IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.24928 of 2022

Arising Out of PS. Case No.-2 Year-2017 Thana- GOVERNMENT OFFICIAL COMP. District- Patna

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BIKASH KUMAR @ VIKASH KUMAR Son of Ramadhar Ram Resident of village - Birsa Nagar, Chhota Bariarpur, P.S.- Chhatauni, District - East Champaran (Bihar).

... ... Petitioner/s

Versus

1. The State of Bihar.
2. The Union of India, Through the Director, Directorate of Enforcement, Government of India, New Delhi, New Delhi.
3. The Deputy Director, Directorate of Enforcement, Patna Zonal Office, Government of India, Patna. Bihar.
4. Tha Assistant Director, Directorate of Enforcement, Government of India, 1st Floor, Chandpura Place Bank Road, West Gandhi Maidan, Patna 800001, Bihar.

... ... Opposite Party/s

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with

CRIMINAL MISCELLANEOUS No. 24534 of 2022

Arising Out of PS. Case No.-2 Year-2017 Thana- GOVERNMENT OFFICIAL COMP. District- Patna

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RAMADHAR RAM S/o Late Mangani Ram R/o village- Birsa Nagar, Chhota Bariarpur, P.S.- Chhatauni, District- East Champaran

... ... Petitioner/s

Versus

1. The State of Bihar.
2. The Union of India through the Director, Directorate of Enforcement, Govt. of India, New Delhi Bihar
3. The Deputy Director, Directorate of Enforcement, Patna Zonal Office, Govt. of India, Patna Bihar
4. The Assistant Director, Directorate of Enforcement, Government of India. 1st Floor, Chandpura Place, Bank Road, West Gandhi Maidan, Patna 800001, Bihar

... ... Opposite Party/s

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Appearance :
(In CRIMINAL MISCELLANEOUS No. 24928 of 2022)
For the Petitioner/s : Mr.Bhubneshwar Prasad, Advocate
For the Opposite Party/s : Mr.Jitendra Kumar Singh, APP
For the UOI : Mr. K.N. Singh, ASG
Mr. Manoj Kumar Singh, Advocate (ED)
(In CRIMINAL MISCELLANEOUS No. 24534 of 2022)
For the Petitioner/s : Mr.Sarbottam Kumar Sarkar, Advocate
For the Opposite Party/s : Mr.Jitendra Kumar Singh, APP
For the UOI : Mr. K.N. Singh, ASG
Mr. Manoj Kumar Singh, Advocate (ED)

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CORAM: HONOURABLE MR. JUSTICE RAJIV ROY

C.A.V. ORDER

5 16-02-2023 Heard learned counsel for the petitioners the learned counsel for the Enforcement Directorate and the learned APP for the State.

2. The petitioners apprehend their arrest in connection with Complaint Case-cum-Special Trial No.(PMLA)04 / 2020 arising out of ECIR No.PTZO 02/2017 instituted under Sections 4 of the Prevention of Money Laundering Act, 2002.

3. As per the prosecution story:

(i) the Assistant Director, Directorate of Enforcement (Prevention of Money Laundering Act, 2002) Patna filed Complaint Case under Section 45 (1) of Prevention of Money Laundering Act, 2002 (henceforth for short ‘the 2002 Act’) against the accused persons namely, Ramadhar Ram his wife, Anita Devi and son Bikash Kumar stating therein that the Superintendent of Police, Economic Offence Unit 3, Bihar, Patna vide Letter No. 4245/ C dated 05.09.2014 forwarded a copy of FIR No. 220/ 2013 dated 18.06.2013 registered against him by the then Executive Engineer, PHED, Siwan for commission of offence punishable under Section 13 (2) read with Section 13 (1) (e) of Prevention of Corruption Act, 1988 (henceforth for short 'the PC Act');

(ii) subsequently, charge sheet bearing No. 28/17 dated 04.10.2017 was filed in that case against Ram Adhar Ram, Anita Devi and Bikash Kumar for the offence under Section 13 (2) read with the Section 13 (1)(e) of 'the P.C. Act' and Section 109/ 120 (B) of the IPC, 1860 by the Economic Offence Unit, Bihar, Patna before the Hon'ble Special Judge, Vigilance, North Bihar, Muzaffarpur;

(iii) the said Section 13 (2) read with Section 13 (1) (e) of the 'P.C. Act', and Section 120 (B) of IPC are covered as "Scheduled Offence under Para 1 and Para 8 in Part 'A' of the '2002 Act' (as amended) and scrutiny of the said FIR/ Charge Sheet revealed that Ram Adhar Ram has acquired huge property in his name and in the names of his family members during the check period from 12.07.1979 to 19.06.2013;

(iv) further allegation is/are that Ram Adhar Ram had joined in P.H.E.D., Motihari on 12.07.1979 as Junior Engineer and posted at different places in Bihar and acquired huge property through the corrupt practices;

