

**I. PMLA: VIJAY MADANLAL CHOUDHARY V. UNION OF INDIA. [2022 SCC ONLINE SC 929]**

**II. ELECTRONIC EVIDENCE AND GLOBAL LEGAL PERSPECTIVE VIS-À-VIS ARJUN PANDITRAO KHOTKAR V. KAILASH KUSHANRAO GORANTAYAL, (2020) 7 SCC 1**

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# THE ERA OF PMLA AND ENFORCEMENT DIRECTORATE

- PMLA was enacted in 2002 in response to India's global commitment (including the Vienna Convention) to combat the menace of money laundering.
- Statement of objects and reasons of the PMLA Bill of 1999 refers to various international conventions and instruments dealing primarily with money laundering related to crimes involving drugs and narcotics.

# THE ERA OF PMLA AND ENFORCEMENT DIRECTORATE

- The Act is a comprehensive legislation, dealing in preventing money-laundering, attachment of proceeds of crime, adjudication and confiscation including vesting of it in the Central Government.
- The Act sets up mechanisms for combating money-laundering and to prosecute the persons indulging in the process or activity connected with proceeds of crime

# THE ERA OF PMLA AND ENFORCEMENT DIRECTORATE

- Money laundering is a serious threat not only to the financial system of our country but also to the global economy at large.
- The Act (with amendments till 2019) gives *almost unfettered powers to the ED for search, seizure, investigation, arrest and attachment of assets considered to be proceeds of crimes listed under the PMLA along with constrictive bail provisions* – in disregard of Part III rights.

**VIJAY MADANLAL CHOUDHARY V.**

**UNION OF INDIA,**

**[2022 SCC ONLINE SC 929]**

**[Review Petition (Crl.) No. 219/2022 pending before the Hon'ble  
Supreme Court]**

# Nikesh Tarachand Shah vs. Union of India

## [(2018) 11 SCC 1]

- Section 45 twin conditions challenged and struck down in Nikesh Tarachand Shah vs. Union of India [(2018) 11 SCC 1] being violative of Article 14 of the constitution.

*“the statutory scheme, with Section 45 in its present avatar, would therefore, lead to the same offenders in different cases having different results qua bail depending on whether Section 45 does or does not apply. This shows that manifestly arbitrary, discriminatory and unjust results would arise on the application or non-application of Section 45, and would directly violate Article 14 and 21, inasmuch as the procedure for bail would become harsh, burdensome, wrongful and discriminatory, depending upon whether a person is being tried for an offence which also happens to be an offence under part A of the Schedule, or an offence under part A of the schedule together with an offence under the 2002 Act.*

*Obviously, the grant of bail would depend upon a circumstance which has nothing to do with the offence of money laundering. ....Section 45 would have to be struck down as being manifestly arbitrary and providing a procedure which is not fair or just and would, thus, violate both Articles 14 and 21 of the Constitution.”*

# REVIVAL OF TWIN CONDITIONS

In order to revive the twin conditions, Section 45 of PMLA was amended by way of Finance Act, 2018.

| Prior to amendment<br>(Section under challenge in Nikesh Tarachand)  | After amendment  |
|--|--|
| <p>45. Offences to be cognizable and non-bailable.-<br/>(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence <b><u>punishable for a term of imprisonment of more than three years under Part A of the Schedule</u></b> shall be released on bail or on his own bond unless-</p> <ul style="list-style-type: none"><li>(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and</li><li>(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..”</li></ul> | <p>“45. Offences to be cognizable and non-bailable.<br/>(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence <b><u>under this Act</u></b> shall be released on bail or on his own bond unless—</p> <ul style="list-style-type: none"><li>(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and</li><li>(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...”</li></ul> |

