

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 25.01.2016

+ **W.P.(C) 1925/2014 & CM No.4017/2014**

M/S MAHANIVESH OILS & FOODS PVT. LTD. Petitioner

versus

DIRECTORATE OF ENFORCEMENT Respondent

Advocates who appeared in this case:

For the Petitioner :Mr Shishir Mathur with Mr Kunal Bahri.

For the Respondent :Mr Arun Bhardwaj, CGSC for UOI with
Mr Abhishek Pundir.

CORAM:-

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present writ petition seeking quashing of the provisional attachment order dated 24.01.2014 (hereafter 'impugned order') passed by the Deputy Director, Directorate of Enforcement under section 5 (1) of Prevention of Money Laundering Act, 2002 (hereafter the 'Act') whereby the entire basement and ground floor of the property situated at E-14/3, Vasant Vihar, New Delhi belonging to Smt. Alka Rajvansh has been attached considering it as proceeds of crime.

2. The brief facts that are relevant for examining the controversy in the

present petition are as under:-

2.1 On 08.05.2009, an FIR was lodged by the CBI on a written complaint made by Shri S.K. Maggu, Deputy Manager of National Agricultural Cooperative Marketing Federation of India (hereafter 'NAFED') wherein it was alleged that Mr Homi Rajvansh - the Additional Managing Director of NAFED, had hatched a conspiracy, in connivance with the directors of M/s M.K. Agri International Ltd. (hereafter 'MKAIL'), for making wrongful gains by executing Memoranda of Understandings (MOUs) with MKAIL on behalf of NAFED for import of raw sugar and selling the same by entering into three High Seas Sale (HSS) Agreements with M/s M.K. International Ltd. (hereafter 'MIL'), a sister concern of MKAIL, without charging/recovering any cost for the commodity.

2.2 On 16.10.2003, NAFED through Mr Homi Rajvansh entered into an MOU with M/s Earthtech Enterprises Ltd. (EEL) which is a sister concern of MKAIL and run by one of the accused Manish Kant Agarwal for import of petroleum products. On 12.02.2004, an addendum to the above MOU was signed between NAFED and EEL and certain other items were added for purchase. On the request of EEL, vide two letters dated 27.09.2004,

NAFED allowed two import orders each containing 38,000/- MT of raw sugar to be imported from M/s Noble Resources SA, Switzerland. The request of EEL for opening two separate Letters Of Credit (LCs) covering the said import orders was also acceded to by NAFED.

2.3 On 30.11.2004, NAFED through Mr Homi Rajvansh entered into a MOU with MKAIL for import of various products. MKAIL is the sister concern of EEL. On the request of MKAIL, NAFED through Mr Homi Rajvansh sold the entire cargo of raw sugar under two LCs to MIL - which is also a sister concern of MKAIL - under the three separate HSS Agreements entered into by NAFED with MIL. MIL, subsequently, sold the raw sugar in the open market. It is alleged that Mr Homi Rajvansh, acting on behalf of NAFED, permitted the sale of raw sugar through the three HSS Agreements without charging the cost of the commodity and, thereby, caused wrongful loss to NAFED and wrongful gain to themselves.

2.4 On 10.02.2005, MIL through its director - Mr M.K. Agarwal issued cheques for an amount aggregating to ₹1.5 crores in favour of its two holding companies namely, M/s Duoroyale Enterprises Ltd. and M/s Sri Radhey Trading Pvt. Ltd. Subsequently, both the said companies issued two cheques each amounting to ₹75 lacs in favour of M/s Mahanivesh Oils

& Foods Pvt. Ltd., the petitioner company, where Smt. Alka Rajvansh - wife of Mr Homi Rajvansh was a Director.

2.5 On 16.02.2005 and 17.02.2005, M/s Mahanivesh Oils and Foods Pvt. Ltd., issued two cheques of ₹1,32,00,00/- and ₹10,81,000/- respectively in favour of M/s Uppal Agencies Pvt. Ltd. for purchase of the ground floor and basement of the property situated at E-14/3, Vasant Vihar, New Delhi (hereafter 'the said property').

2.6 It is alleged that Smt. Alka Rajvansh used the funds received from M/s Duoroyale Enterprises Ltd. and M/s Sri Radhey Trading Pvt Ltd. for purchasing the above-mentioned property pursuant to a sale deed dated 18.03.2005 executed by Shri B.K. Uppal in favour of the petitioner company. By the impugned order, the Deputy Director of Directorate of Enforcement has provisionally attached the said property under Section 5(1) of the Act considering it as the 'proceeds of crime'. A charge sheet dated 30.07.2010 was filed in the court of Chief Metropolitan Magistrate, Delhi wherein Smt. Alka Rajvansh was charged under Sections 120B, 403, 409 and 420 of IPC.

3. The learned counsel for the petitioner contended as under:-

3.1 That Section 5 of the Act requires that a person must have been charged of having committed a scheduled offence for provisionally attaching his property which is considered to be the proceeds of crime. It was contended that the provisions of the Act have been applied retrospectively as Section 420 and 120B of Indian Penal Code for which the petitioner has been charged with were not a part of scheduled offences at the time of commission of the offence in the year 2005 and said provisions were added in Part A of the Schedule by the Prevention of Money-Laundering (Amendment) Act, 2009 effective from 01.06.2009.

