

GAHC010113592022



**IN THE GAUHATI HIGH COURT
(The High Court of Assam: Nagaland: Mizoram &
Arunachal Pradesh)
Crl. Rev.P. 324/2022**

Enforcement Directorate

Deptt. Of Revenue, Govt. Of India, Represented By The Assistant

Director, Guwahati Zonal Office, House No. 20, Bye Lane 1,

Rajgarh Road, Chandmari, Guwahati-781003, Assam,

(Represented By Retainer Counsel Directorate Of

Enforcement)

..... Petitioner

Versus

Gautam Kundu And Anr

S/O- Shri Nirmal Kundu, Chairman Of Rose Valley Group Of

Companies, Presently Lodged In- Presidency Correctional

Home, 2, Thackeray Road, Alipore, Near National Library,

Kolkata-700027.

2: Shibamoy Dutta

S/O- Late Sati Ranjan Dutta

Managing Director Of Rose Valley Group Of Companies

Presently Lodged In- Presidency Correctional Home

2 Thackeray Road

Alipore

Near National Library

Kolkata-700027

..... Respondents

BEFORE

HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Advocate for the Petitioner : Mr. R. Dhar
Advocate for the Respondent : Mr. S. Borthakur (res Nos. 1 and 2)
Date of Hearing : 26.04.2023
Date of Judgment : **26.07.2023.**

JUDGMENT & ORDER (CAV)

1. Heard Mr. R. Dhar, learned counsel for the petitioner, Enforcement Directorate, Department of Revenue, Govt. of India represented by the Assistant Director, Guwahati Zonal Office, who has filed an application under Section 397/401 read with 482 of the Code of Criminal Procedure, 1973 as amended up to date (Cr.P.C for short) against the order dated 20.04.2022 passed by learned Special Judge, Assam, Guwahati in Special (PMLA) Case No. 18/2018 in F. No. ECIR/GWZO/03/2014 rejecting the petition No. 363/2022 and prayer of the petitioner, seeking permission to enter into the jail premises along with the Laptop and other documents to interrogate and record statements of Shri Gautam Kundu and Shri Shibamoy Dutta who are arrayed as respondent nos. 1 and 2 in connection with this case.

2. The order dated 20.04.2022, reflects that the Assistant Director of ED, (Niraj Kr. Singh) vide petition no. 363/2022 dated 10.03.2022 had prayed for interrogation of the respondents lodged in the Presidency Correctional Home, Kolkata, in pursuance of the investigation of the aforementioned case. The defence had raised objection stating that the case was already been fixed for evidence and the intention of the I/O to interrogate in furtherance of investigation could not be accepted.

3. On the contrary, the learned Special P.P. for the E.D had submitted that the prosecution had a prayer for filing additional/supplementary complaint and during the course of further investigation, some properties have been identified by the I/O, which are proceeds

of the crime. It was held by the trial Court that on 12.07.2018, the ED had filed a complaint against the accused persons/respondents and therefore, cognizance was taken under Section 4 of the Prevention of Money Laundering Act, 2002, (PMLA for short). On 29.12.2021, a formal charge was framed and this case was posted for evidence. As trial had already commenced, petition with prayer for further investigation was rejected by the learned trial Court.

4. It is submitted on behalf of the petitioner that on the basis of the FIRs registered by the Assam Police, which was later transferred to the Central Bureau Investigation, Guwahati, and re-registered by CBI, vide FIRs bearing No. RC 0172015A0007 and RC 0172015A0008, under Sections 120B & 420 of IPC, 1860, and ECIR bearing No. ECIR/GWZO/03/2014 was recorded on 16.12.2014, as the Sections incorporated in the FIRs are Scheduled Offences within the meaning of Section 2(1)(y) of PMLA, 2002 for investigating the said matter under the Provisions of PMLA, 2002. After recording of ECIR, several properties worth Rs. 4.63 Crores were attached to the State of Assam. The prosecution complaint was filed before the learned Court of Special Judge, Assam, Guwahati on 12.07.2018, as per the statutory mandates, with rider that "the investigation in this case is still continuing".