# VIJAY MADANLAL CHOUDHARY V. UNION OF INDIA, 2022 SCC ONLINE SC 929

| ISSUES   | FINDINGS OF THE COURT   |
|--|---|
| <p>1. Whether offence under S.3 is a standalone offence?</p>   | <ul style="list-style-type: none"><li>○ Dependent on the wrongful and illegal gain of property as a result of criminal activity relating to a scheduled offence. The property must qualify the definition of “proceeds of crime” under S. 2(1)(u) of the 2002 Act. All or whole of the crime property linked to scheduled offence need not be regarded as proceeds of crime, but all properties qualifying the definition of “proceeds of crime” under S. 2(1)(u) will necessarily be crime properties. <b>[Para 281]</b></li><li>○ .....a wider reach and captures every process and activity, direct or indirect, in dealing with the proceeds of crime and is not limited to the happening of the final act of integration of tainted property in the formal economy. <b>[Para 467 v(a)]</b></li></ul> |
| <p>2. Section 5: Attachment, adjudication and confiscation</p> | <ul style="list-style-type: none"><li>○ Order of provisional attachment is, thus, the outcome of such satisfaction already recorded by the authorised officer, operating for fixed duration not exceeding one hundred and eighty days from the date of the order. <b>[Para 287]</b></li><li>○ S.5 provides a balancing effect, having reasonable nexus with the object of the Act. <b>[Para 301]</b></li></ul>  |



# VIJAY MADANLAL CHOUDHARY V. UNION OF INDIA, 2022 SCC ONLINE SC 929

| ISSUES   | FINDINGS OF THE SUPREME COURT   |
|--|---|
| <p>3. Whether the twin conditions for grant of bail as provided for in Section 45 of the Prevention of Money Laundering Act, 2002, as it stands amended, is unconstitutional? Whether the amendment takes away the basis of the judgment in (2018) 11 SCC 1 and revives the twin conditions for grant of bail?</p> | <p>Relying upon <i>Ranjitsingh Brahamjeet Singh Sharma v. State of Maharashtra</i>, (2005) 5 SCC 294 (under MCOCA) held that the twin conditions under Section 45, <u>though restrict the right of the accused to grant of bail, do not impose absolute restraint on the grant of bail – discretion vested in court is not arbitrary or irrational but judicial, guided by ...</u> Section 45 of the Act. <b>[Para 400]</b></p> |
| <p>4. In case it is held that the twin conditions stand revived, whether the judgment in (2018) 11 SCC 1, holding that the twin conditions cannot apply to anticipatory bails, lays down the correct proposition of law?</p>   | <p>It can never be the intention of the Parliament to exclude the operation of Section 45 in the case of <u>anticipatory bail</u>, otherwise, it will create an unnecessary dichotomy between bail and anticipatory bail which will be discriminatory and arbitrary. <b>[Para 410]</b></p>  |

# VIJAY MADANLAL CHOUDHARY V. UNION OF INDIA, 2022 SCC ONLINE SC 929

| ISSUES   | FINDINGS OF THE SUPREME COURT  |
|--|--|
| 5. Whether non-supply of ECIR violative of Article 21 of the Constitution?   | Supply of ECIR in every case to person concerned is <b>not mandatory</b> . So long as the person has been informed about the grounds of his arrest, that is sufficient compliance of the mandate of Article 22(1) of the Constitution. [ <b>Para 459</b> ] |
| 6. Whether Section 24 concerning the burden of proof under PMLA violate fundamental rights of the accused persons? | Section 24 has reasonable nexus with the purposes and objects sought to be achieved by the 2002 Act and cannot be regarded as manifestly arbitrary or unconstitutional. [ <b>Para 351</b> ]  |

# VIJAY MADANLAL CHOUDHARY V. UNION OF INDIA, 2022 SCC ONLINE SC 929

| ISSUES  | FINDINGS   |
|---|--|
| <p>7. Whether the Sections 17 and 18 of PMLA, as amended, relating to search and seizure are unconstitutional and void?</p> | <ul style="list-style-type: none"><li>• Power of search and seizure under Section 17 of the 2002 Act, is a special self-contained provision and is different from the general provisions in the 1973 Code. <b>[Para 317]</b></li><li>• In view of the inbuilt safeguards and stringent stipulations to be adhered to by the Authorities under the 2002 Act, it ought to be regarded as reasonable provision having nexus with the purposes and objects sought to be achieved by the 2002 Act. It is certainly not an arbitrary power at all. <b>[Para 317]</b></li></ul> |
| <p>8. Is the power of arrest conferred under Section 19 of PMLA violative of Articles 14 and 21 of the Constitution?</p>    | <ul style="list-style-type: none"><li>• The safeguards before effecting arrest, as contained in Section 19 of the 2002 Act, are equally stringent and of higher standard. Those safeguards ensure that the authorised officers do not act arbitrarily, but make them accountable for their judgment about the necessity to arrest any person as being involved in the commission of offence of money-laundering even before filing of the complaint. <b>[Para 325]</b></li></ul>   |

