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

Date of decision: 15th March, 2019

+ LPA 179/2019 & CM APPL. No. 12127-12129/2019

DIRECTORATE OF ENFORCEMENT

..... Petitioner

Through: Mr. D.P. Singh, SPP with Mr. Amit Mahajan, CGSC with Mr. Manu Mishra & Mr. Randeep Sachdeva, Advs.

versus

ABDULLAH ALI BALSHARAF & Ors.

..... Respondent

Through: Mr. Biswajit Bhattacharya, Sr. Adv. with Mr. Gurpreet Singh, Adv. for R1 & R-2.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI, J. (ORAL)

By way of the present appeal filed under clause 10 of the Letters Patent of this court, the appellant/Directorate of Enforcement ('DoE') impugns order dated 09.01.2019 made by the single Judge in W.P. (C) No. 3531/2018 (the 'impugned order').

2. Respondents Nos. 1 and 2 in the present appeal are individuals who are ordinarily resident in Riyadh, Saudi Arabia and had purchased shares of one M/s Khushi Ram Behari Lal Ltd. ('KRBL') on respondent No. 3/BSE Ltd. (Bombay Stock Exchange) ('BSE') through respondent No. 4/SMC Global Securities Ltd. ('SMC'), which last-mentioned entity was the agency in which respondents Nos. 1 and 2 held Demat Accounts.

3. By the impugned order, the single Judge has disposed of the writ petition, *firstly* holding that the DoE could not issue orders 'freezing' Demat accounts by resorting to the provisions of section 102 of the Code of Criminal Procedure, 1973 ('CrPC') ; and *secondly* rejecting the contention that assets acquired prior to the enactment of the Prevention of Money-Laundering Act, 2002 ('PMLA') could *never* fall within the definition of 'proceeds of crime' under the said enactment.

4. The foregoing issues arose when, *vidé* communication dated 13.02.2018 issued by it, DoE instructed BSE to withhold the amount payable to respondents Nos. 1 and 2 ('private parties') towards shares of KRBL sold by the private parties on BSE. By the said communication DoE also instructed BSE to stop the sale of the said shares on the premise that it was *suspected* that such transaction was an attempt to transfer 'proceeds of crime' outside India, with the intention to frustrate proceedings initiated by DoE under PMLA in respect of alleged bribes paid in the transaction for acquisition of helicopters by the Indian Air Force/Ministry of Defence from M/s AgustaWestland, U.K. DoE also issued another communication dated 22.03.2018 ordering a 'freeze' on the transfer of shares held by the private parties in the Demat accounts maintained with SMC.

5. The relevant portion of letter dated 13.02.2018 is extracted below:

“Thus, the operation of the transaction pertaining to the transfer of shares of M/s. KRBL Ltd owned by M/s Abdullah Ali Obeid Balsharaf & M/s Omar Ali Obeid Balsharaf ought to be restrained/stopped under the provisions of Sec. 102 Cr. P.C. r/w sec. 65 r/w Sec 2(na) of The Prevention of Money Laundering Act 2002 during the pendency of investigation. The same may not be transferred without permission of this Directorate or competent authority.”

6. While the transactions between the concerned parties involved several intricacies, it is not necessary to take note of such details for purposes of deciding the present appeal. Suffice it to say that by way of communications dated 13.02.2018 and 22.03.2018 (the ‘impugned communications’) DoE interdicted, and in effect annulled, the transaction of sale of shares conducted between the concerned parties. In compliance of the impugned communications the BSE withheld 64,94,891 shares of KRBL out of a total of 65,00,000 equity shares ; as also a sum of Rs. 30,35,006/- which was the sale consideration for the balance of 5109 shares that were released to other third party purchasers. For the record, it may be noted that a copy of communication dated 22.03.2018 is not on the file of these proceedings; but what is available is a reference to the said communication by the appellant as well as the respondents in various proceedings, including the writ petition filed before the single Judge.