(v) during his service period 12.07.1979 to 19.06.2013, he acquired properties worth Rs.81,49,323.23/-in his name and in the names of his family members;

(vi) further allegation is that Ram Adhar Ram received total salary of Rs. 36,26,399/- in his service tenure and his total income is/was Rs. 49,73,755/- from all sources but he acquired properties to the tune of Rs. 81,49,323.23/- during the check period;

(vii) further, the wife of Ramadhar Ram purchased land situated at Khata No. 151, Survey Plot Nos. 618 & 619 (area 18 decimals) for the consideration of Rs. 32,30,000/- and the same has been mentioned in paragraph no. 14 (A) of the Complaint petition;

(viii) further allegation is that the son Bikash Kumar also purchased Honda CBR Motor cycle on 26.07.2012 for consideration of Rs. 1,45,018/-. Thereafter, the purchased Hero Honda Glamour Motor cycle on 09.04.2013 for consideration amount of Rs. 58,206/- and the said Bikash Kumar also purchased Maruti Swift Car on 15.09.2018/27.09.2018 for consideration amount of Rs. 6,83,557/- and the same has been mentioned in paragraph no. 14 (B) of the said Complaint petition as movable properties;

(ix) further, the available balance amounts in Bank Account of the said Bikash Kumar as on 29.03.2019 was total Rs. 37,695/- and the same has been mentioned in paragraph no. 14 (B2) of the said Complaint petition;

(x) further, the surrender value amounts of the said Bikash Kumar in Insurance policies as on 25.03.2019 is/was a total of Rs. 1,07,349/ and the same has been mentioned in paragraph no. 14 (B3) of the said Complaint petition.

4. The case of the accused persons is/are that:

(i) Ramadhar Ram was appointed on 12.07.1979 as Junior Engineer in the Department of P.H.E.D. and promoted as an Executive Engineer and during the period of 34 years of service, he received Rs.36,26,399/- as salary, Rs.7,54,952/- as subsistence allowance, Rs.11,23,191/- as G.P.F. amount as also the Group Insurance amount of Rs.2,66,569/- totalling Rs.57,71,111/- (to check the totals);

(ii) further Ramadhar Ram received Rs.5000/- month as rent between 2006 to 2013 and Rs,6000/- month thereafter from his tenant, Abhay Kumar Singh as also Rs.4000/- since 2010 till date from another tenant Sakaldeep Paswan, totalling

Rs.12,84,000/-;

(iii) further 7.69 acre of land was recorded in the name of his great grand father and after his death devolved upon his grand father and then to his father and uncle and finally to him (1.78 acres) on which Sisam, Sagwan, Litchi, Juice fruit and Simar trees were planted;

(iv) as per the report of the Circle Officer, Chiraiya, East Champaran, he earned Rs.3,27,000/- per annum from the sale of goods, fruits, agricultural produce which between 1998 to 2019 will come to more than Rs.50 lacs;

(v) further, son, Bikash Kumar was running a proprietorship firm in the name of Shree Shiv Traders since 2012-13 and Vabhav Accessories since 2018;

(vi) the opposite parties wrongly calculated the confiscation amount worth Rs.82,10,661;

(v) the value of ancestor land is worth Rs.24,92,000/- but again has been wrongly added by the opposite parties;

5. Learned counsel for the petitioners submit that Ramadhar Ram preferred Transfer Petition No.279 of 2019 before the Hon'ble Apex Court which was heard on 10-05-2019 and the further proceedings of Economic Offence Police Station Case No.22 of 2013 (Special Case No.18 of 2013) pending in the court of learned Special Judge, Vigilance (North Bihar), Muzaffarpur has been stayed (Annexure-3 to the petition).

6. Further, an appeal was also filed against the attachment order before the Appellate Tribunal which was pleased to pass an order for maintaining status quo (Annexure-5 Series).

7. The further submission of the learned counsel for the petitioners is/are that under section 45(i)(ii) of PMLA, 2002, a person who is under 16 years or woman or sick or infirm [or is accused either or his own along with other co-accused of Money Laundering on sum of less than one crore rupees] may be released on bail, if the Special Court so directs.

8. In support of their case, the learned counsel for the petitioners cited a case of Patna High Court in **Most. Ahilya Devi @ Ahilya Devi vs. The State of Bihar & Ors.** reported in **2020(4) BLJ 1** in which the learned Single Judge observed as follows:

> "2. Section 45(1) of the Act, as the same stood, when it was declared ultra vires, read thus: -
>
> **"45. 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 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

(ii) any officer of the Central Government or State Government authorised in writing in this behalf by the

Central Government by a general or special order made in this behalf by that Government.

(2) The limitation on granting of bail specified in clause (b) of 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."

