REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL/APPELLATE JURISDICTION

WRIT PETITION (CRIMINAL) NO. 67 OF 2017

NIKESH TARACHAND SHAH …PETITIONER

VERSUS

UNION OF INDIA & ANR. …RESPONDENTS

WITH

WRIT PETITION (CRIMINAL) NO.103 OF 2017

WITH

WRIT PETITION (CRIMINAL) NO.144 OF 2017

WITH

WRIT PETITION (CRIMINAL) NO.152 OF 2017

WITH

CRIMINAL APPEAL NO. 2012 OF 2017
(ARISING OUT OF SLP (CRL) NO.7326 OF 2017)

WITH

CRIMINAL APPEAL NO. 2013 OF 2017
(ARISING OUT OF SLP (CRL) NO.7786 OF 2017)

WITH

CRIMINAL APPEAL NO. 2014 OF 2017
(ARISING OUT OF SLP (CRL) NO.7789 OF 2017)

J U D G M E N T

R.F. Nariman, J.

1. Leave granted.

2. The present writ petitions and appeals raise the question of the constitutional validity of Section 45 of the Prevention of Money Laundering Act, 2002. Section 45(1) imposes two conditions for grant of bail where an offence punishable for a term of imprisonment of more than 3 years under Part A of the Schedule to the Act is involved. The conditions are that the Public Prosecutor must be given an opportunity to oppose any application for release on bail and the Court must be satisfied, where the Public Prosecutor opposes the application, that there are reasonable grounds for believing that the accused is not guilty of such offence, and that he is not likely to commit any offence while on bail.

3. The Prevention of Money Laundering Act, 2002 was introduced, as its Statement of Objects and Reasons mentions, to make money laundering an offence, and to attach property

involved in money laundering, so that this serious threat to the financial system of India is adequately dealt with. It is worth setting out the Statement of Objects and Reasons of the Act in full.

> "**STATEMENT OF OBJECTS AND REASONS**
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> It is being realised, world over, that money-laundering poses a serious threat not only to the financial systems of countries, but also to their integrity and sovereignty. Some of the initiatives taken by the international community to obviate such threats are outlined below:—
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> (a) the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, to which India is a party, calls for prevention of laundering of proceeds of drug crimes and other connected activities and confiscation of proceeds derived from such offence.
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> (b) the Basle Statement of Principles, enunciated in 1989, outlined basic policies and procedures that banks should follow in order to assist the law enforcement agencies in tackling the problem of money-laundering.
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> (c) the Financial Action Task Force established at the summit of seven major industrial nations, held in Paris from 14th to 16th July, 1989, to examine the problem of money-laundering has made forty recommendations, which provide the foundation material for comprehensive legislation to combat the problem of money-laundering. The recommendations were classified under various heads. Some of the important heads are—

(i) declaration of laundering of monies carried through serious crimes a criminal offence;

(ii) to work out modalities of disclosure by financial institutions regarding reportable transactions;

(iii) confiscation of the proceeds of crime;

(iv) declaring money-laundering to be an extraditable offence; and

(v) promoting international co-operation in investigation of money-laundering.

(d) the Political Declaration and Global Programme of Action adopted by United Nations General Assembly by its Resolution No. S-17/2 of 23rd February, 1990, *inter alia*, calls upon the member States to develop mechanism to prevent financial institutions from being used for laundering of drug related money and enactment of legislation to prevent such laundering.

(e) the United Nations in the Special Session on Countering World Drug Problem Together concluded on the 8th to the 10th June, 1998 has made another declaration regarding the need to combat money-laundering. India is a signatory to this declaration.

2. In view of an urgent need for the enactment or a comprehensive legislation *inter alia* for preventing money-laundering and connected activities confiscation of proceeds of crime, setting up of agencies and mechanisms for coordinating measures for combating money-laundering, etc., the Prevention of Money-Laundering Bill, 1998 was introduced in the Lok Sabha on the 4th August, 1998. The Bill was referred to the Standing

Committee on Finance, which presented its report on the 4th March, 1999 to the Lok Sabha. The recommendations of the Standing Committee accepted by the Central Government are that (a) the expressions "banking company" and "person" may be defined; (b) in Part I of the Schedule under Indian Penal Code the word offence under section 477A relating to falsification of accounts should be omitted; (c) 'knowingly' be inserted in clause 3(b) relating to the definition of money-laundering; (d) the banking companies, financial institutions and intermediaries should be required to furnish information of transactions to the Director instead of Commissioner of Income-tax (e) the banking companies should also be brought within the ambit of clause II relating to obligations of financial institutions and intermediaries; (f) a definite time-limit of 24 hours should be provided for producing a person about to be searched or arrested person before the Gazetted Officer or Magistrate; (g) the words "unless otherwise proved to the satisfaction of the authority concerned" may be inserted in clause 22 relating to presumption on inter-connected transactions; (h) vacancy in the office of the Chairperson of an Appellate Tribunal, by reason of his death, resignation or otherwise, the senior-most member shall act as the Chairperson till the date on which a new Chairperson appointed in accordance with the provisions of this Act to fill the vacancy, enters upon his office; (i) the appellant before the Appellate Tribunal may be authorised to engage any authorised representative as defined under section 288 of the Income-tax Act, 1961, (j) the punishment for vexatious search and for false information may be enhanced from three months imprisonment to two years imprisonment, or fine of rupees ten thousand to fine of rupees fifty thousand or both; (k) the word 'good faith' may be incorporated in the clause relating to Bar of legal proceedings. The Central Government have broadly

> accepted the above recommendations and made provisions of the said recommendations in the Bill.
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> 3. In addition to above recommendations of the standing committee the Central Government proposes to (a) relax the conditions prescribed for grant of bail so that the Court may grant bail to a person who is below sixteen years of age, or woman, or sick or infirm, (b) levy of fine for default of non-compliance of the issue of summons, etc. (c) make provisions for having reciprocal arrangement for assistance in certain matters and procedure for attachment and confiscation of property so as to facilitate the transfer of funds involved in money-laundering kept outside the country and extradition of the accused persons from abroad.
>
> 4. The Bill seeks to achieve the above objects."

4. Though the Act was passed by Parliament in the year 2002, it was brought into force only on 1.7.2005. Some of the important provisions, with which we are directly concerned, are set out hereinbelow:

> "**Section 2. Definitions.**—(1) In this Act, unless the context otherwise requires,—
>
> (p) "money-laundering" has the meaning assigned to it in section 3;
>
> (u) "proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country,

then the property equivalent in value held within the country;

(x) “Schedule” means the Schedule to this Act;

(y) “scheduled offence” means—

(i) the offences specified under Part A of the Schedule; or

(ii) the offences specified under Part B of the Schedule if the total value involved in such offences is one crore rupees or more; or

(iii) the offences specified under Part C of the Schedule.

Section 3. Offence of money-laundering.— Whosoever 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 proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering.

Section 4. Punishment for money-laundering.— Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine: Provided that where the proceeds of crime involved in money-laundering relates to any offence specified under paragraph 2 of Part A of the Schedule, the provisions of this section shall have effect as if for the words “which may extend to seven years”, the words “which may extend to ten years” had been substituted.

Section 5. Attachment of property involved in money-laundering.

(1) Where the Director or any other officer not below the rank of Deputy Director authorised by the Director for the purposes of this section, has reason to believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that—

(a) any person is in possession of any proceeds of crime; and

(b) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under this Chapter, he may, by order in writing, provisionally attach such property for a period not exceeding one hundred and eighty days from the date of the order, in such manner as may be prescribed:

Provided that no such order of attachment shall be made unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, 1973 (2 of 1974), or a complaint has been filed by a person authorised to investigate the offence mentioned in that Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or a similar report or complaint has been made or filed under the corresponding law of any other country:

Provided further that, notwithstanding anything contained in first proviso, any property of any person may be attached under this section if the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section has reason to believe (the reasons for such belief to be recorded in writing), on the basis of material in his possession, that if such property involved in money-laundering is not

attached immediately under this Chapter, the non-attachment of the property is likely to frustrate any proceeding under this Act.

(2) The Director, or any other officer not below the rank of Deputy Director, shall, immediately after attachment under sub-section (1), forward a copy of the order, along with the material in his possession, referred to in that sub-section, to the Adjudicating Authority, in a sealed envelope, in the manner as may be prescribed and such Adjudicating Authority shall keep such order and material for such period as may be prescribed.

(3) Every order of attachment made under sub-section (1) shall cease to have effect after the expiry of the period specified in that sub-section or on the date of an order made under sub-section (2) of section 8, whichever is earlier.

(4) Nothing in this section shall prevent the person interested in the enjoyment of the immovable property attached under sub-section (1) from such enjoyment.

Explanation.— For the purposes of this sub-section, "person interested", in relation to any immovable property, includes all persons claiming or entitled to claim any interest in the property.

(5) The Director or any other officer who provisionally attaches any property under sub-section (1) shall, within a period of thirty days from such attachment, file a complaint stating the facts of such attachment before the Adjudicating Authority.

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Section 43. Special Courts.—

(1) The Central Government, in consultation with the Chief Justice of the High Court, shall, for trial of offence punishable under section 4, by notification,

designate one or more Courts of Session as Special Court or Special Courts or such area or areas or for such case or class or group of cases as may be specified in the notification.

