BAIL UNDER PMLA

NIKESH TARACHAND SHAH VS. UNION OF INDIA & ANR

- Supreme Court struck down Section 45(1) of the Prevention of Money Laundering Act, 2002 insofar as it impose two further conditions for release on bail, for the offences punishable for a term of imprisonment of more than 3 years under Part A of the Schedule to the PMLA is involved, to be unconstitutional as it is violative of Article 14 and Article 21 of Constitution of India.
- The 2 conditions provided under the said sub section were as under:
  - The public prosecutor must be given an opportunity to oppose any application for release on bail
  - The court must be satisfied, where the public prosecutor opposes the application, that there are reasonable grounds for believing that the accused is "…not guilty of such offence, and that he is not likely to commit any offence while on bail".

HELD

- Classification made based on the length of sentence of imprisonment had no rational basis or relation with the objects of the Prevention of Money Laundering Act 2002.
- Application of Section 45(1) led to situations where same offenders tried under different cases which end up with different results depending on whether Section 45(1) is applied or not.
- The twin conditions under Section 45(1) were arbitrary and discriminatory in nature.
- In cases of anticipatory bail these twin conditions are not to be applied for granting bail leading to discrimination between those who apply for regular bail and the others who applied for anticipatory bail under Section 45(1).
- It was further held:

  In fact, the presumption of innocence, which is attached to any person being prosecuted of an offence, is inverted by the conditions specified in Section 45, whereas for grant of ordinary bail the presumption attaches.

Section 45 — Prior to Nikesh Tarachand Shah	*Section 45 — Post Nikesh Tarachand Shah*
"**45. *Offences to be cognizable and non-bailable***.—(1) Notwithstanding 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*—	"**45. *Offences to be cognizable and non-bailable***.—(1) 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*—
(*i*) the Public Prosecutor has been given an opportunity to oppose the application for such release; and	(*i*) the Public Prosecutor has been given an opportunity to oppose the application for such release; and
(*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:	(*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:
Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs:"	Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, 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:*" (emphasis supplied)

Government of India with effect from 19th April 2018 has amended Section 45(1) of the PMLA

Words added : "under this Act"

Words deleted : "punishable for a term of imprisonment of more than 3 years under Part A of the Schedule"

APPLICABILITY OF THE TWIN CONDITION UNDER SECTION 45(1) PMLA POST AMENDMENT

Vinod Bhandari v. Assistant Director, Directorate of Enforcement *2018 SCC OnLine MP 1559*

Held: Despite the amendment in the provision of Section 45 of the PMLA in the year 2018, the original Section 45(1)(ii) has not been revived.

"13. It is to be noted here that, after effecting amendment to Section 45(1) of the PMLA Act the words "under this Act" are added to Sub-section (1) of Section 45 of the PMLA Act. However, the original Section 45(1)(ii) has not been revived or resurrected by the said Amending Act. The learned Counsel appearing for the applicant and the learned ASG are not disputing about the said fact situation and in fact have conceded to the same. It is further to be noted here that, even Notification dated 29.3.2018 thereby amending Section 45(1) of PMLA Act which came into effect from 19.4.2018, is silent about its retrospective applicability.

14 . In view of thereof, the contention advanced by the learned ASG cannot be accepted. It is to be further noted here that, the original Sub-section 45(1)(ii) has therefore neither revived nor resurrected by the Amending Act and, therefore, as of today there is no rigor of said two further conditions under original Section 45(1)(ii) of PMLA Act for releasing the accused on bail under the said Act."

