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## REIMAGINING BAIL JURISPRUDENCE UNDER THE PREVENTION OF MONEY LAUNDERING ACT: CONSTITUTIONAL CHALLENGES AND THE REVERSE BURDEN PARADIGM

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### I. ABSTRACT

The Prevention of Money Laundering Act, 2002 (PMLA) was introduced to prevent complicated financial crimes and to make sure that money gained through illegal activities does not go beyond the law's reach. Section 45, which is a crucial element of its enforcement, imposes strict conditions for granting bail. It is also known as the 'twin conditions.' It effectively shifts the burden of proof onto the accused, meaning the accused has to prove their innocence through evidence and assure the court that if they are released, they won't be engaged in any additional offence. Although the Supreme Court in the Vijay Madanlal Choudhary case confirmed that the conditions in question are constitutional and reasonable when it comes to economic offences. Still, there are ongoing worries about how this provision might impact the rights to a fair trial and the principles of procedural equity. It has led to a significant constitutional debate regarding personal liberty under Article 21 of the Indian Constitution. The research methodology includes a detailed analysis of statutory texts, interpretation of parliamentary discussions, and study of landmark judgements from both Indian and comparative jurisdictions. We place special emphasis on the Supreme Court's decision in Nikesh Tarachand Shah vs. Union of India and Vijay Madanlal Choudhary vs. Union of India, along with subsequent rulings that demonstrate the judiciary's progressive view regarding the reverse burden. It appears that the courts have been shifting between strict enforcement and partial constitutional arrangement. However, the larger issue of disproportionate pre-trial custody remains unaddressed. Although the reverse burden

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was intended to reduce money laundering, its rigid application without proper judicial oversight seems to infringe on fair trial. This article undertakes a doctrinal and jurisprudential analysis of Section 45, uncovering its legislative amendments, judicial responses, and evaluating its alignment with established constitutional norms.

## II. KEYWORDS

PMLA Section 45, Bail, Presumption of Innocence, Reverse Burden, Twin Conditions, Article 21 and Personal Liberty, Constitutional Law, Article 14, Criminal Procedure, Fair Trial Rights, White-Collar Crime, Pre-trial Detention, Economic Offences.

## III. INTRODUCTION

Bail is an essential element of the criminal justice system. It serves as a fundamental protection against the unfair deprivation of personal liberty. In India, the judiciary has consistently emphasized that ‘bail is the rule and jail is the exception.’ This principle is enshrined in Article 21 of the Constitution, which guarantees the right to life and personal liberty. However, this idea has been compromised over time, especially with the rise of special laws which are designed to combat serious offenses such as terrorism, drug trafficking, and white-collar crime. One significant law is the Prevention of Money Laundering Act, 2002 (PMLA), which was established to combat the laundering of money from unlawful activities. Initially, it was set up to track and confiscate proceeds of crime, but the PMLA Act has been significantly enhanced through amendments, particularly in 2009 and 2012, which introduced stringent procedural rules. The Finance Act of 2018 also made extensive amendments, including the revalidation of Section 45, which regulates bail for PMLA-related offences.

Section 45(1) of the PMLA states, *“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 the Public Prosecutor has been given an opportunity to oppose the application for such release; and 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.”<sup>3</sup>*

While the ‘twin conditions’ were once declared unconstitutional in *Nikesh Tarachand Shah*, the Supreme Court has since reversed that view in *Vijay Madanlal*, holding that the reverse burden under Section 45 is justified given the nature of the economic offenses. As a result, this has led to a situation where continued detention is predictable, particularly at the pre-charge-sheet phase, where evidence is often either sealed or incomplete. Recently, the court’s decision in *V. Senthil Balaji vs. State*<sup>4</sup> and *Pankaj Kumar Tiwari vs. Directorate of Enforcement*<sup>5</sup> highlighted the evolving stance of the judiciary.

#### IV. THE CONSTITUTIONAL CONFLICT: LIBERTY VS. STATE INTEREST

The presumption of innocence is the keystone of criminal law, acting as a vital safeguard for personal liberty. However, Section 45 of PMLA introduces a reverse burden of proof at the bail stage through two important stipulations. Firstly, the public prosecutor must be allowed to oppose the bail. Secondly, the courts must be convinced that there are reasonable grounds to believe that the accused is innocent and is unlikely to commit any further offences if released on bail. This shifts the burden from the prosecution to the defense before even the trial starts, before any evidence is presented, and often even when the case details are disclosed.

