

Shifting Regime of Bail Provisions under PMLA, 2002 with Respect to Constitutionalism and Developmental Justice

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ABSTRACT

The author has come across the statute of Prevention of Money Laundering Act, 2002 (hereinafter to be referred as PMLA, 2002) and the functioning of bail provisions under the Act. The Act calls for excessive power granted to the enforcement directorate after the Amendment Act (No. 13) of 2018. In this research paper, the before and after complexities of bail provisions are discussed which has critically affected the rights of individuals. The aspect of constitutionalism and developmental justice is discussed that involves balancing the need to combat financial crimes vis-à-vis protecting fundamental rights. The enforcement directorate has given wide powers under the Act where the rights of accused has come to the secondary position. The hardships of twin bail conditions for accused person under PMLA. The various judicial pronouncements passed by Hon'ble Supreme Courts and High Courts leading to cause of dilemma to clearly understand the law on the point of bail. The paper argues that the Supreme Court's judgment in the Vijay Madanlal Choudhary V. Union of India case deviates from constitutional principles. It criticizes the court's decision as flawed.

Keywords: PMLA, Enforcement Directorate, Excessive Powers, Bail, Fundamental Rights.

Introduction

Bail is a fundamental right under the Indian Constitution, the PMLA's provisions for granting bail are significantly stricter and more complex than in other criminal cases. The urge of countries to tackle the problem of money laundering gave rise to the enactment of Prevention of Money Laundering Act, 2002. The countries of U.K. and U.S. were the first to guide for anti-money laundering regime which was later followed by India. The PMLA, while legally operational, faced challenges due to concerns that its provisions were unconstitutional. These concerns stems from allegations that the law was overly broad and disproportionately harsh.

India is a member nation to the Vienna Convention, 1988, United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, Basle Convention, 1989, Political Declaration and Global Programme of Action alongwith Financial Action Task Force (hereinafter to be referred as FATF). The FATF's 40 Recommendations and Special IX recommendations are followed by India as well as being the signatory to this global fight against money laundering. The FATF came under existence by Group of Seven (G7) to carry investigations against practices of money laundering.

The Case of Nikesh Tarachand Shah¹

In Nikesh Tarachand Shah v. Union of India (2017), the Supreme Court of India examined significant constitutional issues pertaining to the bail provisions of the Prevention of Money Laundering

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¹ Nikesh Tarachand Shah v. Union of India (2018) 11 SCC 1

Act (PMLA), 2002. Nimesh Tarachand Shah, the petitioner, contested the legality of Section 45(1) of PMLA, which established rigorous requirements for the granting of bail to those charged with money laundering. This section necessitated that the accused needs to establish not only the lack of a prima facie case against him but also substantiate that he would refrain from committing additional offenses if granted bail.

The Court's analysis determined that these "twin conditions" negated the presumption of innocence, imposing an unjust burden on the accused to prove their innocence during the bail proceedings phase. The ruling determined that this method contravened Articles 14 and 21 of the Constitution of India. The Court condemned the illogical classification predicated on jail duration, resulting in capricious outcomes and violating individual liberty.

The Court noted that whereas analogous provisions in other statutes were warranted by compelling state interests to combat major offenses, such justification was lacking in the context of the PMLA. The ruling emphasized that any legal limitations on individual liberties must be substantiated by a compelling governmental interest, which was not demonstrated in this case.

The Supreme Court's rulings on provisions related to the Terrorist and Disruptive Activities (Prevention) Act (TADA) and the Prevention of Money Laundering Act (PMLA) highlight the tension between public safety and individual liberties. In *Kartar Singh v. State of Punjab* (1994), the Supreme Court upheld the twin requirements under Section 20(8) of TADA, acknowledging the need to balance victim/community interests, national security, and the accused's liberty. In the case of Nimesh Tarachand, this case differentiated Section 20(8) of TADA from Section 45(1) concerning the most heinous nature of the offense addressed. Crucially, Section 20(8) applied to "most heinous" offenses under TADA, while the challenged Section 45(1) (pre-amendment) did not relate to offenses under the PMLA. Instead, it applied to offenses listed in Schedule A of an unspecified Act.¹

The Supreme Court mandated that all bail requests under the PMLA be returned to their respective courts for re-evaluation, excluding the illegal stipulations outlined in Section 45(1). This ruling upheld the idea that "bail is the rule, jail is an exception," emphasizing the judiciary's responsibility to safeguard individual rights against capricious state acts.

