

## JSA Prism Anti-Money Laundering

November 2023

### Enforcement Directorate ought to furnish the grounds of arrest in writing, failing which, the arrest cannot be sustained

The Supreme Court of India (“**Supreme Court**”) in *Pankaj Bansal v. Union of India & Ors.*<sup>1</sup> has ruled that merely reading out the grounds of arrest by the Enforcement Directorate (“**ED**”) to an arrested person is not compliant with the procedure enshrined under the Prevention of Money Laundering Act, 2002 (“**PMLA**”), as also the Constitution of India (“**Constitution**”).

#### Brief Facts

1. A first information report (“**FIR**”) was registered by the Anti-Corruption Bureau, Panchkula, Haryana, under the Prevention of Corruption Act, 1988 read with Section 120-B of the Indian Penal Code, 1860 for the offences of corruption, bribery and criminal conspiracy against certain accused persons, including the M3M Group and one of its promoters.
2. The Appellants, *viz.*, Pankaj Bansal and Basant Bansal (“**Appellants**”) were promoters/directors in the M3M Group. However, they were not named as an accused in the FIR or in the enforcement case information report (“**the first ECIR**”) recorded by the ED.
3. When ED raided the properties, seized bank accounts of M3M group and arrested one of the accused persons, the Appellants, apprehending arrest, secured interim protection from the Delhi High Court by way of an anticipatory bail. The ED approached the Supreme Court assailing the protection granted by the Delhi High Court.
4. In the meantime, the ED recorded another ECIR (“**the second ECIR**”) against the same accused persons. However, yet again, the Appellants were not named accused in the second ECIR as well.
5. Thereafter, the ED issued summons to the Appellants to appear. Whilst the Appellants were present at the ED office on the said date, Appellant No. 1 - Pankaj Bansal was served with fresh summons in connection with the second ECIR to appear before another investigating officer on the same day.
6. Subsequently, the Appellants were arrested on the same day in terms of Section 19 of the PMLA<sup>2</sup> and then taken to the Vacation Judge/Additional Sessions Judge, Panchkula. There, they were served with the remand application

<sup>1</sup> Judgment dated October 3, 2023 in Criminal Appeal Nos. 3051-3052 of 2023

<sup>2</sup> Section 19 of the PMLA prescribes the procedure post arrest of an arrested person by the ED. As per the procedure enshrined therein, the ED must:

1. Inform the grounds of arrest to the arrested person;
2. Forward a copy of the arrest order to the Adjudicating Authority, PMLA;
3. Produce the arrested person before the Magistrate within 24 (twenty four) hours of the arrest.

filed by the ED. The Vacation Judge passed an order granting custody to the ED for 5 (five) days, which was later extended and thereafter they were sent to the judicial custody.

7. Feeling aggrieved, the Appellants filed writ petitions before the Punjab and Haryana High Court, which were dismissed. The Appellants challenged the decisions of the Punjab and Haryana High Court by filing criminal appeals before the Supreme Court.

## Issue

Whether the arrest of the Appellants under Section 19 of the PMLA is valid?

## Findings

While allowing the appeals, the Supreme Court ruled as follows:

1. The Supreme Court referred to its decisions in *Vijay Madanlal Chaudhary and Ors. v. Union of India & Ors.*<sup>3</sup> and *V. Senthil Balaji vs. The State* represented by the Deputy Director and others<sup>4</sup> and reiterated the following:
  - a) Section 19 of the PMLA provides for inbuilt safeguards to be adhered by authorised officers under the PMLA to effect arrests;
  - b) It is the bounden duty of the authorised officer to record reasons to believe that the person is guilty of an offence and that he needs to be arrested;
  - c) Grounds of arrest are to be informed to that person and due compliance under Article 22(1) of the Constitution is to be ensured;
  - d) It is the obligation of the authorised officer to produce the person so arrested before the Magistrate within 24 (twenty four) hours as per Section 167 of the Code of Criminal Procedure, 1973;
  - e) It is for the investigating agency to satisfy the Magistrate with adequate material on the need for custody of the accused.
2. The Supreme Court then made the below key observations:
  - a) The Vacation Judge/Additional Sessions Judge did not even record a finding that he had perused the grounds of arrest and ascertain whether ED had reasons to believe that the Appellants were guilty of an offence under the PMLA.
  - b) Noticeably, Section 19 of the PMLA does not specify in clear terms as to how the arrested person is to be 'informed' of the grounds of arrest and this aspect has not been dealt with or delineated in the case of *Vijay Madanlal Choudhary (supra)* or *V. Senthil Balaji (supra)*.
  - c) To ensure proper compliance of Article 22(1) of the Constitution which provides, *inter alia*, that no person who is arrested will be detained in custody without being informed, as soon as may be, of the grounds for such arrest, it is also important that the mode of conveying the grounds must be meaningful.
3. The Supreme Court analysed the twin conditions set out under Section 45 of the PMLA enabling an arrested person to seek release on bail, which are as below:
  - a) Firstly, the court must be satisfied that there are reasonable grounds to believe that the arrested person is not guilty of the offence;
  - b) Secondly, that the arrested person is not likely to commit any offence while on bail.

