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

+ W.P.(C) 5537/2018 & CM Nos. 21583/2018 & 33487/2018

M/S HIMACHAL EMTA POWER LIMITED Petitioner

Through: Mr Abhimanyu Bhandari with Ms
Kartika Sharma and Mr Cheitanya
Madan, Advocates.

versus

UNION OF INDIA AND ORS. Respondents

Through: Mr Amit Mahajan, CGSC for UOI.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER
23.08.2018

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VIBHU BAKHRU, J.

1. The petitioner – M/S Himachal Emta Power Limited (hereafter ‘HEPL’) – has filed the present petition under Article 226 & 227 of the Constitution of India, *inter alia*, impugning the provisional attachment order dated 29.12.2017 (hereafter ‘the impugned order’) issued by the Deputy Director, Enforcement Directorate (respondent no.2 – hereafter ‘the ED’) under Section 5(1) of the Prevention of Money Laundering Act, 2002 (hereafter ‘the PML Act’).

2. By the impugned order, the ED has provisionally attached: (i) investment made by HEPL in M/s Gaurangdih Coal Ltd. (hereafter ‘GCL’) –

a joint venture company formed by HEPL and M/s JSW Steel Ltd. – for carrying out mining activities including excavation work in the coal block allocated to HEPL to the extent of ₹2,45,00,000/-; (ii) ₹11,86,710/- lying as fixed deposit in its account; (iii) ₹1,26,540/- credited in A/c No.0153201100424; and (iv) ₹7,160/- deposited in A/c No.0153201002578.

3. The impugned order is premised on the basis that the said amounts have been used in commission of a scheduled offence and are proceeds of crime in terms of Section 2(u) and (v) of the PML Act.

4. The petitioner has assailed the impugned order on several grounds including that the ED has not provided any reason to believe that HEPL is in possession of the proceeds of crime, the existence of such reasons is a pre-condition for issuing any order under Section 5(1) of the PML Act. In this regard, reliance is placed on the decision of the Division Bench of this Court in *J. Sekar v. Union of India & Ors.: 2018 SCC Online Del (6523)*. The petitioner also claims that the impugned order is without jurisdiction, as the funds attached by the ED are investments made in or by HEPL and cannot, by any stretch, be held to be proceeds of crime.

Factual context

5. Before proceeding further, it would be relevant to refer to the facts as narrated in the impugned order. The impugned order is founded on the basis of an FIR registered by Central Bureau of Investigation (CBI) on 07.08.2014 alleging offences under Section 120-B read with Section 420 IPC against HEPL, its promoters / directors, members of the 35th Screening Committee and other unknown persons. It is alleged that the said persons have cheated

the Government of India by securing allocation of Gaurangdih ABC Coal Block in favour of HEPL.

6. On 06.11.2006, the Ministry of Coal had issued an advertisement inviting applications from companies engaged in generation of power, production of iron and steel and production of cement for allocation of coal blocks for captive coal mines. In the aforesaid context, Himachal Pradesh Infrastructure Development Board invited 'expression of interest' on behalf of Government of Himachal Pradesh from experienced and well established organizations for setting up a 2x250 MW capacity pithead Coal Base Thermal Power Plant in joint venture with the Government of Himachal Pradesh. M/s Eastern Minerals and Trading Agency (hereafter 'EMTA') submitted its expression of interest and, thereafter, Himachal Pradesh Power Corporation Limited (hereafter 'HPPCL') entered into a MoU dated 04.01.2007 for setting up of a pithead thermal power plant in a joint venture. Pursuant to the aforesaid MoU, HEPL was formed on 09.01.2007 as a joint venture company between EMTA and HPPCL (a Govt. of Himachal Pradesh Enterprise). It is stated that, thereafter, HEPL submitted its application for allocation of Gaurandih ABC Coal Block located in West Bengal for the proposed 500 MW captive power plant in Rani Ganj, West Bengal.

7. It is alleged that HEPL had misrepresented the status of land in question and the investment made by it in the project and had secured the allocation of the coal block based on such misrepresentations.

8. It is not necessary to examine allegations made against HEPL in any detail. Suffice it to mention that the gravamen of allegation is that HEPL

was not entitled for allocation of the coal block but had secured the same by misrepresentations.

