IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CWP No.6065 of 2017 (O&M)
Date of decision:02.06.2017

M/s Zoom Buildwell Pvt. Ltd. and another ... Petitioners

Vs.

Dakshin Haryana Bijli Vitran Nigam,
Vidyut Sadan, Vidyut Nagar, Hissar Haryana
and others ... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Atul Nanda, Senior Advocate with
Mr. Gurmohan Singh Bedi, Advocate
for the petitioners.

Mr. Raheel Kohli, Advocate
for respondent No.1.

Mr. Deepak Gupta, Advocate
for respondent No.2.

Mr. S.P.Jain, Addl. Solicitor General of India with
Mr. Alok Kumar Jain, Advocate with
Mr. Dheeraj Jain, Advocate
for respondents No.3 and 4/Union of India.

AMIT RAWAL J.

C.M.No.8072 of 2017

Prayer in the application is for substitution of respondents No.3 and 4 and impleading respondent No.5- Union of India.

For the reasons stated in the application which is duly supported by an affidavit, the same is allowed.

Amended Memo of Parties is taken on record.

CWP No.6065 of 2017 (O&M)

The petitioners have approached this Court for issuance of appropriate directions or order in the nature of certiorari or mandamus setting aside/quashing the attachment proceedings initiated by respondents No.3 and 4 within the jurisdiction of this Court, vide Provisional Attachment Order No.01/2017 dated 16.01.2017 (Annexure P-1) being null and void ab initio lacking the foundation; with a further direction to respondent No.1 to forthwith release the two bank guarantees viz No.315501GL0025607 for ₹1,00,47,000/- and No.315501GL0025707 for ₹7,39,000/- issued by the Union Bank of India, Sir M.V. Road, Andheri-East, Mumbai which were deposited by M/s ZPDL at the time of the bidding of a tender as the attachment of the said Bank Guarantees has been done in grave violation of the “procedure established by law”.

Learned Senior Counsel for the petitioners submitted that the company initially known as ZDPL was executing infrastructure projects on contract basis. Later on, acquired the expertise in providing 'Engineering Design Drawing' services, Project Management, Asset Reconstruction and supply of domain specialists' for various industrial and infrastructure projects in India and abroad. It arrived at a broad understanding with its foreign clients at England and Switzerland, called 'Aggregators' who agreed to offer exclusivity of works to it and ZDP in turn, while executing the contracts assured to protect their intellectual property rights. Subsequently ZDPL availed non-fund credit facilities from a consortium of banks and by way of Foreign Bank Guarantees which would serve as Advance Payment Guarantees-cum-Performance Guarantees in favour of the Aggregators (clients).

The lender banks formed a consortium and the Punjab National Bank was appointed as the leader of the consortium and for many years, ZDPL successfully executed about 80 international contracts and the Aggregators had duly released the Bank Guarantees to the consortium banks at the end of the completion of the contracts. Even the additional credit facilities were sanctioned to ZDPL.

Owing to global recession, the Foreign Intermediary Banks expressed their inability to the Punjab National Bank and to other banks to further confirm or renew the Bank Guarantees issued by them and requested them to make alternate arrangement by way of shifting the guarantees to other banks. Since the consortium banks failed to make any alternate arrangements, at the end of validity periods of the Bank Guarantees, the Aggregators' Bank sent SWIFT message to the Foreign Intermediary Banks to extend or to pay' the Bank Guarantees but it did not do so instead they invoked the counter-guarantees and paid the money to the Aggregators' banks by reducing their risk/exposure levels and also invoked the counter-guarantees of the consortium banks by seeking reimbursement. The consortium banks, though fully aware that there was no invocation from the beneficiary banks, paid the money yet sought payment from ZDPL.

While giving the aforementioned facts, learned Senior Counsel for the petitioners submitted that the Provisional Attachment Order dated 16.01.2017 (Annexure P-1) of the Deputy Director pertaining to dues payable by Dakshin Haryana Bijli Vitran Nigam Hisar, Haryana to the petitioner is without jurisdiction, much less, the Enforcement Director has acted beyond scope of its power and purview. The aforementioned act has been done in pursuance to the lodging of FIR by the Central Bureau of Investigation against the petitioners under the force and coercion and in pursuance to the provisional attachment order, a complaint under Section 5 (5) of the Prevention of Money Laundering Act, 2002 (hereinafter called 'PMLA') has been filed by respondent No.3 before the adjudicating authority.

