IN THE HON'BLE SUPREME COURT OF INDIA

T.C. (CRL.) NO. 4/2018

IN THE MATTER OF:

Karti P. Chidambaram … Petitioner

VERSUS

Directorate of Enforcement and Ors. … Respondent

WRITTEN SUBMISSIONS ON BEHALF OF DR. ABHISHEK MANU SINGHVI, SR. ADV.

Note 1: Reference to Vol. 1-12 refer to Compilation Volumes filed in T.C.(Crl.) 4/2018

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I. SUBMISSIONS RELATING TO CONSTITUTIONALITY OF S. 24, PMLA

Submissions

A. Prior to the amendment to s. 24(a), PMLA, the entire burden was put upon the accused from the stage of investigation till framing of charges and then till judgment. This runs contrary to the principles of criminal jurisprudence and fundamental rights guaranteed to every person under Article 14,19,21 of the Constitution.

B. Even though the 2013 Amendment to S. 24, PMLA restored some balances by providing for the shifting of the burden on the accused after the framing of charge, the same does not cure the vice of unconstitutionality.

1. ***Legislative History***

1.1 The PMLA as it was originally drafted allowed for the raising of the presumption under S. 24, PMLA even prior to the trial and before the stage of charge [***Vol. 1, Pg. 1 @ Pg. 13***].

1.2 This presumption was subsequently diluted by the Amendment Act of 2013 which provided that in a Trial under the PMLA, the presumption under S. 24(a) would only apply after the framing of charge [***Vol. 1, Pg. 44 @ Pg. 52***]

1.3 That the words "*charged with the offence of money-laundering under S. 3*" refer to the formal framing of charge under S. 211, Cr.P.C. by the Ld. Special Court is evident from the Speech of Minister introducing the amendment on the floor of the Parliament [***Vol. 2, Pg. 19 @ Pg. 22-23***]. It, therefore, does not cover the period prior to framing of charges i.e. from initiation of investigation to framing of charges.

2. ***Reasoning/Elaboration***

2.1 A bare reading of S. 24(a) makes it clear that a presumption is raised in relation to the fact of money laundering i.e., the fact of projecting the proceeds of crime as legitimate. A presumption cannot be raised in relation to such an essential ingredient of the offence. In other words, the way the presumption is structured, the commission of offence is itself presumed.

2.2 In cases of trials under the PMLA, the use of the word "*shall presume*" in S. 24(a) mandates that the Ld. Special Court presume that the proceeds of crime are involved in money laundering, without any discretion. This is in distinction to the language of S. 24(b), where the Authority or Court only "*may presume*" the said fact. [***See S. 4, Indian Evidence Act, 1872***]

2.3 Prior to the Amendment of 2013, the blanket presumption u/s 24 would apply against an accused even prior to the framing of charges and during the stage of investigation. Even after the Amendment in 2013 changing the burden for the period prior to framing of charges, there is no requirement for the prosecution to prove any facts in relation to

the trial after the charges are framed. The entire burden of disproving the case as set out in the Complaint would rest with the Accused person, after the framing of charges. This amounts to a complete inversion of the burden of proof.

2.4 This is contrary to the position under several other legislations which all require the proof of some foundational facts before allowing the same. [***See Comparative Chart on Provisions pertaining to reverse evidentiary burden, Vol. 12, Pg. 265-266***]. This is a significant consolidation of major statutes diluting the burden of proof in favour of the prosecution but demonstrating that none constitutes as complete an inversion of this burden as does S. 24, PMLA.

2.5 Even in cases of legislation, such as S. 35 & 54, NDPS, where no foundational facts were required to be proved, this Hon'ble Court has held that the requirement for proving foundational facts must be read into the said sections, especially since the fact of possession of narcotics/illicit substances is an essential ingredient of the offence [***See*** Noor Aga v. State of Punjab, ***(2008) 16 SCC 417 ¶¶58-59, Vol. 5, Pg. 155 @ Pg. 188***; Tofan Singh v. State of Tamil Nadu, ***2020 SCC OnLine SC 882, ¶48, Vol. 2, Pg. 173 @ Pg. 204-205***]. Even this minimalist requirement is done away with in S. 24, PMLA.

2.6 It is therefore clear from a perusal of reverse burden clauses under various statutes, in the above-mentioned chart, that the main ingredients of the offence are required to be proved first by the prosecution before the presumption can be raised against an accused. In the absence of such safeguards, such a presumption will be violative of Article 14 and 21 of the Constitution being a violation of the right to a fair trial and the presumption of innocence.

2.7 Under S. 24(b), for a person not charged with an offence of money laundering, any Authority or Court may presume that proceeds of crime are involved in money laundering. This section not only eliminates the safeguards of S. 24(a), PMLA, but also provides no guidance on when such Court can invoke this presumption, whether at the stage of trial or prior.

2.8 The Authority appearing in S. 24, PMLA also refers to the officers of the ED (defined under S. 48, PMLA). This is in contradistinction to the Adjudicating Authority defined under S. 2(1)(a), PMLA. The two terms are also used distinctly under the PMLA [***See s. 5(5), PMLA v. S. 16(1), S. 17(2), S. 18(2), PMLA***]. S. 24, therefore, allows an authority investigating an offence to presume the commission of an offence, which is absurd and cannot be countenanced.

