ALLIED LAWS

The Evolution of Bail Jurisprudence under the Prevention of Money Laundering Act, 2002 (PMLA)

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Introduction :

The fame or the infamy of any criminal statute in our country seems to be a direct consequence of the difficulty in getting bail. The more elusive the order of bail, the more infamous the statute. The prosecution proceedings under the PMLA have created quite a buzz in the recent years. This is despite the fact that trials in the case of offenses under the PMLA have had a significant period of pendency and in some cases have not even commenced for an extended period of time. The difficulty in obtaining bail for the offense of money laundering is what has caused the proceedings under the PMLA to be much feared.

The provisions for the grant of bail under Section 45 of the PMLA has garnered a lot of criticism from litigants, litigators as well as academics due to the stringent statutory conditions, prescribed including the infamous 'the twin conditions'. While the general and widely accepted mantra taught to students of criminal law is '"Bail is the rule, Jail is the exception", getting bail under the PMLA has proven to be notoriously difficult. The jurisprudence regarding Bail in PMLA proceeding has seen spectacular twists and turns. There is an old proverb "The road to hell is paved with good intentions". This proverb may possibly be reverberating in the minds of those who are accused of the activity of Money Laundering.

What does Bail mean?

'Under the newly minted *Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS)*, bail is defined under Section 2 (1)(b) as:

Section 2(1)(b) *"bail" means release of a person accused of or suspected of commission of an offence from the custody of law upon certain conditions imposed by an officer or Court on execution by such person of a bond or a bail bond*

The procedure of the conditional or unconditional release of an accused against a security is a tale as old as time and has been an integral part of balancing the power of the investigating agencies to impose the limits on the movement of an accused and the personal liberty of the accused in light of the presumption of innocence. The Hon'ble Supreme Court in the case of *State of Gujarat v. Mohanlal Jitmalji Porwal (1987) 2 SCC (364)* observed that, *"Ends of justice are not satisfied only when the accused in a criminal case is acquitted. The community acting through the State and the Public Prosecutor is also entitled to justice. The cause of the community deserves equal treatment at the hands of the court in the discharge of its judicial functions. The community or the State is not a persona-non-grata whose cause may be treated with disdain. The entire community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the community. A disregard for the interest of the community can be manifested only at the cost of forfeiting the trust and faith of the community in the system to administer justice in an even-handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the national economy and national interest."*

What must be kept in mind is that not all economic offenses are created equally. While most offenses under the Income-tax Act, 1961 are bailable, the Goods and Service Tax Act, 2017 makes certain offenses unbailable if the quantum involved is above five Crore Rupees. The offenses under the PMLA are non-bailable in nature. Non bailable would not mean that bail cannot be granted. It just means that bail cannot be granted as a matter of right. For the offense of money laundering however, there is an additional factor to be considered – the infamous twin conditions.

To (grant) Bail or not to (grant) Bail, that is the Question.

Justice Krishna Iyer in the case of *Gudiknti Narasimhulu and Ors. v. Public Prosecutor, High Court of Andhra Pradesh (1978) 1 SCC 240* observed, *"Bail or jail?" — at the pre-trial or post-conviction stage — belongs to the blurred area of the criminal justice system and largely hinges on the hunch of the Bench, otherwise called judicial discretion. The Code is cryptic on this*

topic and the Court prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process. As Chamber Judge in this summit court I have to deal with this uncanalised case-flow, ad hoc response to the docket being the flickering candle light. So it is desirable that the subject is disposed of on basic principle, not improvised brevity draped as discretion. Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the curial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. To glamorize impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of "procedure established by law". The last four words of Article 21 are the life of that human right."

The fetters imposed by the twin conditions for bail in PMLA have been a subject of much debate and discussion. As per Section 45 (1)(ii) for an accused to secure bail in a PMLA case, the special court should be satisfied that there are reasonable grounds to believe that the accused is not guilty of the offence of money laundering. Secondly, he is not likely to commit any offence while he is out on bail. These are infamously known as the twin conditions of bail under PMLA. It is quite clear that the threshold for bail is quite high in money laundering cases since an accused has to prove at the prima facie stage that he is not guilty of the offence of money laundering. Proving one's innocence at the stage of bail is extremely difficult as the material before the court at such an early stage is limited to the ECIR (Enforcement Complaint Information Report) prepared by the Enforcement Directorate which is the nodal agency for investigating money laundering offences in India and the evidence collected for the scheduled offence until that stage. However, since the gravity of economic crimes is considered to be very serious, the conditions of bail are also set at a greater level. The constitutionality of the twin conditions was tested by the Supreme Court firstly in *Nikesh Tarachand Shah v. UOI (2018) 11 SCC 1* where drawing upon the Magna Carta, the Court quoted -

"No free man shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land." The twin conditions were struck down by the Court for being manifestly arbitrary and violative of Article 14 and 21 of the Constitution. The Court further observed "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."