Nikesh Tarachand Shah vs. Union of India & Anr

- The decision in *Dr. Vinod Bhandari* is based on the ratio of the decision of Supreme Court in *Nikesh Tarachand Shah* wherein the Supreme Court considered other enactments also where such twin conditions existed. It was held:

> *"38. We must not forget that Section 45 is a drastic provision which turns on its head the presumption of innocence which is fundamental to a person accused of any offence. Before application of a Section which makes drastic inroads into the fundamental right of personal liberty guaranteed by Article 21 of the Constitution of India, we must be doubly sure that such provision furthers a compelling State interest for tackling serious crime. Absent any such compelling State interest, the indiscriminate application of the provisions of Section 45 will certainly violate Article 21 of the Constitution. Provisions akin to Section 45 have only been upheld on the ground that there is a compelling State interest in tackling crimes of an extremely heinous nature."*

- Referring to the decision of the Constitution Bench in *Kartar Singh Vs. State of Punjab (*1994) 3 SCC 569 Supreme Court in *Nikesh Tarachand Shah* noted that a similar provision under Section 20(8) TADA was upheld because it was necessary for the State to deal with terrorist activities which are a greater menace to modern society than any other activity. It was held that since offence under TADA was the most heinous offence in which the vice of terrorism is sought to be tackled, given the heinous nature of offence which is punishable by death or life imprisonment and that it was triable by a Special Court, Section 20(8) of TADA was upheld. Further that the accused is not likely to commit any offence while on bail meant an offence punishable under the TADA only and not any other enactment.
- In Nikesh Tarachand Shah Supreme Court also noted the decision in Ranjitsing Brahmajeetsing Sharma Vs. State of Maharashtra & Anr. (2005) 5 SCC 294 wherein dealing with similar provision under Maharashtra Control of Organized Crime Act, 1999 (MCOCA) Supreme Court in Paras 38 and 44 held:

  > A. We are of the opinion that the restrictions on the power of the Court to grant bail should not be pushed too far. If the Court having regard to the materials brought on record is satisfied that in all probability he may not be ultimately convicted, an order granting bail may be passed. The satisfaction of the Court as regards his likelihood of not committing an offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever be it minor or major offence.

B. What would further be necessary on the part of the Court is to see the culpability of the accused and his involvement in the commission of an organized crime either directly or indirectly. The Court at the time of considering the application for grant of bail shall consider the question from the angle as to whether he was possessed of requisite mensrea. Every little omission or commission, negligence or direction may not lead to a possibility of his having culpability in the matter which is not a sine-qua-non for attracting the provisions of MCOCA. The Court may in a situation of this nature keep in mind the broad principles of law that some acts of omission and commission on the part of a public servant may attract disciplinary proceedings but may not attract a penal provision.

C. Section 21(4) MCOCA does not lead to the conclusion that the Court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act. The provision must be construed reasonably i.e. that the Court is able to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial.

D. Similarly, the Court will be required to record a finding as to the possibility of his committing a crime after grant of bail, however such an offence in future must be an offence under the MCOCA and not any other offence. Since it is difficult to predict the futuro conduct of an accused the Court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence.

OTHER PROVISIONS RELATING TO BAIL AND COGNIZANCE UNDER PMLA

- Section 44(2)- Nothing contained in Section 44 shall be deemed to affect the special powers of High Court regarding bail under Section 439 of Cr.P.C and the High Court may exercise such power including the power under Section 439(1)(b)

  Reference to “Magistrate” in this section includes also a reference to a “ Special Court” designated under Section 43 of the PMLA.

- Section 45 (2) - The limitation on granting of bail specified in sub-section (1) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.

- Section 45 further provides that the Special Court shall not take cognizance of any offence punishable under Section 4 except upon a complaint in writing made by-

  i. the Director; or

  ii. any officer of the Central Government or State Government authorized in writing in this behalf by the Central Government by a general or a special order made in this behalf by that Government

- Section 45(lA) provides Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or any other provision of this Act, no police officer shall investigate into an offence under this Act unless specifically authorized, by the Central Government by a general or special order, and, subject to such conditions as may be prescribed.
- Explanation to Section 45 reads as under:
  - "*For removal of doubts, it is clarified that the expression "Offence to be cognizable and non-bailable" shall mean and shall deemed to have always meant that all offences under this Act shall be cognizable offences and non-bailable offences notwithstanding anything contrary contained in the Code of Criminal Procedure, 1973 (2 of 1974), and accordingly the officer authorized under this Act are empowered to arrest an accused without warrant, subject to fulfilment of conditions under Section 19 and subject to conditions enshrined under this Section."*

