

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

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Date of decision: 11th May, 2016

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W.P.(C) No.199/2016 & CM No.839/2016 (for stay).

JOSEPH MASSEY & ORS

..... Petitioners

Through: Mr. Sandeep Sethi, Sr. Adv. with Mr. Rishabh Sancheti and Ms. Padma Priya, Advs.

Versus

UNION OF INDIA

..... Respondent

Through: Mr. Sanjay Jain, ASG with Mr. Amit Mahajan, CGSC, Mr. Nitya Sharma, Ms. Shreya Sinha and Mr. Sumit Misra, Advs. for UOI.
Mr. Satish Aggarwal, Adv.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This petition under Article 226 of the Constitution of India impugns the show cause notices dated 12th November, 2015 under Section 13 of the Prevention of Money Laundering Act, 2002 (PMLA) issued by the respondent Financial Intelligence Unit – India, Department of Revenue, Ministry of Finance of the Government of India to each of the three petitioners namely Shri Joseph Massey, Shri Shreekant Javalkar and Shri Jignesh Shah and seeks compensation for causing mental and physical harassment to the petitioners.

2. It is the case of the petitioners (i) that the respondent which is a statutory body enacted under the PMLA, vide order dated 4th November, 2015 held the National Spot Exchange Limited (NSEL) to be guilty of failing in several obligations under the PMLA and imposed a total fine of Rs.1,66,00,000/- on NSEL and directed NSEL to register itself as a reporting entity under the PMLA; (ii) that purportedly in pursuance to the aforesaid order, impugned show cause notices were issued to the petitioners; (iii) that the petitioners worked as non-executive directors of NSEL and notices issued to them are in disregard of law and malicious and by way of a roving and fishing inquiry; (iv) that the respondent in the show cause notices also has not stated any basis for implicating the petitioners and do not disclose the material on the basis of which the petitioners are treated as “in charge” and “responsible” for the business of NSEL and the notices do not mention the exact role or specific involvement of the petitioners with regard to the contravention/violation; (v) that PMLA is a draconian legislation and issuance even of a show cause notice thereunder has bearing on the dignity and reputation of the noticee; (vi) moreover, since the notices do not disclose the jurisdiction of the respondent to issue notice to the petitioners, the petitioners ought not to be compelled to respond thereto; and, (vii) reliance

in the petition itself is placed on ***Gorkha Security Services Vs. Govt. (NCT of Delhi)*** (2014) 9 SCC 105 and ***CCE Vs. Champdany Industries Ltd.*** (2009) 9 SCC 466.

3. The petition came up first before this Court on 11th January, 2016 when being of the view on the basis of:

(I) ***Special Director Vs. Mohd. Ghulam Ghouse*** (2004) 3 SCC 440;

(II) ***Trade Tax Officer, Saharanpur Vs. Royal Trading Co.*** (2005) 11 SCC 518;

(III) ***Union of India Vs. Kunisetty Satyanarayana*** (2006) 12 SCC 28;

(IV) ***Secretary, Ministry of Defence Vs. Prabhash Chandra Mirdha*** (2012) 11 SCC 565;

(V) ***Shri Anant R. Kulkarni Vs. Y.P. Education Society*** (2013) 6 SCC 515;

(VI) ***Arun Kumar Mishra Vs. Union of India*** (2014) 208 DLT 56;

(VII) ***Maruti Suzuki India Ltd. Vs. India Tourism Development Corporation Ltd.*** MANU/DE/1034/2013 (SLP(C) No.27110/2013 whereagainst was dismissed *in limine* on 13th September, 2013),

laying down/holding:

- (a) that against a mere issuance of show cause notice, the Court should be reluctant to interfere as a mere show cause notice does not infringe right of anyone and hence writ jurisdiction should not ordinarily be exercised by quashing a show cause notice, as it does not amount to adverse order, unless the show cause notice is found to be wholly without jurisdiction or for some other reason wholly illegal;
- (b) that the High Court should leave such a hasty petitioner to pursue the remedy of showing cause against the notice, raising all his contentions for the consideration of the statutory authority and then approach the High Court, in the event of the result going against him;
- (c) deprecating entertaining of petitions challenging show cause notice;
- (d) such writ petitions to be premature;
- (e) that a show cause notice serves no other purpose than to set the machinery of law into motion and has no serious

consequence because the noticee is heard before an order is made

that the petition was not maintainable, the senior counsel for the petitioners and the learned ASG appearing for the respondent on advance notice were heard extensively on the admissibility of the petition and order reserved.