However, a few years later in the landmark judgement of *Vijay Madanlal Choudhary and Ors. v. UOI (2022) SCC OnLine 929* the Supreme Court took a divergent view in the back drop of a legislative amendment to Section 45 which purported to do away with the manifest arbitrariness of the Twin Conditions. The Court observed *"We are conscious of the fact that in SCC para 53 of Nikesh Tarachand Shah , the Court noted that it had struck down Section 45 of the 2002 Act as a whole. However, in SCC para 54, the declaration is only in respect of further (two) conditions for release on bail as contained in Section 45(1), being unconstitutional as the same violated Articles 14 and 21 of the Constitution. Be that as it may, nothing would remain in that observation or for that matter, the declaration as the defect in the provision [Section 45(1)], as existed then, and noticed by this Court has been cured by Parliament by enacting Amendment Act 13 of 2018 which has come into force with effect from 19-4-2018. We, therefore, confined ourselves to the challenge to the twin conditions in the provision, as it stands to this date post amendment of 2018 and which, on analysis of the decisions referred to above dealing with enactments concerned having similar twin conditions as valid, we must reject the challenge. Instead, we hold that 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 to combat the menace of money laundering having transnational consequences including impacting the financial systems and sovereignty and integrity of the countries."*

The twin conditions, therefore, were 'revived' and are a threshold that a person accused of money laundering who has been arrested must fulfil even today while seeking bail. The twin conditions therefore, somewhat constrict the judicial discretion that the courts normally have to grant bail to those who are brought before them as accused. This does lead to a vexatious issue with individual liberty. What is to be done in cases where a trial may take a long time to complete but the accused has already undergone a substantial period of time behind bars? The Supreme Court in *Vijay Madanlal Choudhary* did provide a reprieve – it made it clear that Section 436A of the Criminal Procedure Code which states that a person who has spent one half of the maximum period of the prescribed sentence in jail while on trial shall be eligible to ger bail despite the win conditions – but that right is not an absolute right either.

The Exceptions to the Twin Conditions

While keeping in mind that the twin conditions for bail prescribe an additional burden upon the accused for being enlarged on bail, the twin conditions are also not by themselves prescribed for each and every case. There are notable exceptions that have been incorporated in Section 45 itself. The first proviso to Section 45(1) states – *"Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, 3 [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"*. This has been a matter of great reprieve for certain accused that have languished in jail while being unwell. Based on reports of doctors and medical history, many of such accused have been released on medical bail.

It is not just the High Courts but also the Supreme Court that has upheld the right of an accused under the PMLA to get bail due to the exception carved out for those who are "sick and infirm". In *Amar Sadhuram Mulchandani v. Directorate of Enforcement and Anr. (Special Leave to Appeal (Crl. No. 11376/2024 dated 14.10.2024)*, the Supreme Court held that 'the provisio to Section 45(1) of PMLA specifically contemplates that a person who is "sick or infirm" may be released on bail if the Special Court so directs and that based on the medical evaluation it was evident that the Petitioner fulfilled the threshold required for being enlarged on bail. The Supreme Court was pleased to direct the release of the Petitioner on interim bail. However, there are also cases where applicants for bail have been released on regular bail on medical grounds like in the case of *Naresh Goyal v. Directorate of Enforcement and Anr. (Bail Application no. 2494 of 2024 dated 11.11.2024)* as the Petitioner continued to be sick and infirm. This Judgement also considered the order of the Supreme Court in the case of *Amar Sadhuram Mulchandani v. Directorate of Enforcement and Anr. (Special Leave to Appeal (Crl. No. 11376/2024 dated 14.10.2024)*. Similarly bail has also been granted on similar grounds for other accused.

