

A.F.R.

Neutral Citation No. - 2024:AHC-LKO:13207-DB

Court No. - 10

Case :- CRIMINAL MISC. WRIT PETITION No. - 737 of 2024

Petitioner :- Ajeet Pandey

Respondent :- Directorate Of Enforcement

Counsel for Petitioner :- Ashish Chaturvedi

Counsel for Respondent :- Kuldeep Srivastava,A.S.G.I.

Hon'ble Mrs. Sangeeta Chandra,J.

Hon'ble Ajai Kumar Srivastava-I,J.

(1) Heard Shri N. K. Seth, learned Senior Advocate assisted by Shri Ashish Chaturvedi, for the petitioner and Shri Kuldeep Srivastava, appearing for the Opposite party no.1.

(2) This petition has been filed by the petitioner for the following main prayer:-

"1) Issue a writ, order or direction in the nature of Mandamus directing the Respondent no.3 to take steps for constituting the Adjudicating Authority in terms of the mandate of Section 6 of the Prevention of Money Laundering Act, 2002."

(3) An application for interim relief has also been filed wherein the following prayers have been made:-

"a) Stay further proceedings before the Adjudicating Authority as well as operation of the Provisional Attachment Order No. 09/2023 [u/s 5(1)] dated 17.11.2023 (Annexure No.1) and all consequential proceedings arising therefrom including the Original Complaint No. 2119/2023 dated 12.12.2023 (Annexure No.2) filed before the Adjudicating Authority (u/s 5(5)) and the Show Cause Notice dated 14.12.2023 (Annexure No.3) issued by the Adjudicating Authority [u/s 8(1)] as they are nullity in the eyes of the law during the pendency of the Writ Petition.

b) Hold that until the Respondent No. 2 Adjudicating Authority is constituted in terms of the mandate of law under Section 6 PMLA, and a Chairperson is duly appointed, it may not carry out any further proceedings with respect to the adjudication in original complaint no.

2085/2023 filed by Respondent No. 1, as a single member Adjudicating Authority without a Chairperson tantamount to coram non iudice,"

(4) A preliminary objection has been raised by Shri Kuldeep Srivastava, saying that the writ petition is not maintainable only against Show Cause Notice and since statutory remedy is available the writ petition should not be entertained. Only a Provisional Order of attachment was issued by the Deputy Director of Enforcement and thereafter the matter was referred to the Adjudicating Authority. The Show Cause Notice dated 14.12.2023 has been issued thereafter by the Respondent no.2 under Section 8 (1) of the Prevention of Money Laundering Act (hereinafter referred to as the 'PMLA' Act of 2002).

(5) It has been stated in the writ petition that the petitioner is the Director of M/s Kandarp Hotels Pvt. Ltd. and was the erstwhile Managing Director of M/s Gangotri Enterprises Limited and they had taken loan from various Banks way back in 2007. The Company could not repay such loan and opted for loan restructuring and in June, 2013, the process of Corporate Debt Restructuring was initiated with the support of Bank of India which was the lead banker at that stage. Initially, a letter of approval for the Corporate Debt Restructuring was given on 30.09.2013 and a final letter of approval of restructuring was issued on 31.10.2013. The Bank of India declared the Bank Accounts of M/s Gangotri Enterprises Limited as Non-Performing Assets (NPA) and subsequently the other Banks also declared such accounts of the Company as NPA. On 07.09.2016, a Joint Lenders Meeting was held where the Members decided to appoint Forensic Auditor for conducting forensic audit of the accounts. Later on, a report was submitted and the Bank of India proposed for closure of Forensic Audit Report subject to submission / compliance of required documents by the Company. In pursuance of such letter, M/s Gangotri Enterprises Limited, submitted all required documents and the forensic audit was 'implidely' closed. Post closure of Forensic Audit the Bank of India itself sanctioned additional credit limit facilities to the Company. In 2020, the F.I.R. No. RC2232020A0007 was registered at CBI/AC-V, New Delhi, under Section 120-B, 420, 468, 471 of the Indian Penal Code, 1850 and Section 13 (2) read with Section 13 (1) (d) of the Prevention of Corruption Act, 1988. On 01.01.2021 an ECIR bearing ECIR/LKZO/01/2021 was registered by the Enforcement Directorate by treating the subject F.I.R. as a scheduled