3. Subsequent to the Supreme Court's decision, in case of ***Nikesh Tarachand Shah (supra)***, certain amendments were made in various provisions of the Act including Section 45(1) of the Act. The amending provision, which is relevant for the issue which has arisen in the present matter, reads thus : -

"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."

4. Evincibly, consequent upon the aforesaid amendment through Finance Act, 2018, Section 45 of the Act, as it now stands, reads thus : -

"Section 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 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;

Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or in 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:

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

(ii) any officer of the Central Government or State Government authorised in writing in this behalf by the Central Government by a general or 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 clause (b) of 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."

5. It can be easily deciphered, on comparative reading of Section 45(1) of the Act, pre-amendment and post-amendment, that Clause (ii) of sub-Section (1) remained as it stood before amendment.

6. In the aforesaid background, the primordial and the only legal issue, which has arisen in the present matter, is as to whether the Supreme Court's decision in case of Nikesh Tarachand Shah (supra) can be said to have lost its significance because of the aforesaid amendment in Section 45(1) of the Act.

9. Learned Single Judge further took note of the Hon'ble Apex Court in ***Nikesh Tarachand Shah*** (supra) in which it was held as follows:

> "21. The Supreme Court thus noticed anomalies in prescribing conditions for entertaining an application for grant of bail under Section 45(1) of the Act with reference to the Scheduled offences. The Supreme Court, in paragraph 46 of the judgment in case of Nikesh Tarachand Shah (supra), has unequivocally held that Section 45 of the Act is a drastic provision which makes drastic inroads into the fundamental right of personal liberty guaranteed under Article 21 of the Constitution of India. The Court observed that before application of such provision, one must be doubly sure that it furthers a compelling State interest in tackling serious crimes. Absent any such compelling State's interest, indiscriminate application of the provisions of Section 45 will certainly violate Article 21 of the Constitution. The provisions akin to Section 45 have been upheld on the ground that there was compelling State interest in tackling crimes of an extremely heinous nature, Supreme Court noted. For the benefit of quick reference, paragraph 46 of the decision in case of ***Nikesh Tarachand Shah*** (supra) is

being reproduced hereinbelow : -

"46. We must not forget that Section 45 is a drastic provision which turns on its head the presumption of innocence which is fundamental to a person accused of any offence. Before application of a section which makes drastic inroads into the fundamental right of personal liberty guaranteed by Article 21 of the Constitution of India, we must be doubly sure that such provision furthers a compelling State interest for tackling serious crime. Absent any such compelling State interest, the indiscriminate application of the provisions of Section 45 will certainly violate Article 21 of the Constitution. Provisions akin to Section 45 have only been upheld on the ground that there is a compelling State interest in tackling crimes of an extremely heinous nature."

22. I must emphasize, at this juncture, that the Supreme Court clearly held that indiscriminate application of the provision of Section 45 of the Act will certainly violate Article 21 of the Constitution of India.

23. In the aforesaid background, it is to be seen as to whether the amendment introduced in Section 45 of the Act, as noted above, by Act No. 13 of 2018, shall amount to re-framing the entire Section 45 and thereby reviving and resurrecting the requirement of twin conditions under sub-Section (1) of Section 45 of the Act for grant of bail.

24. In my opinion, in view of clear language used in paragraph 46 of the Supreme Court's decision in case of Nikesh Tarachand Shah (supra), I have no hesitation in reaching a definite conclusion that the amendment in sub-Section (1) of Section 45 of the Act introduced after Supreme Court's decision in case of Nikesh Tarachand Shah (supra) does not have the effect of reviving the twin conditions for grant of bail, which have been declared ultra vires Articles 14 and 21 of the Constitution of India.

25. I do not find force in submission made on behalf of Union of India that a different view has been taken in case of P. Chidambaram (supra) by the Supreme Court than the view taken in case of Nikesh Tarachand Shah (supra) on the question of constitutional validity of sub-Section (1) of Section 45 of the Act. There is no discussion in this regard in the said judgment in case of

P. Chidambaram (supra). The application for anticipatory bail in case of P. Chidambaram (supra) was rejected on merits of the allegation and other materials.

26. In view of the above discussions, I do not find any reason to take a different view from what has been taken by the High Court of Judicature at Bombay in case of Sameer M. Bhujbal (supra), High Court of Delhi in case of Upendra Rai (supra) and that of the High Court of Madhya Pradesh Bench at Indore in case of Dr. Vinod Bhandari (supra).

27. ……… …...

28. Coming to the merits of the case, I have already outlined the case of the prosecution. The petitioner is the widow of deceased younger brother of the main accused Ashok Kumar Yadav against whom there are 26 criminal cases and in course of investigation carried out against him in respect of commission of offence under the Act, it emerged that he had purchased properties in the name of the petitioner and her deceased husband to the tune of Rs. 5,66,000/-. Further, a sum of Rs. 6,95,000/- has been allegedly deposited in the savings bank account of the petitioner by the said accused Ashok Kumar Yadav. In addition, a sum of Rs.2,99,500/- is lying in the account

of the deceased husband of the petitioner.