The PMLA aims to recover money obtained through illegal activities. This case examines whether two conditions imposed by Section 45(1) violate fundamental rights (Articles 14 and 21) of the Indian Constitution. These conditions, effectively acting as a punishment before conviction, place a burden on the accused. A further point is whether the stringent bail conditions in Section 45 are justifiable, given the state's interest in combating serious crimes like money laundering. Essentially, the crux of the argument is whether the state's need to combat crime outweighs the individual's fundamental rights.

The case annulled the clause, determining that it violated Article 14 and Article 21 of the Indian Constitution, which protect the rights to equality and personal liberty, respectively. The Court mandated that all petitions concerning bail requests be returned to the appropriate courts for evaluation and determination based on their merits, excepting the additional requirements outlined in Section 45(1) of PMLA.

The Supreme Court underscored the significance of the presumption of innocence, a fundamental principle of criminal law, and condemned the need imposed on the accused to demonstrate their innocence during the bail phase. The Court denounced the classification based on the length of incarceration for planned offenses, noting that it resulted in arbitrary choices and severely undermined the presumption of innocence. The ruling emphasized that although legislative constraints on individual freedoms are acceptable, these restrictions must be justified by a valid state interest, which was insufficiently established in this instance.

The Court mandated that the relevant courts reassess all bail applications under the PMLA without imposing the unlawful stipulations of Section 45(1). This ruling was broadly perceived as a reinforcement of individual rights and a significant confirmation that bail should be granted as a right, rather than an exception.

In reaction to this verdict, Parliament revised Section 45 of PMLA in 2018, reestablishing analogous bail terms under the PMLA. This amendment prompted renewed discussions on its legitimacy

¹ Available at <https://profgsbajpai.in/wp-content/uploads/2022/08/THE-HINDU-03-08-22.pdf>, last accessed on June 26, 2025.

and its possible effects on individual rights. Critics contended that imposing these requirements compromised the Supreme Court's ruling and could facilitate the misuse of authority by police authorities.

The ruling in *Nikesh Tarachand Shah v. Union of India* is a crucial case in debates regarding judicial oversight and legislative power within India's legal framework. This highlights significant concerns regarding the equilibrium between governmental initiatives to combat serious crimes such as money laundering and the imperative to safeguard fundamental rights, illuminating the persistent conflict between individual liberties and legislative actions targeting economic offenders.

Case of Vijay Madanlal Chaudhary V Union of India and Others¹

The Supreme Court's 2022 ruling in *Vijay Madanlal Choudhary v. Union of India*, significantly expanded the Enforcement Directorate's powers under the PMLA. Crucially, the court classified ED officials as distinct from police officers, exempting them from the Code of Criminal Procedure (CrPC) requirements of providing an Enforcement Case Information Report (ECIR) to the accused. This effectively lessened procedural safeguards in ED investigations, undermining transparency and fairness. Furthermore, the court ruled statements made to ED officials admissible as evidence, potentially jeopardizing the right against self-incrimination enshrined under Article 20(3).

The ruling reinstated stringent bail conditions under Section 45 of the PMLA, requiring a demonstration of prima facie innocence and low likelihood of further offenses. This reversal of the *Nikesh Tarachand Shah v. Union of India*² decision, which deemed such conditions unconstitutional, prioritizes preventing future financial crimes. However, critics argue this could lead to prolonged pretrial detention, contradicting the principle of bail as the norm. The court also shifted the burden of proof on to the accused in money laundering cases, contradicting standard criminal law procedure. This was justified by the complexities of financial transactions in such cases, but critics fear it could unduly affect the accused's rights. The judgment also broadened the definition of money laundering, removing the requirement to demonstrate "proceeds of crime" as legitimately purported property.

The Finance Act of 2015, introduced by the Indian government, expanded the definition of "proceeds of crime." Section 2(u) defines Proceeds of crime, it encompasses any assets, money, or property gained through illegal activities. Understanding this concept is crucial for tracing and recovering criminal profits. Proceeds of crime include domestic and foreign assets. These assets can take many forms, including cash, real estate, vehicles, and other valuable items, all obtained illegally.

