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Case Comment: Vijay Madanlal Choudhary vs Union of India - The Holistic Picture of PMLA

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INTRODUCTION

The Prevention of Money Laundering Act, 2002 is the sole parent and guardian that deals with the offences pertaining to money laundering. The PMLA Act came to force in 2002 to provide the prosecution of wrongdoers and criminal punishments if found guilty, however, even in light of the 2019 amendments, the act still does not provide a straight-jacket answer to various provisions, especially in coping with the increasing menace of money laundering elopements from the country. One of the important questions that lack an interpretation is relating to the prerogative of an accused to avail the option of Bail. There are several instances where the apex court got the chance to deal with various provisions of PMLA and has taken some very valuable decisions. The recent verdict has been given by the supreme court on 27th July 2022 where it has put several questions about the impugned sections to rest. Before delving into the stated case, it is impertinent to understand the backdrop of PMLA and all the various judgements and amendments that have taken place since then.

Nikesh Tarachand v Union of India*:* The Supreme Court had a juncture to look into the constitutional validity of the twin conditions as imposed under Section 45[1] in Nikesh Tarachand Shah v Union of India[2]where the Supreme Court struck down the said two conditions by declaring as they violate Articles 14 and 21[3] of the Constitution of India.

***Reasons are given to struck down these provisions*:**

1. While considering the bail in PMLA proceedings, the same accused must pass the test outlined in Section 45 qua the same scheduled offence for which he is already on bail. A person may be increased on bail for the planned offence. Even if the accused is found not guilty of the scheduling offence, he still needs to pass the requirements of Section 45 with regard to the same offence for which he was previously found not guilty.

2. Section 45(1) creates a difficult scenario because the contested twin prerequisites have no connection to the PMLA offences. Whether the person is guilty of the crime of money laundering is not taken into consideration by the court when granting or denying the bail, which makes the court to believe that the accused has committed a predicate or scheduled offence that results in a manifestly arbitrary, discriminatory and unjust result which would invalidate the section.

3. There is no clause in the PMLA that forbids the issuance of pre-arrest bail. A person may be granted anticipatory bail without meeting the twin requirements for an offence involving money laundering and an offence against Part A of the Schedule, but if that person is later arrested for those same offences, he must first meet the twin requirements under Section 45 in order to be granted regular bail.

4. The presumption of innocence is drastically reversed by Section 45, which is inherently harmful to anyone accused of a crime. The Court must be doubly certain that a provision furthers a compelling State interest for combating severe crime before applying one that violates the personal freedom protected by Article 21 of the Indian Constitution. The indiscriminate

[1] Prevention of Money Laundering Act 2002, s 45
[2] *Nikesh Tarachand Shah v Union of India* (2018) 1 SCC 11
[3] Constitution of India 1950, art. 14 and art. 21

implementation of the contested criteria of Section 45 will undoubtedly violate Article 21 of the Constitution in the absence of any such compelling State interest.

In response to the ***Nikesh Tarachand case***, Section 45 of the PMLA was revised as of April 19, 2018, by the Finance Act of 2018, substituting the phrase "under this Act" for the phrase "punishable for a period of imprisonment of more than three years under Part A of the Schedule." The constitutional legality of Section 45 of the PML Act in relation to the dual criteria it contains was contested in the case of Nikesh Shah (supra). Following that judgement, the Legislature changed Section 45 (1) of the Act. The Madras High Court's decision to deny bail to the directors of a corporation was recently dismissed by the Supreme Court, which upheld, among other things, the presumption of validity of Section 45(1) and its twin conditions as amended by the Finance Act of 2018.

AFTERMATH AMENDMENT

It is important to note that in the group of petitions filed contesting the legality of PMLA provisions, Solicitor General TUSHAR MEHTA used the same line of defence to defend the constitutionality of revised section 45 before the Supreme Court. He had argued that Section 45's twin conditions weren't inherently unlawful. In Nikesh Tarachand Shah v Union of India, the Supreme Court had ruled that the Schedule's Part A's arbitrarily tying the twin criteria only to the predicate offence or a portion of the predicate offence was unconstitutional. According to Mr. Mehta, a provision that is found to be unconstitutional just ceases to be in effect rather than being removed from the law book. The legislature alone has the authority to repeal. As a result, the provision may be reinstated if the reason it was found unconstitutional is remedied. The Finance Act of 2018 (effective April 19, 2018) altered the PMLA. Section 45 was changed to read "under this Act" rather than "punishable for a period of imprisonment of more than three years under Part A of the Schedule." According to Mr. Mehta, this corrected the flaw that led to the Supreme Court's declaration that it was unconstitutional, and as a result, the twin condition was resurrected.

In ***Ajay Kumar v ED***[4], the learned ASGI stated that by changing the terms "under this Act" to "under this Act", section 45 of the Act would now reinstate the dual criteria for bail with regard to an offence of money laundering, which is a serious economic offence. He argued that the two requirements included in section 45(1) of the PML Act, which was declared ultra vires in the case of Nikesh Shah (supra), were dependent upon offences listed in Part-A of the Schedule, which is not money laundering offences but rather other offences, rather than having any inherent flaws in the conditions themselves. The learned ASGI would contend that the lack of a meaningful connection between the criteria for the implementation of the twin conditions in the opening portion of Section 45(1) and the intent and purpose of the PML Act led to its unconstitutionality. The Supreme Court invalidated those requirements because they were connected to the underlying crimes rather than the money laundering offence. The legislative amendment fixed the flaw that the Supreme Court had pointed out. By establishing consistent criteria for application, specifically for offences under the PML Act, the Supreme Court's criticism of the arbitrariness in the applicability of twin requirements de-linked from the infraction under the PML Act has been addressed.