3.2 That the amendment made in 2009 is substantive and is prospective in nature and, therefore, the impugned order is bad in law as provisions of the Act have been applied retrospectively and in violation of the mandate of Article 20(1) of the Constitution of India. Reference was made to **Rao Shiv Bahadur Singh and Anr. v. The State of Vindhya Pradesh**: AIR 1953 SC 394 and **Soni Devrajbhai Babubhai v. State of Gujarat**: (1991) 4 SCC 298.

3.3 That there cannot be any question of attachment of the property under Section 8(5) of the Act as the petitioner cannot be prosecuted under the provisions of the Act for the offence of money laundering since the date

of commission of the offence is prior to the date when the Act came into force, i.e., 01.07.2005. A conjoint reading of sub-sections (3), (5) and (6) of Section 8 of the Act as in force prevalent at the material time provides that the attachment of property is directly related to the conviction of accused person for any scheduled offence and an order of attachment of property becomes final only after the court comes to the conclusion that the offence of money laundering has been committed.

3.4 That Section 5(1) of the Act, as in force at the material time, provides that the concerned officer must record his 'reason to believe' that the accused is likely to conceal, transfer or deal with the proceeds of crime in a manner which may result in frustrating any proceedings relating to the confiscation of such proceeds of crime. It was contended that no such reason had been provided in the impugned order which provisionally attached the said property after more than 9 years from the date of commission of the alleged offence.

4. The learned counsel for the respondent contended as under:-

4.1 That the impugned order is valid and legal and does not violate Article 20(1) of the Constitution of India. Reliance was placed on **Ratan**

Lal v. State of Punjab: AIR 1965 SC 444.

4.2 That the proceedings of attachment of property are independent of the proceedings for the offence of money-laundering or the scheduled offence.

4.3 That any property, if involved in the money laundering offences, would be liable to attachment and confiscation irrespective of whether it remains in the name of the accused persons or other persons. Section 3 of the Act covers all purchases of moveable and immovable property inducing or integrating proceeds of crime.

4.4 That the date of commission of the scheduled offence is not relevant; what is relevant is the date of the offence of money laundering. Reliance was placed on decision of Andhra Pradesh High Court in **B. Ramaraju & Ors. v. Union of India: (2011) 164 Comp Cas 149 (AP).**

4.5 That the scheduled offences incorporated by the Prevention of Money-Laundering (Amendment) Act, 2009, with effect from 01.06.2009, have a retrospective effect. Reliance was placed on decision of Gujarat High Court in **Alive Hospitality and Food Private Limited v. Union of India: Special Civil Application No.4171/2012, decided on 31.07.2013.**

4.6 That the impugned order was passed after considering all the material on record and recording the reasons to believe that the said property is the proceeds of crime.

4.7 That the impugned provisional order was confirmed by the Adjudicating Authority by an order dated 21.07.2014. (This was not mentioned during oral submissions but was included in a note filed subsequently).

5. Despite sufficient opportunity, the respondent did not file any counter affidavit to the petition. After the hearings were concluded, a written note on submissions was filed which indicated that the Adjudicating Authority had, subsequent to the impugned order, recorded a finding that the property in question was involved in money laundering. This Court was further informed that the petitioner had preferred an appeal under Section 26 of the Act before the Appellate Tribunal impugning the order of the Adjudicating Authority. However, both the parties requested that the contentions raised be decided on merit.

Conclusion and Reasons

6. It is not disputed that the property sought to be attached under

Section 5 of the Act – E-14/3, Vasant Vihar, New Delhi – was purchased on 18.03.2005 i.e. prior to 01.07.2005, that is, prior to the Act coming into force. In the circumstances, the principal controversy to be addressed is whether any proceedings under the Act could lie in respect of the said asset.

7. The Act owes its genesis to the joint initiatives taken by several nations. The international community recognised that money laundering posed a serious threat to the financial systems of countries as well as a threat to their sovereignty and integrity. Having realized the threat of money laundering and its adverse effect, the international community took several initiatives to combat this threat including the following: The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances called for the confiscation of proceeds of crime related to drugs and further measures for preventing money laundering; in 1989, the Basel Statement of Principles provided the framework of policies and procedures to be adhered to by banks for dealing with the issue of money laundering; at a Summit of seven nations held in Paris in July 1989; Financial Action Task Force (FATF) was established to examine the problems of money laundering; the “Political Declaration and Global Programme of Action” adopted by the United Nations General Assembly

by its Resolution of 23rd February, 1990 called upon the Member States to develop a mechanism to prevent financial institutions from being used for money laundering and further enact legislations for prevention of money laundering; and in a special session of the United Nations held for ‘Countering World Drug Problem Together’ held in June 1998, a declaration was made with respect to combating and prevention of money laundering.

8. India is also a signatory to some of the aforesaid initiatives. In conformity with the international opinion to take measures for combating money laundering, the Prevention of Money Laundering Bill, 1999 was introduced. This Bill was met with a number of objections at various stages but was subsequently passed leading to the enactment of the Act in 2003. Pursuant to a notification issued by the Central Government, the Act came into force with effect from 1st July, 2005. The statement of objects and reasons appended to the Prevention of Money Laundering Bill indicates that the “*objective was to enact a comprehensive legislation inter alia for preventing money laundering and connected activities confiscation of proceeds of crime, setting up of agencies and mechanisms for coordinating measures for combating money-laundering, etc*”. It was also indicated that

the proposed Act was “*an Act to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto*”.