The ruling has been widely criticized for potentially undermining several constitutional rights, including equality under Article 14, protection against self-incrimination under Article 20(3), and the right to life and liberty (Article 21). Concerns remain about the lack of ECIR disclosure, admissibility of ED statements, stringent bail conditions, and the potential for political misuse of the expanded ED powers. Critics believe the PMLA could be used for selective enforcement rather than impartial justice.

The PMLA's definition of "investigation" u/s 2(na) was a key point of contention. Petitioners argued that the definition should align with the Code of Criminal Procedure's understanding of investigation, which centers on the collection of evidence. They contended that statements made by individuals under the Act should fall under the right against self-incrimination and the right to life and personal liberty guaranteed under Indian law.

The court case discussed the scope of investigation under PMLA. Petitioners argued that "investigation," as defined in the PMLA, should align with the Criminal Procedure Code's definition—focused on collecting evidence. Therefore, they claimed statements made by individuals under the PMLA should be protected by the right to self-incrimination and the right to life and personal liberty. Exceptions, they asserted, should only be present in proceedings before an adjudicating authority or a court. However, the court disagreed, stating investigation should be understood synonymously with inquiry, meaning an action by authorities to compile evidence and submit it to the court. The court thus dismissed the petitioner's comparison of the PMLA's definition of investigation to that of the Criminal Procedure Code and ruled that rights to self-incrimination and life/liberty are not automatically applicable to proceedings by authorized PMLA officers.³

¹ SLP(Crl.) No. 4634 of 2014

² Supra note 1

³ Available at <https://ijirl.com/wp-content/uploads/2023/09/THE-VIJAY-MADANLAL-JUDGMENT-OF-INDIA-A-NEW-ERA-FOR-PMLA.pdf>, last accessed on June 25, 2025.

This act significantly alters the burden of proof in money laundering cases. Instead of the prosecution proving guilt, the accused now has to demonstrate their innocence. This places a substantial and potentially insurmountable burden on the defendant to prove they were not involved with any tainted money, effectively reversing traditional criminal jurisprudence. The law presumes all proceeds from the underlying crime are subject to money laundering.¹

The Requirement of Twin Bail Conditions

Section 45 of the PMLA requires two conditions for bail: a reasonable ground to believe the accused is not guilty and he would not commit further offences, and an opportunity for the public prosecutor to oppose the bail application.

Petitioners argued that these conditions violate the fundamental rights to equality (Article 14) and life and dignity (Article 21). They contend that the stringent conditions place an unfair burden on accused individuals, making bail extremely difficult to obtain. This, they argue, is contrary to the principle that bail is the rule and jail the exception, and infringes on the right to life and liberty. Further, they point out the more rigorous bail provisions in PMLA compared to the Criminal Procedure Code (CrPC) and the distinct treatment of the same act under different statutes as a violation of Article 14.²

In 2017, the Supreme Court ruled that these twin conditions were unconstitutional. However, the government amended Section 45 PMLA in 2018, essentially reaffirming these same conditions. The Court's recent ruling on this matter states that the twin conditions are not unconstitutional. While recognizing the more restrictive nature of PMLA bail compared to CrPC, the court emphasizes that the law does not impose an absolute bar on bail. It maintains that judicial discretion in granting bail, guided by Section 45, remains.

The abovesaid judgment points out some key flaws:

- **Inconsistent Application of Standards**

The ruling imposes similar requirements for money laundering as for more serious offenses like those under TADA and UAPA. The author contends that the gravity of terror-related crimes vastly outweighs the economic crime of money laundering. Applying the same stringent measures to a crime with significantly lower penalties is arbitrary.

- **Deficiencies in ECIR Handling Leading to Erosion of Protections**

The court has not only applied stringent measures but has also eroded existing protections for the accused. Even anticipatory bail is affected. The recording of ECIRs is not mandatory under the PMLA, despite established criminal law principles. Even when ECIRs are filed, the accused is not obligated to be informed of their contents, creating a severe lack of transparency and procedural fairness. Critically, the accused is denied access to an ECIR (likely a report outlining charges) until arrest, depriving them of crucial information. The author argues that even statutes dealing with more severe offenses provide some protections, which are absent in this money laundering case. This lack of access, contradicting the Supreme Court's decision requiring ECIR access to accused, harms the accused's ability to defend themselves, as they lack knowledge of the allegations.³

In short, the ruling is deemed regressive due to its disproportionate demands and the stripping away of standard protections.

