

**CASE COMMENT: TARSEM LAL v.
DIRECTORATE OF ENFORCEMENT CRIMINAL
APPEAL NO.2608 OF 2024**

Shubhangi Agarwal and Anushree Malviya***

ABSTRACT

'Tarsem Lal v. Directorate of Enforcement' concerns itself with the intricacies of an Anticipatory Bail in a case under the Prevention of Money Laundering Act, 2002 (PMLA). The anticipatory bail filed by the accused herein, for allegations under Section 44(1)(b) of the PMLA, was rejected by both the Special Court and the High Court. The case deals with significant questions with regards to judicial powers and procedures when dealing with economic offences, especially under the stringent PMLA.

The Appellants herein failed to appear before the Court after summons and hence warrants were issued against them under Sections 200 to 205 CrPC, to ensure their presence. Consequently, their anticipatory bail

*Shubhangi Agarwal is an Advocate at the Supreme Court of India. The author may be reached at shubhangi.agarwal03@outlook.com.

**Anushree Malviya is a PHD Scholar at the Dr. Ram Manohar Lohiya National Law University, Lucknow. The author may be reached at malviya.anushree15@gmail.com.

applications were rejected. The Supreme Court addressed the limitation of the Directorate of Enforcement (ED) in arresting individuals once cognizance is taken in a case barring situations where custodial interrogation is explicitly justified and approved by the court.

This judgment emphasizes the necessity for a strict compliance with the conditions of bail in Section 45(1) of the PMLA when considering anticipatory bail in money laundering cases. The authors through this case comment shall examine the balance between individual liberty provided under Article 21 of the Constitution of India and the State's efforts to combat financial crimes. They shall further critically examine the reasoning behind this decision, the procedural safeguards for individuals under PMLA and the future implications of this judgment.

This case thus serves as a critical reference point for understanding the balance between personal liberty and the regulatory measures of the Indian legal framework.

Keywords: *Anticipatory Bail, Prevention of Money Laundering Act (PMLA), Directorate of Enforcement (ED), Personal Liberty, Article 21, Special Court, Economic Offences.*

I. INTRODUCTION

As on May 16, 2024, the division bench of the Hon'ble Supreme Court (hereinafter 'SC') delivered a judgment namely '*Tarsem Lal v. Directorate of Enforcement, Jalandhar Zonal Office*' bearing Criminal Appeal No. 2608 of 2024 which considered the perplexing legal intricacies vis-a-vis anticipatory bail in offences under the Prevention of Money Laundering Act, 2002 (hereinafter 'PMLA'). This case is crucial to understand the limitations placed on the Directorate of Enforcement (hereinafter 'ED') in regards to taking individuals into custody, especially when the court has taken cognizance of the same; barring cases where such custody has been justified by the prosecution and approved by the court. This case thus, is a bedrock for interpreting the interplay between the waxing and waning of the individual liberty and the regulatory enforcement in the Indian legal system.¹ Through this case comment, the authors seek to analyse the judgement by examining the background and material facts of the case. The authors also explain the legal issues involved and the potential future implications of this judgement.

A. Background

PMLA was enacted by the Indian Parliament in 2002, with the prime objective of preventing money laundering, narcotics trade and terror financing. The PMLA grants the enforcement authority i.e. the ED the power to confiscate property and/or assets earned through illegal sources and money laundering. The ED is responsible for investigating offences under the PMLA², and the Financial Intelligence Unit – India

¹Kapil Arora and Pravar Misra, 'Tarsem Lal v Directorate of Enforcement: Supreme Court further clarifies PMLA framework' (*CAM*, 30 May 2024) <<https://disputeresolution.cyrilamarchandblogs.com/2024/05/tarsem-lal-v-directorate-of-enforcement-supreme-court-further-clarifies-pmla-framework/>> accessed 20 January 2025.

²'What we do' (Directorate of Enforcement) <<https://enforcementdirectorate.gov.in/>> accessed 4 August 2024.