Explanation.— In this sub-section, "High Court" means the High Court of the State in which a Sessions Court designated as Special Court was functioning immediately before such designation.

(2) While trying an offence under this Act, a Special Court shall also try an offence, other than an offence referred to in sub-section (1), with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

Section 44. Offences triable by Special Courts.—

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

(a) an offence punishable under section 4 and any scheduled offence connected to the offence under that section shall be triable by the Special Court constituted for the area in which the offence has been committed: Provided that the Special Court, trying a scheduled offence before the commencement of this Act, shall continue to try such scheduled offence; or

(b) a Special Court may, upon perusal of police report of the facts which constitute an offence under this Act or upon a complaint made by an authority authorised in this behalf under this Act take cognizance of offence under section 3, without the accused being committed to it for trial;

(c) if the court which has taken cognizance of the scheduled offence is other than the Special Court which has taken cognizance of the complaint of the offence of money-laundering under sub-clause (b),

it shall, on an application by the authority authorised to file a complaint under this Act, commit the case relating to the scheduled offence to the Special Court and the Special Court shall, on receipt of such case proceed to deal with it from the stage at which it is committed.

(d) a Special Court while trying the scheduled offence or the offence of money-laundering shall hold trial in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) as it applies to a trial before a Court of Session.

(2) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under section 439 of the Code of Criminal Procedure, 1973 (2 of 1974) and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to "Magistrate" in that section includes also a reference to a "Special Court" designated under section 43.

Section 45. Offences to be cognizable and non-bailable.—

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given a opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail: Provided that a person,

who, is under the age of sixteen years, or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs: Provided further that the Special Court shall not take cognizance of any offence punishable under section 4 except upon a complaint in writing made by—

(i) the Director; or

(ii) any officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government by a general or special order made in this behalf by that Government.

(1A) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or any other provision of this Act, no police officer shall investigate into an offence under this Act unless specifically authorised, by the Central Government by a general or special order, and, subject to such conditions as may be prescribed.

(2) The limitation on granting of bail specified in sub-section (1) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.

Section 46. Application of Code of Criminal Procedure, 1973 to proceedings before Special Court.—

(1) Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) (including the provisions as to bails or bonds), shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the persons conducting the prosecution before the Special Court, shall be deemed to be a Public Prosecutor: Provided that the Central Government may also appoint for any

case or class or group of cases a Special Public Prosecutor.

(2) A person shall not be qualified to be appointed as a Public Prosecutor or a Special Public Prosecutor under this section unless he has been in practice as an advocate for not less than seven years, under the Union or a State, requiring special knowledge of law.

(3) Every person appointed as a Public Prosecutor or a Special Public Prosecutor under this section shall be deemed to be a Public Prosecutor within the meaning of clause (u) of section 2 of the Code of Criminal Procedure, 1973 (2 of 1974) and the provisions of that Code shall have effect accordingly.

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Section 65. Code of Criminal Procedure, 1973 to apply.— The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply, in so far as they are not inconsistent with the provisions of this Act, to arrest, search and seizure, attachment, confiscation investigation, prosecution and all other proceedings under this Act.

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Section 71. Act to have overriding effect.—The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."

5. Shri Mukul Rohatgi, learned senior advocate appearing on behalf of the petitioners, has argued before us that Section 45 of the said Act, when it imposes two further conditions

before grant of bail is manifestly arbitrary, discriminatory and violative of the petitioner's fundamental rights under Article 14 read with Article 21 of the Constitution. According to learned senior counsel, at the stage that the said Act was a Bill (which was referred to a Standing Committee on Finance of the Parliament, and which presented its report on 4.3.1999 to the Lok Sabha), the Central Government broadly accepted the recommendations of the Standing Committee, which were then incorporated in the said Bill along with some other changes. At this stage, argued Shri Rohatgi, it is interesting to note that Clauses 43 and 44 of the Bill, which correspond to Sections 44 and 45 of the present Act, were very differently worded and dealt only with offences under the 2002 Act. The twin conditions laid down as additional conditions for grant of bail were, at this stage, only qua offences under the 2002 Act. When Parliament enacted the 2002 Act, this scheme was completely changed in that Section 45 of the Act now spoke only of the predicate/scheduled offence and not the offence under the 2002 Act. In the present Act, a scheduled offence, which is an offence under other penal laws contained in Part A

of the Schedule, that is tried with offences under the Act, bail would be granted only after satisfying the twin conditions laid down in the Section. Also, when the Act was originally enacted, according to learned senior counsel, part A of the Schedule was very sparsely populated, in that it comprised of two paragraphs only consisting of two offences under the Indian Penal Code, 1860 and 9 offences under the Narcotic Drugs and Psychotropic Substances Act, 1985. These offences were considered extremely heinous by the legislature and were, therefore, classified apart from offences under Part B, which dealt with certain other offences under the Indian Penal Code and offences under the Arms Act 1959, Wildlife (Protection) Act 1972, Immoral Traffic (Prevention) Act, 1956 and the Prevention of Corruption Act, 1988. According to learned senior counsel, this classification was maintained right until the Amendment Act of 2012, which then incorporated Part B offences into Part A of the Schedule, resulting in offences under 26 Acts, together with many more offences under the Indian Penal Code, all being put under Part A. This, according to learned senior counsel, was done because the definition of

"scheduled offence" in Section 2(y) of the Act made it clear that, if offences are specified under Part B of the Schedule at the relevant time, the total value involved for such offences should be Rs.30 lakhs or more. The idea behind the 2012 Amendment, as the Statement of Objects of the said Amendment discloses, is that this limit of Rs.30 lakhs be removed, which is why the entire Part B of the Schedule was subsumed in Part A. He further argued that the object was not to deny bail to those charged with offences under the erstwhile Part B, and that putting Part B offences together with heinous offences in Part A would amount to treating unequals equally and would be discriminatory and violative of Article 14 of the Constitution. In addition, such lumping together of disparate offences would have no rational relation to the object sought to be achieved by the Amendment Act of 2012, that is to obviate the Rs.30 lakh limit qua Part B offences, and it would violate Article 14 on this ground as well. According to learned senior counsel, the change from the original scheme of the Bill to introducing offences outside the 2002 Act dependent upon which bail would be granted, with the twin conditions as aforestated first having

to be satisfied, is itself manifestly arbitrary, in that the predicate offence, which is the scheduled offence, and the classification of such offence as being punishable with three years or more would again be wholly irrelevant and would have absolutely no rational relation to the object of granting bail insofar as offences under the 2002 Act are concerned. Learned senior counsel also referred to Article 21 of the Constitution and stated that the aforesaid procedure would be unfair, unjust and would fall foul of Article 21 inasmuch as it would certainly fall foul of the US Constitution's Eighth Amendment which interdicts excessive bails. Since this Court has recognized that this feature of the Eighth Amendment would fall within Article 21, it would be a direct infraction thereof. He also argued that a person will be punished for an offence contained under the 2002 Act, but will be denied bail because of a predicate offence which is contained in Part A of the Schedule, which would again render Section 45(1) as manifestly arbitrary and unreasonable. He referred to **Nikesh Tarachand Shah**'s case, which is Writ Petition (criminal) No.67 of 2017, in which the scheduled offences were Sections 120B, 409, 420, 471 and 477A of the

Indian Penal Code read with Section 13 of the Prevention of Corruption Act. These offences were being investigated by the CBI in CBI Special Case No.91/2009 in which the petitioner was granted bail by the Sessions Court by an order dated 10.12.2015. When the offence under the 2002 Act was added to the aforesaid offences, thanks to the applicability of the twin conditions in Section 45(1), he was denied bail with effect from 27.11.2015, which itself shows that Section 45(1) is being used in an extremely manifestly arbitrary fashion to deny bail for offences which extend only to seven years under the 2002 Act, as opposed to predicate offences which may extend even to life imprisonment. Also, according to learned senior counsel, the threshold of three years and above contained in Section 45 of the 2002 Act is itself manifestly arbitrary in that it has no reference to the offence of money laundering under the 2002 Act, but only to three years and more of the predicate offence. There is no condition, so far as the 2002 Act is concerned, of classification based on the amount of money that is laundered, which perhaps may be a valid basis for classification. Also, according to learned senior counsel, if the twin conditions of

Section 45(1) are to be satisfied at the stage of bail, the defendants will have to disclose their defence at a point in time when they are unable to do so, having been arrested and not being granted bail at the inception itself. Another conundrum raised by Section 45 is the fact that, there being no interdict against anticipatory bail in the 2002 Act, and the Code of Criminal Procedure applying to offences under the 2002 Act, it would be clear that anticipatory bail could be granted for both offences under the 2002 Act and predicate offences. This being so, unlike the Terrorist and Disruptive Activities (Prevention) Act 1987, where anticipatory bail expressly cannot be granted, the twin conditions of Section 45 would not apply at the anticipatory bail stage, which would mean that a person charged of money laundering and a predicate offence could continue on anticipatory bail throughout the trial without satisfying any of the twin conditions, as opposed to a person who applies for regular bail, who would have to satisfy the twin conditions, which in practice would mean denial of bail. For all these reasons, according to learned senior counsel, Section 45 needs to be struck down. Also, according to learned senior counsel, it is not

possible to read down the provision to make it constitutional as the very scheme of Section 45 is manifestly arbitrary and irrational. Shri Rohatgi cited various judgments to buttress his submissions which will be referred to by us in the course of this judgment.