- **Interpretation of Proceeds of Crime**

The interpretation of proceeds of crime legislation is overly broad. A court ruling has eliminated the requirement that a person projecting or claiming ownership of the proceeds be established, making any possessor of tainted property potentially liable under the Act. This lack of a knowledge or intent requirement is problematic, as it effectively presumes guilt before proof of any wrongdoing, thus violating a fundamental principle of criminal law (innocent until proven guilty). Section 24 of the Act, in its current interpretation, is therefore seen as problematic.⁴

¹ Ibid.

² Ibid.

³ Siddh Sanghavi, *Digression from Constitutionalism in the Case of Vijay Madanlal Choudhary V. Union of India* Indian Journal of Law and Legal Research (IJLLR) Volume V, 4 (2023) Available at https://3fdef50c-add3-4615-a675-a91741bcb5c0.usfiles.com/ugd/3fdef5_b0b93894dd7d4d0c815a63c26b18980b.pdf, last accessed on June 25, 2025.

⁴ Ibid.

- **Unfair Burden of Proof**

In a legal dispute concerning the burden of proof for untainted crime proceeds u/s 3, the defense argued that the prosecution should bear the burden. Upon which, the Supreme Court deemed section 24, which places the burden on the accused, to be reasonable and not unconstitutional.¹

- **Difficult Bail Conditions**

Accused persons face stringent bail conditions under PMLA section 45, requiring proof both of innocence and non-reoffending risk. The lack of ECIR access significantly hinders the accused's ability to satisfy these conditions, making it dramatically challenging to prove innocence without knowing the scope of allegations. This results in a huge hurdle for the accused to overcome their presumptive guilt.

- **Arbitrary Seizure of Assets**

Section 5 and 8(4) of the relevant legislation granted the Enforcement Directorate broad authority to seize the assets of individuals accused of crimes. In light of arbitrary property seizure, the ED has the power to attach and seize property without sufficient justification. The PMLA's process allows this, despite the need for a confirming adjudicating authority, placing the burden of proof on the accused to demonstrate the seized property is not criminal proceeds, a burden arguably unfair. This power directly contradicts Article 300A of the Indian Constitution.²

- **Problematic Admissibility of Statement**

Section 50 of the relevant legislation allows the ED to compel self-incriminating statements from the accused by threatening fines. This is unconstitutional, violating the accused's right against self-incrimination. The Act permits the inclusion of all self-incriminating testimony collected by the ED during trial proceedings. This unlike other investigative procedures, makes ED recorded statements admissible in court.³

Moreover, ED in certain landmark cases have also arrested the persons then and there at their office after recording of their statement without giving them any notice u/s 41-A Cr.P.C. (now as section 35 BNSS, 2023). In case of *Pankaj Bansal v. Union of India*⁴ the Hon'ble Justices AS Bopanna and PV Sanjay Kumar remarked, "*In any event, it is not open to the ED to expect an admission of guilt from the person summoned for interrogation and assert that anything short of such admission would be an evasive reply*"⁵. The Hon'ble Bench opined the requirements to be fulfilled for making arrest u/s 19 of PMLA, where there has to be need and necessity to arrest.

- **Before and After Complexities of Summoning by ED**

When a person is summoned under PMLA by enforcement directorate (investigating agency), the summoning notice fails to show as in what capacity a person is summoned to the office of ED, meaning thereby that whether summoning of a person is made as an accused or as a witness is never made clear. This situation creates a state of panic for any person whether he may be called as a witness only because proper clarity is not imparted through the summons.

Criticism is suffered by PMLA for violating several fundamental rights, specifically around procedural fairness, transparency, and due process of law. It argues the Act's provisions related to property seizure, ECIR handling, bail provisions, and evidentiary procedures are problematic and potentially violate the accused's constitutional rights.

Approach of Constitutionalism and Developmental Justice

The matter of *Vijay Madanlal Chaudhary v. UOI*⁶ is pending before the Hon'ble Supreme Court and is being hotly contested by both the parties and at present two points are taken under consideration by the Hon'ble Supreme Court i.e., first whether the copy of ECIR should be supplied to an accused by the ED and second that whether the reversal of the presumption of innocence in money laundering cases constitutionally valid.

¹ Ibid.

² Ibid.