(hereinafter ‘FIU-IND’) is the “national agency that receives, processes, analyzes, and disseminates information related to suspect financial transactions”³. Under the PMLA, various actions can be taken against an individual that is found guilty of money laundering like, the property acquired through the proceeds of crime may be frozen, seized or attached⁴ and rigorous imprisonment for three to seven years, and/or a fine may be awarded to the accused. ⁵. If the Money laundering offence is under the Narcotic Drugs and Psychotropic Substances Act of 1985, it would carry rigorous 10-year imprisonment and a fine.⁶

But the PMLA has also been dubbed to be “the most draconian statute that has ever seen the light of day in the country”⁷. PMLA has seen a shocking increase in the number of cases registered under it in the recent decade, rather the increase in cases is reflected from the 195 cases registered in the year 2018-19 to 579 cases in the first two months of 2022 itself⁸. The Act is adorned by stringent provisions for investigation and bail particularly since with the number of amendments it has gone through, in today’s day and time, it has meant shifting all the offences from Part B of the Act to Part A, diluting the commitment to ‘serious crime’ while also introducing severe implications in cases of arrest and bail in even ‘minor crimes’ by averring that all money laundering is grave, something which the SC

³‘Overview’ (Financial Intelligence Unit- India) <https://fiuindia.gov.in/files/About_FIU-IND/About_FIUIND.html> accessed 4 August 2024.

⁴The Prevention of Money Laundering Act, 2002 (15 of 2003) s 60.

⁵Prevention of Money Laundering Act 2002 (15 of 2003) s 4.

⁶ibid.

⁷Awstika Das, ‘PMLA Most Draconian Statute Ever in The Country: Kapil Sibal Urges Supreme Court to Reconsider 'Vijay Madanlal Choudhary' Judgment’ (*Live Law*, 10 April 2023) <<https://www.livelaw.in/top-stories/prevention-of-money-laundering-act-draconian-kapil-sibal-pvijay-madanlal-choudhary-judgmentenforcement-directorate-supreme-court-225950>> accessed 7 August 2024.

⁸Government of India, Ministry of Finance, Department of Revenue, Lok Sabha Un-Starred Question No. 4346, 27 March 2023.

too has accepted in its decision in *Vijay Madanlal Choudhary v. Union of India*⁹. Now, an individual charged under this offence would not be entitled to bail unless they can show reasonable grounds that they are not guilty of the offense. Thus, it arbitrarily makes the principle to be 'guilty until proven innocent' even though it should be the opposite to uphold the cornerstone of justice.

The transformation of PMLA has been gradual, driven by international pressures. But this does not justify the decisions made in the process, particularly when the Indian regime has been aggressively coercive in achieving its objective. The securing of the crime proceeds does not necessitate making it impossible for the person alleged to be released on bail, especially when the case against him is yet to begin.¹⁰

The present case similarly, deals with the following questions of law:

- “Does PMLA have an overriding effect over CrPC?”
- Is an accused considered to be in custody after a Special Court issues a summons order?
- Is it mandatory for an accused to file a bail application under Section 45 after a summons warrant is issued by a Special Court?
- Can a bond application filed by the accused under Section 88 of the CrPC be construed as a bail application?
- Can the ED arrest an accused after a Special Court takes cognizance of the offence of money laundering under Section 44(1)(b) of the PMLA?”¹¹

⁹*Vijay Madanlal Choudhary and Ors. v Union of India and Ors.* (2022) SCC OnLine SC 929.

¹⁰Abhinav Sekhri, 'PMLA: From Prosecuting Drug Lords to Going after Critics and Farmers?' (*Supreme Court Observer*, 25 January 2024) <<https://www.scobserver.in/journal/pmla-from-prosecuting-drug-lords-to-going-after-critics-and-farmers/>> accessed 4 August 2024.

¹¹'Enforcement Directorate's power to arrest under PMLA after Special Court's cognizance' (*Supreme Court Observer*, 30 June 2024) <<https://www.scobserver.in/cases/enforcement-directorates-power-to-arrest-under->

Thus, serving as an important precedent for this stringent, unreasonably harsh, and disproportionate regime under the PMLA which has transformed a trial under the Act to that of punishment especially, making the pre-trial stage purely punitive in nature.

B. Brief material facts of the case

In this case, the woes of the Petitioner commenced when Tarsem Lal was accused of (among other offences) money laundering under Section 4 of PMLA. He was implicated in a purported conspiracy in which he was unjustly given “shamlat” lands, which is essentially a common village land, owned by multiple landowners, contributed by them for the common good of the village, , even though he was ineligible for receiving the same. This resulted in him being accused of misusing government machinery for obtaining large amounts of money from property dealers. The ED became involved when one of the offences for which he was allegedly accused of, fell under the ambit of “predicate offences” in the Part B of the Schedule of the PMLA. After the Enforcement Case Information Report (hereinafter ‘ECIR’) was filed by the ED, a Special Court took cognizance of the case under PMLA¹². Tarsem Lal was not arrested after the filing of the ECIR but later he failed to appear before the Court when summons was issued. As a result, the Court issued warrants to assure his presence, in response to which he applied for an anticipatory bail under Section 438 of the CrPC. Upon dismissals and several appeals, climbing the

pmla-after-special-courts-cognisance-tarsem-lal-v-directorate-of-enforcement/>
accessed 2 August 2024.

