

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

Judgment reserved on : 22.01.2015
% Judgment delivered on: 04.02.2015

+ **W.P.(C) 8970/2014**

GAUTAM KHAITAN & ANR. Petitioners

Versus

UNION OF INDIA & ANR. Respondents

Advocates who appeared in this case:

For the Petitioner: Mr. Parag P. Tripathi, Sr. Advocate with Mr. Ramesh Singh, Mr. A.T. Patra, Mr. N.K. Malhotra, Mr. Jayant K. Mehta, Mr. Ashish Goel, Mr. Nipan Malhotra and Mr. Sagar Suri, Advocates
For the Respondent: Mr. Sanjay Jain, ASG with Mr. Ajay Digpaul, CGSC and Mr. Akash Nagar, Advocates.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

W.P.(C) 8970/2014 & CM No.20512/2014 (stay) & 20885/2014 (stay)

1. The petitioners have invoked, Article 226 of the Constitution, to assail order No.10/2014, dated 15.11.2014, passed by Shri Vikas Singh, Deputy Director in the Directorate of Enforcement (DOE). This order has been passed under Section 5(1) of the Prevention of Money Laundering Act, 2002 (in short the PMLA) to provisionally attach properties of petitioners which, according to the respondents, represent proceeds of crime.

1.1 The reason, I have adverted to the name of the officer in the preceding sub-paragraph, is on account of a submission made with some vehemence,

that the, impugned order was not passed by the officer, named above. I shall deal with this aspect, amongst others, in the course of my discussion.

2. The broad factual matrix, in which, the challenge has arisen is as follows:

2.1 In 1999, the Indian Air Force (I.A.F.) had proposed to the Government of India (G.O.I), Ministry of Defence (M.O.D) to replace the existing MI-8 VIP helicopters, on account of operational difficulties faced by the organisation.

2.2 Based on I.A.F's proposal, in October, 2000, a procurement process was initiated. Accordingly, a Request for Proposal (in short RFP) was issued to eleven (11) global vendors. Out of the eleven (11), four (4) vendors responded. The RFP, amongst others, contained a mandatory condition with regard to 'service ceiling'. Service ceiling is the technical term for the altitude, at which a helicopter can fly. The RFP, provided for a service ceiling of 6000 metres. This requirement was relaxed, which led to the service ceiling being reduced to 4500 metres.

2.3 The reduction in the service ceiling enabled Augusta Westland to enter the fray. Eventually, Augusta Westland, won a contract for supply of 12 AW-101, VVIP helicopters.

2.4 The respondents contend, that the, reduction in service ceiling was brought about by corrupt means. According to the respondents, Augusta Westland had paid kick-backs for this purpose, to two Italians, namely, Mr. Guido Ralph Haschke and Mr. Carlo Gerosa, by employing a charade of consultancy contracts. It is also the case of the respondents that monies were

also paid via Mr. Haschke and Mr. Gerosa to three Indians, amongst others, these being: Mr. Sanjeev Tyagi, Mr. Rajeev Tyagi and Mr. Sandeep Tyagi. It is the allegation of the respondents that the aforementioned persons were used to make in roads in the I.A.F. via the then Air Chief Marshal, Mr. S.P. Tyagi.

2.5 The respondents, also allege, that as regards the payments to Indian counterparts of Messrs Haschke and Gerosa, the same were enabled through the petitioner, who, at the relevant time, was a Legal Adviser of a company by the name of IDS Infotech Ltd. (India) (in short IDS India).

2.6 It is alleged by the respondents that the petitioner was instrumental, in introducing, Mr. Satish Bagrodia and Mr. Pratap K. Aggarwal, the Chairman and Managing Director, respectively of IDS India, to Messers Haschke and Mr. Gerosa.

2.7 It is further alleged that IDS India, between November 2007 to April 2010, received approximately Euros 2.166 million from Augusta Westland. Apparently, IDS India incorporated a 100% subsidiary, in Tunisia, by the name IDS Sarl, Tunisia [(hereafter referred to as IDS (Tunisia))].

2.8 Apparently, the ownership of IDS (Tunisia) changed hands within few months of its incorporation, inasmuch as, Messers Haschke and Gerosa acquired interests and control in the said company.

2.9 Alongside the aforesaid development, a company by the name of Aeromatrix Info Solution Ltd., was incorporated in India. The first Directors of this company (in short Aeromatrix) were the petitioners and, also another gentleman by the name of Mr. Arihant Jain. To begin with,

majority shares (i.e., 9,990 shares out of 10,000 shares) in Aeromatrix were held by the petitioners. Subsequently, though, Messrs Haschke and Gerosa were also brought on to the Board of Directors of Aeromatrix. It is alleged that, eventually, the kick-backs, were funnelled to Aeromatrix via the Mauritius route, for payment of illegal gratification to the petitioners.

3. Evidently, the Central Bureau of Investigation (in short CBI) interrogated, the petitioner, on 7.3.2013. Consequent thereto, on 12.3.2013, an FIR was registered, amongst others, against the petitioner, as well.