9. Chapter II of the Act contains provisions relating to the offence of money-laundering. Section 2(p) of the Act defines money-laundering to have the meaning assigned to it in Section 3 of the Act. Section 3 of the Act enacts money-laundering to be an offence. It is relevant to note that Section 3 of the Act was amended by Prevention of Money-Laundering (Amendment) Act, 2012 with effect from 03.01.2013. Prior to the said Amendment, Section 3 of the Act read as under:-

“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 it as untainted property shall be guilty of offence of money-laundering.”

After the amendment effective from 03.01.2013, the said Section reads as under:-

“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 concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering”

It is seen from the above that the scope of the offence of money-laundering has been widened by virtue of the Prevention of Money-Laundering (Amendment) Act, 2012. Section 3 of the Act now also takes within its sweep any person who assists or is a party or is involved in any process or activity connected with concealment, possession, acquisition or use of the proceeds of crime.

10. Section 4 provides that the offence of money-laundering shall be punishable with rigorous imprisonment for a term of not less than three years and may extend to seven years and also a fine upto Rupees Five lacs. In cases of proceeds relating to the specified offences, the term can extend upto 10 years.

11. Chapter III of the Act is captioned “Attachment, Adjudication and Confiscation”. Section 5 of the Act provides for the attachment of property involved in money-laundering and as originally enacted and brought in force with effect from the 01.07.2005 reads as under:-

“Attachment of Property involved in Money-laundering-

(1) Where the Director or any other officer not below the rank of Deputy Director authorized by the Director for the purposes of the section, has reason to believe (the reason for such 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
- 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 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 an offence under:

- (i) Paragraph 1 of Part A and Part B of the Schedule, a report has been forwarded to a Magistrate under section 173 of the Code Of Criminal Procedure, 1973 (2 of 1974); or
- (ii) Paragraph 2 of Part A of the Schedule, a police report or a complaint has been filed for taking cognizance of an offence by the Special Court constituted under sub-section (1) of Section 36 of the Narcotic and Psychotropic Substances Act, 1985 (61 of 1985)

(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, along with 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) Every order of attachment made under sub-section (1) shall cease to have effect after the expiry of the period specified in that sub-section or on the date of an order made under sub-section (2) of section 8, whichever is earlier.

(4) Nothing in this section shall prevent the person interested in the enjoyment of the immovable property attached under sub-section (1) from such enjoyment.

Explanation —For the purposes of this sub-section “person interested”, in relation to any immovable property, includes all persons claiming or entitled to claim any interest in the property.

(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.”

By virtue of Section 3(b) of the Act 21 of 2009, the provisos to sub-section 1 of Section 5 were substituted to read as under:-

“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.”

Section 5(1) of the Act was further amended by Prevention of Money-Laundering (Amendment) Act, 2012. With effect from 03.01.2013

Section 5(1) of the Act reads as under:-

“5.(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—

(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 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.”

12. Section 17 of the Act empowers a Director or an Officer not below the rank of Deputy Director to conduct search and seizure operations, if on the basis of information, he has reason to believe that any person

- “(i) has committed any act which constitutes money-laundering, or
- (ii) is in possession of any proceeds of crime involved in money laundering, or
- (iii) is in possession of any records relating to money-laundering, or
- (iv) is in possession of any property related to crime,”

Similarly, Section 18 empowers an authority so authorized on behalf of the Central Government to search any person who is believed to have secreted

about his person or has under his possession, ownership or control, any record or proceeds of crime.

13. By virtue of Section 5(5) of the Act, the concerned officer who provisionally attaches any property under Section 5(1) is required to file a complaint stating the facts of such attachment before the Adjudicating Authority. Similarly, Section 17(4) of the Act and Section 18(10) of the Act also require the officer or the authority which has seized any record or property under Section 17 or 18 of the Act to make an application to the Adjudicating Authority.

14. Section 8 of the Act provides for adjudication of the complaint or the applications made under Section 5(5), 17(4) or 18(10) of the Act. Section 8(1) of the Act provides that where on receipt of complaints or applications as the case may be, the Adjudicating Authority has a reason to believe that any person has committed an offence under Section 3 of the Act or is in possession of proceeds of crime, he may serve a notice to such person calling upon him to indicate the sources of his income, earning or assets, out of which or by means of which such person has acquired the property which has been attached under Section 5(1) or seized under Section 17 or Section 18 of the Act. Section 8(2) of the Act provides that the

Adjudicating Authority shall after considering the reply, if any, to the notice under Section 8(1) of the Act and after hearing the aggrieved person and the director and after taking into account all relevant material, record a finding whether the property (or properties) referred to in the notice issued under Section 8(1) of the Act is (are) involved in money-laundering.

15. In cases where the Adjudicating Authority confirms that the property is involved in money-laundering, he is required to record a finding that the property attached is involved in money-laundering. Such attachment shall continue during the proceedings relating to the offence under the Act before any Court or any other corresponding law or before the competent court outside India. The order of the Adjudicating Authority shall become final after the order of confiscation is passed by the Special Court either under Section 8(5) of the Act where the trial has been concluded or under Section 8(7) of the Act where the trial cannot be conducted. In cases where the property has been attached or seized relates to a crime tried in a country outside India and with whom India has reciprocal arrangement, the order of adjudication shall become final on an order passed under Section 58B of the Act or Section 60(2A) of the Act.