6. On the other hand, the learned Attorney General Shri K.K. Venugopal impressed upon us the fact that the Parliamentary legislation qua money laundering is an attempt by Parliament to get back money which has been siphoned off from the economy. According to the learned Attorney General, scheduled offences and offences under Sections 3 and 4 of the 2002 Act have to be read together and the said Act, therefore, forms a complete code which must be looked at by itself. According to the learned Attorney General, it is well settled that classification which is punishment centric has been upheld by a catena of judgments and so have the twin conditions been upheld by various decisions which were referred to by him. According to him, the expression "any offence" in Section 45(1)(ii) would mean offence of a like nature and not any offence, which would include a traffic offence as well. According

to the learned Attorney General, Section 45 can easily be read down to make it constitutional in two ways. First, the expression "there are reasonable grounds for believing that he is not guilty of such offence" must be read as the making of a prima facie assessment by the Court of reasonable guilt. Secondly, according to the learned Attorney General, in any case the conditions contained in Section 45(1)(ii) are there in a different form when bail is granted ordinarily insofar as offences generally are concerned and he referred to **State of U.P. through C.B.I. v. Amarmani Tripathi**, (2005) 8 SCC 21 for this purpose. According to the learned Attorney General, if harmoniously construed with the rest of the Act, Section 45 is unassailable. He relied upon Section 24 of the Act, which inverts the burden of proof, and strongly relied upon **Gautam Kundu v. Directorate of Enforcement (Prevention of Money-Laundering Act)**, (2015) 16 SCC 1 and **Rohit Tandon v. The Enforcement Directorate**, Criminal Appeal Nos.1878--1879 Of 2017 decided on 10th November, 2017. In answer to Shri Rohatgi's argument on the object of the 2012 Amendment Act, according to the learned Attorney General, it is well settled

that where the language of the Act is plain, no recourse can be taken to the object of the Act and he cited a number of judgments for this proposition. He referred us to Section 106 of the Indian Evidence Act, 1872 and argued that when read with Section 24 of the 2002 Act, it would be clear that the twin conditions contained in Section 45 are only in furtherance of the object of unearthing black money and that we should, therefore, be very slow to set at liberty persons who are alleged offenders of the cancer of money laundering. Ultimately, according to the learned Attorney General, Section 45 being part of a complete code must be upheld in order that the 2002 Act work, so that money that is laundered comes back into the economy and persons responsible for the same are brought to book.

7. Having heard learned counsel for both sides, it is important to first understand what constitutes the offence of money laundering. Under Section 3 of the Act, the kind of persons responsible for money laundering is extremely wide. Words such as “whosoever”, “directly or indirectly” and “attempts to indulge” would show that all persons who are even remotely involved in this offence are sought to be roped in. An

important ingredient of the offence is that these persons must be knowingly or actually involved in any process or activity connected with proceeds of crime and "proceeds of crime" is defined under the Act, by Section 2 (u) thereof, to mean any property derived or obtained directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence (which is referred to in our judgment as the predicate offence). Thus, whosever is involved as aforesaid, in a process or activity connected with "proceeds of crime" as defined, which would include concealing, possessing, acquiring or using such property, would be guilty of the offence, provided such persons also project or claim such property as untainted property. Section 3, therefore, contains all the aforesaid ingredients, and before somebody can be adjudged as guilty under the said provision, the said person must not only be involved in any process or activity connected with proceeds of crime, but must also project or claim it as being untainted property. Under Section 4 of the Act, the offence of money laundering is punishable with rigorous imprisonment for a minimum period of three years which may extend to 7 years and fine. Also, under

the proviso, where the proceeds of crime involved in money laundering relate to a predicate offence under paragraph 2 of Part A of the Schedule, the sentence then gets extended from 7 years to 10 years.

8. Under Section 5 of the Act, attachment of such property takes place so that such property may be brought back into the economy. Coming now to Chapter VII of the Act with which we are really concerned, Section 43 lays down that Special Courts to try offences under the Act are to be designated for such area or areas or for such case or class or group of cases as may be specified by notification. Section 44 is very important in that the Section provides for the trial of a scheduled offence and the offence of money laundering together by the same Special Court, which is to try such offences under the Code of Criminal Procedure as if it were a court of sessions. Under Section 46, read with Section 65 of the Act, the provisions of the Code of Criminal Procedure apply to proceedings before the Special Court and for the purpose of the said provisions, the Special Court shall be deemed to be a court of sessions.

9. When the Prevention of Money Laundering Bill, 1999 was tabled before Parliament, Section 44, which corresponds to Section 45 of the present Act, provided that several offences punishable under "this Act" are to be cognizable, and the twin conditions for release on bail would apply only insofar as the offences under the Act itself are concerned. When the Act was finally enacted in 2002 and notified in 2005, this scheme changed radically. Now, both the offence of money laundering and the predicate offence were to be tried by the Special Court, and bail is granted only if the twin conditions under Section 45(1) are met, where the term of imprisonment is more than three years for the predicate offence. It is important to note that Clause 44 of the Bill referred only to offences under Sections 3 and 4 of the Bill, whereas Section 45 of the Act does not refer to offences under Sections 3 and 4 of the Act at all. Reference is made only to offences under Part A of the Schedule, which are offences outside the 2002 Act. This fundamental difference between the Bill and the Act has a great bearing on the constitutional validity of Section 45(1) with which we are directly and immediately concerned.

10. The provision for bail goes back to Magna Carta itself. Clause 39, which was, at that time, written in Latin, is translated as follows:

> "No free man shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land."

It is well known that Magna Carta, which was wrung out of King John by the barons on the 15th of June, 1215, was annulled by Pope Innocent III in August of that very year. King John died one year later, leaving the throne to his 9 year old son, Henry III. It is in the reign of this pious King and his son, Edward I, that Magna Carta was recognized by kingly authority. In fact, by the statutes of Westminster of 1275, King Edward I repeated the injunction contained in clause 39 of Magna Carta. However, when it came to the reign of the Stuarts, who believed that they were kings on earth as a matter of divine right, a struggle ensued between Parliament and King Charles I. This led to another great milestone in the history of England called the Petition of Right of 1628. Moved by the hostility to the Duke of Buckingham, the House of Commons denied King Charles I the

means to conduct military operations abroad. The King was unwilling to give up his military ambition and resorted to the expedient of a forced loan to finance it. A number of those subject to the imposition declined to pay, and some were imprisoned; among them were those who became famous as "the Five Knights". Each of them sought a writ of habeas corpus to secure his release. One of the Knights, Sir Thomas Darnel, gave up the fight, but the other four fought on. The King's Bench, headed by the Chief Justice, made an order sending the knights back to prison. The Chief Justice's order was, in fact, a provisional refusal of bail. Parliament being displeased with this, invoked Magna Carta and the statutes of Westminster, and thus it came about that the Petition of Right was presented and adopted by the Lords and a reluctant King. Charles I reluctantly accepted this Petition of Right stating, "let right be done as is desired by the petition". Among other things, the Petition had prayed that no free man should be imprisoned or detained, except by authority of law.

11. In **Bushel's** case, decided in 1670, Chief Justice Sir John Vaughan was able to state that, "the writ of habeas corpus is

now the most usual remedy by which a man is restored again to his liberty, if he have been against law deprived of it." Despite this statement of the law, one Jenkes was arrested and imprisoned for inciting persons to riot in a speech, asking that King Charles II be petitioned to call a new Parliament. Jenkes went from pillar to post in order to be admitted to bail. The Lord Chief Justice sent him to the Lord Chancellor, who, in turn, sent him to the Lord Treasurer, who sent him to the King himself, who, "immediately commanded that the laws should have their due course." (See Jenke's case, 6 How. St. Tr. 1189 at 1207, 1208 (1676)). It is cases like these that led to the next great milestone of English history, namely the Habeas Corpus Act of 1679. This Act recited that many of the King's subjects have been long detained in prison in cases where, by law, they should have been set free on bail. The Act provided for a habeas corpus procedure which plugged legal loopholes and even made the King's Bench Judges subject to penalties for non-compliance.

12. The next great milestone in English history is the Bill of Rights of 1689, which was accepted by the only Dutch monarch

that England ever had, King William III, who reigned jointly with his wife Queen Mary II. It is in this document that the expression "excessive bail ought not to be required…." first appears in Chapter 2, clause 10.

13. What is important to learn from this history is that clause 39 of Magna Carta was subsequently extended to pre-trial imprisonment, so that persons could be enlarged on bail to secure their attendance for the ensuing trial. It may only be added that one century after the Bill of Rights, the US Constitution borrowed the language of the Bill of Rights when the principle of habeas corpus found its way into Article 1 Section 9 of the US Constitution, followed by the Eighth Amendment to the Constitution which expressly states that, "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted". We may only add that the Eighth Amendment has been read into Article 21 by a Division Bench of this Court in **Rajesh Kumar v. State through Government of NCT of Delhi** (2011) 13 SCC 706, at paragraphs 60 and 61.