¹²‘Enforcement Directorate’s power to arrest under PMLA after Special Court’s cognizance: Tarsem Lal v Directorate of Enforcement, Jalandhar Zonal Office’ (*Supreme Court Observer*, 30 June 2024) <<https://www.scobserver.in/cases/enforcement-directorates-power-to-arrest-under-pmla-after-special-courts-cognisance-tarsem-lal-v-directorate-of-enforcement/>> accessed 6 August 2024.

hierarchy of the Courts, the case reached the Division Bench of Hon'ble Justice A.S. Oka and Hon'ble Justice Ujjal Bhuyan through the Criminal Appeal No. 2608 of 2024.

The appellants submitted that after the Special Court takes cognizance of the offence under Section 4 of PMLA, ED officers cannot exercise their power of arrest under Section 19 of PMLA. They contended that if the accused appears in response to the summons issued by the Special Court, there is no need for an arrest warrant or custody. They submitted that if cognizance is based on a complaint, then in cases where the prosecution did not seek custody of the accused during the investigation, there is no requirement to arrest the accused after the Court takes cognizance. If custody of the accused is needed for further investigation or to file a supplementary complaint, the officers of the ED must request the Special Court for custody.

The Additional Solicitor General's (hereinafter 'ASG') appearing on behalf the ED submitted that an accused person is considered to be in the Special Court's custody once he or she appears before it. Once cognizance is taken, the conditions of Section 45(1) of the PMLA will apply to the accused's bail application which he argued has not been met and hence, the appellants aren't eligible to receive anticipatory bail. He further submitted that money laundering is an offence against the country. Consequently, considering the seriousness and severity of the PMLA offence, obligatory adherence to Section 45(1) requirements has to be guaranteed at all times. Section 45 requires the adherence of the 'twin conditions'¹³ i.e. that there are reasonable grounds for believing that the accused is not guilty of such offence and that the accused is not likely to commit an offence while out on bail.

After considering the submissions, the SC set aside the dismissal to the grant of anticipatory bail. It also cancelled the warrants issued by the

¹³*Vijay Madanlal Chaudhary v Union of India* (2023) 12 SCC 1.

Special Courts against the accused, subject to the conditions that the accused shall furnish a bond under Section 88¹⁴ and give an undertaking as per Section 205¹⁵ that they will appear before the Court punctually and regularly. Once the warrant issued against the accused stood cancelled, the prayer for grant of anticipatory bail held no ground and hence, were not considered.

II. ANALYSIS OF THE JUDGMENT

A. *In-Depth Analysis of the Legal Issues in the Case*

a) PMLA v. CrPC: Overriding Effect

It is firstly important to note that the Special Court can take cognizance of an offence under Sections 3 and 4 of the PMLA when a complaint is preferred before them by the authorized authority. Secondly, as per Section 46 of the PMLA, the provisions of the CrPC, including those related to bail and bonds shall apply to proceedings under the PMLA in the Special Court¹⁶ and the Special Court shall be deemed to be a Court of Sessions (as under the provisions of CrPC).

Once the complaint is filed, Sections 200 and 204 of the CrPC shall apply on the case during the trial before the Special Court.¹⁷ No PMLA provision overrides the same, thus the exception clause¹⁸ that indicates PMLA takes precedence over the CrPC would not apply in such cases. The Special Court shall then determine if *prima facie* the offence is made out or not. If the offence is not made out under Section 3 of the

¹⁴The Code of Criminal Procedure Code 1973 (2 of 1974) s 88.

¹⁵The Code of Criminal Procedure Code 1973 (2 of 1974) s 205.

¹⁶The Prevention of Money Laundering Act 2002 (15 of 2003) s 46.

¹⁷*Yash Tuteja & Anr. v Union of India & Ors.* (2024) INSC 301.

¹⁸Prevention of Money Laundering Act 2002 (15 of 2003) s 46 (1).