5. Meanwhile, the CBI had completed its investigation and filed charge-sheets bearing No. 02/2020 dated 10.02.2020 in RC 0172015A0007 and C.S. No. 03/2020 dated 09.03.2020 in RC 0172015A0008. An application under Section 44(1) (c) of PMLA, 2002 was filed before the CBI Court for committal of CBI's case before the Special PMLA Court.

6. The respondent No. 1, Shri Gautam Kundu was involved in the process of acquisition, utilization & possession of proceeds of crime and the other respondent No. 2, Shri Shibomay

Dutta, intentionally assisted in the process of acquisition, utilization & possession of proceeds of crime. Both the respondents were charged under Section 3 of the PLMA, 2002.

7. The charge-sheet reflects that an amount of Rs. 1723,96,95,525/- was collected from the investors in Assam (except Jorhat Division) in the name of fake and fabricated schemes and out of the said collection an amount of Rs. 1186,13,19,855/- was refunded to the investors. It is alleged that the proceeds of crime amounting to Rs. 537,83,75,670/- appears to have been misappropriated by the present respondents and the co-accused who are named already in the complaint petition. In another charge-sheet No. 03/2020 dated 09.03.2020, the CBI had alleged that an amount of Rs. 592,48,88,868/- was collected from the investors in a similar manner and proceeds the crime amounting to Rs. 180,24,11,623/- appears to have been misappropriated by the respondents along with the other co-accused already named in the complaint petition.

8. It is submitted that during the course of further investigation, under the provisions of PMLA, 2002, other evidences, regarding utilization and integration of proceeds of crime into financial system, collected from gullible public, by commission of the alleged offences was unearthed necessitating the further investigation of the present respondents. Under the compelling circumstances, the petition no. 363/2022 dated 10.03.2022 in connection with Special (PMLA) Case No. 18/2018 before the learned Special Judge, Assam, which was rejected vide the order dated 20.04.2022.

9. It is submitted that the Hon'ble Supreme Court in ***Vinubhai Haribhai Malaviya and Others Vs. State of Gujarat and Another*** reported in ***(2019) 17 SCC 1***, has discussed the power of the Court in relation to further investigation. Law has been laid down at post-

cognizance stage that until trial commences, the power of further investigation can be directed and this power can also be exercised suo *motu* by the Magistrate himself, depending on the facts of each case. It is submitted that it was erroneously held by the trial Court that in the case at hand, the charge has already been framed and the trial of the case has already commenced and the Investigating Agency cannot be directed to proceed with further investigation of the case. It is also submitted by the petitioner that Section 45 of the PMLA Act refers only to the term 'Special Court' and therefore has to be given restricted meaning, that Section 45 of the PMLA Act begins with a non obstante clause which indicates that the provisions laid down in Section 45 of the PMLA will have an overriding effect on the general provisions of the Code of Criminal Procedure, in case of conflict between them. Section 5 of the Code of Criminal Procedure, also provides that the provisions of the Code of Criminal Procedure will not affect any special statute or any local law; implicating that any special statute will prevail over the general provisions of the Cr.P.C in case of any conflict.

10. It is averred that the learned trial Court failed to appreciate while rejecting the prayer of the petitioner citing the grounds held by the Hon'ble Supreme Court in ***Vinubhai Haribhai's case (supra)***, that the offence allegedly committed by the respondents is of a more serious and heinous nature relating to economic offences committed by white collared accused, more so, when the case is pertaining to police report whereas, the present case is a prosecution complaint filed under the PML Act under Section 44 read with Section 45 of the Act and there is an independent provision of supplementary complaint provided in explanation (ii) of Section 44 (1) of PMLA, 2002 as amended up to date.