7. In the above backdrop, the private parties challenged the actions of DoE on two counts. *Firstly*, the private parties challenged the power of DoE

to reverse the transaction of sale of shares by them. *Secondly*, they challenged the very applicability of PMLA to the shares which admittedly were acquired by the private parties in 2003, that is much prior to initiation of the investigation by DoE in 2014.

8. Before the single Judge, the DoE took the stand that its actions were in pursuance of investigation it was conducting into money laundering of the kickbacks alleged to have been received by certain persons/parties in connection with the purchase of helicopters by the Indian Air Force/Ministry of Defence from M/s AgustaWestland, U.K. The DoE stated that the Central Bureau of Investigation had also registered a case for offences under section 420 read with section 120-B of the Indian Penal Code, 1860 ('IPC') read with provisions of the Prevention of Corruption Act, 1988; and in this background, it was essential to interdict the transactions, which the DoE believed involved laundering of the proceeds of crime.

9. The single Judge disposed of the writ petition :

- (a) holding that the DoE had no powers to issue orders freezing the demat accounts of the private parties under section 102 CrPC; and
- (b) rejecting the contention that assets acquired prior to the enactment of the PMLA could *never* fall within the definition of 'proceeds of crime' under section 2(1)(u) of the PMLA; and
- (c) thereby ruling that the impugned communications are without authority of law.

10. In the course of arguing the present appeal, the DoE has pressed the following prayer:

“Quash and set aside the said Impugned Order dated 09.01.2019 to the extent that the Directorate of Enforcement cannot exercise powers u/s 102 CrPC.”

11. Accordingly, the question that arises for our consideration is the following:

In the light of section 65 of the PMLA, which makes the provisions of Cr.P.C. applicable *inter alia* to seizure and attachment of property under the PMLA, can DoE proceed in exercise of powers under the general provisions of section 102 CrPC instead of acting under the stricter provisions of section 17 of the PMLA ?

12. It would be beneficial at this point to set-out the provisions referred to above *in-extenso* :

Section 65 of Prevention of Money Laundering Act:

“65. Code of Criminal Procedure, 1973 to apply – The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply, insofar as they are not inconsistent with the provisions of this Act, to arrest, search and seizure, attachment, confiscation, investigation, prosecution and all other proceedings under this Act.”

(Emphasis Supplied)

Section 17 of Prevention of Money Laundering Act:

“17. Search and seizure.-(1) Where the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section, on the basis of information in his possession, has reason to believe

(the reason for such belief to be recorded in writing) that any person-

(i) has committed any act which constitutes money-laundering, or

(ii) is in possession of any proceeds of crime involved in money-laundering, or

(iii) is in possession of any records relating to money-laundering, or

(iv) is in possession of any property related to crime

then, subject to the rules made in this behalf, he may authorise any officer subordinate to him to-

(a) enter and search any building, place, vessel, vehicle or aircraft where he has reason to suspect that such records or proceeds of crime are kept;

(b) break open the lock of any door, box, locker, safe, almirah or other receptacle for exercising the powers conferred by clause (a) where the keys thereof are not available;

(c) seize any record or property found as a result of such search;

(d) place marks of identification on such record or property, if required or make or cause to be made extracts or copies therefrom;

(e) make a note or an inventory of such record or property;

(f) examine on oath any person, who is found to be in possession or control of any record or property, in respect of all matters relevant for the purposes of any investigation under this Act:

Provided that no search shall be conducted unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under section 157 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 the Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or in cases where such report is not required to be forwarded, a similar report of information received or otherwise has been submitted by an officer authorised to investigate a scheduled offence to an officer not below the rank of Additional Secretary to the Government of India or equivalent being head of the office or Ministry or Department or Unit, as the case may be, or any other officer who may be authorised by the Central Government, by notification, for this purpose.