2.9 In fact, the ED regularly invokes the presumption u/s 24, PMLA even before the prosecution complaint is filed before the Ld. Special Court such as in attachment proceedings filed before the Adjudicating Authority under S. 5, PMLA. [***See Crl. M. P. 59717/2020 in T.C. (Crl.) 4/2018 @ Pg. 157-158***].

2.10 Considering the above, S. 24, PMLA insofar as it places the entire burden of proof to disprove the essential ingredient of money laundering on the accused person is violative of Article 14 and 21 of the Constitution and ought to be struck down.

2.11 In the alternative and wholly without prejudice to the foregoing, this Hon'ble Court would be required to read a requirement of proving certain foundational facts relating to the essential ingredient of projecting and converting tainted property as untainted property into S. 24, PMLA.

II. SUBMISSIONS RELATING TO THE CONSTITUTIONALITY OF S. 17 & 18, PMLA

Submissions

A. In the absence of safeguards under S. 17 & 18, officers of the ED can conduct searches and seizures even in the absence of any FIR being registered by the Police [in case of cognizable offences] or a Complaint being filed by designated officers [in cases of special statutes such as the Customs Act, 1962] before a competent Court.

B. Further, the absence of safeguards is in contradistinction to the safeguards for similar search and seizures under the Cr.P.C. which is the procedure established by law.

1. ***Legislative History***

1.1 The PMLA as it was originally enacted only allowed for the search and seizure under s. 17 & 18 to be conducted after the filing of a chargesheet or a complaint in the predicate offence [***Vol. 1, Pg. 1 @ Pg. 9-11***]

1.2 This protection was partially diluted by way of the PML (Amendment) Act, 2009 which stipulated that search and seizure operations under S. 17 & 18 of the Act could now take place only after forwarding of a report to the Magistrate u/s 157, Cr.P.C. in relation to the predicate offence. Notably, there was no change in the requirement for the filing of a Complaint in cases of offences not covered under s. 154, Cr.P.C. [***Vol. 1, Pg. 32 @ Pg. 34-35***]

1.3 Finally, in the year 2019, the safeguards (trigger events) under s. 17 & 18 were completely removed by way of the Finance (No. 2) Act, 2019 [***Vol. 1, Pg. 82 @ Pg. 85***]

2. ***Reasoning/Elaboration***

2.1 The effect of the amendment in 2019 therefore, was to allow the ED to conduct searches and seizures without any investigation being carried out in the predicate offence, in some cases even without an FIR being registered. There is no statutory provision for registration of an FIR being a prerequisite for the registration of an ECIR. The complete omission of the safeguards can now allow the ED to search premises or persons even without an FIR being filed.

2.2 Further, in cases where an FIR is not required to be filed, such as in cases of non-cognizable offences under the Cr.P.C. or in cases of offences under Special Acts such as the Customs Act, 1962, the ED need not wait for the filing of a Complaint before the Court to conduct search and seizure operations. The ED can therefore, even in cases where the Customs Officer may only have information of an offence, raid and harass persons under S. 17 & 18, PMLA.

2.3 The importance of the safeguards prescribed above is the fact that the offence of money laundering is predicated on the existence of a schedule offence. To allow the ED to investigate in the absence of credible information would not only go against the object of the statute but also lead to uncanalized power in the hands of the ED.

2.4 Under the current statutory scheme, even where the relevant authorities are of the opinion that no investigation is required in the schedule offence, the ED would be allowed to search premises and persons under s. 17 & 18.

2.5 Even otherwise, S. 17 & 18, PMLA contain none of the safeguards applicable in cases of search and seizure under the Cr.P.C, particularly s. 93, 94, 99 of the Cr.P.C. all of which contemplate the involvement of a magistrate. Even in cases of emergency searches and seizures u/s 165, Cr.P.C., magisterial oversight is still maintained.

2.6 In case of the PMLA, the magisterial involvement is replaced by limited oversight of the Adjudicating Authority [***See s. 17(2) & s. 18(3), PMLA***]. The Adjudicating Authority exercises no control over the ED, particularly in cases of criminal investigations. ***Therefore, the search and seizure provisions under s. 17 & 18, PMLA are conducted without any effective checks and balance and amount to unreasonable and unjust procedure violative of Article 21***.

2.6A The AA, *ex hypothesi*, is an ex-post facto filter and/or safeguard. The core infirmity of the existing law is the complete absence, by removal of the even limited earlier safeguards, at the stage of initiation and in the hands of the Investigating Officer. The fact that the AA may subsequently correct egregious exercise of power would not detract from this fundamental infirmity at the initial threshold stage and would not cure the serious inroads into liberty already made in the not insubstantial period between initiation and possible rectification by the AA.

2.7 It is to be noted however, that under the Prevention of Money Laundering (Forms, Search and Seizure or Freezing and the Manner of Forwarding the Reasons and Material to the Adjudicating Authority, Impounding and Custody of Records and the Period of Retention) Rules, 2005, (***"Seizure Rules, 2005"***) a search of a place may not be conducted unless a report u/s 157, Cr.P.C. has been forwarded to a Magistrate or a Complaint has been filed before a Magistrate or Special Court.