# VIJAY MADANLAL CHOUDHARY V. UNION OF INDIA, 2022 SCC ONLINE SC 929

| ISSUES  | FINDINGS OF SUPREME COURT  |
|---|--|
| <p>9. Whether the reliance on the statements recorded by the officers of the Enforcement Directorate during the investigation in judicial proceedings, violate Article 20[3] of the Constitution and are inadmissible in light of section 25 of the Evidence Act?</p> | <ul style="list-style-type: none"><li>• The statements recorded by authorities under the 2002 Act cannot be hit by the vice of <a href="#">Article 20(3)</a> of the Constitution or for that matter, <a href="#">Article 21</a> being procedure established by law. <b>[Para 449]</b></li><li>• (Whether)...protection given to the accused who is being prosecuted for the offence of money - laundering, of <a href="#">Section 25</a> of the Evidence Act is available or not, may have to be considered on case-to-case basis being rule of evidence. <b>[Para 449]</b></li><li>• <b>Article 20(3) will apply once person is an accused.</b></li></ul> |
| <p>10. What is the linkage between money laundering under PMLA and the prior criminal activity that led to generating tainted assets</p>  | <ul style="list-style-type: none"><li>• ...only such property which is derived or obtained, directly or indirectly, as a result of criminal activity relating to a scheduled offence can be regarded as proceeds of crime. The authorities under the 2002 Act cannot resort to action against any person for money-laundering unless the same is registered with the jurisdictional police or pending inquiry by way of complaint..... <b>[Para 253]</b></li></ul>   |

# EVIDENCE ACT AND ELECTRONIC EVIDENCE

- *Electronic evidence: S.65A/65B, Evidence Act, 1872* Under S. 65B(1), any information that is contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document, and shall be admissible in any proceedings without further proof of production of the original, as evidence of the contents of the original or of any facts stated therein of which direct evidence would be admissible.
- S. 65B(2) refers to conditions to be satisfied in respect of computer output like computer is regularly used etc.
- If the electronic evidence is “original” and fulfils the conditions in sub-section (2) then it is admissible in any proceedings without any further proof or production of the original.

# EVIDENCE ACT AND ELECTRONIC EVIDENCE

## Relevant Sections:

- i. **Section 29A IPC:** The words “electronic record” shall have the meaning assigned to them in clause (t) of sub-section (1) of section 2 of the Information Technology Act, 2000
- ii. Under the Evidence Act, Electronic Signature, Electronic Signature Certificate, Electronic Form, Electronic Records, Secure Electronic Record, shall have the meanings respectively assigned to them in the Information Technology Act, 2000.

# EVIDENCE ACT AND ELECTRONIC EVIDENCE

- i. **2(i) of IT Act, 2000** defines computer to be any electronic magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic, and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software, or communication facilities which are connected or related to the computer in a computer system or computer network
- ii. **2(o) IT Act, 2000** defines "data" as representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system.
- iii. **2(p) IT Act, 2000** defines "digital signature" means authentication of any electronic record by a subscriber by means of an electronic method or procedure
- iv. **2(t) IT Act, 2000** defines "electronic record" as data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche

# EVIDENCE ACT AND ELECTRONIC EVIDENCE

- Under sub-section 65B(4), a certificate doing any of the following things is evidence of the matter stated in the certificate:
  - (a) identifying the document containing the statement and describing the manner in which it was produced;
  - (b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;
  - (c) dealing with any of the matters to which the conditions mentioned in subsection (2) above relate, and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities



# EVIDENCE ACT AND ELECTRONIC EVIDENCE

- The requirement of a certificate is a particularly low threshold for determining the authenticity of electronic evidence.
- Technology is not static and therefore, Section 65B of the Evidence Act will have to expand to incorporate additional modes of authentication - **to corroborate the information stated in the certificate and help increase its reliability and accuracy.**