3.1 Apparently, on 13.3.2013, a search was conducted by the CBI at the residence and office of the petitioner, whereupon certain documents were retrieved. The CBI, as a matter of fact, took out a Look-Out Circular (LOC), against the petitioner, which was challenged by him. As averred in the petition, by an order dated 10.4.2013, the Special Judge, CBI granted permission to Mr. Gautam Khaitan to travel abroad. Evidently, on 25.11.2013, the CBI, withdrew the LOC issued against the petitioner.

3.2 The DOE, however, registered an ECIR against the petitioner, under Section 3 and 4 of the PMLA. The DOE, it appears, carried out their investigations independent of the CBI. The DOE, during the course of its investigation, also conducted a search at the residence and the office premises of the petitioner, on 22.9.2014. It is claimed by the petitioners that during the search, jewellery and title documents of immovable property, were seized.

3.3 Apparently, the petitioner, was arrested on 23.9.2014.

3.4 Petitioner no.2, wife of petitioner no.1, along with her son, made a representation dated 11.10.2014, for return of the seized properties, on the ground that the properties seized stood disclosed in their wealth tax returns, much prior to the occurrence of the scheduled offence.

3.5 Evidently, on 17.10.2014, an order was passed by the DOE under Section 20(1) of the PMLA, for retention of jewellery seized from petitioner no.1's residence.

3.6 Apparently, as a consequence of the aforesaid events, on 15.11.2014, an order of provisional attachment was passed vis-a-vis certain movable and immovable assets of the petitioners. It is this order, which has been assailed in the instant writ petition.

3.7 In consonance with the provisions of Section 5(5) of the PMLA, an original complaint was filed by the Deputy Director, DOE, on 12.12.2014, with the adjudicating authority. This complaint is numbered as: OC No.383 of 2014. The adjudicating authority upon taking cognizance of the complaint filed before it, I am told, has issued a show cause notice, amongst others, to the petitioners herein. The show cause notice, evidently, was issued on 17.12.2014. The notice, has been made returnable on 16.2.2015.

4. The petitioners moved this Court on 17.12.2014, whereupon the matter was re-notified on 22.12.2014. On that date, my predecessor restrained respondents from initiating any further steps in the matter. The matter was, however, posted for hearing on 6.1.2015. On that date, petitioners were granted ten (10) days accommodation to file a rejoinder in the matter. Though, the interim order was continued, pending hearing in the matter, it was made clear that it was confined to the petitioners before this

Court. Finally, arguments were heard and judgment was reserved on 22.1.2015.

SUBMISSIONS OF COUNSELS

5. In the background of the aforesaid facts, submissions were advanced on behalf of the petitioners by Mr. Prag P. Tripathi, Senior Advocate, while the respondents were represented by Mr. Sanjay Jain, Additional Solicitor General.

6. On behalf of the petitioners, the submissions made, proceeded, broadly, as follows:

(i) The concerned officer, who passed the impugned order lacked jurisdiction inasmuch as the circumstances which were necessary for triggering the power vested in him under Section 5(1) of the PMLA, were not present. In other words, to enable provisional attachment of properties of persons who are said to be in possession of proceeds of crime, the pre-requisite is, the institution of a charge sheet under Section 173 of the Code of Criminal Procedure, 1973 (in short the Cr.P.C.) qua the scheduled offence. Since, CBI has not filed any charge sheet to date, qua the scheduled offences, the DOE, could not have triggered the power of provisional attachment of the petitioners properties under Section 5 of the PMLA.

(ii) Apart from the above, for triggering the provisions of Section 5(1) of the PMLA, the respondents, would have to demonstrate that the concerned officer had “*reasons to believe*”, based on the material in his possession, that the properties of which provisional attachment is sought (which otherwise

ought to reflect the proceeds of the crime), if not attached, is likely to frustrate the proceedings under the said Act.

(iii) The reasons to believe should be reflected in the order itself and not in the affidavit filed by the respondents in this court.

(iv) The impugned order has been passed by an Assistant Director, who is not authorised to pass the impugned order, as per, the provisions of Section 5 of the PMLA.

(v) The impugned order is otherwise bad in law, as it is violative of principles of natural justice. Prior to the passing of the impugned order, no opportunity of hearing was provided to the petitioners. The impugned order entails civil consequences and, therefore, in the absence of an opportunity of hearing, would have to be declared as bad in law.

7. On the other hand, Mr. Sanjay Jain, ASG, in opposition, contended as follows:

(i) The scheme of PMLA is suggestive of the fact that it is not necessarily tied-in with the prosecution of the scheduled offence. The DOE's mandate to prosecute persons who fall foul of the provisions of PMLA is independent of the prosecution carried out vis-a-vis the scheduled offence under the Indian Penal Code, 1860 (in short the I.P.C) and other statutes. In support of this proposition, the reliance was placed on the provisions of Sections 2(u), 2(y), 3, 4 and 5 of the PMLA.

(ii) Clause (a) and (b) of Sub-section (1) of Section 5 of the PMLA were inter-linked inasmuch as any person who is in possession of any proceeds of crime, which are likely to be concealed, transferred or dealt with, in any

manner which may result in frustrating proceedings relating to confiscation of the proceeds of crime, is amenable to provisional attachment of his properties and, in passing an order of provisional attachment, the officer concerned, based on the material available with him, has to only form an opinion as to whether or not, a situation has arisen which demands imminent action. In other words, there is no fetter on the officer concerned in exercising his powers of provisional attachment qua such like persons, prior to the filing of a charge sheet with a competent court qua scheduled offences under Section 173 of the Cr.P.C., as long as he has reasons to believe, on the basis of material in his possession, that if the property, which is involved in money laundering, is not attached immediately, the non-attachment could lead to frustration of proceedings under the Act.

