

* **HONOURABLE SRI JUSTICE T.SUNIL CHOWDARY**

+ CRIMINAL PETITION No.15912 of 2016

% Date: 05.1.2017

A.Sambaiah Nayak and another

... Petitioners

and

\$ The State of Telangana, represented by
its Special Public Prosecutor

... Respondent

! Counsel for the petitioners : Sri T.Pradyumna Kumar Reddy

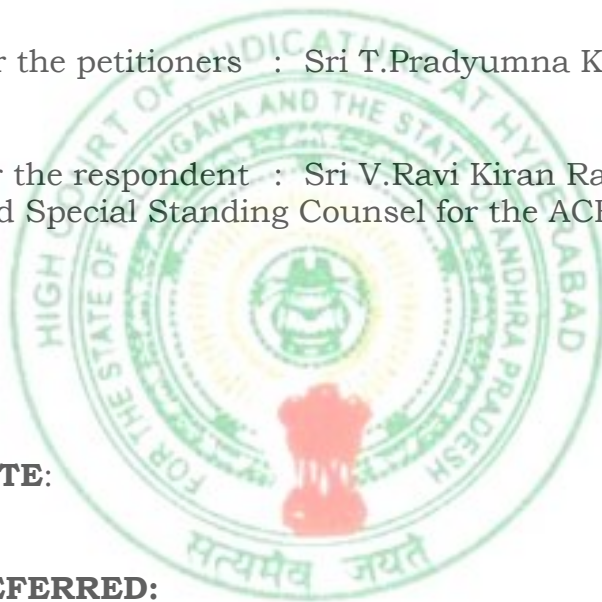
^ Counsel for the respondent : Sri V.Ravi Kiran Rao,
Learned Special Standing Counsel for the ACB, Telangana

< **GIST:**

➤ **HEAD NOTE:**

? **CASES REFERRED:**

- 1) (2008) 9 SCC 800
- 2) (2014) 10 SCC 814
- 3) 1958 CriLJ 1217
- 4) (2014) 4 SCC 392



THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARYCRIMINAL PETITION No.15912 of 2016**ORDER:**

This Criminal Petition is filed under Section 482 Cr.PC seeking to quash the order dated 18.10.2016 passed in CrI.M.P.No.457 of 2016 in C.C.No.5 of 2016 on the file of the Court of the Principal Special Judge for SPE & ACB Cases-cum-IV Additional Chief Judge, City Civil Court, Hyderabad, wherein and whereby the reliefs sought by the petitioners to (1) return the original sale deeds, link documents and pattadar passbooks, which are shown as item Nos.8 to 11 in the charge sheet, to the petitioners and (2) direct the Sub-Registrar Offices to permit sale transactions in respect of the above documents, were rejected.

2. The contention of Sri T. Pradyumna Kumar Reddy, the learned counsel for the petitioner is three fold: 1) the trial Court failed to consider that the second petitioner is the owner of the property covered under item Nos.8 to 11, 2) the trial Court, without considering the scope of Criminal Law Amendment Ordinance 1944 (hereinafter referred to as, the Ordinance), dismissed the petition on assumptions and presumptions, and 3) if the order passed by the trial Court is allowed to stand, certainly, it would amount to abuse of process of law; therefore, it is liable to be set aside. ***Per contra***, Sri V. Ravi Kiran Rao, the learned Special Standing Counsel for the ACB, State of Telangana, submitted that the application filed by the petitioners is not maintainable either on facts or in law. He further submitted that the petitioners are asking for release of the sale deeds, which *per se* cannot be ordered, without seeking relief of withdrawal of the attachment.

The learned Special Standing Counsel, with humility, submitted that on some occasions the learned Special Judges are passing orders in a routine manner without considering the scope and object of the Ordinance as if the petitions for release of the properties attached under the Ordinance are maintainable under Sections 451 and 457 of Cr.PC.

3. This court has come across the orders wherein the learned Special Judges allowed the petitions filed under Sections 451 and 457 Cr.PC only, directing release of the properties attached under the provisions of the Ordinance, which are not in accordance with law.

