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Laws Relating to Bail under UAPA & PMLA: A Jurisprudential Analysis

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ABSTRACT

The offences committed under UAPA and PMLA are of very serious nature. Offences under UAPA are relating to unlawful activities and terrorist activities which are serious threat to the peace of the society as well as to the sovereignty, unity & integrity of the Bharat. The offences under PMLA are not only threat to the national economy but also causes menace to international economy. Both UAPA and PMLA were enacted to fulfil our commitment made at international forums. The provisions under UAPA and PMLA are being made more stringent by keeping in mind the seriousness, enormity and gravity of the offences as well as the consequential loss to national and international security to the life, liberty and property of human kind. In this research paper while examining certain provisions of both UAPA and PMLA, there would be special emphasis on the laws relating to the bail under UAPA and PMLA.

Keywords: UAPA, PMLA, Unlawful Activities, Money Laundering, Bail.

I. INTRODUCTION

Since the very inception of human existence, any sort of the criminal activities has always been taken as bad for a civilized society. Such activities are either committed in organized manner or otherwise, causes serious breach of the peace and tranquillity of the society. The Criminal laws are made for prevention and control of traditional as well as socio-economic offences. Certain unlawful activities committed by either individuals or by associations and for certain terrorist activities are specifically dealt with, under the Unlawful Activities (Prevention) Act, 1967 (hereinafter will be referred as UAPA). The offences regarding money laundering and the confiscation of the properties derived from such offences have been dealt under the Prevention of Money-Laundering Act, 2002 (hereinafter will be referred as PMLA). The statutory provisions under UAPA and PMLA have been elaborately dealt with the commission of offences regarding unlawful activities as well as terrorist act and money laundering respectively. Whosoever commits any offences under UAPA and PMLA shall be booked under the respective laws and criminal case would be initiated. The investigation process would be initiated by the

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competent officer under law who is empowered to arrest any person in the course of proceedings under both UAPA and PMLA. The offences under both laws are cognizable and non-bailable. The purpose of arrest is to secure the presence of accused at the time of trial and to ensure that if he would be found guilty, would be available for receiving sentence. There is golden principle of criminal jurisprudence that every person shall be presumed to be innocent till his guilt has been proved beyond reasonable ground. There is fundamental right to life or personal liberty of every person and no person shall be deprived his life or personal liberty except according to the procedure established under law.² When the person arrested is accused for commission of offences under UAPA and PMLA, as both are serious offence, and also likely be convicted and punished, he would be prone to abscond in order to avoid trial and possible sentence after conviction. In such circumstances, the bail of such persons may not be justified because there would be destruction of evidence and witnesses may be tampered. But in those cases, where there are different circumstances than as mentioned above, it would be unjust to deny bail. The basic law regarding bail has been dealt under the Criminal Procedure Code, 1973 (hereinafter will be referred as Code) but at the same time special laws are also provided under both UAPA and PMLA.

II. UNLAWFUL ACTIVITIES (PREVENTION) ACT, 1967- UAPA

The unlawful activity means by any action or incitement, whether by committing an act or by words, of any individual or association, which is either intended or supported, any claim relating to cession/secession of the part of territory of Bharat from the Union; or disclaimed, questioned, disrupted the sovereignty and territorial integrity of Bharat either intentionally or by causing to do so; or causes or intended to cause disaffection against Bharat.³ Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security, economic security, or sovereignty of Bharat or with intent to strike terror or likely to strike terror in the people of Bharat or in any foreign country; causing death or injuries to any person or persons; or loss or destruction of or damage to property; or disruption of any essential services or supplies; or damage to the monetary stability by way of production or smuggling of counterfeit Indian currency or coins; or by way of causing damages or destruction to property belonging to defence establishment of the Bharat or of the Government of the Bharat; by using bombs, dynamite and other explosive substances of like nature and by a of using weapons or poisonous or noxious gases and other means of like nature; or by use of or show of criminal force causes or attempt to cause death of public functionary as may be notified by the Government; or detains, kidnap

² The Constitution of India: Article 21.

³ The Unlawful Activities (Prevention) Act, 1967; Section-2.

or abducts any person in order to compel any Government to do or abstain from doing any act; are said to commit a terrorist act.⁴ Whoever raises or collects fund for the purpose of terrorist act shall be liable to be punished with imprisonment which shall not be less than five years and may be extended to imprisonment for life.