(1A) Where it is not practicable to seize such record or property, the officer authorised under sub-section (1), may make an order to freeze such property whereupon the property shall not be transferred or otherwise dealt with, except with the prior permission of the officer making such order, and a copy of such order shall be served on the person concerned:

Provided that if, at any time before its confiscation under sub-section (5) or sub-section (7) of section 8 or section 58B or sub-section (2A) of section 60, it becomes

practical to seize a frozen property, the officer authorised under subsection (1) may seize such property.

(2) The authority, who has been authorised under subsection (1) shall, immediately after search and seizure, or upon issuance of a freezing order forward a copy of the reasons so recorded along with 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 reasons and material for such period, as may be prescribed.

(3) Where an authority, upon information obtained during survey under section 16, is satisfied that any evidence shall be or is likely to be concealed or tampered with, he may, for reasons to be recorded in writing, enter and search the building or place where such evidence is located and seize that evidence:

Provided that no authorisation referred to in subsection (1) shall be required for search under this subsection.

(4) The authority seizing any record or property under subsection (1) or freezing any record or property under subsection (1A) shall, within a period of thirty days from such seizure or freezing, as the case may be, file an application, requesting for retention of such record or property seized under subsection (1) or for continuation of the order of freezing served under subsection (1A), before the Adjudicating Authority."

(Emphasis Supplied)

Section 102 of Code of Criminal Procedure :

“102. Power of police officer to seize certain property.-

(1) Any police officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence.

(2) Such police officer, if subordinate to the officer in charge of a police station, shall forthwith report the seizure to that officer.

(3) Every police officer acting under sub- section (1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized is such that it cannot be conveniently transported to the Court or where there is difficulty in securing proper accommodation for the custody of such property, or where the continued retention of the property in police custody may not be considered necessary for the purpose of investigation, he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same :

Provided that where the property seized under sub-section (1) is subject to speedy and natural decay and if the person entitled to the possession of such property is unknown or absent and the value of such property is less than five hundred rupees, it may forthwith be sold by auction under the orders of the Superintendent of Police and the provisions of sections 457 and 458 shall, as nearly

as may be practicable, apply to the net proceeds of such sale.”

(Emphasis Supplied)

13. On a plain reading of the foregoing provisions, the following aspects emerge: *firstly*, the provisions of CrPC relating *inter alia* to seizure and attachment apply to proceedings under the PMLA but only *insofar as they are not inconsistent* with the provisions of the PMLA; *secondly*, the power conferred on an officer under section 17 of the PMLA *inter alia* for seizure of property must be exercised on the basis of *information in the possession* of the officer, *if* founded on such information the officer has *reason to believe* that a person has committed any of the acts specified in the provision; with the reason for such belief to be *recorded in writing*. Section 17 also mandates that upon seizure or upon issuance of a ‘freeze’ order, a copy of the reasons recorded by the officer alongwith material in his possession is required to be forwarded to the Adjudicating Authority in a sealed envelope.

14. On the other hand, section 102 CrPC empowers a police officer to seize any property which may (merely) be *alleged or suspected to have been stolen*; or which may be found in circumstances which create suspicion of commission of any offence. Section 102 also provided that a seizure so made is required to be reported to the officer-in-charge of a police station; and in certain cases to the concerned Magistrate or, in certain circumstances, be handed to any person on executing a bond of undertaking to produce the property before the court.

15. The question therefore is whether an officer of DoE acting under PMLA can seize property *merely* upon suspicion and without necessity of having or recording any reason to believe in writing.

16. The following provisions of PMLA and CrPC help elucidate the answer to the above query:

Section 71 of PMLA reads as under:

“71. Act to have overriding effect.—The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.”

(Emphasis Supplied)

whereby the intention of the legislature is manifest, namely that the provisions of PMLA are to have effect regardless of anything discordant with such provisions that may be contained in any other extant law. The provisions of PMLA therefore prevail if there is anything contrary herewith in any other statute, which in this case would include the CrPC.

17. Correspondingly, section 5 of CrPC saves the provisions of any special or local law ; or any special jurisdiction or power conferred; or any special form of procedure prescribed by any other law in the following words:

Section 5 of CrPC reads as under:

“5. Saving – Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any

special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.”