16. In cases where the order of confiscation has been made either under Section 8(5), 8(7), 58B or Section 60(2A) of the Act, the property ordered to be confiscated shall vest with the Central Government free from all encumbrances.

17. It is clear from the above scheme that any provisional attachment under Section 5(1); seizure under Section 17 or 18 of the Act; or the order of attachment by the adjudicating authority under Section 8(2) is founded on the fundamental premise that the properties attached/seized “are involved in money-laundering”.

18. In the present case, the impugned order has been made under Section 5(1) of the Act. A plain reading of Section 5(1) of the Act indicates that where the officer concerned has reason to believe, on the basis of material in his possession that any person: “(a) *is in possession of any proceeds of crime; and (b) that such proceeds are likely to be concealed, transferred or dealt with in any manner that may frustrate any proceedings relating to confiscation of such proceeds of crime under this Chapter*”, he may make an order for provisional attachment of “*such property*”. The use of the word ‘such’ clearly indicates that the reference is to the property mentioned

in the preceding portion of Section 5(1) of the Act, that is, proceeds of crime.

19. Section 2(u) of the Act defines proceeds of crime and reads as under:-

“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;”

20. Thus, a conjoint reading of Section 5(1) read with Section 2(u) of the Act clearly indicates that the power to attach is only with respect to the 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 such property.

21. Thus, plainly, the occurrence of a scheduled offence is the substratal condition for giving rise to any proceeds of crime and consequently, the application of Section 5(1) of the Act. A commission of a scheduled offence is the fundamental pre-condition for any proceeding under the Act as without a scheduled offence being committed, the question of proceeds of crime coming into existence does not arise.

22. In view of the above, the contention that the Act is completely independent of the principal crime (scheduled offence) giving rise to proceeds of crime is unmerited. It is necessary to bear in mind that the substratal subject of the Act is to prevent money-laundering and confiscate the proceeds of crime. In that perspective, there is an inextricable link between the Act and the occurrence of a crime. It cannot be disputed that the offence of money-laundering is a separate offence under section 3 of the Act, which is punishable under Section 4 of the Act. However as stated earlier, the offence of money-laundering relates to the proceeds of crime, the genesis of which is a scheduled offence. In the aforesaid circumstances, before initiation of any proceeding under Section 5 of the Act, it would be necessary for the concerned authorities to identify the scheduled crime. The First Proviso to Section 5 also indicates that no order of attachment shall be made unless in relation to a scheduled offence a report has been forwarded to a Magistrate under Section 173 of the Code of Criminal Procedure, 1973 or a complaint has been filed by a person authorised to investigate the scheduled offence before a Magistrate or Court for taking cognizance of the scheduled offence. Thus, in cases where the scheduled offence is itself negated, the fundamental premise of continuing any

proceedings under the Act also vanishes. Such cases where it is conclusively held that a commission of a scheduled offence is not established and such decision has attained finality pose no difficulty; in such cases, the proceedings under the Act would fail.

23. It was contended by Mr Bhardwaj that, in terms of Section 8(5) of the Act, the attachment would continue till the conclusion of a trial of an offence under the Act before the Special Court irrespective of whether the person accused of the scheduled crime has been acquitted. In my view, this contention is also not acceptable. If the crime, which has allegedly resulted in the proceeds attached under the Act, is not established, the basis of the attachment would cease to exist and the question of proceeding further under the Act would not arise. The trial for an offence of money-laundering is also predicated on commission of a scheduled crime and would have to be terminated. It is only in cases where it is found that a scheduled crime has been committed that the question of determining whether an offence of money-laundering is made out would survive. Thus, in cases where the persons accused of a scheduled offence are acquitted, the fundamental premise that any proceeds have been derived or obtained from any activity relating to a scheduled offence by either the persons accused or any other

person linked to them would also not hold good and, therefore, any proceeding initiated under the Act would have to be terminated.

24. The next issue to be examined is whether the order of provisional attachment can be issued only in respect of property that is in possession of a person accused of a scheduled offence. In view of the statutory amendment to Section 5 of the Act carried out by virtue of Prevention of Money-Laundering (Amendment) Act, 2012, this controversy does not survive. Prior to the said amendment, the concerned officer could provisionally attach proceeds of crime if he had reasons to believe 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”*. With effect from 01.03.2013, clause (b) has been deleted and it is now no longer necessary that the person who is in possession of the property alleged to be proceeds of crime must also be charged with a scheduled offence. In the circumstances, the order of provisional attachment could be issued against any property in

possession or any person even if the said person is not alleged to have committed the scheduled offence.

25. However, such powers are not unbridled and there are several conditions that must be met before any property can be attached or confiscated. First and foremost, it is necessary that the property sought to be attached is one, which the concerned officer has reason to believe is the proceeds of a scheduled crime. Secondly, a provisional attachment under Section 5 is only in aid of adjudication under Section 8(2) of the Act, which may result in the Adjudicating Authority recording a finding that the property concerned is involved in money-laundering; therefore, it is also necessary that an offence of money-laundering is believed to have been committed and the same bears a live link with the property sought to be provisionally attached. Section 5 of the Act does not stand independent of Section 3 of the Act and unless it is believed that an offence of money-laundering has been committed the question of attaching any property provisionally under Section 5 would not arise.