11. It is averred that the learned Special judge, Assam failed to appreciate Section 173 (8) Cr.P.C. as amended upto date, which states that 'Nothing in this Section shall be deemed to

preclude further investigation in respect of an offence after a report under Sub-Section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)".

12. It is also contended that the learned Special Judge, Assam failed to appreciate that Section 2 (na) of the PMLA defines "investigation" as including all the proceedings under the Act conducted by the Director or by an authority authorised by the Central Government under this Act for the collection of evidence.

13. The provision of Section 65 of PML Act states that "the provisions of Cr.P.C 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". Section 71 of the PMLA, 2002 was also invoked by the learned trial Judge who failed to appreciate clause (2) (3) and (4) of Section 50 of the PMLA 2002. It is contended that the impugned order is bad in law and is liable to be set aside and quashed.

14. The learned counsel for the respondents laid stress in his argument that the petition is vague as the proceeds of the crime, which allegedly surfaced during the course of the trial has not been specifically described. The evidence of PW-1 has already been recorded. No property was attached under Section 5 of the Act. Without mentioning the quantum of the proceeds of crime, further investigation relating to the same offence is debarred under Article 20 (3) of the Constitution of India. No property has been attached under Section 5 of the PML

Act.

15. Both parties have also deliberated on the ingredients and the meaning of Section 3 of the PMLA of 2002. The petition No. 363/2022 was filed on 10.03.2022. This case was initiated against the respondents in the year 2018, when the FIRs No. RC 0172015A0007 and RC 0172015A0008 was registered on 22.08.2018. The case was thereafter, registered as Special PMLA case No. 18/2018. The scanned copies of the LCR reveals that charge was framed on 29.12.2021. On 17.08.2022, the evidence of PW-1 Shri Kishore Kumar Nath was recorded. The trial has commenced. It has been held by the Hon'ble Supreme Court in **Vinubhai Haribhai's case (supra)** that:-

“There is no good reason given by the Court in these decisions as to why a Magistrate's powers to order further investigation would suddenly cease upon process being issued, and an accused appearing before the Magistrate, while concomitantly, the power of the police to further investigate the offence continues right till the stage the trial commences. Such a view would not accord with the earlier judgments of this Court, in particular, Sakiri (supra), Samaj Parivartan Samudaya (supra), Vinay Tyagi (supra), and Hardeep Singh (supra); Hardeep Singh (supra) having clearly held that a criminal trial does not begin after cognizance is taken, but only after charges are framed. What is not given any importance at all in the recent judgments of this Court is Article 21 of the Constitution and the fact that the Article demands no less than a fair and just investigation. To say that a fair and just investigation would lead to the conclusion that the police retain the power, subject, of course, to the Magistrate's nod under Section 173(8) to further investigate an offence till charges are framed, but that the supervisory jurisdiction of the Magistrate suddenly ceases mid- way through the pre-trial proceedings, would amount to a travesty of justice, as certain cases may

cry out for further investigation so that an innocent person is not wrongly arraigned as an accused or that a prima facie guilty person is not so left out. There is no warrant for such a narrow and restrictive view of the powers of the Magistrate, particularly when such powers are traceable to Section 156(3) read with Section 156(1), Section 2(h), and Section 173(8) of the CrPC, as has been noticed hereinabove, and would be available at all stages of the progress of a criminal case before the trial actually commences. It would also be in the interest of justice that this power be exercised suo motu by the Magistrate himself, depending on the facts of each case. Whether further investigation should or should not be ordered is within the discretion of the learned Magistrate who will exercise such discretion on the facts of each case and in accordance with law. If, for example, fresh facts come to light which would lead to inculcating or exculpating certain persons, arriving at the truth and doing substantial justice in a criminal case are more important than avoiding further delay being caused in concluding the criminal proceeding, as was held in Hasanbhai Valibhai Qureshi (supra). Therefore, to the extent that the judgments in Amrutbhai Shambubhai Patel (supra), Athul Rao (supra) and Bikash Ranjan Rout (supra) have held to the contrary, they stand overruled. Needless to add, Randhir Singh Rana v. State (Delhi Administration) (1997) 1 SCC 361 and Reeta Nag v. State of West Bengal and Ors. (2009) 9 SCC 129 also stand overruled."