In the landmark case of *Nikesh Tarachand Shah vs. Union of India*<sup>6</sup>, the Supreme Court found certain conditions unconstitutional as they breached Article 14 (equality before law) and Article 21 (protection of life and personal liberty). The court ruled that applying these conditions uniformly across all scheduled offences, without any rational classification or procedural safeguards, made the provision arbitrary and clearly unjust. In response, Parliament amended Section 45 with the Finance Act of 2018, focusing on the twin conditions specifically on offenses under the PMLA instead of a broader

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<sup>3</sup> Prevention of Money Laundering Act, 2002, Section 45(1).

<sup>4</sup> *V. Senthil Balaji vs. State*, (2024) 3 SCC 51

<sup>5</sup> *Pankaj Kumar Tiwari vs. Directorate of Enforcement* (2024) SCC OnLine SC 2270

<sup>6</sup> *Nikesh Tarachand Shah v. Union of India*, (2018) 11 SCC 1

schedule. This amendment aimed to resolve the issue identified in the Nikesh Tarachand Shah case by narrowing the scope of the reverse burden.

The important precedent we need to focus on is the Supreme Court's decision in the *Vijay Madanlal Choudhary vs. Union of India*<sup>7</sup>, which marked a major turning point in judicial reasoning. A three-judge bench endorsed the amended Section 45, affirming that the two conditions it includes are sensible and not overly harsh, especially considering the 'serious threat' that money laundering poses to both our financial system and national security. The court highlighted that economic crimes form a distinct category that requires exceptional handling, thereby dismissing the challenge based on Articles 14 and 21. In the Vijay Madanlal ruling, the court brought to light an important principle that while the presumption of innocence is fundamental, it can have exceptions in specific laws as long as those exceptions are reasonable.

Since 2022, this viewpoint marks a clear departure from the liberal and rights-oriented perspective of the Nikesh Tarachand Shah judgement. The role of the judiciary has transitioned from actively examining constitutional matters to a more restrained acceptance of legislative authority in the regulation of economic crimes. Critics claim that this defense has come at the expense of the proportionality doctrine and individual rights, particularly during pre-trial stages where procedural safeguards are at their most fragile state. They assert that the reverse burden presents a daunting challenge for securing bail, especially when evidence is withheld under confidentiality pretenses. Although, the paper's goal is to reassess the doctrinal and procedural impact of Section 45 post-Vijay Madanlal, it also brings to the forefront some unresolved issues about the balance between legislative convenience and constitutional integrity.

## V. REVERSE BURDEN AND PROCEDURAL FAIRNESS

Reverse burden clauses have been a part of Indian criminal law for a while now. Statutes such as the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act), the

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<sup>7</sup> *Vijay Madanlal Choudhary v. Union of India*, (2022) 3 SCC 1

Unlawful Activities (Prevention) Act, 1967 (UAPA), and the Protection of Children from Sexual Offences Act, 2012 (POCSO) feature similar presumptive provisions. However, the judiciary has made it clear that these clauses should be interpreted with caution and not infringe the fundamental rights of the accused. In the case of *Noor Aga vs. State of Punjab*<sup>8</sup>, it was held that under the NDPS Act, the prosecution must establish foundational facts beyond a reasonable doubt before any statutory presumption can arise. This reflects a balanced approach, acknowledging the unique aspects of certain crimes while ensuring that procedural fairness is maintained.

In comparison, the PMLA framework takes a much different approach from the usual norms of criminal procedure. Section 45 imposes a reverse burden at the bail stage, which means that the accused must prove 'twin conditions' before the trial that they are innocent of the offence and they are not likely to commit any further offences if released on bail. This situation is further complicated by the fact that, unlike in standard criminal law, where the First Information Report (FIR) must be shared with the accused as per the CrPC, the Enforcement Directorate isn't legally required to share the Enforcement Case Information Report (ECIR). This was upheld by the Supreme Court in the case of *Vijay Madanlal Choudhary*, stating that the ECIR is an internal document and does not hold the same status as FIR. The court also distinguished PMLA from statutes like the NDPS Act, asserting that money laundering poses a significant threat to national economic stability and needs a distinct legislative approach. The majority concluded that the twin conditions and the lack of ECIR disclosure are constitutionally valid, emphasizing that economic offenses are a 'class apart' and should have higher bail thresholds.