29. Considering the nature of allegation, in my opinion, a case of grant of anticipatory bail is made out.

30. This application is allowed."

10. Learned counsel for the petitioners submit that in view of the fact that petitioner Ram Adhar Ram is an old man, infirm and as per the documents that have been attached, he is ill, he deserves reliefs.

11. Further, in case of Bikash Kumar also, he is sick and have brought on record the documents to support his case, both the petitioners are ready to abide by all the terms and conditions, if granted relief and as such the petitioners be allowed.

12. Per contra, Mr. Manoj Kumar Singh, learned counsel for the Enforcement Directorate submitted that subsequent to the filing of the charge sheet No.28/2017 dated 04-10-2017 against the accused persons in connection with FIR No.22/2013 under Prevention of Corruption Act, 1988, it was revealed that during his service tenure, the petitioner Ram Adhar Ram received total salary of Rs.36,26,399/- and had total income of Rs.49,73,755. 12 from all sources (including salary). Further, he acquired properties to the tune of Rs.1,00,95,588/- during the check period.

13. The disproportionate Assets of Ramadhar Ram has been calculated as under:

Income	= Rs.49,73,755. 12
Non-verifiable expenditure (1/3rd of salary)	= Rs.12,08,799/-
Verifiable expenditure	= Rs.18,80,029/-
Total expenditure	= Rs.30,88,828/-
Likely Saving (Income-Expenditure)	= Rs.18,84,927/-
Disproportionate Asset (Total Asset - Likely Savings)	= Rs. 82, 10,66 1/-
% Disproportionate Assets	= (D.A/Total Income) x 100 = 165.07%

It further came to notice during investigation under PMLA that during the check period from 12.07.1979 to 19.06.2013, Ramadhar Ram acquired properties worth Rs.81,49,323.23/-in his name and in the name of his family members, which are disproportionate to his known source of income.

14. ECIR bearing No. PTZO/02/2017 dated 04.05.2017 was recorded by Enforcement Directorate, Patna Zonal Office against Ramadhar Ram and others, as offences defined under Section 13(2) read with Section 13(1)(e) under Prevention of Corruption Act, 1988 are scheduled offences under the schedule (Part- A) of the PML Act, 2002.

15. Ramadhar Ram was a Government Servant holding a responsible post, yet he did not file his ITR regularly. The only ITR he filed was for the AY 2013-14 after the raids conducted by EOU, Bihar. His claim to have got annual agricultural income of Rs. 3-4 lakhs also appears, to be an afterthought as earlier he did not declared his agricultural income in the ITR.

16. Ramadhar Ram had deposited huge cash amounting to Rs.25,29,000/- in his various savings accounts, Rs. 12,85,900/- in the saving accounts of his wife, Anita Devi and Rs.36,37,500/- into the saving accounts of his son, Bikash Kumar.

17. Further, 4 (Four) bank accounts were opened in the name of Ramadhar Ram, Anita Devi and Pinki Kumari with the fruits of proceeds of crime, the available bank balance into the new accounts are also liable for attachment. The cash deposits are not in commensurate with their illicit source of income and these deposits have subsequently been used for acquisition of immovable and movable properties.

18. Ramadhar Ram made huge investments in landed properties in his name and in the name of his wife, son and his daughter-in-law and constructed two houses, one in his name and the other in his son's name. The acquisition of said properties are not commensurate with his justifiable salaried income. He stated to have incurred Rs.8-9 lakhs on the house constructed in his name but did not disclosed about having invested Rs. 13 lakhs in the construction of the house in the name of his son, Bikash Kumar which came to notice while recording the statement of Bikash Kumar under section 50 of PMLA, 2002. As such, he has concealed his investments generated from illegal sources.

19. Ramadhar Ram and his son, Bikash Kumar have invested total amount of Rs.3,45,000/- in cash in immovable properties in the form of taking 'Mahadnamas' (amount taken on behalf of mortgaging of others' land) from different persons during the check-period. The amount in 'Mahadnamas' invested is nothing but the proceeds of crime of Ramadhar Ram. It reveals the tendency of Ramadhar Ram to conceal the proceeds of crime to frustrate the proceedings under PMLA.