(Emphasis Supplied)

18. In ***Ajmer Singh & Ors. vs. Union of India & Ors.*** reported as (1987) 3 SCC 340, dealing with applicability of section 428 of the CrPC to a General Court Martial under the Army Act 1950 (Army Act), the Supreme Court has held that since section 167 of the Army Act specifically says that the period of sentence shall be reckoned from the day on which the original proceedings are signed by the presiding officer/court-martial, the benefit of set-off of the period of detention undergone by an accused during investigation, enquiry or trial under section 428 of the CrPC is not available against the term of imprisonment awarded by a court-martial. The Supreme Court has so held on an interpretation of section 5 of the CrPC, observing that the effect of section 5 is clearly to *exclude* application of the CrPC to any proceedings under any special or local law or any special jurisdiction or form of procedure prescribed by any other law, in this case the Army Act.

19. Though CrPC is the general procedural law applicable to all criminal matters, the legislature has provided that nothing in the CrPC is to affect any special law or special jurisdiction or special power or special form of procedure prescribed by any other law that may be in force. In our view, section 5 CrPC squarely applies in the context of PMLA, which is a special law, carving-out a special jurisdiction, providing special power and a special

form of procedure for offences relating to money laundering and saves those provisions.

20. On a combined reading of section 5 of CrPC and section 71 of PMLA, it is clear that any special procedure or power conferred by PMLA would prevail over any general procedure or power conferred by CrPC. Section 65 of PMLA must therefore be read as providing a *residuary procedural blueprint* inasmuch as for matters relating to arrest, search, attachment, confiscation, investigation, prosecution and *all* other proceedings under the PMLA, the relevant provisions contained in the CrPC are to apply but *only so long as* there is nothing inconsistent between provisions of CrPC and those of PMLA. Provisions of CrPC are, in that sense, the ‘fall-back option’ available provided there is *no specific or inconsistent provision* on a procedural matter under the PMLA.

21. In the context of the present matter however, section 17 lays down specific conditions and requirements for search and seizure to be made for offences covered by PMLA. The DoE would urge us to construe section 17 of the PMLA to bring it in consonance with the provisions of section 102 of CrPC; and to that extent read-down or dilute the stringent conditionalities for exercise of power of seizure under section 17. We are afraid that the purport of section 65 of PMLA and section 5 of CrPC is that section 102 of CrPC must be read, if at all, to bring in-line with the mandatory requirements of section 17 of the PMLA and not the other way around.

22. We find support for our view in the judgment of the Supreme Court in the case titled ***Gautam Kundu vs. DoE (Prevention of Money-Laundering Act), Government of India*** reported as (2015)16 SCC 1, in which case the

Supreme Court considered the inter-play between the provisions of section 45 of PMLA (offences under PMLA being cognizable and non-bailable) and the provisions of section 439 of CrPC (special powers to the High Court and Sessions Court in matters of grant of bail). Ruling upon the necessity to comply with the conditions enumerated in section 45 of PMLA when considering the grant of bail under that Act, the Supreme Court holds :

“28. Before dealing with the application for bail on merit, it is to be considered whether the provisions of Section 45 of PMLA are binding on the High Court while considering the application for bail under Section 439 of the Code of Criminal Procedure. There is no doubt that PMLA deals with the offence of money-laundering and Parliament has enacted this law as per commitment of the country to the United Nations General Assembly. PMLA is a special statute enacted by Parliament for dealing with money-laundering. Section 5 of the Code of Criminal Procedure, 1973 clearly lays down that the provisions of the Code of Criminal Procedure will not affect any special statute or any local law. In other words, the provisions of any special statute will prevail over the general provisions of the Code of Criminal Procedure in case of any conflict.”