9. The Ministry of Coal allocated Gaurandih ABC Coal Block jointly in favour of HEPL and M/s JSW Steel Ltd (hereafter 'JSW') on an equal sharing basis with a condition that a joint venture company be formed between the two entities. It is stated that in terms of the said allocation, HEPL and JSW formed a joint venture company (GCL) for carrying out mining activities including excavation work. It is stated in the impugned order that HEPL applied for mining lease to the Directorate of Mines and Mineral, Kolkata but the same was not processed in view of the decision of the Supreme Court delivered on 24.09.2014. The impugned order further indicates that investments had been made by joint venture partners (HPPCL and EMTA) in subscribing to the shares of HEPL. HEPL, in turn, had also subscribed to the share capital of GCL. It is stated that GCL, in turn, made an investment of ₹4.90 crores for development of the coal block and on cancellation of the same had received back a sum of ₹4,78,81,951/-.

Submissions

10. Mr. Abhimanyu Bhandari, the learned counsel appearing for HEPL assailed the impugned order, essentially, on two grounds. First he submitted that the ED had no reason to believe that the properties attached are proceeds of crime. He further stated that the ED had not communicated such reasons to believe. He relied on the decision of the Division Bench of this Court in ***J. Sekar*** (*supra*) in support of his contention that the same was necessary. Second, he submitted that there was no basis to assume that

HEPL had derived any benefit from the allocation of the coal block. He submitted that there was no dispute that mining activity was not carried out prior to cancellation of the allocation. He submitted that therefore even if the assumption that HEPL had committed the offence under Section 420 IPC is accepted, HEPL had derived no benefit which could be construed as proceeds of crime.

11. Mr. Amit Mahajan, the learned counsel appearing for the respondents resisted the present petition on the ground of jurisdiction. He submitted that the impugned order was issued by an authority in Chandigarh and therefore, this Court does not have territorial jurisdiction to entertain the present petition. He relied on the decision of the Co-ordinate Bench of this Court in ***Rashmi Cement Ltd. v. Enforcement Directorate: W.P.(Crl.) No.2170/2017, decided on 30.08.2017*** in support of his contention. Next he submitted that there was no requirement for the ED to furnish reasons to HEPL. He also pointed out that the decision in the case of ***J. Sekar*** (*supra*) has been stayed by the Supreme Court.

Reasons and Conclusion

12. The first and foremost question to examine is whether this Court has territorial jurisdiction to entertain the present petition. Although the impugned order has been passed by the Deputy Director, ED, from his office in Chandigarh, there is no dispute that the alleged offence of money laundering would have to be tried in Delhi. The impugned order is founded on the FIR which has been registered in Delhi. The Enforcement Case Information Report (ECIR) also indicates the place of occurrence of the

alleged offence as “New Delhi and other places”. In the aforesaid circumstances, this Court is not persuaded to accept that this Court does not have the jurisdiction to entertain the present petition. Even otherwise, the rule of *forum non conveniens* does not denude the court of its jurisdiction; it only entails that a court will decline to exercise its jurisdiction if it is more convenient that the petition be considered by another court. It is a rule founded on convenience and self restraint by courts and not on lack of jurisdiction. Thus, the contention that the present petition is not maintainable in unmerited.

13. The reliance placed on the decision in ***Rashmi Cement Ltd.*** (*supra*) is also misplaced. In that case, the ECIR was registered in Kolkata. The offence under Section 3 of the PML Act was also alleged to have been committed outside the territorial jurisdiction of this Court. The FIR on the basis of which proceedings under the PML Act had commenced was also registered in Calcutta. The Railway administration had also issued a show cause notice in respect of the allegations made against the petitioner in that case and the same was also subject matter of challenge before the Calcutta High Court, which was pending consideration at the material time. In this view, it is clear that no part of the cause of action had arisen within the territorial jurisdiction of this Court. The facts in this case are materially different; in the present case, the offence of money laundering has allegedly been committed within the territorial jurisdiction of this Court.

14. The next question to be examined is whether any interference with the impugned order is warranted by this Court at this stage. It is relevant to note that the impugned order is only a provisional order of attachment and the

question whether the same has to be confirmed is now required to be adjudicated by the Adjudicating Authority in terms of Section 8 of the PML Act. In this view, this Court was initially reluctant to interfere at this stage. However, a plain reading of the impugned order clearly indicates that the impugned order is fundamentally flawed and is without authority of law. The impugned order of provisional attachment is founded on the allegation that the property sought to be attached has been used in commission of a scheduled offence and, therefore, is liable to be attached as proceeds of crime. However, it is obvious that merely because a property used in commission of crime, the same cannot be construed as proceeds of that crime.

