

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

%

Reserved on: 22nd December, 2014
Date of Decision: 09th April, 2015

+ CRL. M.C. 5508/2014

ARUN KUMAR MISHRA

....Petitioner

Through: Mr.Neeraj Chaudhari & Mr.
Naveen Dabas Advocate

versus

DIRECTORATE OF ENFORCEMENT

....Respondent

Through: Mr. Sanjay Jain, Sr. Advocate
with Mr.Ajay Digpaul, CGSC
with Mr. P.K. Sharma,
Advocate.

CORAM:

HON'BLE MR. JUSTICE VED PRAKASH VAISH

JUDGMENT

1. By way of the present petition under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') the petitioner seeks quashing of the proceedings in ECIR No.03/DZ/2011/AD(SC)/SDS dated 24.02.2011 under sections 3 and 4 of the Prevention of Money Laundering Act, 2002 (hereinafter referred to as 'PMLA') and the proceedings emanating therefrom.

2. Shorn off unnecessary details, the facts as borne out from the petition are that the petitioner is presently working at the post of Chief Engineer (Projects) in Uttar Pradesh State Industrial Development Corporation since 2005. The CBI/ Dehradun branch received an information that five employees of Punjab National Bank (hereinafter referred to as 'PNB') and

other persons had during the period from November, 2005 to December 2006 entered into a criminal conspiracy and made false entries in the accounts of PNB, Vidhan Sabha branch, Dehradun allowing deposits and withdrawal from five fictitious accounts maintained in the name of non-existent persons at PNB, Arya Vanprastha Ashram Branch, Jwalapur, Haridwar. By doing so, said persons misappropriated the funds of PNB and also caused a pecuniary gain to themselves or any other persons and correspondingly pecuniary loss to the PNB. In the said information it was stated that the said persons had obtained an illegal pecuniary gain of Rs. 10,88,987/- (Rupees Ten lakhs eighty eight thousand nine eighty seven) which was the interest accrued on the principal amount of Rs. 3,30,82,105/- (Rupees Three crore thirty lakhs eighty two thousand one hundred and five) deposited in these accounts and subsequently withdrawn.

3. On the basis of the said information RC No. 0072011A0003 was registered on 21.01.2011, by CBI SPE, Dehradun against the five persons namely, Mr.M.M. Sharma Manager (Retd.), PNB Vidhan Sabha Branch Dehradun, Mr. Harish Kamboj Deputy Manager, PNB, Vidhan Sabha Branch, Dehradun, Mr. A.K. Bansal Manager, PNB, Arya Vanprastha Ashram Branch, Jwalapur, Haridwar, Mr. Sanjeev Kumar Clerk, PNB, Arya Vanprastha Ashram Branch, Jwalapur, Haridwar, Mr. A.K. Chaddha Clerk (Retd.), PNB Vidhan Sabha Branch Dehradun and other unknown persons under Sections 13(2) read with 13(1)(d) of the Prevention of Corruption Act, 1988 (hereinafter referred to as 'PC Act'), and Sections 120B, 409, 477A Indian Penal Code (hereinafter referred to as 'IPC'). The said FIR pertained to a total of 71 bank accounts, which were in two groups one pertaining to five accounts and the second group pertaining to remaining 66

accounts.

4. The respondent, Enforcement Directorate registered a case bearing ECIR No. 03/DZ/2011/AD(SC)/SDS dated 24.02.2011 against the aforementioned five persons and other unknown persons for committing an offence under Section 3 of PMLA punishable under Section 4 of the said Act. On the basis of the said facts, the respondent concluded that as the aforementioned five persons cheated the PNB by manipulating the records of the bank by abusing their official position for their personal gain, it is therefore essential to conduct investigation under the provisions of Prevention of Money Laundering Act, 2002 since the amount involved is more than Rs.30 lakhs which is threshold limit of Part B of PMLA-2002.

5. On the basis of aforesaid FIR, CBI/ Dehradun investigated the matter and during the course of investigation, the petitioner was arrested by CBI on 27.04.2011. The police remand of petitioner was obtained on 05.08.2011. Vide order dated 01.10.2011 passed by learned District & Additional Sessions Judge, Karkardooma Courts, Delhi, bail was granted to him.

6. On the completion of the investigation into the first set of 5 accounts, the CBI filed a charge sheet on 09.09.2011 before the learned Special Judge, CBI, Dehradun against the two original accused persons and the present petitioner for offences committed u/s 13(2) r/w 13(1)(d) PC Act and Sections 120-B, 420, 471 r/w 468, 409 and 477-A IPC. Three other accused person were not charge sheeted. In the said charge sheet it was stated that the petitioner's money had been deposited and subsequently withdrawn through fictitious accounts. With regards to the remaining 66 accounts, CBI continued with its investigation. On the basis of the said charge sheet

respondent proceeded to attach various properties at Dehradun and Delhi through provisional attachment orders dated 25.10.2012 and 30.08.2013 respectively which were subsequently confirmed vide orders dated 21.03.2013 and 26.02.2014 respectively. A supplementary charge sheet was filed by the CBI on 28.09.2011.