14. In **Gurbaksh Singh Sibbia v. State of Punjab**, (1980) 2 SCC 565 at 586-588, the purpose of granting bail is set out with great felicity as follows:-

> "27. It is not necessary to refer to decisions which deal with the right to ordinary bail because that right does not furnish an exact parallel to the right to anticipatory bail. It is, however, interesting that as long back as in 1924 it was held by the High Court of Calcutta in *Nagendra v. King-Emperor* [AIR 1924 Cal 476, 479, 480 : 25 Cri LJ 732] that the object of bail is to secure the attendance of the accused at the trial, that the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial and that it is indisputable that bail is not to be withheld as a punishment. In two other cases which, significantly, are the 'Meerut Conspiracy cases' observations are to be found regarding the right to bail which deserve a special mention. In *K.N. Joglekar v. Emperor* [AIR 1931 All 504 : 33 Cri LJ 94] it was observed, while dealing with Section 498 which corresponds to the present Section 439 of the Code, that it conferred upon the Sessions Judge or the High Court wide powers to grant bail which were not handicapped by the restrictions in the preceding Section 497 which corresponds to the present Section 437. It was observed by the court that there was no hard and fast rule and no inflexible principle governing the exercise of the discretion conferred by Section 498 and that the only principle which was established was that the discretion should be exercised judiciously. In *Emperor v. Hutchinson* [AIR 1931 All 356, 358 : 32 Cri LJ 1271] it was said that it was very unwise to make an attempt to lay down any particular rules which will bind the High Court,

having regard to the fact that the legislature itself left the discretion of the court unfettered. According to the High Court, the variety of cases that may arise from time to time cannot be safely classified and it is dangerous to make an attempt to classify the cases and to say that in particular classes a bail may be granted but not in other classes. It was observed that the principle to be deduced from the various sections in the Criminal Procedure Code was that grant of bail is the rule and refusal is the exception. An accused person who enjoys freedom is in a much better position to look after his case and to properly defend himself than if he were in custody. As a presumably innocent person he is therefore entitled to freedom and every opportunity to look after his own case. A presumably innocent person must have his freedom to enable him to establish his innocence.

28. Coming nearer home, it was observed by Krishna Iyer, J., in *Gudikanti Narasimhulu v. Public Prosecutor* [(1978) 1 SCC 240 : 1978 SCC (Cri) 115] that: (SCC p. 242, para 1)

> "... the issue of bail is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process. . . . After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of procedure established by law. The last four words of Article 21 are the life of that human right."

29. In *Gurcharan Singh v. State (Delhi Administration)* [(1978) 1 SCC 118 : 1978 SCC (Cri) 41] it was observed by Goswami, J., who spoke for the court, that: (SCC p. 129, para 29)

> "There cannot be an inexorable formula in the matter of granting bail. The facts and circumstances of each case will govern the exercise of judicial discretion in granting or cancelling bail."

30. In AMERICAN JURISPRUDENCE (2d, Volume 8, p. 806, para 39), it is stated:

> "Where the granting of bail lies within the discretion of the court, the granting or denial is regulated, to a large extent, by the facts and circumstances of each particular case. Since the object of the detention or imprisonment of the accused is to secure his appearance and submission to the jurisdiction and the judgment of the court, the primary inquiry is whether a recognizance or bond would effect that end."

It is thus clear that the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail."

15. The stage is now set for an examination of the constitutional validity of Section 45 of the 2002 Act.

16. At this stage, it is important to advert to the tests for the violation of Article 14, both in its discriminatory aspect and its "manifestly arbitrary" aspect. It is settled by a catena of cases

that Article 14 permits classification, provided such classification bears a rational relation to the object sought to be achieved. In an early judgment of this Court, **State of Bombay and Anr. v. F.N. Balsara** (1951) SCR 682 at 708, Fazl Ali, J. summarized the law as follows:

> "(1) The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds.
> (2) The presumption may be rebutted in certain cases by showing that on the face of the statute, there is no classification at all and no difference peculiar to any individual or class and not applicable to any other individual or class, and yet the law hits only a particular individual or class.
> (3) The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position, and the varying needs of different classes of persons often require separate treatment.
> (4) The principle does not take away from the State the power of classifying persons for legitimate purposes.
> (5) Every classification is in some degree likely to produce some inequality, and mere production of inequality is not enough.
> (6) If a law deals equally with members of a well-defined class, it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons.

> (7) While reasonable classification is permissible, such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained, and the classification cannot be made arbitrarily and without any substantial basis."

Proposition 7 is important for the present purpose. Also, it is well settled that Article 14 condemns discrimination not only by substantive law, but also by procedural law. (See **Budhan Choudhry v. State of Bihar,** (1955) 1 SCR 1045 at 1049).

17. After adverting to these judgments, Bhagwati J., in **Asgarali Nazarali Singaporawalla v. The State of Bombay**, 1957 SCR 678 at 690-692 held:

> "The first question which we have to address to ourselves is whether there is in the impugned Act a reasonable classification for the purposes of legislation. If we look to the provisions of the impugned Act closely it would appear that the legislature classified the offences punishable under Sections 161, 165 or 165-A of the Indian Penal Code or sub-section (2) of Section 5 of the Prevention of Corruption Act, 1947 in one group or category. They were offences relating to bribery or corruption by public servants and were thus appropriately classified in one group or category. The classification was founded on an intelligible differentia which distinguished the offenders thus grouped together from those left out of the group. The persons who committed these offences of bribery or corruption would form a class by themselves quite distinct from those offenders who

could be dealt with by the normal provisions contained in the Indian Penal Code or the Code of Criminal Procedure, 1898 and if the offenders falling within this group or category were thus singled out for special treatment, there would be no question of any discriminatory treatment being meted out to them as compared with other offenders who did not fall within the same group or category and who continued to be treated under the normal procedure. The next question to consider is whether this differentia had a rational relation to the object sought to be achieved by the impugned Act. The preamble of the Act showed that it was enacted for providing a more speedy trial of certain offences. An argument was however addressed before us based on certain observations of Mahajan, J. (as he then was) at p. 314, and Mukherjea, J. (as he then was) at p. 328 in *Anwar Ali Sarkar's case* [(1952) SCR 284]) quoted at p. 43 by Patanjali Sastri, C.J. in the case of *Kedar Nath Bajoria* v. *State of West Bengal* [(1954) SCR 30] that the speedier trial of offences could not afford a reasonable basis for such classification. Standing by themselves these passages might lend support to the contention urged before us by the learned counsel for the appellant. It must be noted, however, that this ratio was not held to be conclusive by this Court in *Kedar Nath Bajoria's case* [(1954) SCR 30] where this Court held:

> "(*1*) That when a law like the present one is impugned on the ground that it contravenes Article 14 of the Constitution the real issue to be decided is whether, having regard to the underlying purpose and policy of the Act as disclosed by its title, preamble and provisions, the classification of the offences for the trial of which the Special Court is set up and a special procedure

> is laid down can be said to be unreasonable or arbitrary and therefore violative of the equal protection clause;
> (*2*) having regard to the fact that the types of offences specified in the Schedule to the Act were very common and widely prevalent during the post war period and had to be checked effectively and speedily tried, the legislation in question must be regarded as having been based on a perfectly intelligent principle of classification, having a clear and reasonable relation to the object sought to be achieved, and it did not in any way contravene Article 14 of the Constitution."

In the instant case, bribery and corruption having been rampant and the need for weeding them out having been urgently felt, it was necessary to enact measures for the purpose of eliminating all possible delay in bringing the offenders to book. It was with that end in view that provisions were enacted in the impugned Act for speedier trial of the said offences by the appointment of Special Judges who were invested with exclusive jurisdiction to try the same and were also empowered to take cognizance thereof without the accused being committed to them for trial, and follow the procedure prescribed for the trial of warrant cases by Magistrates. The proceedings before the Special Judges were thus assimilated to those before the courts of sessions for trying cases without a jury or without the aid of assessors and the powers of appeal and revision invested in the High Court were also similarly circumscribed. All these provisions had the necessary effect of bringing about a speedier trial of these offences and it cannot be denied that this intelligible differentia had rational relation to the object sought to be achieved by the impugned Act.

> Both these conditions were thus fulfilled and it could not be urged that the provisions of the impugned Act were in any manner violative of Article 14 of the Constitution."

18. In so far as "manifest arbitrariness" is concerned, it is important to advert to the majority judgment of this Court in **Shayara Bano v. Union of India and others**, (2017) 9 SCC 1. The majority, in an exhaustive review of case law under Article 14, which dealt with legislation being struck down on the ground that it is manifestly arbitrary, has observed:

> "87**.** The thread of reasonableness runs through the entire fundamental rights chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14. Further, there is an apparent contradiction in the three-Judge Bench decision in *McDowell* [*State of A.P.* v. *McDowell and Co.*, (1996) 3 SCC 709] when it is said that a constitutional challenge can succeed on the ground that a law is "disproportionate, excessive or unreasonable", yet such challenge would fail on the very ground of the law being "unreasonable,

unnecessary or unwarranted". The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution.

xxx xxx xxx

101. It will be noticed that a Constitution Bench of this Court in *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India* [*Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*, (1985) 1 SCC 641 : 1985 SCC (Tax) 121] stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."