(iii) The writ petition, at the present juncture, is pre-mature inasmuch as the DOE has already instituted a complaint with the Adjudication Officer under Section 5(1) of the PMLA, in which, notice has been issued to the petitioners. In the said proceedings, the petitioners would have complete opportunity to demonstrate, as to why, the order of attachment ought not to continue.

(iv) The remedy under the statute cannot be bypassed by the petitioners by taking recourse to proceedings under Article 226 of the Constitution. Against the order of the Adjudicating Authority, an appeal is available under Section 26 of the PMLA, to an appellate tribunal, followed by a remedy of a second appeal before the concerned High Court, under Section 42 of the PMLA.

(v) There is no requirement of hearing the petitioners before exercising powers of a provisional attachment under Section 5 of the PMLA as, the basis for exercise of the power is, immediacy. Prior to confirmation of the order of attachment, the petitioners are heard by the Adjudicating Authority. This requirement is provided for under Section 8 of the PMLA. There are in-built safeguards in the PMLA, inasmuch as, the DOE, is required to approach the Adjudicating Authority within 30 days of passing of an order of provisional attachment under Section 5(5) of the PMLA, even while, the order of provisional attachment remains valid for 180 days. There is thus, no breach of principles of natural justice, as alleged or at all.

(vi) The grievance that the impugned order was not passed by the designated officer, is incorrect. The said fact is demonstrable upon a bare perusal of the impugned order.

(vii) The petitioners have misconstrued the assertions made in paragraph 20 of the complaint filed on 20.11.2014 by the DOE, under Section 44 of the PMLA.

REASONS

8. I have heard the learned counsels for the parties and perused the record. The writ petition raises primarily three jurisdictional issues for the consideration of this court. First, whether provisional attachment of the properties in issue, could have been passed without a charge sheet having been filed under Section 173 of the Cr.PC qua the scheduled offences.

8.1 Second, whether the officer concerned, who passed the impugned order, had reasons to believe based on the material available with him to order provisional attachment of the properties in issue.

8.2 Third, was there a breach of principles of natural justice in the respondents, not issuing notice to the petitioners before passing the impugned order which, resulted in provisional attachment of their properties.

8.3 In so far as the first issue is concerned, it may be relevant to examine, broadly, the legislative history and the scheme of the Act in so far as it is relevant for adjudication of the issues raised in the present writ petition.

8.4 The PMLA, which is an Act of 2002, was enacted in 2003 and was brought into force with effect from 01.07.2005.

8.5 The PMLA, was essentially, enacted by India to align with the world order, which got reflected in the resolution and declaration made under the “Political Declaration and Global Programme Action”, against money laundering, adopted by the General Assembly of the United Nations, in 1998.

8.6 The PMLA, was first amended in 2005, then in 2009, and thereafter, in 2013. The amendments made to the PMLA from time to time have their genesis in the experience gained not only by the Government of India but also by other countries across the globe. In this behalf, it would, therefore, be pertinent to mention that, in a sense, the amendments carried out in 2013, have their genesis, in the evaluation, carried out by an Inter-Governmental Body, that is, a Financial Action Task Force (FATF), constituted for

development and promotion of policies to deal with money laundering and to combat terrorism. The evaluation carried out by FATF was examined by the Standing Committee on Finance constituted by the 10th Lok Sabha. It is largely the recommendation of the said Committee, contained in its 56th Report, which led to the amendments carried out by Act No.2 of 2013.

8.7 Since, I do not wish to deal with the entire gamut of amendments, I may only point out those, which are relevant for the present case. Consequent to the recommendations of the Standing Committee on Finance, amendments were, inter alia, made in Section 3, 4, 5 and 8.

8.8 By virtue of amendment carried out in Section 3, even those activities were criminalized, which involved concealment, possession, acquisition and use of proceeds of crime.

8.9 Section 4, was amended to the extent that the monetary limit of Rs.5 Lakhs, on the fine, which was liable to be imposed qua a person who was convicted of the offence of money laundering, was removed. In other words, it is now open to the concerned court to employ its discretion as to the amount of fine which ought to be imposed in a given case.

9. In so far as Section 5 is concerned, the provision contained in the original clause (b) of Sub-section (1) was deleted. Clause (b) of Section 5(1) prior to amendment read as follows :-

“..such a person has been charged of committing a scheduled offence..”

9.1 Furthermore, the period for which provisional attachment would remain valid was enhanced from 150 days to 180 days from the date of the order.

9.2 In so far as Section 8 is concerned, amendments were carried out in Sub-Sections (1), (3) and (4); besides, substitution of Sub-Sections (5) and (6) with new Sub-Sections (5), (6) and (7) were mandated.