³ Ibid

⁴ [2023] 12 S.C.R. 714:2023 INSC 866

⁵ Ibid. page 733, para 25

⁶ 2022 INSC 756

The Hon'ble Court has ample power to uplift the conditions of persons languishing in jail under incarceration for years in a hope that their chargesheet would be filed soon and their case would come up for hearing and one day they would see the light of the day after being granted bail or would be discharged. But the reality is, chargesheet is not filed on time and the jails are congested with illegal detentions under PMLA offences. As discussed above, the proceedings for grant of bail are a mini trial in itself for an accused. The facts at the hearing of bail presented before the Hon'ble Court forms a matter of trial where evidences are discussed in detail without supplying the copy of the same to the accused. Although during bail proceedings, it has to been seen that whether prima facie offence is made out or not, as it has been committed or not can only be proved after the examination-in-chief, cross examination and conclusion of the trial. But the public prosecutor (state) is given an opportunity to oppose the bail and the accused is asked to prove or depose that he would never do this thing or alleged offence again as a condition precedent to qualify for grant of bail.

In case of *Ajay Ajit Peter Kerkar v. Directorate of Enforcement*¹, the Court ruled and upheld the application of Section 436A Cr.P.C. (now section 479 BNSS, 2023), that bail be granted to UTP (under trial prisoner) if they have been detained for half the maximum period of imprisonment for the offence. The problem arises if the person convicted has been again arrested for more than one offence, this provision or relief is not applicable to them.

The developmental justice in the light of constitutionalism can take place for the welfare of accused persons serving illegal detention by affording them opportunity to be heard and be released on furnishing bonds, as the Court deems fit rather than putting them behind bars without being convicted. The bringing of ED Manual in the public domain like other procedural manuals of criminal procedure or civil procedure code, etc. would be a great constitutional step by delivering developmental justice to the persons accused in the offences under PMLA, as they would get to know the working, rulings, investigative know how of enforcement directorate. The ED manual which is kept secret on the pretext of being so called "internal document" be brought in the public domain so the transparency and working of ED can be ascertained. The Constitution of India says that an accused person is innocent until proven guilty as a fundamental safeguard against wrongful convictions and abuses of power. This important aspect of law needs to be applied in practicality as well.

Conclusion

The Supreme Court's recent ruling on money laundering reveals several critical flaws in the current legislation. The ruling creates a new offense for projecting or claiming crime proceeds as legitimate, even absent further evidence of wrongdoing. This could lead to unfair accusations. Furthermore, the Court allows temporary property seizure without requiring a registered predicate offense, potentially enabling abuse and arbitrary action. Uncertainties arise regarding the status of provisionally seized property if a confirmation complaint is not filed within one year.

This ruling also violates the principle of "innocent until proven guilty" by shifting the burden of proof to the accused to demonstrate the legitimacy of their assets. The legislation prioritizes the Prevention of Money Laundering Act over predicate offenses, creating an unfair situation where individuals charged only with the predicate crime might still face harsher penalties under the PMLA due to excessive sentencing guidelines. Finally, the lack of transparency in the Enforcement Directorate Manual and the use of money bills to modify the law are concerning, undermining parliamentary procedure and due process.

Overall, the ruling highlights critical shortcomings in the current legal framework, including potential for abuse of power and unfair treatment of accused individuals. The application of the PMLA is being questioned due to its strict bail provisions, raising concerns about the potential conflict between delivering justice and safeguarding individual liberties. There are several issues with the working of PMLA, 2002 unless they are rectified with the aid and advice of judiciary as well as legislature.

A comprehensive review and necessary reforms are crucial to ensure a just and equitable legal system under the umbrella of constitutionalism and developmental justice. The future amendments and additions in the PMLA, 2002 would surely be a solace for litigants who and whose family's are wreathing in pain of their custody and separation.

¹ Decided on May 16, 2024

Suggestions

- The overreaching powers of enforcement directorate needs proper cheque and balance by judiciary.
- The stringent bail requirements need to be curtailed tor lessened down to some extent in light of article 21 of the Constitution of India leading to decongestion of jails where persons are lodged and brandished as of lost opportunities, waiting for their turn for completing years of half sentence without their guilt and conviction.
- The summons against a person should contain the allegations alongwith the purpose of the visit to ED office whether as an accused or witness.
- The law of PMLA needs to be amended on the domestic lines of the country as per the guidelines of FATF. At present the domestic needs are sidelined and commitment to foreign policy is adopted.