This view of the law by two learned Judges of this Court was concurred with by Kurian, J. in paragraph 5 of his judgment.

19. Article 21 is the Ark of the Covenant so far as the Fundamental Rights chapter of the Constitution is concerned. It deals with nothing less sacrosanct than the rights of life and personal liberty of the citizens of India and other persons. It is the only article in the Fundamental Rights chapter (along with Article 20) that cannot be suspended even in an emergency (See Article 359(1) of the Constitution). At present, Article 21 is the repository of a vast number of substantive and procedural rights post **Maneka Gandhi v. Union of India** (1978) 1 SCC 248. Thus, in **Rajesh Kumar** (supra) at 724-726, this Court held:

> "56. Article 21 as enacted in our Constitution reads as under:
> "21. *Protection of life and personal liberty*.—No person shall be deprived of his life or personal liberty except according to procedure established by law."
>
> 57. But this Court in *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] held that in view of the expanded interpretation of Article 21 in *Maneka Gandhi* [(1978) 1 SCC 248], it should read as follows: (*Bachan Singh case* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] , SCC p. 730, para 136)

"*136*. … 'No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law.'

In the converse positive form, the expanded article will read as below:

'A person may be deprived of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law.'"

58. This epoch-making decision in *Maneka Gandhi* [(1978) 1 SCC 248] has substantially infused the concept of due process in our constitutional jurisprudence whenever the court has to deal with a question affecting life and liberty of citizens or even a person. Krishna Iyer, J. giving a concurring opinion in *Maneka Gandhi* [(1978) 1 SCC 248] elaborated, in his inimitable style, the transition from the phase of the rule of law to due process of law. The relevant statement of law given by the learned Judge is quoted below: (SCC p. 337, para 81)

"*81*. … 'Procedure established by law', with its lethal potentiality, will reduce life and liberty to a precarious plaything if we do not *ex necessitate* import into those weighty words an adjectival rule of law, civilised in its soul, fair in its heart and fixing those imperatives of procedural protection absent which the processual tail will wag the substantive head. Can the sacred essence of the human right to secure which the struggle for liberation, with 'do or die' patriotism, was launched be sapped by formalistic and pharisaic prescriptions, regardless of essential standards? An enacted apparition is a constitutional, illusion. Processual justice is writ patently on Article 21. It is too grave to be circumvented by a black letter ritual processed through the legislature."

59. Immediately after the decision in *Maneka Gandhi* [(1978) 1 SCC 248] another Constitution Bench of this Court rendered decision in *Sunil*

Batra v. *Delhi Admn.* [(1978) 4 SCC 494 : 1979 SCC (Cri) 155] specifically acknowledged that even though a clause like the Eighth Amendment of the United States Constitution and concept of "due process" of the American Constitution is not enacted in our Constitution text, but after the decision of this Court in *Rustom Cavasjee Cooper* [(1970) 1 SCC 248] and *Maneka Gandhi* [(1978) 1 SCC 248] the consequences are the same. The Constitution Bench of this Court in *Sunil Batra* [(1978) 4 SCC 494 : 1979 SCC (Cri) 155] speaking through Krishna Iyer, J. held: (*Sunil Batra case* [(1978) 4 SCC 494 : 1979 SCC (Cri) 155] , SCC p. 518, para 52)

"*52*. True, our Constitution has no 'due process' clause or the Eighth Amendment; but, in this branch of law, after *Cooper* [(1970) 1 SCC 248] and *Maneka Gandhi* [(1978) 1 SCC 248], the consequence is the same."

60. The Eighth Amendment (1791) to the Constitution of the United States virtually emanated from the English Bill of Rights (1689). The text of the Eighth Amendment reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted". The English Bill of Rights drafted a century ago postulates, "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted".

61. Our Constitution does not have a similar provision but after the decision of this Court in *Maneka Gandhi case* [(1978) 1 SCC 248] jurisprudentially the position is virtually the same and the fundamental respect for human dignity underlying the Eighth Amendment has been read into our jurisprudence.

62. Until the decision was rendered in *Maneka Gandhi* [(1978) 1 SCC 248], Article 21 was viewed

> by this Court as rarely embodying the Diceyian concept of the rule of law that no one can be deprived of his personal liberty by an executive action unsupported by law. If there was a law which provided some sort of a procedure it was enough to deprive a person of his life or personal liberty. In this connection, if we refer to the example given by S.R. Das, J. in his judgment in *A.K. Gopalan* [AIR 1950 SC 27 : (1950) 51 Cri LJ 1383] that if the law provided the Bishop of Rochester "be boiled in oil" it would be valid under Article 21. But after the decision in *Maneka Gandhi* [(1978) 1 SCC 248] which marks a watershed in the development of constitutional law in our country, this Court, for the first time, took the view that Article 21 affords protection not only against the executive action but also against the legislation which deprives a person of his life and personal liberty unless the law for deprivation is reasonable, just and fair. And it was held that the concept of reasonableness runs like a golden thread through the entire fabric of the Constitution and it is not enough for the law to provide some semblance of a procedure. The procedure for depriving a person of his life and personal liberty must be eminently just, reasonable and fair and if challenged before the court it is for the court to determine whether such procedure is reasonable, just and fair and if the court finds that it is not so, the court will strike down the same.
>
> 63. Therefore, "law" as interpreted under Article 21 by this Court is more than mere "lex". It implies a due process, both procedurally and substantively."

20. Given the parameters of judicial review of legislation laid down in these judgments, we have to see whether Section 45 can pass constitutional muster.

21. It is important to first set out the genesis of Section 45 as it appeared in the Prevention of Money Laundering Bill, 1999. In its original avatar, the precursor to Section 45, which was Section 44 of the said Bill, read as follows:-

> "44. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973,-
>
> (a) every offence punishable under this Act shall be cognizable;
>
> (b) no person accused of an offence punishable for a term of imprisonment of more than three years under this Act shall be released on bail or on his own bond unless-
>
> (i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and
>
> (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail;
>
> Provided that a person who is under the age of sixteen years, is a woman or is sick or infirm, may be released on bail, if the Special Court so directs;
>
> Provided further that the Special Court shall not take cognizance of any offence punishable under Section 4 except upon a complaint in writing made by-
>
> (i) the Director; or
> (ii) any officer of the Central Government or State Government authorized in writing in this behalf by the Central Government by a general or a

special order made in this behalf by that Government.

(2) The limitation on granting of bail specified in clause (b) of sub-section (1) is in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting of bail."

At this stage, it is clear that this Section referred only to offences punishable under the Act itself, in which the twin conditions for grant of bail were imposed, in addition to limitations for such grant under the Code of Criminal Procedure. Somehow, this provision did not translate itself into dealing with offences under the 2002 Act, but became Section 45 of the 2002 Act, which was brought into force in 2005. This provision originally read as follows:

"**45. Offences to be cognizable and non-bailable.-**

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule shall be released on bail or on his own bond unless-
(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

> (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:
>
> Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs:
>
> Provided further that the Special Court shall not take cognizance of any offence punishable under section 4 except upon a complaint in writing made by- (i) the Director; or (ii) any officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government by a general or special order made in this behalf by that Government.
>
> (2) The limitation on granting of bail specified in clause (b) of sub-section (1) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail."

The change made by Section 45 is that, for the purpose of grant of bail, what was now to be looked at was offences that were punishable for a term of imprisonment of three years or more under Part A of the Schedule, and not offences under the 2002 Act itself. At this stage, Part A of the Schedule contained two paragraphs – Para 1 containing Sections 121 and 121A of the Indian Penal Code, which deal with waging or attempting to

wage war or abetting waging of war against the Government of India, and conspiracy to commit such offences. Paragraph 2 dealt with offences under the Narcotic Drugs and Psychotropic Substances Act, 1985. Part B of the Schedule, as originally enacted, referred to certain offences of a heinous nature under the Indian Penal Code, which included murder, extortion, kidnapping, forgery and counterfeiting. Paragraphs 2 to 5 of Part B dealt with certain offences under the Arms Act 1959, Wildlife (Protection) Act 1972, Immoral Traffic (Prevention) Act, 1956 and the Prevention of Corruption Act, 1988. When the Act was originally enacted, it was, thus, clear that the twin conditions applicable under Section 45(1) would only be in cases involving waging of war against the Government of India and offences under the Narcotic Drugs and Psychotropic Substances Act. Even the most heinous offences under the Indian Penal Code were contained only in Part B, so that if bail were asked for such offences, the twin conditions imposed by Section 45(1) would not apply. Incidentally, one of the reasons for classifying offences in Part A and Part B of the Schedule was that offences specified under Part B would get attracted

only if the total value involved in such offences was Rs.30 lakhs or more (under Section 2(y) of the Act as it read then). Thereafter, the Act has been amended several times. The amendment made in 2005 in Section 45(1) was innocuous and is not an amendment with which we are directly concerned. The 2009 Amendment further populated Parts A and B of the Schedule. In Part A, offences under Sections 489 A and B of the Indian Penal Code, relating to counterfeiting were added and offences under the Explosive Substances Act, 1908 and Unlawful Activities (Prevention) Act, 1967, which dealt with terrorist activities, were added. In Part B, several other offences were added from the Indian Penal Code, as were offences under the Explosives Act 1884, Antiquities and Arts Treasures Act 1972, Securities and Exchange Board of India Act 1992, Customs Act 1962, Bonded Labour System (Abolition) Act 1976, Child Labour (Prohibition and Regulation) Act 1986, Transplantation of Human Organs Act 1994, Juvenile Justice (Care and Protection of Children) Act 2000, Emigration Act 1983, Passports Act 1967, Foreigners Act 1946, Copyright Act 1957, Trademarks Act 1999, Information Technology Act

2000, Biological Diversity Act 2002, Protection of Plant and Farmers Rights Act 2001, Environmental Protection Act 1986, Water (Prevention and Control of Pollution Act) 1974, Air (Prevention and Control of Pollution Act) 1981 and Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms of Continental Shelf Act, 2002.