<sup>3</sup> 2022 (10) SCALE 577

<sup>4</sup> Criminal Appeal Nos. 2284-2285 of 2023, decided on August 7, 2023

4. To meet the above requirements, the Supreme Court noted that it would be essential for an arrested person to know the grounds of arrest in order for him/her to be a position to plead and prove before the Special Court that there are grounds to believe that he/she is not guilty of such offence, so as to avail the relief of bail. As such, communication of the grounds of arrest, as mandated by Article 22(1) of the Constitution and Section 19 of the PMLA, is meant to serve this higher purpose and must be given due importance.
5. The Supreme Court, examined the rules formulated under the PMLA governing arrests of persons and how there is a disparate procedure adopted by the ED in informing the grounds of arrest. Consequently, the Supreme Court observed that furnishing written grounds of arrest to an arrested person would be the advisable course of action for the following reasons:
  - a) First, in the event that the grounds are orally read out to the arrested persons, it may boil down to the word of the arrested person against the word of the authorized officer as to whether or not there is due and proper compliance in this regard;
  - b) Second, the constitutional objective of giving such information to the arrested person would be fulfilled, which is to enable the arrested person in seeking legal counsel. Therefore, permitting the authorities to merely read out the grounds of arrest (which in some cases might run into volumes of pages) would defeat the very purpose of securing the statutory and constitutional right.
6. Therefore, in view of the above, the Supreme Court ruled that a copy of the written grounds of arrest must be furnished as a matter of rule and not exception, thereby ensuring due compliance of the mandate prescribed under Article 22(1) of the Constitution and Section 19 of the PMLA.
7. Based on the above conclusion, the Supreme Court found that in the present case, the arrest of the Appellants was not in compliance with the mandate of Section 19 of the PMLA and Article 22(1) of the Constitution. It thus ruled that the arrest of the Appellants and their remand to the ED custody and, thereafter, to judicial custody, was not sustainable.

## Conclusion

The decision by the Supreme Court is a welcome move as it emphasizes that the mode of conveying the grounds of arrest to an arrested person must be meaningful. If the grounds of arrest are not provided in writing, it would be challenging for an arrested person to record and remember all that they had read or heard being read out for future recall to avail legal remedies. A person who has just been arrested would not be in a calm and collected frame of mind and may be incapable of remembering the contents of the grounds of arrest (which in some cases can be voluminous) read out to him/her. Conveying the grounds of arrest in writing will therefore ensure that the fundamental right guaranteed to an arrested person (in the form of Article 22(1)) is safeguarded.

## Anti-Corruption, White Collar Crimes & Investigations Practice

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Our experienced white-collar teams undertake complex risk assessments and anti-corruption compliance diligences as part of M&A and PE transactions, vetting target entities for compliance with white-collar crime laws and best practices. We have extensive experience in investigating internal issues arising out of misconduct, fraud, corruption, money laundering and other such matters with implications under various Indian laws. We have an in-depth understanding of the legal framework as well as the real-life nuances of operating a business in a high-risk jurisdiction, which we leverage to our clients' benefit while assisting on diverse matters. We specialise in investigations which include compliance investigations arising out of FCPA and UKBA matters in India, whistle blower complaints, HR / employee misconduct and breach of company policies.

Our white-collar crimes litigation team routinely represent clients from across industries and sectors in different fora including all courts, tribunals and judicial bodies in India, along with arbitrations and other forms of dispute resolution.









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