20. Further, the Gazette Notification dated 29.03.2018 relating to Finance Act, 2018 No.13 of 2018 issued by the Ministry of Law and Justice (Legislative Department) incorporated the following lines:

> *(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;

21. Further, he cited the decision of the Hon'ble Apex Court in the case of **P. Chidambaram v. Directorate of Enforcement, (2019) 9 SCC 24**, wherein in the context of anticipatory bail it was held as under:

> *"78. Power under Section 438 CrPC being an extraordinary remedy, has to be exercised sparingly; more so, in cases of economic offences. Economic offences stand as a different class as they affect the economic fabric of the society. In Directorate of Enforcement v. Ashok Kumar Jain [Directorate of Enforcement v. Ashok Kumar Jain, (1998) 2 SCC 105: 1998 SCC (Cri) 510], it was held that in economic offences, the accused is not entitled to anticipatory bail."*

22. In view of the above case laws cited and considering the grave nature of offence, learned counsel for the E.D. submitted that the petitioners are not entitled for any relief as there is every likelihood that the accused petitioners are seeking anticipatory bail only to frustrate the due process of law and delay the trial inordinately.

23. The counsel for the Enforcement Directorate finally cited the decision of Bombay High Court in **Ajay Kumar vs. Directorate of Enforcement** decided on 28-01-2022 in **Cr. Application (BA) No.1149 of 2021** in which it has been held as follows:

QUESTION REFERRED :-

"Whether the twin conditions in section 45(1) of the 2002 Act, which was declared unconstitutional by the judgment of the Apex Court in Nikesh T. Shah Vs. Union of India (2018) 11 SCC 1, stand revived in view of the Legislative intervention vide Amendment Act 13 of 2018?"

In turn, we are called upon to answer the above referred question.

06. We have exhaustively heard learned Senior Counsel Mr.Sunil Manohar for the applicant-accused and learned Additional Solicitor General of India (ASGI) Mr. (7) criaba1149.21 Anil Singh on behalf of the ED. Both of them made elaborate submissions on the issue involved in context with the relevant provisions in different enactments like, The Terrorist and Disruptive Activities (Prevention) Act, 1987, Narcotic Drugs and Psychotropic Substances Act, 1985, The Maharashtra Control of Organised Crime Act, 1999, The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities)

> Act, 1989 etc. Besides that both of them placed reliance on various reported judgments, which we prefer to deal contextually. We may hasten to add that submissions were made as if we are dealing with the issue about constitutional validity of the amended provision, which challenge, in fact, is pending before the Supreme Court.

The Bombay High Court thus held as follows:

> "11. We are confronted by divergent views expressed by the learned Single Judges spread over the country. Reverting to the reference order dated 03.12.2021, we have noted that two decisions of this Court in case of Sameer Bhujbal (supra) and Yogesh Deshmukh (supra) cited before the referal Judge, became the genesis for the reference. The learned Single Judge (Reference Court) shown his disagreement with the view expressed by coordinating Benches of this Court by expressing that the very foundation or basis for striking down the twin conditions has been removed by the Legislative amendment and therefore in his opinion the twin conditions would revive.
>
> 12. It necessitates us to go through the decision of the learned Single Judge in Sameer Bhujbal's case, which we consider to be a foundation, since it has been referred by

various High Courts while echoing the same view. In Samir Bhujbal's case, this Court was dealing with bail application in terms of section 439 of the Code of Criminal Procedure for the offence punishable under section 3 read with section 4 of the PML Act. The argument was advanced that taking note of the decision in the case of Nikesh Shah (supra), the Parliament has brought amendment in the Finance Act, 2018 and thus rectified the defects pointed out by the Supreme Court. In short, it was contended that after amendment, the twin conditions have been revived. The Court expressed (Sameer Bhujbal's case) that the Supreme Court in Nikesh Shah's case has struck down section 45 of the Act as a whole. The Supreme Court expressed in para 45 that 'we declare section 45(1) of the PML Act 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'. It is expressed that even after amendment original section 45(1)(ii) has neither been revived or resurrected by the Amending Act. Moreover, the notification dated 29.03.2018 thereby amending section 45(1) of the PML Act is silent about its retrospective effect. Therefore, as of today, there is no rigor of said twin conditions.

13. The second decision of this Court in line was in case of Union of India Vs. Yogesh Narayanrao Deshmukh (supra). In said case, the learned Single Judge took note of earlier two decisions of this Court in cases of Sameer Bhujbal (supra) and Deepak Virendra Kochar Vs. Directorate of Enforcement (Cri.B.A. No.1322/2020 Bombay High Court). It is expressed that, in Nikesh Shah's case the Hon'ble Apex Court has struck down Section 45 of the PML Act, as a whole having found it arbitrary and violative of Article 14 and 21 of the Constitution of India and not just applicability of twin conditions to scheduled offences and, therefore expressed its agreement with the view taken in earlier decisions in the cases of Sameer Bhujbal (supra) and Deepak Kochhar (supra) along with decision of Delhi High Court in Upendra Rai's case. In short, taking a note of the Supreme Court's decision in case of Nikesh Shah coupled with the views expressed by this Court in earlier two decisions, same view has been reiterated. In the said decision, we are unable to find much deliberation on the point as to what was the effect of subsequent amendment.