PMLA, then the complaint shall be dismissed as per Section 203 of the CrPC. If the offence is made out under Section 3 of the PMLA, then the Special Court shall take recourse to Section 204 of the CrPC.¹⁹

As the present case concerns itself with punishment under Section 4 of the PMLA, wherein the punishment exceeds 3 years, it should be treated as a warrant case²⁰ under the CrPC²¹. Though the Special Court has a discretion under Section 204(1)(b) of the CrPC to either issue summons and/or warrants at the stage of cognizance, the SC has had, to some extent, already guided the exercise of such discretion in the case of *Inder Mohan Goswami & Anr. v. State of Uttaranchal & Ors.*²² The Court in the said case held that as a general rule, summons should be issued first with the exception of the crime being a heinous crime and /or there being a fear of tampering with evidence and evading law.

Elaborating more on the same, the Court laid down the following steps:

- A. To serve summons along with the complaint copy;
- B. If the accused avoids the summons, then issue aailable warrant;
- C. If avoidance continues, only then issue a non-ailable warrant.

This is because as per the Supreme Court, personal liberty of an individual should take prime precedence and thus, there needs to be caution exercised when issuing warrants, especially non-ailable warrants.

As was the case herein, the accused was not taken into custody/arrested till the complaint was filed and hence, at the stage of taking cognizance

¹⁹*Yash* (n 17).

²⁰The Code of Criminal Procedure Code 1973 (2 of 1974) s 2 (x).

²¹The Code of Criminal Procedure Code 1973 (2 of 1974) s 204(1) (b).

²²*Inder Mohan Goswami & Anr. v State of Uttaranchal & Ors* (2007) 12 SCC 1.

of the complaint under Section 44(1)(b) of the PMLA, the Special Court should have ideally issued the summons first.

Section 44(1)(d) of the PMLA mandates that the trial for the scheduled offences or other offences under the PMLA, be as per the CrPC, with the same provisions as applicable to a Court of Session. The Special Court, that deals with cases as the present case, is appointed under Section 43(1) of the PMLA and is considered to be the Court of Sessions. Section 437 of the CrPC, on the other hand, that defines when bail may be taken in cases of non-bailable offences, does not apply when the accused appears before the Special Court in response to a summon issued on a complaint under Section 44(1)(b) of the PMLA. b) Determining status of custody after summons issued by Special Court.

Section 61 of the CrPC specifies the form of the summons, that is prescribed in Form No. 1 in the 2nd Schedule of the CrPC. A cursory review of the prescribed form reveals that the primary purpose of summons is to ensure the accused's presence in Court to answer the charges. If the accused appears before the Court in response to the summons issued, it is deemed that the accused has complied sufficiently. The summons are not meant to be issued with an intent to take the accused into custody, as was also argued by the Petitioner's counsel. Thus, the Court dismissed the Ld. ASG's argument that an accused shall be deemed to be in custody upon appearing in Court in compliance of the summons. The primary objective behind issuance of summons is to assure the accused's presence and not to take him into custody. Thus, the misconception that the accused should apply for bail under Section 437(1) of the CrPC once he appears before the Special Court, was corrected by the SC. The SC confirmed that the term 'issue of summons' does not mean that the accused is in custody or that he needs to apply for bail. It further clarified that Section 437(1) of the

CrPC does not apply when the accused appears or is brought before the High Court or the Court of Sessions.

The Court observes that there are many provisions in the CrPC, which state that an accused who appears before the Special Court under a summon pertaining to a complaint will not be presumed to be in custody. Firstly, the Section 205²³ – which is consistent with the provisions of the PMLA in matters of complaint proceedings- describes when a magistrate may dispense with the personal attendance of the accused upon issuance of the summons. If the argument that the appearance of an accused upon issuance of a summon is treated at par with him being taken into custody is assumed correct, there would have been no need for the Court to dispense with the personal attendance of the accused, thereby rendering the discretion provided to the Court under Section 205 of the CrPC otiose. Secondly, as it is not inconsistent with PMLA, Section 88 applies to all the complaints under Section 44(1)(b). Section 88 is an enabling provision which provides courts the discretion to direct the accused to furnish bonds for their regular appearance, as per the facts and circumstances of the case. It is applicable in both pre and post summons. The objective behind Section 88 is to assure a person's regular appearance via summons by empowering the court to mandate a bond for appearance from the person present before it. Thus, if an accused offers to submit bond in terms of Section 88 upon appearing in the Court, then the Court should execute the bonds as an assurance of his presence during the trial.