16. The so called proceeds of the crime alleged to have been amassed by the respondents came to the notice of the petitioner at a later stage. Trial has already commenced. It is true that, if there are any proceeds of the crime, the same may have to be attached, but at this stage, no order can be passed for further investigation as evidence of PW-1 has already been recorded.

17. It is submitted that it has been held in ***Vijay Madanlal Choudhary and Others Vs. Union of India and Others*** reported in **2022 SCC OnLine SC 929** that:-

“246. We would now elaborate upon the meaning of “investigation” in Clause (na) of Section 2(1). It includes all proceedings under the Act conducted by the Director or an authority authorised by the Central Government under this Act for collection of evidence. The expression “all the proceedings under this Act” unquestionably refers to the action of attachment, adjudication and confiscation, as well as actions undertaken by the designated authorities mentioned in Chapter VIII of the Act, under Chapter V of the Act, facilitating the adjudication by the Adjudicating Authority referred to in Chapter III to adjudicate the matters in issue, including until the filing of the complaint by the authority authorised in that behalf before the Special Courts constituted under Chapter VII of the Act. The expression “proceedings”, therefore, need not be given a narrow meaning only to limit it to proceedings before the Court or before the Adjudicating Authority as is contended but must be understood contextually. This is reinforced from the scheme of the Act as it recognises that the statement recorded by the Director in the course of inquiry, to be deemed to be judicial proceedings in terms of Section 50(4) of the 2002 Act. Needless to underscore that the authorities referred to in Section 48 of the Act are distinct from the Adjudicating Authority referred to in Section 6 of the 2002 Act. The Adjudicating Authority referred to in Section 6 is entrusted with the task of adjudicating the matters in issue for confirmation of the provisional attachment order issued under Section 5 of the 2002 Act, passed by the Authority referred to in Section 48 of the Act. The confirmation of provisional attachment order is done by the Adjudicating Authority under Section 8 of the 2002 Act, and if confirmed, the property in question is ordered to be confiscated and then it would vest in the Central Government as per Section 9 of the 2002 Act subject to the outcome of the trial of the offence under the 2002 Act (i.e., Section 3 of offence of money-laundering punishable under Section 4). Suffice it to observe that the expression “proceedings” must be given expansive meaning to include actions of the authorities (i.e., Section 48) and of the Adjudicating Authority (i.e., Section 6), including before the Special Court (i.e., Section 43).

247. The task of the Director or an authority authorised by the Central Government under the 2002 Act for the collection of evidence is the intrinsic process of adjudication proceedings. In that, the evidence so collected by the authorities is placed before the Adjudicating Authority for determination of the issue as to whether the provisional attachment order issued under Section 5 deserves to be confirmed and to direct confiscation of the property in question. The expression “investigation”, therefore, must be regarded as interchangeable with the function of “inquiry” to be undertaken by the authorities for submitting such evidence before the Adjudicating Authority.

248. In other words, merely because the expression used is “investigation” — which is similar to the one noted in Section 2(h) of the 1973 Code, it does not limit itself to matter of investigation concerning the offence under the Act and Section 3 in particular. It is a different matter that the material collected during the inquiry by the authorities is utilised to bolster the allegation in the complaint to be filed against the person from whom the property has been recovered, being the proceeds of crime. Further, the expression “investigation” used in

the 2002 Act is interchangeable with the function of "inquiry" to be undertaken by the Authorities under the Act, including collection of evidence for being presented to the Adjudicating Authority for its consideration for confirmation of provisional attachment order. We need to keep in mind that the expanse of the provisions of the 2002 Act is of prevention of money- laundering, attachment of proceeds of crime, adjudication and confiscation thereof, including vesting of it in the Central Government and also setting up of agency and mechanism for coordinating measures for combating money-laundering.

