Sanjay Agarwal vs The Directorate Of Enforcement on 13 April, 2022

Author: Bibek Chaudhuri

Bench: Bibek Chaudhuri

IN THE HIGH COURT AT CALCUTTA
CRIMINAL MISCELLANEOUS JURISDICTION
APPELLATE SIDE

The Hon'ble JUSTICE BIBEK CHAUDHURI

C.R.M (SB) 5 of 2022

Sanjay Agarwal
Vs.
The Directorate of Enforcement

For the Appellant: Mr. Milon Mukherjee, Sr. Adv.,
Ms. Sompurna Chatterjee, Adv.

For the Enforcement Directorate:
Mr. Y.J Dastoor, Ld. A.S.G.,
Mrs. Debjani Ray, Adv.

Heard on: 06 & 08 April, 2022.
Judgment on: 13 April, 2022.

BIBEK CHAUDHURI, J. : -

Background of the case

1. On the basis of source information that accused Sanjay Agarwal was trying to divert 54.096 kg gold jewellery meant for export from NSCBI airport, Kolkata to the domestic area after completion of all export formalities. The shipping bill and documents showing customs duty were filed in the name of Shri Ganesh Jewels, Hyderabad for export of the said gold jewellery to Dubai on 4th April, 2018 on hand carry basis through Preet Kumar Agarwal, son of the accused. On the date of journey to Dubai for exporting the said gold jewellery, Preet went to the office of the SDO, Customs at NSCBI airport being accompanied by a preventive officer of the Customs Department. The SDO, Customs verified the sealed consignments and handed over the same to Preet Kumar Agarwal at his office itself violating the procedure of handing over the sealed boxes at the security hold or boarding area itself. After receiving the said articles, he put it to a strolley bag and handed over the strolley bag to his father, the accused herein. Then Sanjay went straight to cargo complex, broke the seals of

customs affixed on the boxes and booked them with Indigo Airlines domestic cargo for delivery at Hyderabad airport. He then boarded a flight to Hyderabad using a boarding pass in the name of his son Preet. This was the precise way how huge quantity of gold ornaments, meant for export, was diverted to domestic market. Thereafter, Sanjay was intercepted by the officers of DRI.

2. The petitioner, his son, wife, since claimed to be divorced and other associates of the alleged offence of alleged smuggling were implicated for committing offences under Section 135 of the Customs Act, Section 12 of the Passport Act and also under the penal provision of Prevention of Money Laundering Act (PMLA, for short).

Petitioner's case

3. The petitioner purchased gold from authorised companies, like MMTC, STC etc submitting security deposit equivalent to the duty payable on the gold. The gold in question were legally purchased property of the petitioner and not smuggled goods as alleged by the opposite party. Only allegation against the petitioner is that he sold out gold jewelleries made of the said purchased gold in domestic market without exporting the same.

4. It is further submitted on behalf of the petitioner that in the complaint in Final Form, it was mentioned by DRI that about 500 kgs of gold were not exported by the petitioner for which duties imposed by the appropriate authorities and penalties have been paid. It is the allegation of DRI that the petitioner had smuggled gold amounting to 2700 kgs. Thereafter, the ED proceeded on the basis of finding made by the DRI and the claim that ED found conversion of gold meant for export to domestic marketing is false and concocted. Considering the fact that the petitioner has already paid duty and penalty for using the gold scheduled to be exported for domestic use, his detention under COFEPOSA was held to be illegal by the Delhi High Court. It was further held that the act of petitioner was not smuggling.

5. It is further submitted on behalf of the petitioner that when the petitioner was discharged form 'predicate offence' allegation under the PMLA is diluted. Moreover, the case under PMLA was filed on the basis of seizure of gold jewellery on 4th April, 2018. On the date of arrest, Section 45 of the PMLA was declared ultra vires by the Hon'ble Supreme Court. Therefore the amended provision of Section 45 shall not lie in this case.

6. It is further submitted on behalf of the petitioner that the Enforcement Directorate repeatedly tried to convince this Court that the petitioner illegally smuggled about 2700 kgs of gold which was supposed to be exported. The story was manufactured by the Enforcement Directorate to create a suspicion in the mind of the court about the volume of offence allegedly committed by the petitioner in association with others. On this regard, learned Counsel for the petitioner submits that as an established businessman dealing with gold the petitioner exported 2700 kgs gold jewellery in different consignments. The said amount of gold was not admitted to be exported in a single consignment.

