

Crl.O.P.Nos.3381, 3383 and 3385 of 2021_

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.12.2021

DELIVERED ON : 03.01.2022

CORAM:

**THE HON'BLE MR. JUSTICE M.DURAI SWAMY
AND
THE HON'BLE MR. JUSTICE J. SATHYA NARAYANA PRASAD**

Crl.O.P.Nos.3381, 3383 and 3385 of 2021

1. N.Umashankar @ N.M.Umashankar
... Petitioner in Crl.O.P.No.3381/2021
- 2.V.Janarthanan
- 3.N.Arunkumar ... Petitioners in
Crl.O.P.No.3383/2021
4. Saravanakumar ... Petitioner in Crl.O.P.No.3385/2021

v.

The Assistant Director,
Directorate of Enforcement,
Government of India,
Chennai Zone-2,
3rd Floor, 3rd Block,
Shastri Bhawan, Haddows Road,
Chennai 600 006.

... Respondent



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COMMON PRAYER: Criminal Original Petition filed under [Section 45](#) of the Prevention of Money Laundering Act, 2002 read with section 439 of the Criminal Procedure Code, to enlarge the petitioners on bail pertaining to ECIR No.ECIR/MDSZO/04/2018 pending investigation on the file of the respondent.

For Petitioners in all Crl.O.Ps	: Mr.R.Jayaprakash
For Respondent in all Crl.O.Ps	: Mr.Rajinish Pathiyil Special Public Prosecutor

COMMON ORDER

M. DURAISWAMY, J.

The petitioners, namely, N.Umashankar @ N.M.Umashankar V.Janarthanan, N.Arunkumar and Saravanakumar, are arrayed as accused Nos. 2, 3, 4 and 9, respectively in ECIR No.ECIR/MDSZO/04/2018, on the file of the Court of Principal Sessions Judge, City Civil Court, Chennai.



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2. The Division Bench of this Court, by order dated 10.03.2021, granted bail to the petitioners. Aggrieved over the order passed by the Division Bench, the respondent filed Appeals before the Hon'ble Supreme Court in S.L.P. (Crl.) Nos. 7563-7565 of 2021 and the Apex Court, by order dated 22.11.2021, set aside the order dated 10.03.2021 and relegated the parties before this Court for reconsideration of Criminal Original Petitions to be decided in accordance with law.

3. Pursuant to the order passed by the Apex Court, the learned counsel on either side made their submissions in the bail petitions.

4. It is not in dispute that the petitioners were arrested by the respondent for the alleged offence under [Section 3](#) of the Prevention of Money Laundering Act (hereinafter referred to as "PMLA") and punishable under [Section 4](#) of PMLA. The petitioners filed petitions in Crl.O.P.Nos.673, 675 and 677 of 2021 seeking for bail. The said petitions were dismissed on 02.02.2021 on the ground that investigation was pending. The Economic Offences Wing of Tamil Nadu Police had registered a case in Crime No.6 of 2016 on 02.06.2016, for



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the alleged commission of offences under [Sections 406, 420, 120B](#) of IPC read with Section 5 of the Tamil Nadu Protection of Interest of Depositors (in Financial Establishment) Act, 1997 (TNPID Act) and they were granted Anticipatory Bail and subsequently, the Anticipatory Bail granted to them came to be cancelled and during their incarceration, the Committee of Administrator appointed by the Hon'ble First Bench of this Court had seized and got over almost all documents pertaining to the properties and some of the properties are also brought for sale and this Court had also confirmed the sale in respect of some of the properties.

5.1 Mr.R.Jayaprakash, learned counsel appearing for the petitioners submitted that since the investigation done by the respondent has been completed and complaint has also been filed, which is yet to be taken on file, the question of hampering investigation and tampering of witnesses would not arise. The learned counsel also submitted that the passports of the petitioners were also ordered to be surrendered, in connection with the case in Crime No.6 of 2016, registered by the Economic Offences Wing of Tamil Nadu Police and as such, the question of fleeing from the hands of justice also would not arise.



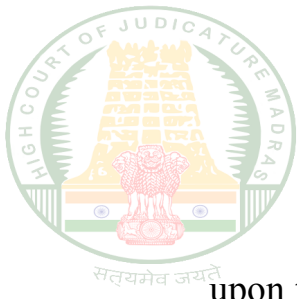
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5.2 The learned counsel further submitted that the provisions of section 45 of the PMLA has no application for the reason that the Hon'ble Supreme Court in its Judgment reported in 2018(11) SCC -1 **[Nikesh Tarachand Shah v. Union of India and another]**, had declared section 45(1) of the Act as unconstitutional. Further the learned counsel submitted that the amendment brought in section 45 of the Act on 19.04.2018 is also having no application for the reason that the provisions of section 45 has already been struck down by the Apex Court.

5.3 It is the contention of the learned counsel for the petitioners that once section 45 of the Act has been struck down by the Apex Court, the legislature cannot bring in amendment to the said provision, which is not in existence. The learned counsel also submitted that the petitioners are law abiding citizens and they would co-operate with the investigation, hence, bail may be granted as per the provisions of section 45(1)(ii).