2.8 This Court must, therefore, clarify that these Rules are not ultra vires S. 17 & 18, PMLA. Further, the said rule does not apply to the search of persons under s. 18, PMLA.

2.9 Further, under Rule 5, Seizure Rules, 2005 the provisions of the Cr.P.C. are applicable to searches under the Act, only insofar as they are not inconsistent with the provisions of the Act.

2.10 Failure to read the appropriate triggers for the power of the ED to investigate offences and the lack of any safeguards under the Cr.P.C., most notably, the absence of magisterial oversight renders the provisions under S. 17 & 18 unreasonable, unfair and unjust and therefore, violative of Article 14 and 21.

III. SUBMISSIONS RELATING TO THE CONSTITUTIONALITY OF S. 5, PMLA

Submissions

A. The 2nd Proviso to S. 5(1), PMLA is *ultra vires* the main section insofar as it allows attachment independent of the existence of a predicate offence and of property which may not be proceeds of crime.
B. Property that is not temporally connected with the proceeds of crime cannot be attached under S. 5, PMLA
C. Though allowing for an emergency procedure under the 2nd proviso, no additional threshold is required to be met other than the subjective satisfaction of the officer. There is no reason for the officer therefore to follow the 1st proviso under any circumstances.
D. It is a settled position of law that a proviso cannot travel beyond the scope and ambit of the main provision.

1. ***Legislative History***

1.1 The PMLA as it was originally enacted did not contain the second proviso. The initial position was that no attachment could be affected before the filing of a chargesheet in the predicate offence. [***Vol. 1, Pg. 1 @ Pg. 5***]

1.2 The second proviso in its present form was introduced in the year 2009 to provide for an emergency route of attachment in cases where it appeared that the immediate non-attachment would lead to the frustration of any proceeding under the PMLA. [***Vol. 1, Pg. 32 @ Pg. 34***]

2. ***Reasoning/Elaboration***

2.1 The 2nd proviso to S. 5(1) is unconstitutional or at the very least, must be read down insofar as it permits emergency attachment without anchoring the operation of the proviso to either the schedule offence or the proceeds of crime relating to that specific schedule offence.

2.2 S. 5(1) allows the attachment of property where the officer is satisfied that (a) a person is in possession of proceeds of crime and that (b) they are likely to alienated to frustrate any proceedings relating to confiscation under the PMLA.

2.3 A safeguard in the form of the first proviso has been provided to ensure that the drastic step of attachment is taken only after a view relating to the commission of the predicate offence in the form of chargesheet has been formed.

2.4 However, the second proviso not only allows attachment without a chargesheet, but also allows the attachment of any property or any person. Thus, the link with the schedule of offence and proceeds of crime has been completely removed.

2.5 This also delinks the attachment provisions from the essential requirements of projecting the proceeds of crime as untainted property.

2.6 To say that the definition of S. 3 r/w 2(p), PMLA would restrict the operation of the 2nd proviso, fails to consider the fact that the specific use of the word "*any property*" of "*any person*" in distinction from the term "*proceeds of crime*" shows that the ambit of the 2nd proviso is far wider than the main section.

2.7 For instance, the 2nd proviso could allow for the attachment of property which may have been derived from an offence (other than the schedule offence being investigated by the ED) even though there may be no FIR registered in respect of that offence.

2.8 The ED also uses the 2nd proviso to attach property that had been purchased much before the commission of the schedule offence and thus cannot have any nexus with the schedule offence.

2.9 Notably, such attachment cannot be justified as attachment of "*value*" of such proceeds of crime, since the use of the word "*value of such property*" refers to the value that is derived from the proceeds of crime as distinct from property equivalent in value to the proceeds of crime which can be attached only when the proceeds of crime are situated abroad [***See S. 2(u), PMLA***]

2.10 It is therefore necessary to link the 2nd proviso to the proceeds of crime relatable to the schedule offence being investigated by the ED under a specific ECIR.

2.11 Therefore, if the 2nd proviso is read in a way to delink it from the proceeds of crime relating to a specific schedule offence, the same would not only be violative of Article 14, 19, 21 and 300A but also would violate the rule that a statute cannot travel beyond the scope of the main section [*Dwarka Prasad v. Dwarka Das Saraf,* ***(1976) 1 SCC 128, ¶18, Vol. 12, Pg. 75 @ Pg. 84****; Satnam Singh & Ors. v. Punjab & Haryana High Court and Ors.,* ***(1997) 3 SCC 353, ¶9, Vol. 12, Pg. 89 @ Pg. 93 (Placitum b)***]

IV. SUBMISSIONS RELATING TO THE CONSTITUTIONALITY OF S. 8, PMLA

Submissions

A. S. 8(4), PMLA is unconstitutional because it permits the ED to take possession of the attached property at the stage of confirmation of the provisional attachment order by the Adjudicating Authority itself.
B. This deprivation by taking possession with simply one stage of confirmation deprives a person of their right to property without due process of law.
C. The period of attachment under S. 8(3)(a), PMLA is arbitrary and unreasonable.