The practice of using sealed covers, which has been endorsed in multiple ED prosecutions, significantly undermines transparency and accountability. It creates an imbalanced and speculative bail process, putting the accused in a difficult position to defend against allegations that aren't fully disclosed to them. Although the *Vijay Madanlal* case backs this system, it opens up larger questions about whether these

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<sup>8</sup> *Noor Aga vs. State of Punjab*, (2008) 16 SCC 417

procedural shortcuts align with the evolving standards of fair trial rights, due process, and proportionality as outlined in Articles 14 and 21. While Vijay Madanlal's ruling is indeed a binding precedent, that doesn't mean to stop exploring more profound constitutional concerns that arise from the PMLA's reverse burden framework. This becomes even more significant when we look at India's obligations under Article 9 of the International Covenant on Civil and Political Rights (ICCPR) and the judiciary's role in enhancing personal liberty protections.

## VI. JUDICIAL DISCRETION AND INCONSISTENT APPLICATION

Since the Supreme Court confirmed the twin conditions in the case of Vijay Madanlal Choudhary vs. Union of India, the High Courts and Trial Courts have taken quite different paths in interpreting and applying Section 45 of the PMLA. While some benches are leaning towards a broader interpretation that considers individual rights, others are still applying the twin conditions in a rigid manner. This often leads to pre-trial detention, even when the evidence might not warrant it. For instance, in the case of *Naresh Goyal vs. Directorate of Enforcement*<sup>9</sup>, the Bombay High Court granted bail, pointing out significant delays, a lack of clear flight risk, and some procedural errors. The court remarked that mere mention of a serious economic offence doesn't negate the constitutional rights under Article 21, especially when the evidence on record doesn't convincingly establish a strong prima facie case. Similarly, in the case of *Sameer Bhujbal vs. ED*<sup>10</sup>, the Bombay High Court granted bail, following the earlier decision to grant bail to his uncle, Chhagan Bhujbal. The court considered the lengthy time in custody, the delays in the trial process, and the absence of any significant new evidence. These judgments indicate a growing recognition within judiciary that Section 45 needs to be interpreted in a way that aligns with the evolving concepts of personal freedom and proportionality.

However, not all courts have adopted this approach. In numerous cases, especially during trials, judges often refuse bail based on rigid criteria. They insist that unless the

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<sup>9</sup> *Naresh Goyal v. Directorate of Enforcement*, 2023 SCC OnLine Bom 2121

<sup>10</sup> *Sameer Bhujbal v. Directorate of Enforcement*, 2018 SCC OnLine Bom 2438

accused can prove their innocence, something that is nearly impossible without access to investigation records, they don't qualify for interim bail. This inconsistency reveals a crisis in legal clarity and results in random outcomes for individuals facing similar charges. The inconsistency in interpretive standards can have both practical and unsettling consequences. When Section 45 is applied too rigidly and without clear procedural guidelines, it can lead to selective enforcement and coercive prosecution. There are concerns that the Enforcement Directorate, taking advantage of vague procedures and reverse burden standards, may resort to prolonged detention as a means of exerting pressure, particularly against political opponents, corporate dissenters, or prominent figures.

In recent years, the Supreme Court has been working to reshape bail laws in the realm of criminal justice, particularly through decisions like *Satendar Kumar Antil vs. CBI*<sup>11</sup> and *Anand Daga vs. Union of India*<sup>12</sup>. These judgments make it clear that a person's freedom shouldn't be based on what's convenient for the prosecution. Even though these cases do not specifically relate to PMLA, they reflect a broader shift in judicial thinking that liberty shouldn't be compromised for the sake of technicalities or inflated state concerns.

More recently, in the case of *Manish Sisodia vs. Directorate of Enforcement*<sup>13</sup>, the Supreme Court took a careful yet significant step towards rebalancing bail jurisprudence under special statutes. Although bail was ultimately denied, the court highlighted that pre-trial detention should be considered alongside factors like proportionality, delays, and the presumption of innocence. This judgement reiterated that the seriousness of the offence is important, but it alone cannot justify indefinite detention, especially if the trial is unlikely to start or finish anytime soon. The court also pointed out that Article 21 should remain a guiding principle, even in cases involving strict laws like PMLA or the Prevention of Corruption Act. This landscape illustrates not just procedural differences but a deeper conflict between the formalities of law and the essence of fairness. Unless

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<sup>11</sup> *Satendar Kumar Antil vs. CBI*, (2022) 10 SCC 51

<sup>12</sup> *Anand Daga vs. Union of India*, (2022) 7 SCC 389

<sup>13</sup> *Manish Sisodia vs. Directorate of Enforcement*, (2023) 12 SCC 764



the judiciary provides clear guidelines for how Section 45 should be applied in accordance with Article 21, we risk the law becoming a blunt instrument of punishment without evidence, which contradicts the idea of a liberal constitutional democracy.