offence under the Act of 2002. The CBI filed a Charge-Sheet on 30.06.2022 where various sections of the IPC and the Prevention of Corruption Act were dropped and only Sections 420 read with Section 120-B IPC were mentioned. The petitioner has been granted anticipatory bail in the predicate offence by the Special Judge, CBI (West), Lucknow on 20.05.2023.

(6) It has further been stated that the petitioner is aggrieved by the Provisional Attachment Order no.09/2023 issued by the Respondent no.1 under Section 5 (1) of the Act of 2002, where the properties owned by the petitioner have been provisionally attached. An original complaint has thereafter been filed by the Directorate of Enforcement registered as Original Complaint No. 2119 of 2023 under Section 5 (5) of the Act of 2002, on 12.12.2023 and in pursuance thereof, a Show Cause Notice has been issued by the Respondent no.2 as a member of the Adjudicating Authority on 14.12.2023.

(7) Learned counsel appearing on behalf of the petitioner has argued that there is no Adjudicating Authority available as the Chairperson one Mr. Vinodanand Jha, had retired on 22.06.2023, hence, the proceedings that have been initiated by way of Show Cause Notice, need to be quashed.

(8) Learned counsel appearing for the petitioner has placed reliance upon Section 2 (1) (a) of the Act where Adjudicating Authority has been defined as one constituted under Sub-Section (1) of Section 6. He has thereafter referred to Section 6 Sub Section (1) where it has been stated that the Central Government shall, by notification, appoint an Adjudicating Authority to exercise jurisdiction, powers and Authority conferred by or under the Act. Referring further to Section 6 (2), the learned counsel has argued that the Adjudicating Authority shall consist of a Chairperson and two other Members from the field of law, and from the field of Administration, Finance or Accountancy.

(9) Learned Senior counsel has referred to Sub-Section (5) & (6) to say that under Clause (b), a Bench may be constituted by the Chairperson of the Adjudicating Authority with one or two members as the Chairperson of the Adjudicating Authority may deem fit; and thereafter has referred to Sub-Section (7) of Section 6 to say that if at any stage of the hearing of any case or matter, it appears to the Chairperson or a Member, that the case or

matter is of such a nature that it ought to be heard by a Bench consisting of two Members, the case or matter may be transferred by the Chairperson or, as the case may be, referred to him for transfer, to such Bench as the Chairperson may deem fit.

(10) It has been argued that since the Chairperson alone can constitute Benches and he is one who can transfer the matters from one Bench to the other Bench. It is evident that without the Chairperson the Adjudicating Authority cannot function and it can be said that without the Chairperson there is no Adjudicating Authority in existence.

(11) It has been argued by referring to the Regulations of 2013 framed under Act of 2002 that Regulations 26 Sub Clause-2 also says that every sheet of the order shall bear the signature of the Chairperson and Members constituting the Bench which means that if the Chairperson is not available then the order-sheet cannot be authenticated.

(12) Learned counsel for the petitioner has also placed reliance upon Sub-Section (13) of Section 6 to say that in the event of occurrence of any vacancy in the office of the Chairperson by reason of his death or resignation or otherwise, the Senior most member shall act as the Adjudicating Authority until the date on which a new Chairperson enters upon his office.