4. In order to appreciate the rival contentions, it is apt to refer the historical background of the Ordinance and other relevant Statutes. Any Ordinance promulgated under Article 123 of the Constitution of India shall have the same force and effect as an Act of Parliament; the said Ordinance shall cease to operate at the expiration of six weeks from its reassembly unless approved by both the Houses of Parliament. It should be noted that the Ordinance was promulgated by virtue of the powers conferred under Section 72¹, as set out in the ninth schedule to the Government of India Act, 1935. Section 72 emphasises that, “*any ordinance made under this section is subject to the like disallowance as an Act passed by the Indian legislature, and*

¹ 72. *Power to make ordinances in cases of emergency*.— The Governor-General may, in cases of emergency, make and promulgate ordinances for the peace and good government of British India or any part thereof, and any ordinance so made shall, for the space of not more than six months from its promulgation have the like force of law as an Act passed by the Indian legislature; but the power of making ordinances under this section is subject to the like restrictions as the power of the Indian legislature to make laws; and any ordinance made under this section is subject to the like disallowance as an Act passed by the Indian legislature, and may be controlled or superseded by any such Act.

may be controlled or superseded by any such Act". Therefore, unless and until it is repealed or superseded by the Parliament, it should be in force. Sections 18(3) and 8(2) of the Indian Independence Act refer to the continuation of the Government of India Act, 1935. Latter, by virtue of Article 372(1) of the Constitution of India, the provisions of the Ordinance have been in force, however, with certain modifications. The Ordinance was promulgated with an avowed object of preventing disposal or concealment of money or other property procured by means of offences specified in the Schedule to the Ordinance (Scheduled Offences) and to confiscate the same in favour of the Government. To put it in a different way, the Ordinance was promulgated in order to discourage public at large, more particularly bureaucrats, to acquire or procure property or money by indulging in Scheduled Offences. This Ordinance is one of the preventive measures aimed at curbing the menace of corruption. The Ordinance, which is a substantive in nature, is dealing with the money or other property suspected to be tainted with the Scheduled Offences, pending disposal of the trial and it is in force as on today. There is no conflict between the provisions of the Ordinance and that of the provisions of the Code of Criminal Procedure, as both of them are independent and operate in different spheres.

5. Section 2 of the Ordinance deals with two aspects – (1) the Scheduled Offences, and (2) the date of termination of the criminal proceedings instituted under the Ordinance. Section 3 of the Ordinance enables the State or Central Government, as the case may be, to make an application to the Special Court for attachment of the money or other property of any person

suspected to have been procured the same by committing any of the Scheduled Offences. Sub-section (3) of Section 3 of the Ordinance mandates that the application shall be accompanied by an affidavit stating the grounds for belief, that the accused has committed the Scheduled Offence. The affidavit shall also disclose the location of the property and other necessary details. A perusal of Sub-section (2) of Section 3 of the Ordinance clearly demonstrates that the learned Special Judge has to follow the procedure as contained in Order XXVII of the Code of Civil Procedure, 1908 (*Suits by or against Government or public officers in their official capacity*), while dealing with the proceedings for an order of *ad interim* attachment.

6. Section 4 of the Ordinance enumerates the *ad interim* attachment. Sub-section (1) of Section 4, mandates that if there exists *prima facie* ground the learned Special Judge has to pass the order of *ad interim* attachment without delay in order to prevent the disposal or concealment of the property or money liable for confiscation. Otherwise, the learned Special Judge, by assigning reasons, can refuse to order *ad interim* attachment. The learned Special Judge, before passing the order of *ad interim* attachment, can examine the deponent.