7. It is urged by Mr. Milan Mukherjee, learned Senior Counsel on behalf of the petitioner that the incident for which the petitioner was booked under the PMLA Act took place on 4th April, 2018. Both the petitioner and his son were arrested on 6th April, 2018. The competent authority under the COFEPOSA Act passed an order of detention of the petitioner, his son and his brother on 1st June, 2018 for the allegation of smuggling goods, abetting the smuggling of goods or engaging in transporting or concealing or keeping smuggled good or dealing in smuggled in future. However, the said order of detention was revoked by the advisory board vide order dated 15th August, 2018. The petitioner and his brother challenged the detention order under COFEPOSA Act before the Delhi High Court in WP (CRL) 1971 of 2018 and Crl. M.A 12159 of 2018. Vide order dated 27th August, 2018 the detention order of the petitioner and his brother under the COFEPOSA Act was set aside by the High Court at Delhi. The ED preferred special leave petition before the Hon'ble Supreme Court being SLP No.6940 of 2019 which was also dismissed on 11th March, 2019. The petitioner was also enlarged on bail by the learned Chief Judicial Magistrate, North 24 Pgs in case No.C-562 of 2018 filed by DRI over the incident that allegedly took place on 4th April, 2018 vide order dated 28th August, 2018. When the petitioner was released on bail in almost all other proceedings instituted either by DRI or CBI, the ED registered a case in the month of March, 2021 under Section 3 of the PMLA Act which is punishable under Section 4 of the PMLA Act and arrested the petitioner's son under Section 19 of the PMLA Act. Mr. Mukherjee has also urged that the son of the petitioner was released on bail by a Coordinate Bench of this Court in CRM 3549 of 2021 vide order Dated 5th May, 2021 in ML Case No.1 of 2021 under Sections 3/4 of the PMLA Act. It is clearly observed by the Hon'ble Judge while disposing of CRM 3549 of 2021 that the petitioner was arrested on 6th April, 2018 and was released by an order dated 16th August, 2018 of the Advisory Board, Central Economic Intelligence Bureau in relation to offences under COFEPOSA. Second, the order of the CJM, North 24 Pgs, by which the petitioner was released on bail clearly records that the petitioner was in custody since 6th April, 2018 during which the prosecuting agency had sufficient opportunity for custodial interrogation of the petitioner. The order further records that since one of the co-accused was released on bail, further detention of the petitioner was not deemed to be necessary for the purpose of investigation. Third, the grounds on which the petitioner was arrested on 9th March, 2021 appear to be the same grounds for which the petitioner was arrested on 6th April, 2018. Fourth, the contention with regard to overarching importance of Section 45 of the PMLA has considerably been diluted by Nikesh Tarachand Shah vs. UOI & Ors.; (2018) 11 SCC 1. The relevant paragraphs of the report shows that the Supreme Court was of the view that Section 45 of the PMLA would have to be struck down as being manifestly arbitrary and providing a procedure which is not fair or just and would violate Articles 14 and 21 of the Constitution of India.

8. It is submitted by Mr. Mukherjee that the petitioner was arrested on 28th November, 2021 and thereafter he is in police custody. The prosecuting agency got sufficient time to interact with him thoroughly in judicial custody. Therefore, further detention of the petitioner is not warranted.

9. On the point of law, Mr. Mukherjee first relies on the decision of the Hon'ble Supreme Court in Nikesh Tarachand Shah vs. UOI & Ors.; (2018) 11 SCC 1.

10. The aforesaid decision was discussed, deliberated and referred time and again by different High Courts in cases under PMLA with reference to the importance and applicability of Section 45 of the

PMLA. Paragraph 46 and 47 are very relevant and quoted below:-

> 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.
>
> 47. The judgment in Kartar Singh v. State of Punjab, is an instance of a similar provision that was upheld only because it was necessary for the State to deal with terrorist activities which are a greater menace to modern society than any other.

It needs only to be mentioned that, unlike Section 45 of the present Act, Section 20(8) of TADA, which speaks of the same twin conditions to be applied to offences under TADA, would pass constitutional muster for the reasons stated in the aforesaid judgment. Ultimately, in paragraph 349 of the judgment, this Court upheld Section 20(8) of TADA in the following terms:

> "349. The conditions imposed under Section 20(8)(b), as rightly pointed out by the Additional Solicitor General, are in consonance with the conditions prescribed under clauses (i) and (ii) of sub-section (1) of Section 437 and clause (b) of sub-section (3) of that section. Similar to the conditions in clause (b) of sub- section (8), there are provisions in various other enactments -- such as Section 35(1) of Foreign Exchange Regulation Act and Section 104(1) of the Customs Act to the effect that any authorised or empowered officer under the respective Acts, if, has got reason to believe that any person in India or within the Indian customs waters has been guilty of an offence punishable under the respective Acts, may arrest such person. Therefore, the condition that "there are grounds for believing that he is not guilty of an offence", which condition in different form is incorporated in other Acts such as clause (i) of Section 437(1) of the Code and Section 35(1) of FERA and 104(1) of the Customs Act, cannot be said to be an unreasonable condition infringing the principle of Article 21 of the Constitution." It is clear that this Court upheld such a condition only because the offence under TADA was a most heinous offence in which the vice of terrorism is sought to be tackled. Given the heinous nature of the offence which is punishable by death or life imprisonment, and given the fact that the Special Court in that case was a Magistrate and not a Sessions Court, unlike the present case, Section 20(8) of TADA was upheld as being in consonance with conditions prescribed under Section 437 of the Code of Criminal Procedure. In the present case, it is Section 439 and not Section 437 of the Code of Criminal Procedure that applies. Also, the offence that is spoken of in Section 20(8) is an offence under TADA itself and not an offence

> under some other Act. For all these reasons, the judgment in Kartar Singh (supra) cannot apply to Section 45 of the present Act."

11. Finally the Hon'ble Supreme Court struck down Section 45(1) of the PMLA with the following observation in paragraph 54:-

> "Regard being had to the above, we declare Section 45(1) of the Prevention of Money Laundering Act, 2002, 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. All the matters before us in which bail has been denied, because of the presence of the twin conditions contained in Section 45, will now go back to the respective Courts which denied bail. All such orders are set aside, and the cases remanded to the respective Courts to be heard on merits, without application of the twin conditions contained in Section 45 of the 2002 Act. Considering that persons are languishing in jail and that personal liberty is involved, all these matters are to be taken up at the earliest by the respective Courts for fresh decision. The writ petitions and the appeals are disposed of accordingly."

12. It is also submitted by Mr. Mukherjee that twin condition for bail contained in Section 45(1) being struck down by Supreme Court in Nikesh Tarachand Saha (supra), the Central Government has brought an amendment to Finance Act, 2018 which came into force from 19th April, 2018 to Section 45(1) of the PMLA thereby inserting words "under this Act" in Section 45(1) of the Act. In view of such amendment, it was contended on behalf of the Enforcement Directorate that the original Sub- Section (ii) of Section 45(1) which imposes the said twin conditions automatically stands revived and the said conditions therefore remain on statute book. It was further contended on behalf of the Enforcement Directorate that Amending Act of 2018 inserting words "under this Act"

> the precedent laid down by the Supreme Court in Nikesh Tarachand Saha was virtually diluted.

13. Mr. Mukherjee refers to a decision of Bombay High Court in the case of Sameer M. Bhujbal vs. Assistant Director, Directorate of Enforcement & Anr (Bail Application No.286 of 2018) decided on 6th June, 2018 wherein the Court held that the original Section 45(1)(ii) has neither revived nor resurrected by the Amending Act and therefore, as of today there is no rigor of said two further conditions under original Section 45(1)(ii) of PMLA Act for releasing the accused on bail under the said Act. The same principle is laid down by the Madhya Pradesh High Court in Dr. Vinod Bhandari vs. Assistant Director reported in 2018 SCC OnLine MP 1559; Criminal Miscellaneous No.41413 of 2019 decided by the High Court of Judicature at Patna on 28th May, 2020; Deepak Virendra Kochhar vs. Directorate of Enforcement & Anr. (Criminal Bail Application No.1322 of 2020) by the High Court of Judicature at Bombay vide order dated 25th March, 2021; Sai Chandrasekhar vs. Directorate of Enforcement delivered by the High Court of Delhi, reported in 2021 SCC Online Del 1081.