22. By the Amendment Act of 2012, which is Act 2 of 2013, a very important amendment was made to the Schedule by which the entire Part B offences were transplanted into Part A. The object for this amendment, as stated in the Statement of Objects and Reasons for the amendment in clause 3 (j), specifically provided:

> "(j) putting all the offences listed in Part A and Part B of the Schedule to the aforesaid Act into Part A of that Schedule instead of keeping them in two Parts so that the provision of monetary threshold does not apply to the offences."

23. By the Finance Act of 2015, by Section 145, the limit of Rs.30 lakhs in Section 2(y) was raised to Rs.1 crore and in the Schedule after Part A, Part B was populated with only one entry, namely Section 132 of the Customs Act. Certain other

amendments were made, by the Finance Act of 2016, to the 2002 Act with which we are not directly concerned.

24. The statutory history of Section 45, read with the Schedule, would, thus show that in its original avatar, as Clause 44 of the 1999 Bill, the Section dealt only with offences under the Act itself. Section 44 of the 2002 Act makes it clear that an offence punishable under Section 4 of the said Act must be tried with the connected scheduled offence from which money laundering has taken place. The statutory scheme, as originally enacted, with Section 45 in its present avatar, would, therefore, lead to the same offenders in different cases having different results qua bail depending on whether Section 45 does or does not apply. The first would be cases where the charge would only be of money laundering and nothing else, as would be the case where the scheduled offence in Part A has already been tried, and persons charged under the scheduled offence have or have not been enlarged on bail under the Code of Criminal Procedure and thereafter convicted or acquitted. The proceeds of crime from such scheduled offence may well be discovered much later in the hands of Mr. X, who now becomes charged

with the crime of money laundering under the 2002 Act. The predicate or scheduled offence has already been tried and the accused persons convicted/acquitted in this illustration, and Mr. X now applies for bail to the Special Court/High Court. The Special Court/High Court, in this illustration, would grant him bail under Section 439 of the Code of Criminal Procedure – the Special Court is deemed to be a Sessions Court – and can, thus, enlarge Mr. X on bail, with or without conditions, under Section 439. It is important to note that Mr. X would not have to satisfy the twin conditions mentioned in Section 45 of the 2002 Act in order to be enlarged on bail, pending trial for an offence under the 2002 Act.

25. The second illustration would be of Mr. X being charged with an offence under the 2002 Act together with a predicate offence contained in Part B of the Schedule. Both these offences would be tried together. In this case, again, the Special Court/High Court can enlarge Mr. X on bail, with or without conditions, under Section 439 of the Code of Criminal Procedure, as Section 45 of the 2002 Act would not apply. In a third illustration, Mr. X can be charged under the 2002 Act

together with a predicate offence contained in Part A of the Schedule in which the term for imprisonment would be 3 years or less than 3 years (this would apply only post the Amendment Act of 2012 when predicate offences of 3 years and less than 3 years contained in Part B were all lifted into Part A). In this illustration, again, Mr. X would be liable to be enlarged on bail under Section 439 of the Code of Criminal Procedure by the Special Court/High Court, with or without conditions, as Section 45 of the 2002 Act would have no application.

26. The fourth illustration would be an illustration in which Mr. X is prosecuted for an offence under the 2002 Act and an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule. In this illustration, the Special Court/High Court would enlarge Mr. X on bail only if the conditions specified in Section 45(1) are satisfied and not otherwise. In the fourth illustration, Section 45 would apply in a joint trial of offences under the Act and under Part A of the Schedule because the only thing that is to be seen for the purpose of granting bail, under this Section, is the alleged occurrence of a Part A scheduled offence, which has

imprisonment for over three years. The likelihood of Mr. X being enlarged on bail in the first three illustrations is far greater than in the fourth illustration, dependant only upon the circumstance that Mr. X is being prosecuted for a Schedule A offence which has imprisonment for over 3 years, a circumstance which has no nexus with the grant of bail for the offence of money laundering. The mere circumstance that the offence of money laundering is being tried with the Schedule A offence without more cannot naturally lead to the grant or denial of bail (by applying Section 45(1)) for the offence of money laundering and the predicate offence.

27. Again, it is quite possible that the person prosecuted for the scheduled offence is different from the person prosecuted for the offence under the 2002 Act. Mr. X may be a person who is liable to be prosecuted for an offence, which is contained in Part A of the Schedule. In perpetrating this offence under Part A of the Schedule, Mr. X may have been paid a certain amount of money. This money is ultimately traced to Mr. Y, who is charged with the same offence under Part A of the Schedule and is also charged with possession of the proceeds of crime,

which he now projects as being untainted. Mr. X applies for bail to the Special Court/High Court. Despite the fact that Mr. X is not involved in the money laundering offence, but only in the scheduled offence, by virtue of the fact that the two sets of offences are being tried together, Mr. X would be denied bail because the money laundering offence is being tried along with the scheduled offence, for which Mr. Y alone is being prosecuted. This illustration would show that a person who may have nothing to do with the offence of money laundering may yet be denied bail, because of the twin conditions that have to be satisfied under Section 45(1) of the 2002 Act. Also, Mr. A may well be prosecuted for an offence which falls within Part A of the Schedule, but which does not involve money laundering. Such offences would be liable to be tried under the Code of Criminal Procedure, and despite the fact that it may be the very same Part A scheduled offence given in the illustration above, the fact that no prosecution for money laundering along with the said offence is launched, would enable Mr. A to get bail without the rigorous conditions contained in Section 45 of the 2002 Act. All these examples show that manifestly arbitrary,

discriminatory and unjust results would arise on the application or non application of Section 45, and would directly violate Articles 14 and 21, inasmuch as the procedure for bail would become harsh, burdensome, wrongful and discriminatory depending upon whether a person is being tried for an offence which also happens to be an offence under Part A of the Schedule, or an offence under Part A of the Schedule together with an offence under the 2002 Act. Obviously, the grant of bail would depend upon a circumstance which has nothing to do with the offence of money laundering. On this ground alone, Section 45 would have to be struck down as being manifestly arbitrary and providing a procedure which is not fair or just and would, thus, violate both Articles 14 and 21 of the Constitution.

28. Another interesting feature of Section 45 is that the twin conditions that need to be satisfied under the said Section are that there are reasonable grounds for believing that the accused is not guilty of "such offence" and that he is not likely to commit any offence while on bail. The expression "such offence" would be relatable only to an offence in Part A of the Schedule. Thus, in an application made for bail, where the

offence of money laundering is involved, if Section 45 is to be applied, the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of the offence under Part A of the Schedule, which is not the offence of money laundering, but which is a completely different offence. In every other Act, where these twin conditions are laid down, be it the Terrorist and Disruptive Activities (Prevention) Act, 1987 or the Narcotic Drugs and Psychotropic Substances Act, 1985, the reasonable grounds for believing that the accused is not guilty of an offence is in relation to an offence under the very Act in which such section occurs. (See for example, Section 20(8) of TADA and Section 37 of the NDPS Act). It is only in the 2002 Act that the twin conditions laid down do not relate to an offence under the 2002 Act at all, but only to a separate and distinct offence found under Part A of the Schedule. Obviously, the twin conditions laid down in Section 45 would have no nexus whatsoever with a bail application which concerns itself with the offence of money laundering, for if Section 45 is to apply, the Court does not apply its mind to whether the person prosecuted is guilty of the offence of money laundering, but

instead applies its mind to whether such person is guilty of the scheduled or predicate offence. Bail would be denied on grounds germane to the scheduled or predicate offence, whereas the person prosecuted would ultimately be punished for a completely different offence - namely, money laundering. This, again, is laying down of a condition which has no nexus with the offence of money laundering at all, and a person who may prove that there are reasonable grounds for believing that he is not guilty of the offence of money laundering may yet be denied bail, because he is unable to prove that there are reasonable grounds for believing that he is not guilty of the scheduled or predicate offence. This would again lead to a manifestly arbitrary, discriminatory and unjust result which would invalidate the Section.

