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**BAIL UNDER THE PREVENTION OF MONEY
LAUNDERING ACT, 2002 (Act 15 of 2003)**

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Bail Under The Prevention of Money Laundering Act, 2002 (Act 15 of 2003).

1. Introduction:

To curb the menace of money laundering the parliament has enacted the Prevention Of Money Laundering Act, 2002 (hereinafter referred to as ‘the Act’ or ‘PMLA’) which came into force on 01.07.2005. In layman’s terms the offence of money laundering simply means the conversion of property earned or acquired by indulging in any criminal activity (related to a scheduled offence) into untainted property or legitimate money. Under the Act property means any property or assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and includes deeds and instruments evidencing title to, or interest in property or assets. As per **Section 2 (p)**¹ of the Act “**money-laundering**” has the same meaning assigned to it under Section 3. **Section 3** of the Act inter alia provides that *whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of the offence of money-laundering.* As per **Section 2 (u)** “**proceeds of crime**” inter alia means *any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad.* Thus, the offence of money laundering involves the process by which black money or any property acquired by any criminal activity relating to a **scheduled offence** is converted into white money or is portrayed as untainted property. The list of schedule offences under the PMLA is provided in the schedule attached with the Act (which includes but is not limited) to the offences punishable under the IPC,1860 (eg. Cheating, Forgery, Robbery, Dacoity, Extortion, Kidnapping for

Ransom, Murder etc.), offences punishable under The NDPS Act,1985, The Immoral Traffic (Prevention) Act, 1956, offences punishable under The Prevention of Corruption Act,1988 etc. In order to charge a person as an accused under the PMLA it is necessary that such person is also prosecuted and charged in respect of one or more schedule/predicate offence(s). The offence of money laundering takes place through various channels such as Hawala, shell companies etc.

2. Accused Presumed To Be Guilty:

The general principle of law is that an accused, regardless of the offence for which he is charged with, is entitled to the presumption of innocence i.e “he is presumed to be innocent until proved guilty” and the burden of proof lies upon the prosecution to prove his guilt. However, **Section 24** of the PMLA incorporates the doctrine of “*reverse burden of proof*” upon the accused who has been charged under Section 3 of the Act. In other words, if a person is charged with the offence of money-laundering under Section 3, the authority or Court shall presume that such person is involved in the commission of the offence of money-laundering, unless the accused proves that he is innocent and has not committed any offence under the PMLA.

3. Stringent Provisions Related To Grant Of Bail Under Section 45 of the PMLA (Twin Conditions):

That since The PMLA, 2002 is a special enactment and the offence of money laundering is an aggravated form of crime which has serious impact on the economic system of the country including the sovereignty and integrity of the country as observed by the Hon’ble Apex court in **Vijay Madanlal Choudhary and Others V/s Union of India and Others**, therefore, the PMLA contains stringent bail conditions under **Section 45** of the Act which are similar to the conditions contained in other special enactments such as the Terrorist and

Disruptive Activities (Prevention) Act, 1987 and the Maharashtra Control of Organised Crime Act, 1999 etc.

Section 45 provides that before granting bail, the following **twin conditions** must be satisfied:-

- (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 the *accused is “not guilty of such offence” and that “he is not likely to commit any offence while on bail”*.

4. Constitutional Validity of Section 45 of the PMLA:

4.1 Position Before 2018 amendment:-

(A) In **Nikesh Tarachand Shah V/s UOI & Anr**², a **2 Judge Bench** of the Hon’ble Apex court had struck down Section 45(1) of the Prevention of The Money Laundering Act, 2002 declaring it to be unconstitutional as it violated Articles 14 and 21 of the Constitution of India, in so far as it imposed twin conditions for release on bail. The Hon’ble Apex Court also held 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.

(B) It is to be noted that **Nikesh Tarachand Shah’s** judgment was passed by the Hon’ble Apex Court prior to 2018 amendment made in The PMLA. Prior to 2018 amendment, in order to seek bail one of the conditions laid down in Section 45 was that the accused was required to satisfy the Court that he was not guilty of any of scheduled offences mentioned in the Act as opposed to an offence committed under the PMLA. This condition was held by the Hon’ble Apex Court to be

unreasonable, arbitrary & unjust because in a proceeding for the offence of money laundering, for seeking bail the accused was required to show that he was not guilty of a different offence (i.e. the scheduled offence) and not the offence of money laundering under the PMLA.

4.2 Position after 2018 amendment:-

(C) However, Section 45 of the PMLA, 2002 was amended by the Parliament in 2018. Post 2018 amendment one of the conditions which an accused is required to establish for seeking bail under Section 45 is that he is not guilty of the offence of money laundering under the PMLA.