There are majorly two scenarios of an accused not appearing despite summons:

- a) Firstly, that the accused appears on the returnable date of the summon but then does not appear in the subsequent dates.

²³The Code of Criminal Procedure Code 1973 (2 of 1974) s 205.

- b) Secondly, that he does not appear at all after the service of the summons.

In these cases, Section 89 of the CrPC empowers the Court to issue a warrant be it bailable or non-bailable, to ensure the accused's presence²⁴. The warrant is thus issued solely for ensuring the accused's appearance before the Court. Thus, a warrant in such contingencies would not necessarily require the accused to apply for bail. The court issuing it also has the power to cancel the warrant.²⁵ So if a bailable warrant is issued to the accused due to non-appearance, the accused is required to be released on bail "as a matter of right" when he appears before the Court²⁶. There is no need for him to apply for the cancellation of the warrant.

The Special Court has the authority to cancel a warrant based on the accused's conduct. The court can further require an undertaking from the accused to ensure his appearance on all subsequent dates, unless specifically exempted. The Supreme Court thus says that if the ED has not taken the accused into custody during the investigation, the Special Court should cancel the warrant, as is standard practice, without detaining the accused provided that the accused undertakes to appear before the Court whenever required.

- b) *Requirement of filing a Bail Application under Section 45 following Issuance of Summons Warrant*

The Supreme Court has very categorically held that when handling an application for cancellation of a warrant, as aforementioned, the Special Court is not handling a bail application. Therefore, Section

²⁴The Code of Criminal Procedure Code 1973 (2 of 1974) s 70 (1).

²⁵The Code of Criminal Procedure Code 1973 (2 of 1974) s 70 (2).

²⁶*Satender Kumar Antil v Central Bureau of Investigation* (2021) 10 SCC 773.

45(1) of the PMLA would not apply in this case. The SC referred to the pivotal precedent of the *Satender Kumar Antil v. CBI case*²⁷, wherein a two-judge bench of the Supreme Court emphatically underlined the principle of presumption of innocence being inherent, and held in addition to many other principles that warrants are exceptions and the Courts must uphold liberty. The Court clarified that there is no need for a bail application to be considered under Section 88 (take a bond for appearance), 170(produced by a police officer before a magistrate), 204 (issue of process) and 209(when it appears to the Magistrate that the offence is to be tried by the Court of Sessions exclusively) of CrPC. The Special Law applies only when the accused has already been arrested. But if the accused is either not arrested or arrested and later released on bail, the Court need not order further arrest. A provision in the Special Law analogous provision to Section 167(2) CrPC grants the accused the right to default bail,²⁸ subject to the satisfaction of Section 440 of the CrPC.

The court has opined that the object of both a summons and a warrant is to ensure the presence of the accused in the court at the stipulated time. As a rule, the court should first issue a summons, then aailable warrant, and then a non-ailable warrant.²⁹ If a warrant is issued by the court, it is to ensure that the accused appears before the court in furtherance of investigation. Once the accused appears before the court, and the court is satisfied that the accused will cooperate in the said investigation, the court has the power to cancel the warrants so issued. So, it is not necessary for the accused to file a bail application in such a case. It is also pertinent to note that if the accused has not been arrested prior to the filing of the complaint under Section 19 of the PMLA, he cannot be arrested by the ED at the stage of cognizance, until it specially approaches the Special Court for custody and a fair

²⁷*Satender Kumar Antil v Central Bureau of Investigation* (2022) 10 SCC 51.

²⁸Ridhi Setha and Lakshya Bhatiab, 'How do courts react to the disrepute of summons?' (2022) 2(1) JCLJ 863.

²⁹*Ibid.*

hearing is given to both of the parties by the Special Court before deciding accordingly.