5.4 In support of his contention, the learned counsel, has relied



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upon the following judgments:-

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(i) 2018 (11) SCC-1 [Nikesh Tarachand Shah v. Union of India and another], wherein the Hon'ble Supreme Court held as follows:-

“29 By the Amendment Act of 2012, which is Act 2 of 2013, a very important amendment was made to the Schedule by which the entire Part B offences were transplanted into Part A. The object for this amendment, as stated in the Statement of Objects and Reasons for the amendment in clause 3 (j), specifically provided:

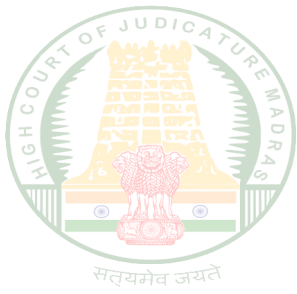
“(j) putting all the offences listed in Part A and Part B of the Schedule to the aforesaid Act into Part A of that Schedule instead of keeping them in two Parts so that the provision of monetary threshold does not apply to the offences.”

30. By the Finance Act of 2015, by Section 145, the limit of Rs.30 lakhs in Section 2(y) was raised to Rs.1 crore and in the Schedule after Part A, Part B was populated with only one entry, namely Section 132 of the Customs Act. Certain other amendments were made, by the Finance Act of 2016, to the 2002 Act with which we are not directly concerned.



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31. The statutory history of [Section 45](#), read with the Schedule, would, thus show that in its original avatar, as Clause 44 of the 1999 Bill, the Section dealt only with offences under the Act itself. [Section 44](#) of the 2002 Act makes it clear that an offence punishable under [Section 4](#) of the said Act must be tried with the connected scheduled offence from which money laundering has taken place. The statutory scheme, as originally enacted, with [Section 45](#) in its present avatar, would, therefore, lead to the same offenders in different cases having different results qua bail depending on whether [Section 45](#) does or does not apply. The first would be cases where the charge would only be of money laundering and nothing else, as would be the case where the scheduled offence in Part A has already been tried, and persons charged under the scheduled offence have or have not been enlarged on bail under [the Code](#) of Criminal Procedure and thereafter convicted or acquitted. The proceeds of crime from such scheduled offence may well be discovered much later in the hands of Mr. X, who now becomes charged with the crime of money laundering under the 2002 Act. The predicate or scheduled offence has already been tried



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and the accused persons convicted/acquitted in this illustration, and Mr. X now applies for bail to the Special Court/High Court. The Special Court/High Court, in this illustration, would grant him bail under [Section 439](#) of the Code of Criminal Procedure – the Special Court is deemed to be a Sessions Court – and can, thus, enlarge Mr. X on bail, with or without conditions, under [Section 439](#). It is important to note that Mr. X would not have to satisfy the twin conditions mentioned in [Section 45](#) of the 2002 Act in order to be enlarged on bail, pending trial for an offence under the 2002 Act.

32. The second illustration would be of Mr. X being charged with an offence under the 2002 Act together with a predicate offence contained in Part B of the Schedule. Both these offences would be tried together. In this case, again, the Special Court/High Court can enlarge Mr. X on bail, with or without conditions, under [Section 439](#) of the Code of Criminal Procedure, as [Section 45](#) of the 2002 Act would not apply. In a third illustration, Mr. X can be charged under the 2002 Act together with a predicate offence contained in Part A of the Schedule in which the term for imprisonment would be 3 years or less than 3



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years (this would apply only post the [Amendment Act](#) of 2012 when predicate offences of 3 years and less than 3 years contained in Part B were all lifted into Part A). In this illustration, again, Mr. X would be liable to be enlarged on bail under [Section 439](#) of the Code of Criminal Procedure by the Special Court/High Court, with or without conditions, as [Section 45](#) of the 2002 Act would have no application.

33. The fourth illustration would be an illustration in which Mr. X is prosecuted for an offence under the 2002 Act and an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule. In this illustration, the Special Court/High Court would enlarge Mr. X on bail only if the conditions specified in [Section 45\(1\)](#) are satisfied and not otherwise. In the fourth illustration, [Section 45](#) would apply in a joint trial of offences under the Act and under Part A of the Schedule because the only thing that is to be seen for the purpose of granting bail, under this Section, is the alleged occurrence of a Part A scheduled offence, which has imprisonment for over three years. The likelihood of Mr. X being enlarged on bail in the first



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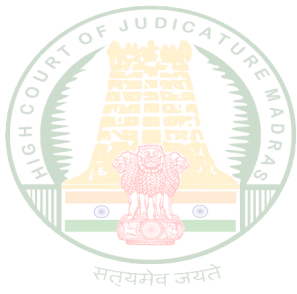
three illustrations is far greater than in the fourth illustration, dependant only upon the circumstance that Mr. X is being prosecuted for a Schedule A offence which has imprisonment for over 3 years, a circumstance which has no nexus with the grant of bail for the offence of money laundering. The mere circumstance that the offence of money laundering is being tried with the Schedule A offence without more cannot naturally lead to the grant or denial of bail (by applying [Section 45\(1\)](#)) for the offence of money laundering and the predicate offence.

.....

53. The matter came to this Court by a certificate of fitness granted by the High Court. Sikri, J and Ramana, J., by their order dated 12th August, 2016, stated:

“Though the High Court has granted certificate to appeal, we have heard the learned counsel for some time and are of the opinion that the impugned judgment of the High Court is correct. This appeal is, accordingly, dismissed.”

The complaint of the learned Attorney General is that this was done at the very threshold without hearing the Union of India. Be that as it may, we are of the



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opinion that, even though the Punjab High Court judgment appears to be correct, it is unnecessary for us to go into this aspect any further, in view of the fact that we have struck down [Section 45](#) of the 2002 Act as a whole.