1. ***Relevant Legislative History***

1.1 In terms of the PMLA as it was originally enacted, once a provisional attachment order is confirmed under S. 8(3), the same would continue during the pendency of the proceedings relating to any schedule offence [***Vol. 1, Pg. 1 @ Pg. 7***]

1.2 This position was amended in 2012, after which the provisional attachment order, once confirmed would continue during the pendency of the proceedings for any offence under the PMLA and not the schedule offence [***Vol. 1, Pg. 44 @ Pg. 47***]

1.3 Subsequently, in 2018, S. 8 was further amended to state that the provisional attachment order once confirmed would continue for a period of 90 days during the investigation of the offence or during the pendency of proceedings under the PMLA. [***Vol. 1, Pg. 74 @ 75***]

1.4 This period of 90 days was further increased to a period of 365 days through amendment by way of the Finance Act, 2019. [***Vol. 1, Pg. 78 @ 79***]

2. ***Reasoning/Elaboration***

2.1 The scheme of attachment of property under the PMLA is as follows,

a. An officer can issue a provisional attachment order under s. 5(1), PMLA which will be valid for a period of 180 days unless confirmed.
b. Thereafter, the Officer shall within a period of 30 days from the issuance of the PAO forward a Complaint to the Adjudicating Authority [***S. 5(5), PMLA***]
c. The Adjudicating Authority after examining the Complaint would then commence the adjudication proceedings by issuing show-cause notices to the persons whose properties were attached [***S. 8(1), PMLA***]
d. The Authority can then after hearing both parties either confirm or set aside the PAO [***S. 8(3), PMLA***]
e. Immediately after the confirmation of the attachment, the ED is authorised to take possession of the property [***S. 8(4), PMLA***]
f. That upon conclusion of the trial of the offence of money laundering, if the attached property is found to be involved in money laundering, the same will stand confiscated to the Central Government [***S. 8(5), PMLA***]
g. Finally, in case there are persons who claim to be the claimant having a legitimate interest in the property, the same can be restored to them by the Special Court [***S. 8(8), PMLA***]

2.2 From the above, evidently, the PMLA authorises the ED to take possession of the attached property only after a single adjudication process by an Authority which exercises no oversight over the ED. The ED can take possession of the attached property without even a chargesheet being filed in the predicate offence, by virtue of the 2nd Proviso to S. 5(1), PMLA.

2.3 The objective of the attachment provisions being to prevent the alienation of the property pending the trial, the effective confiscation of the attached property in the form of taking possession under S. 8(4), even before any proceedings have commenced before any Court is disproportionate to the state interest sought to be protected and ought to be struck down as unconstitutional.

2.4 Further, S. 8(3)(a), PMLA allows for the continuation of the confirmed PAO for a period of 365 days or during the pendency of proceedings under the PMLA. The ED, therefore, has a period of 365 days in which to file its Complaint.

2.5 This statutory language creates a lacuna in case the complaint by the ED is not filed within a period of 365 days, but the same is only filed thereafter. Illustratively, it is unclear that if proceedings relating to the PMLA offence only commence on the 400th day after the confirmation of the PAO, whether the attachment would lapse, the Complaint not having been filed within 365 days [*the first statutory time limit under S. 8(3)(a), PMLA]*.

2.6 The above attains importance as in several cases, the ED does not commence proceedings under the PMLA by filing a Complaint within 365 days, but also does not release the property from attachment either.

2.7 Further, the statute does not provide for the consequence of not filing a Complaint within a period of 365 days from the date of confirmation of the PAO. This Hon'ble Court must therefore clarify that if the ED does not file a complaint within a period of 365 days, the attachment must lapse, and the property must be released to the holder. Any alternate interpretation would render the period of 365 days as explicitly provided for under the Act illusory.

V. SUBMISSIONS RELATING TO THE CONSTITUTIONALITY OF THE PREVENTION OF MONEY-LAUNDERING (TAKING POSSESSION OF ATTACHED OR FROZEN PROPERTIES CONFIRMED BY THE ADJUDICATING AUTHORITY) RULES, 2013 (*"TAKING POSSESSION RULES"*)

Submissions

A. R. 4(4) of the Taking Possession Rules, 2013 which provides for the transfer of attached shares/mutual funds to the Director of Enforcement is unreasonable and arbitrary.
B. Further, the absence of any proportionality requirement during the stage of attachment, confirmation or taking possession is unreasonable and unconstitutional.

C. The ED perversely depresses the value of property to attach property far greater than the proceeds of crime.
D. The eviction of owners of immovable properties without any exception, much before confiscation is unreasonable and disproportionate.
E. R. 5(3) and 5(4), Taking Possession Rules, 2013 are arbitrary and unreasonable.
F. R. 5(6), Taking Possession Rules, 2013 which allows the taking possession of productive assets along with the gross income and all monetary benefits generated therefrom is absurd and unreasonable.

1. Reasoning/Elaboration

1.1 The Taking Possession Rules, 2013 lead to extremely drastic consequences which are disproportionate to the interest of the State which is sought to be protected.