POWER TO ARREST AND PREREQUISITES FOR THE SAME HAVE BEEN PROVIDED UNDER SECTION 19 OF PMLA AND A COMPARISON OF SECTION 19 PMLA AND SECTION 41(1) CRPC SHOWS AS UNDER:

- ***Section 19 PMLA*** requires that before arresting anybody, Authorized officer must have ***"reason to believe"*** based upon ***"the material in his possession" to be "recorded in writing"*** *that the person is* **"guilty"** of an offence under the Act.
- Thus, the prerequisites for an authorized officer to make the arrest of an accused under Section 19 PMLA are:
  - Reason to believe
  - Based on material in his possession
  - To be recorded in writing
  - That the person is guilty of an offence under the Act.

- ***Section 41(1) Cr.P.C*** requires that before arresting any person, there must be a ***"reasonable complaint made"***, "***credible information received***" or "***a reasonable suspicion exist***" of a person having committed a cognizable offence and
- Police officer has reason to believe on the basis of such complaint, information or suspicion that such person has committed such offence and
- That the arrest is necessary to prevent that person
  - from committing any further offence or
  - for proper investigation or
  - from causing the evidence to disappear or tamper the same or
  - from making any inducement or threat to another person or
  - To ensure presence in court

REASON TO BELIEVE

- Supreme Court in its decision ***P. Chidambaram v. Directorate of Enforcement, 2019 SCC OnLine SC 1143 held that:***
  - The term "reason to believe" is not defined under PMLA.
  - It has been defined under Section 26 IPC.
    - A person is said to have "reason to believe" a thing, if he has sufficient cause to believe that thing but not otherwise.
    - The specified officer must have reason to believe on the basis of material in his possession that the property sought to be attached is likely to be concealed , transferred, or dealt with in a manner which may result in frustrating any proceeding for confiscation of their property under this act.

- ***Calcutta Discount Company v. Income Tax Officer, 1961 SCR (2) 241.***

  The Supreme Court with reference to provisions of Income Tax Act, observed that the expression reasons to believe' postulates belief and existence of reasons for that belief. ***Such belief may not be based on mere suspicious it must be founded upon information.***

COMPARISON OF THE PREREQUISITES FOR AN AUTHORIZED OFFICER TO EXERCISE POWER UNDER SECTION 5 AND SECTION 19

- Section 5 PMLA - Where ***the Director, or any other officer not below the rank of Deputy Director authorised*** by the Director ***has reasons to believe*** (***the reason*** for such belief ***to be recorded in writing***), on the basis of material in his possession, that—
  - (a) ***any person is in possession of any proceeds of crime*** and
  - (b***) such proceeds of crime or likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings*** relating to confiscation of such proceeds of crime he may, by an order in writing, provisionally attach such property for a period not exceeding 180 days from the date of the order, in such manner as may be prescribed.
- (ii) ***No such order of attachment shall be made unless***, in relation to the scheduled offence, ***a report has been forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, 1973***, or a complaint has been filed by a person authorized to investigate the offence mentioned in the Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be or a similar report or complaint has been made or filed under the corresponding law of any other country.
- (iii) Further any property of any person may be attached, if the Director or any other officer not below the rank of Deputy Director authorized by him has reason to believe (reasons for such belief to be recorded in writing), on the basis of material in his possession, that if such property involved in money laundering is not attached immediately the non-attachment of the property is likely to frustrate any proceedings under this Act.