26. Mr Bhardwaj had referred to the decision of the Gujarat High Court in *Alive Hospitality and Foods Private Limited* (*supra*) wherein the court had observed that: “*On the text and authority of our Constitution while it*

may perhaps gainfully be contended that conviction for the offence of money-laundering cannot be recorded if the said offence is committed prior to the enforcement of Section 3 of the Act, such a contention cannot be advanced to target proceedings for attachment and confiscation as these fall outside the pale of the prohibitions of the Constitution, in particular Article 20(1)”. However, I am unable to persuade myself to concur with that view principally for the reason that Section 5 is not a standalone provision; it is in aid of adjudication under Section 8 of the Act and final vesting of the attached property with the Central Government under Section 9 of the Act. The Adjudicating Authority is required to return a finding under Section 8(2) of the Act whether the property is attached/seized/frozen. And, by virtue of Section 8(3) of the Act, if the Adjudicating Authority decides that the property is involved in money-laundering, the attachment, retention and freezing of the property shall continue during the pendency of proceedings relating to the offence under the Act or a corresponding law of any other country with whom India has a bilateral agreement. Thus, it is not possible to envisage provisional attachment of any property in absence of an offence of money-laundering. Consequently, in a given case where the offence of money-laundering

cannot be made out as the acts constituting such offence were prior to the Act being brought in force, it would be impermissible for the authorities concerned to attach the property representing the proceeds of crime.

27. The central issue in the present case is not on whether the scheduled offence was committed, but whether the attachment under Section 5 of the Act can be sustained where the principal offence as well as the offence of using its proceeds is alleged to have been committed prior to the Act coming into force.

28. As stated hereinbefore, the scope of the offence of money-laundering was widened by virtue of the Prevention of Money-Laundering (Amendment) Act, 2012 and the rigor of Section 3 of the Act also extends to any person who assists or is a party or is involved in any process or activity connected with concealment, possession, acquisition or use of proceeds of crime. However, the subject of the offence continues to be the proceeds of crime and its involvement in money-laundering. This again draws one to the central controversy in this petition, that is, whether any property of any person could be attached as allegedly involved in money-laundering prior to the enactment of the Act or acquired as a result of a crime, committed prior to the Act coming into effect.

29. The Act is a penal statute and, therefore, can have no retrospective or retroactive operation. Article 20(1) of the Constitution of India expressly forbids that no person can be convicted of any offence except for the violation of a law in force at the time of the commission of the act charged as an offence. Further, no person can be inflicted a penalty greater than what could have been inflicted under the law at the time when the offence was committed. Clearly, no proceedings under the Act can be initiated or sustained in respect of an offence, which has been committed prior to the Act coming into force. However, the subject matter of the Act is not a scheduled offence but the offence of money-laundering. Strictly speaking, it cannot be contended that the Act has a retrospective operation because it now enacts that laundering of proceeds of crime committed earlier as an offence. In *The Queen v. The Inhabitants of St. Mary, Whitechapel (1848) 12 QB 120*, the Court pointed out that “*The Statute which in its direct operation of prospective cannot be properly be called a retrospective statute because a part of the requisites for that action is drawn from the time antecedent to its passing*”. Thus, with effect from 1st June, 2009 laundering proceeds of crime under Section 420 of the IPC is enacted as an offence of money-laundering punishable under Section 4 of the Act. It is

important to note that the punishment under Section 4 of the Act is not for commission of a scheduled offence but for laundering proceeds of a scheduled crime. The fact that the scheduled crime may have been committed prior to the Act coming into force would not render the Act a retrospective statute as only the offence of money-laundering committed after the enforcement of the Act can be proceeded against under the Act.

30. The respondent's contention that the relevant date would be the date of offence of money-laundering and not that of the commission of the scheduled offence is merited and the impugned order cannot be set aside only on the ground that it has been issued in respect of proceeds of a scheduled crime which was allegedly committed prior to 1st July, 2005.

31. The next contention to be considered is whether in the given facts and circumstances, any offence or money-laundering had been made out to warrant an issuance of the impugned order. It is alleged that on 10th February, 2005, MIL through its Director issued cheques aggregating ₹1.5 crores in favour of its holding companies, namely, M/s Duoroyale Enterprises Ltd. and M/s Shri Radhey Trading Pvt. Ltd. and these companies in turn issued two cheques of ₹75 lacs each in favour of the petitioner. It is suggested that these amounts were proceeds of crime

received by the petitioner as a result of a criminal activity and bulk of these funds were utilized by the petitioner for paying the consideration for acquiring the property in question. It was argued that all actions of integrating the money by purchase of immovable property would fall within the definition of 'money-laundering'. In this respect it is relevant to note that the sale deed in respect of the property was executed on 18.03.2005. Thus, even if the allegations made by the respondent are assumed to be correct, the proceeds of crime had been used by the petitioner for acquisition of the property much prior to the Act coming into force. The process of activity of utilising the proceeds of crime, if any, thus, stood concluded prior to the Act coming into force. Even if it is assumed that the funds received from M/s Duoroyale Enterprises Ltd. and M/s Shri Radhey Trading Pvt. Ltd. were proceeds of crime and were properties involved in money-laundering, such funds had come into possession of the petitioner prior to the Act coming into force. Thus, funds were already projected as untainted funds unconnected with the crime for which Mr Homi Rajvansh and other persons are accused. The funds had, thus, been laundered at a time when money-laundering was not an offence and proceedings under the Act cannot be initiated.

