

IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : 13.04.2016

PRONOUNCED ON : 07-06-2016

CORAM

THE HONOURABLE MR. JUSTICE R. SUBBIAH

Writ Petition No. 12548 of 2016
and

W.M.P. No. 10845 of 2016

Indian Overseas Bank
represented by its Chief Manager/
Constituted Attorney
ARM Branch
Canteen Block
No.763, Anna Salai, Chennai - 600 002

... Petitioner

Versus

1. Government of India
Ministry of Finance
Enforcement Directorate
represented by its Joint Director
Office of the Enforcement Directorate
Chennai Zonal Office
2nd and 3rd Floor
Murugesha Naicker Complex
No.84, Greams Road
Chennai - 600 006

2. M/s. Kannya Electronics Pvt Ltd.,
C/o. The Managing Director
Shri. B. Subash
No.10, E.C.R. Road
Mandavelipakkam
Chennai - 600 028

3. Shri. B. Subash
Son of Balaram
Managing Director
M/s. Kannya Electronics Pvt Ltd.,
No.10, E.C.R. Road
Mandavelipakkam
Chennai - 600 028

4. Maple Exim Limited
Suite No. 1402
Duddell Street
Central Hongkong

5. Mr. Mathan Balaraman
Old No.2/425, New No.2/505
Mambakkam Road
Medavakkam
Chennai - 601 302

... Respondents

Petition filed under Article 226 of The Constitution of India praying for a Writ of Certiorari calling for the records of the first respondent bearing file No. ECIR/ CEZO/60/2010 dated 07.12.2015, quash the same.

For Petitioner : Mr. F.B. Benjamin George

For Respondents : Mr. M. Dhandapani for R1

ORDER

The petitioner bank has filed this writ petition challenging the provisional attachment order dated 07.12.2015 issued by the first respondent by which the first respondent provisionally attached the sum of Rs.1.71 crore which is available with the petitioner bank for a period of 180 days in terms of Section 5 (1) of The Prevention of Money Laundering Act, 2002 (hereinafter referred to as The Act).

2. For disposal of this writ petition, certain facts which are necessary and germane are stated hereunder:-

(i) The petitioner bank - Indian Overseas Bank is a body corporate incorporated under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and it is transacting in banking business through its various branches spread across the country and also abroad. During the course of its business, one M/s. Dinakar Trading Company has availed certain credit limits from the Broadway Branch of the petitioner bank by creating equitable mortgage in respect of the property situated at No.53, First Floor, Ganesh Bhavan, Greenways Road, Perumalpuram, Chennai - 600 028. As the said M/s.Dinakar Trading company has committed default in payment of the loan amount, the petitioner bank initiated proceedings under the provisions of Securitisation and Enforcement of Security Interest Act, 2002, (in short SARFAESI Act). After such proceedings have been initiated, the third respondent herein has purchased the property from the original borrower/mortgagor. On such purchase, the third respondent, claiming ownership over the mortgaged property, has filed S.A. No. 97 of 2007 before the Debts Recovery Tribunal-II at Chennai under Section 17 of the SARFAESI Act challenging the sale notice issued by the petitioner bank. On receipt of notice in S.A. No. 97 of 2007, the petitioner bank has filed C.R.P. No. 839 of 2007 before this Court contending that S.A. No. 97 of 2007 filed by the third respondent is not maintainable. The

Civil Revision Petition No. 839 of 2007 was allowed by this Court on 21.07.2007. As against the same, the third respondent preferred Special Leave to Appeal No. 12617 of 2007 before the Honourable Supreme Court and it was dismissed on 07.12.2007 upholding the action initiated by the petitioner bank. While dismissing the Special Leave Petition, the Supreme Court directed the petitioner bank to refund the amount deposited by the third respondent. Accordingly, the sum of Rs.1,71,00,000/- deposited by the third respondent was refunded by the petitioner bank by means of a demand draft dated 31.01.2008. However, the third respondent did not receive the amount and returned the demand draft dated 31.01.2008. In the meantime, in the auction sale conducted by the bank, the mortgaged property was sold in favour of one Mr. Sekar.

