

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

% Date of decision: 5th December, 2018

+ W.P.(C) 12494/2018 & CM. Nos. 48492/2018 and 48493/2018

AASMA MOHAMMED FAROOQ AND ANR.

..... Petitioners

Through: Mr. Vikram Chaudhri, Sr. Adv. with
Mr. Harshit Sethi, Mr. Sartaj Singh
Gill & Mr. Rishi Sehgal, Advs.

versus

UNION OF INDIA AND ORS.

..... Respondents

Through: Ms. Maninder Acharya, ASG with
Mr. Amit Mahajan, CGSC with Mr.
Sahil Sood, Mr. Harshul Choudhary &
Mr. Viplav Acharya, Advs.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

CM. No. 48493/2018

Exemption allowed subject to all just exceptions.

Application stands disposed of.

W.P.(C) 12494/2018

1. A preliminary objection has been taken by Ms. Maninder Acharya, learned ASG on the maintainability of the petition on the ground that this Court would not like to entertain the petition as the same would militate against the principles of forum conveniens, and

also in view of Section 42 of The Prevention of Money-Laundering Act, 2002 ('Act' in short). She has drawn our attention to the judgment of Five Judges of this Court in the case of *M/s Sterling Agro Industries Ltd. v. Union of India & Ors.* ILR (2011) VI Delhi 729 to contend that even if the impugned order has been issued by an Authority and the same constitutes a part of cause of action to make the writ petition maintainable in this Court, yet the same may not be a singular factor for this Court to decide the matter on merits and this Court can refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum conveniens.

2. According to Ms. Acharya, there is no dispute that the part of cause of action has arisen within the territorial jurisdiction of this Court but keeping in view the provisions of Section 42 of the Act, which we reproduce hereunder, as the property is situated in Mumbai, the petitioner is also based in Mumbai, and finally it is the Bombay High Court to which an appeal shall lie from the order of the Appellate Authority, instead of two Courts applying its mind to the facts, it shall be appropriate to relegate the petitioner to the Bombay High Court, as being forum conveniens.

“42. Appeal to High Court.-Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law or fact arising out of such order:

Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

Explanation.-For the purposes of this section, "High Court" means-

(i) The High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain;

and

(ii) Where the Central Government is the aggrieved party, the High Court within the jurisdiction of which the respondent, or in a case where there are more than one respondents, any of the respondents, ordinarily resides or carries on business or personally works for gain.”

3. She also relies upon the judgment of a Single Bench of this Court in the case of ***Rashmi Cement Limited v. Enforcement Directorate W.P.(Crl.) 2170/2017 decided on August 30, 2017***, wherein the learned Single Judge has considered the judgment of the Five Judges of this Court in ***M/s Sterling Agro Industries Ltd. (supra), Vishnu Security Services v. Regional Provident Fund Commissioner 2012 (129) DRJ 661 (DB)*** and the effect of Section 42 of the Act and has held that this Court ought not entertain the

writ petition and if this Court assumes jurisdiction, the same would militate against the principles of forum conveniens. She also relies upon the judgment of the Division Bench of this Court in the case of *Raj Kumar Shivhare v. Assistant Director of Enforcement, Mumbai W.P.(C) 6527/2008 decided on 24th September, 2008*, wherein the Division Bench relying upon a similar provision under the FEMA Act, refused to exercise its jurisdiction and relegated the petitioner to the appropriate High Court on the ground of forum conveniens of that Court and also in view of Section 35 of the FEMA Act, which clearly stipulates that any person aggrieved by any decision or order of the Appellate Tribunal to file an appeal to High Court where the aggrieved party ordinarily resides or carries on business or personally works for gain.

4. To this objection of Ms. Acharya, Mr. Vikram Chaudhri, learned Senior Counsel for the petitioner has drawn our attention to the provisions of Section 6 of the Act to contend that before 2009, the said Section contemplated the Central Government shall appoint one or more adjudicating authorities to exercise jurisdiction, powers and authority conferred by or under this Act. The said Section has undergone an amendment whereby only one adjudicating authority

has been contemplated, who is stationed in Delhi. According to Mr. Chaudhri, this writ petition has been filed by the petitioners challenging the provisions of Section 5(1), 5(5), 8(3), 8(5) and 8(6) of the Act. That apart, they are seeking quashing of provisional attachment order No. 08/2018 dated June 20, 2018 / impugned original complaint No.998 of 2008 dated July 18, 2018 and show cause notice dated July 31, 2018. It is his submission that the notice to show cause under Section 8 of the Act has been issued by the adjudicating authority, based in Delhi. In other words, a part of cause of action has arisen in Delhi, for this Court to entertain the present writ petition, in terms of Para 33 (b) of the *Sterling Agro Industries Ltd. (supra)*.