7. Finally, CBI completed its investigation regarding 66 other accounts mentioned in the said FIR and submitted its closure report dated 08.08.2014 with regard to the said accounts. In the said closure report it was concluded that the investigation did not reveal any wrongful loss to the bank or Government of India due to the said 66 accounts and hence no offence was said to be made out. In the said closure report, it was also mentioned that the issue of petitioner's alleged disproportionate assets and the said false accounts are a subject matter of investigation by the SIT UP Police, Lucknow in FIR No.4/2011 dated 03.05.2011. The closure report filed by the CBI was accepted by the learned Special Judge, CBI, Dehradun by way of its order dated 21.08.2014.

8. Thereafter, the petitioner moved a petition before the High Court of Uttarakhand seeking quashing of the CBI proceedings pending in the Court of learned Special Judge, Anti Corruption, CBI, Dehradun pursuant to RC No. 0072011A0003 CBI SPE, Dehradun. The said petition was allowed by the High Court of Uttarakhand vide order dated 13.10.2014. In the background of these facts the petitioner has preferred the present petition.

9. Learned counsel for the petitioner contended that the entire basis for the ECIR was the contents of the FIR filed by CBI. However, in light of the closure report dated 08.08.2014 and the order of the Uttarakhand High Court

quashing the proceedings arising out of the said FIR against the petitioner, the very basis of the ECIR has ceased to exist. Without the predicate offence there can be no question of the respondent proceeding with the investigation against the petitioner. No offence under the Schedule of PMLA is established. Even if all the allegations are admitted, the act of depositing money in various bank accounts and later withdrawing the same from those accounts cannot be said to be a criminal act. It would not fall under the category of “Scheduled Offence” just because the amount is valued at more than Rs.30,00,000 (Rupees Thirty lakhs). Since the above act of opening bank accounts, depositing and withdrawing monies from those accounts are not “Scheduled Offences”, no offence is made out under Section 3 PMLA. The offence punishable under Section 120B IPC and Section 13 of the PC Act, were inserted in PMLA with effect from 01.06.2009. ECIR admitted itself that the alleged offence had taken place between November 2005 and December 2006 and thereby offences cannot be retrospectively applied to the petitioner. Article 20(1) of the Constitution prohibits the conviction of a person or his being subjected to a penalty under ex-post facto laws. An ECIR can only be registered once there has been a conviction and a judicial conclusion has been arrived at as to the quantum of the proceeds of that crime that are sought to be projected as untainted. It is only upon a conviction by a trial court in the predicate offence and a determination of a certain amount projected as untainted that the respondent would be clothed with the jurisdiction to register an ECIR and investigate accordingly. However, the respondent registered the ECIR on 24.02.2011 much before the charge sheet dated 09.09.2011 was filed by the CBI. The respondent has reproduced almost verbatim the contents of CBI’s FIR in the ECIR without any independent confirmation. The ECIR does not mention the name of the

petitioner.

10. Learned counsel for the petitioner further submitted that in a separate proceedings concerning the investigations by SIT of the State of Uttar Pradesh, certain statements of witnesses were recorded u/s 164 Cr.P.C. namely that of Anil Vaid, Devaki Nandan Taneja and Ravindra Taneja out of whom Anil Vaid stated on affidavit that he was forced by the officers of the respondent to state that the petitioner had visited him, failing which he was threatened to be implicated as an accused. The remaining two persons denied that they knew the petitioner.

11. The counsel for the petitioner further contended that advertence to the relevant provisions of the PMLA would reveal that without a 'scheduled offence', the provisions of the Money Laundering Statute cannot be attracted. This is apparent from Section 3, 2(u) and 2(y) of the PMLA which require that money laundering occurs when the proceeds of crime from a scheduled offence are sought to be projected as untainted. In the circumstances of this case where the CBI proceedings have been closed and quashed, there is no existence of a predicate offence on the basis of which the ECIR continues to be maintainable.

12. Mr. Neeraj Chaudhary, Advocate appearing for the petitioner urged that the agency has intentionally, deliberately and illegally exhorted pressure on the witnesses in order to fortify their attempt to establish a nexus between the petitioner and M/s. Ajanta Merchants Pvt. Ltd. He also submitted that copies of statement of witnesses relied upon by CBI under Section 164 of Cr.P.C., which the counsel for the petitioner claims will expose the illegal and wrongful acts of the respondent of falsely implicating

the petitioner.