29. It is important to notice that Section 45 classifies the predicate offence under Part A of the Schedule on the basis of sentencing. The learned Attorney General referred to a number of judgments in which classification on this basis has been upheld. It is unnecessary to refer to these judgments inasmuch as the classification of three years or more of offences

contained in Part A of the Schedule must have a reasonable relation to the object sought to be achieved under the 2002 Act. As has already been pointed out, the 2002 Act was enacted so that property involved in money laundering may be attached and brought back into the economy, as also that persons guilty of the offence of money laundering must be brought to book. It is interesting to note that even in the recent 2015 amendment, the Legislature has used the value involved in the offence contained in Part B of the Schedule as a basis for classification. If, for example, the basis for classification of offences referred to and related to offences under the 2002 Act with a monetary limit beyond which such offences would be made out, such classification would obviously have a rational relation to the object sought to be achieved by the Act i.e. to attach properties and the money involved in money laundering and to bring persons involved in the offence of money laundering to book. On the other hand, it is clear that the term of imprisonment of more than 3 years for a scheduled or predicate offence would be a manifestly arbitrary and unjust classification, having no rational relation to the object sought to be achieved by an Act

dealing with money laundering. Again a few illustrations would suffice to prove the point.

30. An extremely heinous offence, such as murder, punishable with death or life imprisonment, which is now contained in Part A of the Schedule may yield only Rs.5,000/- as proceeds of crime. On the other hand, an offence relating to a false declaration under Section 132 of the Customs Act, punishable with a sentence of upto 2 years, which is an offence under Part B of the Schedule, may lead to proceeds of crime in crores of rupees. In short, a classification based on sentence of imprisonment of more than three years of an offence contained in Part A of the Schedule, which is a predicate offence, would have no rational relation to the object of attaching and bringing back into the economy large amounts by way of proceeds of crime. When it comes to Section 45, it is clear that a classification based on sentencing qua a scheduled offence would have no rational relation with the grant of bail for the offence of money laundering, as has been shown in the preceding paragraphs of this judgment. Even in the judgments citied by the learned Attorney General, it is clear that a

classification is justified only if it is not manifestly arbitrary. For example, in **Special Courts Bill, 1978, In re,** (1979) 1 SCC 380, a judgment cited by the learned Attorney General, proposition 9 contained at page 425 states:

> "If the legislative policy is clear and definite and as an effective method of carrying out that policy a discretion is vested by the statute upon a body of administrators or officers to make selective application of the law to certain classes or groups of persons, the statute itself cannot be condemned as a piece of discriminatory legislation. In such cases, the power given to the executive body would import a duty on it to classify the subject-matter of legislation in accordance with the objective indicated in the statute. If the administrative body proceeds to classify persons or things on a basis which has no rational relation to the objective of the Legislature, its action can be annulled as offending against the equal protection clause. On the other hand, if the statute itself does not disclose a definite policy or objective and it confers authority on another to make selection at its pleasure, the statute would be held on the face of it to be discriminatory, irrespective of the way in which it is applied."

It is clear from a reading of this judgment that offences based on sentencing of the scheduled offence would have no rational relation to the object of the 2002 Act and to the granting of bail for offences committed under the Act, and, therefore, have to be annulled on the basis of the equal protection clause.

31. When we go to Part A of the Schedule as it now exists, it is clear that there are many sections under the Indian Penal Code punishable with life imprisonment which are not included in Part A of the Schedule, and which may yet lead to proceeds of crime. For example, Sections 232 and 238 of the Indian Penal Code, which deal with counterfeiting of Indian coin and import or export of counterfeited Indian coin, are punishable with life imprisonment. These sections are not included in Part A of the Schedule, and a person who may counterfeit Indian coin is liable to be tried under the Code of Criminal Procedure with conditions as to bail under Section 439 being imposed by the High Court or the Sessions Court. As against this, a person who counterfeits Government stamps under Section 255 is roped into Part A of the Schedule, which is also punishable with life imprisonment. If such person is to apply for bail, the twin conditions contained in Section 45 would apply to him. Similar is the case with offences where a punishment of maximum of 10 years is given. Section 240 dealing with delivery of Indian coin possessed with knowledge that it is counterfeit; Section 251 dealing with delivery of Indian coin

possessed with knowledge that it is altered; Sections 372 and 373 which deal with the selling and buying of minors for the purpose of prostitution, are all offences which are outside Part A of the Schedule and are punishable with the maximum of 10 years sentence. Each of these offences may involve money laundering, but not being in Part A of the Schedule, a person prosecuted for these offences would be able to obtain bail under Section 439 of the Code of Criminal Procedure, without any further conditions attached. On the other hand, if a person is charged with extortion under Sections 386 or 388, (such sections being included in Part A of the Schedule) and Section 4 of the 2002 Act, the person prosecuted under these sections would only be able to obtain bail after meeting the stringent conditions specified in Section 45. This is yet another circumstance which makes the application of Section 45 to the offence of money laundering and the predicate offence manifestly arbitrary.

32. When we come to paragraph 2 of Part A of the Schedule, this becomes even more apparent. Sections 19, 24, 27A and 29 of the Narcotic Drugs and Psychotropic Substances Act,

1985 are all sections which deal with narcotic drugs and psychotropic substances where a person is found with, what is defined as, “commercial quantity” of such substances. In each of these cases, under Section 37 of the NDPS Act, a person prosecuted for these offences has to meet the same twin conditions which are contained in Section 45 of the 2002 Act. Inasmuch as these Sections attract the twin conditions under the NDPS Act in any case, it was wholly unnecessary to include them again in paragraph 2 of Part A of the Schedule, for when a person is prosecuted for an offence under Sections 19, 24, 27A or 29 of the NDPS Act, together with an offence under Section 4 of the 2002 Act, Section 37 of the NDPS Act would, in any case, be attracted when such person is seeking bail for offences committed under the 2002 Act and the NDPS Act.

33. Also, the classification contained within the NDPS Act is completely done away with. Unequals are dealt with as if they are now equals. The offences under the NDPS Act are classified on the basis of the quantity of narcotic drugs and psychotropic substances that the accused is found with, which are categorized as: (1) a small quantity, as defined; (2) a

quantity which is above small quantity, but below commercial quantity, as defined; and (3) above commercial quantity, as defined. The sentences of these offences vary from 1 year for a person found with small quantity, to 10 years for a person found with something between small and commercial quantity, and a minimum of 10 years upto 20 years when a person is found with commercial quantity. The twin conditions specified in Section 37 of the NDPS Act get attracted when bail is asked for only insofar as persons who have commercial quantities with them are concerned. A person found with a small quantity or with a quantity above small quantity, but below commercial quantity, punishable with a one year sentence or a 10 year sentence respectively, can apply for bail under Section 439 of the Code of Criminal Procedure without satisfying the same twin conditions as are contained in Section 45 of the 2002 Act, under Section 37 of the NDPS Act. By assimilating all these three contraventions and bracketing them together, the 2002 Act treats as equal offences which are treated as unequal by the NDPS Act itself, when it comes to imposition of the further twin conditions for grant of bail. This is yet another manifestly

arbitrary and discriminatory feature of the application of Section 45.

34. A reference to paragraph 23 of Part A of the Schedule would also show how Section 45 can be used for an offence under the Biological Diversity Act, 2002. If a person covered under the Act obtains, without the previous approval of the National Biodiversity Authority, any biological resources occurring in India for research or for commercial utilization, he is liable to be punished for imprisonment for a term which may extend to 5 years under Section 55 of the Act. A breach of this provision, when combined with an offence under Section 4 of the 2002 Act, would lead to bail being obtained only if the twin conditions in Section 45 of the 2002 Act are satisfied. By no stretch of imagination can this kind of an offence be considered as so serious as to lead to the twin conditions in Section 45 having to be satisfied before grant of bail, even assuming that classification on the basis of sentence has a rational relation to the grant of bail after complying with Section 45 of the 2002 Act.

35. Another conundrum that arises is that, unlike the Terrorist and Disruptive Activities (Prevention) Act, 1987, there is no provision in the 2002 Act which excludes grant of anticipatory bail. Anticipatory bail can be granted in circumstances set out in **Siddharam Satlingappa Mhetre v. State of Maharashtra,** (2011) 1 SCC 694 (See paragraphs 109, 112 and 117). Thus, anticipatory bail may be granted to a person who is prosecuted for the offence of money laundering together with an offence under Part A of the Schedule, which may last throughout the trial. Obviously for grant of such bail, Section 45 does not need to be satisfied, as only a person arrested under Section 19 of the Act can only be released on bail after satisfying the conditions of Section 45. But insofar as pre-arrest bail is concerned, Section 45 does not apply on its own terms. This, again, would lead to an extremely anomalous situation. If pre-arrest bail is granted to Mr. X, which enures throughout the trial, for an offence under Part A of the Schedule and Section 4 of the 2002 Act, such person will be out on bail without his having satisfied the twin conditions of Section 45. However, if in an identical situation, Mr. Y is prosecuted for the same offences,

but happens to be arrested, and then applies for bail, the twin conditions of Section 45 will have first to be met. This again leads to an extremely anomalous situation showing that Section 45 leads to manifestly arbitrary and unjust results and would, therefore, violate Articles 14 and 21 of the Constitution.