14. In the decision of Delhi High Court in case of Upendra Rai (supra) while dealing with the issue, Delhi High Court has expressed its agreement with a view taken by this Court in case of Sameer Bhujbal (supra) and also its agreement with a decision of Madhya Pradesh High Court in case of Vinod Bhandari (supra) and accordingly stated that it has no reason to take different view.

15. Another decision in case of Most. Ahilya Devi Vs. State of Bihar (supra) rendered by Patna High Court has been pressed into service. On careful examination, we find that Patna High Court has simply stated that (para 24) in view of clear language used in para 46 of the Supreme Court decision in case of Nikesh Shah (supra), the Amendment Act does not have effect of reviving twin conditions. In another decision of Manipur High Court in case of Okram Ibobi Singh Vs. Directorate of Enforcement (2020) SCC Online Mani 365 cited by the applicants, similar view was taken that twin conditions would not revive. We have also gone through some other decisions in cases of Sai Chandrashekar Vs. Directorate of Enforcement (2021) SCC Online Del 1081 and Amarendradhari Singh Vs. Directorate of Enforcement, 2021 SCC Online Del 3901

of Delhi High Court, Prakash Gurubaxani Vs. Directorate of Enforcement (2021) SCC Online P & H 1567 of Punjab and Haryana High Court, Pankaj Grover Vs. Directorate of Enforcement (2021) SCC Online All 566 of Allahabad High Court, wherein same view was expressed.

It further held:

> "17. We have carefully examined the above decisions which speak that Legislative amendment does not revive the twin conditions which were declared unconstitutional by the Supreme Court in Nikesh Shah's case. In most of the cases, respective High Courts have reiterated the view expressed by this Court in case of Sameer Bhujbal (18) criaba1149.21 (supra).
>
> 18. The learned ASGI has assiduously pointed out that the view taken by Delhi High Court in case of Upendra Rai Vs. Directorate of Enforcement (supra) has been stayed by the Supreme Court in SLP (Cri) 2598/2020 vide its order dated 03.06.2020. Likewise, the decision taken in case of Dr. Shivinder Singh (supra) has also been stayed by the Supreme Court in its order dated 31.07.2020 in SLP (Cri) No.3474/2020. The learned ASGI has submitted that the review petition was filed against the decision of

> Delhi High Court in case of Bimal Kumar Jain (supra) taking contrary view, however, by reiterating the earlier view and expressing that there is presumption in favour of constitutionality the review petition was rejected."

Further held,

> "26. Learned ASGI took us through preamble of the PML Act which inter alia provides that it is an enactment to prevent money laundering and to provide confiscation of property derived from or involved in money laundering and or matters connected there with or incidental thereto. It is submitted that the offence of money laundering poses serious threat to the financial system of the country. Learned ASGI Mr. Anil Singh has submitted that already the Supreme Court has upheld the validity of twin conditions, namely, section 45(1) in its earlier decision in the case of Gautam Kundu Vs. Directorate of Enforcement (2015) 15 SCC 1 later on approved by the Supreme Court in another decision in case of Rohit Tandon Vs. Director of Enforcement (2018) 11 SCC 46. His line of argument is that in case of Nikesh Shah (supra) per se applicability of the twin conditions to the PML Act has not been

struck down but considering the defects about its applicability depending upon predicated offence twin conditions are held unconstitutional, which now stood rectified."

38. It is a settled law that a statute must be given its effect unless it is struck down. Always there is presumption about constitutionality of the provisions of law. For this purpose, we may refer to the decisions of the Supreme Court in the cases of **Nagaland Senior Government Employees Welfare Association and Others Vs. State of Nagaland and Ors., (2010) 7 SCC 643 and M.L. Kamra Vs. The Chairman cum Managing Director, New India Assurance Co. Ltd. and Anr., AIR 1992 SC 1072.** Unless the provision introduced by the Legislature is struck down or wiped up from Statute book, its effect cannot be nullified unless found to be exceptionally undoing the earlier decision of the Court.

39. Essentially the reference arises out of bail application. The limited question is referred to the Larger Bench to decide whether the twin conditions of Section 45(1) of the PML Act which were declared unconstitutional by the Supreme Court in Nikesh Shah's case stands revived by virtue of the subsequent Legislative amendment. We remind ourselves that the constitutional

validity of the Amendment Act 13 of 2018 is not under challenge, which is admittedly pending before the Supreme Court. The entire tenor of argument advanced by the learned Senior Counsel Mr. Manohar is on the line that all the defects pointed out by the constitutional Court have not been cured and therefore the Amendment Act 13 of 2018 has no effect of revival of twin conditions. The endeavour was to impress that the Amendment Act 2018 has not cured all the defects and thus it has no effect in reviving twin conditions. The learned ASGI has countered said submission by contending that all (39) criaba1149.21 the defects pointed out by the Supreme Court stood cured by the Amendment Act 13 of 2018. The issue whether the Amendment Act 13 of 2018 has cured all the defects directly connects to the aspect of validity of the Amendment Act 13 of 2018, which is not the matter for consideration nor can be dealt under this reference arising out of bail application filed under the statutory provision.