13. The counsel for petitioner also submitted that the respondent has failed to establish any nexus between M/s. Ajanta Merchants Pvt. Ltd. and the petitioner. Further, M/s. Ajanta Merchants Pvt. Ltd. does not seem to have any *prima facie* nexus with the petitioner and the Enforcement Directorate has failed to produce any evidence of such a link. In fact, a bare perusal of the statements recorded under Section 164 Cr.P.C. reveal that the representatives of the company have no knowledge about the petitioner and they were coerced by the respondent to make statements for wrongfully indicting the petitioner.

14. Another submission of learned counsel for the petitioner is that the provisions under which the ECIR was registered as a scheduled offence under the PMLA was brought in 2009 by Act 21 of 2009 w.e.f. 01st June, 2009. The alleged offence in question related to the period of 2005-2006 when the said offences were not scheduled offences. He pointed out that in the original complaint No.167/2012 dated 22.11.2012 before the adjudicating authority shows that the respondent has attributed the alleged offence was committed during the year 2000-2001 when the PMLA was not in existence. A statute cannot operate with retrospective effect without a specific provision to that effect. In support of his submission he has relied upon judgments of Andhra Pradesh High Court in '**Tech Mahindra Ltd. vs. Joint Director of Enforcement**', in Writ Petition No.17525/2014 decided on 22.12.2014.

15. *Per Contra* learned Senior Counsel for the respondent contended that the investigation in the present case is at the final stage and there is every

likelihood that the respondent may file a criminal prosecution against the petitioner under PMLA. The order dated 03.12.2014 is causing prejudice to the respondent. Therefore, it may be recalled. After completion of investigation CBI filed a charge sheet on 09.09.2011 wherein the petitioner was named for commission of offences under Section 120B, 420, 417 r/w 468, 409 and 477A IPC and 13(2) r/w 13(1) (d) of the PC Act. CBI further filed a supplementary charge sheet on 28.09.2011 against the petitioner based upon the report of Forensic Science Laboratory, Dehradun, Uttarakhand dated 26.09.2011 inter-alia to the effect that he had signed as 'A Kumar' on '11 Withdrawal Slips', through which total amount of Rs.77,20,520/- (Rupees Seventy seven lakhs twenty thousand five hundred and twenty) was withdrawn by him from Account No. 106400010120669 maintained/operated in the name of 'Kaushik A. Kumar', maintained with Punjab National Bank, Arya Vanprastha Ashram, Jwalpur, Haridwar. The petitioner submission is factually incorrect regarding quashing of the FIR. Investigating agency under the PMLA has independent power to investigate the allegations, irrespective of the fact that whether the FIR on the basis of which the ECIR was registered is in existence or not. For establishing this contention the learned Senior Counsel has relied on '**Janta Jha v. Assistant Director**' 2014 CriLJ 2556 (Orissa High Court).

16. I have heard the learned counsel for both the parties and have also perused the material on record.

17. Before advertng to the facts of the case, it is necessary to consider the relevant provisions of the Prevention of Money Laundering Act. Section 3 of PMLA defines the offence of money laundering 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 [proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming] it as untainted property shall be guilty of offence of money-laundering”

18. The term ‘proceeds of crime’ has been defined in Section 2(u) of PMLA, which reads as under: -

“2. Definitions. - (1).....

xxx

xxx

xxx

(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;”

19. At the outset it may be mentioned that the ECIR discloses the commission of the alleged offences during the period from November, 2005 to December, 2006. Section 3 of the PMLA specifically mandates that the act of money laundering should be intentional, therefore, it has to be traced to the point of time when the actual transaction took place. The offence punishable under Section 120B IPC and Section 13 of the PC Act were inserted in the schedule of PMLA w.e.f. 01.06.2009 i.e. after the period in which the alleged offences have been committed.

20. In ‘**Tech Mahindra’s case**’ (**supra**) it was observed as under: -

“70. It is settled principle of law that no person can be prosecuted on the allegation which occurred earlier by applying the provision of law which has come into force after the alleged incident. In other words, there can be no retrospective application of criminal liability for the incident occurred prior

to introduction of such liability in the statute book.

71. Admittedly, prior to Amendment Act, 2009, none of the provisions which are now invoked by the Enforcement Directorate were on the statute book except Section 467 IPC. Thus, the petitioner cannot be prosecuted by invoking those provisions.”

21. It is settled principle of law that the provisions of law cannot be retrospectively applied, as Article 20(1) of the Constitution bars the ex-post facto penal laws and no person can be prosecuted for an alleged offence which occurred earlier, by applying the provisions of law which have come into force after the alleged offence.