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“30. The conditions specified under Section 45 of PMLA are mandatory and need to be complied with, which is further strengthened by the provisions of Section 65 and also Section 71 of PMLA. Section 65 requires that the provisions of CrPC shall apply insofar as they are not inconsistent with the provisions of this Act and Section 71 provides that the provisions of PMLA shall have overriding

effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. PMLA has an overriding effect and the provisions of CrPC would apply only if they are not inconsistent with the provisions of this Act. Therefore, the conditions enumerated in Section 45 of PMLA will have to be complied with even in respect of an application for bail made under Section 439 CrPC. That coupled with the provisions of Section 24 provides that unless the contrary is proved, the authority or the Court shall presume that proceeds of crime are involved in money-laundering and the burden to prove that the proceeds of crime are not involved, lies on the appellant.”

(Emphasis Supplied)

For completeness, it may be mentioned that the conditions referred to by the Supreme Court in the para quoted above are that the prosecutor must be given an opportunity to oppose the bail application ; and that the court must be satisfied that there are reasonable grounds for believing that the accused person is *not* guilty of the offence alleged and that he is *not* likely to commit an offence while on bail.

23. In ***Gautam Kundu*** (supra) the Supreme Court has therefore held that where an offence alleged is one under PMLA, the conditions for grant of bail under section 45 of the PMLA must necessarily be satisfied before bail is granted; and the provisions of section 439 CrPC must, to that extent, *yield to* those of section 45. It may be mentioned here that section 439 CrPC gives to the High Court or the Sessions Court the discretion to admit an accused on bail without giving notice to the public prosecutor, for reasons to

be recorded in writing, where the court is of the opinion that it is not practicable to give such notice. This direction is however taken away under section 45 of the PMLA (excepting in the case of certain categories of persons or amount involved, as specified in the provision).

24. As noted in the impugned order, a single Judge of the Gujarat High Court has taken a contrary view on the issue in a case titled ***Paresha G. Shah vs. State of Gujarat & Ors.*** reported as MANU/GJ/1127/2015 : 2016 GLH(1) 329 holding that it may happen that initially the authority may be in possession of some material, which may create some doubt or suspicion but not adequate material sufficient to record reasons to believe that an offence under PMLA has been committed. In this view of the matter, the Gujarat High Court holds that the authorities *are empowered* to issue appropriate directions for attachment or freezing of a bank account in exercise of power under section 102 CrPC by virtue of provisions of section 65 of PMLA. We however, are not persuaded to concur in this view. Our difference of opinion with the view taken by the single Judge of the Gujarat High Court arises from noticing the emphasis and clarity with which the essential conditions for search and seizure are specified in section 17 of PMLA, as evident from the following extract of the provision:

“17. Search and seizure.-(1) Where the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section, on the basis of information in his possession, has reason to believe (the reason for such belief to be recorded in writing) that any person...”

(Emphasis Supplied)

25. We must add that in fact the phrase ‘reason to believe’ is defined in section 26 of the Indian Penal Code, 1860 (IPC) in the following words:

“26. ‘Reason to believe’ —A person is said to have “reason to believe” a thing, if he has sufficient cause to believe that thing but not otherwise.”

The phrase ‘reason to believe’ as appearing in section 26 of IPC has been interpreted by the Supreme Court in the case titled **Joti Parshad vs. State of Haryana** reported as 1993 Supp (2) SCC 497 in the following way:

“5. Under the Indian Penal law, guilt in respect of almost all the offences is fastened either on the ground of "intention" or "knowledge" or “reason to believe”. We are now concerned with the expressions "knowledge" and "reason to believe". "Knowledge" is an awareness on the part of the person concerned indicating his state of mind. "Reason to believe" is another facet of the state of mind. Reason to believe is not the same thing as "suspicion" or "doubt" and mere seeing also cannot be equated to believing. "Reason to believe" is a higher level of state of mind. Likewise "knowledge" will be slightly on higher plane than "reason to believe". A person can be supposed to know whether there is a direct appeal to his senses and a person is presumed to have a reason to believe if he has sufficient cause to believe the same. Section 26 I.P.C. explains the meaning of the words "reason to believe" thus:

"26. ‘Reason to believe’-A person is said to have ‘reason to believe’ a thing, if he has sufficient cause to believe that thing but not otherwise.”

