BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 11.11.2021

Delivered on : 23.11.2021

CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN
and
THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

W.P.(MD)Nos.14567 and 14568 of 2021
and
W.M.P.(MD)Nos.11499, 11500, 12894 and 12896 of 2021

T.Subramanian ... Petitioner in W.P.(MD)No.14567 of 2021

S.Rajeswari ... Petitioner in W.P.(MD)No.14568 of 2021

-vs-

The Assistant Director,
Directorate of Enforcement,
No.6, (Old No.42) Besant Road,
Chokkikulam,
Madurai - 620 002. ... Respondent in both the W.Ps.

Prayer in both the W.Ps.: Petitions filed under Article 226 of the Constitution of India, praying for issuance of Writs of Certiorari, to call for the records of the impugned summon F.No.ECIR/MDSZO/16/2021, dated 30.07.2021, issued by the respondent, quash the same as illegal.

For Petitioner (in both the W.Ps.) : Mr.Arul Vadivel @ Sekar

For Respondent (in both the W.Ps.) : Mr.R.Vijaya Rajan
Central Government
Enforcement Counsel

COMMON ORDER

S.VAIDYANATHAN, J.
and
G.JAYACHANDRAN, J.

T.Subramanian the petitioner in W.P.(MD)No.14567 of 2021 is the former Executive Engineer in Manimuthar Basin Division, PWD, WRD, Devakottai. His wife S.Rajeswari is the petitioner in W.P.(MD) No.14568 of 2021. These two writ petitions are filed by the husband and wife challenging the summons dated 30.07.2021, issued under

Section 50 (2) and (3) of the Prevention of Money-Laundering Act, 2002 [in short ''PMLA''], by the Enforcement Directorate to appear before the Assistant Director, Enforcement Directorate, Madurai, on 23rd August, 2021 along with the documents mentioned in the schedule annexed to the summons.

2.The facts leading to the writ petitions is that, on reliable source information that T.Subramanaian had acquired and in possession of movable and immovable properties and pecuniary resources in his name and his wife's name [Rajeswari] disproportionate to his known source of income, the Deputy Superintendent of Police, Directorate of Vigilance and Anti-Corruption, Madurai, registered a case under Sections 13(2) r/w 13 (1)(b) of Prevention of Corruption Act and Section 109 of IPC against the writ petitioners herein in Crime No.5 of 2021 on 16.04.2021. The said case is under investigation.

3.Meanwhile, the Enforcement Directorate on registration of complaint in the predicate offence disclosing *prima facie* case for money-laundering, had registered case in F.No.ECIR/MDSZO/16/2021 against the writ petitioners and had issued summons to them to appear and produce documents for the purpose of investigation.

4.The said summon dated 30.07.2021 is challenged in these writ petitions on the ground that,

(a) The authorities of Enforcement Directorate acquire jurisdiction to commence investigation only after the conclusion / confirmation that the properties are the proceeds of crime as a result of criminal activity relating to the offences mentioned in the schedule to the PMLA. Before such declaration, authorities have no jurisdiction to summon under the PMLA.

(b) The issuance of summon under Section 50 of the PMLA is for the attachment of the property involved in money-laundering. As per proviso of Section 5 of the PMLA, no provisional order of attachment shall be made unless a report has been forwarded to the Magistrate under Section 173 Cr.P.C. in relation to any schedule offence. In the instant case, F.I.R. alone is filed and no progress in the investigation. While so, the Enforcement Directorate has hurriedly commenced investigation under the PMLA.

5.According to learned counsel appearing for the writ petitioners, 'proceeds of crime' as defined under the Act could be determined only after the conclusion of trial in the predicate offence. Filing of final report in the predicate offence is precondition to proceed under the PMLA for provisional attachment under Section 5 of the PMLA. Since the summon is issued without jurisdiction and not in accordance to the format prescribed under the Rules framed thereunder, the same is liable to be quashed for want of jurisdiction.

6.In support of the Writ Petitions, the following judgements are relied by the petitioners' counsel:

(i) Mahanivesh Oils & Foods Private Ltd Vs. Directorate of Enforcement [2016] (1) High Court Cases (Del) 265.

(ii) Ajay Kumar Gupta and others Vs. Adjudicating Authority and others [2017 SCC online Mad 37651].