The Bombay High as such held:

"41. Undeniably there has been no assail to the constitutional validity of the Amendment Act, since the reference arose out of bail application. In order to raise the challenge to the constitutional validity, at least prima facie acceptable grounds in support have to be pleaded to sustain and entertain the challenge. The said exercise would be, of course, by appropriate proceeding in proper way. The Supreme Court in the case of **A.C. Estates Vs. Serajuddin & Co. (1973) 2 SCC 324** has observed that when the question of ultra vires is wholly foreign to the scope and jurisdiction of initial authority, then it will not be open to the High Court to go into those questions in proceeding arising out of said initial proceeding.

43. We may note that there is no proper challenge to the constitutional validity of the Amending Act. Neither there are grounds of challenge nor pleadings to that effect, since obviously the reference was made while dealing bail application. The Supreme Court in reported case of **New Delhi Municipal Committee Vs. State of Punjab, AIR 1997 SC 2847** has observed that courts should, particularly in constitutional matters, refrain from expressing opinions on points not raised or not fully and effectively argued by counsel on either side. Learned Sr. Counsel Mr.Sunil Manohar raised several grounds by reading judgment of Nikesh Shah (supra) to state that all the deficiencies, which are

pointed, have not been met. In our view, this submission has come up without proper challenge and pleadings, at the time of oral submission. Certainly, the State has lost its opportunity to counter such grounds of challenge besides making mere oral submission.

44. The reference which arises out of bail application is to the limited extent of expressing about existence or non-existence of twin conditions after amendment despite the earlier pronouncement of the Supreme Court in the case of Nikesh Shah (supra). Whether the Amendment Act No. 13 of 2018 has cured all the defects pointed out by the Supreme Court is an issue directly touching to the constitutional validity of the Amendment Act which cannot be dealt without proper pleading and proper challenge.

45. After decision of Nikesh Shah (supra) the Parliament has introduced an amendment to Section 45 of the Act, which has changed the entire complexion. Merely because the entire section is not re-enacted, has no consequence. Admittedly, the Amendment Act is not struck down yet by the Courts as the said challenge is pending. Since the Legislative amendment on date is in existence, presumption of constitutionality would apply. In the subsequent pronouncement of P. Chidambaram's case

(supra), the Supreme Court took a note of its earlier decision in case of Nikesh Shah (supra) and subsequent amendment, but never expressed that despite amendment, twin conditions do not survive. Our view is fortified by recent decision of the Supreme Court in the case of Assistant Director, Directorate of Enforcement Vs. V.C. Mohan decided on 04.01.2022. In said case, High Court of Telangana at Hyderabad has granted anticipatory bail in connection with offence under the PML Act. It is observed that though offence under the PML Act is dependent on the predicate offences that does not mean that while considering the prayer for bail, in connection with offence under the PML Act, the mandate of section 45 of the PML Act would not come into play. Pertinent to note that the judgment in Nikesh Shah's case was brought to the notice of the Supreme Court. However, it is observed that the underlying principles and rigor of section 45 of the Act must get triggered although the application is under section 438 of the Cr.P.C. The (45) criaba1149.21 reading of said judgment conveys that the Supreme Court in its above pronouncement even after taking note of the decision of Nikesh Shah (supra) has expressed that the rigor of Section 45 of the PML Act would be attracted while dealing with bail application.

46. It is argued that the Amendment Act has not reintroduced twin conditions in Section 45 of the Act. In this regard, we may take a note of the decision of the Supreme Court in the case of **Shamrao V. Parulekar Vs. The District Magistrate, Thana, Bombay** 1952

SCR 683, of which para 7 reads as below :-

> "The rule is that when a subsequent Act amends an earlier one in such a way as to incorporate itself, or a part of itself, into the earlier, then the earlier Act must thereafter be read and construed (except where that would lead to a repugnancy, inconsistency or absurdity) as if the altered words had been written into the earlier Act with pen and ink and the old words scored out so that thereafter there is no need to refer to the amending Act at all. x x x xxx x "

The above observations are useful to decide the objection about requirement of reintroduction of twin conditions.

47. The Amending Act has changed the entire complexion. Notably section 45 of the Act has not been repelled from the statute book. Therefore, in our view, the section as it stood after amendment has to be read as it stands. We do not find it necessary that the entire section has to be resurrected afresh. The very effect of the amendment has changed the periphery of its applicability. The section which stands after amendment has to be read as a whole.

48. Absence of reference in notification dated 29.03.2018 thereby amending section 45(1) of the Act about its retrospective applicability (as observed in Sameer Bhujbal's case), does not take away the force and impact of amendment. It is for the Legislature to give effect to the amending provisions prospectively or retrospectively.