4. The senior counsel for the petitioners contended:

(i) that the order dated 4th November, 2015 supra of the respondent is against NSEL only and has in this regard drawn attention to para 8 of the said order to demonstrate that the show cause notice preceding that order was issued to NSEL only and to para 6 of the order finding NSEL only to be guilty and to para 27 of the order imposing fine on NSEL only;

(ii) that the impugned show cause notice issued to the three petitioners describes each of the three petitioners as Non-Executive Director of NSEL;

(iii) that if the respondent intended to proceed against the three petitioners, ought to have proceeded against them along with NSEL only and there can be no piecemeal proceedings;

- (iv) parity was drawn with Section 142 of the Negotiable Instruments (NI) Act, 1881;
- (v) *Gorkha Security Services* supra lays down that the fundamental purpose behind serving a show cause notice is to make the noticee understand the precise case set up against him which he has to meet and argued that the impugned show cause notices are deficient in this respect;
- (vi) that under Section 70(1) of the PMLA action can be taken only against such of the Directors who were in charge of and were responsible to the guilty company for the conduct of the business of the company as well as the company and the petitioners who were in the show cause notices themselves described as Non-Executive Directors and who, the notice does not state were in charge of NSEL and responsible to the NSEL for the conduct of business of NSEL could not have been issued notices and cannot be proceeded against;
- (vii) that the show cause notices have thus been issued without the satisfaction of the respondent of the petitioners being responsible for NSEL;

(viii) that monetary penalty can be imposed only under Section 13.

5. Per contra, the learned ASG has contended:

(a) that the parity drawn with Section 142 of the NI Act is wrong;

(b) that even a whole time director can be a Non-Executive Director;

(c) invited attention to Rule 7 of the Prevention of Money Laundering (Maintenance of Records) Rules, 2005 and argued that it is the duty of all officers and employees of a “reporting entity” within the meaning of PMLA and as NSEL is, to observe the procedure and the manner of furnishing information;

(d) that the impugned show cause notices have been issued in compliance of the principles of natural justice although there was no need thereof;

(e) that the doctrine of indoor management is applicable;

(f) drew attention to Sections 12 requiring “reporting entity” to maintain records, 2(n) defining intermediary and 2(wa) defining reporting entity of the PMLA and contended that the records can be entrusted even to a Non-Executive Director;

- (g) relied on *Special Director Vs. Mohd. Ghulam Ghouse* (2004) 3 SCC 440 also deprecating the practise of entertaining writ petitions questioning legality of the show cause notices resulting in stalling enquiries as proposed and retarding investigative process to find actual facts with the participation and in the presence of the parties;
- (h) argued that the petitioners will have opportunity before the respondent to raise all the pleas;
- (i) contended that the respondent could have proceeded against NSEL as well as the petitioners together but having not proceeded against the petitioners along with NSEL, there is no bar thereto at this stage also;
- (j) that the respondent is yet to reach the stage of returning finding and no interference is warranted at this stage.

6. The senior counsel for the petitioners in rejoinder:

- (i) reiterated that Section 142 of the NI Act is *pari materia*;
- (ii) drew attention to the words “in the course of any enquiry” in Section 13(2) of the PMLA and contended that in the course of the enquiry by the respondent against NSEL, nothing against the petitioners was found (as nothing in this regard is stated in the order

dated 4th November, 2015) and no fresh enquiry on foundation of findings in the first enquiry is maintainable;

(iii) drew attention to Appendix A to the memorandum of writ petition containing extracts of *Anita Malhotra Vs. Apparel Export Promotion Council* (2012) 1 SCC 520, *Pepsico India Holdings Pvt. Ltd. Vs. Food Inspector* (2011) 1 SCC 176, *Central Bank of India Vs. Asian Global* (2010) 11 SCC 203, *M.A.A. Annamalai Vs. State of Karnataka* (2010) 8 SCC 524, *National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintel* (2010) 3 SCC 330, *Ramraj Singh Vs. State of M.P.* (2009) 6 SCC 729, *N.K. Wahi Vs. Shekhar Singh* (2007) 9 SCC 481 and *S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla* (2005) 8 SCC 89 on the aspects of liability of Non-Executive Directors.