249. Coming to the next relevant definition is expression "money- laundering", it has the meaning assigned to it in Section 3 of the Act. We would dilate on this aspect while dealing with the purport of Section 3 of the Act a little later.

250. The other relevant definition is "proceeds of crime" in Section 2(1)(u) of the 2002 Act. This definition is common to all actions under the Act, namely, attachment, adjudication and confiscation being civil in nature as well as prosecution or criminal action. The original provision prior to amendment vide Finance Act, 2015 and Finance (No.2) Act, 2019, took within its sweep any property (mentioned in Section 2(1)(v) of the Act) derived or obtained, directly or indirectly, by any person "as a result of" criminal activity "relating to" a scheduled offence (mentioned in Section 2(1)(y) read with Schedule to the Act) or the value of any such property. Vide Finance Act, 2015, it further included such property (being proceeds of crime) which is taken or held outside the country, then the property equivalent in value held within the country and by further amendment vide Act 13 of 2018, it also added property which is abroad. By further amendment vide Finance (No.2) Act, 2019, Explanation has been added which is obviously a clarificatory amendment. That is evident from the plain language of the inserted Explanation itself. The fact that it also includes any property which may, directly or indirectly, be derived as a result of any criminal activity relatable to scheduled offence does not transcend beyond the original provision. In that, the word "relating to" (associated with/has to do with) used in the main provision is a present participle of word "relate" and the word "relatable" is only an adjective. The thrust of the original provision itself is to indicate that any property is derived or obtained, directly or indirectly, as a result of criminal activity concerning the scheduled offence, the same be regarded as proceeds of crime. In other words, property in whatever form mentioned in Section 2(1)(v), is or can be linked to criminal activity relating to or relatable to scheduled offence, must be regarded as proceeds of crime for the purpose of the 2002 Act. It must follow that the Explanation inserted in 2019 is merely clarificatory and restatement of the position emerging from the principal provision [i.e., Section 2(1)(u)].

251. The "proceeds of crime" being the core of the ingredients constituting the offence of money-laundering, that expression needs to be construed strictly. In that, all properties recovered or attached by the investigating agency in connection with the criminal activity relating to a scheduled offence under the general law cannot be regarded as proceeds of crime. There may be cases where the property involved in the commission of scheduled offence attached by the investigating agency dealing with that offence, cannot be wholly or partly regarded as proceeds of crime within the meaning of Section 2(1)(u) of the 2002 Act — so long as the whole or some portion of the property has been derived or obtained by any person "as a result of" criminal activity relating to the stated scheduled offence. To be proceeds of crime, therefore, the property must be derived or obtained, directly or indirectly,

"as a result of" criminal activity relating to a scheduled offence. To put it differently, the vehicle used in commission of scheduled offence may be attached as property in the concerned case (crime), it may still not be proceeds of crime within the meaning of Section 2(1)(u) of the 2002 Act. Similarly, possession of unaccounted property acquired by legal means may be actionable for tax violation and yet, will not be regarded as proceeds of crime unless the concerned tax legislation prescribes such violation as an offence and such offence is included in the Schedule of the 2002 Act. For being regarded as proceeds of crime, the property associated with the scheduled offence must have been derived or obtained by a person "as a result of" criminal activity relating to the concerned scheduled offence. This distinction must be borne in mind while reckoning any property referred to in the scheduled offence as proceeds of crime for the purpose of the 2002 Act. Dealing with proceeds of crime by way of any process or activity constitutes offence of money-laundering under Section 3 of the Act.