7. In view of Sub-section (2) of Section 4 of the Ordinance, the learned Special Judge shall issue a notice to the party, whose money or other property is being attached, along with necessary copies of documents directing him to show cause, within a prescribed date, why the order of *ad interim* attachment should not be made absolute. Similarly, a show cause notice has to be

issued to the persons likely to claim title or interest in the property, to submit their objections, if any, as postulated under Sub-section (3) of Section 4 of the Ordinance. Notwithstanding receipt of the notice, any person, claiming interest in the money or other property or any part thereof, can file objections for *ad interim* attachment of the property in question, in view of sub-section (4) of Section 4 of the Ordinance. The order of *ad interim* attachment shall be passed by the Special Court even before issuing notice to the affected party as provided under Sub-section (1) of Section 4 of the Ordinance unlike under Order XXXVII Rule 5 of CPC wherein an attachment order is passed only after issuing notice to the respondent.

8. Section 5 is heart and soul of the Ordinance, which deals with the procedure for investigation of objections filed under Section 4 of the Ordinance. Section 5 of the Ordinance provides a detailed procedure to be followed by the Special Court to safeguard the interest of the accused as well as the persons claiming title or interest over the attached property. The *ad interim* order of attachment can be made absolute if no cause much less justifiable cause is shown for withdrawing attachment, in view of Sub-section (1) of Section 5 of the Ordinance. If a cause is shown or an objection is made under Section 4, the learned Special Judge has to investigate into the same by following the procedure and in doing so; the learned Special Judge has all the powers of a Civil Court in adjudicating a suit. The underlying object of Sub-section (2) of Section 5 of the Ordinance is that the learned Special Judge has to conduct the investigation in such a manner as if it is a title suit. If the accused or any other person has filed objection petition

against the order of *ad interim* attachment, the burden is on the objector to establish, by adducing oral and documentary evidence, that the property attached was acquired by him in a lawful manner and by the time of *ad interim* attachment, he has interest in the property. A perusal of sub-section (2) of Section 5 of the Ordinance, to my mind, indicates that the objector has to prove his case by preponderance of probabilities. After affording reasonable opportunity, as provided under Sub-section (3) of Section 5, the learned Special Judge can make the *ad interim* attachment absolute or can withdraw the same. Sub-section (6) of Section 5 of the Prevention of Corruption Act, 1988 (the PC Act) enjoins that while trying an offence under the PC Act, the learned Special Judge shall have all the powers and functions exercisable by a District Judge under the Ordinance. In view of introduction of Section 29 of the PC Act, 1988, the applicability of the Ordinance is widened.

9. Section 6 of the Ordinance enjoins the learned Special Judge to order attachment of the property in the hands of the transferee, which was transferred by the accused with a *mala fide* intention. Sub-section (2) of Section 6 of the Ordinance manifests that if the transferee fails to prove that he purchased the property in good faith and with lawful consideration, the same can be attached. Section 7 of the Ordinance deals with execution of the orders of attachment. The learned Special Judge can exercise powers of an executing court so far as attachment of property is concerned. Even though this section does not unveil in so many words, the learned Special Judge can exercise the power under Order XXI Rule 42 *Attachment in case of decree for rent or mesne profits or other matter, amount of which to be subsequently determined*, Rule 44

Attachment of agricultural produce, Rule 45 Provisions as to agricultural produce under attachment, Rule 49 Attachment of partnership property, Rule 50 Execution of decree against firm, Rule 51 Attachment of negotiable instruments, Rule 52 Attachment of property in custody of Court or public officer, and Rule 54 Attachment of immovable property of CPC.

10. Any person whose property has been attached is entitled to make an application for release of the property by furnishing sufficient security as contemplated in Section 8 of the Ordinance. On such application is being filed, the learned Special Judge has to satisfy himself objectively with regard to sufficiency of the security, before releasing the property. The word “*sufficient*”, as mentioned in the Section, qualifies “*security equivalent to the market value of the property by the time of its release*”. The learned Special Standing Counsel for ACB submitted that the Special Court cannot release the property simply on furnishing security without taking into consideration the market value of the property and other relevant aspects. To substantiate his contention, he has drawn the attention of this Court to paragraph No.7 of the decision in **N.**

Naveen Kumar v. State of A.P.², wherein it was held as follows:

7. The High Court has rightly noted that it is the present value of the properties which is of relevance and not the value of the assets at the relevant point of time of seizure. We find no substance in the plea of the appellants as canvassed in this appeal. It is open to the appellants to participate in the auction for sale of the properties in question as and when held.