54. Regard being had to the above, we declare [Section 45\(1\)](#) of the Prevention of Money Laundering Act, 2002, insofar as it imposes two further conditions for release on bail, to be unconstitutional as it violates Articles 14 and 21 of the Constitution of India. All the matters before us in which bail has been denied, because of the presence of the twin conditions contained in [Section 45](#), will now go back to the respective Courts which denied bail. All such orders are set aside, and the cases remanded to the respective Courts to be heard on merits, without application of the twin conditions contained in [Section 45](#) of the 2002 Act. Considering that persons are languishing in jail and that personal liberty is involved, all these matters are to be taken up at the earliest by the respective Courts for fresh decision. The writ petitions and the appeals are disposed of accordingly.”



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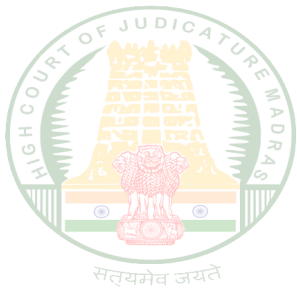
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(ii) 2021 SCC online P & H 1567 [Prakash Gurbaxani v.

The Directorate Of Enforcement], wherein the Hon'ble Supreme Court held as follows:-

“18. By Act 13 of 2018 [Section 45\(1\)](#) of the PMLA was sought to be amended w.e.f. 19.04.2018. Through such amendment the words "punishable for a term of imprisonment of more than three years under Part A of the Schedule" as occurring in [Section 45\(1\)](#) before the judgment of the Supreme Court in Nikesh Tarachand Shah's case (supra) were substituted with the words "under this Act". As per learned ASG, after such amendment, the defect on the basis of which the Supreme Court had declared [Section 45\(1\)](#) of the PMLA to be unconstitutional was cured and consequently the twin conditions prescribed in [Section 45\(1\)](#) stood revived.

19. The declaration by the Supreme Court in Nikesh Tarachand Shah's case (supra) would render the twin conditions prescribed in [Section 45\(1\)](#) of the PMLA for release of an accused on bail to be void in toto; such conditions have to be disregarded of any



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legal force from its inception; they cease to be law; the same are rendered inoperative and that they are to be regarded as if they had never been enacted. That being so, the twin conditions for grant of bail under [Section 45\(1\)](#) of the PMLA as are now sought to be pressed into service by the ED cannot be considered to have revived or resurrected only on the prospective substitution of the words 13 of 19 "punishable for a term of imprisonment of more than three years under Part A of the Schedule" with the words "under this Act" especially without there being any amendment with regard to the twin conditions for grant of bail which had specifically been declared to be unconstitutional as also in the absence of any validating law in this regard with retrospective effect.
.....”

(iii) **2021 SCC Online Del 3901 [Amarendra Dhari Singh vs Directorate Of Enforcement]**, wherein the Division Bench of Delhi High Court held as follows:

“..... 36. Reliance by the respondent has been placed on Bimal Kumar Jain and Naresh Jain Vs. Directorate of Enforcement BAIL APPLN.112/2021 and CRL. M. (BAIL) 81/2021; BAIL APPLN.



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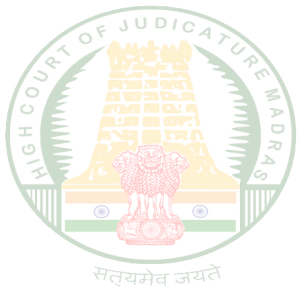
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122/2021. The said bail application has been decided only on the basis of parameters as laid down U/s 439 of the [Cr.PC](#). Therefore, in view of the above, the provisions of [Section 439](#) of Cr.P.C and the conditions therein will apply in the case of petitioner for grant of bail.”

(iv) **2021 SCC online Bom 2905 [The Union Of India v. Yogesh Narayanrao Deshmukh and another]**, wherein the Division Bench of Bombay High Court held as follows:-

“ 29. Next, Question is whether decision in Nikesh Tarachan Shah (Supra) has lost its' significance because of amendment in [Section 45](#) of the PMLA Act. Mr. Singh, learned ASG vehemently submitted that, twin conditions set out in Shivgan 24/41 Cri.APPLN-158-2021.odt [Section 45](#) of the PMLA are valid and would be applicable in the instant case. This submission is made on following two grounds, viz.

(i) binding precedent of the Hon'ble Apex Court holding that twin conditions apply; Reliance is placed



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on the judgment of the Apex Court in P.Chidambaram
(2018) 10 SCC 753.

(ii) defect found by the Hon'ble Apex Court in
Nikesh T. Shah (Supra) has been rectified by the
legislative amendment.

6.1 Countering the submissions made by the learned counsel appearing for the petitioners, Mr.Rajinish Pathiyil, learned Special Public Prosecutor appearing for the respondent submitted that the bail petitions filed by the petitioners are liable to be rejected solely on the ground that the amended provisions of Section 45 of the PMLA bars filing of bail petitions. That apart, the learned Special Public Prosecutor submitted that the petitioners never co-operated for the investigation and therefore, they are not entitled to the grant of bail under section 45(1)(ii) of the Act. The learned Special Public Prosecutor also submitted that the amended provisions of section 45 of the PMLA has been challenged before the Hon'ble Supreme Court and the Special Leave Petition is also pending without any interim order. In these circumstances, the learned



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Special Public Prosecutor submitted that the amended provisions of section 45 is binding on the petitioners.