(13) It has been argued by the learned Senior Counsel that the word 'Vacancy' used in Sub-Section (13) should be read as a temporary vacancy only and not a permanent vacancy and only in case of a temporary vacancy the Senior most Member may act as the Chairperson. He has argued that Sub-Section (10) of Section 6 deals specifically with a vacancy which occurs for reasons other than temporary absence, and how the Adjudicating Authority has to continue with the adjudication in such cases of substantive vacancy. He argued that Sub-Section (10) implies that the proceedings shall be held up, in case if a permanent vacancy occurs in the office of the Chairperson and proceedings may be continued by the Adjudicating Authority from the stage at which the vacancy is filled, meaning thereby that if there occurs a Permanent Vacancy then proceedings would stop and would resume only on appointment of Chairperson.

(14) Shri N.K. Seth, has also referred to Sub-Section (14) and has argued that it provides how the hearings are to be managed before the Adjudicating Authority in case of temporary vacancy.

(15) In other words, Shri N.K. Seth, has stated that under Sub-Section (10), a substantive vacancy has been referred to and under Sub-Section (14) of Section 6, a temporary absence has been referred to and not a substantive vacancy and a provision has been made by the Legislature with regard to the various exigencies and how the Adjudicating Authority should function in each of such Administrative exigencies.

(16) It has been argued on the basis of judgment rendered in ***Kamlesh Kumar Sharma Vs. Yogesh Kumar Gupta and others reported in MANU/SC/0110/1998 & AIR 1998 SC 1021***, decided by the Hon'ble Supreme Court on 09.02.1998; that the Supreme Court was dealing with the vacancies in non-Government Colleges on the post of Teachers and in Paragraph-14, it observed that the word 'Otherwise' has to be read as '*ejusdem generis*' that is to say in a group similar to *death, resignation, long leave vacancy, invalidation, person not joining after being duly selected*. In other words, it would be case of unforeseen vacancies which could not be conceived earlier as substantive vacancy, as Substantive Vacancy relating to retirement are vacancies that arise out with certainty as the date of retirement of the incumbent is known beforehand.

(17) It has been argued by Shri Seth that the Supreme Court has interpreted the word 'Otherwise' in such a manner that the vacancies that are not certain should be treated as temporary vacancies and not substantive vacancies.

(18) Learned Senior counsel has referred to Annexure No.15 at Page 456 of the paper book and Paragraph-42 of the writ petition which is a news item that after retirement of the Vinodanand Jha as Chairperson the Member, Finance Mr. P.K. Upadhyaya, is working as Adjudicating Authority and has argued that he has issued the Show Cause Notice without jurisdiction. He has referred to the contents of the Paragraph-29 of the writ petition which are to same effect i.e. since at present the Adjudicating Authority comprises of a single member that too from outside the field of law and he is neither the Chairperson nor the Acting Chairperson, the Adjudicating

Authority cannot be said to be constituted in terms of Section 6 of the Act of 2002 and the composition of the Adjudicating Authority suffers from the vice of *Coram Non-Judice*.

(19) It has also been argued on the basis of interim orders of different High Courts, that a large number of High Courts have stayed the proceedings before the Adjudicating Authority on the same grounds as have been argued before us with regard to Show Cause Notice/ Proceedings being without jurisdiction. The counsel for the petitioner has annexed copies of three such interim orders passed by the different High Courts in the paper book.

(20) The counsel for the Respondent no.1 has argued that all such orders that have been passed are interim orders of different High Courts and carry only persuasive value for this Court. He has referred to a Final Order/ Judgment rendered by the High Court of Delhi in LPA No.167 of 2023 in the matter of ***Gold Croft Properties Pvt. Ltd. Vs. Directorate of Enforcement***, decided on 19.09.2023 and reported in ***2023 SCC OnLine Del 5900***. He has read out the Paragraph no.1 of the judgment to say that a similar argument was raised by the appellants therein challenging an order passed by the Adjudicating Authority under the Act of 2002 disposing of an application filed by the appellant praying for deferment of proceedings before the Adjudicating Authority on the ground that the Bench at that point of time suffered from "*Coram non-judice*" as no Adjudicating Authority had been constituted in terms of Section 2 (a) read with Section 6 (1) and (2) of the PMLA, 2002. The writ court had rejected such arguments and the appellant being aggrieved had approached the Division Bench in Letters Patent Appeal against such order of the writ Court.