(D) Post 2018 amendment the constitutional validity of the **twin conditions** laid down in Section 45 of the PMLA once again came up for consideration before the Hon'ble Supreme Court of India in the case **Vijay Mandal Choudhary & Ors V/s UOI & Ors** ³ (3 Judge bench) by which the judgment of **Nikesh Tarachand Shah (2 Judge Bench)** (*supra*) has been **overruled** by holding as follows:

*Para 187..... (xiii) (a) The reasons which weighed with this Court in **Nikesh Tarachand Shah** for declaring the twin conditions in Section 45(1) of the 2002 Act, as it stood at the relevant time, as unconstitutional in no way obliterated the provision from the statute book; and it was open to the Parliament to cure the defect noted by this Court so as to revive the same provision in the existing form.*

*(b) We are unable to agree with the observations in **Nikesh Tarachand Shah** distinguishing the enunciation of the Constitution Bench decision in **Kartar Singh**; and other observations suggestive of doubting the perception of Parliament in regard to the seriousness of the offence of money-laundering, including about it posing serious threat to the sovereignty and integrity of the country.*

(c) 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.

4.3. In order to better understand and appreciate the changes made in Section 45 of the PMLA before the pronouncement of **Nikesh**

Tarachand Shah judgment (supra) and post **Nikesh Tarachand Shah's** judgment (i.e. by way of 2018 amendment), both the unamended and amended sections are reproduced hereunder:

Section 45- Before Nikesh Tarachand Shah's Judgment: -	Section 45- After Nikesh Tarachand Shah's Judgment: -
<p>45. Offence 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 <u><i>punishable for a term of imprisonment of more than three years under Part A of the Schedule</i></u> 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>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:</p>	<p>45. Offence 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 <u><i>under this act</i></u> shall be released on bail or on his own bond unless—</p> <p>(iii) the Public Prosecutor has been given an opportunity to oppose the application for such release; and</p> <p>(iv) 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>Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, <u><i>or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees</i></u> may be released on bail, if the Special Court so directs:</p> <p>(emphasis supplied)</p>

5. Principle That Bail Is The Rule And Jail Is The Exception Applicable Even Under The PMLA:

Despite their being stringent provisions for grant of bail under the PMLA, the Hon'ble Supreme Court of India in “**Manish Sisodia (II) V/s Directorate of Enforcement** ⁴” and “**Prem Prakash V/s Directorate of Enforcement** ⁵”, has held that even under PMLA the governing principle is that “Bail is the Rule and Jail is the Exception”. In **Perm Prakash** (supra) the Hon'ble Apex court relying upon **Manish Sisodia (II)** (supra) held that, *all that Section 45 of PMLA mentions is that certain conditions are to be satisfied. The principle that, “bail is the rule and jail is the exception” is only a paraphrasing of Article 21 of the Constitution of India, which states that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Liberty of the individual is always a Rule and deprivation is the exception. Deprivation can only be by the procedure established by law, which has to be a valid and reasonable procedure. Section 45 of PMLA by imposing twin conditions does not re-write this principle to mean that deprivation is the norm and liberty is the exception. As set out earlier all that is required is that in cases where bail is subject to the satisfaction of twin conditions, those conditions must be satisfied.*

6. Conclusion:

In granting or rejecting bail to an accused under the PMLA, keeping in view the twin conditions laid down under Section 45 of the Act and the guidelines laid down in **Manish Sisodia (II)** (supra) and **Perm Prakash** (supra) the Courts while exercising their discretion have to strike a balance between the larger interest of the Country at one hand to ensure that the evil of black money is eradicated from the Country and guilty is punished and on the other hand the Courts have to ensure that the fundamental right of personal liberty of the accused is not deprived due to long incarceration and the deprivation of personal liberty can only be by the procedure established by law, which has to be a valid and reasonable procedure.

Disclaimer:

This article is for information purposes only. Laws, Rules and Regulations are subject to judicial interpretation which may vary and evolve as per the peculiarity of every case. It is strongly recommended to seek professional advice on any specific issue.

Views of the author are personal.

Sources/References:

1. The Prevention Of Money Laundering Act, 2002 (Act 15 of 2003).
2. Nikesh Tarachand Shah V/s UOI & Anr, 2018 (2) SCC (Cri) 302.
3. Vijay Mandal Choudhary & Ors V/s UOI & Ors, [2022] 6 S.C.R 382.
4. Manish Sisodia (II) V/s Directorate of Enforcement, 2024 SCC OnLine SC 1920.
5. Prem Prakash V/s Directorate of Enforcement, (2024) 9 SCC 787.