Unlawful activities and terrorist acts are cognizable offence within the meaning of the Criminal Procedure code, 1973 (herein after will be referred as Code).⁵ The officers competent under UAPA are empowered to arrest any person who are accused of offence under UAPA and all the provisions of the Code regarding arrest, searches and seizure shall apply, insofar as not inconsistent with the provisions of the UAPA. The arrested person may apply for bail as per provisions under the Code as well as the UAPA.

III. JAIL IS RULE AND BAIL IS EXCEPTION UNDER UAPA

In cases relating to UAPA,⁶ general provisions of the bail under section 439 of the Code shall be subject to the sub-section 5 of the section 43 (D) of the UAPA. Accordingly, in such offences the public prosecutors shall be given an opportunity to be heard while considering the bail application of the accused. The accused person shall not be released on bail in such proceedings when, after perusing the case diary or police report regarding offences under chapter IV and VI of the UAPA, the Court is of opinion that there is reasonable ground for believing that there is *prima facie* true case against the accused person. It is important to note that no such provisions regarding bail may be found in any other criminal statute.⁷ ‘*Bail is rule, jail is exception*’ has been established general principle of the bail jurisprudence in ordinary penal offences but the same principle is not applicable in the cases related to UAPA, as the words of the statute itself suggestive under the proviso to the sub-section (5) of the section 43D of the UAPA “shall *not be released*” against “*may be released*” under sub-section (1) of the section 437 of the Code, which substantiate the intention of the legislature that ‘*Jail is rule, bail is exception.*’⁸ The Courts dealing with bail applications under UAPA have to handle very sensitive task in the sense that the Courts will have to merely justify the rejection of the bail on *prima facie* standard of scrutiny and such justification shall be substantiated on the basis of the materials found in the case diary and police report submitted before the Court.⁹ Therefore, the Courts shall reject the bail applications under UAPA as a matter of rule, by fulfilling the statutory requirement of giving the public prosecutor an opportunity to be heard and on the basis of reasonable ground

⁴ Id. Section-15.

⁵ Id. Section 43-A.

⁶ The Offences under Chapter IV and VI of the UAPA.

⁷ *Gurwinder Singh Vs. State of Punjab & Another* 2024 INSC 92.

⁸ Id. At para 18.

⁹ Id. At para 19.

of believing that the accusation are prima facie true after perusing the case diary or police report submitted in the Court. If the aforesaid rejection criteria are not satisfied then the Court would apply ‘*tripod test*’ for deciding bail applications as per general provisions under the Code, as provided under sub-section (6) of the section 43D of the UAPA as an additional restrictions other than prescribed under the Code.¹⁰ The tripod test are ‘*flight risk*’ i.e. the possibility of accused person’s absconding; ‘*influencing witnesses*’ i.e. the possibility of the accused person’s attempt to dissuade the witnesses against deposing the true facts before the Court during trial; and ‘*tampering with evidence*’ i.e. the possibility of the accused persons’ attempt to tamper important evidences relating to the case.¹¹

The *prima facie* true case against accused person means there must be complicity of the accused person in commission of the offence supported by good and sufficient evidences.¹² There is no need of elaborate examination of the evidences while considering bail application of the accused person under UAPA.¹³ Here at this stage the Court is expected to see high degree of probabilities that the accused person may have committed the alleged offence.¹⁴ The application of the section 43D of the UAPA shall commence from registration of the FIR and until conclusion of the trial of the accused person.¹⁵ The admissibility of the documents submitted by the prosecution, at the time of consideration of the bail application of the accused person, shall not be questioned.¹⁶ The contents of the documents shall be presumed to be true.¹⁷ There was an attempt to strike balance between the mandatory provision regarding rejection of the bail under section 43D of the UAPA and other rights of the accused in while determining the *prima facie* true test rule.¹⁸ The Court directed that in order to satisfy the rule of *prima facie* true test the following important things must be considered. (a) whether accused has certain association with the prohibited organizations under UAPA? (b) whether there is recovery of explosive materials in possession of the accused person? (c) whether there is any eye witness or any such evidences against the accused person regarding presence of the accused at the crime occurrence site? (d) whether the arrest of the accused was made on the basis of information received soon after the occurrence of the alleged crime?

