

TWIN CONDITIONS UNDER PMLA: A HINDRANCE TO THE RIGHTS OF THE ACCUSED

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BEST CITATION – RIJUL SETH, TWIN CONDITIONS UNDER PMLA: A HINDRANCE TO THE RIGHTS OF THE ACCUSED, *INDIAN JOURNAL OF LEGAL REVIEW (IJLR)*, 4 (2) OF 2024, PG. 529-531, APIS – 3920 – 0001 & ISSN – 2583-2344.

I. Introduction

Money laundering has become a global issue in recent years, governments around the world have turned their attention to the offence of money laundering as, this offence in many cases leads to an increase in other kinds of offences as well, such as terrorism, tax evasion etc. the people of India as well as the economy have been suffering due to money laundering. Every year large amounts of money laundered not just across domestic border but also international borders, severely affecting the economy and has also boosted the funding and presence of terrorist organisations. It is in this light that the Government of India enacted the Prevention of Money Laundering Act, 2002 (PMLA). There is no denying that there is a dire need for a stringent statute such as the PMLA to tackle the issue of money laundering. However, in this paper we will argue that the PMLA is not free of infirmities and loopholes that in many instances has led to incarceration of the innocent and has on many occasions put to question the efficacy of the statute itself. In this paper we will critically examine the twin conditions of bail enshrined under Section 45 of the PMLA and prove that the same has led to curtailment of rights of accused individuals

II. Understanding Bail under PMLA

Money laundering primarily is the movement and concealment of illegally acquired gains. Section 3 of PMLA states that any person who directly or indirectly attempts to indulge or knowingly is party or is actually involved in any process connected with the proceeds of crime including its concealment, Possession, acquisition and projecting it as untainted property.⁷⁰² This means that any person who has indulged in an illegal activity and has benefited from it and has later tried to shroud that benefit will be held liable for the offence of money laundering. It is noteworthy that money laundering is not a standalone offence but must be preceded by an offence through which illicit gains have accrued. This effectively means that if an accused is acquitted under predicate offence then that person is acquitted under

PMLA as well. A similar view was taken by the Hon'ble Supreme Court of India in the case of *Vijay Madanlal Choudhary V/s Union of India*.⁷⁰³ However, the acquittal under the predicate offence or even under PMLA may take time and during the pendency of proceedings the ED might arrest the person, in such a scenario if a person is to apply for bail they must invoke Section 45 of PMLA, 2002. However, bail under the said provision is not easily granted, under the said section a person seeking bail must satisfy the twin conditions mentioned under the Act.⁷⁰⁴ These conditions are in furtherance to the existing triple test for bail. The triple test of bail states that if a person is not a flight risk, is not likely to influence witness and is not likely to tamper with evidence, then that person must be granted bail. A similar view was held in the case of *P. Chidambaram V/s Directorate of*

⁷⁰² Section 3 of the PMLA, 2002.

⁷⁰³ 2022 LiveLaw (SC) 633

⁷⁰⁴ Section 45 of the PMLA, 2002

Enforcement, wherein the Hon'ble Supreme Court had stated that courts must apply the triple test while adjudicating upon bail matters.⁷⁰⁵ However, under section 45, PMLA, it is necessary that court must be satisfied that the accused has not committed the offence and that he is not likely to commit any offence while on bail.⁷⁰⁶ It well settled and no more *res integra* that at the time of consideration of bail application, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at the conclusion that the accused has committed the offence. It is noteworthy that a similar view was taken in the case of *Union of India V/s Shiv Shankar Kesari*, in this case the accused was booked under the NDPS Act and sought bail under Section 37 of the Act, now just like section 45 of the PMLA, Section 37 of the NDPS Act also deals with the twin conditions of bail and the fact that the court has taken a view that at the time of dealing with such an issue it is not necessary to meticulously analyze the evidence is especially noteworthy as just like an money laundering, offences involving narcotics have the capability to cripple an entire community.⁷⁰⁷ Hence, if the burden of twin conditions can be reduced under NDPS Act, there is no reason that the same benefit could not be accorded to cases under PMLA.