7.The respondent oppose the writ petitions for the reasons that, the petitions are ill-conceived and devoid of merits. The Directorate of Vigilance and Anti-Corruption had registered an F.I.R. against the writ petitioners under Section 13 of the Prevention of Corruption Act as amended by Central Act 16 of 2018 for possession of disproportionate assets. The said offence is a schedule offence under the PMLA and on *prima facie* disclosure of money-laundering offence, the Enforcement Directorate has registered F.I.R. and had issued summons under Section 50 of the PMLA for investigation in order to ascertain whether the accused persons have in their possession any proceeds of crime.

8.Issuance of summons under Section 50 of the PMLA to enquire into any case involving money-laundering is well within the jurisdiction of the Enforcement Directorate. The summons issued under Section 50 of the PMLA for production of records in their possession is misconstrued as a summon issued under Section 5 of the PMLA for provisional attachment. Culmination of filing charge sheet in the predicate offence is not a precondition to invoke the provisions of the PMLA. The contention of the writ petitioners that issuance of summon before filing of final report in the predicate offence lack jurisdiction is incorrect. The second proviso to Section 5 (1) (b) of the PMLA empowers the Enforcement Directorate to act and attach any property on formation of reason to believe that the said property is proceeds of crime. Filing of final report under Section 173 of Cr.P.C. before the Magistrate is not required while the power is exercised invoking the second proviso of Section 5(1)(b) of the PMLA. Further, after the amendment to the PMLA by insertion of Explanation to Section 44(1) of the PMLA any little ambiguity in the legislation is given quietus by removal of doubts that the offence under the PMLA during investigation, enquiry or trial will not depend upon any orders passed in respect of scheduled offence.

9.In addition, the learned counsel for the respondent also submitted that it is settled principle of law that summons cannot be quashed or stayed, except in exceptional cases and it is always open to the person summoned to appear in person or through his authorised representative and produce documents called to produce.

10.To buttress the submission, the learned counsel for the respondent (Enforcement Directorate) relied upon the following judgments.

(i) M/s.VGN Developers, Rep. By its Managing Director and another vs. The Deputy Director, Directorate of Enforcement, Chennai (Crl.O.P.No. 9796 of 2019, dated 04.10.2019)

(ii) J.Sekar @ Sekar Reddy and another vs. The Directorate of

Enforcement (Crl.O.P.No.24200 and 24202 of 2017, dated 04.02.2021).

(iii) Mohinder Singh Gill vs. The Chief Election Commissioner (AIR 1978 SC 851).

11.As per F.I.R.No.5 of 2021 registered by Directorate of Vigilance and Anti-Corruption, Madurai, against the writ petitioners, T.Subramainan (the petitioner in W.P.(MD)No.14567 of 2021) joined the Government service on 28.09.1987 as Assistant Engineer in Public Works Department. His wife S.Rajeswari (the petitioner in W.P.(MD)No.14568 of 2021) is a home-maker and have no independent source of income. T.Subramanian has no ancestral property or significant sources of income except his salary. The petitioner have two daughters and one son. The elder daughter studied MBBS between 2012-2013 and 2017-2018 in a private Medical College. She was given to marriage to a Doctor in the year 2018. The second daughter is pursuing her MBBS course in a private Medical College. His son pursuing MBBS course in Madras Medical College, Chennai. The investigation conducted by Directorate of Vigilance and Anti-Corruption reveals that during the check period 01.12.2011 to 31.07.2018, T.Subramanian had acquired wealth in his name and his wife's name disproportionate to his known sources of income. The value of the disproportionate assets is fixed as Rs 1,03,05,400/- which is about 223% excess to the known source. The case is under investigation.

12.The Prevention of Money Laundering Act, 2002 was enacted to provide for confiscation of property derived from, or involved in money-laundering and for matters connected therewith or incidental thereto. This Act came into force on 01.07.2005. This Act underwent amendments in the years 2009 and 2013 to remove the difficulties and doubts. Second proviso was inserted to Section 5(1) in the year 2015. The Sections which are relevant for the instant case were subjected to amendment earlier and as on the date of issuance of the impugned summons till now, the provisions read as below:-

> ***''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 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) .....*
>
> *(b) .....*
>
> *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 first proviso, 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.