## VII. COMPARATIVE JURISDICTIONAL PERSPECTIVE

While Vijay Madanlal Choudhary case has upheld India's unique approach to bail in economic offences, a comparative view offers insights possible future recalibration in favor of proportionality and procedural safeguards.

In countries that embrace liberal democracy, such as the United Kingdom, Canada, and the United States, the approach to bail for economic offenses prioritizes fairness and proportionality instead of presuming guilt. The onus is on the prosecution to justify pre-trial detention, while courts evaluate risks based on factors like flight risk, evidence tampering, and public safety, rather than merely the nature of the charge.

Under the Bail Act 1976<sup>14</sup> in the UK, the general rule is that bail should be granted unless there are specific reasons to deny it. Economic offenses don't particularly lead to bail denial unless there are compelling reasons, such as the risk of someone fleeing or tampering with the justice system. The case of *R (O) vs. Crown Court at Harrow*<sup>15</sup> clarified that bail decisions must comply with Article 5 of the European Convention on Human Rights (ECHR), which means that taking away someone's freedom needs to be well justified. The Human Rights Act 1998<sup>16</sup> brings the ECHR into UK law, shaping how bail is interpreted and applied.

Section 11(e) of the Canadian Charter of Rights and Freedoms<sup>17</sup> guarantees the right "*not to be denied reasonable bail without just cause*". The Supreme Court of Canada reinforced this in *R vs. Antic*<sup>18</sup>, stating that release should be standard, with conditions that are mainly restrictive. The 'ladder principle' directs the court to begin with the least severe

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<sup>14</sup> Bail Act 1976, UK <https://www.legislation.gov.uk/ukpga/1976/63>

<sup>15</sup> *R (O) v Crown Court at Harrow* [2006] EWCA Civ 182

<sup>16</sup> Human Rights Act 1998 (UK) <https://www.legislation.gov.uk/ukpga/1998/42/contents>

<sup>17</sup> Canadian Charter of Rights and Freedoms, s 11(e)

<sup>18</sup> *R v Antic*, 2017 SCC 27 (CanLII)

form of release. Even in cases involving white-collar crimes, the Crown has to prove why an individual should be detained according to Section 515 of the Criminal Code<sup>19</sup>.

In the United States, the Eighteenth Amendment Act prohibited excessive bail. The Bail Reform Act of 1984<sup>20</sup> outlines how federal pre-trial release works. In the case of *United States v. Salerno*, the U.S. Supreme Court upheld the concept of preventive detention, but it made it clear that this must be done with strict due process. They pointed out that pre-trial detention should be justified by 'clear and convincing evidence' or risk, especially in cases involving economic crimes. These models reveal that reverse burden provisions are quite exceptional and seldom used, especially in economic offences, unless they're linked to national security or terrorism.

## **IX. REFORM FRAMEWORK: TOWARDS A CONSTITUTIONALLY VIABLE BAIL MODEL**

In the landmark case of *Vijay Madanlal Choudhary vs. Union of India*, the court upheld the twin conditions outlined in Section 45 of the PMLA. Any suggested reforms will have to work within the framework established by this precedent. This decision confirmed the constitutional validity of the reverse burden and limited the court's discretion in granting bail under the Act. Therefore, reform proposals should focus on adjusting the existing framework rather than completely dismantling it.

Firstly, instead of questioning the core validity of Section 45, reforms ought to concentrate on aligning the PMLA with Sections 437 and 439 of the CrPC (now Sections 480 and 439 BNSS). This is particularly relevant in cases where investigations are delayed, insufficient recovery, or pre-trial detention is disproportionate. Judicial discretion should be informed by a structured framework rather than being entirely restricted.