¹⁰ Id. At para 20.

¹¹ Ibid.

¹² Zahoor Ali Watali case (2019) 5 SCC 1 (at para- 23).

¹³ Id. (at para-24).

¹⁴ Id.

¹⁵ Id. (at para-26).

¹⁶ Id. (at para-27).

¹⁷ Id.

¹⁸ Devender Gupta v. NIA 2014 (2) ALD Cri. 251.

IV. PREVENTION OF MONEY-LAUNDRING ACT, 2002- PMLA

The PMLA has international ramifications as the offence of money-laundering not only affects the municipal economy where the predicate offence is committed, but also has its impact over international economy where the proceeds of the predicate crime may be channelized for the purpose of laundering. The offence of money-laundering destroys the fabric of national economy just like termites to wooden structure. The enactment of the PMLA was fulfilment of international commitment for dealing sternly with the menace of money laundering. The PMLA came into force on 1st July 2005. Any person shall be guilty of offence of money laundering, from criminal activity who either directly or indirectly attempts to indulge or knowingly assist or being a party or is actually involved in any process or activity connected with the proceeds of predicate crime and projecting such proceeds as untainted property.¹⁹ The person includes head of the political party registered by Election Commission of India and shall be deemed to be guilty of the commission of the offences under PMLA .²⁰ The property derived or obtained either directly or indirectly, by any person from criminal activities relating to certain predicate offences under certain specified sections of the Indian Penal Code(IPC); the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS); the Arms Act, 1959 (Arms Act); the Wild life (Protection) Act, 1972 (Wild Life Act); the Immoral Traffic (Prevention) Act, 1956 (Immoral Traffic Act) and the Prevention of Corruption Act, 1988 (PC Act) are said to be the proceeds of crime.²¹ The proceeds of the crime derived from the aforesaid criminal activities constitutes the core element of the crime under the Act.²² The property derived or obtained includes movable or immovable, tangible or intangible, legal instruments such as deeds pertaining to title etc. which may be located anywhere either in within Bharat or beyond this.²³ The value of crime proceeds under certain specified sections of the IPC, NDPS, Arms Act, Wild Life Act, Immoral Traffic Act and PC Act should be thirty lakh or more. The offence of money laundering is an independent offence regarding the process or activity relating to the proceeds of the crime.²⁴ There are three stages relating to money laundering; firstly- Placement which means movement of the funds associated with crime. Secondly- Layering i.e. disguising money trail and Thirdly- Integration of such criminal proceeds into legitimate sources.²⁵ The offence of money laundering has been taken as very serious crime all over the world, therefore, the provisions of

¹⁹ The Prevention of Money-Laundering Act, 2002; Section-3.

²⁰ W.P. (CRL) 985/2024 CR. M.A. 9427/2024; 2024: DHC:2851.

²¹ Id. Section 2 (u).

²² *Vijay Madanlal Choudhary v. Union of India* 2022 SCC Online SC 929.

²³ Id. Section 2 (v).

²⁴ Supra at Note 21.

²⁵ Id at Para 44.

the PMLA have been made very stringent in a view to combat such global menace.²⁶ The offences under PMLA are cognizable and non-bailable.²⁷ Therefore, the competent officers under the PMLA have power to arrest by an order, to any person on the basis of material in his possession and having reason to believe that such person has been guilty of any offence under PMLA.²⁸ Reason to believe implies sufficient cause to believe.²⁹ Such reason must be recorded in writing by the concerned officer.³⁰ The arrestee shall have right to be informed of the ground of arrest.³¹ Every arrested person be taken to Judicial Magistrate, having jurisdiction over such offence, within twenty-four hours.³² After arrest the concerned officer shall forward a copy of the arrest order along with material in his possession on the basis of which he had reason to believe in a sealed cover, to the adjudicating authority.³³ The burden of proof regarding charge lies with accused person as there is presumption of law that accused might have committed an offence under section 3 of the PMLA.³⁴ Section 45 (1A) as inserted by an amendment in the year 2005, provides that no police officer shall investigate the offence committed under PMLA unless specifically authorised by the Central Government. The trial of offences shall be conducted by the special Courts constituted for particular area.³⁵ Such Court shall take cognisance of the offence committed under PMLA, upon complaint made by the concerned authorities.³⁶