44.Offences triable by Special Courts.—

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

(a) an offence punishable under section 4 and any scheduled offence connected to the offence under that section shall be triable by the Special Court constituted for the area in which the offence has been committed:

Provided that the Special Court, trying a scheduled offence before the commencement of this Act, shall continue to try such schedule offence; or

(b) ......

(c) ......

(d) ......

Explanation.- *For the removal of doubts, it is clarified that,-*

(i) the jurisdiction of the Special Court while dealing with the offence under this Act, during investigation, enquiry or trial under this Act, shall not be dependent upon any orders passed in respect of the scheduled offence, and the trial of both sets of offences by the same court shall not be construed as joint trial;

(ii) the complaint shall be deemed to include any subsequent complaint in respect of further investigation that may be conducted to bring any further evidence, oral or documentary, against any accused person involved in respect of the offence, for which complaint has already been filed, whether named in the original complaint or not.

50.Powers of authorities regarding summons, production of documents and to give evidence, etc.—

(1) The Director shall, for the purposes of section 12, have the same powers as are vested in a civil Court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:—

(a) discovery and inspection;

(b) enforcing the attendance of any person, including any officer of a reporting entity and examining him on oath;

(c) compelling the production of records;

(d) receiving evidence on affidavits;

(e) issuing commissions for examination of witnesses and documents; and

(f) any other matter which may be prescribed.

(2) The Director, Additional Director, Joint Director, Deputy Director or Assistant Director shall have power to summon any person whose attendance he considers necessary whether to give evidence or to produce any records during the course of any investigation or proceeding under this Act.

(3) All the persons so summoned shall be bound to attend in person or through authorised agents, as such officer may direct, and shall be bound to state the truth upon any subject respecting which they are examined or make statements, and produce such documents as may be required.''

13.The fallacy in the petitioners' case can be put under two heads. First, the summons issued is not under Section 5 of the PMLA to provisionally attach the alleged proceeds of crime. It is a summon issued for production of documents and particulars sought in the Annexure to the summon. The writ petitioners presume the impugned summon is for provisional attachment. Through this summon, the documents and details are sought from the petitioners in connection with investigation and there is no indication in the said summon that the authorities has reason to believe that the writ petitioners are in possession of proceeds of crime and same if not attached immediately, it will likely to frustrate proceedings under the PMLA. Even otherwise by virtue of second proviso to Section 5(1)(b) of the PMLA, the respondent has the competency and jurisdiction to issue the impugned summon.

14.Unless final report in the predicate offence is filed, proceedings under the PMLA cannot be initiated is the second fallacy in the petitioners' submission. After the insertion of Explanation to Section 44 and the second proviso to Section 5 (1) (b) of the PMLA, it is made clear in the statute that the proceedings under the PMLA not dependant to the predicate offence. Soon after registration of a schedule offence case, the authorities under the PMLA can act upon and register case under the PMLA, for money-laundering and also provisionally attach the proceeds of crime. Under first proviso to this Section in ordinary circumstances, the authorities shall wait till the filing of final report under Section 173 Cr.P.C. in the predicate offence. In extraordinary circumstances if the authority has reasons to believe that non-attachment of the suspected proceeds of crime will frustrate the proceeding under the PMLA, the authority need not wait for the schedule offence agency to file their final report, but shall proceed even prior to filing of final report by virtue of second proviso.

15.Section 13 of the Prevention of Corruption Act is a schedule offence under the PMLA. 'Proceeds of crime' as defined under Section 2(u) of the PMLA, is any property derived or obtained directly or indirectly by any person as a result of criminal activity relation to a schedule offence. Section 3 of the PMLA defines the offence Money-Laundering as the process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property. The authorities of the Enforcement Directorate in view of the registration of the crime under Section 13 of the Prevention of Corruption Act, has thought fit to summon the persons involved in the scheduled offence to ensure whether there is any act of money- laundering involved. For the said purpose, the summons under Section 50 (2) and (3) of the PMLA has been issued. In such circumstances, the petitioners are expected to produce documents sought by the authorities and satisfy them that they are not involved in any act of money- laundering. Instead, under false pretext that the properties are likely to be provisionally attached before filing of final report in the predicate offence, the writ petitions are filed.