Secondly, learning from comparative models can provide useful direction. For example, the UK Proceeds of Crime Act, 2002<sup>21</sup> allows for a reversal of the burden of proof in

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<sup>19</sup> Criminal Code, RSC 1985, c. C-46 (Canada)

<sup>20</sup> Bail Reform Act of 1984, 18 U.S.C. § 3142 (US)

<sup>21</sup> UK Proceeds of Crime Act, 2002, <https://www.legislation.gov.uk/ukpga/2002/29/contents>

certain cases, but it also requires a ‘proportionality assessment’ under the Human Rights Act. This ensures that any detention decision is in compliance with rights. Similarly, Canada’s Criminal Code (Section 515)<sup>22</sup> retains reverse onus provisions for certain offences, but it requires courts to consider the least restrictive options available. These provisions do not undermine the state’s enforcement powers; rather, they ensure that personal liberty is not compromised without justification.

Thirdly, when it comes to legislative reforms, we should consider the idea of implementing a statutory presumption for bail in certain situations. This could apply to elderly accused individuals, first-time offenders, or those who have been in pre-trial custody for an extended period without their trial beginning. If these conditional presumptions adhere to the ‘reasonable classification’ test under Article 14, they would be consistent with ruling in the Vijay Madanlal case.

Fourthly, courts must be legally allowed to establish a time-bound review mechanism. If a person is held in pre-trial detention for an extended time, like six or twelve months, without any charges being filed, they should be granted a bail hearing under more lenient conditions. This aligns with the ‘constitutional patience’ as outlined in *Hussainara Khatoon and Ors. vs. Home Secretary, State of Bihar*<sup>23</sup> and *Moti Ram and Ors. vs. State of Madhya Pradesh*<sup>24</sup>.

Lastly, enforcement agencies need to hold a higher standard of accountability, which means they should regularly update on pending investigations and have judicial oversight for arrests and remand orders. This will help ensure that strict bail laws are not misused as tools of coercion but are instead used for legitimate prosecution. These carefully calibrated reforms don’t aim to undermine the preventive and punitive goals of the PMLA. Instead, they’re designed to protect the Constitution’s fundamental promise that our liberty should never be the first thing to go in the fight against economic crime.

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<sup>22</sup> Canada Criminal Code (Section 515) <https://laws-lois.justice.gc.ca/eng/acts/C-46/section-515.html>

<sup>23</sup> *Hussainara Khatoon and Ors. vs. Home Secretary, State of Bihar*, (1980) 1 SCC 81

<sup>24</sup> *Moti Ram and Ors. vs. State of Madhya Pradesh*, (1978) 4 SCC 47

## **X. CONCLUSION**

The battle against money laundering is vital for keeping India's financial system intact. Illicit financial flows can threaten our national security, economic health, and global reputation. The Prevention of Money Laundering Act 2002 (PMLA) was introduced with this serious issue in mind, and its tough regulations highlight the seriousness of these offences. As we work to address these offenses, we must not forget the fundamental constitutional rights that support Indian criminal jurisprudence. While the Supreme Court has upheld Section 45's constitutionality, it remains important to critically assess its procedural impact to ensure it does not erode the core tenets of personal liberty and fair trial. It shifts the balance too far in favor of the state, jeopardizing the presumption of innocence, which is not just a procedural issue but a fundamental aspect of a fair trial.

The Supreme Court's verdict in the Nikesh Tarachand Shah case initially recognized the conflicting issues and found parts of Section 45 to be unconstitutional. However, the 2018 amendment and subsequent rulings, particularly the Vijay Madanlal Choudhary case, have reinforced a more stringent position. While these precedents are mandatory to follow, they also highlight a critical need for legislative reflection. Reimagining bail under PMLA isn't about diminishing the state's authority to prosecute economic crimes; it's about recalibrating the system to ensure that justice doesn't suffer as a result. A revised framework could restore a *prima facie* threshold instead of an absolute evidentiary burden on the accused. It could also introduce proportionality in assessing detention and enhance access to investigation materials, making bail hearings more effective.

Countries like the UK, Canada, and the US provide solid examples of how to handle financial crimes effectively. They manage to prosecute offenders without compromising constitutional protections. India does not have to imitate them exactly, but it can certainly learn from their experiences to bolster procedural fairness. Ultimately, the true strength of a democracy lies not only in punishing the guilty but also in safeguarding the rights of the innocent. Courts, as guardians of constitutional principles, should diligently review any reverse burden provisions to ensure justice is served.

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