# EVIDENCE ACT AND ELECTRONIC EVIDENCE

- Under S. 45A Evidence Act 1872, opinion of the Examiner of Electronic Evidence referred to in Section 79A of the Information Technology Act, 2000 is a relevant fact, relating to any information transmitted or stored in any computer resource or any other electronic or digital form.
- **NOTE – IT IS ONLY OPINION EVIDENCE AND NOT GOSPEL TRUTH!!**

# EVIDENCE ACT AND ELECTRONIC EVIDENCE

| Developments  | Findings   |
|---|--|
| Contents of electronic records may be proved strictly in accordance with the provisions of Section 65B of the Act.<br>In the absence of a certificate under Section 65B, electronic evidence remains inadmissible.  | <b>Anvar PV v. PK Basheer</b><br>(2014) 10 SCC 473,                              |
| Without source, there is no authenticity for the translation. Source and authenticity are the two key factors for an electronic evidence  | <b>Sanjaysinh Ramrao Chavan v. Dattatray GulabRao Phalke</b><br>(2015) 3 SCC 123 |
| <b>Objection to the admissibility of electronic record</b> – The Supreme Court held that as electronic evidence are not inherently inadmissible, objections to the mode of proof cannot be taken at the appellate stage and must be taken at the stage of trial. This is because such objections (such as the absence of a certificate under Section 65B) are procedural in nature and should be raised at the time of trial. | <b>Sonu v. State of Haryana,</b><br>(2017) 8 SCC 570                             |
| <b>Dilution of Standard</b> – the Supreme Court took the view such compliance is not always mandatory as such a certificate can only be produced by a person who is in control of the said device   | <b>Shafhi Mohd. V. Sate of Himachal Pradesh</b><br>(2018) 2 SCC 801              |

# EVIDENCE ACT AND ELECTRONIC EVIDENCE

| Developments  | Judgments   |
|---|---|
| Section 65B Evidence required at the stage of trial   | <i>State By Karnataka Lokayukta vs M. R. Hiremath</i><br>(2019) 7 SCC 515         |
| The Supreme Court for certainty in law regards to electronic records referred matter to larger Bench.   | <i>Arjun PanditRao Khotkar vs. Kailash Kushanrao Gorantyal</i> , (2020) 3 SCC 216 |
| Production of certificate under section 65 B (4) is mandatory. Shafhi Mohammad, (2018) 2 SCC 801 is overruled and Anvar P.V. case (2014) 10 SCC 473 is followed with clarification. | <i>Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantayal</i> , (2020) 7 SCC 1   |
| Certificate under Section 65B(4) is a mandatory requirement for production of electronic evidence - Oral evidence in the place of such certificate cannot possibly suffice.         | <i>Ravinder Singh Alia Kaku v. State of Punjab</i> (2022) 7 SCC 581               |

# EVIDENCE ACT AND ELECTRONIC EVIDENCE

- Admissibility of electronic evidence in the **UK** is determined under **Section 5 of the Civil Evidence Act, 1968** which is **identical to S. 65B** of the Evidence Act. The following conditions are prescribed by the provision:
  - (a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any body, whether corporate or not, or by any individual;
  - (b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;
  - (c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and
  - (d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.

# EVIDENCE ACT AND ELECTRONIC EVIDENCE

- Section **59B of the Australian Evidence Act, 1929** introduced three conditions in addition to the conditions under the UK Act, which are as under:
  - the computer must not have been affected in any manner which would impact the accuracy of its output
  - records of any alteration to the computer must be maintained by a reasonable person
  - there must be no reason to believe that the accuracy of the output has been adversely affected due to inadequate safeguards while using the computer
- Further, Section 59B (6) allows oral evidence, if the court deems it necessary, while admitting electronic evidence.

# INFORMATION TECHNOLOGY ACT, 2000 AND ELECTRONIC EVIDENCE

- **Sharat Babu Digumarti vs Govt of NCT of Delhi (2017) 2 SCC 18:**

*“IT Act is a special enactment. It has special provisions. Once the offence has a nexus or connection with the electronic record the protection and effect of Section 79 cannot be ignored and negated. It is apt to note here that electronic forms of transmission is covered by the IT Act, 2000, which is a special law. It is settled position in law that a special law shall prevail over the general and prior laws.*”



**THANK YOU**