1.2 As submitted above, the ED can take possession of the attached properties once confirmed by the Adjudicating Authority immediately without waiting for the trial under the predicate or PMLA offence to be completed. The properties may be taken over by the ED even before the chargesheet is filed in the predicate offence. In addition to the above, the Rules governing the procedure for taking possession of attached properties are excessive and arbitrary and deserve to be struck down.

1.3 Under R. 4(4), Taking Possession Rules, 2013, where the attached property is in the form of shares, debentures, or similar instruments, the same shall be transferred in favour of the Director of Enforcement.

1.4 This may lead to an anomalous situation where the ED may become a majority shareholder of a corporation. In such cases, either the voting control of the shares is restricted, or the ED is allowed to exercise the same. This could even lead to a situation where the ED uses the very same shares to vote against the owner of the shares. Such a situation could have grave implications for the operation of corporations.

1.5 Even otherwise, it is important to note that there is no proportionality requirement at the stage of provisional attachment, confirmation, or confiscation, either in the statute or the rules.

1.6 In the absence of any restrictions under the PMLA and the rules thereunder, the ED often attaches properties worth far more than the value of the proceeds of crime being alleged by the ED.

1.7 This is achieved through the perverse and deliberate depression of the value of the property sought to be attached. Under s. 2(zb), the term "*value*" is defined as the fair market value of any property on the date of its acquisition and not its fair market value on the date of attachment. This is distinct from several other statutes which provide for the calculation of fair market value of attached/confiscated properties as on the date of attachment.

1.8 The absurdity of the above situation is compounded by the fact that the ED often attaches immovable property purchased several years ago, the market value of which would be far more than the value against which it is sought to be attached.

1.9 Another tactic used by the ED to perversely depress the value of property is to attach an unportioned immovable property worth Rs. 1 Crore "*to the extent of Rs. 10 Lakhs*". This not only further depresses the value of the property but also allows the ED to take possession of property more than even what it claims to have attached.

1.10 Further, in cases of immovable properties, under R. 5(1), Taking Possession Rules, 2013, an owner of a residential building, house, flat, etc can be evicted from the property, even if the said residence is the sole residence of the person. At a stage where even a Complaint/Chargesheet may not have been filed, such a deprivation is excessive and arbitrary.

1.11 Under R. 5(3) and 5(4), in cases of a property leased under an instrument which is registered in accordance with the provisions of S. 17, Registration Act, 1908, the ED may collect the lease amount/rent from the tenant. However, in cases where the property is leased where registration is optional under S. 18, Registration Act, 1908, the ED may evict the occupants.

1.12 Notably, under R. 5(4), the ED shall evict the occupant who has taken a property on lease by way of an instrument of which registration is optional, even if the same has been registered.

1.13 Finally, under R. 5(6), the ED may take possession of a productive asset (factory, manufacturing plant). Further, the ED may require that the gross income and other monetary benefits from the said unit shall be deposited in the account of the ED. Since neither the terms gross income or monetary benefits are defined, leaving the rule itself completely vague, the taking possession of a productive asset and the deposit of gross income would lead to the shutdown of the factory/manufacturing unit, amounting not only to the loss of livelihoods of several employees but also affect other persons dependant on the same for livelihood.

1.14 It is therefore evident that the above Rules as well as S. 8(4), PMLA have extremely drastic consequences at a stage where there may not even be a chargesheet or complaint against a person, only after a single confirmation proceeding but the Adjudicating Authority.

1.15 The same are therefore disproportionate to the object sought to be achieved and impose unreasonable restrictions on the fundamental rights of persons under Article 14, 19(1)(g) and 21 [***Anuradha Bhasin v. Union of India, 2020 (3) SCC 637, Vol. 12, Pg. 1 @ Pg. 46, Shayara Bano v. Union of India, (2017) 9 SCC 1 ¶101-102***]

VI. SUBMISSIONS RELATING TO THE CONSTITUTIONALITY OF S. 45(1), PMLA

Submissions

A. S. 45(1), PMLA insofar as it reverses the presumption of innocence at the stage of bail is unconstitutional being violative of Article 21
B. An accused person can never show that he is not guilty at the stage of bail, since the entire material is not handed over to him till the stage of Charge, post the filing of the Complaint.
C. The restrictive conditions for bail are disproportionate, excessive, and unconstitutional being in violation of Article 14
D. The amendments to the PMLA vide the Finance Act, 2018 did not remove the invalidity in S. 45(1), PMLA as declared in *Nikesh Tarachand Shah v. Union of India, (2018) 11 SCC 210.*
E. The Note on Clauses to the Finance Act, 2018 makes it clear that the amendments to the PMLA had no intention to validate S. 45(1), PMLA
F. Without prejudice to the above, the twin conditions under the PMLA should only be restricted to cases where the predicate offence also stipulates the twin conditions for grant of bail under those Acts.

1. Reasoning/Elaboration

1.1 The PMLA, as it was originally enacted, contained the twin conditions for bail under S. 45(1) [***Vol. 1, Pg. 1 @ Pg. 18***]

1.2 S. 45(1), insofar as it imposed two further conditions for bail was struck down by this Hon'ble Court in the decision of ***Nikesh Tarachand Shah v. Union of India, (2018) 11 SCC 210 ¶¶46, 53-54 for S. 14 and 21 [Vol. 3, Pg. 210 @ Pg. 249, 252]***. While striking down S. 45(1), this Hon'ble Court held that S. 45(1), PMLA was a drastic provision which inverted the burden of proof and the presumption of innocence at the stage of bail.