5. It is his submission that cause of action in PMLA cases, is not related to the place of investigation or place of a property and as such the plea of Ms. Acharya that investigation has been done in Mumbai and properties are in Mumbai and the Bombay High Court shall have the jurisdiction, is totally misconceived. He heavily relied upon the judgment of the Division Bench of this Court in the case of *J. Sekar v. Union of India & Ors. and other connected writ petitions (2018) 246 DLT 610* to contend that the Division Bench

has, in the said case by relying upon paras 33(b) and (c) of the judgment held that as part of cause of action has arisen in Delhi, this Court will have jurisdiction. Insofar as Section 42 of the Act is concerned, the Division Bench held that on the existence of an alternative efficacious remedy of appeal before the High Court under Section 42, shall be decided independently by the learned Single Judge in accordance with law.

6. Suffice it to state, we have been informed by Ms. Acharya that the judgment of the Division Bench in ***J. Sekar (supra)*** has been stayed by the Supreme Court. It is also necessary to state here that the Division Bench in ***J. Sekar (supra)*** has not considered, in view of Section 42 of the Act whether this Court should exercise its discretionary jurisdiction of entertaining the petition as if an order passed by the Appellate Authority under Section 26 of the Act, the appeal thereof has to be filed wherever the aggrieved person ordinarily resides or carries on business or personally works for gain.

7. We have heard the learned counsel for the parties. At the outset, we may state that the Five Judges of this Court in ***M/s Sterling Agro Industries Ltd. (supra)*** by considering the case law

on the subject of jurisdiction and forum conveniens, has in para 33

held as under:-

“33. In view of the aforesaid analysis, we are inclined to modify the findings and conclusions of the Full Bench in New India Assurance Company Limited (supra) and proceed to state our conclusions in seriatim as follows:

(a) The finding recorded by the Full Bench that the sole cause of action emerges at the place or location where the tribunal/appellate authority/revisional authority is situate and the said High Court (i.e., Delhi High Court) cannot decline to entertain the writ petition as that would amount to failure of the duty of the Court cannot be accepted inasmuch as such a finding is totally based on the situs of the tribunal/appellate authority/revisional authority totally ignoring the concept of forum conveniens.

(b) Even if a miniscule part of cause of action arises within the jurisdiction of this court, a writ petition would be maintainable before this Court, however, the cause of action has to be understood as per the ratio laid down in the case of Alchemist Ltd. (supra).

(c) An order of the appellate authority constitutes a part of cause of action to make the writ petition maintainable in the High Court within whose jurisdiction the appellate authority is situated. Yet, the same may not be the singular factor to compel the High Court to decide the matter on merits. The High Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum conveniens.

(d) The conclusion that where the appellate or revisional authority is located constitutes the place of forum

conveniens as stated in absolute terms by the Full Bench is not correct as it will vary from case to case and depend upon the lis in question.

(e) The finding that the court may refuse to exercise jurisdiction under Article 226 if only the jurisdiction is invoked in a malafide manner is too restricted / constricted as the exercise of power under Article 226 being discretionary cannot be limited or restricted to the ground of malafide alone.

(f) While entertaining a writ petition, the doctrine of forum conveniens and the nature of cause of action are required to be scrutinized by the High Court depending upon the factual matrix of each case in view of what has been stated in Ambica Industries (supra) and Adani Exports Ltd. (supra).

(g) The conclusion of the earlier decision of the Full Bench in New India Assurance Company Limited (supra) "that since the original order merges into the appellate order, the place where the appellate authority is located is also forum conveniens" is not correct.

(h) Any decision of this Court contrary to the conclusions enumerated hereinabove stands overruled."

8. During the course of the arguments, a reference was made to the judgment of the Coordinate Bench of this Court in **Vishnu Security Services (supra)**, wherein the Coordinate Bench has further explained the judgment of the Five Judges in **M/s Sterling Agro Industries Ltd. (supra)** and has clarified in para 11 as under:-

“11. It is thereafter that the Court went further and expounded the doctrine of forum conveniens with reference to a situation where original authority is in one State and the seat of the appellate authority is located in another State. Once it is categorically held in paras 25 to 27 that in such a case, the writ would be maintainable in both the Courts and also that it is the petitioner which has right to choose his forum, we are of the view that primacy to the freedom given to the petitioner needs to be respected. Therefore, we clarify that normally in such circumstances, writ would be maintainable at both the places and only in extreme cases where the Court finds that it is totally inconvenient for a Court to entertain the writ petition and the other High Court may be better equipped to deal with such a case then the doctrine of forum conveniens has to be applied. The directions of the Sterling Agro (supra) have to be understood in that manner alone, otherwise it would be negation of the principle stated in Kusum Ingots (supra), particularly paras 25 to 27 thereof.....”