15. At this stage, it would be relevant to refer to Section 5(1) of the PML Act, the relevant extract of which is set out below:

“Section 5 (1) – Where the Director or any other officer not below the rank of Deputy Director authorized 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.”

16. A plain reading of Section 5(1) of the PML Act indicates that an order of provisional attachment can be passed only where the concerned officer has reasons to believe on the basis of material in his possession that: (a) any person is in possession of proceeds of crime; and (b) such proceeds are likely to be concealed, transferred, or dealt with any manner which would result in frustrating any proceedings relating to confiscation of such proceeds of crime. The expression “proceeds of crime” is defined under clause (u) of Section 2 (1) of the PML Act as under:

“Section 2 (u) – “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 (or where such property is taken or held outside the country, then the property equivalent in value held within the country).”

17. It is clear from the language of Section 2(u) of the PML Act that the expression “proceeds of crime” refers to a property, which is “*derived or obtained*” by any person as a result of criminal activity. Therefore, in order to pass an order of provisional attachment, it was necessary for the ED to have reasons to believe that the property sought to be attached was “derived or obtained” from any scheduled crime.

18. A plain reading of the impugned order indicates that there is no material whatsoever on the basis of which the ED could have possibly

concluded that the investments made by HEPL were ‘derived or obtained’ as a result of any criminal activity relating to a scheduled offence. In the impugned order, the ED has elaborately discussed the allegation made against HEPL. It is also recorded that at the time of filing of the application for allocation of coal block, the capital of HEPL was ₹5 lakhs which had swelled upto ₹7.91 crores after filing application for a coal block. The investment made by joint venture constituents of HEPL, namely, Himachal Pradesh Power Corporation Ltd. and EMTA, were further invested by HEPL; including in subscribing to the shares of CGL. The same cannot by any stretch be held to be proceeds of crime. The ED has, essentially sought to attach the investments made in HEPL on the allegation that the same have been used in commission of a scheduled offence. This is apparent from paragraphs 7 and 16 of the impugned order which are set out below:

“7. AND WHEREAS, the investment of Rs. 7.91,00,000/- was made after filing for allocation of Coal Block, and the same has been used in commission of scheduled offence. i.e. the allocation of coal block by fraudulent means and to further obtain mining lease on the basis of said allocation. Further, there is a balance of Rs. 1,33,700/- lying in the bank accounts as mentioned at Para 5(xiv) and the fixed deposit No. 015340100288/8 dated 4.7.2017 amounting to Rs. 11,86,710/-.

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16. AND WHEREAS, the following amounts have been used in the commission of scheduled offence and are proceeds crime in terms of Section 2 (u) and 2 (v) of PMLA, 2002:-

S.No.	Amount in Rs.	Remarks
1.	2,45,00,000	Investment in M/s GCL By M/s HEPL and lying in Corporation Bank, Bhowanipur Branch, Kolkata A/c No.510101003473693 of M/s GCL.
2.	11,86,710	Lying as fixed deposits No.015340100288/8 dated 04.07.2017
3.	1,26,540	Lying in A/c No.0153201100424
4.	7,160	Lying in A/c No.0153201002578
Total	2,58,20,410	

19. The said assumption that any amount used in commission of a scheduled offence would fall within the expression “proceeds of crime” as defined under Section 2(1) (u) of the PML Act is fundamentally flawed. In the present case, the allegation against HEPL is that it had obtained allocation of coal block on the basis of misrepresentation. However, it is not disputed that mining of the coal from the block had not commenced, therefore, HEPL did not derive or obtain any benefit from the coal block. The ED has also not indicated any reason, which could lead one to believe

that HEPL had derived any other benefit from the allocation of the coal block in question.

20. In view of the above, the petition is allowed and the impugned order is set aside. Consequently, the complaint dated 19.01.2018 made under Section 8 of the PML Act is also set aside. The Parties are left to bear their own costs. All the pending applications are also disposed of.

AUGUST 23, 2018
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VIBHU BAKHRU, J



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