1.3 Thereafter, it is contended that the legislature attempted to cure the defects in S. 45(1), PMLA by amendment by way of the Finance Act, 2018. The ED now contends that the vice pointed out by ***Nikesh Tarachand Shah (supra)*** has been rectified by the said amendment.

1.4 The fact that S. 45(1), PMLA was struck down was also noticed by this Hon'ble Court in ***Kiran Prakash Kulkarni v. The Enforcement Directorate and Anr., Order dt. 11.04.2019 in SLA(Crl.) 1698/2019 [Vol. 12 Pg. 234 @ Pg. 235]***. Notably, the order of this Hon'ble Court came after the Amendment of 2018 and was passed after hearing the ED as well.

1.5 Such an amendment to S. 45(1), PMLA, in essence amending a bail provision through a money bill, is impermissible being in violation of Article 110(1)(a)-(f) as well as being a violation of the basic structure of federalism and bicameralism.

1.6 It is therefore evident that for this Hon'ble Court to hold that the Finance Act, 2018 amended the PMLA and revived S. 45(1), PMLA, it must first be concluded that the Legislature was competent to enact the same through the route of a money bill.

1.7 It is also to be noted that the question relating to the interpretation of Article 110(1)(a)-(f) is pending before a bench of 7 judges subsequent to the reference in ***Rojer Mathew v. South Indian Bank Ltd. and Ors., (2020) 6 SCC 1, ¶116 [Vol. 9, Pg. 1 @ Pg. 124***].

1.8 In any case, it is evident that this Hon'ble Court in ***Nikesh Tarachand Shah (supra)*** struck S. 45(1), PMLA down not only on the ground sought to be cured by the legislature but also on the ground that it was in violation of Article 21 of the Constitution by virtue of the nature of the offence under the PMLA itself. This basis for the judgment of this Hon'ble Court has not been cured by the Legislature and S. 45(1), PMLA cannot be said to have been revived. [***Madan Mohan Pathak & Anr v. Union of India & Ors., (1978) 2 SCC 50, ¶32, Vol. 12, Pg. 149 @ Pg. 184-185; Shri Prithvi Cotton Mills Ltd. & Anr. v. Broach Borough Municipality & Ors., (1969) 2 SCC 283, ¶4 Vol. 12, Pg. 189 @ Pg. 192-19***3]

1.9 The above basis is also supported by the Notes on Clauses accompanying the Finance Bill, 2018, which do not make any reference to the judgment of this Hon'ble Court or of the fact that the relevant clauses were being incorporated as validating clauses [***Vol. 12, Pg. 95 @ Pg. 98***].

1.10 Without prejudice to the above, it is submitted that S. 45(1), PMLA insofar as it imposes two further conditions for bail is unconstitutional being violative of Article 14 and 21 of the Constitution.

1.11 The presumption of innocence is cardinal principle of our criminal jurisprudence, which applies with great force to bail proceedings [***Arnab Manoranjan Goswami v. State of Maharashtra & Ors., (2021) 2 SCC 427 ¶70 (Placitum b), Vol. 12, Pg. 99 @ Pg. 146***].

1.12 This presumption is fundamentally turned on its head by bail provisions in the nature of the twin conditions, where a person is required to show that he is not guilty of an offence.

1.13 Similarly restrictive conditions for bail have been soundly deprecated by Parliament even in cases of statutes dealing with offences which are far more serious. For instance,

a. By way of the Finance Bill, 2012, twin conditions of the nature inserted in the PMLA were sought to be introduced in the Customs Act [***Vol. 12, Pg. 95 @ 96***]. However, after serious opposition by Parliament, the said proposal was dropped by the Government [***See Speech of Shri. Arun Jaitley dt. 26.03.2012 in the Rajya Sabha, Vol. 12, Pg. 244-246].*** It is to be noted that the effect of such conditions in economic offences would also be to discourage persons from doing business in India, causing long-term damage to the economic fabric of the country.

b. In 2008, the Government sought to introduce restrictive conditions for bail under the Unlawful Activities (Prevention) Act, 1967 [***Vol. 12, Pg. 247 @ Pg. 249***]. On the floor of both Houses, it was clarified by the Government that the restrictions under the UAPA were less restrictive than those under the TADA or POTA. It was highlighted that under the TADA or POTA (as in the PMLA), it is nearly impossible to prove that a person did not commit an offence. [***See Speech of Shri. P. Chidambaram dt. 17.12.2008 in Lok Sabha, Vol. 12, Pg. 251 @ Pg. 255-256; Speech of Shri. Kapil Sibal dt. 17.12.2008 in Lok Sabha, Vol. 12, Pg. 251 @ Pg. 257; Speech of Shri. P. Chidambaram dt. 18.12.2008 in Rajya Sabha, Vol. 12, Pg. 258 @ Pg. 263-264***]

1.14 The PMLA, which provides a punishment of only 7 years (10 years in cases of select NDPS offences), has restrictive conditions, whereas offences under the IPC, which are of a far more serious nature, being punishable with the death penalty also do not have restrictive conditions for bail. [***See Appendix 1: "Comparative Chart relating to restrictions on grant of Bail"***]
[***Note***: The restrictions under S. 437(1)(i), Cr.P.C. apply only to the power of the Magistrate to grant bail and place no fetters on the powers of the Special Court or High Court.]