(ii) According to the petitioner, similarly, the fourth respondent availed certain credit facilities from the petitioner's Hong Kong Branch for which the respondents 2, 3 and 5 stood as guarantors. The fourth respondent had committed default in payment. Therefore, the petitioner bank initiated recovery proceedings and obtained a Judgment and Decree in HCA No. 189/2/08 from the High Court of Hong Kong on 29.10.2008 for a sum of US \$ 937908.02 which is equivalent to Rs.4.75 crores.

(iii) According to the petitioner, during the course of enquiry, they came to know that the sum of Rs.1,71,00,000/- deposited by the third respondent with the petitioner bank is from and out of the loan availed by the fourth respondent from their Hong Kong Branch and it was routed through State Bank of Hyderabad and UCO Bank. Thereafter, to enforce the decree and judgment of the High Court of Hong Kong, the petitioner bank has filed O.A. No. 95 of 2010 on the file of Debt Recover Tribunal-I, Chennai and obtained a final order on 31.07.2014. During the pendency of execution proceedings, the petitioner bank exercised its general lien over the sum of Rs.1,71,00,000/- and obtained an order from the Tribunal in IA SR No. 4493 of 2005 on 05.09.2012 for appropriation of the said amount in part satisfaction of the dues under the said Original Application. The Tribunal also issued a recovery certificate on 29.10.2014 for Rs.4,76,84,927.85 after giving credit to a sum of Rs.2,20,22,995/- being the sum of Rs.1,71,00,000/- with accrued interest.

(iv) According to the petitioner, the second respondent has also availed credit facilities from Union Bank of India and committed default. Therefore Union Bank of India has filed O.A. No. 261 of 2007 before the Debts Recovery Tribunal-I, Chennai for recovery of Rs.8,34,99,505/- and they have also filed I.A. (SR) No. 461 of 2006 for an interim injunction restraining the petitioner from paying the proceeds of the demand draft dated 31.01.2008 to the third respondent. In the said application, the Tribunal passed an order of injunction on 08.02.2008 restraining the petitioner from paying the proceeds of the demand draft dated 31.01.2008 to the third

respondent and later, by order dated 21.03.2014, the Tribunal directed the petitioner to deposit the sum of Rs.1,71,00,000/- with the Tribunal. According to the petitioner, the order dated 21.03.2014 was passed by the Tribunal without taking note of its earlier order dated 05.09.2012 in O.A. No. 95 of 2007. Therefore, challenging the order dated 21.03.2014, the petitioner filed M.A. No. 126 of 2015 before the Appellate Authority and it is pending.

(v) At this stage, the first respondent has passed the impugned provisional attachment dated 07.12.2015, attaching the sum of Rs.1,71,00,000/- on the basis that the first respondent had reasons to believe that the amount deposited with the petitioner bank is generated out of the proceeds of crime and therefore it has become necessary to attach the amount pending investigation under the Act. Challenging the order of provisional attachment dated 07.12.2015 of the first respondent, the petitioner bank has filed this writ petition.

3. When the writ petition is taken up for consideration, the learned counsel appearing for the petitioner would contend that the petitioner bank initiated proceedings under the SARFAESI Act against the property which was mortgaged with the petitioner bank. As against the said proceedings, the third respondent filed S.A. No. 97 of 2007 before the Debts Recovery Tribunal-II, Chennai contending that he has purchased the property. As against the same, the petitioner has filed CRP No. 839 of 2007 before this Court and it was allowed on 21.07.2007. Challenging the same, the third respondent filed Special Leave to Appeal No. 12617 of 2007 before the Honourable Supreme Court. While entertaining the Special Leave to Appeal, the Honourable Supreme Court directed the third respondent to deposit Rs.1,71,00,000/- with the petitioner bank and he has also deposited it. Ultimately, the Special Leave Petition was dismissed on 07.12.2007 thereby the action initiated by the petitioner bank has been held as valid and proper. At the time of dismissal of the Special Leave Petition, the Supreme Court directed the petitioner bank to refund the amount deposited by the third respondent to the tune of Rs.1,71,00,000/-. Accordingly, the petitioner bank refunded the sum of Rs.1,71,00,000/- deposited by the third respondent by a demand draft dated 31.01.2008, but the third respondent refused to receive it for the reasons best known to him. In the meantime, the fourth respondent availed certain credit facilities with the Hong Kong Bank of the petitioner's branch in which the respondents 2, 3 and 5 stood as guarantors. After availing the loan amount, the fourth respondent committed default which led to filing of a case in Civil Action No. 1892 of 2008 before the High Court of Hong Kong Special Administrative Region for recovery of US \$ 937,908.02 with interest and costs and it was allowed on 29.10.2008. Thereafter, to enforce the said order passed by the Court at Hong Kong on 29.10.2008, the petitioner bank filed O.A. No. 95 of 2010 before the Debts Recovery Tribunal-I, Chennai. During the pendency of the said