9.3 The consequent effect of insertion of new Sub-Sections (5) and (6), is that, even if conviction for the scheduled offence does not take place, the attachment and pursuant thereto, confiscation of proceeds of crime can take place if, upon conclusion of trial for an offence under PMLA, the special court finds, that the, offence of money laundering has been committed. In other words, the special court, on coming to a conclusion that the offence of money laundering stood committed, can order confiscation of property in favour of the Central Government, in respect of a property, involved in money laundering or, that which was used for commission of offence of money laundering.

10. Having regard to the above and a perusal of the PMLA as amended by Act 2 of 2013, it is clear that the scheme of Act, as it now operates, is directed not only against persons and juridical entities which are prosecuted for scheduled offences by various agencies, such as the CBI, Customs, SEBI etc., but also operates qua persons who conceal, possess, acquire, use and project or claim proceeds of crime. The scope and ambit of the Act is best defined by the amended Sections 2(u) and 3 which reads, respectively, as follows:-

“..2(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.

..3. Offence of money-laundering – Whosoever directly or indirectly attempts to indulge 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...”

10.1 It is in consonance with the scheme of the Act, as it now obtains, that Sections 5 and 8 have also been amended. The amended provisions of Section 5 to the extent they are relevant are extracted herein below.

“..5. Attachment of property involved in money-laundering – ¹[(1). Where the Director or any other officer not below

¹ Subs. By Act 2 of 2013, sec. 5 for sub-section (1) (w.e.f 15.02.2013, vide S.O. 343 (E), dated 08.02.2013). Earlier sub-section (1) was amended by Act 21 of 2009, sec. 3(a) (w.e.f. 01.06.2009). Sub-section (1), **before** substitution by Act 2 of 2013, stood as under :

“(1). where the Director, or any other officer not below the rank of Deputy Director authorised by him 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 – 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;
(b). such person has been charged of having committed a scheduled offence; and
(c). such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to 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 fifty days] from the date of the order, in the manner provided in the Second Schedule to the Income-Tax Act, 1961 (43 of 1961) and the Director or the other officer so authorised by him, as the case may be, shall be deemed to be an officer under sub-rule (e) of rule 1 of that Schedule :

[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 (2 of 1974), or a complaint has been filed by a person, authorised to investigate the offence mentioned in the Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be :

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 authorised 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 t his Chapter, the non-attachment of the property is likely to frustrate any proceeding under this Act.”

the rank of Deputy Director authorised by the Director 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 the 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 in any manner which may result in frustrating any proceedings relating to 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 (2 of 1974), or a complaint has been filed by a person authorised to investigate the offence mentioned in that Schedule, 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 authorised 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.].

(2). The Director, or any other officer not below the rank of Deputy Director, shall, immediately after attachment under sub-section (1), forward a copy of the order, alongwith the material in his possession, referred to in that sub-section, to the Adjudicating Authority, in a sealed envelope, in the

manner as may be prescribed and such Adjudicating Authority shall keep such order and material for such period as may be prescribed.

(3). x x x x x

(4). x x x x x

(5). The Director or any other officer who provisionally attaches any property under sub-section (1) shall, within a period of thirty days from such attachment, file a complaint stating the facts of such attachment before the Adjudicating Authority.

Section 8 : Adjudication – (1) On receipt of a complaint under sub-section (5) of Section 5, or applications made under sub-section (4) of section 17 or under sub-section (10) of section 18, if the Adjudicating Authority has reason to believe that any person has committed an offence under section 3 or is in possession of proceeds of crime, he may serve a notice of not less than thirty days on such person calling upon him to indicate the sources of his income, earning or assets, out of which or by means of which he has acquired the property attached under sub-section (1) of section 5, or, seized [or frozen] under section 17 or section 18, the evidence on which he relies and other relevant information and particulars, and to show cause why all or any of such properties should not be declared to be the properties involved in money-laundering and confiscated by the Central Government :

Provided that where a notice under this sub-section specifies any property as being held by a person on behalf of any other person, a copy of such notice shall also be served upon such other person :

Provided further that where such property is held jointly by more than one person, such notice shall be served to all persons holding such property.

(2). The Adjudicating Authority shall, after –

(a). considering the reply, if any, to the notice issued under sub-section (1);

(b). hearing the aggrieved person and the Director or any other officer authorised by him in this behalf, and

(c). taking into account all relevant materials placed on record before him,

by an order, record a finding whether all or any of the properties referred to in the notice issued under sub-section (1) are involved in money-laundering:

Provided that if the property is claimed by a person, other than a person to whom the notice had been issued, such person shall also be given an opportunity of being heard to prove that the property is not involved in money-laundering.

(3). Where the Adjudicating Authority decides under sub-section (2) that any property is involved in money-laundering, he shall, by an order in writing, confirm the attachment of the property made under sub-section (1) of section 5 or retention of property or record seized or frozen under section 17 or section 18 and record a finding to that effect, whereupon such attachment or retention or freezing of the seized or frozen property or record shall –

(a). continue during the pendency of the proceedings relating to any offence under this Act before a court or under the corresponding law of any other country, before the competent court of criminal jurisdiction outside India, as the case may be; and

(b). become final after an order of confiscation is passed under sub-section (5) or sub-section (7) of section 8 or section 58B or sub-section (2A) of section 60 by the Adjudicating Authority.