16.Having held that the summons issued by the respondent is well within their competency and jurisdiction, the only other point remains for consideration and intervention in these cases is the instruction in the impugned summon, that the recipient not to depart until permitted by the Assistant Director to do so. This instruction is not found in Form-V appended to Prevention of Money-Laundering (forms, search and seizure or freezing and the manner of forwarding the reasons and materials to the Adjudicating Authority, impounding and custody of records and the period of retention) Rule, 2005.

17.As pointed out by the learned counsel for the writ petitioners, while Section 50 (3) of the PMLA say all persons so summoned shall be bound to attend in person or through authorised agents and state the truth upon any subject respecting which they are examined, the additional instruction that they should not leave without the permission of the undersigned is not in tune with the form prescribed under the Rules. If at all, the respondent needs the presence of the person summoned under Section 50(2) and (3) of PMLA, they can ask to stay back or even remand if they are satisfied about the material collected indicates money-laundering, but when the format prescribed under statute does not provide for such instruction, any alteration in the format which is prejudicial to the recipients and contrary to Section 50(3) of the Act, has to be quashed.

18.Rule 11 of the Prevention of Money-Laundering (Forms, Search and Seizure, etc.) Rules, 2005, mandates that the summoning officer shall, while exercising powers under sub-section (2) and (3) of Section 50 of the Act issue summons in Form-V appended to the Rules. In Form-V, the objectionable sentence mandating the recipient to stay at Enforcement Directorate Office till the signatory of the summons permits is a new clause not found in the format provided under the Rules. As a result, this Court holds that,

(i) Before filing of final report in the predicate offence, Enforcement Directorate can undertake the investigation under the PMLA. Such function is within the jurisdiction of the Enforcement Directorate.

(ii) There is no statutory impediment to proceed under the PMLA and issue summons under Section 50(2) and (3) of PMLA soon after the registration of case for predicate offence.

(iii) Filing of final report under Section 173 of Cr.P.C. for the schedule offence (predicate offence) is not a pre-requisite to cause summons under Section 50 of the PMLA.

(iv) Actions under the PMLA is neither dependant on the predicate offence nor co-terminus with the predicate offence.

(v) Once case under schedule offence is registered, the authorities can initiate action under the PMLA, provided, there is *prima facie* material to suspect presence of proceeds of crime and attempt or preparation for money-laundering.

(vi) Causing summon for production of document in exercise of power under Section 50 of the PMLA is permissible under law, provided such summons be in the form as prescribed under the Rules and not otherwise.

19.Therefore, though the respondent has jurisdiction to issue summon, since the summon not being in the format prescribed under the statute and the deviation is prejudicial to the petitioners, the respondent is directed to issue fresh summons as per Form-V, fixing any future date for production of documents and other particulars. On receipt of the summons, the writ petitioners shall appear and produce the documents and particulars sought under the summons.

20.With the above observations, the Writ Petitions are disposed of. No costs. In view of disposal of the Writ Petitions filed to quash the impugned summon issued by the respondent, the applications *viz.*,W.M.P.(MD)Nos.12894 and 12896 of 2021 filed to amend prayer for a Writ of Certiorarified Mandamus, seeking to quash the impugned summon issued by the respondent, dated 30.07.2021, and consequently, direct the respondent not to issue summon in any other future dates till the final report under Section 173 of Cr.P.C. is filed before the Competent Court by the Vigilance and Anti-Corruption Wing, Madurai, in Crime No.5 of 2021, is preposterous and not maintainable, accordingly, dismissed. This Court expects that the issue is brought to a logical end as expeditiously as possible. A speedy trial is expected. Consequently, W.M.P.(MD)Nos.11499 and 11500 of 2021 are closed.

Sd/-

Assistant Registrar (AD II)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

To

1.The Assistant Director,
Directorate of Enforcement,
No.6, (Old No.42) Besant Road,
Chokkikulam,
Madurai - 620 002.

2.The Officer in Charge,
Vigilance and Anti-Corruption Wing,
Madurai

+1 CC to M/s.C. ARUL VADIVEL @ SEKAR, Advocate (SR-35426[F] dated 23/11/2021)

+1 CC to M/s.R. VIJAYARAJAN, Advocate(SR-35944[F] dated 25/11/2021)

W.P.(MD)Nos.14567 and 14568 of 2021
23.11.2021

MGJ(06.12.2021) 9P 5C