- ***Section 19 PMLA*** - If the Director , Deputy Director , Assistant Director or any other officer authorized in this behalf by Central Government by general or special orders requires that before arresting anybody, the officer must have ***"reason to believe"*** based upon ***"the material in his possession" to be "recorded in writing"*** *that the person is* **"guilty"** of an offence under the Act, he shall arrest such person and shall inform him as soon as may be the grounds of such arrest. Thus, Guilty of scheduled offence
- The authorized officer after the arrest of the person shall forward the copy of the order along with the material in his possession in a sealed envelope to the Adjudicating Authority.
- Arrested person shall be taken to a Special Cort or judicial Magistrate or a Metropolitan Magistrate, as the case may be within 24 hours of his arrest. (Period of24 hours shall exclude the time necessary for the journey from the place of arrest to Special Court or Magistrate's Court.

GUIDELINES FOR GRANT OR REFUSAL OF ANTICIPATORY BAIL UNDER PMLA

- ***Supreme Court in its decision P. Chidambaram v. Directorate of Enforcement, 2019 SCC OnLine SC 1143 laid down salient points to be considered for grant or rejection of anticipatory bail as follows:***
- The privilege of pre-arrest bail should be granted in exceptional cases. Anticipatory bail is not to be granted as a matter of rule and it has to be granted only when the court is convinced that exceptional circumstances exist to resort to that extraordinary remedy.
- ***State of M.P. v. Ram Kishan Balothia (1995) 3 SCC 221***
  - SC held that the right of anticipatory bail is not a part of Article 21 of Constitution of India as it is essentially a statutory right conferred long after the coming into force of the Constitution and cannot be granted as a matter of right.
- Legislative intent behind the introduction of S.438 CrPC is to safeguard individuals personal liberty and to protect him from the possibility of being humiliated and from being subjected to unnecessary police custody. However, the court must also keep in mind that criminal offence is not just an offence against an individual, rather larger societal interest is at stake.
- The object of S. 438 Cr.P.C is to safeguard personal liberty of an individual, striking a delicate balance between two rights that is safeguarding personal liberty of an individual and societal interest.

- Pre-arrest bail is to strike a balance between the individuals right to personal freedom and right of the investigating agency to interrogate the accused as to the material so far collected and to collect more information which may lead to recovery of relevant information.
- ***Siddharam Satlingappa Mhetre v. State of Maharashtra***
  - ❖ Held – Nature and gravity of accusation and the exact role of the accused must be properly comprehended before arrest is made and that the court must evaluate the available material against the accused carefully.

    - Court should also consider whether the accusation have been made only with the object of injuring or humiliating the applicant by arresting him or her.
- ***Jai Prakash Singh v. State of Bihar, (2012) 4 SCC 379 : (2012) 2 SCC (Cri) 468]*** , the Supreme Court held as under:

  "19. Parameters for grant of anticipatory bail in a serious offence are required to be satisfied and further while granting such relief, the court must record the reasons therefor. Anticipatory bail can be granted only in exceptional circumstances where the court is prima facie of the view that the applicant has falsely been enroped in the crime and would not misuse his liberty."

- Power under Section 438 Cr.P.C being an extraordinary remedy has to be exercised cautiously most importantly in case of economic offences.
- Economic offence stand as a different class as they affect economic fabric of the society.
- **Y.S. Jagan Mohan Reddy v. CBI [Y.S. Jagan Mohan Reddy v. CBI, (2013) 7 SCC 439 : (2013) 3 SCC (Cri) 552]** , the Supreme Court held as under:
  - "*34. Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.*
  - *35. While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations.*"
- Section 438 Cr.P.C is to be invoked only in exceptional cases where the case alleged is frivolous or groundless.
- The object of S. 438 Cr.P.C is to safeguard personal liberty of an individual, striking a delicate balance between two rights that is safeguarding personal liberty of an individual and societal interest.

GUIDELINES FOR GRANT OR REFUSAL GRANT OF REGULAR BAIL UNDER PMLA

Some of the salient features of the decision in P. Chidambaram v. ED, 2019 SCC Online SC 1549 laid down by Supreme Court to be considered for grant and refusal of bail under PMLA are:

- The basic jurisprudence for grant of bail remains the same that is bail is the rule and refusal an exception.
- The gravity of the offence is an important aspect in addition to the triple test which is required to be kept in view by the Court. The gravity for the said purpose will have to be gathered from the facts and circumstances arising in each case.
- ***In dealing with bail applications the Triple Test Rule as under is also required to be followed:***

1. ***Presence of the accused:-***

- In doing so the courts are guided by the conduct of the accused . If the accused has made himself available at all times whenever required in past and is co-operating with the investigation , the courts take this factor in favour of the accused while granting bails.

