

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 19.09.2014

+ **W.P.(C) 6293/2014**

RAJIV CHANANA

..... Petitioner

versus

**DY. DIRECTOR, DIRECTORATE OF
ENFORCEMENT**

..... Respondent

Advocates who appeared in this case:

For the Petitioners : Mr Vikas Pahwa, Sr. Advocate with
Mr B. Badrinath.

For the Respondent : Mr Sanjay Jain, ASG with Mr Anurag
Ahluwalia and Ms Rajul Jain for UOI.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J (ORAL)

C.M. No. 15197/2014

Allowed, subject to just exceptions.

W.P.(C) 6293/2014 and C.M. 15196/2014

Issue notice.

The learned counsel for the respondent accepts notice.

1. The petitioner's grievance is that even though the alleged crime on account of which his properties were attached has not been proved and the person accused of the said crime has been acquitted, the attachment on his properties under the Prevention of Money Laundering Act, 2002

(hereinafter referred to as the 'PMLA') has not been lifted.

2. It is averred that pursuant to a complaint filed with PS Palam Vihar, Gurgaon an FIR (i.e. FIR No.27/2008) was registered against one Dr. Upender Kumar and others for offences punishable under Section 420 of the IPC and Section 18/19 of the Transplantation of Human Organs Act, 1994. The investigation with respect to the alleged offences was conducted by CBI and based on its final report dated 29.04.2008, a case (case no. 7/2008) for offences under various provisions of the IPC and Transplantation of Human Organs Act, 1994 was registered.

3. Thereafter, on 12.05.2008, a case being ECIR/7/DZ/2008 was registered by the respondent alleging commission of offences under the PMLA. It is asserted by the petitioner that the basis of the said case was a scheduled offence, which was alleged to have been committed by one Dr. Jeevan Kumar and was a subject matter of case no. 7/2008.

4. It is asserted by the petitioner that in the said case (ECIR/7/DZ/2008) a provisional order (No. 6/2010) was passed on 09.09.2010, attaching his various properties. It is contended that this order was passed on the basis that Dr. Jeevan Kumar, who was accused of being involved in illegal kidney transplantation racket, had committed a punishable offence under Section 307 of the IPC which was a scheduled offence under the PMLA. Subsequently, respondent filed a complaint (OC No.66/2010) under Section 5(5) of the PMLA to the Adjudicating Authority seeking confirmation of the provisional order of attachment. By the order dated 04.02.2011, the said provisional order of attachment was confirmed by the Adjudicating

Authority. The petitioner preferred an appeal against the order dated 04.02.2011 under Section 26 of the PMLA to the Appellate Tribunal constituted under Section 25 of the PMLA. The said appeal is stated to be pending.

5. A criminal complaint being criminal complaint No.1/2011 arising from the case registered by the respondent (i.e. ECIR/7/DZ/2008) alleging offences under Section 3 of the PMLA is pending trial before the Special Judge, PMLA. The petitioner's petition (Crl. MC No.1622/2013) under Section 482 of the CrPC seeking quashing of the said criminal complaint is also pending disposal before this Court.

6. The petitioner states that on 22.03.2013, Dr. Jeevan Kumar, was acquitted of all charges framed in CBI Case No. 7 of 2008. Thus the alleged scheduled crime of Dr. Jeevan Kumar, which is stated to be the basis of the attachment of petitioner's properties under the PMLA has not been established. The petitioner states that the concerned agency (in this case CBI) has not filed an appeal against such acquittal.

7. The learned counsel for the petitioner has referred to Section 3 and Section 8(5) of the PMLA and contended that the basis of attachment order - proceeds of crime - stands negated and, consequently, the attachment under the PMLA would also stand vacated.

8. Mr. Jain, the learned Additional Solicitor General (ASG) appearing for the respondent, raised a preliminary objection and pointed out that the petitioner had already preferred an appeal to the Appellate Tribunal against the Adjudicating Authority's order dated 04.02.2011, confirming the

provisional order of attachment, and the same was pending. He further submitted that the contentions urged by the petitioner in this petition were also the subject matter of a separate application filed by the petitioner before the Appellate Tribunal and the same was also pending consideration. He submits that in these circumstances the appropriate Authority to consider the contentions urged would be the Appellate Tribunal.

9. The learned ASG also submits that Section 8(5) of the PMLA was amended by the Prevention of Money-laundering (Amdt.) Act, 2012, and by virtue of the amendments, the reference to “*conclusion of a trial for any schedule offence*” has been omitted and now the operative words of section 8(5) are “*conclusion of a trial of an offence under this Act*”. He contends that an acquittal of a person of a scheduled offence would not necessarily imply lifting of the attachment of property as long as the trial for an offence under the PMLA is continued.

