security outlined in the Aadhaar Act, permitted these entities to conduct authentication under the Aadhaar Act for the purposes of section 11A of the Money-laundering Act. The reporting entities listed in the table include AEON Credit Service India Private Limited, Appnit Technologies Private Limited, Capital Trust Limited, Poonawalla Housing Finance Limited, Poonawalla Fincorp Limited, Shri Ram Finance Corporation Pvt. Ltd., and VFS Capital Limited. This permission was granted after consultation with the Unique Identification Authority of India and the Reserve Bank of India. The notification was issued by the Director (ES Cell-DOR-Part(1)), Manoj Kumar Singh, under the file number F. No. P-12011/11/2021-ES Cell-DOR-Part(1).

III. Appointment of Administrators under PMLA Section 10

The Ministry of Finance, through a notification dated September 12, 2023, exercised its powers conferred by sub-section (1) of section 10 read with section 51 of the Prevention of Money-laundering Act, 2002. In supersession of the previous notification dated September 10, 2012, the Central Government appointed 'Special Directors' of the Regional Offices of the Directorate of Enforcement as 'Administrators.' These Administrators are designated to receive, manage, and dispose of the property confiscated under the provisions of sub-section (5) or sub-section (7) of section 8, or section 58B, or sub-section (2A) of section 60 of the said Act. The appointment is made in accordance with sub-section (2) and sub-section (3) of section 10 of the said Act. The Administrators are bound by the provisions of the Prevention of Money-laundering Act, 2002, and the Prevention of Money-laundering (Receipt and Management of Confiscated Properties) Rules, 2005. The notification was issued by Rajeev Lochan, Under Secretary, under file number F. No. K-11022/45/2023-Ad.ED-DOR.

International Developments in White Collar Crime

I. Anti-Money Laundering Authority (AMLA) Agreement in Europe

As of December 13, 2023, a provisional agreement has been reached between the European Council and European Parliament for the establishment of the Anti-Money Laundering Authority (AMLA). The agreement emphasizes AMLA's role as the EU's money laundering watchdog, tasked with enforcing anti-money laundering (AML) and counter-terrorist financing (CFT) rules. AMLA will directly supervise high-risk financial entities, including crypto asset service providers, operating in at least six EU Member States. The authority will possess intervention and enforcement powers, including imposing sanctions for AML/CFT framework breaches. AMLA's governance structure comprises a General Board and an Executive Board. Additionally, the ongoing discussion on AMLA's location involves negotiations among nine Member States, with the selected location to be introduced in the final regulation.

II. Financial Crime Reforms in the UK: ECCTA and the Changing Landscape

The UK has undergone significant reforms in financial crime regulation with the enactment of the Economic Crime and Corporate Transparency Act (ECCTA) in October 2023. The reforms include a new failure to prevent fraud offence, changes to corporate criminal liability, expanded powers for the Serious Fraud Office (SFO), and various measures to counter money laundering and illicit activities. The ECCTA introduces a failure to prevent fraud offence that applies to organizations meeting certain criteria, holding them criminally liable if an "associated person" commits a relevant fraud offence. The corporate criminal liability regime is modified, making organizations liable if a senior manager commits a relevant offence. The SFO's powers are expanded, allowing it to compel information in cases of domestic bribery and other economic crimes. Reforms also target Companies House, crypto assets, and the Register of Overseas Entities.

Important Case Laws Related to White Collar Crime

I. Supreme Court of India

Saumya Chaurasia v. Directorate of Enforcement

Supreme Court of India | 2023 INSC 1073

The Supreme Court has ruled that it is not mandatory to grant bail under the first proviso to Section 45 of the Prevention of Money Laundering Act, 2002 (PMLA) solely because the accused is a woman. The court observed that educated and well-placed women can engage in commercial ventures, sometimes involving illegal activities. The case involved a Deputy Secretary arrested for money laundering, challenging the denial of bail by the Chhattisgarh High Court. The court emphasized that the provision for granting bail to certain categories, including women, is discretionary, not mandatory. The decision highlighted the need for full and accurate disclosure of facts by parties and imposed a cost of Rs. 1 lakh on the appellant for misrepresentation.