As per the principle enunciated in the above cited case, the Special Court, while releasing the property attached, has to take into consideration the value of the property at the time of release, but it

² (2008) 9 SCC 800

is neither the value of the property at the time of seizure, nor the consideration as mentioned in the sale deed.

11. Section 9 of the Ordinance deals with administration of the attached property. Sub-section (2) of Section 9 enables the learned Special Judge to appoint Receiver to administer the properties under attachment. Order XL Rule 2 *Remuneration*, Rule 3 *Duties*, Rule 4 *Enforcement of Receiver's Duties*, and Rule 5 *When Collector may be appointed as Receiver* of CPC are made applicable in the matter of appointment of Receiver in respect of the properties attached under the Ordinance. The very purpose of incorporation of Section 9 of the Ordinance is to safeguard the properties under attachment and income generated thereon till closure of the criminal proceedings.

12. Section 10 of the Ordinance deals with duration of attachment in force. Unless it is withdrawn, an order of *ad interim* attachment would be in force for a period of three months, prior to 1988 and it is one year with effect from 09.9.1988, by virtue of Section 29 of the PC Act. After expiry of the period of one year, the concerned authority has to make an application, for extension of the order of *ad interim* attachment, subject to non-taking of cognizance of offence by the Special Court. If, for any reason, the Authority fails to file petition seeking extension of *ad interim* attachment, within the period of one year, the same will cease automatically. When such contingency arises, the Authority has no option except to file a fresh application for re-attachment of the property. Once the Special Court takes cognizance of offence, the attachment will continue till termination of the criminal

proceedings. Any person, aggrieved by the order of attachment passed under Sections 4, 6, 8 or 9 of the Ordinance, can prefer appeal before the High Court within thirty days from the date of the order, as provided under Section 11 of the Ordinance.

13. Another interesting aspect to be considered here is whether the provisions of the Limitation Act are applicable to the Ordinance or not. In **State of M.P. v. Anshuman Shukla**³, the Hon'ble apex Court, while dealing with the scope of the Limitation Act, with regard to extension of period of limitation in filing appeals under any special or local law, observed in paragraph Nos.21, 23 and 24 as follows:

21. The Limitation Act, 1963 is the general legislation on the law of limitation. Section 5 of the Limitation Act provides that an appeal may be admitted after the limitation period has expired, if the appellant satisfies the court that there was sufficient cause for delay.

22.

23. This Court in *Mukri Gopalan case* examined the question of whether the Limitation Act will apply to the Kerala Buildings (Lease and Rent) Control Act, 1965. While holding that the appellate authority under the Kerala Act acts as a court, it was held that since the Act prescribes a period of limitation, which is different from the period of limitation prescribed under the Limitation Act, and there is no express exclusion of Sections 4 to 24 of the Limitation Act, in the above Lease and Rent Control Act, thus, those sections shall be applicable to the Kerala Act.

24. While examining the provisions of Section 29(2) of the Limitation Act, it was observed: (*Mukri Gopalan case*, SCC p. 15, para 8)

“8. ... A mere look at the aforesaid provision shows for its applicability to the facts of a given case and for importing the machinery of the provisions containing Sections 4 to 24 of the Limitation Act the following two requirements have to be satisfied by the authority invoking the said provision:

(i) There must be a provision for period of limitation under any special or local law in connection with any suit, appeal or application.

(ii) The said prescription of period of limitation under such special or local law should be different from the period prescribed by the Schedule to the Limitation Act.”

It was further held that if the above two conditions are satisfied, then the following implications would follow: (*Mukri Gopalan case*, SCC pp. 15-16, para 9)

³ (2014) 10 SCC 814

“9. If the aforesaid two requirements are satisfied the consequences contemplated by Section 29(2) would automatically follow. These consequences are as under:

(i) In such a case Section 3 of the Limitation Act would apply as if the period prescribed by the special or local law was the period prescribed by the Schedule.