IMPORTANT JUDGEMENTS

Based on the Supreme Court's ruling in the ***P. Chidambaram*** and ***Mohammad Arif*** case, it was determined in the Ajay Kumar v ED[5] case that the mere fact that the entire section was not re-enacted would be of no consequence because the provision, even after being ruled unconstitutional, does not get repealed or erased from the statute book but only becomes unenforceable. As soon as the Parliament intervenes and corrects a flaw identified by the Constitutional Court, it is believed that the flaw has been resolved, and the presumption of constitutionality should apply to those provisions.

In addition to the previous analysis, the court stated that it would be meaningless if the entire section had not been re-enacted because, even after being ruled unconstitutional, the provision does not disappear from the books or become null and void; rather, it only loses its ability to be

[4] *Ajay Kumar S/O Chandraprakash v Directorate of Enforcement* (2022) Criminal Application (BA) No. 1149/2021
[5] *Ibid*

enforced. The High Court cited the Supreme Court's ruling in ***Nagaland Senior Govt. Employees Welfare Assn. v State of Nagaland***[6] to support its conclusion that there is a presumption in favour of constitutionality because the revised Section 45(1) of the PMLA has not been declared invalid (2010).

CASE STUDY

The current case deals with various provisions of PMLA, 2002, and the Supreme Court has put various questions about the impugned sections to rest. The first issue that has been dealt with under this judgement was of ECIR vis-à-vis FIR

The jurisdictional police, who are subject to the provisions of Chapter XII of the 1973 Code, are not permitted to register the offence of money laundering. A comparison to the provisions of the 1973 Code addressing the registration of money-laundering offences cannot be made since the 2002 Act's complaint procedure is a distinct law that provides for special mechanisms involving inquiry and investigation of money-laundering offences.

Contrary to the formal registration of a FIR by the jurisdictional police in respect of a cognizable offence under ordinary law, there is no need to formally register an Enforcement Case Information Report (ECIR) given the mechanism of inquiry/investigation for proceeding against the property (being proceeds of crime) under this Act by way of civil action (attachment and confiscation). The fact that such an ECIR has not been documented does not prevent the authorities mentioned in Section 48[7] of the 2002 Act from starting an inquiry or investigation in order to start a civil action of attaching property that is the profits of crime by adhering to the necessary procedures.

Before taking legal action or opening a case against someone who was involved in a procedure or activity involving the proceeds of crime, the department generated an internal report called an ECIR. If disclosed prior to the inquiry or investigation necessary to proceed against the property being investigated, it may comprise information about the material the Authority has

[6] *Nagaland Senior Govt. Employees Welfare Assn. v State of Nagaland* (2010) 7 SCC 643
[7] Prevention of Money Laundering Act 2002, s 48

in its custody and recording satisfaction of reason to think the person is guilty of money laundering. The proceeds of crime, including the individual involved in the procedure or activity related thereto, may negatively affect the investigation's conclusion. As long as the person has been notified of the reasons for his arrest, Article 22(1) of the Constitution has been complied with.

According to the 2002 Act, the person who has been arrested for a money-laundering offence is immediately informed of the reasons for his arrest. When the person is brought before a Special Court, the Special Court has the option of asking the ED representative to present any pertinent records regarding the case of the accused before it and conduct an investigation to determine whether the person should remain in custody. When seen in this light, providing an ECIR to the person in question is not always required.

A FIR, which must by law be filed and provided to the accused in accordance with the 1973 Code, cannot be compared to an ECIR. If disclosure of a copy of an ECIR becomes required, it may undermine the goals of the 2002 Act, including impeding the attachment of property (proceeds of crime). Since the ECIR is mainly an internal ED document, its non-supply cannot be regarded as a constitutional right breach. The fundamental principles of justice and fairness are the foundation upon which India's criminal justice system is based. These include the notions that a person is deemed innocent until proven guilty and that they are eligible for bail pending trial if they are held on suspicion of committing a crime. the notions that a criminal statute shouldn't be retroactive, that a suspect has a privilege against self-incrimination, and that a person accused of an offence must be made aware of the charges brought against him. Each of these rules, however, has been so thoroughly undermined by a long list of exceptions.

CASE

Prior to a change made in 2018, the legislation divided the two kinds of predicate offences listed in the schedule. It distinguished between offences that carried a sentence of at least three years in jail and others. Only in situations where the primary offence was thought to be more serious was the twin requirement required. The classification of offences based on the number of years

spent in jail was deemed irrational and the requirements inappropriate by the court in ***Nikesh Tarachand Shah v Union of India***. The classification that the Parliament had created was removed, and Section 45 was amended to include the dual requirements for all PMLA offences. In ***Vijay Madanlal Choudhary***, the petitioners contended that the legislature could not legitimately modify legislation that had previously been ruled unconstitutional. It meant that without explicitly deleting the twin criteria, a bail provision could not have been added back into the PMLA.

JUDGMENT: CONCLUDING REMARKS

The judgment in Vijay Madanlal Choudhary held that if a person is ultimately acquitted or discharged in a case concerning the predicate offence, the charge under the PMLA can no longer be maintained. The ruling upheld Section 45 which imposes twin conditions for bail. Vijay Madanlal Choudhary not only grants sanction to Parliament's effort at reintroducing a law previously declared unconstitutional but also holds that the requirements for bail are by no means arbitrary or unreasonable. The Court's finding is unmindful of the fact that the predicate offences contained in the Schedule include crimes ranging from the discharging of pollutants under the Environment Protection Act to penalties for applying for a false trademark under the Trade Marks Act. Therefore, the PMLA aims to stop money laundering in India and has been extremely helpful in doing so. Additionally, the Supreme Court has once again served as a "Sentinel on the qui vive" in the current case.