Per Contra

14. One of the Assistant Directors and Investigating Officer of Case No.1 of 2021 under the PLMA Act has submitted an affidavit in the form of report stating certain facts on which Mr. Y.J Dastoor, Ld. A.S.G. relies on, contains the following facts:- It is admitted at the outset that the complainant under the PLMA Act is based upon a complaint under Section 132 and Section 1319(1)(b)(i)(A) of the customs Act, 1962 bearing Case No.562 of 2018. During Investigation of the aforesaid complaint, it was revealed that the petitioner is a habitual offender and has diverted gold jewellary amounting to 2717 kgs valued at more than 650 crores which was meant to be exported. The said gold owing to 2717 kgs was contended property used for commissioning the offence for diversion of gold as well as the offence of money laundering. The petitioner used to purchase the gold from authorized agents such as MMTC, STC, Diamond India Ltd. etc at a discounted rate for export. While processing export, the petitioner and his associates namely his son, brother and wife surreptitiously diverted the said gold to domestic market and sale out the jewellery at the prevailing domestic market rate which is higher than the export rate of gold. The gold was diverted through the proprietorship firms, namely M/s PH Jewels, M/s Kalpataru Jewelles and Exports Corporation and M/s Shree Ganesh Jewels and M/s V.N. Jewellery, being managed and controlled by the petitioner. More than 120 bank accounts were used by the petitioner, his son, wife and brother and other trusted person to layer integrate and conceal the true origin of funds. Transactions were made without any invoice or bill in this way the accused diverted gold worth Rs.650 crores in the domestic market. After placing the funds in the bank accounts of the above named firms and individuals other than those purportedly diverting the gold, the cash was withdrawn from such accounts and used for generating proceeds of crime. In order to carry out such illegal trade of money laundering, the petitioner procured fake passport in the name of Srikant Gupta and undertook multiple foreign tours with his wife, son and brother for the purpose of his illegal activities. The prosecution has already submitted complaint under Section 3 of the PMLA Act punishable under Section 4 of the said Act against the petitioner and other accused persons before the Special (PMLA) Court and cognizance was taken by the Special Court on 14th February, 2022. The petitioner never co-operated with the investigation conducted by the respondent and non bailable warrants of arrests were issued by the Special Court, PMLA of 27th April, 2021. This Court rejected the anticipatory bail of Smt. Radhika Agarwal wife of Sanjay Agarwal in CRM 6451 of 2021. The petitioner was arrested from Lonavala on 28th November, 2021. Other two accused persons namely Ajay Kumar Agarwal and Avinash Soni are still absconding. There is every chance that if the petitioner is enlarged on bail in the instant case he will abscond and there is every livelihood that he will be engaged in committing similar offence in future. It is further contended by the Enforcement Directorate that the petitioner is a habitual offender and committed offence of ban fraud, defrauding the State Bank of India and Punjab National Bank for an amount of Rs.50 crores and 30 crores respectively. Another case for procuring fake passport is also pending. Cases are pending against him instituted by DRI for his involvement in smuggling of gold meant for export.

15. It is submitted by Mr. Dastoor referring to a decision of the Bombay High Court in Ajay Kumar vs. Directorate of Enforcement through Assistant Director reported in 2022 SCC OnLine 196 that in view of the conflicting decision in Sameer M. Bhujbal (supra) and Union of India vs. Jager Narayan Deshmukh reported in 2021 SCC OnLine Bom 2905 a reference was made before the Larger Bench

of the Bombay High Court to decide the following question:-

> "whether the twin conditions in Section 45(1) of 2002 Act which was declared unconstitutional by the judgment of the Apex Court in Nikesh Tarachand Shah vs. UOI & Ors. (2018) 11 SCC 1, stand revived in view of legislative intervention vide amendment Act 13 of 2018?
>
> The following paragraphs are important for the purpose of this case and quoted below:-
>
> "45. 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.
>
> 46. 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 Amending 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 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.
>
> 47. It is argued that the Amending 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 x x "

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

49. 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.

50. 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 ineffecting the amending provisions of the Act.

Conclusion :-

> 51. 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.

16. The Hon'ble Supreme Court in the Assistant Director Enforcement Directorate vs. Dr. V.C Mohan (Criminal Appeal No.21 of 2022 arising from the SLP (Crl.) No.8441 of 2021) was pleased to hold that the offence under the PMLA Act is dependent on the predicate offence which would be under ordinary law, including provisions of Indian Penal Code. That it does not mean that while

considering the prayer for bail in connections with PMLA offence the mandate of Section 45 of the PMLA Act would not come into place. It is one thing to say that Section 45 of the PMLA Act two offences under the ordinary law would not get attracted but once the prayer for anticipatory bail is made in connection with offence under PMLA Act, the underlying principles and rigors of Section 45 of the PMLA Act must get triggered. Although the application is under Section 438 of the Criminal Procedure.

17. According to the learned A.S.G similar is the law with regard to an application under Section 439 of the Code of Criminal Procedure in The Assistant Director, Directorate of Enforcement vs. N. Umashankar & Ors, arising from SLP (Crl.) Nos.7563 - 7565 of 2021 the Hon'ble Supreme Court in its order dated 22nd November, 2021 was pleased to observe that the statutory bar for grant of bail in offences concerning Prevention of Money Laundering Act shall come into play while considering an application for bail.

