

# Has bail under PMLA become near-impossible?

How has the Supreme Court changed its view on Section 45 (1) of the Prevention of Money Laundering Act, 2002?

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**The story so far:** Recently, the Supreme Court in the case of *Vijay Madanlal Chaudhary vs Union of India* gave the judicial stamp of approval to the twin conditions of bail under Section 45(1) of the Prevention of Money Laundering Act, 2002 (PMLA). The conditions were contested as being arbitrary and draconian in as much as they reverse the presumption of innocence at the stage of bail. The judgment is of immense importance given that delay or denial in grant of bail was recently identified by the Supreme Court in the case of *Satender Kumar Antil vs CBI* as being a leading factor in the perpetration of injustice in our criminal justice system.

## What are the conditions under Section 45(1) of the PMLA?

The PMLA was enacted with the objective to prevent money laundering. The Act provides for a higher threshold for the grant of bail as compared to the standard procedure under the Code of Criminal Procedure (CrPC). Section 45(1) of the PMLA requires that before a person is released on bail or bond, the public prosecutor must initially be given an

opportunity to oppose the application and secondly, when the application is opposed, the court must be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offence and is not likely to commit any crime while out on bail.

## Are there other Acts which impose such conditions?

A similar provision is provided for in Section 43D(5) of the Unlawful Activities (Prevention) Act, 1967 which requires the court to provide an opportunity to the public prosecutor to oppose the bail application and to not release the accused on bail if there are reasonable grounds for believing that the accusation is prima facie true. Section 37(1) of the Narcotic Drugs and Psychotropic Substances Act, 1985 too is in pari materia with Section 45(1) of the PMLA. Previously, Section 20(8) of the Terrorist and Disruptive Activities Act, 1987 (TADA) also carried similar conditions for grant of bail.

## What was the earlier position of the court on Section 45(1)?

The validity of the twin requirements under Section 20(8) of the TADA Act had been upheld by the Supreme Court in the



case of *Kartar Singh vs State of Punjab* (1994) on the grounds that the courts have to balance the interest of the victims and the community as well as the safety of the nation with the liberty of the accused. In the case of *Nikesh Tarachand Shah vs Union of India* (2018), however, the Court differentiated between the wordings of Section 20(8) of the TADA Act and Section 45(1) in two important regards – that Section 20(8) of the TADA Act applied to a ‘most heinous’ offence and that the previously un-amended Section 45(1) under challenge in the Nikesh Shah case did not pertain to an offence under the PMLA Act but only to a predatory offence listed in Schedule A. The Supreme Court, in that case, held Section 45(1) to be unconstitutional and

violative of Articles 14 and 21 of the Indian Constitution and struck it down.

## Why has the Supreme Court reversed its position now?

Post the Supreme Court’s judgment in the Nikesh Shah case, Section 45(1) was amended vide Act 13 of 2018 and the revised section made the twin conditions for grant of bail applicable to all offences under the PMLA. This amended section was again challenged before the Supreme Court in the recent Vijay Madanlal case. The Supreme Court has held that as Section 45 was not obliterated from the statute book but was merely held to be unconstitutional, the Parliament was free to revive the provision by curing the defect. With respect to the first differentiation made between Section 20(8) of TADA and Section 45(1) of the PMLA, the three-judge bench of the Supreme Court in Vijay Madanlal case held that money laundering could not be considered as any lesser an offence than the offence of terrorism sought to be tackled under TADA. It stated that the offence of money laundering had a “direct impact on the financial systems and sovereignty and integrity of the countries,” and held it to be a heinous crime.

## What are the implications of the Supreme Court’s judgment?

The twin conditions, when examined independently require the Court to take a judicial call on the potential guilt of the offender based on the material supplied by the accused in the bail application and the opposition made to the same by the prosecution. In doing so, the provision overturns the settled principle of presumption of innocence which dictates that an undertrial remains innocent until he is proven guilty. These safeguards have been built into the procedure under the CrPC so as to ensure that the due process values enshrined in our Constitution find practical application.

The Vijay Madanlal case decision comes from a three-judge bench of the Supreme Court and therefore conclusively overrules the judgment by the division bench of the Supreme Court in the Nikesh Shah case. In upholding Section 45(1) of the PMLA, the Court has made the twin conditions for the grant of bail constitutionally valid in the name of national security related expediency. It is trite to say that under such stringent conditions, jail becomes the rule while bail is the exception.

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## THE GIST

■ The Supreme Court in the case of *Vijay Madanlal Chaudhary vs Union of India* gave judicial approval to the twin conditions of bail under Section 45(1) of the Prevention of Money Laundering Act, 2002.

■ Section 45(1) of the PMLA requires that before a person is released on bail, the public prosecutor must be given an opportunity to oppose the application and secondly, when the application is opposed, the court must be satisfied that the accused is not guilty.

■ The SC by upholding such stringent provisions overturns the principle of presumption of innocence – that an undertrial remains innocent until he is proven guilty.