(Emphasis provided by this Court)

9. In other words, the Division Bench clarified in a case where the original authority is in one State and the seat of the appellate authority is located in another State, a writ petition would be maintainable in both the Courts and also that it is the petitioner who has a right to choose his forum, which need to be respected. The Division Bench clarified that normally in such circumstances, writ petition would be maintainable at both the places and only in extreme cases where the Court finds that it is totally inconvenient for a Court to entertain the writ petition and the other High Court

may be better equipped to deal with such a case then the doctrine of forum conveniens has to be applied.

10. Mr. Chaudhri may be right in contending that the notice under Section 8 of the Act has been issued by the Authority in Delhi, so jurisdiction is there for this Court to entertain the writ petition. But merely because a part of cause of action has arisen under the jurisdiction of this Court, whether this Court needs to exercise its jurisdiction is the question need to be answered. This Court is of the view *“that it should not”*, for more than one reason; that it is not in dispute that the petitioner is based in Mumbai. The provisional attachment order has been passed in Mumbai. The complaint though, filed before the adjudicating authority in Delhi, it encompasses all the facts that have arisen in Mumbai. The properties are in Mumbai. It is only after filing of the original complaint as contemplated under Section 5(5) of the Act before the adjudicating authority, which is located in Delhi that the impugned notice has been issued from Delhi but the fact remains that nothing has happened in Delhi. Only notice to show cause has been issued. After the adjudicating authority decides the issue, there is a forum of appeal available to the petitioner. Even thereafter, the remedy of

appeal to the High Court is also available under Section 42 of the Act, which has already been enumerated above. In other words, in the case in hand, if an order is passed by the Appellate Authority it shall be the Bombay High Court, which shall have the jurisdiction for both, i.e. the person aggrieved and the Central Government against the order is passed by the Appellate Authority. Therefore, in view of the aforesaid factual / legal aspect, this Court is of the view that instead of two Courts considering set of facts originating in Mumbai and leading to issuance of a provisional attachment order / complaint before the adjudicating authority, it should be the High Court, which is more convenient and where if a party aggrieved against the orders passed by the Appellate Authority shall approach, in terms of Section 42 of the Act, shall be the "*forum conveniens*". In this case, it shall be the Bombay High Court and accordingly this Court is of the view that it should not entertain the present writ petition. The petitioner shall be at liberty to approach the Bombay High Court for appropriate relief. Accordingly, we refrain from going into the merits of the case.

11. We agree with the conclusion arrived at by the learned Single Judge in the case of ***Rashmi Cement Limited (supra)***, the relevant paragraphs of which are reproduced as under:-

“60. In the present case, what is not in dispute is that the petitioner is a company which is situated in Kolkata, West Bengal. The address of the petitioner in the FIR, charge sheet and in all other documents is of Kolkata. The FIR (predicate offence) was lodged by CBI at Kolkata. The ECIR has been registered at Kolkata. Pursuant to the ECIR, properties falling under the jurisdiction of Kolkata High Court have been attached provisionally. It is only after the filing of the original complaint as contemplated under Section 5(5) of the Act before the Adjudicating Authority which is located in Delhi that the impugned notice by the Adjudicating Authority has been issued from Delhi. Though a small fraction of a cause of action has definitely arisen in Delhi but before exercising the discretion of entertaining the present writ petition, this Court would per force be required to look to other factors as well including "forum convenience.