In substance what it means is that a person must have reason to believe if the circumstances are such that a reasonable man would, by probable reasoning, conclude or infer regarding the nature of the thing concerned. Such circumstances need not necessarily be capable of absolute conviction or inference; but it is sufficient if the circumstances are such creating a cause to believe by chain of probable reasoning leading to the conclusion or inference about the nature of the thing. These two requirements i.e. "knowledge" and "reason to believe" have to be deduced from various circumstances in the case..."

26. While the foregoing interpretation has been given in the context of an accused person having reason to believe, the interpretation is by no means confined only to the case of an accused person but would *apply equally* to an officer acting in exercise of his powers under a similar or cognate statute.

27. In fact in **Noor Aga vs. State of Punjab** reported as (2008) 16 SCC 417, the Supreme Court referred to the definition of 'reason to believe' as contained in section 26 of the IPC in the context of sections 42 and 43 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) as also Section 110 of the Customs Act, 1962 (Customs Act) which provisions concern powers of entry, search, seizure and arrest ; and in which the requirement of reason to believe has been incorporated by the legislature. In the context *inter-alia* of the power of seizure under the NDPS Act and the Customs Act, the Supreme Court had this to say in *Noor Aga's* case:

“37. It is the consistent view of this Court that “reason to believe”, as provided in several provisions of the Act and as defined in Section 26 of the Penal Code, 1860 on the part of the officer concerned is essentially a question of fact. The procedures laid down under the Act being stringent in nature, however, must be strictly complied with.”

It is therefore clear that where there is a requirement that an action may be taken by an officer only when there is reason to believe, especially in the context of a statute where stringent procedures are laid down, the requirement of having reason to believe must be strictly complied with. PMLA is exactly such a statute where stringent procedures have been laid down.

28. We see no reason why the essence of the definition contained in section 26 of the IPC should not inform the interpretation of the same phrase in section 17 of the PMLA. It is noteworthy that the phrase ‘reason to believe’ has a specific connotation in criminal jurisprudence and is not merely an ordinary and colloquial phrase.

29. Besides, we must never forget the venerated principle of law laid down by the Privy Council in the case of *Nazir Ahmad vs. Emperor* reported as AIR 1936 PC 253, that where a power is given to do a certain thing in a certain way, the thing *must be done in that way or not at all*; and other methods of performance are necessarily forbidden. In our view this principle must *a fortiori* apply to a special statute such as PMLA.

30. In light of the above discussion, we find no infirmity in the impugned judgment on the issue. We hold that ingredients of section 17 of PMLA *must*

be scrupulously complied with and it is impermissible for seizure to be made by relying instead upon the provisions of section 102 of the CrPC.

31. Wherever there is/are any provision/s covering any aspect of proceedings under PMLA, such provisions would prevail and must be adhered to *regardless* of any cognate provision contained in the CrPC. Provisions of the CrPC may however be relied upon as *residuary provisions* for proceedings under PMLA on aspects and matters for which no specific provision is contained in PMLA. In case of any conflict or contradiction as between provisions of PMLA and CrPC, those contained in PMLA would prevail and those of the CrPC must yield.

32. For the record, insofar as the question of whether assets acquired prior to enactment of PMLA come within the definition of ‘proceeds of crime’, the view taken by the single Judge, namely that it is irrational to hold that such assets could *never* fall within the definition contained in section 2(1)(u) of the PMLA, has not been challenged or argued before us. The appellant has also not pressed any challenge to the observation of the single Judge that the private parties shall be entitled to seek consequential relief in any other court or forum.

33. In view of our opinion as aforesaid, we find no merit in the appeal, which is accordingly dismissed; without however, any order as to costs.

ANUP JAIRAM BHAMBHANI, J.

THE CHIEF JUSTICE

MARCH 15, 2019/uj