(4). Where the provisional order of attachment made under sub-section (1) of section 5 has been confirmed under sub-section (3), the Director or any other officer authorised by him in this behalf shall forthwith take the possession of the

property attached under section 5 or frozen under sub-section (1A) of section 17, in such manner as may be prescribed :

Provided that if it is not practicable to take possession of a property frozen under sub-section (1A) of section 17, the order of confiscation shall have the same effect as if the property had been taken possession of.

²[(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.

(7). Where the trial under this Act cannot be conducted by reason of the death of the accused or the accused being declared a proclaimed offender or for any other reason or having commenced but could not be concluded, the Special Court shall, on an application moved by the Director or a person claiming to be entitled to possession of a property in respect of which an order has been passed under sub-section (3) of section 8, pass appropriate orders regarding confiscation or release of the property, as the case may be, involved in the offence of money-laundering after having regard to the material before it...”

² Subs. by Act 2 of 2013, sec, 6(iv), for sub-sections (5) and (6) (w.e.f. 15.02.2013, vide S.O. 343(E), dated 08.02.2013. Sub-sections (5) and (6), before, substitution, stood as under :-

“(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.

(6). Where the attachment of any property or retention of the seized property or record becomes final under clause (b) of sub-section (3), the Adjudicating Authority shall, after giving an opportunity of being heard to the person concerned, make an order confiscating such property.”

10.2 A bare reading of the aforesaid provisions, in particular, Section 5 would show that for the authorised officer (not below the rank of Dy. Director) to exercise power of provisional attachment, it is no longer necessary, that the person, who is in possession of any proceeds of crime should have also have been charged for commission of a scheduled offence. The Act 2 of 2013 has deleted Clause (b) of Sub-Section (1) of Section 5, as it stood prior to the amendment. Clause (c) of Sub-Section (1) of Section 5, as it stood prior to the 2013 amendment, is now shown as Clause (b) in the amended statute.

10.3 Consequently, the designated officer can provisionally attach a property which, does not concern a person charged with a scheduled offence as long as the following ingredient is found: he has reason to believe, based on the material in his possession, that a person is in possession of proceeds of crime and, such proceeds, are likely to be concealed, transferred or dealt with in any manner which may result in frustrating proceedings relating to confiscation of proceeds of crime.

10.4 Therefore, the argument advanced on behalf of the petitioners that no order of attachment could have been passed unless in relation to the scheduled offence, a report was forwarded to the Magistrate under Section 173 of the Cr.PC is, according to me completely untenable. The first proviso applies if at all to persons who are charged with scheduled offence. It has no applicability to persons other than those charged with scheduled offence. The first proviso, however, has another exception carved out in the form of the second proviso to Section 5(1) of the PMLA. Thus, in effect, even vis-a-vis persons against whom proceedings are taken out qua scheduled offence, the power of provisional attachment can be exercised

provided the conditions stipulated in second proviso are fulfilled. The reason being that second proviso is a non obstante provision which opens with the following words :-

“..Provided further that, notwithstanding anything contained in clause (b), **any property** of **any person** may be attached under this section...” (emphasis supplied)

10.5 The words used in the opening part of second proviso make it clear that it takes into account “any property” of “any person” who is in possession of proceeds of crime. The limitation of attaching properties of persons who are charged with scheduled offence or the limitation on attachment of properties, only when persons accused of having committed scheduled offences are charged, has been done away with.

10.6 The consequential question, which arises is: whether the concerned officer could have taken recourse to the second proviso to Sub-Section (1) of Section 5 in the instant case. In order to trigger the second proviso, the authorised officer (not below the rank of Dy. Director) should have reasons to believe on the basis of material in his possession that if, the property in issue, which is involved in money-laundering is not attached, the non-attachment of the said property is likely to frustrate “any proceeding” under the Act. While the words ‘reasons to believe’ are wide in their import, it cannot include a mere suspicion or *ipse dixit* of the authorised officer. The belief of the authorised officer should lead him to form an honest and reasonable opinion based on reasonable grounds. [See: ***ITO Vs. Lakhmani, 103 ITR 437 at 448 (SC)*** and ***Naveen Chandra Vs. WTO, 124 ITR 68.***]

10.7 The reasonability of the grounds which lead to the formation of belief warranting provisional attachment is tested from the point of view of

whether or not they are germane to the formation of belief that if, provisional attachment is not ordered, it could lead to frustration of proceedings under the Act. Therefore, if the grounds are relevant and have nexus to the formation of belief then, of course the designated / authorised officer would have the necessary jurisdiction to take action under the Act. What is required to be examined is not the adequacy or sufficiency of the grounds but the existence of belief. In coming to this conclusion, in my view, all that one is to examine, is that, whether there was some material which, gave rise to a prima facie view that if provisional attachment was not ordered, it would frustrate proceedings under the Act. [See: ***Commissioner of Sales Tax, UP Vs. Bhagwan Industries, Lucknow, 1973 (3) 3 SCC 265***].

10.8 The scheme of the Act, however, is such that the provisional order of attachment passed under Sub-Section (1) of Section 5 of the PMLA even though valid for 180 days requires the designated / authorised officer to file a complaint before the adjudicating authority within a period of 30 days from the date, when attachment is ordered.