1.15 This disproportionate and discriminatory application is also evident from the fact that several schedule offences are in fact bailable offences. [***See Chart at Vol. 8, Pg. 270 @ Pg. 272***]. Here, though the Accused person can get bail as a matter of right from the police officer concerned in the Schedule Offence, he must face the twin test under the PMLA.

1.16 It also cannot be contended that the restriction of offences under s. 3, PMLA to only serious and continuing activities or processes would cure this discriminatory effect for the following reasons,

1.17 In the absence of a legislative amendment, any interpretation by this Hon'ble Court of the offence u/s 3, PMLA would remain open to abuse and misapplication by the ED.

1.18 Where the Parliament felt that the nature of the activities in the predicate offences were so serious as to warrant the imposition of twin conditions (e.g. NDPS Act), the same have been provided.

1.19 In all other cases, Parliament despite being aware of the seriousness of the offences refused to impose restrictive conditions for the grant of bail. The draconian nature of the bail conditions becomes further evident from the fact that at a time when the person is arrested under S. 19, PMLA, he is not provided with any other documents based on which he is being arrested other than the so-called "grounds for arrest" which are vague. The ECIR registered by the ED is also not provided to him.

1.20 It cannot be contended that the power under S. 19 being only exercised when the officer has reasonable grounds to believe a person is guilty of an offence incorporates certain safeguards, since the same only amounts to the subjective satisfaction of the officer, which cannot even be challenged by the Accused person, largely since he is usually remanded within 24 hours of the arrest.

1.21 Even if it is to be held that all the documents and material available with the ED be supplied to the Accused, the Accused is still handicapped since he cannot place any material in his defence. Further, where the material against the accused is in the form of statement of witnesses recorded under s. 50, PMLA, the Accused is unable to dispute the veracity of such statements, which can only be done through cross-examination.

1.22 Further, the officer will only ever rely on such material in the Complaint as is likely to incriminate the accused. No exculpatory material will be included in the Complaint and may only be available to the accused after the stage of 207, Cr.P.C. The Complaint being the opinion of IO, the same will always be against the arrested Accused.

1.23 Considering the above, it is submitted that even dehors the decision in ***Nikesh*** Tarachand ***Shah (supra)***, this Hon'ble Court ought to hold that S. 45(1), PMLA is unconstitutional insofar as it violates Article 14 and 21 of the Constitution.

1.24 Strictly in the alternative and wholly without prejudice to the foregoing, this Hon'ble Court must restrict the application of the said section only to cases where there exist similar conditions for the predicate offence as well.

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Appendix 1

COMPARATIVE TABLE OF PROVISIONS RELATING TO RESTRICTIONS ON GRANT OF BAIL, PUNISHMENT FOR OFFENCES AND COURTS TRIABLE BY UNDER VARIOUS STATUTES

	PMLA, 2002	TADA, 1987	MCOCA, 1999	UAPA, 1967	NDPS, 1985
Restrictive Conditions for Grant of Bail	**45. Offences to be cognizable and non-bailable.—** (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, 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 : […]	**20. Modified application of certain provisions of the Code.—** (8) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act or any rule made thereunder shall if in custody, be released on bail or on his own bond unless— (*a*) the Public Prosecutor has been given an opportunity to oppose the application for such release, and (*b*) 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. (9) The limitations on granting of bail specified in sub-section (8) are in addition to the limitations under the Code or any other law for the time being in force on granting of bail.	**21.**(4) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond, unless— (a) the Public Prosecutor has been given an opportunity to oppose the application of such release ; and (b) 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. (5) Notwithstanding anything contained in the Code, the accused shall not be granted bail if it is noticed by the Court that he was on bail in an offence under this Act, or under any other Act, on	**43-D. Modified application of certain provisions of the Code.—** (5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release: Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under Section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true. (6) The restrictions on granting of bail specified in sub-section (5) is in addition to the restrictions under the Code or any other law for the time being in force on granting of	**37. Offences to be cognizable and non-bailable.**—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),— (*a*) every offence punishable under this Act shall be cognizable; (*b*) no person accused of an offence punishable for offences under Section 19 or Section 24 or Section 27-A and also for offences involving commercial quantity] 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. (2) The limitations on granting of bail specified in clause (*b*) of sub-section (1) are in addition to the limitations under the Code of