The Supreme Court noticed that the practice nowadays by the Lower Court is to arrest the accused as soon as they answer the respond to the court.³⁰ A warrant is issued against the accused irrespective of whether they answer the summons. This leads accused individuals to preemptively seek anticipatory bail out of fear of arrest. As a result, the purpose of such warrants shifts from ensuring the accused's appearance in court to securing their custody. This has made anticipatory bail applications a common practice, even when not needed, including in cases under Section 45.

c) *Distinguishing between Bond Application under section 88 and Bail Applications*

To understand whether or not a bond application under Section 88 of CrPC can be construed as a bail application, the SC considered the claim of the ASG as to whether the accused can be deemed to be in custody as soon as they appear before the court in response to the summons. The court relied on the case of *Inder Mohan*,³¹ in which it was held that generally, unless the accused is charged with a heinous crime and there is a risk of tampering with or destruction of evidence, or efforts to evade the legal process, summons are issued as a rule. Since in the present case, there was no reason to believe in the above apprehensions on the ground that the accused was being thoroughly cooperative in the investigation, there was no need to issue a warrant.

³⁰Supreme Court Questions Practice of Some Trial Courts to Remand Accused the Moment They Appear in Response to Summons' (*LiveLaw News Network*, 21 March 2023) <<https://www.livelaw.in/top-stories/supreme-court-questions-practice-of-some-trial-courts-to-remand-accused-the-moment-they-appear-in-response-to-summons-224396>> accessed 7 August 2024.

³¹*Inder* (n 22).

It was further held, that if the accused avoided the summons, aailable warrant should be issued first; and then if the Court is satisfied that the accused is intentionally avoiding the court's proceedings, a non-ailable warrant may be issued. This whole process should be followed, without skipping any steps, because "personal liberty is paramount".³² The SC in this case observed that this process will even apply in cases governed by Section 44(1) of the PMLA. In the present case, the accused avoided the first summons, upon which a non-ailable warrant was issued against them. The middle step of issuance of aailable warrant, was skipped.

Upon reading the Form no. 1 in the Second Schedule as prescribed under Section 61 of CrPC, the court concluded that summons is only issued to secure the presence of the accused before the court and not his custody. Its compliance can be fulfilled with or without the person being in custody. The court even stated that there are several provisions, like Section 205 of CrPC where it is clear that the person on whom summons is issued is not in deemed custody. Hence, the claim that on cognizance of offence in the court, the person would be deemed to be in custody does not arise.

Therefore, since the question of the accused being in custody does not arise, the question of the accused being granted bail does not arise either. There was no need for the accused to apply for an anticipatory bail in this case. Furnishing bonds under Section 88 to appear in court regularly would have been enough distinguishing it from an application of bail, which are relevant when custody or arrest is involved.

Thus, there is a clear distinction between bond applications under Section 88 and bail applications.

³²ibid.

d) *Arrest by the Enforcement Directorate after Special Court
takes Cognizance*

The SC sets a clear legal limitation on the power of the ED and other authorities in situations where the arrest of the accused is concerned especially once the Special Court has taken cognizance of the case under the PMLA. Once the Special Court takes the cognizance of the case under Section 4 of the PMLA, it takes control over the matter meaning thereby that the ED or any other investigative authority empowered under the act, loses its authority to arrest the accused under Section 19 of the Act. This is because the accused now falls under the jurisdiction of the Special Court handling the case i.e. the jurisdiction shifts from the ED to the Special Court.

As the ED loses its authority to arrest the accused under Section 19 of the Act, there should similarly be no placement of fear or apprehension of arrest on the accused in the light of the same. But the practice of some Special Courts raises concerns, especially with regard to arresting the accused after they appear in court for an offence under the PMLA.³³ In the case of *Pankaj Jain vs Union Of India*³⁴, the SC had held that Section 88 does not grant any right to a person present in Court. Rather it gives the Court discretionary power to ensure the person's presence in further dates. It held that this discretionary power is designed to assure a person's appearance and the word 'may' in the Section 88 allows the Court to exercise this power as needed. In the present case, however, the SC observed that this discretionary power was given by the SC in cases where bail maybe taken in cases of non-

³³Debbie Jain, 'PMLA Accused Can't Be Arrested After Special Court Has Taken Cognizance of Complaint: Supreme Court Expresses Prima Facie View' (*LiveLaw News Network*, 4 March 2024) <<https://www.livelaw.in/top-stories/ex-cji-js-khehar-awarded-padma-vibhushan-senior-adv-cs-vaideyanathan-awarded-padma-bhushan-282010>> accessed 8 January, 2025.

³⁴*Pankaj Jain v Union of India & Anr.* (2018) 5 SCC 743.

bailable offence in courts other than the Court of Session and the High Court i.e. Section 437 of the CrPC. However, the Special Courts have made it a practice of arresting the accused after they appear in Court in response to the summons issued in the complaint, regardless of applicability of Section 437. The court deemed this practice to be illegal, as it pushes an accused to seek bail or anticipatory bail out of the fear of being arrested during appearance.