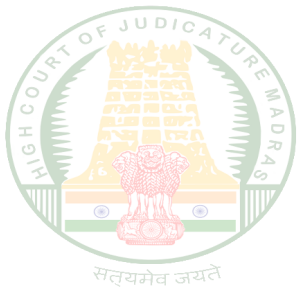
6.2 In support of his contention, the learned Special Public Prosecutor appearing for the respondent, has relied upon the following judgments:-

(i) **2017(1) SCC 283 [Cheviti Venkanna Yadav vs State Of Telangana]** wherein the Hon'ble Supreme Court held as follows:-

27. [In State of Himachal Pradesh v. Narain Singh](#) while dealing with the validation of statute the Court ruled that:-

“It is therefore clear where there is a competent legislative provision which retrospectively removes the substratum of foundation of a judgment, the said exercise is a valid legislative exercise provided it does not transgress any other constitutional limitation.”

28. To arrive at the said conclusion, the two-Judge Bench reproduced from the decision in Constitution



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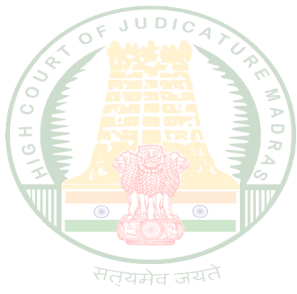
Bench in [State of T.N. v. Arooran Sugars Ltd](#)⁹ which is to the following effect:-

“It is open to the legislature to remove the defect pointed out by the court or to amend the definition or any other provision of the Act in question (2009) 13 SCC 165 (1997) 1 SCC 326 retrospectively. In this process it cannot be said that there has been an encroachment by the legislature over the power of the judiciary. A court’s directive must always bind unless the conditions on which it is based are so fundamentally altered that under altered circumstances such decisions could not have been given. This will include removal of the defect in a statute pointed out in the judgment in question, as well as alteration or substitution of provisions of the enactment on which such judgment is based, with retrospective effect.”

(ii) 2019(9) SCC 24 [P. Chidambaram v. Directorate Of

Enforcement] wherein the Hon'ble Supreme Court held as follows:

“36. Insofar as the issue of grant of bail is concerned, [Section 45](#) of PMLA starts with non-



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obstante clause. [Section 45](#) imposes two conditions for grant of bail to any person accused of any offence punishable for a term of imprisonment of more than three years under Part-A of the Schedule of the Act viz., (i) that the prosecutor must be given an opportunity to oppose the application for such bail;

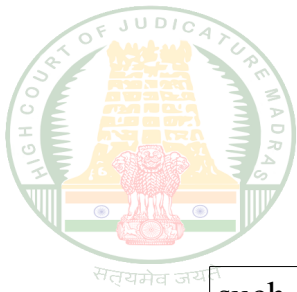
(ii) that the court must be satisfied that there are reasonable grounds for believing that the accused persons is not guilty of such offence and that he is not likely to commit any offence while on bail.

37. The twin conditions under [Section 45\(1\)](#) for the offences classified thereunder in Part-A of the Schedule was held arbitrary and discriminatory and invalid in [Nikesh Tarachand Shah v. Union of India and another](#) (2018) 11 SCC 1. Insofar as the twin conditions for release of accused on bail under [Section 45](#) of the Act, the Supreme Court held the same to be unconstitutional as it violates Articles 14 and 21 of the Constitution of India. Subsequently, [Section 45](#) has been amended by [Amendment Act 13](#) of 2008. The words “imprisonment for a term of imprisonment of more than three years under Part A of the Schedule” has been substituted with “accused of an offence



under this Act.....”. **Section 45** prior to Nikesh Tarachand and post Nikesh Tarachand reads as under:-

Section 45 - Prior to Nikesh Tarachand Shah Section 45. Offences to be cognizable and non-bailable. bailable. (1) Notwithstanding contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule shall be released on bail or on his own bond unless- (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 he is not guilty of	Section 45 - Post Nikesh Tarachand Shah Section 45. Offence to be cognizable and non-bailable. bailable. (2) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence under this Act shall be released on bail or on his own bond unless- (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 he is not guilty of such offence and that he is not likely to commit any offence while on bail;
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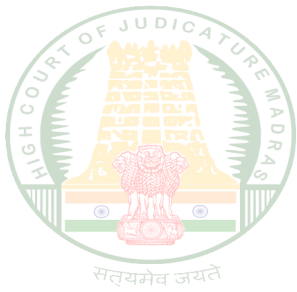
such offence and that he is not likely to be convicted. Provided that a person, who, is under the age of sixteen there are reasonable grounds for years, or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs:	Provided that a person, who, is under the age of sixteen there are reasonable grounds for years, or is a woman or is sick or infirm, or is a woman or is sick or infirm, 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, if the Special court so directs:
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(iii) The order of the Hon'ble Supreme Court made in S.L.P.(CRL.)No.5191 of 2021 **[Satender Kumar Antil v. Central Bureau Of Investigation]** wherein the Hon'ble Supreme Court held as follows;-

“We are inclined to accept the guidelines and make them part of the order of the Court for the benefit of the Courts below. The Guidelines areas under :-

“Categories/Types of offences”

A) Offences punishable with imprisonment of 7 years or less not falling in category B & D.



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B) Offences punishable with death, imprisonment for life, or imprisonment for more than 7 years.

C) Offences punishable under Special Acts containing stringent provisions for bail like NDPS (S.No.37) PMLA (S.45), UAPA (S.430(5), Companies Act 212(6), etc.

D) Economic offences not covered by Special; Acts.

REQUISITE CONDITIONS

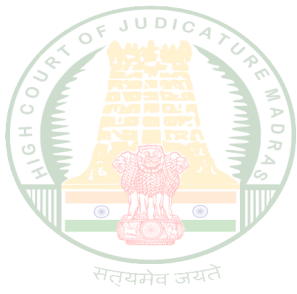
1. Not arrested during investigation.
2. Cooperated throughout in the investigation including appearing before Investigating Officer whenever called.