(ii) For determining any period of limitation prescribed by such special or local law for a suit, appeal or application ***all the provisions containing Sections 4 to 24 (inclusive) would apply insofar as and to the extent to which they are not expressly excluded by such special or local law.***

(emphasis supplied)

14. A period of limitation is prescribed for the validity of the *ad interim* attachment. The period of limitation is also prescribed to prefer an appeal challenging the orders passed under Sections 4, 6, 8 and 9 of the Ordinance. No provision is made in the Ordinance excluding the application of the Limitation Act. In such circumstances, the provisions of the Limitation act are applicable to the Ordinance, which is a special law, in view of Sub-section (2) of Section 29 of the Limitation Act.

15. In the light of the principle enunciated in **Anshuman Shukla**, I am of the considered view that the provisions of the Limitation Act with regard to extension of period of limitation viz., Sections 4 to 24 especially Section 5 of the Limitation Act are applicable to the Ordinance, which is a special law.

16. A duty is cast on the learned Special Judge, by virtue of Section 12 of the Ordinance, to record a specific finding as to the amount of money or the value of other property procured by the accused by means of the Scheduled Offences, while convicting the accused. Consequently, the learned Special Judge has to spell out the money and the value of the property to be confiscated in favour of the State, in the operative portion of the judgment.

17. A specific procedure is prescribed, by way of Section 13 of the Ordinance, for disposal of attached property upon termination of criminal proceedings. Sub-section (1) of Section 13 casts a duty on the Agent to the Government to report the Special Court about the result of the appeal or revision, as the case may be, along with the copy of the judgment. Basing on such report, the learned Special Judge shall forthwith withdraw the order of attachment of property, or release the security given in lieu of such attachment, in view of Sub-section (2) of Section 13. If the accused is convicted, the learned Special Judge shall pass the order forfeiting the money or other property attached in favour of the Government as provided under Sub-section (3) of Section 13. Sub-sections (4) to (6) of Section 13 deals with the procedure to be followed for disposal of the attached properties. While dealing with the scope of Section 13, the High Court of Panta in **Sonamati Devi v The State**⁴, observed as follows:

Even when the final judgment or order of the criminal Court is one of acquittal, there will not be termination of the attachment, unless pursuant to Section 13 the District Judge has passed orders in that behalf. When the order of acquittal is final the District Judge shall withdraw any orders of attachment of property made in connection with the offence. Unless and until the District Judge passes orders withdrawing the order of attachment, the attachment as provided in Section 10 will continue in force.

18. The Hon'ble apex Court in **Biswanath Bhattacharya v Union of India**⁵, while dealing with Sections 12 and 13 of the Ordinance, made the following observations:

32. ... The 1944 Ordinance provided for the attachment of the money or other property which is believed to have been procured by means of one of the abovementioned Scheduled Offences by the offender. Such attached property is required to be disposed off as provided under Section 13

⁴ 1958 CriLJ 1217

⁵ (2014) 4 SCC 392

of the said Ordinance. Under Section 12 of the Ordinance, the criminal court trying a Scheduled Offence is obliged to ascertain the amount or value of the property procured by the accused by means of the offence. Under Section 13(3), it is provided that so much of the attached property referred to earlier equivalent to the value ascertained by the criminal court under Section 12 is required to be *forfeited* to the State.

19. In view of the principle enunciated in the cases cited supra, Section 13 of the Ordinance exhaustively deals with the withdrawal of the attachment, release of the security or confiscation of properties attached. Therefore, except the procedure contained in Section 13, no suit or other proceedings are maintainable against the orders passed attaching or withdrawing the money or other property under Sections 4, 6 and 13 of the Ordinance, in view of the bar stipulated under Section 14 of the Ordinance.