36. However, the learned Attorney General has argued before us that we must uphold Section 45 as it is part of a complete code under the 2002 Act. According to him, Section 45, when read with Sections 3 and 4, would necessarily lead to the conclusion that the source of the proceeds of crime, being the scheduled offence, and the money laundering offence, would have to be tried together, and the nexus that is provided is because the source of money laundering being as important as money laundering itself, conditions under Section 45 would have to be applied. We are afraid that, for all the reasons given by us earlier in this judgment, we are unable to agree. The learned Attorney General asked us to read down Section 45 in that when the Court is satisfied that there are reasonable grounds for believing that a person is not guilty of an offence, it only meant that the Court must prima facie come to such a

conclusion. Secondly, the fact that he is not likely to commit "any offence" while on bail would only be restricted to any offence of a like nature. Again, we are afraid that merely reading down the two conditions would not get rid of the vice of manifest arbitrariness and discrimination, as has been pointed out by us hereinabove. Also, we cannot agree with the learned Attorney General that Section 45 imposes two conditions which are akin to conditions that are specified for grant of ordinary bail. For this purpose, he referred us to **Amarmani Tripathi** (supra) at para 18, in which it was stated that, for grant of bail, the Court has to see whether there is prima facie or reasonable ground to believe that the accused has committed the offence, and the likelihood of that offence being repeated has also be seen. It is obvious that the twin conditions set down in Section 45 are a much higher threshold bar than any of the conditions laid down in paragraph 18 of the aforesaid judgment. In fact, the presumption of innocence, which is attached to any person being prosecuted of an offence, is inverted by the conditions specified in Section 45, whereas for grant of ordinary bail the presumption of innocence attaches, after which the various

factors set out in paragraph 18 of the judgment are to be looked at. Under Section 45, the Court must be satisfied that there are reasonable grounds to believe that the person is not guilty of such offence and that he is not likely to commit any offence while on bail.

37. In **United States v. Anthony Salerno & Vincent Cafaro** 481 US 739 (1987), a provision of the Bail Reform Act of 1984, which allowed a Federal Court to permit pre-trial detention on the ground that the person arrested is likely to commit future crimes, had been declared unconstitutional as offending substantive due process by the United States Court of Appeals for the Second Circuit. A majority of the US Supreme Court reversed this judgment with reference to both substantive due process and to the 8th amendment to the US Constitution. The majority judgment concluded:

> "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception. We hold that the provisions for pretrial detention in the Bail Reform Act of 1984 fall within that carefully limited exception. The Act authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release

> can dispel. The numerous procedural safeguards detailed above must attend this adversary hearing. We are unwilling to say that this congressional determination, based as it is upon that primary concern of every government—a concern for the safety and indeed the lives of its citizens—on its face violates either the Due Process Clause of the Fifth Amendment or the Excessive Bail Clause of the Eighth Amendment."

In a sharply worded minority judgment of Justice Marshall, with whom Justice Brennan agreed, the minority held that the Bail Reform Act, which permitted pre-trial detention on the ground that the person arrested is likely to commit future crimes would violate substantive due process and the 8th amendment to the US Constitution. This it did with reference to an earlier judgment, namely, **Stack v. Boyle,** 342 US 1, where Chief Justice Vinson stated that unless pre-trial bail is preserved, the presumption of innocence secured only after centuries of struggle would lose its meaning. The dissenting judgment concluded:

> "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." United States v. Rabinowitz, 339 U.S. 56, 69, 70 S.Ct. 430, 436, 94 L.Ed. 653 (1950) (Frankfurter, J., dissenting). Honoring the presumption of innocence is often difficult; sometimes we must pay substantial social costs as a result of our commitment to the

> values we espouse. But at the end of the day the presumption of innocence protects the innocent; the shortcuts we take with those whom we believe to be guilty injure only those wrongfully accused and, ultimately, ourselves."

Justice Stevens also dissented, agreeing with Justice Marshall's analysis.

38. 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.

39. The judgment in **Kartar Singh v. State of Punjab**, (1994) 3 SCC 569 at 707 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.

40. A similar provision in the Maharashtra Control of Organised Crime Act, 1999, also dealing with the great menace of organized crime to society, was upheld somewhat grudgingly by this Court in **Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra and Anr,** (2005) 5 SCC 294 at 317, 318-319 as follows:

> "38. We are furthermore of the opinion that the restrictions on the power of the court to grant bail should not be pushed too far. If the court, having regard to the materials brought on record, is satisfied that in all probability he may not be ultimately convicted, an order granting bail may be passed. The satisfaction of the court as regards his likelihood of not committing an offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever be it a minor or major offence. If such an expansive meaning is given, even likelihood of commission of an offence under Section 279 of the Indian Penal Code may debar the court from releasing the accused on bail. A statute, it is trite, should not be interpreted in such a manner as would lead to absurdity. What would further be necessary on the part of the court is to see the culpability of the accused and his involvement in the commission of an organised crime either directly or indirectly. The court at the time of considering the application for grant of bail shall consider the question from the angle as to whether he was possessed of the requisite mens rea. Every little omission or commission, negligence or dereliction may not lead to a possibility of his having culpability in the matter which is not the sine qua non for attracting the provisions of MCOCA. A person in a given situation may not do that which he

> ought to have done. The court may in a situation of this nature keep in mind the broad principles of law that some acts of omission and commission on the part of a public servant may attract disciplinary proceedings but may not attract a penal provision."

The Court then went on to say:

> "44. The wording of Section 21(4), in our opinion, does not lead to the conclusion that the court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act. If such a construction is placed, the court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an event, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the legislature. Section 21(4) of MCOCA, therefore, must be construed reasonably. It must be so construed that the court is able to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. Similarly, the court will be required to record a finding as to the possibility of his committing a crime after grant of bail. However, such an offence in futuro must be an offence under the Act and not any other offence. Since it is difficult to predict the future conduct of an accused, the court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence."

41. The learned Attorney General relied heavily on Section 24 of the 2002 Act to show that the burden of proof in any proceeding relating to proceeds of crime is upon the person

charged with the offence of money laundering, and in the case of any other person i.e. a person not charged with such offence, the Court may presume that such proceeds are involved in money laundering. Section 45 of the Act only speaks of the scheduled offence in Part A of the Schedule, whereas Section 24 speaks of the offence of money laundering, and raises a presumption against the person prosecuted for the crime of money laundering. This presumption has no application to the scheduled offence mentioned in Section 45, and cannot, therefore, advance the case of the Union of India.

42. The learned Attorney General then relied strongly on **Gautam Kundu** (supra) and **Rohit Tandon** (supra). **Gautam Kundu** (supra) is a judgment relating to an offence under the SEBI Act, which is a scheduled offence, which was followed in **Rohit Tandon** (supra). In **Rohit Tandon** (supra), Khanwilkar, J., speaking for the Bench, makes it clear that the judgment does not deal with the constitutional validity of Section 45 of the 2002 Act. Both these judgments proceed on the footing that Section 45 is constitutionally valid and then go on to apply Section 45 on the facts of those cases. These

judgments, therefore, are not of much assistance when it comes to the constitutional validity of Section 45 being challenged.

43. Shri Rohatgi's alternate argument, namely, that if Section 45 were not to be struck down, the 2012 Amendment Act should be read down in the manner indicated in **Gorav Kathuria v. Union of India and Ors.**, 2017 (348) ELT 24 (P & H) and having been expressly approved by this Court, must apply to the facts of these cases.

44. In **Gorav Kathuria** (supra), the 2012 Amendment Act was read down having regard to the object sought to be achieved by the amendment, namely, that Part B of the Schedule is being made Part A of the Schedule, so that the provision of a monetary threshold limit does not apply to the offences contained therein. The High Court concluded:

> "12.20 Guided by the aforesaid principles laid down by the Hon'ble Supreme Court regarding statutory interpretation and the duty of the Court to secure the ends of justice, we have no hesitation in holding that in 2013, Part B of the Schedule was omitted and the Scheduled Offences falling thereunder were incorporated in Part A with the sole object to overcome the monetary threshold limit of Rs. 30 lakhs for invocation of PMLA in respect of the

> laundering of proceeds of crime involved in those offences. No substantive amendment was proposed with express intention to apply limitations on grant of bail as contained in Section 45(1) in respect of persons accused of such offences which were earlier listed in Part B. Therefore, twin limitations in grant of bail contained in Section 45(1) as it stands today, are not applicable *qua* a person accused of such offences which were earlier listed in Part B."

The matter came to this Court by a certificate of fitness granted by the High Court. Sikri, J and Ramana, J., by their order dated 12th August, 2016, stated:

> "Though the High Court has granted certificate to appeal, we have heard the learned counsel for some time and are of the opinion that the impugned judgment of the High Court is correct.
>
> This appeal is, accordingly, dismissed."

The complaint of the learned Attorney General is that this was done at the very threshold without hearing the Union of India. Be that as it may, we are of the opinion that, even though the Punjab High Court judgment appears to be correct, it is unnecessary for us to go into this aspect any further, in view of the fact that we have struck down Section 45 of the 2002 Act as a whole.

45. 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.

…….....J.
(R.F. Nariman)

…….....J.
(Sanjay Kishan Kaul)

New Delhi;
November 23, 2017.