It is not just medical reasons that are carved out as exceptions for the non-applicability of the twin conditions. Other two notable are a person under the age of 16 years or a woman. In the case of *Kalvakuntla Kavitha v. Directorate of Enforcement. (2024) SCC OnLine SC 2269,* the Supreme Court was please to grant bail to the Petitioner who was denied Bail by the Delhi High Court for not being a 'vulnerable woman'. The Supreme Court observed that *"the proviso to Section 45(1) of the PMLA would entitle a woman for special treatment while her prayer for bail is being considered."* The Court further observed that *"A perusal of the above proviso would thus reveal that the proviso permits certain category of accused including woman to be released on bail, without the twin requirement under Section 45 of the PMLA to be satisfied. No doubt that, as argued by the learned ASG, in a given case the accused even if a woman may not be automatically entitled to benefit of the said proviso and it would all depend upon the facts and circumstances of each case. However, when a statute specifically provides a special treatment for a certain category of accused, while denying such a benefit, the Court will be required to give specific reasons as to why such a benefit is to be denied."*

These judgements which have very recently been pronounced show that bail jurisprudence in the case of accused under the PMLA is rapidly evolving as time passes. In fact in the case of **Kalvakuntla Kavitha**, the Supreme Court reiterated an interesting observation regarding the grant of bail to those accused of financial crimes where it observed that *"We had also reiterated the well-established principle that 'bail is the rule and refusal is an exception'. We had further observed that the fundamental right of liberty provided under Article 21 of the Constitution is superior to the statutory restrictions".*

A Long Period of Incarceration

Denying bail to an accused would lead to a long period of incarceration, sometimes even as long as the accused serving one-third or half of the of sentence he would serve in case he was proven guilty. This would certainly lead to an infringement of an accused person's right to a speedy trial and a violation of his right to liberty under Article 21 of the Constitution of India. The consideration of long period of incarceration in cases under PMLA is turning out to be an important one.

This very fact was pointed out by the Supreme Court in the case of *Manish Sisodia v. Directorate of Enforcement (2024) SCC OnLine SC 1920* where the court observed that, *"The courts below have rejected the claim of the appellant applying the triple test as contemplated under Section 45 of the PMLA. In our view, this is in ignorance of the observations made by this Court in paragraph 28 of the first order wherein this Court specifically observed that right to bail in cases of delay coupled with incarceration for a long period should be read into Section 439 Cr. P.C. and Section 45 of the PMLA."* It was also observed that, *"We find that, on account of a long period of incarceration running for around 17 months and the trial even not having been commenced, the appellant has been deprived of his right to speedy trial. As observed by this Court, the right to speedy trial and the right to liberty are sacrosanct rights. On denial of these rights, the trial court as well as the High Court ought to have given due weightage to this factor. The Court further observed that, over a period of time, the trial courts and the High Courts have forgotten a very well-settled principle of law that bail is not to be withheld as a punishment. From our experience, we can say that it appears that the trial courts and the High Courts attempt to play safe in matters of grant of bail. The principle that bail is a rule and refusal is an exception is, at times, followed in breach. On account of non-grant of bail even in straight forward open and shut cases, this Court is flooded with huge number of bail petitions thereby adding to the huge pendency. It is high time that the trial courts and the High Courts should recognize the principle that "bail is rule and jail is exception".*

The statement of the Supreme Court that bail is rule and jail is the exception even in PMLA cases is a watershed moment in the evolution of Bail jurisprudence under this Special Act. This has been not a one off incident. Similar observations have been made in the case of *UOI v. K.A. Najeeb (2021) 3 SCC 713 as well as V. Senthil Balaji v. Deputy Director, Directorate of Enforcement (2024) SCC OnLine SC 2626.*

This would not mean that the twin conditions have lost their potency or relevance. It just means that the possibility of a long period of incarceration with no end to the trial in sight can be mitigating factor for an accused to be enlarged on bail despite the stringent twin conditions.

Conclusion

It is of no doubt that the bail jurisprudence with regards to PMLA is rapidly evolving with a focus to balancing the Article 21 rights of an accused against the mandate of the statute. The law is fast evolving. Very recently in the case of *Vinod Chaturvedi v. Directorate of Enforcement (Bail Application in PMLA Special Case No. 1390 of 2021 dated 27.11.2024)*, the PMLA Special Court at Greater Bombay enlarged the Applicant on bail considering that Section 479 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), the Applicant would be entitled to be enlarged on bail after undergoing one third of the sentence subject to the conditions being fulfilled. It referred to the order of the Supreme Court in In *Re-Inhuman Conditions in 1382 Prisons (Writ Petition (Civil) No. 406/2013)* has held that the provisions of Section 479 of the BNSS being beneficial is made applicable to the under-trial prisoners. This would herald in a new factor for bail jurisprudence under the PMLA especially because this order is a cumulation of the latest development in the law laid down by the Supreme Court.

The PMLA continues to be an Act that is stringent. However, with the evolution of law it would seem that the process itself may no longer prove to be the punishment for those accused under the special Act.

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