<table>
<tr><th></th><th>PMLA, 2002</th><th>TADA, 1987</th><th>MCOCA, 1999</th><th>UAPA, 1967</th><th>NDPS, 1985</th></tr>
<tr><td></td><td></td><td></td><td>the date of the offence in question.
(6) The limitations on granting of bail specified in sub-section (4) are in addition to the limitations under the Code or any other law for the time being in force on the granting of bail.</td><td>bail.
(7) Notwithstanding anything contained in sub-sections (5) and (6), no bail shall be granted to a person accused of an offence punishable under this Act, if he is not an Indian citizen and has entered the country unauthorisedly or illegally except in very exceptional circumstances and for reasons to be recorded in writing.</td><td>Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force on granting of bail]</td></tr>
<tr><td>Offences and Punishment</td><td>
<table>
<tr><th>Offence</th><th>Punishment</th></tr>
<tr><td>Money-Laundering [Section 3]</td><td>Imprisonment for 3-7 years (except if scheduled offence is an offence under the NDPS Act, then 3-10 years)</td></tr>
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<table>
<tr><th>Offence</th><th>Punishment</th></tr>
<tr><td>Committing a terrorist act resulting in death of a person [Section 3(2)(i)]</td><td>Death or imprisonment for life</td></tr>
<tr><td>Committing any other terrorist act [Section 3(2)(ii)]</td><td>Imprisonment for 5 years up to life</td></tr>
<tr><td>Abetment or attempt to commit terrorist act [Section 3(3)]</td><td>Imprisonment for 5 years up to life</td></tr>
</table>
</td><td>
<table>
<tr><th>Offence</th><th>Punishment</th></tr>
<tr><td>Organised Crime resulting in death of a person [Section 3(i)]</td><td>Death or imprisonment for life</td></tr>
<tr><td>Any other Organised Crime [Section 3(ii)]</td><td>Imprisonment for 5 years up to life</td></tr>
<tr><td>Abetment or attempt</td><td>Imprisonment for 5 years up to life</td></tr>
</table>
</td><td>
<table>
<tr><th>Offence</th><th>Punishment</th></tr>
<tr><td>Punishment for terrorist act resulting in death [Section 16(1)(a)]</td><td>Death or imprisonment for life</td></tr>
<tr><td>Punishment for any other terrorist act [Section 16(1)(b)]</td><td>Imprisonment for 5 years up to life</td></tr>
<tr><td>Punishment for raising funds for terrorist activities [Section 17]</td><td>Imprisonment for 5 years up to life</td></tr>
</table>
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<table>
<tr><th>Offence</th><th>Punishment</th></tr>
<tr><td>Punishment for embezzlement of opium by cultivator [Section 19]</td><td>Imprisonment for 10-20 years</td></tr>
<tr><td>Punishment for external dealings in narcotic drugs and psychotropic substances in contravention of Section 12 [Section 24]</td><td>Imprisonment for 10-20 years</td></tr>
<tr><td>Punishment for financing illicit</td><td>Imprisonment for 10-20 years</td></tr>
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	PMLA, 2002	TADA, 1987		MCOCA, 1999		UAPA, 1967		NDPS, 1985	
		Harbouring or concealing any terrorist [***Section 3(4)***]	Imprisonment for 5 years up to life	to commit organised crime [***Section 3(2)***]		Punishment for conspiracy for commission of a terrorist act [***Section 18***]	Imprisonment for 5 years up to life	traffic and harbouring offenders [***Section 27-A***]	
		Being a member of a terrorist's gang or organization [***Section 3(5)***]	Imprisonment for 5 years up to life	Harbouring or concealing any member of organised crime [***Section 3(3)***]	Imprisonment for 5 years up to life	Punishment for organising terrorist camps [***Section 18(A)***]	Imprisonment for 5 years up to life	Offences relating to commercial quantities u/s 15(c), 17(c), 18(b), 20(ii)(C), 21(c), 22(c), 23(c).	Imprisonment for 10-20 years
		Holding or acquiring any property derived or obtained through commission of any terrorist act [***Section 3(6)***]	Imprisonment for 5 years up to life	Being a member of an organised crime [***Section 3(4)***]	Imprisonment for 5 years up to life	Punishment for recruiting of any person or persons for terrorist act [***Section 18(B)***]	Imprisonment for 5 years up to life		
		Punishment for disruptive activity [***Section 4***]	Imprisonment for 5 years up to life	Holding or acquiring any property derived or obtained through commiss	Imprisonment for 3 years up to life	Punishment for harbouring a terrorist [***Section 19***]	Imprisonment for 3 years up to life		
		Possession of unauthorized arms [***Section 5***]	Imprisonment for 5 years up to life						
		Enhanced Penalties for commission of offences under Acts	Imprisonment for 5 years up to life			Punishment for being a member of a terrorist organization	Imprisonment up to life		

	PMLA, 2002	TADA, 1987		MCOCA, 1999		UAPA, 1967		NDPS, 1985
		such as Arms Act, Explosives Act, etc. with intent to aid a terrorist or disruptionist. [***Section 6***]		ion of organised crime [***Section 3(5)***]		[***Section 20***]		
						Punishment for holding proceeds of terrorism [***Section 21***]	Imprisonment up to life	
						Punishment for threatening witness [***Section 22***]	Imprisonment up to 3 years	
						Offence relating to membership of a terrorist organisation [***Section 38***]	Imprisonment up to 10 years	
						Offence relating to support given to a terrorist organisation [***Section 39***]	Imprisonment up to 10 years	
						Offence of raising funds for a terrorist organisation [***Section 40***]	Imprisonment up to 14 years	