(21) The counsel for the Respondent no.1 has taken this Court through the observations made by the Division Bench in Paragraph Nos.11 to 14 of the judgment in *Gold Croft Properties Pvt. Ltd.* (supra) which are being quoted hereinbelow:-

"11. Section 6 of the PMLA deals with the composition of the adjudicating authority and powers of the Adjudicating Authority. Section 6(2) of the PMLA provides that an Adjudicating Authority shall consist of a Chairperson and two other Members.

12. The question, therefore, as to whether there can be a Bench consisting of a Single Member is no longer a *res integra* and has been settled in a Judgment dated 11.01.2018 passed by the Division Bench of this Court in a batch of petitions i.e., W.P. (C) 5320/2017 etc. in the case of J Sekar vs. Union of India & Ors etc. Paragraph Nos.79 and 80 of the said Judgment reads as under:

"79. The Court next takes up the question of the composition of the AA on which extensive arguments were advanced by the learned counsel for the Petitioners. In this context, it must be noticed that under Section 6 PMLA, the AA is supposed to consist of the Chairperson and two other members - one of whom shall be a person having experience in the field of law. Section 6(3) further sets out what the qualifications for appointment as a member of an AA should be. One of those qualifications is that the person has to be qualified for appointment as a District Judge or a person in the field of law or a member of an Indian Legal Service. The other qualification is possession of a qualification in the field of finance, accountancy or administration as may be prescribed. It is, therefore, not the case that all the members of the AA should be judicial members.

80. It is seen that under Section 5 PMLA, the jurisdiction of the AA —may be exercised by the Benches thereof'. Under Section 6(5)(b) PMLA, a Bench may be constituted by the Chairperson of the AA "with one or two members" as the Chairperson may deem fit. Therefore, it is possible to have single- member benches. The word 'bench' therefore does not connote plurality. There could, even under Section 6(5)(b) PMLA, be a 'single member bench'. When Section 6(6) PMLA states that a Chairperson can transfer a member from one bench to another bench, it has to be understood in the above context of there also being single-member benches." (emphasis supplied)

13. In view of the above, the application filed by the Appellant that the quorum of the Adjudicating Authority was not complete cannot be accepted.

14. Section 6(7) of the PMLA provides if at any stage of the hearing of any case or matter it appears to the Chairperson or a Member that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members, the case or matter may be transferred by the Chairperson or, as the case may be, referred to him for transfer, to such Bench as the Chairperson may deem fit."

(22) It has been submitted on the basis of such judgment

that not only the Division Bench in Gold Croft Properties (supra) but also a Division Bench of the Delhi High Court in bunch of the writ petitions leading case of which was **J. Sekar vs. Union of India & Ors. in Writ Petition No.5320 of 2017** by its judgment and order dated 11.01.2018 had rejected the arguments of the writ petitioners therein regarding defective composition of the Adjudicating Authority.

(23) This Court has considered the rival submissions and also carefully perused the Section-6 of the Act which refers to the composition and Powers etc. of the Adjudicating Authority and it provides that the Adjudicating Authority shall consist of a Chairperson and two members belonging to the field of Law, Administration, Finance or Accountancy. It does not say that the Chairperson shall only belong to the field of law.

(24) This Court has also considered the Sub-Section (5) of Section-6 which in Clause-b mentions that a Bench may be constituted by the Chairperson of the Adjudicating Authority with one or two Members as the Chairperson of the Adjudicating Authority may deem fit. Similarly under Sub-Section (6) the Chairperson may transfer a Member from one Bench to another Bench and under Sub-Section (7) if at any stage of the hearing of any case or matter it appears to the Chairperson or a Member that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members, the case or matter may be transferred by the Chairperson or, as the case may be, referred to him for transfer, to such Bench as the Chairperson may deem fit.

