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## BAIL IN MONEY LAUNDERING CASES: A TUSSELE BETWEEN JUDICIARY AND LEGISLATURE

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Section 45 of the Prevention of Money Laundering Act, 2002 (PMLA) gives provisions for the bail for the offences committed under this Act. Now in the present time it provides scope for bail for any offence committed under the PMLA but before amendment of 2018 it was only available for an offence punishable for term of imprisonment of more than 3 years under Part A of the schedule.

The constitutionality of the section 45 was challenged in the case of *Nikesh Tarachand Shah vs UOI & Anr.*<sup>1</sup> (23<sup>rd</sup> November, 2017) The Hon'ble Supreme Court held that there was no rational basis in differentiating the offences based on term of imprisonment for getting bail. As by earlier provision offences only punishable for term of imprisonment of more than 3 years were given a bail and no other offences. And this distinction between offences for bail was violative of Art. 14 and Art. 19 of the Indian Constitution.

Further SC in the Nikesh Tarachand case held that twin conditions mentioned under section 45(1) of the PMLA should be declared to be violative of Art. 14 and Art. 21 of the Indian Constitution for reason being that person who has already able to get bail for the scheduled offences need to again satisfy the twin conditions mentioned under section 45(1) in order to get bail under PMLA. For reasons mentioned below as-

1. Court stated that the impugned twin conditions have no relation/ nexus with the PMLA proceedings. So, actually court while giving bail under PMLA is not looking whether accused have committed offence of money laundering but looks whether accused is guilty of the scheduled or predicate offence.
2. Further there is no provision under PMLA which opposes or restricts anticipatory bail. So, accused may get anticipatory bail without fulfilling twin conditions but in case

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<sup>1</sup> Writ Petition (Cr) No. 67 of 2017. [(2018) 11 SCC 1]

accused is arrested then same need to satisfy twin conditions in order to get bail.

3. In criminal jurisprudence, accused always have a presumption of innocence and twin conditions tries to negate the presumption of innocence. And twin conditions in a way takes away the right of the accused to show that he is innocent and not guilty of offence charged against him/her.

So, court declared twin conditions under section 45 of PMLA are violative of the Art. 14 and Art. 21 of Indian constitution.

However though twin conditions were declared unconstitutional by Supreme Court in above mentioned case but same were not removed from section by Amendment of 2018. The changes done by amendment of 2018 can be seen as following-

<b><u>Before Amendment-</u></b>	<b><u>After Amendment-</u></b>
<p>1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule shall be released on bail or on his own bond unless:</p> <p>(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and</p> <p>(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail...</p>	<p>Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence (under this Act) shall be released on bail or on his own bond unless:</p> <p>(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and</p> <p>(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail....</p>

So, now the question of law arose in many cases as whether while deciding a bail application under PMLA, whether court need to take into consideration twin conditions or not. Supreme court dealt with the amended section 45 of the Indian constitution and also deal with the above mentioned question of law in the *Chidambaram v. Directorate of Enforcement*. SC here in the present case granted bail without fulfilling the twin test under section 45 of the PMLA.

*The Delhi High court (DHC) in the case Sai Chandrasekhar vs Directorate Of Enforcement<sup>2</sup> (5<sup>th</sup> March,2021), observed that (Para 17,18) –*

*“Twin conditions mentioned in Section 45 of the PML Act continue to be struck down as being unconstitutional in view of the judgment of the Apex Court in the case of Nikesh Tarachand Shah vs. Union of India. The amendment in Section 45 by the Finance Act 2018 is only with respect to substituting the term 'offence punishable for 3 years' with 'offence under this Act'. The said amendment does not revive the twin conditions already struck down by the aforesaid judgment. Since the twin conditions for bail in section 45 of the PML Act have been struck down by the Hon'ble Supreme Court and the same are neither revived nor resurrected by the Amending Act therefore, as of today there is no rigor of said two conditions under original Section 45(l)(ii) of the PML Act for releasing the Petitioner on bail.”*

DHC further observed that in bail proceedings every bail application has to be decided on the facts of the each case and there can be no blanket conditions to decide the same. Court observed that condition given under section 439 CrPC can only be applicable while deciding the bail and no other conditions. The court further in para 20 gave some of the consideration which court needs to take into mind while deciding a bail application-

- the nature of accusation and the severity of the punishment in the case of conviction and the nature of the materials relied upon by the prosecution;
- reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant or the witnesses;
- reasonable possibility of securing the presence of the accused at the time of trial or the likelihood of his abscondence;

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<sup>2</sup> Bail application no. 3791 of 2020. (2021 SCC OnLine Del 1081)

- character behaviour and standing of the accused and the circumstances which are peculiar to the accused.
- larger interest of the public or the State and similar other considerations.

Further Patna High Court (PHC) in the case of **Most. Ahilya Devi @ Ahilya Devi vs The State of Bihar** (28<sup>th</sup> May,2020) observed that the language of Nikesh Tarachand case is very clear that twin conditions in section 45 of the PMLA are violative of the Art. 14 and Art.21 of the Indian constitution and there court through language gave no scope to legislation to amend it in a way to revive the twin conditions given in the section 45 of the PMLA. Hence, in the present case PHC denied to take into consideration the twin conditions while deciding the bail applications.