Pavana Dibbur v. ED (Directorate of Enforcement)

Supreme Court of India | 2023 SCC OnLine SC 1586

The Supreme Court, in a judgment dated 29-11-2023, clarified that the offence of criminal conspiracy under Section 120B of the Indian Penal Code, 1860, will be considered a scheduled offence under the Prevention of Money Laundering Act, 2002 (PMLA) only if the alleged conspiracy aims to commit a specific offence mentioned in the PMLA Schedule.

The case involved an appeal by Pavana Dibbur against the Directorate of Enforcement (ED) challenging the dismissal of her petition by the High Court. The appellant was accused of facilitating the misuse of university funds and siphoning of proceeds of crime through her involvement in a conspiracy with Madhukar Angur.

The Supreme Court examined Section 3 of the PMLA, emphasizing that an offence under this section requires the existence of proceeds of crime, defined in Clause (u) of subsection (1) of Section 2. The court also considered the definition of “scheduled offence” in Clause (y) of subsection (1) of Section 2 and emphasized that the existence of a scheduled offence is a condition precedent for the offence under Section 3.

The court rejected the argument that the appellant must be named as an accused in the charge sheets for scheduled offences, stating that even if she is not named, she can still be accused in the PMLA case if involved after the scheduled offence has been committed. The court also noted that a concrete determination regarding the acquisition of properties using proceeds of crime can only be made after evidence is presented.

Regarding the interpretation of Section 120B of the IPC, the court observed that it becomes a scheduled offence only if the conspiracy alleged is to commit an offence specifically included in the Schedule.

The Supreme Court concluded by quashing and setting aside the High Court’s order and the PMLA case pending before the Special Court for PMLA cases in Bengaluru, specifically in relation to the appellant. The court’s analysis covered the relationship between offences under Section 3 of the PMLA and scheduled offences, the connection of properties to the proceeds of crime, and the conditions for an offence under Section 120B of the IPC to become a scheduled offence.

Shiv Kumar Sharma v. State of Madhya Pradesh & Ors.

Supreme Court of India | (Criminal Appeal No. 3347 of 2023)

The Supreme Court, in Criminal Appeal No. 3347 of 2023 arising from S.L.P. (Crl.) No. 9667 of 2023, heard the appeal of Shiv Kumar Sharma (Appellant) against The State of Madhya Pradesh & Others (Respondents). The appellant sought the quashing of the First Information Report (FIR) through a petition under Section 482 of the Code of Criminal Procedure, 1973 (CrPC) before the High Court.

In its impugned order, the High Court rejected the petition without examining the merits of the appellant's case. The High Court's peculiar observation suggested that the Investigating Officer would allow the appellant an opportunity to explain the collected material before the submission of the final report under Section 173 of the CrPC. The Supreme Court found this approach strange and contrary to law, noting that the appellant's case on merits had not been considered.

The Supreme Court set aside the impugned judgment and order dated 12th April 2023, restoring Miscellaneous Criminal Case No. 13012 of 2023 before the High Court. The Registrar (Judicial) of the Madhya Pradesh High Court was directed to list the restored petition before the roster Bench on 8th December 2023. The interim relief granted by the Supreme Court on 18th August 2023 was extended until 8th January 2024, with liberty given to the appellant to apply for continuation if the remanded case was not decided by that date.

The High Court was instructed to decide the petitioner's case on merits without being influenced by the interim relief granted by the Supreme Court. All contentions were left open to be considered by the High Court. The appeal was allowed on the specified terms.

The Supreme Court's order was made on 30th October 2023, and leave was granted. The appeal was allowed in terms of the signed order, and pending applications were also disposed of.

II. High Courts

Ranjit Singh Kothari v. State of W.B.

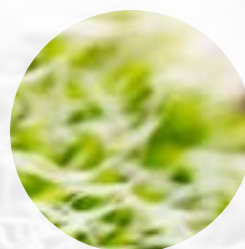
Calcutta High Court | 2023 SCC OnLine Cal 4662

The revisional application challenges the order dated March 24, 2021, passed by the Learned Metropolitan Magistrate, 4th Court, Calcutta, in connection with G.R. Case No. 175 of 2012. The magistrate allowed the application filed by the Complainant/Enforcement Directorate, directing the appearance of all accused persons and committing the case to the Special Designated Court under Section 44(1)(c) of PMLA, 2002.

The Complainant/ED filed an application under Section 44(1)(c) of PMLA, 2002, citing multiple FIRs and charge sheets related to offenses under IPC. The application sought the commitment of the case to the Special Court under PMLA, 2002, for the trial of both scheduled offenses and offenses under PMLA.