(25) It is apparent from a perusal of Sub-Section (7) that a matter can be heard by one Member of the Adjudicating Authority. A Bench can consist of one Member only and a matter can be transferred on sufficient grounds to a Bench of two Members.

(26) This Court has also considered Sub-Section-10 and does not find the arguments made by the Senior Counsel of any substance with regard to a case where on a temporary absence or on a vacancy having occurred in the office of the Chairperson, the Proceedings/ Hearing shall come to a halt and resume only when vacancy is filled. Sub-Section (10) only clarifies that in case of such vacancy or temporary absence of one Member of the Bench, the proceedings shall be continued or resumed before the Adjudicating Authority from the stage at which

the vacancy is filled by the Central Government.

(27) We have also gone through the Sub-Section (13), on the basis whereof the counsel for the petitioner had argued that the vacancy referred therein is only of a temporary nature providing that in such a temporary vacancy the Senior Most Member shall act as Chairperson of the Adjudicating Authority only upto a date on which the new Chairperson is appointed to fill such vacancy, enters upon his office.

(28) This Court is of the considered opinion that the Legislature does not waste words. It used words which clarify its intention Sub-Section (10) refers to a Substantive vacancy as the Legislature has used the words "other than a temporary absence". On the other hand, under Sub-Section (13) the Legislature has used the words "vacancy" alone and has not clarified as to what type of vacancy it has in mind. From a bare perusal of the language of Sub-Section (13), this Court is of the considered opinion that since the Legislature has not used the same phrase as it has used in Sub-Section (10) i.e. *"If for reasons other than temporary absence, any vacancy occurs in the office of the Chairperson or any other Member"*, it is apparent that without suffixing or prefixing the word 'vacancy', with any other descriptive noun the language used by the Legislature is unambiguous and that any type of vacancy, be it substantive or temporary, has to be dealt with under Sub-Section (13) in the manner as provided therein.

(29) Learned Senior counsel has referred to Regulations of 2013 framed under the Act of 2002 and Regulations 26 Sub-Clause 2 thereof. The orders of the Adjudicating Authority need to be signed on every page by the Chairperson and the Members constituting the Bench. The Sub-Clause (2) of Regulation 26 is only a procedural requirement and it reference as to how the order-sheet is to be maintained. The word 'shall' used in Sub-Clause (2) can be read as 'may' being a directory provision and not as mandatory provision as no sanction is attached in case of non-signing of the order-sheet by the Chairperson. In other words, such interpretation abides by the very language of Section 6 of the Parent Act i.e. Act of 2002 which clearly provides that Chairperson can constitute a Bench either with one Member or with two Members and in case, there is a matter of substantial importance which requires hearing by two Members Bench, he can transfer a matter from one Member Bench to a Division Bench/

Two Members Bench. The "Bench" does not necessarily mean a Division Bench as is the established practice in all judicial fora. Even a Bench of the High Court having a single Judge is referred to as a "Bench" and acts as a Court.

(30) This Court is also of the considered opinion that the law was settled by the Constitution Bench of the Hon'ble Supreme Court in the case of ***N.P. Ponnuswami Vs. Returning Officer reported in AIR 1952 SC 64***, where it was categorically held that where rights and liabilities are created under statute and remedies are provided in the statute then such remedies should be availed of first before the extraordinary Writ jurisdiction under Article 226 of the Constitution of India can be invoked.

(31) This Court is of the considered opinion that the petitioner has remedy of approaching the Adjudicating Authority by filing his reply and he should file his reply taking all legally permissible grounds as are available to him, and if he is then aggrieved, he has liberty to approach the Appropriate Forum.

(32) The writ petition stands ***dismissed***.

(33) No order as to costs.

Order Date :- 13.2.2024
N.PAL