> However, that cannot be reason for in effecting the amending provisions of the Act.
>
> CONCLUSION:-
>
> 49. We may reiterate that the reference arose out of statutory jurisdiction and not constitutional jurisdiction of this Court. Unless there is proper challenge and pleadings, the issue of constitutional validity cannot be undertaken. Undoubtedly, the Legislature has power and competence to amend the provisions of the Act. Unless the amended provision is struck down by the Courts, it cannot be watered down. Since after the amendment the entire complexion of section 45 has been changed, we are not in agreement with the contention that the entire section has to be re- enacted by way of amendment after decision in the case of Nikesh Shah (Supra). Therefore, in our opinion, the twin conditions would revive and operate by virtue of Amendment Act, which is on date in force. In view of that, we answer the reference by stating that the twin conditions in section 45(1) of the 2002 Act, which was declared unconstitutional by the judgment of the Apex Court in Nikesh T.Shah Vs. Union of India (2018) 11 SCC 1, stand revived in view of the Legislative intervention vide Amendment Act 13 of 2018.

24. The learned counsel thus submit that it is not a fit case for extending anticipatory bail to the petitioners herein.

25. This Court has gone through the facts of both the cases, as also the rival submissions put forward by the respective parties.

26. This Court is in complete agreement with the Division Bench decision of the Bombay High Court (Nagpur Bench) in **Ajay Kumar vs. Directorate of Enforcement** (supra) that the legislature have the power to and competence to amend the provision of the Act. The amended provision has not been struck down by the Court and as such the same cannot be watered down. Thus, it cannot be said that until and unless the entire section gets amended, the decision in Nikesh Tarachand Shah (supra) will prevail. The Bombay High Court also took note of the decision cited by the learned counsel for the petitioners in Most. Ahilya Devi vs. The State of Bihar (supra) while passing the order aforesaid.

27. Thus in the considered view of the Court the twin conditions in section 45(1) of the 2002 Act after amendment stands revived until any decision comes in the matter by the Hon'ble Apex Court.

28. Now, coming to case in hand, admittedly, the disproportionate asset assessed by the Enforcement Directorate is/are to the tune of Rs.82,10,661/- which is less than one crore.

29. The amended Section 45 of the PMLA, 2002 read as follows:

> **“45. Offences to be cognizable and non-bailable.—**(1) 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,[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:

30. Further, the petitioner Ramadhar Ram (**Cr. Misc. No. 24534 of 2022)** is 67 years old man, sick and infirm and has suffered brain hemorrhage and was operated in Paras HMRI Hospital, Patna (Annexures-6 Series of the petition), the cases having been registered against him, he will be ultimately facing the music, this Court is inclined to grant him privilege of anticipatory bail with conditions.

31. Cr. Misc. No. 24928 of 2022 (Bikash Kumar @ Vikash Kumar Vs. The State of Bihar).

32. The petitioner herein is son of Ramadhar Ram and as stated above, the amount under question is less than one crore. Further, according to the case of the petitioner, he is suffering from epilepsy (Epileptic Seizure) since 2000 and has been treated by different Neurologist/ Neuro Surgeon in Ranchi (Jharkhand) as well as Patna, (Annexure-8 Series) as relief is being granted to his father, Ramadhar Ram and he will also be facing the trial, this Court is inclined to extend him too the benefit of anticipatory bail with conditions.

33. Let the two petitioners namely Ramadhar Ram (Cr. Misc. No. 24534 of 2022) and Bikash Kumar @ Vikash Kumar (Cr. Misc. No. 24928 of 2022), be released in the event of their arrest or surrender before the Sub-ordinate court within a period of four weeks from the receipt of this order, on furnishing bail bond of Rs.1,00,000/-(Rupees One Lac) each with two sureties of the like amount each in connection with Complaint Case cum Special Trial No.(PMLA)04 / 2020 arising out of ECIR No.PTZO 02/2017 to the satisfaction of learned Sessions Judge-cum-Special Judge (PMLA), Patna, subject to the conditions as laid down under Section 438(2) of the Cr.P.C.

with further conditions that:

(i) one of the bailor should be the family member of the petitioners who shall provide official document to show his/her bona fide;

(ii) the petitioners shall appear on each and every date before the Trial court diligently and failure to do so for two consecutive dates without plausible reason will entail cancellation of their bail bonds by the Trial court itself;

(iii) the petitioners shall in no way try to induce or promise or threat the witnesses or tamper with the evidences, failing which the authorities shall be at liberty to take steps for cancellation of their respective bail bonds;

(iv) the petitioners shall surrender their respective passports, if any, before the court concerned.

34. With the aforesaid observations, the anticipatory bail applications stand allowed.

(Rajiv Roy, J)

Prakash Narayan /-

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