20. The next question to be considered is whether the confiscation of property attached under the provisions of the Ordinance would amount to violation of Articles 300A or 20 of the Constitution of India or not. In **Bishwanath Bhattacharya**, the Hon'ble apex Court observed as follows:

33. Dealing with the question — whether such forfeiture (in the factual setting of the case) violated Article 20 of the Constitution of India, a Constitution Bench of this Court held that the forfeiture contemplated in the Ordinance was not a penalty within the meaning of Article 20 but it is only a speedier mode of recovery of the money embezzled by the accused.

39. If a subject acquires property by means which are not legally approved, the sovereign would be perfectly justified to deprive such persons of the enjoyment of such ill-gotten wealth. There is a public interest in ensuring that persons who cannot establish that they have legitimate sources to acquire the assets held by them do not enjoy such wealth. Such a deprivation, in our opinion, would certainly be consistent with the requirement of Articles 300-A and 14 of the Constitution which prevent the State from arbitrarily depriving a subject of his property.

21. In view of the principle enunciated in the case cited supra, the property acquired or procured by resorting to Scheduled

Offences is liable for confiscation in the public interest and such forfeiture would not amount to deprivation of right of enjoyment of property ordained in the Constitution of India.

22. Reverting to the facts of the case on hand, the first petitioner is facing trial in C.C. No.5 of 2016 for the offences punishable under Section 13(2) read with 13(1)(e) of the PC Act on the file of the Court of the Principal Special Judge for SPE & ACB Cases-cum-IV Additional Chief Judge, City Civil Court, Hyderabad. The second petitioner is none other than the wife of the first petitioner. At the fag end of the trial, the petitioners filed CrI.M.P.No.457 of 2016 under Sections 451 and 457 of Cr.P.C., and Sections 4 and 8 of the Ordinance seeking to release the original documents marked as Exs.P46, P47, P54 and P55 as well as link documents of Exs.P54 and P55. The prosecution filed counter before the trial Court opposing release of the documents. The learned Special Judge, after affording reasonable opportunity to both sides, dismissed the petition. Being aggrieved by the orders of the learned Special Judge, the petitioners preferred the present criminal petition.

23. The learned counsel for the petitioners submitted that in similar set of facts, the trial court allowed CrI.M.P.No.457 of 2015 in CrI.M.P.No.743 of 2010 in C.C.No.35 of 2010 ordering return of original sale documents in favour of the accused therein. To substantiate his submission, he has filed copy of the order in CrI.M.P.No.457 of 2015 dated 01.10.2015. As rightly pointed out by the learned counsel for the petitioners, the learned Special Judge allowed the petition and released the documents. It is not

known whether the legality or otherwise of that order was tested before this Court. In such circumstances, this Court cannot glibly swallow the orders passed by the learned Special Judge in CrI.M.P. No.457 of 2015 and allow this petition, without considering the legal implications.

24. In this case, release of documents is sought under the provisions of Sections 451 and 457 Cr.P.C., besides Sections 4 and 8 of the Ordinance. If the property produced before the court is subject to speedy and natural decay or if it is otherwise expedient to do so, the court may release the property by invoking Section 451 Cr.P.C. The question of speedy and natural decay of property attached does not arise in this case; therefore, Section 451 Cr.P.C., is not applicable to the facts of the case on hand.

25. If the seizure of property by the police is reported to the learned Magistrate under the provisions of Cr.P.C., the learned Magistrate may order the property to deliver to such person on imposing certain conditions under Section 457 Cr.P.C. In the instant case, the Investigating Officer produced the documents before the Special Court long back. The documents in question are not in the custody of the Police; therefore, Section 457 Cr.P.C., has no application to the facts of the case on hand. It appears that for release of the properties attached under the provisions of the Ordinance, petitions are being filed purely under Sections 451 and 457 Cr.P.C., before the Special Court. The petitions being filed exclusively under Sections 451 and 457 Cr.P.C., are not maintainable, **in view of specific provision (Section 13) contained in the Ordinance.**

