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Premium

Explained: Bail in money laundering cases, and the 'twin test' under PMLA

A Bench headed by Justice Sudhir Kumar Jain on Friday heard an urgent plea by the Enforcement Directorate seeking a stay on the bail, and reserved its order until next week.

Written by [Apurva Vishwanath](#) [Follow](#)

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As per the ruling, the twin test has to be rigorously applied by all courts – special courts trying money laundering offences as well as constitutional courts. It would also apply in the same way for both regular bail and anticipatory bail.

A day after a trial court granted bail to Delhi Chief Minister Arvind Kejriwal who is in jail on charges under the Prevention of Money Laundering Act (PMLA), the Delhi High Court stayed the order.

A Bench headed by Justice Sudhir Kumar Jain on Friday heard an urgent plea by the Enforcement Directorate seeking a stay on the bail, and reserved its order until next week. The ED challenged the trial court's order on the ground that the court had failed to apply the 'twin test' for granting bail under PMLA.

What is the twin test, and why is bail under PMLA so contentious?

Section 45 and twin test

Section 45 of the PMLA, which deals with bail, first states that no court can grant bail for offences under this law, and then proceeds to mention a few exceptions. The negative language in the provision itself shows that bail is not the rule but the exception under PMLA. ✓

The provision makes it mandatory to hear the public prosecutor in all bail applications, and when the prosecutor opposes bail, the court is required to apply a



There are similar provisions in several other laws that deal with serious offences — for example, Section 36AC of The Drugs and Cosmetics Act, 1940, Section 37 of The Narcotic Drugs and Psychotropic Substances Act, 1985, and Section 43D(5) of the Unlawful Activities Prevention Act, 1967.

The provision in the UAPA, for example, states that “no person accused of an offence punishable under Chapters IV (Punishment for Terrorist Activities) and VI (Terrorist Organisations) of this Act shall...be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard”, or if the court “is of the opinion that there are reasonable grounds for believing that the accusation...is prima facie true”.

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Legal challenges to twin test

The first blow to the constitutional validity of the twin test came in a 2017 ruling, *Nikesh Tarachand Shah v Union of India*.

A two-judge Bench comprising Justices Rohinton Nariman and Sanjay Kishan Kaul struck down the bail provision as unconstitutional on the ground that the onerous conditions were not a reasonable classification. ‘Reasonable classification’ is a feature of the right to equality, which is a fundamental right.

The petitioners argued that the underlying reasoning in Nikesh Tarachand Shah was valid even if Parliament brought back the law. However, a three-judge Bench headed by Justice A M Khanwilkar (now retired) refused to accept the previous ruling.

“We are unable to agree with the observations in Nikesh Tarachand Shah distinguishing the enunciation of the Constitution Bench decision in Kartar Singh; and other observations suggestive of doubting the perception of Parliament in regard to the seriousness of the offence of money-laundering, including about it posing serious threat to the sovereignty and integrity of the country,” the court said.

Legal experts have questioned the logic of equating money laundering with stringent anti-terror and narcotics laws when the offence of money laundering, however serious, carries a maximum sentence of only seven years. Only in money laundering cases where the scheduled offence involves narcotics, is the maximum sentence extended to 10 years.

In response, the government had argued in court that persons who are involved in money laundering are “influential, intelligent, and resourceful, and the crime is committed with full pre-meditation, which ensures that offence is not detected and even if it is detected, investigation agency cannot trace the evidence”.

The government has defended the onerous bail conditions on the ground that the offence is committed “with the help of advanced technology so as to conceal the transaction”.

Current position in law

One key aspect of the challenge to the amendment on bail conditions still remains open even after the Vijay Madanlal Choudhary ruling: the passing of these amendments through the Money Bill route.



As per the ruling, the twin test has to be rigorously applied by all courts — special courts trying money laundering offences as well as constitutional courts. It would also apply in the same way for both regular bail and anticipatory bail.

However, an accused can still get the benefit available under Section 436A of the Code of Criminal Procedure (CrPC), under which he is entitled to bail after serving half of the maximum sentence as an undertrial.



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This means that in most money laundering cases, if the Enforcement Directorate is not able to finish the trial within three and a half years, the accused is entitled to bail, irrespective of the twin test.

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