32. Although, the Respondent has not contended so in clear terms, it appears that the respondents are proceeding on the basis that an offence under Section 3 of the Act is a continuing offence. According to the respondent, the possession of any property linked to a scheduled offense irrespective of when it was acquired would itself constitute the offence of money-laundering. It is important to understand the import of such interpretation. This would mean that a person who has committed a scheduled crime; acquired proceeds therefrom; and thereafter, projected it as untainted money, prior to the Act coming into force, would nonetheless be guilty of the offence of money-laundering only for the reason that he is in possession of some property. This is so because the definition of proceeds of crime also includes the value of any property derived or obtained as a result of criminal activity relating to a scheduled crime. Further any such property - even in the hands of a person not accused of the scheduled crime or offense of money-laundering - would also be subject to the proceedings under the Act. Thus, practically, a person guilty of a scheduled offence who has acquired any benefit in relation to the scheduled offence would in effect also be guilty of the offence of money-laundering immediately on the Act coming into force. If such an interpretation is

sought to be provided, the grievance of the petitioner that a penal provision is sought to be given a retrospective operation would be justified and this would clearly offend Article 20(1) of the Constitution of India as an offender of a scheduled crime would now be visited with a greater punitive measure than as could be inflicted at the time when the scheduled offence was committed. Given the wide definition of “proceeds of crime” it would be contended that irrespective of how far back in the past a scheduled offence was committed, the authorities could nonetheless try persons for an offence of money-laundering as well as confiscate the value of the property alleged to have been derived or obtained by criminal activity relating to the scheduled offence. This would be notwithstanding that the proceeds derived from a scheduled offence have undergone significant changes and have been integrated in legitimate economic activity. The properties could also be traced in the hands of persons unconnected with the scheduled offence. There is no indication from the express language of the Act, that the Legislature intended the Act to be retroactive or operative with retrospective effect.

33. The Act was enacted as the international community recognised the threat of money-laundering whereby money generated from illegal

activities such as trafficking and drugs etc. was finding its way into the economic system of a country and funding further criminal activity. The expression money-laundering would ordinarily imply the conversion and infusion of tainted money into the main stream of economy as legitimate wealth. According to the respondent, there are three stages to a transaction of money-laundering: The first stage is Placement, where the criminals place the proceeds of the crime into normal financial system. The second stage is Layering, where money introduced into the normal financial system is layered or spread into various transactions within the financial system so that any link with the origin of the wealth is lost. And, the third stage is Integration, where the benefit or proceeds of crime are available with the criminals as untainted money. There is much merit in this description of money-laundering and this also indicates that, by its nature, the offence of money-laundering has to be constituted by determinate actions and the process or activity of money-laundering is over once the third stage of integration is complete. Thus, unless such acts have been committed after the Act came into force, an offence of money-laundering punishable under Section 4 would not be made out. The 2013 Amendment to Section 3 of the Act by virtue of which the words “process or activity connected with

proceeds of crime and projecting it as untainted property” were substituted by the words “any process or activity connected with proceeds of crime including concealment, possession, acquisition or use and projecting or claiming it as untainted property”. The words “concealment, possession, acquisition or use” must be read in the context of the process or activity of money-laundering and this is over once the money is laundered and integrated into the economy. Thus, a person concealing or coming into possession or bringing proceeds of crime to use would have committed the offence of money-laundering when he came into possession or concealed or used the proceeds of crime. For any offence of money-laundering to be alleged, such acts must have been done after the Act was brought in force. The proceeds of crime which had come into possession and projected and claimed as untainted prior to the Act coming into force, would be outside the sweep of the Act.

34. In the circumstances, it cannot be readily accepted that any offence of money-laundering had been committed after the Act coming into force. This Act cannot be read as to empower the authorities to initiate proceedings in respect of money-laundering offences done prior to 01.07.2005 or prior to the related crime being included as a scheduled

offence under the Act.

35. Learned counsel for the respondent has contended that Article 20 of the Constitution of India prohibited conviction or sentence under an ex-post facto law but not the trial thereof. He relied on the decision of the Andhra Pradesh High Court in V. Suryanarayhana Prabhakara Gupta and Anr. v. Union of India (UOI): W.P. No. 27898 of 2010, decided on 25.08.2011 (MANU/AP/0518/2011) in support of the aforesaid contention and drew attention of this Court to the following passage.

“From the abovementioned Judgment, the principle that can be deducted is that, Article 20 prohibits only conviction or sentence under an “ex post facto” law and not the trial thereof and such trial cannot “ipso facto” be held to be unconstitutional. In view of this undisputed principle, the resistance offered by the petitioners to the impugned orders, is totally misconceived and unacceptable. The present one is not the stage for securing protection under Article 20 of our Constitution.”

On the strength of the aforesaid view, it was urged that, whereas, the trial in respect of an offence of money-laundering may be continued and the proceeds of crime sought to be believed to be laundered may also be attached but a conviction for an offence of money-laundering committed prior to the enforcement of the Act may not follow.