18. In reply to the argument on behalf of the petitioner. Mr. Mukherjee, learned Senior Counsel submits that the law on the point of applicability or non applicability of Section 45 of the PMLA Act has not been set at rest as yet. There are divergent views of different High Courts. However in the instant case it appears that the incident in the first case allegedly took place on 4th April, 2018. The petitioner was arrested on 6th April, 2018 and Section 45(1) of the PMLA Act was declared unconstitutional on 19th April, 2018. Therefore, on the date of commission of alleged offence on 4th April, 2018 there was no rigors of Section 45 of the PMLA Act and petitioner is entitled to be enlarged on bail because in the main case instituted by the DRI the petitioner was released on bail. Conclusion

19. Having heard the learned Counsels at length and having due regard to the decisions of the Hon'ble Supreme Court as well as different High Courts. Let me record at the outset the scheme of PMLA Act. It is needless to say that for registration of a crime under the PMLA, the only prerequisite is registration of a predicate/scheduled offence as prescribed in various paragraphs of the schedule appended to the Act nothing more than it. In other words, for initiating or setting the criminal law in motion under the PMLA, it is only that requirement of having a predicate/scheduled crime registered prior to it. Once an offence under the PMLA is registered on the basis of a scheduled offence, then it stands on its own and it thereafter does not require support of predicate/scheduled offence. It further does not depend upon the ultimate result of the predicate/scheduled offence. Even if the predicate/scheduled offence is compromised, compounded, quashed or the accused therein is/are acquitted, the investigation of ED does not get affected, wiped away or ceased to continue. It may continue till the ED concludes investigation and either files a complaint or closure report before the Court of competent jurisdiction.

20. Therefore, the PMLA is a standalone statute. If a person is booked under the PMLA, in view of the decisions of the Hon'ble Supreme Court in Dr. V.C Mahan (supra) and N. Umashankar (supra) and the decision of the Division Bench of the Bombay High Court in Ajay Kumar (supra) which were decided on 4th January, 2022 and 22nd November, 2021 and 28th January, 2022 this Court is of the considered view that the twine conditions of Section 45(1)(ii) of PMLA is applicable under the facts and circumstances of the case.

21. Besides the bar imposed in Section 45(1)(ii) of the PMLA, it is the bounden duty of the court to decide while disposing of an application for bail the prima facie material available to fortify commission of offence, gravity of offence, severity of punishment, opportunity of the petitioner of fleeing away and tempering with the evidence if the bail is granted to him. The complaint under the PMLA was registered on 5th May, 2021 vide ML Case No.1 of 2021. The petitioner was not found in his residence at Hyderabad. Finally he was apprehended from Lonavala on 28th November, 2021. The magnitude of the transaction prima facie shows the gravity of offence. Prima facie it appears that the petitioner travelled abroad with a fake passport. Therefore, there is always a possibility that the petitioner may flee away in order to evade trial of the case. The petitioner having financial influence, there is every chance that the witnesses may be influenced by the petitioner. Therefore, the established tests for granting or refusal of a application for bail under Section 439 of the Cr.P.C also runs against the petitioner.

22. As a last resort, it is argued by Mr. Mukherjee that the Enforcement Directorate has hopelessly failed to prove that the petitioner was involved in smuggling gold jewellery.

23. Section 2(p) of the PMLA defines "money laundering" which has the meaning assigned to it in Section 3. Section 3 States that a person is guilty of the offence of money laundering, if he directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime and projecting it as untainted property. Therefore, money laundering has two essential ingredients - (a) involvement in any process or activity connected with the proceeds of crime and (b) projecting it as untainted property. The modus operandi of the petitioner in committing offence and illegally procuring money has been narrated hereinabove in detail. When jewellery which was scheduled to be exported were diverted to the domestic market and sold out in domestic market rate which is higher than the gold purchased for the purpose of export, the petitioner and his associates through their companies and numerous bank accounts used to make transaction to establish that the money, he used to earn in business, are not proceeds of crime and/or untainted money.

24. Section 2(39) defines smuggling. The provision is replicated below:-

> "S.2(39) "smuggling", in relation to any goods, means any act or omission which will render such goods liable to confiscation under section 111 or section 113".

Section 113 of the Customs Act contains the provision of confiscation of goods attempted to be improperly exported, etc. Clause (k) of Section 113 states - "any goods cleared for exportation which are not loaded for exportation on account of any willful act, negligence or default of the exporter; his agent or employee, or which after having been loaded for exportation are unloaded without the permission of the proper officer."

25. The petitioner with the help of his son, wife and brother adopted the procedure contained in 113(k) of the Customs Act to divert gold jewellery schedule for exportation in domestic market.

26. For the reasons stated above I am not inclined to release the petitioner on bail.

27. Prayer for bail is thus rejected.

28. C.R.M (SB) 5 of 2022 is accordingly disposed of.

(Bibek Chaudhuri, J.)