10.9 The adjudicating authority thereafter, on receipt of complaint under Sub-Section (5) of Section 5 of PMLA, is required to issue notice on the said complaint if, he has reason to believe that any person has committed an offence under Section 3 of the PMLA or is in possession of proceeds of crime. The period of notice cannot be less than 30 days. By this notice, the adjudicating authority calls upon the addressee to indicate sources of his income, earning or assets, out of which or by means of which he acquired the property attached under Sub-Section (1) of Section 5 of the PMLA and other evidence, relevant information and particulars, which, he would want to rely upon; and demonstrate as to why, the property in issue ought not to

be declared as one involved in money-laundering and therefore, be confiscated by the Central Government.

11. It is only after the adjudicating authority has : considered the reply of the person to whom notice is issued; heard him and, taken into account, all material supplied – that he can proceed to record a finding under Sub-Section (2) of Section 8 of the PMLA, whether all or any of the properties referred to in the notice, are involved in money-laundering.

11.1 Once the adjudicating authority comes to the conclusion that the property in issue is involved in money-laundering, he is required to confirm under Sub-Section (3) of Section 8, the attachment made Sub-Section (1) of Section 5, by an order, in writing.

11.2 Upon such finding being recorded, the attachment of the property in issue, will continue, during the pendency of proceedings relating to offence under the PMLA or, under corresponding law of any other country before a competent court of criminal jurisdiction outside India.

11.3 Under Sub-Section (4) of Section 8, once the order of attachment has been confirmed by the adjudicating authority, the designated / authorised officer is required to take possession of the property attached under Section 5, forthwith.

11.4 In case in the trial of the offence under PMLA, the special court, returns a finding that the offence of money-laundering, has been committed, it shall order that such property involved in money-laundering, which has been used in the offence of money-laundering, shall stand confiscated. If a

converse finding is reached then, the property in issue, will stand released. Provisions to this effect are contained in Sub-Sections (5) and (6) of the Act.

11.5 Therefore, the manner in which the attachment proceedings are legislatively structured, indicate, that when, the designed / authorised officer orders provisional attachment, based on the material available with him, it is a tentative view, taken, keeping in mind that, if provisional attachment is not ordered, it could lead to frustration of proceedings under the PMLA.

11.6 It is not unknown that trial of offences both under the PMLA Act as also of scheduled offences, often takes considerable time and if, power of provisional attachment is not exercised where, circumstances demand and jurisdictional facts exist, it could result in defeating the very purpose for which, PMLA has been enacted. If properties, which reflect the proceeds of crime change hands, it could lead to creation of bonafide third party interest which may, make it difficult, if not impossible, for the concerned authorities, to retrieve the proceeds of crime.

12. Having regard to the aforesaid legal position, let me advert to the material on record. This exercise is being done because the petitioners have invited the court to delve into the material despite having been given an option, during the course of proceedings, to answer the notice issued by the adjudicating authority.

12.1 A perusal of the order would show that in coming to the conclusion, which the designated / authorised officer has come to, in the impugned order, he has relied upon the following documents :-

(i). Copy of the FIR dated 12.03.2013 registered by the CBI;

- (ii). Copies of documents received by Ministry of Defence, Govt. of India;
- (iii). Statements of suspected persons and witnesses under PMLA and other records including documents produced by accused / witnesses and the bank statements, and the result of his investigation. [See: Paragraph 16 of the impugned order]

12.2 In so far as estimated quantification of proceeds of crime are concerned, the impugned order records the following, which includes, the petitioners herein in paragraph 20(c). The said paragraph is extracted hereinbelow.

“..A. Through M/s. IDS Tunisia :

M/s. IDS Sarl, Tunisia received Euro 24.06 millions (equivalent to approximately Rs.160 Crore) from M/s. Agustawestland Spa and out of the said amount, Euro 3.88 millions (equivalent to approximately Rs.24.6 crore) have been transferred to M/s. Aeromatrix Info Solutions Pvt. Ltd.; Euro 1.88 millions (equivalent to approximately Rs.12 crore) were transferred to M/s. IDS Infotech, India and the remaining amount of approximately Euro 18.94 million (equivalent approximately to Rs.123 crore) was retained by IDS Tunisia. This differential amount forms a major chunk of proceeds of crime unrelated to any work carried out by IDS Chandigarh and M/s. Aeromatrix. The said money amounting to Euro 18.94 million was further laundered by payments raised on fictitious invoices to various companies. Investigation are on for ascertaining the actual beneficiaries, though it was found that money was transferred to various companies / persons including M/s. Interstellar, Mauritius, M/s. Euromed, USA and Mr. Gautam Khaitan. This money being raised through criminal

conspiracy between/amongst M/s. Agustawestland, Mr. Carlo Gerosa, Mr Guido Haschke and Mr. Gautam Khaitan through over invoicing for apparently no value addition to the software work done by M/s. IDS Infotech and M/s. Aeromatrix Info Solutions Pvt. Ltd. and by also increasing the number of man-hour instead of actual hour basis is thus ascertained as proceeds of crime.