application the petitioner bank filed O.A. No. 95 of 2010 seeking permission of the Court to adjust the sum of Rs.1,71,00,000/- as the petitioner bank came to know that the sum of Rs.1,71,00,000/- deposited by the third respondent is part of the loan amount availed from their Hong Kong Branch by the fourth respondent. Further, during the pendency of the said application, the petitioner bank exercised its general lien over the sum of Rs.1,71,00,000/- and obtained an order from the Tribunal on 05.09.2012 for appropriation of the amount in part satisfaction of its dues. The Tribunal also issued a recovery certificate on 29.10.2014, while so, the impugned order of provisional attachment issued by the first respondent, purportedly on the ground that the amount was generated out of proceeds of crime is illegal.

4. The learned counsel for the petitioner would further contend that the first respondent failed to take note of the fact that the sum of Rs.1,71,00,000/- was transferred to their account from the Hong Kong Branch and as such the petitioner is the owner of the amount. According to the learned counsel for the petitioner, none of the provisions of The Act are attracted in this case, much less Section 5 (1) of the Act warranting the first respondent to issue the impugned notice. The first respondent failed to consider that the petitioner bank itself is a victim of calculated deception perpetrated by the private respondents. It is further contended that amount of Rs.1,71,00,000/- was deposited by the third respondent pursuant to the order passed by the Honourable Supreme Court. Further, as per the proviso to Section 5 (1) of the Act, the first respondent has to forward a report to the Magistrate concerned under Section 173 of the Code of Criminal Procedure but such a procedure has not been followed by the first respondent. The first respondent also failed to take note of the recovery certificate issued by the Tribunal in favour of the petitioner bank and therefore, the learned counsel for the petitioner prayed for allowing the writ petition.

5. In support of his submissions, the learned counsel for the petitioner relied on the decision of this Court in (A. Kamarunnisa Ghorl vs. The Chairperson, Prevention of Money Laundering, Union of India, New Delhi and others) reported in (2012) 4 CTC 608 to contend that the object of a provisional order of attachment is ensure that no person is authorised to deal with the possession of any proceeds of the crime or to indulge in transferring or concealing such proceeds. In the present case, as the petitioner is the lawful owner of the money, the question of invocation of Section 5 of the Act by the first respondent does not arise.

6. Even though no counter affidavit has been filed by the first respondent in this case, Mr. M. Dhandapani, learned counsel for the first respondent, would contend that the impugned order of attachment is in consonance of Section 5 (1) of the Act. The first respondent is empowered to invoke

Section 5 of the Act if he has reasons to believe that a person is in possession of any amount which was generated through a proceeds of crime. Further, the impugned order of attachment is provisional in nature and it has not adjudicated the right of the petitioner bank finally. In fact, in the impugned order, the first respondent has given detailed account of the transaction and came to a subjective conclusion that he has reasons to believe that the amount with the petitioner bank is part of the proceeds of a crime. Such an order of provisional attachment is valid only for 180 days and the petitioner can very well approach the first respondent and prove their right, if any. Further, he would contend that the writ petition is not maintainable inasmuch as there is an alternative and effective remedy available by way of an appeal and without exhausting the same, the writ petition is not maintainable.

7. I heard the learned counsel for the petitioner and the learned standing counsel for the first respondent. I had gone through the material records placed. Before dealing with the rival submission, it is necessary to consider Section 5 of the Act, which reads as follows:-

"5. Attachment of property involved in money-laundering:- (1) Where the Director or any other officer not below the rank of Deputy Director authorised by the Director for the purposes of this Section, has reason to believe (the reason for such belief to be recorded in writing) on the basis of material in his possession, that:-

(i) any person is in possession of any proceeds of crime; and

(ii) 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.