Various other High Courts also same observation as mentioned above in the cases - Delhi High Court in **Deepak Virendra Kochhar vs Directorate of Enforcement**<sup>3</sup> (25<sup>th</sup> March,2021), Manipur High Court in **Okram Ibobi Singh vs Directorate of Enforcement**<sup>4</sup> (16<sup>th</sup> December,2020), Madhya Pradesh High Court in **Vinod Bhandari vs Director**<sup>5</sup> (29<sup>th</sup> August,2019).<sup>6</sup>

But there was no SC decision in this regard as to twin conditions should not be taken into consideration while giving a bail under PMLA. And the twist came in the case of **Vijay Madanlal Choudhary vs Union Of India**<sup>7</sup> (27<sup>th</sup> July,2022) where observation of the SC was totally in contradiction to observations made by the various high courts mentioned above. SC in the present case uphold the validity of twin conditions mentioned in the amended section 45 of the PMLA. The SC observed that the defect was highlighted by the SC in Nikesh Tarachand case and same was cured by the 2018 amendment by imposing twin conditions with context of all offences under the Act and not to specific category of offences as before 2018 amendment. SC observed that if any defect is highlighted by the constitutional bench of the SC, then it would not automatically led to repeal of the impugned provisions but power regarding repeal will always vests with the Parliament and none else. Court observed that Parliament has power

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<sup>3</sup> Criminal Bail Application No. 1322 of 2020.

<sup>4</sup> A.B. No. 42 of 2020.

<sup>5</sup> M.Cr.C. No. 34201/2018.

<sup>6</sup> 'Controversial Rule of Jail under PMLA,2002' by Kapil Madan, Saurabh Gupta, 2021 SCC OnLine Blog Exp 56, Published on 7<sup>th</sup> July, 2021.

<sup>7</sup> SLP (CRIMINAL) No. 4634 of 2014.

to cure the defect highlighted by the Constitutional court and once Parliament repeals any provision then it would become non est for all purposes until re-enacted. A new provision effected by Parliament after curing defect would be implemented as a revival of repealed provision. So, in the present case when SC struck down section 45 of the PMLA in Nikesh Tarachand case then Parliament revived that section by an amendment of 2018 and it did not struck down the twin conditions in an amendment while correcting the defects, so it cannot be said that twin conditions are not applicable. If parliament while correcting defects would have also deleted the twin conditions then it could have been said that twin conditions are not applicable.

Court also while interpreting section 45 of the PMLA in paragraph no. 131 observed that it does not absolutely put a blanket bar from getting a bail for an accused but it depends on discretion of the Court which is not arbitrary or irrational but judicial, guided by the principles of law as provided under Section 45 of the 2002 Act. Further in paragraph 134, court observed that there are many other special statutes where conditions exists for grant of bail and even general law as CrPC also stipulates conditions which court needs to take into consideration before granting a bail. Though bail is an important right of the accused but still cannot be extended to accused in free manner but have to be complied with some conditions.

Court also interpreted the scope of section 45 very widely and answered the substantive question of law as whether 'pre-arrest bail or anticipatory bail' is covered under section 45 or not? Court answered affirmative that the word bail will include both pre-arrest bail and after arrest bail. It was observed that there is merely difference of stage of proceeding at which bail is granted and no other difference and hence pre-arrest bail is also covered under the scope of section 45 of PMLA. In conclusion SC was of the opinion that-

*"The provision in the form of Section 45 of the 2002 Act, as applicable post amendment of 2018, is reasonable and has direct nexus with the purposes and objects sought to be achieved by the 2002 Act and does not suffer from the vice of arbitrariness or unreasonableness."*

Further proviso to section 45 of the PMLA reads as following-

*"Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, 3 [or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees] may be released on bail, if the Special Court so directs."*

It can be seen that an exception is given to category of person mentioned above from fulfilling any conditions of the section and be given bail on direction of the special court. In the case of ***Devki Nandan Garg vs Directorate of Enforcement***<sup>8</sup>, issue was whether sick would even include accused with conditions which could be addressed from jail or not? While addressing this issue DHC referred to decision of SC ***Gautam Kandu vs Directorate of Enforcement***<sup>9</sup> (28<sup>th</sup> February, 2020), where it was observed that legislature with special intention carved out exception to categories mentioned in proviso of section 45 of the PMLA and once person falls within these categories then there is no need for fulfilling any conditions for getting a bail. Court also replied to argument raised by ED, that it is immaterial as to whether accused conditions are addressable from jail or not because treatment given in jail is different from treatment given in any private hospital. In the present case accused was functioning on only one kidney which was even functioning only 30% and he need a constant monitoring otherwise it would have led to a death. Now in such scenario court was of the opinion that accused needs special treatment which would be given in private hospital and there is no need to comply with any conditions in order to decide the grant of bail for the accused.

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<sup>8</sup> Bail Application No. 540/2022.

<sup>9</sup> CRM No. 8345 of 2010.