B. M/s. Aeromatrix Info Solutions Pvt. Ltd :

M/s. Aeromatrix Info Solutions Pvt. Ltd. received funds generated by Mr. Carlo Gerosa, Mr. Guido Haschke and Mr. Gautam Khaitan through M/s. IDS Tunisia by way of criminal act, in the shape of FDI amounting to Rs.4.77 Crores from M/s. Infotech Design System Ltd., Mauritius. Investigations have revealed that M/s. IDS Sarl, Tunisia after making payments to M/s. IDS Infotech Chandigarh and Aeromatrix Info Solutions Pvt. Ltd. against the invoices actually raised by them, remitted part of the differential amount, which it received from M/s. Agusta Westland Spa; to M/s. Aeromatrix Info Solutions Pvt. Ltd. in the shape of FDI, by transferring it firstly into the account of M/s. Interstellar Technology, Mauritius and then to M/s. Infotech Design System Ltd., Mauritius.

C. M/s. OP Khaitan & Co./Gautam Khaitan and Ritu Khaitan :

Mr. Gautam Khaitan and Mrs. Ritu Khaitan have received the following proceeds of crime from various sources as follows :-

- i. Through payments to M/s. O P Khaitan and Co. by M/s. Aeromatrix Info Solutions Pvt. Ltd. in the garb of legal fees and reimbursements to the tune of Rs.1.05 Crores.
- ii. Through remittances to M/s. O P Khaitan & Co. from IDS Sarl, Tunisia amounting to Euro 30000 (approx.. Rs.18 Lakhs @ Rs.60 per Euro)

iii. Through direct remittances to Mr. Gautam Khaitan from IDS Sarl, Tunisia amounting to Euro 83000 (Euro 80000 in November and Euro 3000 in December) as per document seized from his office premises (Approx Rs.50 Lakhs @ Rs.60 per Euro)

iv. Through direct remittances to Mr. Gautam Khaitan from M/s. Interstellar Technologies, Mauritius amounting to Approximately USD 150000 (approx. Rs.75 Lakhs @ Rs.50 per USD).

v. Through direct remittances to Mrs. Ritu Khaitan from M/s. Interstellar, Mauritius, amounting to Euro 50,000 (approx. Rs.30 Lakhs @ Rs.60 per Euro).

12.3 In so far as investment of proceeds of crime are concerned, the impugned order records the following details :-

“..A. M/s. Aeromatrix Info Solutions Ltd.

(i). The very basis for the formation of M/s. Aeromatrix was laundering of proceeds of crime. An amount of Rs.4.77 Crores was received in M/s. Aeromatrix as FDI which is laundered money from M/s. IDS Tunisia through M/s. Interstellar Technologies, Mauritius and M/s. Infotech Design System, Mauritius. This was further invested in running the company. Subsequently, M/s. Aeromatrix Info Solutions Pvt. Ltd. received Euro 3.88 million (approx. Rs.24.6 crores @ Rs.63 per Euro) for the software exported to Agustawestland. M/s. Aeromatrix Info Solution Pvt. Ltd. opened its account with ICICI Bank, Defence Colony, New Delhi. The balance held in the following accounts of M/s. Aeromatrix Info Solution Pvt. Ltd. is nothing but laundered money and thus, a proceed of crime in terms of provisions of Section 2(u) of PMLA, 2002.

a). Rs.61,34,031.38 as on 23.09.2014 in A/c No.630005008562 in ICICI Bank, Defence Colony;

b). Euro 20,912.00 as on 31.03.2014 in EEFC A/c No.630006000022 in ICICI Bank, Defence Colony.

(ii). M/s. Aeromatrix Info Solution Pvt. Ltd. also purchased a vehicle Chevrolet Cruze car bearing registration no.CH01AD 4562. As per the value shown in vehicle insurance for 2013-2014, the value of the same is Rs.6,98,000/-.

B. M/s. OP Khaitan & Co. / Gautam Khaitan and Ritu Khaitan : Gautam Khaitan and Ritu Khaitan have invested in the purchase of immovable properties and jewellery..”

12.4 Having regard to the above as well as other assertions in the impugned order, the designated / authorised officer has proceeded to direct provisional attachment of properties referred to, which includes bank accounts and a vehicle belonging to Aeromatrix, as mentioned in paragraph 33.

12.5 As regards the petitioners herein, in their individual capacity, the following properties stand attached :

“.. (ii). Jewellery, valued Rs.1,62,57,245/- seized from the residential premises of Shri Gautam Khaitan at B-12, Panchsheel Park, New Delhi, vide Panchnama dated 22.09.2014.

(iii). Advance of Rs.44,37,446/- paid between 03.08.2009 to 06.08.20014 against property at D-112, Tower D, Privy Express Sector-72, Village Fazilpur, District Gurgaon.