Such a practice, violates Article 21³⁵ of the accused i.e. the right to liberty. It would be completely unacceptable to arrest a person, who was not arrested before the filing of the complaint by the authorized authority under PMLA, to be taken into custody simply for complying with a court's order of summons. If PMLA requires custodial interrogation then it must follow proper procedure of filing an application in the Special Court providing reasons requiring custody of the accused, which the Court shall give a hearing to, along with hearing the accused, and then decide accordingly. The custodial interrogation shall be allowed, after cognizance, only when the Court is convinced that the same is required now, even though the accused was not arrested before this stage under Section 19 of the PMLA.

The SC also allowed the ED to arrest other people, not necessarily named as accused in the complaint, required in the case, only if, the conditions of Section 19 of PMLA is fulfilled.

B. Implications of the Detailed Analysis on the Present Case

Once a complaint is filed under Section 44(1)(b) of the PMLA, Sections 200 to 205 of the CrPC shall apply, as they are consistent with the special law of the PMLA. If the accused was not arrested by the ED before this complaint was filed, summons shall be issued to the accused when taking cognizance of the case. In the present case, the accused

³⁵The Constitution of India, 1950 art 21.

did not appear before the Special Court after receiving the summons, resulting into warrants under Section 70 being issued against him.³⁶ Initially, the warrants to be issued should beailable in nature and then non-bailable warrants can be issued. The purpose of these summons was purely to have the accused appear before the court. Now as the accused persons are not considered to be in custody when they appear in response to the summons, there is no need to apply for bail however they may need to furnish bonds under Section 88³⁷. But herein, summons was ignored by the accused and warrants were issued. The accused could have applied for the cancellation of warrants, as the court cannot treat the same as a bail matter under the stringent conditions of Section 45(1) of the PMLA but can also not release the accused simply on the furnishing of a bond. In the present case the Petitioner prefers an application for anticipatory bail, due to the prevalent practice of the Special Courts, arresting the accused in offences under the PMLA when they merely appear in court in response to the summons/warrants issued against them. This case has set a significant precedence for the Lower Courts to appreciate the cooperation of an accused with the investigation and to refrain from unnecessary arrests. The Court's decision to cancel the warrants issued against the accused on the condition that they shall provide an undertaking to the Special Court that they shall regularly and punctually attend the subsequent dates of the trial, unless they are exempted under Section 205 of the CrPC demonstrates a progressive step towards safeguarding personal liberty under Article 21 of the Constitution of India. This ruling emphasizes the importance of judicial discretion in ensuring compliance without infringing on an individual's rights, thereby setting a new course for legal principles regarding anticipatory bail and the treatment of accused persons in non-bailable offenses.

³⁶The Code of Criminal Procedure Code 1973 (2 of 1974) s 70.

³⁷The Code of Criminal Procedure Code 1973 (2 of 1974) s 88.

It is pertinent to note that the court held that the ED lost its jurisdiction to the Special Court in the present case, once the court took cognizance of the complaint under Section 44(1)(b) and thus, also lost its power to arrest the accused under Section 19 of the PMLA. If they want custody of the accused, they would have to follow the procedure and apply to the Special Court for his custody. Since the issuance of summons and warrants is not the court taking custody of the accused, there was no need to file an application of bail under Section 439 of the CrPC as argued by the ASG. There was also no need to file an anticipatory bail under Section 437³⁸ as there should have been no fear of arrest on the mere issuance of summons and warrants to ensure the accused's presence. This way, this case enforces a more humane approach in the Courts, when following due process and ensuring that the cooperation and the concurrent respect for the legal proceedings by the accused does not get met with punitive actions. This case, can thus become a pivotal reference in addressing the SCs continuously highlighted problem with the lower judiciary, of dealing with similar cases by insisting on arrest of an accused as a pre-requisite formality³⁹

As the warrants in the present case were cancelled, the Court set aside the refusal of the grant of anticipatory bail, but did not provide the same to the accused either. The Court held that as with cancellation of warrant there is no threat of arrest anymore it is unnecessary to consider the question of anticipatory bail, thus, reinforcing the protection of personal liberty to be the guiding principle while deciding such cases.