(No need to forward such an accused along with the chargesheet (Siddharth Vs. State of UP, 2621 SCC online SC 615)

CATEGORY - A

After filing of charge sheet/complaint taking of cognizance

- a) Ordinary summons at the 1%



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instance/including permitting appearance through Lawyer.

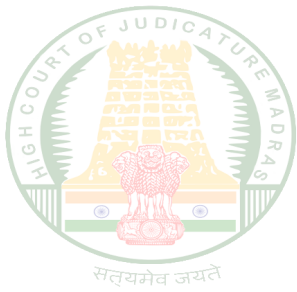
b) If such an accused does not appear despite service of summons, then Bailable Warrant for physical appearance may be issued.

c) NBW on failure to failure to appear despite issuance of Bailable Warrant.

d) NBW may be cancelled or converted into a Bailable Warrant/Summons without insisting physical appearance of accused, if such an application is moved on behalf of the accused before execution of the NBW on an undertaking of the accused to appear something physically on the next date/s of hearing.

e) Bail applications of such accused on appearance may be decided w/o the accused being taken in physical custody or by granting interim bail till the bail application is decided.

CATEGORY. B/D



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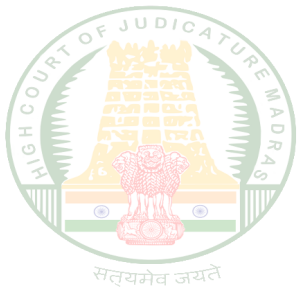


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on appearance of the accused in Court pursuant to process issued bail application to b decided on merits, CATEGORY – C Same as Category B & D with the additional condition of compliance of the provisions of bail under NDPS S.37, 45, PMLA, 212(6) Companies Act 43(5) of UAPA, POSCO Act etc.”

Needless to say that the category A deals with both police cases and complaint cases.

The trial courts and the High Courts will keep in mind the aforesaid guidelines while considering bail applications. The caveat which has been put by learned ASG is that where the accused have not cooperate din the investigation nor appeared before the Investigating officers, nor answered summons when the courts feels that judicial custody of the accused is necessary for the completion of the trial, where further investigation including a possible recovery is needed, the aforesaid approach cannot give them benefit, something we agree with.



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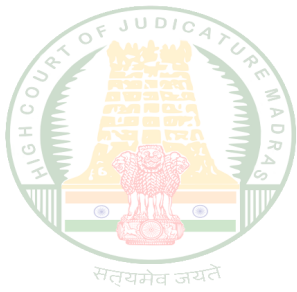
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(iv) The order of the Hon'ble Supreme Court made in Miscellaneous Application No.1849 of 2021 in S.L.P. No.5191 of 2021 **[Satender Kumar Antil v. Central Bureau Of Investigation]** wherein the Hon'ble Supreme Court held as follows

“Learned senior counsels for parties state that they will endeavour to work out some of the fine tuning which is required to give meaning to the intent of our [order dated 07.10.2021](#)

We make it clear that our intent was to ease the process of bail and not to restrict it. The order, in no way, imposes any additional fetters but is in furtherance of the line of judicial thinking to enlarge the scope of bail.

At this stage, suffice for us to say that while referring to category ‘C’, inadvertently, Section 45 of Prevention of Money laundering Act (PMLA) has been mentioned which has been struck down by this Court. Learned ASG states that an amendment was made and that is pending challenge before this Court before a different Bench. That would be a matter to be considered by that Bench.



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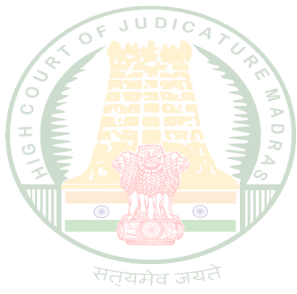
We are also putting a caution that merely by categorizing certain offences as economic offences which may be non-cognizable, it does not mean that a different meaning is to be given to our order.

We may also clarify that if during the course of investigation, there has been no cause to arrest the accused, merely because a charge sheet is filed, would not be an *ipso facto* cause to arrest the petitioner, an aspect in general clarified by us in Criminal Appeal No.838/2021 –*Siddharth v. State of Uttar Pradesh & Anr.* Dated 16.08.2021.

List on 20.01.2022”.

(v) Manu/OR/0157 /2020 [Mohammad Arif vs Directorate Of Enforcement] wherein the Division Bench of Orissa High Court held as follows:

“... 20. While deciding a bail application, the provisions of [Section 45](#) read with [Section 24](#) which reverses the burden of proof and creates presumption of 3(2015) 16 SCC 1, guilt required to be dislodged by the accused, will mandatorily apply. A similar view of



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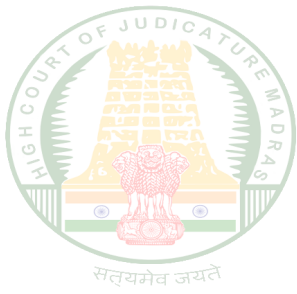


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the matter has been reiterated in [Rohit Tandon vs. Directorate of Enforcement](#).⁴ It may further be held that the reliance placed by the petitioner on [Nikesh Tarachand Shah vs. Union of India](#)⁵ is untenable in view of the fact that [Section 45](#) has been amended (by the [Amendment Act 13 of 2018](#)) whereby the original expression "imprisonment for a term of more than three years under Part A of the Schedule"(pre-amendment) now stands substituted by the expression "no person accused of an offence under this Act shall be released on bail or on his own bond". Thus, the contention raised by the petitioner with regard to [Section 45](#) of the Act does not hold good. A similar sentiment has been echoed by the apex court in [P. Chidambaram v. Directorate of Enforcement](#). MAN/SC/1209/2019 : (2019) 9 SCC 24 ...”