36. In my view, the aforesaid contention is also without any merit.

There is no question of any trial being conducted for an offence for which a conviction cannot, in law, follow. A law which seeks to impose penalty for any act constituting an offence which when done or committed was not an offence would itself fall foul of Article 20(1) of the Constitution of India. In *Rao Shiv Bahadur Singh & Another v. State of Vindhya Pradesh* (*supra*) the Supreme Court had unequivocally held that Article 20 of the Constitution of India was not confined to the validity of the law but extended to conviction or the sentence. The Supreme Court drew a distinction between the Sections 9(3) and 10 of Article 1 of the American Constitution which prohibited passing of ex-post facto law and Article 20 of the Indian Constitution. The Court held that the language of Article 20 was much wider and the prohibition under the Article was not confined to passing of validity of the law but extended to conviction or the sentence.

The relevant passage from the said decision is extracted below:-

“8.On a careful consideration of the respective articles, one is struck by the marked difference in language used in the Indian and American Constitutions. Sections 9(3) and 10 of Article 1 of the American Constitution merely say that “No ex post facto law shall be passed ...” and “No State shall pass ex post facto law ...” But in article 20 of the Indian Constitution the language used is in much wider terms, and what is prohibited is the conviction of a person or his subjection to a

penalty under ex post facto laws. The prohibition under the article is not confined to the passing or the validity of the law, but extends to the conviction or the sentence and is based on its character as an ex post facto law. The fullest effect must therefore be given to the actual words used in the article. Nor does such a construction of Article 20 result in giving retrospective operation to the fundamental right thereby recognised.”

37. In that case the, the first and the second appellants before the Supreme Court were Minister of Industries and the Secretary to the Government, Commerce and Industries Department respectively of the then United State of Vindhya Pradesh. The prosecution alleged that on 31st October, 1947 Panna Durbar (Panna being a part of the United States of Vindhya Pradesh) had directed Panna Diamond Mining Syndicate to stop the mining work. It is alleged that the appellants entered into a conspiracy at the beginning of February, 1949 to obtain illegal gratification for reviewing the previous order directing stoppage of mining work. The appellants before the Supreme Court were charged with criminal conspiracy for taking illegal gratification by a public servant for doing an official act and also commission of forgery in connection therewith. They were charged under Sections 120-B, 161, 465 and 466 of the Indian Penal Code, as adapted by the Vindhya Pradesh Ordinance 48 of 1948. The

appellants were tried by a Special Judge under the Vindhya Pradesh Criminal Law Amendment (Special Court) Ordinance 5 1949 and were acquitted. The State filed an appeal to the Judicial Commissioner which led to the conviction of the appellants. The validity of the convictions and sentences were challenged on the ground of violation of Articles 14 and 20 of the Constitution. The appellants contended that the trial conducted under the Special Procedure prescribed by the aforesaid Ordinance was discriminatory and therefore unconstitutional.

38. The challenge in relation to Article 20 of the Constitution arose as the appellants had been convicted for offences under various Sections of the Indian Penal Code as adapted in the United States of Vindhya Pradesh by Ordinance 48 of 1949 which was passed on 11th September, 1949. The said Ordinance was passed on 11th September, 1949 while the offences were found to have been committed in the month of February, March and April, 1949 - prior to the Ordinance. It is in this context that it was urged that the convictions which were made after the constitution came into force were in respect of an *ex post facto* law creating offences after the commission of the acts charged as offences and, therefore, were unconstitutional. The Supreme Court observed that the aforesaid contention

raised two important questions –“(1) *the proper construction of Article 20 of the Constitution and (2) whether the various acts in respect of which the appellants were convicted constituted offences in this area only from the date when Ordinance 48 of 1949 was passed or were already so prior thereto.*” In the context of the trial itself having been conducted under a procedure which was different from the procedure as was prevalent at the time of commission of the alleged offences, the Supreme Court observed that:

“what is prohibited under Article 20 is only conviction or sentence under an ex post facto law and not the trial thereof. Such trial under a procedure different from what obtained at the time of the commission of the offence or by a court different from that which had competence at the time cannot ipso facto be held to be unconstitutional. A person accused of the commission of an offence has no fundamental right to trial by a particular court or by a particular procedure, except insofar as any constitutional objection by way of discrimination or the violation of any other fundamental right may be involved.”

39. The Supreme Court next considered the States’ contention that since Vindhya Pradesh Ordinance 48 of 1949 - though enacted on 11th September, 1949 - was made retrospective from 09th August, 1948, the offences for which the appellants were charged were offences under the

said ordinance. Thus, the convictions could not be stated to be in respect of a law not in force at the time when the offences were committed. This contention was rejected by the Supreme Court in the following words:-

“This, however, would be to import a somewhat technical meaning into the phrase “law in force” as used in Article 20. “Law in force” referred to therein must be taken to relate not to a law “deemed” to be in force and thus brought into force but the law factually in operation at the time or what may be called the then existing law. Otherwise, it is clear that the whole purpose of Article 20 would be completely defeated in its application even to *ex post facto* laws passed after the Constitution. Every such *ex post facto* law can be made retrospective, as it must be, if it is to regulate acts committed before the actual passing of the Act, and it can well be urged that by such retrospective operation it becomes the law in force at the time of the commencement of the Act. It is obvious that such a construction which nullifies Article 20 cannot possibly be adopted. It cannot therefore be doubted that the phrase “law in force” as used in Article 20 must be understood in its natural sense as being the law in fact in existence and in operation at the time of the commission of the offence as distinct from the law “deemed” to have become operative by virtue of the power of legislature to pass retrospective laws. It follows that if the appellants are able to substantiate their contention that the acts charged as offences in this case have become such only by virtue of Ordinance 48 of 1949 which has admittedly been passed subsequent to the commission thereof, then they would be entitled to the benefit of Article 20 of Constitution and to have their convictions set aside. This leads to an examination of the relevant pre-existing law.”