8. Thus, it is evident that for invoking the provisions of Section 5 (1) of the Act, the first respondent has to conclude that he has reason to believe that a person is in possession of any proceeds of a crime and such proceeds are likely to be transferred or dealt with in any other manner which may frustrate the investigation that may be carried out under this Act. Further, the impugned provisional order has been passed on 07.12.2015 and as per Section 5 of the Act, the provisional order shall remain in force only for a period of 180 days. Even other wise, the impugned order of attachment is only provisional in nature and it is very well open to the petitioner to approach the first respondent and prove that the money, which is in their possession is not a whole or part of proceeds of the crime by producing all the documentary evidence in their possession. Further, the first respondent has taken

note of the fact that if a provisional order of attachment is not passed, it will frustrate the very object of investigation that may be conducted by him. At any rate, in the impugned order of provisional attachment, the first respondent has given various details relating to the manner in which the amount was transacted between several persons and the reasons which prompted him to invoke the provisions of Section 5 (1) of the Act. Therefore, in this writ petition, this Court cannot conduct a roving enquiry to find out whether those details given by the first respondent are correct. The details furnished by the first respondent in the impugned order of provisional attachment deals with several transactions which are factually disputed by the petitioner. While so, this Court, in exercise of the powers conferred under Article 226 of the Constitution of India cannot interfere with such order of provisional attachment passed by the first respondent.

9. In this context, useful reference can be made to the decision of this Court in (M. Saraswathy and another vs. The Registrar, Adjudicating Authority (under provisions of Money Laundering Act, 2002), New Delhi and another) reported in (2013) (1) MWN (Crl) 193 wherein it was held in para No.24 as follows:-

"24. From the provisions of Section 5 (1) of P.M.L.A., 2002, five conditions are prerequisite for attaching the proceeds of crime provisionally without issuing notice prior to the attachment. They are:-

i. The Director or any other officer, who provisionally attaches any property, shall have reasons to believe on the basis of materials in his possession.

ii. The person, against whom proceedings under P.M.L.A. 2002 has been initiated, must be in possession of any proceeds of crime.

iii. Such person must be charged for having committed any scheduled offence;

iv. Such proceeds of crime are likely to be concealed, transferred or dealt with in any manner and

v. If the provisional order of attachment is not ordered immediately such concealment or transfer of such proceeds of crime may result in frustrating the proceedings relating to confiscation of such proceeds of the crime."

10. If the impugned order of the first respondent is tested in the light of the decision rendered by this Court, it is evident that the first respondent has satisfied all the conditions laid down by this Court in the above order and therefore, I hold that the impugned provisional order is in consonance with Section 5 of the Act.

11. The learned counsel for the petitioner relied on the decision of this Court in (A. Kamarunnisa Ghorri vs. The Chairperson, Prevention of Money Laundering, Union of India, New Delhi and others) reported in (2012) 4 CTC 608. In that case, the persons accused therein have collected huge amount from various persons and out of such amount, they have purchased several properties. In such circumstances, the department issued a provisional order of attachment to ensure that those who lawfully paid the amount on the basis of representation of the accused are not deprived of the same. This decision will not lend support to the facts of this case. In this case, the first respondent has issued a provisional order of attachment on the belief that the amount in deposit with the petitioner bank is part of the proceeds of ill gotten money. It was not a final order and therefore, it is for the petitioner to subject themselves to the enquiry that may be conducted by the first respondent and to disprove the claim of the first respondent.

12. For all the above reasons, I hold that the impugned provisional order of attachment issued by the first respondent is in accordance with Section 5 of the Act and consequently the writ petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To

The Joint Director
Enforcement Directorate
Government of India
Ministry of Finance
Office of the Enforcement Directorate
Chennai Zonal Office
2nd and 3rd Floor
Murugesu Naicker Complex
No.84, Greaves Road
Chennai - 600 006.

+1cc to Mr.F.B.Benjamin George, Advocate, S.R.No.30356

W.P.No. 12548 of 2016