252. Be it noted that the definition clause includes any property derived or obtained "indirectly" as well. This would include property derived or obtained from the sale proceeds or in a given case in lieu of or in exchange of the "property" which had been directly derived or obtained as a result of criminal activity relating to a scheduled offence. In the context of Explanation added in 2019 to the definition of expression "proceeds of crime", it would inevitably include other property which may not have been derived or obtained as a result of any criminal activity relatable to the scheduled offence. As noticed from the definition, it essentially refers to "any property" including abroad derived or obtained directly or indirectly. The Explanation added in 2019 in no way travels beyond that intent of tracking and reaching upto the property derived or obtained directly or indirectly as a result of criminal activity relating to a scheduled offence. Therefore, the Explanation is in the nature of clarification and not to increase the width of the main definition "proceeds of crime". The definition of "property" also contains Explanation which is for the removal of doubts and to clarify that the term property includes property of any kind used in the commission of an offence under the 2002 Act or any of the scheduled offences. In the earlier part of this judgment, we have already noted that every crime property need not be termed as proceeds of crime but the converse may be true. Additionally, some other property is purchased or derived from the proceeds of crime even such subsequently acquired property must be regarded as tainted property and actionable under the Act. For, it would become property for the purpose of taking action under the 2002 Act which is being used in the commission of offence of money-laundering. Such purposive interpretation would be necessary to uphold the purposes and objects for enactment of 2002 Act.

253. Tersely put, it is only such property which is derived or obtained, directly or indirectly, as a result of criminal activity relating to a scheduled offence can be regarded as proceeds of crime. The authorities under the 2002 Act cannot resort to action against any person for money-laundering on an assumption that the property recovered by them must be proceeds of crime and that a scheduled offence has been committed, unless the same is registered with the jurisdictional police or pending inquiry by way of complaint before the competent forum. For, the expression "derived or obtained" is indicative of criminal activity relating to a scheduled offence already accomplished. Similarly, in the event the person named in the criminal activity relating to a scheduled offence is finally absolved by a Court of competent jurisdiction owing to an order of discharge, acquittal or because of quashing of the criminal

case (scheduled offence) against him/her, there can be no action for money-laundering against such a person or person claiming through him in relation to the property linked to the stated scheduled offence. This interpretation alone can be countenanced on the basis of the provisions of the 2002 Act, in particular Section 2(1)(u) read with Section 3. Taking any other view would be rewriting of these provisions and disregarding the express language of definition clause "proceeds of crime", as it obtains as of now.

254. By and large the debate today is restricted to the discrepancy between the word 'and', which features in the original definition, against the 'or' in the newly inserted Explanation in Section 3. While the stand of the Government is that there is no requirement under Section 3 to project or claim the proceeds of crime as untainted property. The petitioners have claimed that said interpretation will be unconstitutional. For, the requirement is that not only does a predicate crime need to be committed, it in turn needs to generate proceeds of crime and it must also then be projected as untainted property to qualify for the crime of money-laundering. The general scheme of the law of this land is that any law which is questioned is presumed to be unblemished and within the confines of the Constitutional principles so laid down within the Constitution. Yet, as the arguments, challenges laid against the interpretation of the impugned section are so many we find it necessary to see how India embarked on the framing of the definition of "money-laundering" under Section 3 of the 2002 Act. Thereafter, we will see how the Parliament over the years responded to changes and suggestions from the outside world, notably the FATF. Thus, in seriatim we endeavour to see the international Conventions which led to the evolution of money-laundering, based on which the Government decided to enact the law, followed by the FATF recommendations which have led to the amendments, then the debates in the Parliament of India followed by the law of the land as laid down by this Court."

18. Reverting back to this case, it is apt to reiterate that the so called proceeds of the crime was not specifically described by the petitioner. The procedure of investigation, framing of charge and recording of evidence cannot be encompassed into the category of 'inquiry'. Other measures may be adopted by the petitioner at the stage of trial, and if, any such evidence surfaces, the charges can also be altered. However, at this juncture recording the statements of the respondents in furtherance of investigation cannot be allowed.

19. In view of my foregoing discussions, the present application under Sections 397/401 stands rejected. No order as to costs.

JUDGE

Comparing Assistant