10. I have heard the learned counsel for the parties.

11. Chapter III of the PMLA contain provisions for attachment, adjudication and confiscation of “*proceeds of crime*”. Section 5(1) of the PMLA is relevant and is quoted below for ready reference:

“5. Attachment of property involved in money-laundering

(1) Where the Director or any other officer not below the rank of Deputy Director authorized 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 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, or a complaint has been filed by a person authorized to investigate the offence mentioned in that Scheduled, 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 clause (b), 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 authorized 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.”

12. It is apparent that the power of attachment is limited to attaching “*proceeds of crime*”. The expression “*proceeds of crime*” is defined under clause (u) of Section 2(1) of the PMLA, which reads as under:-

“(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;”

13. It is apparent from the above definition of the expression “*proceeds of crime*” that existence of criminal activity relating to a scheduled offence is the substratal condition for existence of proceeds of crime and the applicability of the provisions of Section 5 of the PMLA. Essentially, the edifice of PMLA rests on the foundation of existence of a scheduled offence.

14. The “offence of money-laundering” is defined under Section 3 of the PMLA which reads as under:-

“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 the proceeds of crime and projecting it as untainted property shall be guilty of offence of money-laundering.”

15. The plain language of Section 3 indicates that an offence of money laundering is premised on existence of “*proceeds of crime*”. The proceeds of crime are properties that are derived or obtained as a result of criminal activity relating to a scheduled offence. As discussed earlier, proceeds of crime - by its definition – are nonexistent if the scheduled offence which is stated to give rise to those proceeds is itself negated. Accordingly, acquittal of a concerned person of charges of a scheduled offence, *ipso facto*, erodes the foundation of the offence of money laundering.

16. Section 8(5) of the PMLA as it existed prior to the 2013 amendment expressly provided for automatic vacation of attachment of property if conclusion of a trial resulted in acquittal of the concerned person. Section 8(5) of the PMLA as it existed prior to 03.01.2013 reads as under:-

“Section 8(5). Where on conclusion of a trial for any scheduled offence, the person concerned is acquitted, the attachment of the property or retention of the seized property or record under sub-section (3) and net income, if any, shall cease to have effect.”

17. As pointed out by the learned ASG, Section 8 of the PMLA was amended in 2013 and the relevant amended provisions, Sub-section 5 and Sub-section 6 of Section 8 of the PMLA, read as under:

“(5) Where on conclusion of a trial of an offence under this Act, the Special Court finds that the offence of money-laundering has been committed, it shall order that such property involved in the money-laundering or which has been used for commission of the offence of money-laundering shall stand confiscated to the Central Government.

(6) Where on conclusion of a trial under this Act, the Special Court finds that the offence of money-laundering has not taken place or the property is not involved in money-laundering, it shall order release of such property to the person entitled to receive it.”

18. The suggestion of the learned ASG that an attachment order under Section 5 of the PMLA would survive an acquittal of the concerned person for the alleged crime, is unsustainable. It was argued by the learned ASG that acquittal of the person after trial of a scheduled offence would not

release the order of attachment under PMLA till the trial for an offence under Section 3 of the PMLA is completed. This contention is based on an erroneous assumption that a trial for an offence of “money laundering” under the PMLA would survive. One is hard pressed to imagine how a trial for an offence of money laundering can continue where the fundamental basis – the commission of a schedule offence – in this case offence under Section 307 IPC – has been found to be disproved.

19. It necessarily follows that the attachment of a property is liable to be vacated if the existence of a scheduled offence is negated. Clearly, attachment of proceeds of crime cannot continue if the alleged scheduled offence is not established after trial. Given the scheme of the PMLA, attachment of property (proceeds of crime) must be lifted if it is found that the scheduled offence, on the basis of which attachment was effected, does not exist. In absence of a scheduled offence, the question of existence of any proceeds thereof, do not arise.

20. The proceedings before the Appellate Tribunal emanate from the order of an Adjudicating Authority passed on 04.02.2011. It is, thus apparent that the Appellate Tribunal would consider the merits of that order. In the present case, an intervening event has occurred inasmuch as the accused of the schedule offence has been acquitted. In the circumstances, it *prima facie* appears that the attachment order ought to be vacated. The petitioner has already filed a representation before the respondent on 23.04.2013, which is not disposed of as yet.

21. In the given circumstances, it is directed that the respondent dispose

of the representation within a period of four weeks from today uninfluenced by the proceedings pending before the Appellate Tribunal.

22. The writ petition and the application are disposed of with the aforesaid directions.

VIBHU BAKHRU, J

SEPTEMBER 19, 2014
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