26. In the petition, the petitioners have categorically mentioned that the property in question was attached vide orders in CrI.M.P. No.143 of 2004. The fact remains that attachment order was made absolute from the date of taking cognizance of offence in C.C. No.5 of 2016. As referred supra, Section 4 of the Ordinance deals with *ad interim* attachment. The first petitioner has not filed objections questioning the *ad interim* attachment. The first petitioner allowed the Special Court to make the *ad interim* attachment absolute. The second petitioner did not file a petition claiming interest or title in the properties under attachment at the time of *ad interim* attachment. Both the petitioners had kept quiet for a period of twelve years and filed the petition for release of the properties at this juncture. Section 8 of the Ordinance deals with furnishing of security to the satisfaction of Court in lieu of attachment. An application requesting permission to offer security in lieu of attachment may be filed at any stage of the proceedings. If it is filed before passing the order of *ad interim* attachment, the learned Special Judge may refrain from passing attachment order. If it is filed after attachment order, the learned Special Judge may withdraw the order of attachment by recording reasons thereof.

27. Section 8 of the Ordinance consists of two parts: (1) seeking relief to withdraw the attachment, if it is made, and (2) production of sufficient security to the satisfaction of the learned Special Judge for the value of the property as on the date of its release. The petitioners did not seek the relief of withdrawal of attachment order; therefore, the learned Special Judge has no power whatsoever to withdraw the attachment order. If the accused or any third party makes an objection or files a petition for

withdrawal of the attachment order, the learned Special Judge has to decide the same as if it is a title suit. The burden lies on the petitioner to establish that he has purchased the property with known legal source of income. The learned Special Judge has to keep in mind that the burden of proof heavily lies on the petitioner. The Special Court shall not allow this type of petitions simply because the respondent has not adduced any contrary evidence. Mere filing of the petition under the provisions of the Cr.P.C., or under the provisions of the Ordinance, does not automatically entitle the accused or any other person claiming interest in the property under attachment for release of the same in his favour. While passing the orders, so far as the withdrawal of attachment is concerned, the Special Court shall not lose sight of various provisions of the Ordinance. The very purpose of the Ordinance is to confiscate or forfeit the properties, which are procured by any person by resorting to any of the Scheduled Offences, in favour of the Government. If the Special Court releases the property by taking into consideration the value of the property as on the date of attachment, certainly it would amount to defeating the provisions of the Ordinance. While releasing the property under attachment, the Special Court has to keep in mind all these aspects.

28. The Hon'ble apex Court, taking note of the prevailing scenario in the society more particularly the life style of the persons, who indulged in procuring the property by resorting to any of the schedule offences, the psychological feelings of the general public towards those persons, and by referring the legal measures taken by different countries restraining the persons to

enjoy such properties and moneys, made the following observations in Paragraphs Nos.40, 41 and 42 of the decision in

Bishwanath Bhattacharya. They read as follows:

40. Whether there is a right to hold property which is the product of crime is a question examined in many jurisdictions. To understand the substance of such examination, we can profitably extract from an article published in the *Journal of Financial Crime, 2004* by Anthony Kennedy⁶.

“... It has been suggested that a logical interpretation of Article 1 of the First Protocol of the European Convention on Human Rights is:

‘Everyone is entitled to own whatever property they have (lawfully) acquired....’

hence implying that they do not have a right under Article 1 to own property which has been unlawfully acquired. This point was argued in the Irish High Court in *Gilligan v. Criminal Assets Bureau, Galvin, Lanigan & Revenue Commissioners*, (1994-97) 5 Irish Tax Reports 424, namely, that where a defendant is in possession or control over assets which directly or indirectly constitute the proceeds of crime, he has no property rights in those assets and no valid title to them, whether protected by the Irish Constitution or by any other law. A similar view seems to have been expressed earlier in a dissenting opinion in *Welch v. United Kingdom*, (1995) 20 EHRR 247: ‘in my opinion, the confiscation of property acquired by crime, even without express prior legislation is not contrary to Article 7 of the Convention, nor to Article 1 of the First Protocol’. This principle has also been explored in US jurisprudence. In *United States v. Van Horn*, 789 F 2d 1492 (1986), a defendant convicted of fraud and money laundering was not entitled to the return of the seized proceeds since they amounted to contraband which he had no right to possess. In *United States v. Dusenbery*, 34 F Supp 2d 602 (1999) the Court held that, because the respondent conceded that he used drug proceeds to purchase a car and other personal property, he had no ownership interest in the property and thus could not seek a remedy against the Government’s decision to destroy the property without recourse to formal forfeiture proceedings. The UK Government has impliedly adopted this perspective, stating that:

‘... It is important to bear in mind the purpose of civil recovery, namely, to establish as a matter of civil law that there is no right to enjoy property that derives from unlawful conduct.’”