III. Analysing Section 45 PMLA

It is further contended that the court's directive under *Vijay Madanlal Choudhary* (Supra.) needs to be revisited, as under that case the Hon'ble Supreme Court had upheld the constitutional validity of the twin conditions of bail under PMLA.⁷⁰⁸ This view was deemed flawed by many legal scholars, jurists as well as judges, resultantly the judgement is now under review and is pending adjudication by a higher bench. The court – I believe erred by not considering the principle of bail being the rule and jail being the exception. This principle was enshrined within the Indian jurisprudence in the

case of *State of Rajasthan V/s Balchand*.⁷⁰⁹ Furthermore, it is also argued that the said judgement as well as the provision in question go against the law set up under the *Magna Carta*, a document drafted almost 800 years ago and considered a benchmark for individual liberty.⁷¹⁰ It is noteworthy that the India legal system has followed the *Magna Carta* consistently over the years. Hence, it would be counterproductive and against basic principles of law to disregard the document while deciding the matter of bail under PMLA cases. It is further contended that the Hon'ble supreme court never intended that the twin condition be employed in PMLA cases. In this regard it is imperative that we analyze the case of *Nikesh Tarachand Shah V/s Union of India*, wherein the Hon'ble Supreme Court struck down the twin conditions as being violative of Article 14 and 21, the court in its reasoning stated that under the said provision if a person is granted bail under the scheduled offence he will again have to apply for bail under Section 45 in order to get bail for an offence for which he has already been granted bail during the proceedings pertaining to the scheduled offence.⁷¹¹ The court further pointed out the anomaly by stating that even if the accused is under the scheduled offence they will still have to go through the proceedings under section 45 of the Act even though they are already acquitted. It was also rightly pointed out by the court that the twin conditions have no nexus to the offences under the PMLA. I believe that its necessary to realize that while applying the twin conditions the court is essentially adjudicating upon the fact that whether or not the person is guilty of the scheduled offence or not, as only when it is proven that the gains under question were acquired through illegal. Hence, while the court might not be meticulously analyzing the offence of money laundering, it is forced to meticulously analyse the scheduled offence as only when the scheduled offence is proven can there be an offence of money laundering. Hence, Section 45,

⁷⁰⁵ AIR 2019 Supreme Court 4198.

⁷⁰⁶ Section 45 of the PMLA, 2002

⁷⁰⁷ 2007 AIR SCW 5945.

⁷⁰⁸ 2022 LiveLaw (SC) 633

⁷⁰⁹ 1977 AIR 2447

⁷¹⁰ Clause 39, Magna Carta

⁷¹¹ AIR 2017 SCC 5500

PMLA goes against all principles of natural justice and settled principles of law. Now, it may be argued that after *Nikesh Tarachand* (Supra.) The 2019 Amendments made the necessary changes to the provision and the phrase 'under Part A of the schedule' was replaced by 'under the Act'.⁷¹² However, it is contended that the change of phrase has not affected the meaning and intention of the provision, which is to keep a person behind bars for as long as possible. A similar view was taken in *Nikesh Tarachand* (Supra.) as well wherein the court stated that the said provision turns the presumption of innocence on its head, which is fundamentally detrimental to a person accused of any offence. The intent of the original section 45 still echoes through the amendment and the said amendment in no way can have the effect of reviving the twin conditions as the would be detrimental to fundamental rights of the accused.⁷¹³ This view was also shared by the Hon'ble Supreme Court in the *P. Chidambaram* (Supra.) wherein the accused was granted bail without applying the amended section 45 of the Act.⁷¹⁴ Further the Bombay High Court in the case of *Deepak Virendra Kocchar V/s ED* had opined that amendment to section 45 in no way has the impact of reviving the twin conditions as the same would be violative of Article 14 and 21 of the Constitution.⁷¹⁵ It is also noteworthy that the Court in *Vijay Madanlal* (Supra.) contradicts itself as on the one hand it agrees that if the person is acquitted of the predicate offence then that person is acquitted under PMLA but at the same time upholds the validity of amended section 45, court here overlooks the fact that if twin conditions are applied in such a scenario then during the pendency of the suit for the scheduled offence the person will first have to prove his innocence under Section 45 to get bail and then subsequently will again have to prove his innocence during the proceedings for the scheduled offence. Hence, the said judgement

creates an anomaly that must be rectified to ensure fair proceedings.

IV. Conclusion

In conclusion, through this paper we have analyzed how the PMLA a statute enacted to prevent money laundering has lost its way and instead has become a statute marred with conflicting opinions. It is also noteworthy that the legislature have erred in trying to reintroduce section 45 of the Act by amending certain phrases in it as the effect of the provision is virtually still the same and has led to curtailment of fundamental rights of the accused. Now, it up to the Hon'ble Supreme Court to fix the anomaly created and finally put the matter to rest. The constitutional validity of the said provision must be struck down in order to maintain the sanctity of the PMLA and to ensure that fundamental rights of the accused are protected.

⁷¹² PMLA (Amendment) Act, 2019

⁷¹³ AIR 2017 SCC 5500

⁷¹⁴ AIR 2019 Supreme Court 4198.

⁷¹⁵ CRL B.A. 1322 of 2020