The Director and other authorities under PMLA shall have power to summon any person, either for production of any records or for giving any evidence, during the course of the investigation.³⁷ The person so summoned, shall be bound to attend and state truth upon any subject and has obligation to produce any document which would be asked for the production.³⁸ All such proceeding shall be judicial proceeding under sections 193 and 228 of the Indian Penal Code.³⁹

V. PROVISIONS REGARDING BAIL UNDER PMLA

The provisions regarding bail relating to the offences under PMLA are provided under sections

²⁶ Supra at Note 21.

²⁷ PMLA Explanation to Section 45 (2).

²⁸ Id. Section 19 (1).

²⁹ Indian Penal Code; Section 26.

³⁰ *Pankaj Bansal v. Union of India* 2023INSC866.

³¹ Id.

³² Id.

³³ Supra at Note 21.

³⁴ PMLA Section- 24.

³⁵ Id. Section- 44.

³⁶ Id.

³⁷ PMLA Section 50 (2).

³⁸ Id. Section 50 (3).

³⁹ Id. Section 50 (4).

44 (2), 45 and 46 of the Act. Section 44 (2) provides that the High Court shall have power to grant bail under section 439 of the Code and while exercising such power, the Court may impose any conditions which may it think necessary to impose, similar to conditions which may be imposed under section 437 (3) of the Code.

Section 45 (1) of the PMLA provides that no person, who is accused of the offence under section 4 of the Act shall be released on bail unless the public prosecutor has been given an opportunity to be heard for opposing bail application. If the public prosecutor opposes the bail application the Court shall not release on bail or on his bond unless there is full satisfaction of the Court that there are reasonable grounds for believing that the accused person is not guilty of the said offence and also the Court shall satisfy herself that there is not likelihood that the accused would commit any offence while on the bail. There are certain exceptions to this rule that an accused person, who are under sixteen years, or is a woman, or is sick or infirm person, or who is accused of offence of money laundering of less than one crore rupees, may be released on bail subject to judicial discretion of the Special Court. The aforesaid limitations regarding granting of bail shall be in addition to the limitations under the Code.⁴⁰ The twin conditions under section 45 of the PLA are that there should be reasonable grounds for believing that accused is no way guilty of the offence under the Act as well as that after released on the bail, it is not likely that he would commit such offences.⁴¹ The conditions specified under section 45 of the PMLA are mandatory and which may be substantiated by the provisions under sections 65 and 71 of the Act.⁴² Section 65 of the PMLA provides that the provisions of the Code shall apply so far as such provisions are not inconsistent with the PMLA and section 71 provides that provisions of the PMLA shall override the provisions of the Code or any other law for the time being in force.⁴³ The Court in this case further held that the conditions specified regarding bail under section 45 shall be complied with even regarding the applications relating to bail under section 439 of the Code.⁴⁴

The essence of the provisions regarding bail under the PMLA is that it is not necessary that very meticulous weighing of the evidences should be done by the Court for granting bail to the accused rather broad probabilities would be sufficient which shall be done after just application of mind of the Court.⁴⁵

⁴⁰ PMLA Section 45 (2).

⁴¹ Supra at Note 21.

⁴² *Gautam Kundu v. Directorate of Enforcement (Prevention of Money Laundering Act), Government of India* (2015) 16 SCC 1.

⁴³ Id.

⁴⁴ Id.

⁴⁵ *Manish Sisodia v. Central Bureau of Investigation* 2023 INSC 956.

VI. CONCLUSION

The offences under UAPA and PMLA are very aggravated form of offence. Such offences have national as well as international ramifications. The laws relating to such offences have been drafted so stringently, that the offender may not be able to escape out of the clutches of the law enforcing authorities under both UAPA and PMLA. The laws regarding bail under both of the enactments have been made harsh but subject to provisions of the Constitution of Bharat. The constitutional validity of the provisions regarding bail under both UAPA and PMLA are upheld by the Supreme Court of India in several decided cases. Such stringent provisions regarding bail are very much desirable in order to cope with very dangerous offenders who are threat to the peace and security of humanity.