61. As has been stated earlier, but for the lodging of the original complaint, nothing has happened in Delhi. That apart, no final order has been passed by the Adjudicating Authority and only notice to show cause as to how and with what available resource, the property which has been provisionally attached was purchased by the petitioner. The impugned notice, in the present case, no doubt, has serious fiscal/penal consequences in case the explanation offered by the petitioner is not accepted by the Adjudicating Authority. But entertaining a writ petition seeking quashment of the aforesaid notice would amount to exercising discretion in the matter of arrogating jurisdiction only by virtue of the location of the Adjudicating Authority which is in Delhi. The petitioner, otherwise also has various stages and forums available to him for challenging any decision/action of

the respondent or the Adjudicating Authority, viz. the Appellate Tribunal and the High Court. Section 42 of the Act clearly indicates that in case the matter travels upto the Appellate Tribunal under Section 26 of the Act, any person aggrieved against the order of the Appellate Tribunal could approach the High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain. In case the Central Government is the aggrieved party, the High Court within the jurisdiction of which the respondent, or in a case where there are more than one respondent, any of the respondents ordinarily resides or carries on business or personally works for gain, shall have the jurisdiction.

62. In that view of the matter, the respondent would be forced to, if it is aggrieved finally by an order of the Appellate Tribunal to challenge such order before the High Court of Kolkata only whereas if the contention of the petitioner is accepted and if this Court assumes the jurisdiction of exercising its discretion, two options would be available to the petitioner namely of Kolkata High Court and Delhi High Court. This would definitely militate against the principle of forum convenience.

63. This Court, therefore, is of the view that this Court ought not to entertain the present writ petition. In case the petitioner is so advised, an appropriate petition could be preferred before the High Court of Kolkata for the needful.”

12. Even we find that the Coordinate Bench of this Court in **Raj Kumar Shivhare (supra)**, has in paras 5 to 7, held as under, with which we concur.

“5. This question has now been authoritatively settled by the Supreme Court in Ambica Industries -vs- Commissioner of Central Excise, (2007) 6 SCC 769 where several of the above quoted decisions have been

reviewed. The Petitioner/Assessee in that case carried on business at Lucknow where it was also assessed. It approached the CESTAT, New Delhi which exercised jurisdiction in respect of the States of Uttar Pradesh, Maharashtra and the National Capital Territory of Delhi. The Appeal filed in the Delhi High Court was rejected on the ground of lack of territoriality, and the Appeal to the Supreme Court turned out to be a sterile exercise. Their Lordships observed that "the aggrieved person is treated to be the dominus litis, as a result whereof, he elects to file the appeal before one or the other High Court, the decision of the High Court shall be binding only on the authorities which are within its jurisdiction. It will only be of persuasive value on the authorities functioning under a different jurisdiction. If the binding authority of a High Court does not extend beyond its territorial jurisdiction and the decision of one High Court would not be a binding precedent for other High Courts or courts or tribunals outside its territorial jurisdiction, some sort of judicial anarchy shall come into play. An assessee, affected by an order of assessment made at Bombay, may invoke the jurisdiction of the Allahabad High Court to take advantage of the law laid down by it and which might suit him and thus he would be able to successfully evade the law laid down by the High Court at Bombay. ... It would give rise to the issue of forum shopping.For example, an assessee affected by an assessment order in Bombay may invoke the jurisdiction of the Delhi High Court to take advantage of the law laid down by it which may be contrary to the judgments of the High Court of Bombay".

6. Section 35 of the Foreign Exchange Management Act, 1999 („FEMA“ for short) enables any person aggrieved by any decision or order of the Appellate Tribunal to file an Appeal to the High Court. The Explanation to the Section is extremely significant inasmuch as it prescribes that High Court means "the High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain" and further clarifies that if the Appeal is filed by the

Central Government it is the residence or place of business of the Respondent which is the relevant and determining factor. Any lingering doubt that may remain stands dispelled by Section 35 of FEMA.

7. Therefore, on two counts this Court ought not to exercise territorial jurisdiction - firstly, on the general principles as culled out in Ambica Industries and secondly by virtue of Section 35 of FEMA.”

13. We may also note, Mr. Chaudhri has also referred to the Judgment of the co-ordinate Bench of this Court in ***Sonu Sardar v. Union of India W.P.(Crl.) 441/2015***. Suffice it to state in the facts of this case, this court has in exercise of its discretionary Jurisdiction, decided not to entertain the writ petition. The Judgment is distinguishable on facts.

14. In the end, Mr. Chaudhri would submit as this Court is not entertaining the writ petition, the interim protection granted by this Court on November 30, 2018 be extended for a period of 10 days to enable the petitioner approach the Supreme Court. Accordingly, the interim order dated November 30, 2018 shall continue for a period of 10 days from today.

15. The writ petition is dismissed, with liberty to the petitioner to approach High Court at Bombay. No costs.

CM. No. 48492/2018 (for stay)

Dismissed as infructuous.

V. KAMESWAR RAO, J

CHIEF JUSTICE

DECEMBER 05, 2018/ak