40. In view of the above, the ratio of the aforesaid decision cannot be read to support the view of the Andhra Pradesh High Court in the passage quoted above.

41. The next aspect that is to be examined is whether the necessary conditions for passing the impugned order under Section 5(1) had been met. As discussed hereinbefore, a concerned officer (a Director or any other officer not below the rank of Deputy Director, so authorised by the Director) may order for provisional attachment of property only where the twin conditions as specified in Section 5(1) are satisfied, namely, the concerned officer has reason to believe, 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 Chapter III of the Act. In addition, the concerned officer records the reasons in writing.

42. In the present case, the respondent could not point out any material to counter the petitioner's contention that there was no material on record, which could possibly lead to a belief that the petitioner is likely to transfer or conceal the property in any manner. As indicated earlier, the concerned

officer must have a reason to believe on the basis of material in his possession that the property sought to be attached is likely to be concealed, transferred or dealt with in a manner which may result in frustrating any proceedings for confiscation of their property under the Act.

43. The expression ‘reason to believe’ has been defined under Section 26 of the Indian Penal Code as under:-

“26. “Reason to believe”.—A person is said to have “reason to believe” a thing, if he has sufficient cause to believe that thing but not otherwise.”

Thus, on a plain reading of the aforesaid definition, the Deputy Director, Directorate of Enforcement – the concerned officer who passed the impugned order – would require to have sufficient cause to believe that the property sought to be attached would be transferred or dealt with in a manner which would frustrate proceedings relating to confiscation of such property. Further, the officer was also required to record the reasons for such belief. However, there is nothing in the impugned order, which indicates that the concerned officer had any cause to so believe.

44. The expression ‘reason to believe’ has also been the subject matter of several decisions of the Supreme Court *albeit* in the context of other laws.

In the case of **Aslam Mohd. Merchant v. Competent Authority & Ors:** (2008) 14 SCC 186, the Supreme Court considered the meaning of the expression ‘reason to believe’ in the context of Narcotic Drugs and Psychotropic Substances Act, 1985. The Supreme Court referred to its earlier decisions rendered in the context of Section 147 of the Income Tax Act, 1961 where a similar expression has been used to clothe an Assessing Officer with the power to reopen income tax assessments. In **Phool Chand Bajrang Lal v. ITO:** (1993) 203 ITR 456 (SC), the Supreme Court held as under:

“Since the belief is that of the Income- tax Officer, the sufficiency of reasons for forming this belief is not for the court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non- specific information. To that limited extent, the court may look into the conclusion arrived at by the Income-tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income-tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief.”

45. In **Income Tax Officer v. Lakhmani Mewal Das:** 1976 SCR (3) 956, the Supreme Court explained that powers of Income Tax Officer to reopen an assessment, though wide, are not plenary as the words used are ‘reason

to believe’ and not ‘reason to suspect’. The Court held that there should be a “*live link or close nexus*” between the material before the Income Tax Officer and the formation of his belief that the income had escaped assessment.

46. In the present case, there is no material that could suggest that the property sought to be attached was likely to be dealt with in a manner which would frustrate the confiscation of the property under the Act.

47. In *Calcutta Discount Company v. Income Tax Officer*: 1961 SCR (2) 241, the Supreme Court held as under:-

“The expression “reason to believe” postulates belief and the existence of reasons for that belief. The belief must be held in good faith: it cannot be merely a pretence. The expression does not mean a purely subjective satisfaction of the Income Tax Officer: the forum of decision as to the existence of reasons and the belief is not in the mind of the Income Tax Officer. If it be asserted that the Income Tax Officer had reason to believe that income had been under assessed by reason of failure to disclose fully and truly the facts material for assessment, the existence of the belief and the reasons for the belief, but not the sufficiency of the reasons, will be justiciable. The expression therefore predicates that the Income Tax Officer holds the belief induced by the existence of reasons for holding such belief. It contemplates existence of reasons on which the belief is founded, and not merely a belief in the existence of reasons inducing the belief; in other words, the Income Tax Officer must on information at his disposal believe that income has been under assessed by reason of failure fully and truly to disclose all

material facts necessary for assessment. Such a belief, be it said, may not be based on mere suspicion: it must be founded upon information”

48. Although, the impugned order records that the concerned officer has reason to believe that the property in question is likely to be concealed, transferred or dealt with in a manner, which may result in frustrating the proceedings relating to confiscation of the said proceeds of crime, there is no reference to any fact or material in the impugned order which could lead to this inference. A mere mechanical recording that the property is likely to be concealed, transferred or dealt with would not meet the requirements of Section 5(1) of the Act. Consequently, the impugned order is likely to be set aside.

49. In view of the above, the petition is allowed and the impugned order is set aside. The writ petition alongwith pending application stand disposed of. The parties are left to bear their own costs.

VIBHU BAKHRU, J

JANUARY 25, 2016
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