III. PROPOSITIONS THAT WILL ARISE IN FUTURE

³⁸The Code of Criminal Procedure Code 1973 (2 of 1974) s 437.

³⁹'Supreme Court Directs That Its Two Judgments On Bail & Arrest Guidelines Be Made Part Of Curriculum In Judicial Academies' (*LiveLaw News Network*, 3 February 2023) <<https://www.livelaw.in/top-stories/supreme-court-directs-that-its-two-judgments-on-bail-arrest-guidelines-be-made-part-of-curriculum-in-judicial-academies-220605?fromIpLogin=96525.0839484242>> accessed 8 January 2025.

As acknowledged by the SC, the common practice in the Special Court is to take the accused into custody once they comply with the summons or warrants issued. The failure to address the issue of anticipatory bail leaves a large gap between the actual practice of lower courts and the principles established in the present case. The fear of granting bail in cases involving an authority like the ED, would always loom over the lower courts. In such a situation addressing the issue of anticipatory bail becomes paramount. As seen in this case, such applications may continue to be filed till the SC instead of being properly addressed by the lower courts themselves.

IV. CONCLUSION

A stringent framework, with appropriate departures from the accepted standards of criminal procedures may be accepted in some cases but money laundering in India is considered to be a by-product of both grave and minor offences, as defined in the schedules of PMLA. Though, as per the objective of the act, these scheduled/predicate offences should have been limited to grave offences such as terrorism, narcotics smuggling, corruption and serious forms of evasion of taxes and duties but in practice it includes offences such as fraud, forgery, cheating, kidnapping and even copyright and trademark infringements irrespective of the fact that there is slight money changing hands.⁴⁰ This grants the ED an unrestricted authority to apply the harsh provisions of PMLA on anyone it deems fit, without clear limitations. Currently, ED is conducting money laundering investigations in a way that exposes ordinary citizens to arbitrary searches, seizures, and arrests at the discretion of executive overreach.

⁴⁰‘Narrow view: On the Supreme Court’s PMLA verdict’ (*The Hindu*, 29 July 2022) <<https://www.thehindu.com/opinion/editorial/narrow-view-the-hindu-editorial-on-the-supreme-courts-verdict-on-the-prevention-of-money-laundering-act/article65695526.ece>> accessed 7 August 2024.

On the other hand, the bail provisions of the PMLA impose such strict conditions, that it puts a reverse burden of proof on the accused to prove his innocence. The statements recorded by the officials under Section 50 of the PMLA are admissible in court unlike the statements given to the police and the ED authorities are not even required to share the copy of the ECIR (as is required in the FIR) with the necessary persons.⁴¹ PMLA hence, gives one agency outrageous power to harass any section of the Indian populace with the help of its provisions, which it uses to turn the entire criminal jurisprudence of this country on its head, simply because the officials of the agency considered filing a complaint against an individual. Today out of the 5000 cases being investigated by the ED, only 40 have seen convictions.⁴² This data further highlights that PMLA is being used to badger any individual, despite the seriousness of crime, simply on the basis of one complaint.

The same was true in this case also. The ED filed a complaint with the Special Court against the accused, and sought to use summons and warrants to take the individual into custody, despite the fact that he had been cooperative throughout the investigation and the ED had never required his custody before filing the complaint.

This form of harassment and misconstrued practice of using summons as a mode to take the accused into custody under the Special law, even though the only objective of summons and warrants is to make sure that the accused is present before the court when required during the trial, was correctly hammered on its head by the SC in this case. This case is

⁴¹Ashish Tripathi, 'ECIR not FIR, presenting copy to accused is not mandatory: Supreme Court' (*Deccan Herald*, 27 July 2022) <<https://www.deccanherald.com/india/ecir-not-fir-presenting-copy-to-accused-is-not-mandatory-supreme-court-1130696.html>> accessed 8 January 2025.

⁴²Debaran Roy, 'Supreme Court highlights low conviction rate under PMLA, questions ED on quality of prosecution' (*Bar & Bench*, 07 Aug 2024) <<https://www.barandbench.com/news/supreme-court-highlights-low-conviction-rate-pmla-questions-ed-quality-prosecution>> accessed 7 August 2024.

thus, a welcome precedent in the spew of an authoritarian acceptance of this special law being openly used to harass different individuals. This case, will hopefully, serve as a means for the lower courts to show some fortitude before authorities like ED and not bow down to their wishes of taking an individual into custody as and how they want, until required by valid reason.