22. The primary contention of the learned counsel for the petitioner is that the entire basis of the ECIR has been the contents of the FIR filed by the CBI. It has been further contended that since CBI's closure report dated 08.08.2014 and the order dated 13.10.2014 passed by the High Court of Uttarakhand the proceedings arising out of the FIR against the petitioner, have been quashed and hence ECIR should also be quashed. A bare perusal of record shows that on completion of investigation into the first set of five accounts, CBI filed a charge sheet on 09.09.2011 before the learned Special Judge, CBI, Dehradun (Uttarakhand) against Mr. Manmohan Sharma, Mr. Arun Kumar Bansal alongwith the petitioner, for the offences u/s 13(2) r/w 13(1)(d) of the PC Act and Section 120B, 420, 468, 409, 477A IPC. At that point in time, the investigation pertaining to 66 accounts was in process and subsequently CBI filed a closure report dated 08.08.2014. In the said closure report the reason specified by CBI was that the investigation did not reveal any wrongful loss to the bank or government due to the said 66 accounts and no offence was made out against the petitioner. Another reason

specified in the said closure report is that the said accounts and disproportionate assets were a subject matter of investigation by the SIT UP Police in FIR No.04/2011 dated 03.05.2011.

23. The petitioner when challenged the charge sheet dated 09.09.2011 and the entire proceedings pursuant to it, before the High Court of Uttarakhand, the said charge sheet and the entire proceedings pursuant thereto were quashed qua the petitioner only vide order dated 13.10.2014.

24. At this juncture it may be mentioned that after the judgment was reserved on 22nd December, 2014, Crl. M.A. No.2905/2015 was filed by the petitioner seeking permission to bring on record additional facts and documents concerning the ECIR No.11/2013 dated 22.10.2013 being investigated by the respondent Enforcement Directorate, related to the investigation conducted by SIT (UP) of two FIR Nos.01/2007 and 02/2007. An opportunity was granted to the respondent to file reply but the counsel for respondent preferred to argue the matter and oppose the said application.

25. Mr. Neeraj Chaudhary, Advocate appearing for the petitioner has put forth his apprehension that some hostile individuals are attempting to use Enforcement Directorate as a tool to falsely implicate the petitioner in certain unrelated investigations of SIT (UP).

26. The counsel for the petitioner submitted that ECIR No.11/2013 dated 22.10.2013 was registered by respondent against the petitioner and several named and unnamed persons on the basis of FIR No.01/2007 and 02/2007 dated 10.09.2007. However, closure report was filed in FIR No.01/2007 and was accepted by the Special Judge, CBI, Dehradun and in FIR

No.02/2007 SIT (UP) has exonerated the petitioner in its charge-sheet filed against the other accused persons. The same is not disputed by the respondent.

27. The facts emerging from the aforesaid are as under: -

- (i) Closure report filed by the CBI in RC No. 0072011A0003 which was accepted by the learned Special Judge, CBI, Dehradun vide order dated 21.08.2014;
- (ii) The order of the High Court of Uttarakhand dated 13.10.2014, quashing the proceedings of CBI qua the petitioner;
- (iii) The retrospective application of the provisions of the PMLA which came into existence in 2009 for the offences alleged to have been committed in 2005-2006;
- (iv) Statements of witnesses under Section 164 of Cr.P.C. of namely Mr. Anil Vaid, Mr. Devki Nandan Taneja and Mr. Ravindra Taneja dated 04.08.2014 recorded by Special JM, CBI, Uttarakhand (Annexure A to C of rejoinder to the reply filed by the respondent) relied upon by the respondent, revealing the facts that they have no knowledge of the petitioner and were coerced to make statements for wrongfully indicting the petitioner;
- (v) Final report filed by SIT (UP) in case FIR No.01/2007 which was accepted by the learned Special Judge, CBI vide order dated 10.03.2014; and
- (vi) Charge-sheet filed by SIT (UP) in case FIR No.02/2007 exonerating the petitioner.

28. In view of the above, the impugned ECIR No.03/DZ/2011/AD (SC)/SDS dated 24.02.2011 under Sections 3 and 4 of PMLA is quashed qua the petitioner only.

29. However, I am of the considered opinion that since SIT (UP) is already investigating the disproportionate assets case bearing FIR No.04/2011 against the petitioner and if after the completion of investigation, SIT (UP) establishes the offence of money laundering against the petitioner in this case, then the respondent Enforcement Directorate shall be at liberty to initiate fresh proceedings against the petitioner in accordance with law, thereafter.

30. This Court is confident that contrary to apprehensions of the petitioner, the respondent Enforcement Directorate will not proceed with other proceedings against the petitioner in ECIR No.11/2013 as well, if after the completion of investigation no predicate offence is made out against the petitioner.

31. The petition stands disposed of accordingly.

Crl. M.A. No.18779/2014

The application is dismissed as infructuous.

**(VED PRAKASH VAISH)
JUDGE**

APRIL 09th, 2015
hs