41. Non-conviction based asset forfeiture model also known as Civil Forfeiture Legislation gained currency in various countries: the United States of America, Italy, Ireland, South Africa, UK, Australia and certain Provinces of Canada.

42. Anthony Kennedy conceptualised the civil forfeiture regime in the following words:

⁶ Head of Legal Casework, Northern Ireland for the Assets Recovery Agency in his article “Justifying the Civil Recovery of Criminal Proceeds” published in the *Journal of Financial Crime*, 2004, Vol.12, Issue 1.

“Civil forfeiture represents a move from a crime and punishment model of justice to a preventive model of justice. It seeks to take illegally obtained property out of the possession of organised crime figures so as to prevent them, first, from using it as working capital for future crimes and, secondly, from flaunting it in such a way as they become role models for others to follow into a lifestyle of acquisitive crime. Civil recovery is therefore not aimed at punishing behaviour but at removing the ‘trophy’ of past criminal behaviour and the means to commit future criminal behaviour. While it would clearly be more desirable if successful criminal proceedings could be instituted, the operative theory is that ‘half a loaf is better than no bread’.”

29. The petitioners filed the petition seeking permission of the Court to sell the property under attachment and a consequential direction to the Sub-Registrars to permit the petitioners to execute sale deeds in respect of the properties under attachment. If such reliefs are granted before disposing of the main case, the very purpose of the attachment order would be frustrated. For withdrawal of the order of attachment, the petitioners have to establish that they have acquired the property under attachment by lawful means, by adducing evidence. For one reason or the other, the first petitioner did not choose to come into witness box to dislodge the case of the prosecution that he procured the properties under attachment with ill-gotten money. Likewise, the second petitioner also did not choose to come into witness box, to establish that she purchased the properties under attachment with legitimate source of income. When the petitioners themselves have failed to adduce evidence in accordance with the provisions of Section 5 of the Ordinance, the question of granting of any relief much less the relief of release of the documents with a consequential direction to the Sub-Registrars to permit the petitioners to execute the sale deeds in favour of third parties does not arise. The reliefs sought by the petitioners are misconceived.

30. Any person aggrieved with the orders passed by the learned Special Judge under Sections 4, 6, 8 and 9 of the Ordinance, he has to prefer an appeal under Section 11 of the Ordinance, within 30 days from the date of the order. When a specific provision is made under a Statute for redressal, the aggrieved person has to resort to the same. The petitioners filed the petition under Sections 4 and 8 of the Ordinance. If really they are aggrieved by the order passed under Sections 4 and 8, the remedy available to them is to file an appeal by invoking Section 11 of the Ordinance. Filing of the criminal petition under Section 482 Cr.PC is nothing but circumventing the procedure contemplated under the provisions of the Ordinance, which is not permissible under law. Viewed from this angle also, the criminal petition is not maintainable.

31. In the light of the above discussion, I am of the considered view that it is not a fit case to quash the order dated 18.10.2016 passed in CrI.M.P.No.457 of 2016 in C.C.No.5 of 2016 on the file of the Court of the Principal Special Judge for SPE & ACB Cases-cum-IV Additional Chief Judge, City Civil Court, Hyderabad.

32. In the result, the criminal petition is dismissed. Miscellaneous petitions, if any pending in this criminal petition shall stand closed.

T.SUNIL CHOWDARY, J.

January 05, 2017.
YS

NOTE:

L. R. Copy be marked : **YES** / NO