2. Nature of evidence involved:-

- If the case is primarily based on documents and all the documents were already in the custody of the investigating agency, the scope of tampering becomes impossible and the accused be released on bail, also keeping in mind that since the accused had not tampered the documents at any point of time in past, the courts take this factor in favour of the accused while granting bails.

3. Deep Roots in the society:-

- The court take judicial notice of the fact that the accused had deep roots in the society, is staying at his permanent address since long, had all properties and family within the local limits and is not previously involved in any criminal activity.

- Even economic offences would fall under the category of “grave offence” in view of the consequences of financial irregularities that befall upon the society.
- Even if the allegation is one of grave economic offence, it is not a rule that bail should be denied in every case since there is no such bar created in the relevant enactment passed by the legislature nor does the bail jurisprudence provides so.
- Court can look into the documents handed over in sealed cover by the prosecution while considering an application for bail to assure itself that
  - Whether the investigation is on the right line.
  - Whether bail should be granted or not
  - However without giving a copy thereof to the accused the court cannot return a finding in nature of guilt against the accused.

CANCELLATION OF BAIL

***Union of India v. Hassan Ali Khan*, (2011) 10 SCC 235,**

*"**36.** The High Court having proceeded on the basis that the attempt made by the prosecution to link up the acquisition by Respondent 1 of different passports with the operation of the foreign bank accounts by the said respondent, was not believable, failed to focus on the other parts of the prosecution case.*

***37.** It is true that having a foreign bank account and also having sizeable amounts of money deposited therein does not ipso facto indicate the commission of an offence under the PML Act, 2002. However, when there are other surrounding circumstances which reveal that there were doubts about the origin of the accounts and the monies deposited therein, the same principles would not apply. The deposit of US $700,000 in Barclays Bank account of Respondent 1 has not been denied. On the other hand, the allegation is that the said amount was the proceeds of the sale of diamond jewellery which is alleged to have been stolen from the collection of the Nizam of Hyderabad. In fact, on behalf of Respondent 1 it has been submitted that in respect of the said deal, Respondent 1 had received by way of commission a sum of US $30,000 which he had spent in Dubai.*

- ***38.*** *Although, at this stage, we are also not prepared to accept the convoluted link attempted to be established by the learned ASG with the opening and operation of the bank accounts of Respondent 1 in Union Bank of Switzerland, AG, Zurich, Switzerland, the amounts in the said bank account have not been sought to be explained by Respondent 1. We cannot also ignore the fact that the total income of Respondent 1 for Assessment Years 2001-2002 to 2007-2008 has been assessed at Rs 11,04,12,68,85,303 by the Income Tax Department and in terms of Section 24 of the PML Act, Respondent 1 has not been able to establish that the same were neither the proceeds of crime nor untainted property. In addition to the above is the other factor involving the notarised document in which the name of Adnan Khashoggi figures.*
- ***39.*** *Lastly, the manner in which Respondent 1 had procured three different passports in his name, after his original passport was directed to be deposited, lends support to the apprehension that, if released on bail, Respondent 1 may abscond.*
- ***40.*** *As far as Mr Bagaria's submissions regarding Section 439(2) CrPC are concerned, we cannot ignore the distinction between an application for cancellation of bail and an appeal preferred against an order granting bail. The two stand on different footings. While the ground for cancellation of bail would relate to post-bail incidents, indicating misuse of the said privilege, an appeal against an order granting bail would question the very legality of the order passed. This difference was explained by this Court in State of U.P. v. Amarmani Tripathi [(2005) 8 SCC 21 : 2005 SCC (Cri) 1960 (2)] .”*