(vi) **Manu/WB/1498/2018 [Arun Mukherjee v. Enforcement Directorate]** wherein the Division Bench of Calcutta High Court held as follows:

“.....14. Mr. Chanda raising serious objection to grant of bail to the petitioner, adverted to the provision of [Section 45](#) of PMLA,2002 and the



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amendment brought in with effect from 19.4.2018 vide GSR 383 (E) in exercise of powers conferred under [Section 207](#) of the Finance Act, 2018 (13 of 2018) which provisions are reproduced for profitable understanding as under-

"S.45. Offences to be cognizable and non-bailable.--

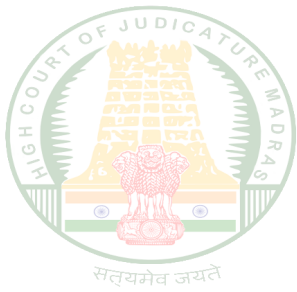
(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule shall be released on bail or on his own bond unless--

(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 he is not guilty of such offence and that he is not likely to commit any offence while on bail: 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:

Provided further that the Special Court shall not take cognizance of any offence punishable under section 4 except upon a complaint in writing made by--

(i) the Director; or



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(ii) any officer of the Central Government or state Government authorised in writing in this behalf by the Central Government by a general or a special order made in this behalf by that Government.

[(1A) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or any other provision of this Act, no police officer shall investigate into an offence under this Act unless specifically authorised, by the Central Government by a general or special order, and, subject to such conditions as may be prescribed.] (2) The limitation on granting of bail specified in 29 [***] sub-section (1) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail."

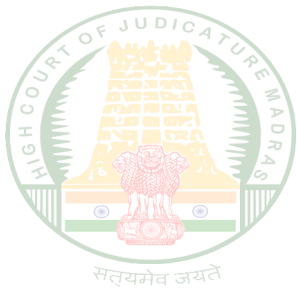
Amended provision :

"(e) in Section 45, in Sub-Section (1),

(i) for the words "punishable for a term of imprisonment of more than three years under Part A of the Schedule", the words "under this Act" shall be substituted;

(ii) in the proviso, after the words "sick and infirm", the words "or is accused either on his own or along with other co-accused of money- laundering a sum of less than one crore rupees "shall be inserted."

15. Thus, I find from the amended provision of Section 45 of the Act that no person accused of an



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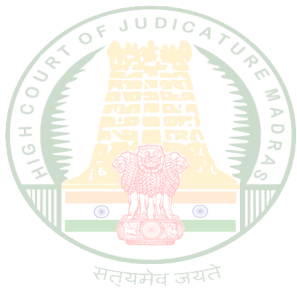
offence under this Act shall be released on bail or on his own bond unless he is under the age of sixteen years or is a woman or is sick or infirm or is accused either on his own or along with other accused of money laundering a sum of less than one crore rupees, may be released on bail, if the Special Court so directs.”

(vii) **Manu/DE/1458/2021 [Bimal Kumar Jain Ors. v.**

Directorate of Enforcement] wherein the Division Bench of Delhi

High Court held as follows:

“12. The last limb of argument was qua twin conditions of 45 of the PMLA. Admittedly the Hon’ble Supreme Court in Nikesh Tarachand Shah (supra) declared the Section 45 of the PMLA as it stood then, as unconstitutional and violative of Articles 14 and 21 of the Constitution of India, but the defects pointed out by the Hon’ble Supreme Court in Nikesh Tarachand Shah (supra) were cured by the Legislature and an amendment to section 45(1) was made vide the Finance Act, 2018 (No.13 of 2018). Under the amendment Act, section 45(1) was revived and for the words “punishable for a term of imprisonment of more than three years under part A



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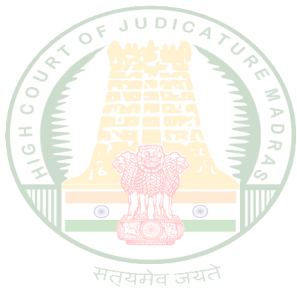
of the Schedule”, the words “under this Act” were substituted in section 45(1) of the PMLA.

13. The Supreme Court in P. Chidambaram vs E.D. (2019) 9 SCC 24 has taken judicial note of such amendment:-

38. The twin conditions under Section 45(1) for the offences classified thereunder in Part A of the Schedule was held arbitrary and discriminatory and invalid in Nikesh Tarachand Shah v. Union of India (2018)11 SCC 1 . Insofar as the twin conditions for release of the accused on bail under Section 45 of the Act are concerned, the Supreme Court held (at SCC p. 15. para 3) the same to be unconstitutional as it violates Articles 14 and 21 of the Constitution of India. Subsequently, Section 45 has been amended by Amendment Act 13 of 2018. The words "imprisonment for a term of imprisonment of more than three years under Part A of the Schedule" has been substituted with "accused of an offence under this Act...".