(C). IMMOVABLE PROPERTY

S.No	Details of property	Name of the owners of property	Value in Rs.
1	Unit No.150/151/152 (970 sq. feet. X 3 = 2910 sq ft.) Tower B, First Floor, Spazeedge, Sector-47, Sohna Road, Gurgaon-Ritu Khaitan	Mrs. Ritu Khaitan W/o. Shri Gautam Khaitan	79,62,222

12.6 A perusal of the details of the properties of the petitioners, which have been provisionally attached, would show that the designated / authorised officer has included within its ambit, essentially, properties, which were, clearly were acquired between 2009 and 2014. The petitioner no.1, in his statement dated 24.09.2014 made to the DOE gave details of immovable properties and bank accounts owned by his family members, which included properties owned by him and his wife as well. Out of the many properties disclosed, the advance in the sum of Rs.44,37,446/- against property described as: D-112, Tower D, Privy Express Sector-72, Village Fazilpur, District Gurgaon, and an immovable property being, Unit No.150/151/152 (970 sq. feet x 3 = 2910 sq. ft.) in the name of petitioner no.2, having a value of Rs.79,62,222/-, has been attached. All other properties except jewellery worth Rs.1,62,57,245/-, have been excluded. It appears that properties acquired between 2009 and 2014 have been taken into account, as it was around this time that Aeromatrix was incorporated, with the help of petitioner no.1.

13. In my view, having regard to the material accompanying the impugned order and the discussion therein, one cannot but come to the conclusion that the designated / authorised officer had reason to believe that the properties in issue were involved in money-laundering, and that, if they

were not attached, immediately, it could lead to the proceedings under the PMLA, being frustrated.

13.1 As indicated above, this could only be a tentative view based on the material presently available with the designated / authorised officer. The petitioners would have a full opportunity to present their version of events and demonstrate with the help of material and evidence in their possession, that the properties which stand provisionally attached, are not, involved in money-laundering. Therefore, the submission made on behalf of the petitioners that there was no material available for existence of such a belief, is in my view, untenable.

14. The last issue, which requires consideration is : whether there has been breach of principles of natural justice. The scheme of the Act as discussed above by me would show that, implicitly, the legislature, has excluded the requirement to issue notice or having to hear the person whose, property is sought to be provisionally attached as this power is vested in the designated / authorised officer to avoid and / or prevent a situation, which would result in, any proceeding, under PMLA, being frustrated. The PMLA provides for issuance of notice and hearing at the stage of section 8 proceedings before the adjudicating authority, after a complaint under Section 5(5) is filed, having regard to the nature of power vested in the designated / authorised officer. It is an emergent power, invested in a senior officer of the DOE to deal with a situation at hand, in the facts and circumstances of a particular case. The fact that a post facto hearing is provided under Section 8 of the PMLA, in my view, rules out, by necessary implication, the requirement to issue notice and of hearing at the stage of provisional attachment, under Section 5(1) of the Act. Therefore, complete

opportunity was given to the petitioner to agitate and advance its case. As a matter of fact under PMLA, the decision of the adjudicating authority can be assailed by way of an appeal before the Appellate Tribunal. The appeal is maintainable under Section 26 of the PMLA. There is, in addition, a right available to an aggrieved party to prefer a second appeal to this court under Section 42 of the PMLA. These provisions clearly indicate that the legislature did not intend to provide for a hearing and notice at the stage of provisional attachment. [See *Maneka Gandhi Vs. UOI*, (1978) 2 SCR 621 and *Swadeshi Cotton Mills Vs. UOI*, (1981) 2 SCR 533].

14.1 The other question, which requires consideration, is: whether the writ petition is maintainable for laying a challenge to the order of provisional attachment. It is trite to say that a remedy under Article 226 of the Constitution can be availed of by an aggrieved party, even where, a statutory remedy is provided, in two broad situations. First, when it is a case of lack of jurisdiction. Second, where there is a breach of principles of natural justice.

14.2 As discussed above, at the stage of issuance of an order of provisional attachment, no recourse could have been taken to a writ petition under Article 226, merely, on the ground that no notice was issued or, no opportunity of hearing was given before passing the order of provisional attachment. The reason for the same, as indicated above, is, that a post facto hearing is provided in the aftermath of a provisional attachment being ordered. Section 8 of the PMLA, provides for a full dress hearing and for grant of complete opportunity to the aggrieved party in that behalf. The legislature's intention, in the manner in which, Sections 5 and 8 of the PMLA are structured, makes that amply clear.

14.3 In so far as the first situation is concerned, there is a very narrow leeway available to the petitioners to come by way of a writ petition. The court ordinarily would be circumspect in entertaining a writ petition at the stage of provisional attachment, that is, at the Section 5, stage. The aggrieved petitioners will have to demonstrate, and the burden in that behalf would be heavy, that there is, an absence of jurisdiction in the designated / authorised officer directing provisional attachment of his / her properties. Therefore, while not shutting out completely access to a remedy under Article 226 of the Constitution, the aggrieved party will have to demonstrate that it is a case of complete lack of jurisdiction. As to whether, this case would fulfil, that criteria, my answer is, in the negative. The issues raised in the writ petition could have been well nigh dealt with by the adjudicating authority. The adjudicating authority is free to ascertain as to whether in a given action filed before it, the necessary jurisdictional facts are present.

15. In these circumstances, I find no merit in the writ petition. The writ petition and the pending applications are accordingly dismissed. Consequently the interim order dated 22.12.2014 stands vacated. Costs will follow the result in the petition.

16. Needless to say, any observations made hereinabove by me, will not impact the proceedings before adjudicating authority or the merits of the case.

RAJIV SHAKDHER, J.

FEBRUARY 04, 2015
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