The adjudicating authority by way of show-cause-notice dated 14.02.2017 (Annexure P-4) directed the petitioner No.2 to indicate the source of income, earning or assets. He submitted that in view of the provisions of Section 2(1)(na) of PMLA, the aforementioned notice has not been issued by the competent authority. The expression “investigation” includes all the proceedings under this Act conducted by the Director or by any authority authorized by the Central Government under this Act for the collection of evidence.

Sub-section (1) of Section 49 of PMLA deals with the powers of the Central Government for appointing such person as it thinks fit to the authorities for the purpose of this Act i.e., (2) without prejudice to the provisions of sub-section (1), the Central Government may authorize the Director or an Additional Director or a Joint Director or a Deputy Director or an Assistant Director appointed under that sub-section to appoint such other authorities below the rank of an Assistant Director and sub-section (3) of Section 49 empowers that the Central Government may impose the conditions and limitations on the authority for exercising the powers and discharge the duties conferred or imposed on it under this Act and the authorities as per the provisions of Section 51 of the PMLA, shall exercise all or any of the powers and perform all or any other function conferred on or assigned as the case may be, to such authorities under this Act or the rules framed thereunder.

Similarly Section 73(1) of the PMLA enables the Central Government may make rules and therefore, perusal of aforementioned provisions would leave no manner of doubt that no authority appointed in the Act can embark upon the collection of evidence unless specifically authorized by the Central Government. The authorization contemplated under Section 2(1)(na) of the PMLA cannot be granted by any other authority including the 'Director' himself as Section 39(2) has empowered the Central Government or the Director, who may authorize one or more authorized representatives or any of its officers to act as presenting officers and every person so authorized may present the case.

The aforementioned Section 2(1)(na) was inserted vide amendment carried out in PMLA w.e.f. 01.07.2005, in essence, the aforementioned provisions did not exist earlier, therefore, there is no ambiguity whatsoever in the Legislative intent so the entire process of collection of evidence is without jurisdiction as it is wanting the obtaining of authorization from the Central Government and therefore, amounting to violation of fundamental rights as enshrined under Article 19(1)(g) of the Constitution of India.

Learned Additional Solicitor General of India appearing on behalf of respondents No.3 and 4 submitted that the instant writ petition is liable to be dismissed for want of impleading of Union of India as a party and Enforcement Director as respondent No.4. It is the only Investigating

Officer and Director, who have been arrayed as parties. The petitioners have also concealed the material facts to the extent that earlier also two provisional attachment orders, whereby, the properties of the petitioner had been attached and after due process, the said attachment was confirmed by the adjudicating authority. In fact, there is also an attempt of concealment as other persons are also accused in five FIRs lodged by five public banks wherein the petitioner is accused of cheating the banks to the tune of more than ₹1000 crores and the short relief sought by the petitioners viz-a-viz attachment order dated 16.01.2017 issued under Section 5(1) of PMLA.

He further submitted that subsequent to the aforementioned order, the complaint has been filed before the adjudicating authority and the proceedings under Section 8 of the aforementioned Act, have already been initiated, whereby, the petitioner has been issued notices. All the pleas raised herein can be raised before the adjudicating authority. An attempt has also been made to mislead this Court that respondent No.4- Deputy Director has not been authorized by the Central Government to embark upon the investigation as per the provisions of Section 2(1)(a) of the PMLA. However, the same is not only vague but also baseless.

He also submitted that a perusal of Section 5(1) clearly shows that it empowers the Director or any other officer not below the rank of Deputy Director authorized by the Director, to pass the order of attachment of property. However, on conjoint reading of the aforementioned Section and perusal of Annexure P-1, it leaves no manner of doubt that respondent No.4 being Deputy Director, who has been duly authorized, vide authorization letter dated 07.02.2007 and addendum dated 12.11.2011, (Annexure R-3/1 (collectively) and this fact has not been brought to the notice of this Court and thus, urged this Court for dismissal of the writ petition.

Besides the aforementioned arguments, various other points qua lodging of FIR etc, have been raised by filing a short reply.

I have heard learned counsel for the parties, appraised the paper book and of the view that the writ petition is liable to be dismissed.

Concededly, the attachment order dated 16.01.2017 (Annexure P-1) is signed by the Deputy Director and on examination of notification dated 01.07.2005, the Central Government while exercising the powers under Section 49(1) of the PMLA, w.e.f. 01.07.2005 appointed the Director of Enforcement holding the office immediately before the said date under Foreign Exchange Management Act, 1999 (42 of 1999) as Director to exercise the exclusive powers conferred under Sections 5, 8, 16, 17, 18, 19, 20, 21, sub-section (1) of Section 26, 45, 50, 57, 60, 62 and 63 of the PMLA and the Director shall also concurrently exercise the powers conferred by sub-section (3), sub-section (4) and sub-section(5) of Section 26, Sections 39, 40, 41, 42, 48, 49, 66 and 69 of the aforesaid Act.