14. Further, in Mohd. Arif vs. Govt. of India, 2020 SCC OnLine Ori 544, the Orissa High Court has held as under:-

“ 23. While deciding a bail application, the provisions of Section 45 read with Section 24 which reverses the burden of proof and creates presumption of guilt required to be dislodged by the accused, will



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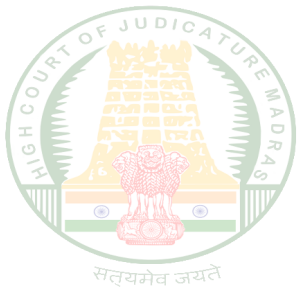


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mandatorily apply. A similar view of the matter has been reiterated in Rohit Tandon v. Directorate of Enforcement. It may further be held that the reliance placed by the petitioner on Nikesh Tarachand Shah v. Union of India is untenable in view of the fact that Section 45 has been amended (by the Amendment Act 13 of 2018) whereby the original expression “imprisonment for a term of more than three years under Part A of the Schedule“(pre-amendment) now stands substituted by the expression “no person accused of an offence under this Act shall be released on bail or on his own bond”. Thus, the contention raised by the petitioner with regard to Section 45 of the Act does not hold good. A similar sentiment has been echoed by the apex court in P. Chidambaram v. Directorate of Enforcement”

15. The Supreme Court has dismissed the SLP as withdrawn against the above judgment of the Orissa High Court vide order dated 24.11.2020 in SLP Crl 4878/2020.

16. The contrary view taken by this Court in Upendra Rai vs Directorate of Enforcement 2019 SCC OnLine Del 9086 has also been stayed by the Hon’ble Supreme Court in SLP (Crl) 2598/2020 vide an order dated 03.06.2020. Moreso, contrary view taken by



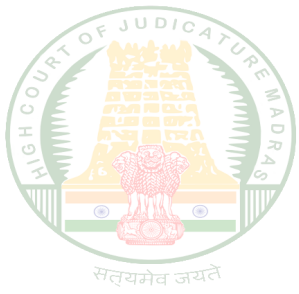
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this Court also in Dr. Shivender Mohan Singh vs. Directorate of Enforcement 2020 SCC OnLine Del 766, has also been stayed by the Supreme Court vide its order dated 31.07.2020 in SLP(CrI) No.3474/2020 while stating “Until further orders, status quo with respect to release from jail be maintained and impugned Judgment not to be treated as a precedent for any other case.”

7. On a careful consideration of the materials available on record and the submissions made by the learned counsel on either side, it could be seen that the petitioners are the Directors of the Company, viz., M/s. Disc Assets Promoter India Ltd, who are the persons responsible for the affairs of the company and they had collected money from the public under various investment schemes from the year 2006 with a promise to pay attractive returns in the form of loan or cash, but, they had failed to pay the investors of the promised returns and defrauded the investors/public by the said company and caused pecuniary loss to the tune of Rs.1137 crores to the investors.

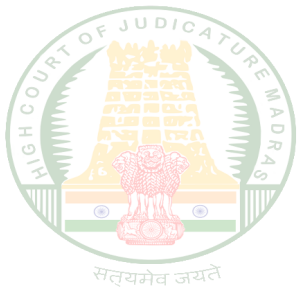


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8. With regard to the investment mobilized from the public, the SEBI, by its interim order dated 20.08.2015 and final order dated 30.03.2016, directed the Company and its Directors to wind up the investment schemes and refund the money due to the investors. However, the Directors had failed to refund the money to the investors. Based on the reference from the SEBI and the complaints received from the investors/public, the Economic Offences Wing of the Tamil Nadu Police registered a case in Crime No.6 of 2016, dated 02.06.2016, for the offences under [Sections 406, 420, 120B](#) of IPC read with Section 5 of the TNPID Act. The Economic Offences Wing had registered a case in ECIR No.ECIR/MDSZO/04/2018 on 09.07.2018. The respondent issued an order of arrest on 09.12.2020 under section 19(1) of PMLA and remanded to judicial custody.

9. In the appeal filed against the order granting bail to the petitioners, the Hon'ble Supreme Court in S.L.P. (Crl.)Nos. 7563-7565 of 2021, by order dated 22.11.2021, observed that the High Court has not dealt with the issue with regard to the statutory bar for grant of bail in offences concerning Prevention of Money Laundering Act.



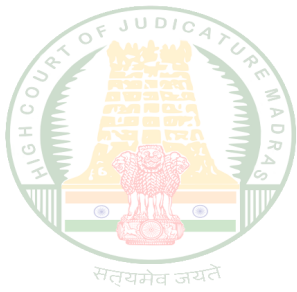
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10. So far as application of Section 45 is concerned, the said provision was amended on 19.04.2018.

11. The learned counsel for the petitioners has not disputed that a Special Leave Petition is pending before the Hon'ble Supreme Court challenging the amended provision of Section 45 of PMLA.

12. In S.L.P. (Crl.)Nos. 7563-7565 of 2021, the Hon'ble Supreme Court observed that the statutory bar for grant of bail in offences concerning PMLA was not considered while granting bail to the petitioners. Similarly, the Hon'ble Supreme Court in S.L.P.(Crl.) No.5191 of 2021 [cited supra], by order dated 16.12.2021, recorded the submissions of the learned Additional Solicitor General to the effect that an amendment was made and that is pending challenge before the Apex Court before a different Bench and that would be a matter to be considered by that Bench.

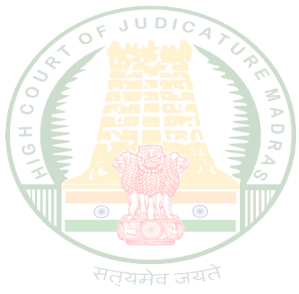


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13. It is not in dispute that the Hon'ble Supreme Court had not granted an order of stay in the Special Leave Petition challenging the amended provisions of Section 45 of PMLA. When the amended provision of the Act was neither set aside nor stayed by the Hon'ble Supreme Court, we are of the considered view that it is binding on the petitioners.