The petitioner contested the order, arguing that the amended provisions no longer mandate trying both offenses before the same Special Court, emphasizing the discretionary nature of Section 44(1)(c).

The court, after considering the arguments, upheld the order, stating that a harmonious construction of the provisions leads to the conclusion that the Special Designated Court for trying offenses under PMLA would also try the scheduled offenses. The court affirmed that both offenses being interconnected and sharing a common factual foundation, trying them together serves the legislative intent.



Shibu J v. State of Kerala

Kerala High Court | (Crl. MC No. 8455 of 2023)

In Criminal Miscellaneous Case No. 8455 of 2023, the petitioner, Shibu J., is the 4th accused in Crime No.19/2023 of the Excise Enforcement and Anti-Narcotic Special Squad, facing charges under Section 8(C), 22(C), 20(b)(ii)(C) of the Narcotic Drugs And Psychotropic Substances Act, 1985. The prosecution alleges that on 09.07.2023, the petitioner and others were found in possession of 155.480 kgs of ganja and 70.71 grams of MDMA.

The petitioner filed an application (Crl.M.P.No.5181/2023) seeking a certified copy of the seizure mahazar in Crime No.19/2023, which was dismissed by the Additional Sessions Court-I, Thiruvananthapuram (Annexure A1 order). The petitioner, aggrieved by this dismissal, filed the present Criminal Miscellaneous Case.

The petitioner contends that the denial of a copy of the seizure mahazar is illegal, arguing that it is a public document under Section 74(1)(iii) of the Indian Evidence Act. The petitioner asserts that the seizure mahazar is crucial for preparing a defence, especially at the bail application stage, given the serious nature of the charges.

The High Court, after considering the arguments, refers to precedents indicating an accused's entitlement to a copy of the FIR and observes that the seizure mahazar is also a public document. The Court cites Rule 222 of the Criminal Rules of Practice Kerala, 1982, which allows the issuance of certified copies of even confidential or non-judicial documents with the court's permission (except under Rule 225).

The Court concludes that the denial of a copy of the seizure mahazar is illegal, setting aside Annexure A1 order. The Court directs the Additional Sessions Court-I, Thiruvananthapuram, to issue a certified copy of the seizure mahazar to the petitioner on payment of necessary fees. The judgment is dated 30th October 2023, and the case is allowed accordingly.

Madhu Bakshi v. Anti-Corruption Bureau Kashmir & Anr.

Jammu & Kashmir High Court | (CRM (M) No. 235/2023)

The High Court of Jammu & Kashmir and Ladakh, at Srinagar, heard CRM(M) No. 235/2023 along with several connected cases. The petitioner, Madhu Bakshi, represented by Mr. Tanveer Ahmad Mir, Advocate, challenged the actions of the Anti-Corruption Bureau Kashmir & Another (respondents), represented by Mr. T. M. Shamsi, DSGI, with Ms. Zeenaz Akhter, Advocate.

On 8th November 2023, the court took the reply filed on behalf of the respondent Central Bureau of Investigation (CBI) on record for CRM(M) No. 235/2023, CRM(M) No. 234/2023, CRM(M) Nos. 236/2023 & 504/2023. Further pleadings were directed to be completed by the next date of hearing, scheduled for 23rd February 2024. The interim direction, if any, was ordered to continue until the next hearing.

Regarding CRM(M) No. 308/2023 and CRM(M) No. 309/2023, the court addressed two petitions filed by Raj Singh Gehlot and Aman Gehlot, respectively. The petitions challenged the order of the Additional Special Judge, Anti-Corruption, Kashmir Srinagar, which had dismissed their applications seeking the release of their passports. The passports were seized during the investigation of a case involving allegations of criminal conspiracy, criminal breach of trust, cheating, and criminal misconduct.

The court observed that the seizure of passports was not a condition for bail and cited the Supreme Court's decision in Suresh Nanda vs. Central Bureau of Investigation (2008) 3 SCC 674. The court held that the Investigating Agency did not have the authority to retain or impound passports and directed the release of the passports of the petitioners after retaining photocopies. The petitions (CRM(M) No. 308/2023 and CRM(M) No. 309/2023) were allowed and disposed of.

The order was made by Hon'ble Mr. Justice Sanjay Dhar on 8th November 2023.

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