Vide letter dated 07.02.2007, the Director while exercising the powers conferred upon him under sub-section(1) of Section 5 of the PMLA read with the aforementioned Notification authorized all the Deputy Directors of the Directorate of the Enforcement for the purpose of Section 5 of the said Act to provisionally attach the property in respect of the cases registered for investigation in the respective Zones in accordance with the statutory requirement of the PMLA and on 12.10.2011 also issued the

Addendum. For the sake of brevity notification, authorization, addendum and provisions of Section 5 of PMLA read as under:

Notification

"In exercise of the powers conferred by sub-section(1) of Section 49 of the Prevention of Money Laundering Act, 2002 (15 of 2003), the Central Government hereby appoints, with effect from 1st day of July 2005, the Director of Enforcement holding office immediately before the said date under the Foreign Exchange Management Act, 1999 (42 of 1999) as the Director to exercise the exclusive powers conferred under Section 5, Section 8, Section 16, Section 17, Section 18, Section 19, Section 20, Section 21, sub-section (1) of Section 26, Section 45, Section 50, Section 57, Section 60, Section 62 and Section 63 of the said Act and the said Director shall also concurrently exercise powers conferred by sub-section (3), sub-section (4) and sub-section (5) of section 26, section 39, section 41, section 42, section 48, section 49, section 66 and section 69 of the afore-said Act.

Authorization

"In exercise of the power conferred on the Director by sub-section (1) of section 5 of the Prevention of Money Laundering Act, 2002 (15 of 2003) read with Notification published in the Gazette of India on 1st July, 2005 vide GSR 441(E), all Deputy Directors of the Directorate of Enforcement are hereby authorized for the purposes of Section 5 of the said Act to

provisionally attach property in respect of cases registered for investigation in their respective Zones in accordance with the statutory requirements of the said Act and the Rules made thereunder.”

Addendum

“In the 'Authorization under sub-section (1) of Section 5 of the Prevention of Money Laundering Act, 2002 (15 of 2003) issued vide file No.T-1/HQ/03/PMLA/2007 dated 07.02.2007 by Director of Enforcement, the following words are hereby inserted/added:-

“Or Joint Directors” after the words “all Deputy Directors” in the fourth line of said Authorization.”

5 Attachment of property involved in money-laundering. —

(1) Where the Director, or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section, has reason to believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that—

(a) any person is in possession of any proceeds of crime;

(b) such person has been charged of having committed a scheduled offence; and

(c) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such

proceeds of crime under this Chapter, he may, by order in writing, provisionally attach such property for a period not exceeding [one hundred and fifty days] from the date of the order, in the manner provided in the Second Schedule to the Income-tax Act, 1961 (43 of 1961) and the Director or the other officer so authorised by him, as the case may be, shall be deemed to be an officer under sub-rule (e) of rule 1 of that Schedule:

[Provided that no such order of attachment shall be made unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, 1973 (2 of 1974), or a complaint has been filed by a person authorised to investigate the offence mentioned in that Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be or a similar report or complaint has been made or filed under the corresponding law of any other country:

Provided further that, notwithstanding anything contained in clause (b), any property of any person may be attached under this section if the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section has reason to believe (the reasons for such belief to be recorded in writing), on the basis of material in his possession, that if such property involved in money-laundering *is not attached immediately under this Chapter, the non-attachment of the property is likely to frustrate any proceeding under this Act.]*

(2)The Director, or any other officer not below the rank of Deputy Director, shall, immediately after attachment under sub-section (1), forward a copy of the order, 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.

On conjoint reading of the aforementioned notification, authorization, attachment order and provisions of Section 5 of PMLA, it reveals that the attachment order has been issued by the Deputy Director, who has been authorized to do so, much less the provisions of Section 5 also empowers the Deputy Director to deal with the attachment of the property, thus, in my view, the apprehension expressed in the writ petition is wholly mis-placed, mis-conceived and devoid of merit, much less, the same cannot be said abdication or excess of jurisdiction.

Resultantly, the writ petition is dismissed.

(AMIT RAWAL)
JUDGE

June 02, 2017
savita

Whether Speaking/Reasoned Yes/No

Whether Reportable Yes/No