7. The senior counsel for the petitioners, after the orders were reserved, has also filed an index of judgments with copies of:

(A) *Anil Bhargava Vs. State* (2008) ILR 2 Delhi 792 to contend that different complaints on the same cause of action are impermissible;

(B) ***Bhagwati Prasad Khaitan Vs. The Special Director*** 1977 SCC Online Cal. 285 holding the show cause notice issued to the Director to be vague and thus bad;

(C) ***Ajay Bagaria Vs. Union of India*** 2008 (103) DRJ 324 holding the requirement of minimum averments against Directors, as laid down in cases of NI Act, applicable to Foreign Exchange Management Act, 1999 also;

(D) ***Commissioner of Central Excise, Bangalore Vs. Brindavan Beverages (P) Ltd.*** (2007) 5 SCC 388 quashing the show cause notice for the reason of being unspecific and vague;

(E) ***Anand Brothers Private Limited Vs. Union of India*** (2014) 9 SCC 212 laying down recording of reasons to be essential;

(F) ***L.P. Desai Vs. Union of India*** 2003 (71) DRJ 553 laying down that unless the information is clearly conveyed to the noticee, he would not be in a position to make a proper representation.

8. I am afraid the contentions aforesaid of the senior counsel for the petitioners do not persuade me to hold this petition impugning the show cause notices to be maintainable. I have already hereinabove noted that as per the dicta of the Supreme Court, a show cause notice does not adversely

affect the noticee and furnishes no cause of action to a noticee to maintain a petition under Article 226 of the Constitution of India thereagainst, unless is issued by a person having no authority / jurisdiction to do so or is otherwise patently illegal.

9. It is not the case of the petitioners that the respondent had no authority or jurisdiction to issue the impugned show cause notices. Similarly, the petitioners have otherwise not shown any other patent illegality in the show cause notices. The other arguments urged are such which can be urged by the petitioners in response to the impugned show cause notices and unless the respondent, after considering the said reply of the petitioners decides to take action against the petitioners, the petitioners would have no cause of action or grievance. If the arguments as urged by the senior counsel for the petitioners were to be accepted, it would nullify what has been held consistently by the Courts, of non-maintainability of writ petitions against show cause notices.

10. Supreme Court in *Shri Anant R. Kulkarni* supra held that the facts and circumstances of the case in question must be carefully examined by the High Court before entertaining a petition under Article 226 of the Constitution of India against a show cause notice, taking into consideration

the gravity / magnitude of charges involved therein and that the Court has to consider the seriousness and magnitude of the charges and while doing so must weigh all the facts, both for and against the delinquent officers and come to a conclusion which is just and proper considering the circumstances involved. This Court has in *Farida Begum Biswas Vs. Union of India* (2015) SCC Online Del. 11834 and *SRJ Infratech Pvt. Ltd. Vs. Director Directorate of Enforcement* 2016 SCC Online Del. 221 also refused to interfere in show cause notices under the PMLA.

11. Having seen the matter in this light and having gone through the contents of the order dated 4th November, 2015 and the contents of the impugned show cause notices, in my opinion, no interference at the show cause notice stage is warranted in the interest of clean and honest administration. NSEL, as aforesaid, vide order dated 4th November, 2015 has already been held to be a “reporting entity” and guilty of failure to comply with the provisions of PMLA. The petitioners were admittedly Non-executive Directors of NSEL. Section 13 empowers the respondent to issue directions to any of the employees of a reporting entity to comply with specific instructions or to send reports at such intervals as may be prescribed on the measures it is taking and to impose monetary penalty on any of the

employees of a “reporting entity”. In exercise of such power, in my view the respondent is within its right to issue impugned show cause notices to the petitioners. At this stage, I need not say anything further for the fear of affecting the proceedings before the respondent.

12. There is thus no merit in the petition, which is dismissed as not maintainable, leaving all the pleas as raised herein open for the petitioners to take, if aggrieved from the decision of the respondent.

No costs.

RAJIV SAHAI ENDLAW, J.

MAY 11, 2016
‘pp/bs’..