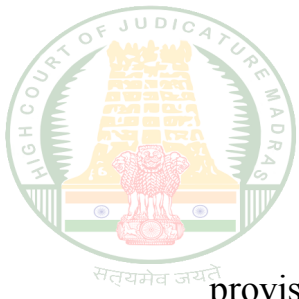
14. It is also brought to the notice of this Court by the learned Special Public Prosecutor that as against the order passed by the Delhi High Court [**cited supra**], a Special Leave Petition in S.L.P.(Crl) No.2598 of 2020 was filed before the Apex Court and that the Hon'ble Supreme Court, vide order dated 03.06.2020, has also granted an order of interim stay. It is also brought to the notice of this court that the contrary view taken by the Delhi High Court in **Dr. Shivender Mohan Singh vs. Directorate of Enforcement 2020 SCC OnLine Del 766**, has also been stayed by the Hon'ble Supreme Court vide its order dated 31.07.2020 in SLP(Crl) No.3474 of 2020.



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15. In the Judgment reported in **2018 (11) SCC-1** [cited *supra*], the Apex Court declared Section 45 of the PMLA as it stood then, as unconstitutional and violative of Articles 14 and 21 of the Constitution of India, but the defects pointed out by the Hon'ble Supreme Court in the said Judgment were cured by the legislature and an amendment to section 45(1) was made vide the Finance Act, 2018 (No.13 of 2018). Under the amendment Act, section 45(1) was revived and for the words “punishable for a term of imprisonment of more than three years under part A of the Schedule”, the words “under this Act” were substituted in section 45(1) of the PMLA.

16. No doubt, the legislature has the power to cure the underlying defect pointed out by a Court, while striking down a provision of law and pass a suitable amendment. When such a law is passed, the legislature basically corrects the errors which have been pointed out in a judicial pronouncement. Resultantly, it amends the law, by removing the mistakes committed in the earlier legislation, the effect of which is to remove the basis and foundation of the judgment. Therefore, merely because the entire section is not re-enacted would be of no consequence, since the

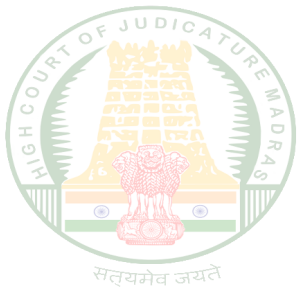


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provision even after being declared unconstitutional, does not get repealed or wiped out from the statute book and it only becomes unenforceable. Therefore, once the Parliament steps in and cures the defect pointed out by a Constitutional Court, the defect appears to be cured and the presumption of constitutionality is to apply to such provision. Therefore, there is a presumption in favour of constitutionality since the amended section 45(1) of the PMLA has not been struck down.

17. So far as section 43(1)(ii) of PMLA is concerned, the respondent took a stand as to the attitude of the accused in not cooperating with the Investigating Agency, Economic Offences Wing, Government Of Tamil Nadu, their cancellation of bail, in the event of arrest and the amount and number of depositors involved and took a categorical stand that the petitioners have committed serious offence and the looting of money has also been done scientifically and as such, they are not entitled to be enlarged on bail, despite the fact that the respondent had filed the complaint on the file of the Court of Principal Sessions Judge, City Civil Court, Chennai.



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18. It is also brought to the notice of this Court by the respondent in the counter affidavit that the documents collected would *prima facie* disclose that all the accused have committed acts of money laundering under [Section 3](#) of the Prevention of Money Laundering Act and punishable under [Section 4](#) of the said Act and the petitioners, during police custody also, did not co-operate with them and despite the complaint has been filed, further investigation is also in progress. Even before the Hon'ble Supreme Court in S.L.P. (Crl.) Nos. 7563-7565 of 2021, the respondent submitted that the petitioners are not co-operating during the investigation. Even before this court the learned Special Public Prosecutor appearing for the respondent submitted that the petitioners never co-operated for the investigation and therefore, the petitioners should not be enlarged on bail. It is also brought to the notice of this Court by the learned Special Public Prosecutor that even after the registration of the criminal complaint against the petitioners, they have indirectly started new Companies by using other names.

19. In view of the past conduct of the petitioners, this court does not believe that the petitioner are not guilty of the alleged offences and in



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such circumstances, this court cannot give a finding that the petitioners are not likely to commit offence while on bail. It is also alleged that if the petitioners are enlarged on bail, there is every likelihood that the petitioners may flee the jurisdiction of this Court to avoid the process of law. In these circumstances, we are not inclined to grant bail to the petitioners.

In the result, the Criminal Original Petitions are dismissed. No costs.

[M.D., J.] [J.S.N.P., J.]

03.01.2022

Index : Yes/No

Internet: Yes

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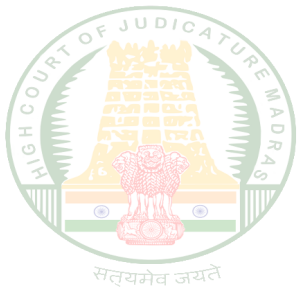
To

The Assistant Director,



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Directorate of Enforcement,
Government of India,
Chennai Zone-2,
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Shastri Bhawan, Haddows Road,
Chennai 600 006.



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M. DURAISWAMY, J.
and
J. SATHYA NARAYANA PRASAD ,J

Rj

Order in
Crl.O.P.Nos.3381, 3383 and 3385 of 2021

03.01.2022